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Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge

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**VICTIMS BEFORE INTERNATIONAL CRIMINAL COURTS: SOME VIEWS
AND CONCERNS OF AN ICC TRIAL JUDGE**

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I.	INTRODUCTION	476
II.	VICTIMS AT THE ICC	479
	A. <i>Victim Status in General</i>	479
	B. <i>Victims' Participation in Proceedings</i>	481
	C. <i>What Participatory Rights do Victims Have?</i>	483
	D. <i>Reparations</i>	486
III.	SOME VIEWS AND CONCERNS	487
	A. <i>Victims and the Truth Finding Process</i>	487
	B. <i>Victims and the Rights of the Accused</i>	488
	C. <i>Is the Participatory Regime Meaningful for Victims?</i>	489
	D. <i>How Meaningful Can Reparations Be?</i>	490
	E. <i>Equal Access to Justice?</i>	491
	F. <i>Is the System Sustainable?</i>	492
IV.	FINAL OBSERVATIONS	494

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I. INTRODUCTION

For much of my career as an academic, international criminal justice was a faraway dream. Like most scholars of my generation, I never expected to see international criminal courts emerge in my own lifetime. And then, all of a sudden, they were there: first the ad hoc tribunals, now the International Criminal Court (ICC). And to make it even more exciting, I have had the privilege of serving first at the International Criminal Tribunal for the former Yugoslavia (ICTY) for nearly six years and now at the ICC since 2009. These years have been the most rewarding years in my professional life. It has been a thrilling experience to have belonged to panels of judges who made defining decisions in the field of international criminal law. This was true at the ICTY, and perhaps even more so at the ICC, which, despite the entry into force of the Statute almost ten years ago, is still a fledgling court facing challenges that are multiple and immense. One of those challenges is the role of victims before the Court, which I believe to be one of the most important ones for the years to come. The victims' participation regime at the ICC has indeed been hailed as one of the major achievements of modern day international criminal justice.¹ But it is also only one of the more controversial aspects of the ICC Statute, and it is for this reason that I have chosen it as a topic for this lecture. It is a good moment in time, as the first two trials before the ICC have almost run their course, which allows for a preliminary assessment of how the regime has been implemented in practice. It also allows for a comparison between the objectives of the designers of the victims' participation regime and the results achieved in practice.

The ICC is said to have marked the shift away from a retributive judicial system to a more restorative, justice-oriented model.² Victims did not participate at Nuremberg, nor did they at the two ad hoc Tribunals of the U.N. created in the early 1990s.³ In fact, the ICC regime for victims can, in part, be traced back to the dissatisfaction, at least in some quarters, over the ICTY system, which does not allow participation of or reparations for vic-

¹ Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. U. J. INT'L HUM. RTS. 459, 459 (2008).

² WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASHINGTON COLL. OF LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 8 (2007) [hereinafter WRCO REPORT].

³ *See id.* at 12 ("While the *ad hoc* criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right . . ."); Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1641 (2006) ("At Nuremberg, the prosecution was overwhelmingly based on documentary evidence. . . . The decision to rely primarily on documentary evidence minimized the role of victims/survivors in the trials.").

tims of serious human rights abuses.⁴ Critics of the ICTY system blamed it for failing to sufficiently account for the interests of the victims.⁵ Victims testifying at the ICTY, very far away from their homes and from the places where the crimes were committed, were often traumatised by the experience. The French ICTY judge, Claude Jorda, complained that victims were “reduced” to instrumentalised witnesses.⁶ Civil lawyers had problems with the fact that victims testifying for the prosecution were subjected to the often painful cross-examination process by the defence. Much of this was captured in the phrase “secondary victimization,” meaning that victims of atrocity crimes were victimised for a second time as a result of a judicial process in which they could not fully participate.⁷

Looking at this from my own experience as an ICTY judge, I understand these criticisms, but I am not sure they are well founded. I saw many courageous victims who were very keen to come and testify and tell their stories. The cross-examination process, although difficult at times, was practiced with restraint and caution by counsel appearing before the tribunal and, if necessary, was controlled by presiding judges. The system had its shortcomings, but whether victims’ participation in criminal proceedings was an appropriate remedy against secondary victimisation remains to be seen. In a report presented to the Security Council in 2000, ICTY judges, while emphasizing that victims of crimes coming within the jurisdiction of the court should receive compensation, advised against incorporating a compensation mechanism in the Statute or the Rules, as this would affect the duration of the trials. Rather, they advocated the creation of another body that could operate as an international compensation commission.⁸

Meanwhile, the drafters of the 1998 ICC Statute had ventured in a different direction. They not only granted victims a right to reparations, but they also introduced a totally novel participatory regime. Much of the par-

⁴ Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 220 (2006).

⁵ WRCO REPORT, *supra* note 2, at 11–12.

⁶ See Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1387, 1387–88 (Antonio Cassese et al. eds., 2002) (exploring consequences in lack of victim participation in the international criminal system).

⁷ See UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS 9–10 (1999) (describing how institutional mechanisms can create a secondary victimization, often due to the failure to properly account for the victim’s point of view).

⁸ See generally President of the Int’l Tribunal for the Former Yugoslavia, Letter dated Oct. 12, 2000 from President of the International Tribunal for the Former Yugoslavia to the Secretary-General, Annex to a letter dated Nov. 2, 2000 from the Secretary-General to the President of the Security Council, U.N. Doc. A/60/706 (Nov. 2, 2000) (discussing the possibility of establishing a compensation commission for victims) [hereinafter Letter].

ticipatory regime for victims was inspired by the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the U.N.⁹ This declaration, which was followed up in the 2005 Resolution of the U.N. Commission on Human Rights containing guidelines,¹⁰ is still considered as the foundational text by advocates of extensive victims' rights to participation and reparation.¹¹ Parts of this declaration were copy-pasted into the Statute.

Yet, the regime that was introduced in Rome was the result of heated debates. It was mainly France and some civil law countries that insisted on the introduction of a participatory regime that resembled the French *partie civile* system. While no such full-fledged system was incorporated in the Statute, victims were given the right to "present their views and concerns" to the Court, and to do so "where their personal interests are affected."¹² This way of drafting illustrates what Philippe Kirsch, chairman of the Committee of the Whole at Rome and the first president of the ICC, used to call "a constructive ambiguity."¹³

It was left to the Rules and the judges to further explain and develop the victims' participatory regime. In their first decisions on this matter, the judges gave an extremely extensive, teleological interpretation of the regime, often by reference to the jurisprudence of the human rights courts, in particular the decisions of these courts on the right to access to justice.¹⁴

⁹ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc A/RES/40/34 (Nov. 29, 1985).

¹⁰ See Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

¹¹ See THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS, INT'L CRIMINAL COURT, REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT 30 (2010) ("Indeed, the UN General Assembly adopted in December 2005 the Resolution 60/147 which points out that victims are entitled to the following forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, also known as the Van Boven Principles."). The ICC also adopted the Basic Principles. *Id.* at 26.

¹² Rome Statute of the International Criminal Court art. 68.3, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹³ See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 409 n.166 (2000); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 605–06 (2003) (noting that constructive ambiguity was used in the drafting of the Rome Statute and accompanying rules to allow judges to shape the ICC's structure).

¹⁴ See, e.g., Prosecutor v. Germain Katanga & Matheiu Ngudjolo Chui, Case No. ICC-01/04-01/04-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc486390.pdf> (discussing access to justice in the context of victims' rights and access to court materials during ICC proceedings).

In this lecture, I will briefly describe the victims' regime at the ICC, and I will then share some of my observations and concerns with you. Considering my position as a judge and the fact that so many issues are still in the process of being decided, I must limit myself to expressing some general thoughts. Having served on both the ICTY and the ICC, I may be in a position to make some comparisons that could be a useful contribution to the debate. What follows are my personal thoughts, which do not necessarily reflect the views of my colleagues at the ICC.

II. VICTIMS AT THE ICC

A. *Victim Status in General*

All in all, the ICC regime is characterised by its "victim-friendliness," which is certainly to be welcomed as an improvement as compared to the ICTY and ICTR regimes. The Statute requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹⁵ Various rules and regulations further implement this part of the ICC mandate in great detail.¹⁶

In 2009, the Court adopted an overall Strategy in relation to victims that, again, draws upon the two U.N. instruments on Basic Principles of Justice for Victims and the Right to Reparation for Victims.¹⁷

A whole infrastructure has been set up to fulfil this part of the mandate. Within Registry, there is a Victims and Witnesses Unit (VWU) which, like its counterpart at ICTY, provides protective measures and security arrangements for victims and witnesses who appear before the Court.¹⁸ In addition, there are two other sections dealing with victims: the Victims Participation and Reparations Section (VPRS), a specialised unit in Registry for dealing with participation and reparations;¹⁹ and the Office of Public Coun-

¹⁵ Rome Statute, *supra* note 12, art. 68.1.

¹⁶ See, e.g., Rules of Procedure and Evidence, ICC-ASP/1/3 (Sept. 9, 2002) (establishing extensive regulations regarding, *inter alia*, victims' legal representatives, physical protection of witnesses, and other policies involving access to and the protection of victims).

¹⁷ Int'l Criminal Court, Report of the Court on the Strategy in Relation to Victims, para. 6, ICC-ASP-8/45 (Nov. 10, 2009); see also G.A. Res. 40/34, *supra* note 9; G.A. Res. 60/147, *supra* note 10.

¹⁸ *Victims and Witnesses Unit*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm> (last visited Mar. 4, 2012).

¹⁹ *Reparation for Victims*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/> (last visited Mar. 4, 2012).

sel for Victims (OPCV), which provides support to counsel representing victims.²⁰

Victims at the ICC are indeed entitled to legal representation, which is another big difference with the ICTY. Although it is theoretically possible for victims to appear individually, this would be totally impractical in view of the high number of victims, which tends to increase as time goes by and the Court becomes better known. For that reason, victims at the ICC are, in all cases, represented by common legal representatives. For example, there were three groups of legal representatives in the *Lubanga* case.

The ICC's draft budget for 2012 envisages at least seven million euros (ten million USD) being earmarked specifically for victim-related tasks.²¹ Almost four million euros would be spent on paying the fees and expenses of the lawyers representing the victims.²² The VPRS budget would be almost 1.9 million euros (over 2.5 million USD), whereas the OPCV would receive close to 1.2 million euros (1.6 million USD).²³ The draft budget is still under discussion with the States Parties, but these figures illustrate the overall order of magnitude involved.²⁴

Alongside the participatory regime, a reparatory mechanism has been created: the Trust Fund for Victims.²⁵ This Fund may play a role in the process of awarding reparations to victims after a conviction has been reached. Apart from these reparations, the Trust Fund for Victims can also use its resources to benefit victims of crimes that have not given rise to prosecution.²⁶ Whereas reparations in the narrow sense have not yet been

²⁰ *Office of Public Counsel for Victims*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%20victims/office%20of%20public%20counsel%20for%20victims?lan=en-GB> (last visited Mar. 4, 2012); see INT'L CRIMINAL COURT, VICTIMS BEFORE THE INTERNATIONAL COURT: A GUIDE FOR THE PARTICIPATION OF VICTIMS IN THE PROCEEDINGS OF THE COURT 9–19, available at <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> (last visited Feb. 26, 2012).

²¹ Int'l Criminal Court, Proposed Programme Budget for 2012 of the International Criminal Court, 54, 85, 133, ICC-ASP/10/10 (July 21, 2011) [hereinafter Proposed 2012 ICC Budget], available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (noting proposed budgets of 3,990,500 euros for counsel for victims, 1,160,200 euros for the OPCV and 1,873,000 euros for VPRS, among others).

²² *Id.* at 54 (budgeting 3,990,500 euros for counsel for victims, a noteworthy 147.6% increase over 2011 expenditures).

²³ *Id.* at 85, 133 (projecting expenditures on the Victims Participation and Reparations Section and Office of Public Counsel for Victims of 1,873,000 euros and 1,160,200 euros, respectively).

²⁴ See generally Proposed 2012 ICC Budget, *supra* note 21.

²⁵ Rome Statute, *supra* note 12, art. 79.

²⁶ The General Assistance role of the Trust Fund for Victims is specified in Rule 98(5) of the Rules of Procedure and Evidence. Rules of Procedure and Evidence, *supra* note 16, r. 98. The resources available are outlined in Regulation 47 and are used in accordance with Regu-

awarded, the Trust Fund for Victims has already started implementing the second branch of its mandate, giving general assistance to victims and their families by means of programs for physical rehabilitation, material and/or psychological rehabilitation in situations where the Court has jurisdiction.²⁷ For example, although, to date, no accused in the Uganda situation has been brought before the court to stand trial, various projects have already been set up in Northern Uganda, including, among other things, medical care and reconstructive surgery such as prosthetic limbs, as well as vocational training for victims.²⁸

B. Victims' Participation in Proceedings

Victims who wish to participate in the proceedings must make an application to the Registrar, who then transmits the application to the Chamber.²⁹ For each individual victim, the Chamber must assess whether he or she satisfies the criteria; i.e., whether the applicant qualifies as a victim under Rule 85 of the Rules of Procedure and Evidence.³⁰ In practice, this means that for every applicant, the Chamber must make an individual decision, based on a *prima facie* assessment of the victim-status of the person or organisation in question.

This involves a long and cumbersome process of receiving the applications, which arrive in the form of very lengthy standard forms plus supporting evidence. These forms—and especially the supporting evidence—may have to be translated into one of the working languages of the

lation 48 of the Regulation of the Trust Fund for Victims. Int'l Criminal Court, Regulations of the Court, ICC-BD/01-01-04 (May 26, 2004). A practical example is that of projects Trust Fund for Victims/UG/2007/R2/039 & Trust Fund for Victims/UG/2007/R2/041. These projects are taking place in the Gulu and Amuru Districts of Uganda and include vocational training and school fees for victims of mutilation or torture, "Healing of Memory" sessions for victims of mutilation and torture and referrals to healthcare services for victims who are in need of physical rehabilitation. See *Projects*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/projects> (last visited Feb. 17, 2012) [hereinafter *TFV Projects*] (providing a complete list of the General Assistance Projects).

²⁷ See generally THE TRUST FUND FOR VICTIMS, REVIEWING REHABILITATION ASSISTANCE AND PREPARING FOR DELIVERING REPARATIONS, PROGRAMME PROGRESS REPORT (2011) (providing background information about the Rehabilitation Assistance Mandate).

²⁸ *TFV Projects*, *supra* note 26.

²⁹ Rules of Procedure and Evidence, *supra* note 16, r. 89

³⁰ See *id.* r. 85

Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court [and] . . . organisations 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 or objects for humanitarian purposes.

Id.

Court. Once that is done, the applications must be sent to the parties for observations. In almost all cases victims are afraid of being identified publicly and ask for the redaction of identifying information. This means that their names are blackened out, as well as any passages in their story that may lead to their identification. In principle, these redactions must each be checked and approved by the competent Chamber. The parties are then given a deadline to make observations. However, as they usually only receive heavily redacted forms, their submissions are unavoidably somewhat abstract. The Chamber is then required to decide—on a case-by-case basis—whether each applicant meets the criteria of Rule 85 and whether his or her interests are affected by the proceedings.

Since the ICC started functioning, 9,910 applications for participation have been received. Of those applicants, roughly a third was actually allowed to participate in the proceedings thus far. For example, in the Democratic Republic of the Congo situation, 127 victims were given permission to participate in the *Lubanga* case,³¹ and 366 in the *Katanga* case.³² In the *Bemba* case, 1889 victims are participating.³³

Under the current prevailing interpretation, the assessment of personal interest in the proceedings must be made anew each time a victim applies to participate at a different procedural stage. For example, the Appeals Chamber has held that if a victim wants to intervene in an interlocutory appeal, that victim must demonstrate how his interests are affected by the appeal, *even if this person already has victim status in the proceedings that gave rise to the appeal*.³⁴ Such applications are made by written submission, on which the parties have the right to comment. This process inevitably delays the appeals proceedings.

Some Chambers have also taken the approach that even within the same procedural phase, victims must justify each intervention they want to

³¹ Press Release, Int'l Criminal Court, Trial Chamber I to Deliberate on the Case Against Thomas Lubanga Dyilo, ICC-CPI-20110826-PR714 (Aug. 26, 2011).

³² Int'l Criminal Court, *Questions and Answers: Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, § 7, ICC-PIDS-CIS-DRC2-01-001/09 (Nov. 16, 2009), available at <http://www.icc-cpi.int/NR/rdonl yres/51E53AB9-7D3B-4582-AE3B-F4999C7EB521/281257/QAKatangaandchuiWEBENG.pdf>.

³³ Press Release, Int'l Criminal Court, Central African Republic: VPRS Holds Training Seminar for Local Intermediaries Assisting Victims, ICC-CPI-20110729-PR705 (July 29, 2011).

³⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA9 OA10, Decision on Request of the Prosecutor and the Defense for Suspensive Effect of the Appeal Against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ¶¶ 17–20 (May 22, 2008).

make by explaining how the intervention relates to their interests.³⁵ For example, under Rule 91(3), if a victim wishes to question a particular witness, the legal representative must submit a written request, explaining which questions they want to ask and how these questions further their interests.³⁶ This was in part meant to rein in questioning by victims and to make sure that their questions bear on their “personal interests” in the sense of Article 68(3) of the Statute.³⁷ The side effect, however, is a steady stream of submissions on the part of the victims’ legal representatives. In principle, the Prosecution and the Defence have the right to make observations on each such request, and the Chamber must rule on them separately.

This individualised approach to victim participation may work in a national proceeding, where there are only a few victims in each case. At the ICC, however, the number of victims is becoming overwhelming. The judges had to go through this entire process for each of the nearly 10,000 applications received. Now that the Court is investigating the Libya and Ivory Coast situations, even more applications continue to arrive. The Court may soon reach the point where this individual case-by-case approach becomes unsustainable. It may well have to consider replacing individual applications with collective applications.³⁸

C. *What Participatory Rights do Victims Have?*

The key provision concerning participation is Article 68, paragraph 3, which states that: “where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered.”³⁹

The provision does not elevate victims into real parties to the proceedings. They are but “participants.” They are indeed limited to raising their “views and concerns.” Yet their role exceeds by far the role that their counterparts can play at the ad hoc tribunals, ICTY and ICTR. In practice, judges at the ICC have given a quite broad interpretation of victims’ rights.

³⁵ Cf. Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT’L REV. RED CROSS 409, 412–14 (2008), available at http://www.icrc.org/eng/assets/files/other/irrc-870_baumgartner.pdf (describing the two different victim participation regimes used in the ICC).

³⁶ Rules of Procedure and Evidence, *supra* note 16, r. 91(3)(a).

³⁷ Rome Statute, *supra* note 12, art. 68(3).

³⁸ See Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-33, Decision on Issues Related to the Victims’ Application Process, ¶ 8 (Feb. 6, 2012) (holding that “under the existing legal framework collective victims’ applications cannot be imposed but individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent”).

³⁹ *Id.*

Victims have been allowed to participate, not only in cases, but also in the stage of the situation, that is before charges have been formulated against a particular individual. This far-reaching decision was in part based on the jurisprudence of the human rights courts according to which the right of access to a court of law also implies that victims should have some participatory rights during the investigation of human rights abuses.⁴⁰ Initially, victims were even given a general right to participate at the stage of the investigation, regardless of judicial proceedings.⁴¹ However, the Appeals Chamber put a limit to this general participatory right: it now applies only if there is a judicial proceeding in which victims would be able to participate,⁴² for example proceedings regarding a review by the Pre-trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to Article 53 of the Statute.⁴³

Not only the Pre-trial Chambers, but also the Trial Chambers have given a very extensive interpretation of participatory rights. For example, in *Lubanga*, the Trial Chamber initially granted participatory rights, not only

⁴⁰ For an explanation of the rationales behind the decision to expand victims' participation rights in the ICC, see WAR CRIMES RESEARCH OFFICE, WASH. COLL. LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 8–14 (2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf.

⁴¹ Situation in the Democratic Republic of the Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 71 (Jan. 17, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183441.pdf>.

In the light of the core content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

Id.

⁴² Situation in the Democratic Republic of the Congo, ICC-01/04-556, 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, ¶ 56 (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

[T]he Pre-Trial Chamber adopts the position that [Article 68(3)] could be extended beyond its self-evident confines, to areas outside its ambit. Article 68 (3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.

Id.

⁴³ Rome Statute, *supra* note 12, art. 53(3)(b).

to victims of the crimes charged, but also to victims of uncharged crimes.⁴⁴ In practice, this meant that, although the prosecutor had limited the charges to child soldiers only, victims of sexual crimes (rape, sexual slavery, etc.) could also participate.⁴⁵ This too was reversed by the Appeals Chamber, which limited participatory rights to victims of the crimes charged.⁴⁶

Despite these limitations, participatory rights for victims are quite extensive, both during pre-trial and trial. The implication is that the Chambers, in many of their decisions, must also consider submissions of the victims, in addition to the submission of the parties. This inevitably increases the length of our decisions, compared to, for example, those of the ICTY, where judges only have to address the observations of the prosecution and the defence.⁴⁷

At pre-trial, the role of victims has, thus far, mainly consisted of the right to attend public sessions of the confirmation hearing and to present views and concerns. They have access to and are notified of all public filings, public decisions and all the evidence disclosed between the parties, insofar as it is public. They have also been granted the right to make short opening and closing statements and could request permission to make oral submissions. In terms of written submissions, they have been allowed to address both issues of law and fact. Finally, the legal representatives could make an application to question witnesses called by the defence, on the condition that they demonstrate that the personal interest of one or more of the victims was affected by the testimony.

⁴⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, ¶ 93 (Jan. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc409168.pdf>.

Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a "crime within the jurisdiction of the Court" and to add the proposed additional element—that they must be the crimes alleged against the accused—therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.

Id.

⁴⁵ *Id.*

⁴⁶ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 108 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>.

⁴⁷ WAR CRIMES RESEARCH OFFICE, *supra* note 40, at 11–14 (describing the failure of the ICTY and ICTR to substantively include victims in the process and noting that "[w]hile the ad hoc criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right").

At the trial level, victims are allowed to question witnesses called both by the Prosecution and the Defence. They have also been given the possibility of suggesting evidence to the Trial Chamber. However, they have not been given the right to call such evidence themselves. Significantly, victims can apply to be heard as witnesses, independently of the Prosecutor or the Defence.⁴⁸ This has led to a separate stage in the proceedings: in the *Katanga* trial, there was a “victim’s case” that came after the Prosecution’s case and before the Defence’s case.⁴⁹ Different from the pre-trial phase, common legal representatives (not the victims themselves) at the trial stage have been allowed to access confidential documents and evidence and attend closed sessions as well.⁵⁰

D. *Reparations*

Ultimately, victims do not only want to participate in the proceedings. They want to be recognized as victims and they want to be compensated for the harm suffered. While the Rome Statute is quite vague on victim’s participatory rights, it is even vaguer on reparations. Indeed, the drafters could not agree on this subject, and left it to the Court to further decide what it means. This is another example of a “constructive ambiguity” in the Statute, which places a high burden on the shoulders of the judges.

In Article 75, the Statute provides that the Court must “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”⁵¹ On the basis of these principles, victims may request—and the Chambers may award—reparations.

Some observers expected the Court to lay down general court-wide principles applicable to reparations. The Court has thus far refrained from doing so. It will therefore be for the first trial chambers to determine on which basis they will award reparations in concrete cases. As a result, we

⁴⁸ Trial Chamber III decided to allow victims to present their “views and concerns” in the form of unsworn statements as well. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-1935, Order Regarding Applications by Victims to Present Their Views and Concerns or to Present Evidence (Nov. 21, 2011).

⁴⁹ Jennifer Easterday, *Judges in Katanga and Ngudjolo Trial Hear Testimony from Participating Victims*, KATANGATRIAL.ORG (Mar. 15, 2011), <http://www.katangatrial.org/2011/03/judges-in-katanga-and-ngudjolo-trial-hear-testimony-from-participating-victims/> (“Upon resuming hearings after the Prosecution rested its case and the court observed its annual winter recess, the trial heard testimony from victim participants.”).

⁵⁰ Prosecutor v. Katanga, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ¶ 149 (May 13, 2008); Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, ¶¶ 118–25 (Jan. 22, 2010).

⁵¹ Rome Statute, *supra* note 12, art. 75(1).

will have to wait for the first convictions before we know the legal principles that will allow victims to claim reparations before the ICC.

In essence, the States Parties have delegated to the Court—eventually the judges—the responsibility of defining rules of tort liability. This is not an obvious task for a judge in a criminal trial, especially considering the massive numbers of victims that are likely to claim reparations. What causal link will be required between the crime and the harm? For example, when dealing with mass murders, will each individual murder need to be established for the purposes of reparations? What type of harm will be the subject of reparations, only material harm or also psychological and moral harm? Will the court go for individual or collective reparations? Who will adduce the evidence? What is the evidentiary regime? Will the defence have the right to cross-examine all the witnesses? What will be the standard of proof? These are but a few of the very many questions that need to be resolved.

How to avoid a prolongation of an already very lengthy trial proceeding? Imagine for a moment what might happen if, after the criminal trial has been completed, the Trial Chamber would still have to rule on each individual claim for reparations. If the extent of the harm suffered and the causal link with the crimes has to be proved on an individual basis, there is a good chance that the length of the reparations proceedings could exceed the duration of the criminal trial itself.

III. SOME VIEWS AND CONCERNS

A. *Victims and the Truth Finding Process*

One of the arguments in favour of victim participation at trial is that victims can make a meaningful contribution to the truth-finding process and can thus add to the evidence led by the prosecution. The idea is that victims should be able to make the Chamber see the facts from their perspective as well. As they are the ones who lived through the relevant events, their experience and knowledge of the circumstances of the case could be helpful in providing the judges with important insights about the local situation. As such, victims can make their contribution to the fight against impunity, which is the basic objective of the ICC.

It remains to be seen whether this really happens in practice. In a typical case, many witnesses for the prosecution will be victims, which means that victims will give evidence anyway. A trial against a person accused of human rights abuses without victims of such abuses testifying in court is indeed highly unlikely. To allow common legal representatives to bring an extra number of victims to The Hague to testify as part of a “victim-case” may not be necessary to try the case. It may not only be time consuming, but it poses all sorts of problems relating to the “double status” of the witness, i.e., a participating victim and a witness.

There is even a risk that a “victim case” may, unwittingly, undermine the case of the prosecution, in situations where common legal representatives bring victims to The Hague whom the prosecutor, for strategic reasons, decided not to call. Also, victims may have a very different theory of the case, which may, or may not, be conducive to the truth-finding process.

B. Victims and the Rights of the Accused

In theory, victims’ participation should not have a negative impact on the rights of the accused. Article 68(3) provides clearly that the Court must permit victims to present their views and concerns “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁵² In other words, the ideal of allowing victims to take part in the trials must not come at the expense of the accused.

Yet the paradox remains. Typically, victims have an interest in seeing the accused found guilty and convicted. Only then can they feel that justice has been done. Only then can they hope to receive reparations from the Court. Yet, the most basic requirements of fairness dictate that Victims’ Legal Representatives should not act as so-called “Prosecutor *bis*.”⁵³ It would be wholly unfair if the defence had to counter not just the Prosecutor’s accusations, but also those of the Victims’ Legal Representatives. Nevertheless, the participation of victims would probably be meaningless if they were entirely barred from proffering incriminating evidence. A fine balancing act is thus required. Experience has shown that finding this balance is not always easy. Victims are not neutral and forcing them to act as if they were risks alienating them from the proceedings.

A related problem is whether victims should have the obligation to disclose potentially exonerating evidence they may have. The jurisprudence so far says that they do not have such an obligation.⁵⁴ This may strike some as odd: how can victims have a right to tender incriminating evidence without a corresponding duty to disclose exculpatory material?

⁵² *Id.* art. 68(3).

⁵³ *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-1432, ¶ 93 (stating that, despite the role given to victims’ representatives, it is still the prosecutor’s duty to investigate crimes, formulate charges, and decide what evidence to bring).

⁵⁴ *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-2288, 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,” ¶ 72 (July 16, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc909021.pdf>.

C. *Is the Participatory Regime Meaningful for Victims?*

The question whether the participatory system is meaningful will be differently answered by different persons. Even the judges of the Court may have very different views on this issue. Maybe it is a little early to make a full assessment, because, at this point in time, no trial has completely run its course. However, it is possible to make some preliminary observations.

Victims who expect to find a forum where they could personally and publicly express their grief and thus have a platform to expose their feelings will probably be disappointed. In mass trials, victims are necessarily represented by common legal representatives, and consequently victims will not be able to appear in person. Also, a criminal trial, unlike, for example, a truth and reconciliation commission, is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding.

The meaningfulness of the ICC victims' participation regime will probably vary from one victim to another. The level of education, language skills, and access to means of communications all play an important role in this regard. There is an enormous distance—both in the literal and the cultural sense—that often separates the reality of victims' lives from the proceedings in The Hague. Victims generally do not personally attend any 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.

Common legal representatives will have to take instructions from their clients for a meaningful representation. But how do you achieve this when your clients are several thousands of kilometres away from the courtroom and live scattered over large distances—sometimes in very remote areas that are hard to reach? Sometimes victims live in areas where armed conflict—or the threat thereof—is still on-going. It may even be dangerous for them to have regular contacts with the legal representative, because they have to keep secret the fact that they are participating in the proceedings, for fear of harassment or reprisals by people loyal to the accused.

In the typical case before the Court, massive amounts of victims will be represented by common legal representatives who attend the hearings in court. Even if these common legal representatives organise themselves to take instructions from great numbers of victims, it will be very difficult if not impossible to relay these instructions to the court. In those circumstances, can legal representation be anything more than symbolic? And if it is only symbolic, how meaningful can it be?

D. *How Meaningful Can Reparations Be?*

It may well be that reparations matter more for victims than participation. As explained above, it still remains to be seen how the judges will give effect to the statutory provisions on reparations.

However, one thing is already very clear at this point in time. The resources available for reparations will probably not allow the Court to meet the expectations of all victims. Indeed, once we have defined the principles and determined reparation awards, where will we find the money to pay for reparations? So far, most accused have arrived in the Court's Detention Centre penniless. And those who are not may have spent most of their money by the time their case comes to an end, as the Charles Taylor case before the Special Tribunal for Sierra Leone illustrates.⁵⁵

This problem is not typical for the ICC: in many national proceedings, courts award generous compensations to victims. However, very often, victims never see their money. This is true for many victims who bring successful proceedings under the Alien Tort Claims Act in the United States,⁵⁶ as it is for victims of the genocide trials in Belgium who acted as *partie civile* under our famous war crimes statute.⁵⁷ And I would not wish to count the victims who were promised compensation by Truth and Reconciliation Commissions who were disappointed at the result.⁵⁸

Theoretically, this problem could be resolved by the ICC's Trust Fund for Victims. However, the Fund has very limited resources, by far insufficient to provide anything more than nominal sums to individual victims. Furthermore, the current financial crisis makes it seem unlikely that the Fund will be able to increase its resources significantly in the near future. Moreover, it is not at all clear whether the Chambers can decide how

⁵⁵ See Doreen Carvajal, *As Liberian Stands Trial, Investigators Lose Scent in Hunt for Missing Millions*, N.Y. TIMES, June 6, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9905E4D8173CF935A35755C0A9669D8B63&ref=liberia> (stating that no money has been found in Charles Taylor's name and that he has been declared "partially indigent").

⁵⁶ See Edward A. Amley, Jr., *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2178 (1998) (noting that plaintiffs who win Alien Tort Claims Act suits are not likely to collect "a dime" of the judgments they are awarded).

⁵⁷ See *Large Compensation Awards... Never Paid*, INT'L JUST. TRIB. (Sept. 23, 2007), <http://www.rnw.nl/international-justice/article/large-compensation-awards-never-paid> (detailing situation of Rwandan genocide victims who won verdicts in Belgian courts but had nothing paid to them).

⁵⁸ See Tyrell Haberkorn, *Just, Fair, Accountable!*, NEW MANDALA (Aug. 22, 2011), <http://asiapacific.anu.edu.au/newmandala/2011/08/22/just-fair-accountable/> (detailing the work of the Truth and Reconciliation Commission in Thailand, where, as of August 2011, many victims had not been compensated); see also Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 246 (2007) (noting that implementation of the Truth and Reconciliation Commission's reparations plan was slow).

the money of the Trust Fund can be used.⁵⁹ In other words, if the convicted person is indigent, the Trial Chamber simply cannot decide how the victims should be compensated. At this point in time, the Trust Fund has a budget of one million euros to cover all the reparations in all the cases that are before the Court.⁶⁰

There is a possibility of making awards on a so-called “collective basis.”⁶¹ An example would be that, instead of paying individual victims for the harm they suffered, the Court would finance the construction of a hospital or a school. Such measures benefit communities as a whole. But here again, if the convicted person is indigent, reparations will largely depend on the initiative of the Trust Fund, which plays a leading role in defining and financing collective reparations.

Here too, putting into practice the lofty ideals expressed in the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power seems to be more difficult than anticipated.⁶² Reparations for victims risk being more symbolic than real.

E. *Equal Access to Justice?*

One of the central objectives of the 1985 Basic Principles and the 2005 Guidelines underlying the ICC system is that victims should have *equal* access to justice.⁶³ The 2009 report spelling out the overall Court Strategy in relation to victims makes very clear that the ICC subscribes to this goal.⁶⁴

This may be possible for human rights courts and for reparations commissions, but it is far from obvious before criminal courts and tribunals. Prosecutors will never be able to bring charges in *all* the cases involving victims of human rights abuses that have come to their attention after investigating a given situation. Prosecutorial selectivity being inherent in crimi-

⁵⁹ See Int'l Criminal Court, Regulations of the Trust Fund for Victims, paras. 54–75, ICC-ASP/4/Res.3 (Dec. 3, 2005).

⁶⁰ *Financial Info*, THE TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/financial-info> (last visited Feb. 20, 2012).

⁶¹ Rules of Procedure and Evidence, *supra* note 16, r. 97.

⁶² See G.A. Res. 40/34, *supra* note 9 (declaring that states should help to compensate victims when offenders cannot and that victims should receive access to prompt redress through “mechanisms of justice” that have “expeditious, fair, inexpensive, and accessible” procedures).

⁶³ See *id.* ¶ 3 (providing that the Basic Principles are “applicable to all, without distinction of any kind”); see also G.A. Res. 60/147, *supra* note 10, Annex ¶ 12 (stating that victims should have equal access to an “effective judicial remedy”).

⁶⁴ Int'l Criminal Court, Report of the Court on the Strategy in Relation to Victims, para. 15(d), ICC-ASP-8/45 (Nov. 10, 2009).

nal trials means that, inevitably, only a limited amount of victims will be able to participate and to receive reparations.

Victims of uncharged crimes in situations that are before the court will not be able to participate. From the viewpoint of the victims, this means that only victims who happen to have been victimized in the locations that are the subject of the charges will be allowed to participate.

This lack of equal access does not only affect the participation regime, but also the reparations regime. Only victims of crimes charged that lead to a conviction will be able to claim reparations. If the accused is acquitted, or if he cannot be apprehended, reparations will have to wait. For example, in the Uganda situation, with Joseph Kony and others still being fugitive, no participating victim has, at this point in time, any perspective of reparations.⁶⁵

This may even have a negative impact on reconciliation, as victim groups belonging to different sides of a conflict may not always understand the legal intricacies of the system explained above, and may wonder why other victims can claim participation and reparations.

These inequalities are inherent in a system where victims participate in criminal trials. It sharply contrasts with other redress mechanisms, such as access to human rights courts or administrative claims commissions. It may be too much to expect from the ICC to be a retributive (fighting impunity) and a restorative mechanism at the same time. It may be worth considering separating the two, and to leave the restorative functions to the Trust Fund.

F. Is the System Sustainable?

A lot of judicial energy and resources have been put in the victims' participation and reparation regime. To date, no information exists as to reparations, but what seems to be likely in the two first trials is that the means of the accused will not suffice for reparations. Even if the Trust Fund were to be asked to contribute, the resources available for a reparation award would be very modest.

This stands in sharp contrast with the expenditure on victims in terms of fees, salaries and expenses. I already mentioned the budget numbers for 2012, which indicate that at least some seven million euros (almost ten million USD) have been directly earmarked for victims-related tasks, money that will be spent on fees, salaries and expenses of the common legal

⁶⁵ See U.N. Secretary General, *Report of the Secretary-General on the Lord's Resistance Army-Affected Areas Pursuant to Security Council Press Statement*, ¶ 4, U.N. Doc. S/2011/693 (Nov. 4, 2011) (noting that Kony and two others charged with crimes against humanity and war crimes remain fugitives who continue to commit atrocities as part of the Lord's Resistance Army).

representatives and the sections in the ICC registry responsible for victims.⁶⁶ However, the real cost is probably even higher, because the budget figures do not reflect the considerable time also spent by the parties (prosecution as well as defence) on responding to victims-related issues. Nor do they tell you how many working hours judges and their staff devoted to dealing with victims' applications and participation-related motions.

I know from experience that the time devoted by the Chambers to victims-related issues is considerable. At any given time before or during the trial, there would always be some victims-related issue pending for decision; whether it be a request from a surviving relative to participate in the name of a deceased victim, or a motion to clarify whether the defence is entitled to mention the names of participating victims during their investigations. Moreover, in most cases, Victims' Legal Representatives have made submissions on motions made by the parties. And then, the countless hours spent on determining the victim status of hundreds—and in the future perhaps thousands—of applicants, also puts a strain on the parties (prosecution and defence) and the related expenditure.

I hesitate to guess how significant a portion of the Chamber's time has been used for victims' issues. It is difficult to know this, because it varies a lot depending on the phase of the proceedings. For example, before the start of the hearings on the merits in the *Katanga* case,⁶⁷ for several months, more than one third of the Chamber's support staff was working on victims' applications.

During the trials, victims take up an important proportion of the time. Even if common legal representatives questioning of witnesses has been limited by the Trial Chambers in their victims participation decisions,⁶⁸ time spent during the hearings is considerable because questions by the victims will often trigger new questions by the Defence. In addition, the "victims' case" is taking a lot of time. During the weeks leading up to the testimony of victims at trial in the *Katanga* case, judges and staff devoted a large majority of their time to this, even if the actual hearings only lasted five days.⁶⁹ Whatever the actual average number of hours, it is clearly significant.

⁶⁶ See Proposed 2012 ICC Budget, *supra* note 21, at 128.

⁶⁷ See Int'l Criminal Court, Registry and Trust Fund for Victims Fact Sheet 1 (March 2011), available at http://www.iccnw.org/documents/Victims_Factsheet_March_2011.18_apr1832.pdf (noting the number of victims authorized to participate in the *Katanga* case trial).

⁶⁸ See, e.g., Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, (Jan. 22 2010), http://www.worldcourts.com/icc/eng/decisions/2010.01.22_Prosecutor_v_Katanga.pdf (evaluating the Chambers requirements for legal representatives to question witnesses).

⁶⁹ See *Registry and Trust Fund for Victims Fact Sheet*, *supra* note 67, at 3. See generally *Timeline of Developments Summarized by the CICC on the DRC situation related to the Case*

When I compare my experience as an ICC judge with my experience as an ICTY judge, a huge amount of time is spent on victims-related issues, which, obviously, has an impact on the length of proceedings. Whether this is in the best interest of the victims whom the ICC wishes to serve remains to be seen.

IV. FINAL OBSERVATIONS

The ICC can certainly be commended for its considerable efforts to give a voice to the victims of serious human rights abuses and to put the victims at the head of the international criminal justice system. Its general approach towards victims and the Trust Fund are undoubtedly a great improvement. While the Court still needs to render its first judgments,⁷⁰ the Trust Fund has been in operation since late 2008 and has already reached out to thousands of victims.⁷¹ It has allowed the alleviation of victims' needs long before trials before the Court materialized, as the example of Trust Fund for Victims projects in Northern Uganda illustrates.⁷²

By contrast, the implementation of the ICC victims' participation and reparation regime in trials before the Court shows how difficult it is to put the ideals of the 1985 U.N. Declaration into practice.⁷³ The Court will have to assess whether the system it has installed is capable of reaching the objectives it has set for itself. By the time the first trials have run their full course, the Court will be in a position to do so.

One major objective has been to avoid the "secondary victimization" for which the ad hoc tribunals were blamed.⁷⁴ Victims have vested enormous hopes in the ICC, which, through its outreach programs, has cre-

of Germain Katanga, COAL. INT'L CRIMINAL COURT, http://www.iccnw.org/documents/Timeline_DRCKatangaCase_Current1.pdf (last visited Feb. 22, 2012) (outlining the developments in the *Katanga* case).

⁷⁰ At the time of writing this paper, no decision had yet been rendered. However, on March 14, 2012, Trial Chamber I of the ICC issued its first verdict, finding Thomas Lubanga Dyilo guilty of conscripting and enlisting children to actively participate in hostilities. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

⁷¹ See Gaëlle Carayon, *Interview with Pieter de Baan, Executive Director of the Trust Fund for Victims of the ICC*, ACCESS (Victims' Rts. Working Grp. Bulletin, London), no.18, Spring 2011, at 6, 6 (describing the successes and challenges of the Trust Fund).

⁷² See *id.*

⁷³ See G.A. Res. 40/34, *supra* note 9, Annex (describing who a victim is and outlining how they should be treated based on fairness and justice).

⁷⁴ See U.N. OFFICE FOR DRUG CONTROL & CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS 2, 16–17 (1999) (noting the problems of "secondary victimization" in criminal justice ICC's positive provisions in regards to victims work).

ated immense expectations.⁷⁵ Many resources have gone into fees, salaries and expenses, which are in sharp contrast with the resources that will eventually be available to pay for reparations. If it should appear that both participation in the trials and reparations are more symbolic than real, a different kind of frustration may emerge.

If victims' participation slows down proceedings, fewer trials can be held. Seen from that perspective, victims' participation may be in conflict with the basic purpose of the ICC, which is to fight impunity.

The whole system is premised on the idea that victims' participation in criminal trials avoids secondary victimization and indeed empowers victims. The burden is on the ICC to prove that this proposition is correct. At this point in time, the jury is still out. It may well be that the premise proves to rely on a false analogy with domestic trials in civil law states. It may well be that victims' participation in criminal trials of the kind that are held before the ICC, i.e., trials with massive amounts of victims, cannot be more than symbolic, which, in turn, may be a new cause of secondary victimization. The same risk exists if it appears that reparations, too, can be only symbolic.

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 and time directly on reparations?

Victims' participation in criminal trials is not the only possible avenue if one wants to empower victims. Contrary to what is often argued, I do not believe that victims' procedural rights (such as the right to the truth, the right to reparations, and the right to be informed), recognized by human rights courts,⁷⁶ necessarily need to be exercised by introducing the victims into the *criminal* trial proceeding.

A possible alternative could be to transform the Trust Fund for Victims into a Reparations Commission, which would directly deal with victims' reparations claims. In this proposal, the victims would detach from the criminal proceedings and be allowed to bring their claims before a Trust Fund for Victims Reparations Commission. Reparation claims before such a Commission would not need to be restricted to convictions, but also could be open to potentially all the victims of the situations investigated by the ICC. The number of beneficiaries of this mechanism would be significantly

⁷⁵ See VICTIMS' RIGHTS WORKING GROUP, THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES 8–11 (2010), <http://www.redress.org/Stocktaking-report2010.pdf> (noting the tension between the ICC and the expectations of the victims).

⁷⁶ See generally *Law Sources: Procedural Guarantees*, HUMANRIGHTS.CH, http://www.humanrights.ch/en/Standards/Law-Sources/idart_8107-content.html (last updated Aug. 19, 2011) (containing a collection of treaties on procedural guarantees in international humanitarian law).

higher than the victims of cases that result in convictions. In fact, the “second branch” of the Trust Fund for Victims mandate already fulfills this function.⁷⁷ It has indeed already compensated victims on a parallel track, unattached to cases that are tried before the Court, as the example of Northern Uganda illustrates.⁷⁸ The idea of a Trust Fund for Victims Reparations Commission would bear some analogy with the proposal formulated, but not further elaborated by ICTY judges in 2000⁷⁹ and again repeated by President Robinson in his address to the U.N. General Assembly on November 11, 2011.⁸⁰ It may well be that this procedural avenue is a more effective means to attain the objective of victim empowerment. I think it therefore deserves further consideration. Any change of this kind would of course require extensive prior discussion and negotiation. In the meanwhile, the ICC has to continue the challenging task of finding ways to implement the existing provisions of the Rome Statute which go as far as practically possible towards meeting the legitimate expectations of victims.

In a way, the problems the ICC is facing in giving victims a meaningful place in its proceedings, can serve as a metaphor for the ICC as a whole. Both are inspired by and based upon noble and important ideals. And we should be grateful to those who have made it possible to dream of a world in which the ideal of international justice might one day reign. However, putting into practice those ideals is proving to be a big challenge. It is important to assess and to face this challenge. If we really want our ideals to become reality, we must allow ourselves and others to be critical of our efforts to put them into practice. This, after all, is the only way towards improving ourselves.

⁷⁷ See *What is the Role of the Trust Fund for Victims?*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/27> (last visited Feb. 21, 2012) (noting the Trust Fund for Victims is a separate institution from the ICC and can benefit victims separate from even without a conviction from the ICC).

⁷⁸ See Jennifer Easterday, *Q&A with the Executive Director of the Trust Fund for Victims Pieter W.I. de Baan*, BEMBATRIAL.ORG (Sept. 12, 2011), <http://www.bembatrial.org/2011/09/qa-with-the-executive-director-of-the-trust-fund-for-victims-pieter-w-i-de-baan/> (noting that the Trust is helping Northern Uganda separate from the ICC proceedings).

⁷⁹ See Letter, *supra* note 8, Annex (recognizing the victims need for compensation).

⁸⁰ Press Release, Int'l Criminal Tribunal Former Yugoslavia, President Robinson's Address Before the United Nations General Assembly (Nov. 11 2011), <http://www.icty.org/sid/10850> (calling upon Member States of the ICTY to assist victims beyond the Tribunal via the formation of a trust fund).