



Discussion Paper

# Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?

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## Summary

This Discussion Paper is the first outcome of a two-year research project being conducted by Impunity Watch (IW) into victim participation in transitional justice (TJ) mechanisms. The objective of the project is to provide empirical evidence to inform policymaking on TJ, ultimately aiming to support the enhanced impact of TJ mechanisms for victims and affected communities. After introducing the project, its background and plotting the historical development of attention to victim participation, the Paper undertakes a literature study of victim participation in criminal processes and truth commissions, examining how it has been interpreted, a number of assumed benefits and harms resulting from participation, and looking at different typologies of participation. The Paper ends by drawing out a number of non-exhaustive discussion points and research questions. The latter are intended to contribute to policy discussions on victim participation and will guide IW's empirical research in 2014 and 2015.

*Cover Image: Benjamin Vanderlick. A woman walks home in Bubanza Province, Burundi.*

Table of Contents	
<b>Summary.....</b>	<b>2</b>
<b>Introduction .....</b>	<b>4</b>
Impunity Watch Research Project .....	4
<b>Historical Development – Bridging the Gaps Between Restorative and Retributive Justice? .....</b>	<b>6</b>
<b>What is Participation? .....</b>	<b>8</b>
Criminal Justice Institutions .....	8
ECCC Jurisprudence .....	9
ICC Jurisprudence .....	10
Truth Commissions .....	12
<b>Presumed Benefits of Participation in Transitional Justice.....</b>	<b>14</b>
Presumed Benefits for Victims.....	14
Presumed Benefits for the Institution.....	15
<b>Anticipated Harms of Participation in Transitional Justice .....</b>	<b>17</b>
Anticipated Harms for Victims .....	17
Anticipated Harms for the Institution or Process.....	20
<b>Typologies of Victim Participation .....</b>	<b>22</b>
Forms of Direct Participation .....	24
I. Full Empowerment: Participation as Decision-Makers .....	24
II. Collaboration: Direct Participation during Implementation .....	24
III. Providing Information .....	25
IV. Incidental Expression .....	25
Forms of Indirect Participation .....	26
V. Collaboration: Indirect Participation during Implementation .....	26
VI. Notification .....	27
<b>Towards a Research &amp; Policy Agenda: Discussion Points .....</b>	<b>28</b>
<b>Research Questions.....</b>	<b>38</b>
<b>References .....</b>	<b>39</b>

## Introduction

Since the Nuremberg trials, recourse to transitional justice (TJ) as a response to serious violations of international law has become the norm rather than the exception (Teitel, 2002). Seeking the truth about the past, holding the perpetrators of violence to account, reconciling divided groups and (re)establishing peace are deemed vital for victims, affected communities, and for the future of both state and society. To achieve these goals, institutionalised mechanisms such as truth commissions and criminal tribunals have often been relied upon. And as the practice of TJ has gradually evolved, novel approaches and new principles have been accorded greater importance. Victim participation is one such example, representing both an approach and a principle.

Without doubt, victim participation has changed the way that policymakers and practitioners conceive of TJ. In its absence it is assumed that TJ will be detached from affected communities, will face difficulties in generating local ownership and grassroots impact, and will fail to address the grievances of the victims of serious crimes under international law. In his first report, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (TJRNR) therefore refers to ‘meaningful participation’ of victims as a *sine qua non* for providing recognition, fostering trust and strengthening the rule of law as components of a ‘victim-centred approach’ to TJ (UN Doc. A/HRC/21/46). The report moreover recommends that, ‘None of the proclaimed goals [of TJ] can happen effectively with victims as the key without their meaningful participation.’

Nevertheless whilst the benefits of participation appear self-evident – victim participation having become an axiom of TJ – there is still little evidence to support many of the supposed benefits of participation or indeed to understand its full implications. For example, whereas a number of important empirical studies provide a fuller picture of participation in practice (e.g. Hoven, 2013, Tenove, 2013a; Pham et al., 2011; Stover, Balthazard & Koenig, 2011), these studies remain in the minority when compared to their theoretical or technical-legal counterparts. Added to this, the darker side of participation, including potentially damaging consequences for victims, affected communities and TJ mechanisms, is under-explored. There is a real risk that without better comprehension of the dynamics of victim participation on the ground, this core component of TJ policymaking may become a hollow principle or an empty ritual.

### Impunity Watch Research Project

Beginning in 2014, Impunity Watch (IW) will commence a two-year research project that will partially respond to some of these risks. The objective of the project is to provide empirical evidence to inform policymaking on TJ, ultimately aiming to support the enhanced impact of TJ mechanisms for victims and affected communities.<sup>1</sup>

In the first phase of the project, qualitative research will be conducted in Burundi, Cambodia, Guatemala, Honduras and Kenya to produce comparative studies on victim participation in institutionalised mechanisms of TJ (criminal trials, truth commissions, reparations programmes), primarily from the perspective of victims and affected communities. In a second phase of the research, individual case studies / life histories will be researched to build profiles of several people from the first phase of the research in each country. The challenges, expectations and experiences of these individuals will be profiled, with the aim of contextualising victim participation.<sup>2</sup> IW believes that research can be a crucial first step towards concretely expressing the needs and expectations of affected communities,

<sup>1</sup> For the purposes of this Discussion Paper and IW’s research project, the term ‘victim’ will be used to refer to natural persons who are the surviving direct victims of serious crimes under international law (war crimes, crimes against humanity, genocide) and/or gross human rights violations (e.g. torture, forced disappearances), as well as their family members, irrespective of identity or their potential multiple roles as both victim and perpetrator.

<sup>2</sup> IW is aware of the methodological and practical challenges of this approach, including the risk of homogenisation and essentialisation of victimhood, something that we identify in this Discussion Paper as a potential problem associated with victim participation. The second phase of the research will explicitly pay attention to these risks in the research design.

and the development of policies that are more responsive to those needs and expectations thereafter. It is this belief that is at the heart of the victim participation research project.

In the remainder of this Discussion Paper, a framework will be presented based on a literature study of victim participation. After summarising the historical foundations of the practice and principle of victim participation, some of the purported benefits and harms are presented, followed by a brief examination of various typologies of victim participation, concluding with the formulation of a number of key themes and questions that will guide the empirical research.

## Historical Development – Bridging the Gaps Between Restorative and Retributive Justice?

The Nuremberg trials are etched onto our collective memory as having delivered justice after the horrors of the Holocaust and the Second World War. Yet victims were virtually absent from the proceedings (Zegveld, 2010), leading to important lessons for modern criminal courts such as the need to ensure that ‘victims are heard’ and the message that justice is not satisfied by convictions alone (Moffet, 2012: 270). Contemporary TJ mechanisms now place considerable emphasis on the value of victims’ voices, particularly notions of ‘victim-centred’ processes. In this regard, the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) both provide for types of victim participation in their proceedings. Recent increases in the number of voices demanding ‘bottom-up’ approaches to dealing with the past in other TJ mechanisms provides further evidence of the shift towards victim needs and expectations as a central concern in policy agendas.

To understand these developments, we must look beyond TJ and international criminal law.

Indeed victim participation in criminal proceedings in particular is not a wholly new idea. In countries with a civil law tradition, victims have long been allowed to take an active role in the courtroom process (Trumbull IV, 2008). But until recently distinctions between traditional notions of retributive and restorative justice – the former embodying punishment, guilt and innocence of the accused, and the latter grounded in reparations, truth-telling and conciliation that focuses on the victim – were largely observed within TJ and were determinative for the course of TJ in a particular context. In spite of these distinctions, broad developments among victim movements in conjunction with attitudinal shifts among international practitioners account for four principal factors recognised by scholars as having fuelled the emergence of concern for victim participation (SáCouto, 2012; Stover et al., 2011; Trumbull IV, 2008).

First, victims’ rights movements at the domestic level beginning in the 60s had a particular impact on the rights of victims in countries with a common law tradition. These developments later influenced victims’ movements at the international level (Trumbull IV, 2008: 783). Second, on the back of the growing victim lobby, a number of UN human rights instruments and principles were instituted, beginning with the 1985 United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and including the 2005 ‘Van Boven-Bassiouni Principles’ on the right to a remedy.<sup>3</sup> The 1985 Basic Principles constitute a major milestone in recognising victimhood, in recognising victims’ entitlement to access to mechanisms of justice (SáCouto & Cleary, 2008) and in reflecting ‘the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims.’<sup>4</sup> Taken together, these two instruments provide much of the foundation for the current conception of victim participation.<sup>5</sup> Third, treaty-based human rights courts have interpreted treaty provisions as creating broad victim rights, leading to a rich body of case-law (Aldana-Pindell, 2002).<sup>6</sup> In particular, the Inter-American Court of Human Rights has ‘blazed a trail’ for victim-centred justice (Antkowiak, 2011: 282), ordering remedies after violence that have bridged the traditional gaps between retributive and restorative justice.<sup>7</sup> Finally, criticisms of the ICTY and ICTR for doing little for victims were important considerations during the drafting of the Rome Statute for the ICC.<sup>8</sup> Each Tribunal has been accused of

<sup>3</sup> 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law (Van Boven-Bassiouni Principles).

<sup>4</sup> UNODCCP, Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999), p. 1.

<sup>5</sup> The Rome Statute, for example, reproduces text from the General Principles.

<sup>6</sup> Both the European Court of Human Rights and the Inter-American Court of Human Rights have framed prosecutions as a right of victims through their interpretation of provisions concerning the right of access to justice and the right to an effective remedy. Cases include the well-known decision in *Veldsquez-Rodriguez v. Honduras* from as early as 1988. For further explanation, see: Trumbull IV (2008); Aldana-Pindell (2002).

<sup>7</sup> For example, as well as ordering victim participation, the Court has ordered remedies such as the construction of memorials, public ceremonies and apologies.

<sup>8</sup> In her address to the UN Security Council in 2000 while still Chief Prosecutor, Carla Del Ponte denounced the lack of rights for victims, stating that “the voice of survivors and relatives of those killed are not sufficiently heard” and implored the

‘falling short of delivering justice to the people of Rwanda and the former Yugoslavia’,<sup>9</sup> constituting a ‘wasteful parody of justice’ in the eyes of their intended beneficiaries (Musila, 2010: 45), failing to connect with affected communities, and even causing the ‘secondary victimisation’ of victims through what came to constitute a distressing process of acting as a witness. The latter was particularly stark in the treatment of female witnesses (SáCouto, 2012).

In spite of these factors, the scope of victims’ rights during the drafting of the Rome Statute was a highly controversial subject (Trumbull IV, 2008). The Statute itself contains no specific reason for the inclusion of victim participation, with the main provision (Article 68(3)) essentially leaving the principle and the practice of victim participation up to the Chambers to decide.<sup>10</sup> In Cambodia, the ECCC’s foundational texts also do not expressly provide for victim participation;<sup>11</sup> and in each courtroom the rights of victims are continually weighed against the rights of the accused. Nonetheless, just as with truth commissions before them, the expectation nowadays is that victims should actively participate in the courtroom and be given the opportunity to tell their stories. The judicial process is now imbued with the understanding that criminal justice should meet the demands for justice held by victims that go beyond accountability. This shift towards a ‘more expansive model of international criminal law that encompasses social welfare and restorative justice’ (Haslam, 2004: 315) therefore constitutes both a departure from purist conceptions of criminal justice, as well as a move towards territory previously reserved for truth commissions. Whereas victim participation has always been (in one form or another) at the heart of the modern truth commission, its role in the courtroom is now said to ‘mark a great advance in international criminal procedure’ (Cassese, 1999: 167).

In fact, to all intents and purposes, ‘victims’ have become the *raison d’être* or the very ‘telos’ of the work of the ICC (Kendall & Nouwen, 2013: 5) and TJ mechanisms, with victim participation a central component of TJ policymaking. According to Bonacker, Form & Pfeiffer (2011: 130, 131), a shift has taken place in the lifespan of TJ ‘from a more state-based to a more individual-centred focus’, meaning that TJ is now a global norm in which individuals are empowered as ‘active demanders’.<sup>12</sup>

Whilst these developments have been spectacular and have put victims centre stage like never before, there is still much room for enhanced understanding of the implications of current models of victim participation. For one, the picture that has emerged with respect to the participation of victims after the seminal truth commission in South Africa is at times less than complementary (Clark, 2012; Mendelhoff, 2009; Backer, 2007; Byrne, 2004; Garkawe, 2003). The shift towards a global norm of TJ with victim participation at the forefront may also disguise dynamics in which states gain legitimacy from the appearance of appropriate behaviour, whereas in reality the participation of victims may be exploited to provide little more than a ‘veneer of legitimacy’ for these states (Snyder & Vinjamuri, 2003/2004: 33). And invoking ‘victims’ in the abstract by claiming that they now ‘have a voice’<sup>13</sup> may well have the paradoxical effect of instrumentalising, essentialising, and even disempowering victims.

A number of these dynamics will be explored in the remainder of this Discussion Paper.

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Council to “give serious and urgent consideration to any change that would remove this lacuna in our process” (Carla Del Ponte, Address to the UN Security Council, 21 September 2000, ICTY Doc. JL/P.I.S./542-e).

<sup>9</sup> *Ibid.*

<sup>10</sup> According to 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.’

<sup>11</sup> Indeed it was the ECCC Judges who adopted Rule 23 of the Internal Rules in June 2007, which affords victims the ability to bring a civil action and thus become parties.

<sup>12</sup> For example, in the statute for the Extraordinary African Chambers in the Courts of Senegal, the special criminal court inaugurated in February 2013 to try Hissène Habré, victim participation is provided for at all stages of the proceedings.

<sup>13</sup> For example, see the comments by the UN High Commissioner for Human Rights, Navi Pillay on International Criminal Justice Day (ICC Press Release, ICC-CPI-20130708-PR928, 8 July 2013).



## What is Participation?

The UN Special Rapporteur on TJRN states clearly in his first report that the implementation of measures of TJ must aspire to recognise victims, foster truth and strengthen the democratic rule of law. 'None of this', he states, 'can happen on the backs of victims, without their meaningful participation' (UN Doc. A/HRC/21/46).

But as we have seen, the million dollar question remains, what *is* participation? And moreover, what makes it meaningful?

To begin finding answers to these questions, we can examine first of all how participation has been dealt with in the two types of mechanisms that have now most commonly utilised the principle and practice of victim participation: criminal justice institutions and truth commissions. Thereafter we can examine some of the purported benefits and harms said to result from participation, before looking at the different typologies that have been put forward for participation in TJ.

### Criminal Justice Institutions

Distinctions between civil law and common law systems have logically produced differences in the form of victim participation in court proceedings. Although there are further differences between national jurisdictions, in the former it is generally the case that victims can participate as civil parties, having the right to join civil claims with criminal prosecutions and having powers such as the right to challenge evidence (Doak, 2005: 311). In certain jurisdictions they may also act as auxiliary prosecutors (McGonigle Leyh, 2012). By contrast, in the latter, the participation of victims is traditionally restricted to their role as witnesses or at the very most to submitting impact statements in certain jurisdictions.<sup>14</sup> At the international(ised) courts, the meeting of different legal traditions and the attempts to replicate the prosecution of national, often individual-based crimes, to the international(ised) prosecution of mass crimes, have produced challenges for the operationalisation of victim participation. One of the principal challenges has been to define the scope of participation.

As the late Antonio Cassese (1999) suggested, the ICC marks something of a shift away from purely retributive international criminal justice, towards a more expansive model that incorporates elements of restorative justice. At the ECCC in Cambodia, Rule 23 of the Court's Internal Rules affords victims the right to become civil parties (*parties civiles*) with basic procedural rights akin to those of the defence and prosecution, including participating by 'supporting the prosecution'. Whilst participation under the Rome Statute does not reach the same level of becoming a party to the proceedings, the infrastructure of the Court enables victims to participate in a number of ways in addition to participation during the proceedings envisaged under Article 68(3) and for example in Rules 89 and 91.<sup>15</sup> This wider notion of participation includes the right to be informed (Rule 50(1)) when the Prosecutor intends to seek authorisation to initiate an investigation using her *proprio motu* powers under Article 15(3);<sup>16</sup> the right under Article 19 to submit observations during a challenge to admissibility or jurisdiction of a case; and participation in reparations proceedings. Moreover, the wider Court infrastructure includes the Victims and Witnesses Unit within the Registry, the Victims Participation and Reparations Section, the Office of the Public Counsel for Victims, and the Trust Fund for Victims. The latter is an independent institution working in conjunction with the Court to provide assistance to victims through projects and initiatives regardless of whether there is a conviction by the Court.

<sup>14</sup> These statements allow victims to submit or read a statement detailing the consequences that the criminal act being prosecuted has had on them. Since they are commonly submitted during the sentencing phase, impact statements often include opinions as to what the victims wish to see happen as a result of the conviction.

<sup>15</sup> Under Rule 89(1), victims may make opening and closing statements; Rule 91(2) allows the legal representatives of victims to attend and participate in the proceedings; and Rule 91(3) contains provisions allowing the legal representatives to question witnesses, experts and the accused.

<sup>16</sup> According to Article 13 of the Rome Statute, the Court may exercise its jurisdiction in three ways: (a) referral of a situation to the Prosecutor by a State Party; (b) Referral of a situation by the UN Security Council acting under Chapter VII of the UN Charter; (c) Initiation of an investigation by the Prosecutor *proprio motu* ('on her own initiative').



Still, the scope of participation in the courtroom at the ICC is left for the judges to define, since Article 68(3) leaves open a number of crucial questions. Who, when and how victims can participate are all questions that are undefined, as are questions about the appropriate stage of participation. In fact, Article 68(3) contains only a very vague outline of participation, stating that:

*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.*

Similar questions were in many respects left open at the ECCC. As a result the jurisprudence at the two courts has been crucial for giving meaning to victim participation, though unfortunately a lack of uniformity has meant that this jurisprudence has often created as much confusion as it has clarity.

### ECCC Jurisprudence

To be eligible as a civil party before the ECCC, applicants must demonstrate that they are a direct victim of a crime committed by the Khmer Rouge between April 1975 and January 1979, suffering physical, psychological, or material harm.

A decision by the Pre-Trial Chamber on 20 March 2008 granting the right of civil parties to participate in all criminal proceedings before the Court, including ‘active rights to participate starting from the investigative stage’, was at the time heralded as an historic step forwards for victims’ rights.<sup>17</sup> Soon after however, in July of the same year, a series of oral judgements by the Court curtailed those rights. This trend was to continue throughout Case 001 against Duch.

In reality, the promise of victim participation has never been fully realised, being in practice beset by numerous problems. It should be of little surprise that some of the most vociferous challenges came from the Defence, consistently arguing that the presence and interventions of the civil party lawyers directly threatened the principle of equality of arms. But it has not only been the Defence that that has often been up in arms at the manner of the Court’s interpretation of victim participation, indeed the civil parties themselves have become increasingly exasperated, at times even boycotting the proceedings.<sup>18</sup> The counter arguments from the judges have been that the interventions of the civil parties had begun to overwhelm the proceedings, that the lack of coordination between lawyers was proving impossible to manage, and that judicial action was needed to simplify the trial process. The Trial Chamber in particular has insisted on several occasions that the ECCC’s internal rules should be interpreted restrictively so as not to confer an equal right of participation with the prosecution.

This trend has continued, beginning with the system for grouping civil parties in Case 001 and continuing with the decisions in 2010 as part of Case 002. Given the number of civil party applications and the lessons that the judges took from Case 001, a new system for civil party participation was designed. The most significant components of this new system are that all civil parties are consolidated into one group, represented by two lead co-lawyers, with the individual civil party lawyers not permitted to address the Court. Also, as part of the new system, a single claim for collective and moral reparations will be formulated. Whilst the increase in the number of civil parties to nearly 4,000 clearly indicates that changes were needed, Cambodian organisations such as ADHOC have suggested that the new system

<sup>17</sup> ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008.

<sup>18</sup> For example, in 2009, following a decision by the Trial Chamber to refuse civil parties the right to question character witnesses, the victims and their lawyers boycotted the trial for one week.

is an attempt to align victim participation at the ECCC with the system at the ICC, but that this has in turn eroded the legal meaning and the rights of the *partie civile* in civil law traditions.<sup>19</sup>

For many victims and observers, the result is simple: ‘Victims do not participate as civil parties at the ECCC; they act as victim participants’.<sup>20</sup> The Court, they claim, ‘has created a disempowering process for victims’.<sup>21</sup>

## ICC Jurisprudence

Much like at the ECCC, the ICC judges are also wrestling with victim participation. In the Court’s short lifespan, ‘Different trial chambers have conducted victim participation in different ways, and the Registry has shifted its own policies over time and across situations’ (Tenove, 2013b).

Perhaps unsurprisingly given the vagueness of the law, the first decision interpreting victim participation at the ICC attracted controversy. Pre-Trial Chamber I in the Lubanga case found that Article 68(3) applies to both ‘situations’ and ‘cases’, meaning that victims would be allowed to participate during the investigation stage before a case is opened against an accused.<sup>22</sup> The decision was later overruled by the Appeals Chamber, but reactions to the decision provide useful insight into how victim participation is understood.

Aptel (2012: 1365) notes that the language used by the Office of the Prosecutor (OTP) in appealing the decision, notably that this right would open the door to victims ‘intruding into the investigation process’, indicates that the OTP views victims as ‘outsiders’, as is the traditional common law standpoint. Commenting on the same decision, SáCouto & Cleary (2008: 75) argued that rather than affording a theoretical set of participation rights at this stage of proceedings, the Court should instead focus its resources elsewhere such as ‘making information about the ICC available to victims and encouraging them to communicate with the Court, notifying the broadest category of potential victims about specific rights available to them [...] and making clear to victims how they might meaningfully participate’.

Here we clearly see some of the fundamental tensions with respect to victim participation that have faced the Court: different perceptions and understandings of the term, concern at protecting the rights of the accused, and how to make victim participation meaningful. It was these tensions that Trial Chamber I only partially addressed in its landmark decision on victim participation of 18 January 2008,<sup>23</sup> a decision that was partly confirmed and partly overruled by the Appeals Chamber on 11 July 2008.<sup>24</sup>

Taken together, these decisions set out that victims can participate in a trial in the following ways: making opening and closing statements; consulting the record of proceedings; receiving notification of all public filings and those confidential filings that affect their personal interest; tendering and examining evidence if the Chamber feels it will assist in determining the truth (i.e. not a right to present evidence, but to seek leave for its submission); and finally, the legal representative of victims can attend and participate in proceedings, as well as question witnesses, experts and the accused, subject to certain controls (see: Catani, 2012). Importantly, the Appeals Chamber stated that for the purposes of participation, ‘victims’ are those persons who have suffered directly or indirectly from the charges against the accused, overruling the earlier decision of the Trial Chamber that ‘victims’ are persons who

<sup>19</sup> ADHOC, *Victims Participation Before the ECCC: Baseline Study*, January 2013, available at: <http://www.eccc.gov.kh/sites/default/files/Victims-participation-before-ECCC-Baseline-Study-Jan-2013.pdf>.

<sup>20</sup> Anne Heindel, cited in: RNW, *Losing Civil Parties in Cambodia*, 18 January 2012, available at: <http://www.rnw.nl/international-justice/article/losing-civil-parties-cambodia>.

<sup>21</sup> Theary Seng, cited in: RNW, *Losing Civil Parties in Cambodia*, 18 January 2012, available at: <http://www.rnw.nl/international-justice/article/losing-civil-parties-cambodia>.

<sup>22</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006.

<sup>23</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims’ Participation, ICC-01/04-01/06-1119, 18 January 2008.

<sup>24</sup> *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January, ICC-01/04-01/06 OA 9 OA 10, 11 July 2008.

have suffered from any crime within the jurisdiction of the Court. Nevertheless, as a result of these decisions, a rather laborious process was established whereby each and every proposed intervention by victims during the proceedings was to be decided on a case-by-case basis.

During the Lubanga trial, 129 victims were authorised to participate. The experiment in victim participation had a number of tangible benefits, but also raised a number of problems, including with the application process for victim participation – and the burden on the Registry in processing those applications – and apparent problems with respect to the efficiency of the proceedings. In the second case before the Court these problems and the increased number of participating victims were addressed by dividing the victims into two groups, each group represented by a common legal representative. The Trial Chamber cited the need to ensure that ‘victims’ participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’, noting that the rights of victims are necessarily ‘subject to the important practical, financial, infrastructural and logistical constraints faced by the Court’.<sup>25</sup>

Subsequent trial chambers have followed suit in trying to address these concerns. In the Bemba trial, over 5,000 victims have been put into two groups, whereas in the Gbagbo case a collective application process was recognised for the first time, responding to the increased number of victims seeking to participate.<sup>26</sup> The recent decisions in Kenya I and Kenya II have taken a different approach in responding to the challenges of victim participation, establishing a difference between direct individual participation and indirect participation through a common legal representative. Only those victims who wish to appear before the Court are required to submit the lengthy application form. For the latter category of victims, the common legal representative, based in Kenya, will represent a larger group of victims and will be present in The Hague only at important moments of the proceedings, with the Office of the Public Counsel for Victims (OPCV) otherwise taking charge of the legal proceedings. The common legal representative will also be tasked with working with the Registry’s Victims’ Participation and Reparations Section to register victims in the case.

The move towards collective victim participation responds to the realities that more and more victims are seeking to engage with the Court, as well as the burden that had been put on the various organs of the Court, especially during the application process. But it is questionable whether ‘outsourcing the process of registration’ to the common legal representatives is the most appropriate way forward and indeed whether treating victims as a homogenous mass will actually further the interests of victims, or necessarily threaten them (Sehmi, 2013). Put another way, a collective approach assumes not only levels of homogeneity in victimisation, but also in the interests of victims when seeking participation. As the Victims’ Rights Working Group (VRWG) has argued, consulting with and determining the ‘legitimate voice’ from among a group of victims may present significant challenges. According to the VRWG, it should also not be taken for granted that only a limited number of victims would seek direct participation in the courtroom.<sup>27</sup>

The lack of a clear, coherent approach to victim participation should not come as a complete surprise. In her interviews with staff at the ICC, Wemmers (2010) predictably found that key figures within the Court had different views, perspectives and attitudes towards victim participation, supporting Friman’s (2009) contentions that the ICC has found it difficult to incorporate victims’ rights, with the law often taking a back-seat to personal opinion when ruling on important issues. As Tenove (2013b) notes on the decisions in Kenya I and II, ‘Whether this new approach will improve or harm victim participation

<sup>25</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-579, 22 July 2009, at 10, 11.

<sup>26</sup> *Prosecutor v. Laurent Gbagbo*, Second Decision on Issues Related to the Victims’ Application Process, ICC-02/11-01/11-86, 5 April 2012.

<sup>27</sup> VRWG, International Criminal Court at 10: The implementation of Victims Rights, *Issues and concerns presented on the occasion of the 11th Session of the Assembly of States Parties*, 14-22 November 2012, The Hague.

depends on what participation should achieve – and there is little clear thought, and even less consensus, on that question.’

## Truth Commissions

The traditional distinctions between truth commissions and international criminal trials have been drawn with respect to restorative and retributive justice. Truth commissions have been regarded as more victim-centred, whereas criminal trials have been perceived as state- and defendant-focused, with the principles and procedures of the courtroom creating an environment where the victim is rendered secondary to the process. But as noted, hard and fast distinctions between different models of justice no longer ring as true as they once did, especially with the advent of victim participation. Yet as international criminal justice still tries to get to grips with victim participation, meaning that at present its interpretation has been towards a vicarious form of participation rather than a direct one, the traditional differences remain relevant. In this respect it is useful to look at how victim participation has been conceived in truth commissions, as compared to criminal trials.

Participation in a truth commission has typically been considered distinct from a criminal trial because of both the relevance and the type of ‘truth’ being sought and the information shared. Whereas criminal trials place tight limitations on the testimony of witnesses – and as we have seen at the ICC and ECCC, even on victims participating in the proceedings – the truth commission is said to actively seek the testimonies of victims that concern harms suffered, losses experienced, as well as their feelings and opinions. These more narrative truths, as opposed to the legal, factual truths that characterise criminal trials, shape the participation of victims in truth commissions.<sup>28</sup> It is with this in mind that the UN Special Rapporteur on TJRN refers to truth-seeking as requiring ‘the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred.’

According to Aldana (2006: 108), referring to the South African TRC, the essence of the modern truth commission ‘is an effort to restore and affirm the human and civil dignity of victims’. This, she suggests, can be achieved through a restorative process that: ‘(1) invites victims to tell their story in an open and receptive environment, (2) reveals a comprehensive truth of what transpired, and (3) promotes reconciliation between perpetrators and victims.’ It is in the same vein that Humphrey (2003: 184) states that, ‘the strength of truth commissions has been their participatory process in which the truth about past atrocity is located outside the state within the people.’ Thus victim participation is said to benefit the individual victim by providing space to tell one’s personal story, to hear the truth being told and in some instances to encounter – even confront – the perpetrator. Picker (2005: 14) found that for victims in South Africa, there were four main motivations for public testimony: ‘To share one’s pain and suffering, to gain public acknowledgement, to rectify lies and eventually to achieve closure and healing.’ Therefore, according to this conceptualisation, participation at truth commissions has been as much about providing the space for victims to recount their experiences, as the ‘emphatic reception’ of those accounts, rather than ‘the burden of legal proof or judgment’ (Humphrey, 2003: 175).

But victim participation at truth commissions is also said to serve purposes beyond the individual testifying, with many commissions seeking to operationalise victim participation for objectives that transcend being listened to and being treated with respect (Doak, 2005). These objectives can include the process of facilitating the widest possible participation of individuals and affected communities, but also the outcomes of such participation.

With respect to the former, Quinn & Freeman (2003: 1133) cite Preti who recognises that broad community participation can foster greater understanding, cohesion and unity where division is otherwise the norm. This, they contend, can in turn strengthen the credibility of the truth commission.

<sup>28</sup> These notions of ‘truth’ draw on the four definitions proposed in the Final Report of the South African TRC: factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth; and healing and restorative truth (see: TRC Report, Volume 1, Chapter 5, paras. 29-45).

By the same token, the outcome of active participation can be the social value that is to be gained from enabling people to participate in the reconstruction of a country's past (Martinez, cited in Quinn & Freeman, 2003). As Humphrey (2003: 176) again notes, participation in truth commissions serves goals that are 'social and collective', meaning that whilst 'individuals give testimony, and receive reparations payments', their participation is also aimed at 'the recovery of social continuity and law and promoting reconciliation.' Yet none of this will be possible if the commission itself is seen as biased, if the conditions for participation are not created (e.g. adequate protective measures, having decentralised hearings to offset socio-economic obstacles to participation, sufficient public outreach, adequate time, etc.) and if the population – or its representatives – are inadequately represented in the establishment and composition of the truth commission (UN Doc. A/HRC/21/46).

In these respects, the conceptualisation of participation in truth commissions is that it should be socially inclusive by enabling wide participation in all aspects of its functioning.

## Presumed Benefits of Participation in Transitional Justice

In spite of the different ways that victim participation has been treated both between and among criminal tribunals and truth commissions, its presumed benefits include ensuring that victims' interests are taken into account, dignifying victims, and supporting the process of seeking truth, justice, reparations and even non-recurrence of violence. In her study on the combat of impunity, Diane Orentlicher (2004: 11) thus states that including victims in the design of policies 'can help reconstitute the full civic membership of those who were denied the protection of the law' and that participation 'may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government'.

Based on similar assessments, the interpretations of participation by the international(ised) criminal courts and truth commissions, as well as a review of the research conducted on victim participation, we intend to focus on two categories of presumed benefits: those concerning the victims themselves; and the institutional benefits for the particular TJ mechanism in question. Although there is only a limited amount of empirical research conducted among victims and affected communities to substantiate these presumed benefits, we can examine the literature before moving to look at the different typologies of victim participation that fall within these two categories.

As de Hemptinne (2010: 167) notes with respect to the Special Tribunal for Lebanon, victim participation can have a reparative, symbolic and a judicial effect: 'Granting victims the right to convey their suffering and claim compensation can help victims recover from the harm experienced. Besides this reparative purpose, victim participation also serves a symbolic value. Giving victims a 'say' in the proceedings could render the tribunal's work more transparent and accessible for the victims.' And as an independent panel of experts reported in their review of the ICC, victim participation can be important insofar as it can 'empower victims and contribute to their healing', at the same time establishing 'a strong connection between the Court and victims, with victims providing important factual and cultural context to proceedings, which can also contribute to establishing the truth'.<sup>29</sup> Bringing the proceedings closer to affected communities (SáCouto & Cleary, 2008) was thus an argument brought forward in the drafting of the Rome Statute, whilst in Cambodia NGOs referred to the same need to reduce the gap between the court and society, both physically and symbolically (Sperfeldt, 2012).

### Presumed Benefits for Victims

Triponel & Pearson (2010) distinguish three 'waves' of TJ from the 80s, to the 90s, to the 21st century, the latter now characterised by renewed vigour with respect to local ownership and participation. According to their analysis, the trend towards early public participation in a TJ system 'paves the way for increased public participation throughout its period of operation'. Referring to participation during the planning stages of TJ, they find that 'meaningful participation involves integrating feedback received from the public into the transitional justice mechanism, as opposed to outreach which focuses on educating the public'. These findings correlate with wider changes, particularly in the development sector, where participation has been incorporated as a key principle for success and sustainability.<sup>30</sup>

In this light, Lundy & McGovern (2008) argue that participation has become essential not only to long-term sustainability of the impact of TJ mechanisms, but fundamental to achieving many of the purported goals put forward in the TJ discourse and for locally embedding mechanisms towards achieving sustainable peace. They argue that 'participation is the means to empowerment', indicating that

<sup>29</sup> REDRESS, *Independent Panel of experts report on victim participation at the International Criminal Court*, July 2013, available at:

<http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>.

<sup>30</sup> See later for criticisms of this move to view participation as a "given", with the consequences that this may have for the degree of meaningfulness of that participation. For example, Lundy & McGovern (2008: 282) note that the move towards the adoption of participatory approaches in mainstream development has been severely criticised, with international institutions such as the World Bank criticised for using participation as a political move to neutralize resistance to Structural Adjustment Policies.

involvement at the implementation stage of a mechanism is not enough, since a ‘fully participatory process [requires that local communities] should also take part at every stage in the process including conception, design, decision making, and management’ (Lundy & McGovern, 2008: 280, 266). In this sense, they quote Kenny (2000) who suggests that:

[...] the right to participate in decisions which affect one’s life is both an element of human dignity and the key to empowerment – the basis on which change can be achieved. As such, it is both a means to the enjoyment of human rights, and a human rights goal in itself.

In short, this position argues that participation in TJ can be most successful when it involves ‘co-generative dialogue’ as a result of the ‘transfer of power’ in decision-making processes (Lundy & McGovern, 2008: 280).

The ‘participation equals empowerment’ idea resonates elsewhere too (e.g. see the Independent Panel of Experts Report cited above). The presumed benefit that participation can allow victims to gain ‘a sense of control, an ability to lessen their isolation and be reintegrated into their community’ as well as the ‘possibility of finding meaning through participation’ is commonly found in the literature (Roht-Arriaza, 1995: 19). In this light, responding to some of the challenges faced at the ICC in incorporating victim participation, the VRWG reminded the Assembly of States Parties that the benefits of victim participation range from ‘the possibility to be heard, to voice views and concerns [...] acknowledgement [...] and recognition’ with participation crucial to restoring victim dignity, and considered as the ‘ultimate objective in the provision of justice’.<sup>31</sup> And as Teitel (2000) has suggested, by producing a ‘democratising truth’, truth commissions empower victims to participate in a process of constructing societal truths and in a collective shift in re-imagining and re-interpreting the past.

For particular groups of victims after violence, this empowerment may well be especially important. The active recognition and process of giving value to the victims of crimes that are specifically dis-empowering can thus be a crucial benefit of active participation. It is for this very reason that it was argued in 1997 before the establishment of the ICC that:

The active involvement, enhanced respect and protection afforded by participation and representation is particularly significant for victims of sexual and gender violence whose perceptions and needs are—in all cultures of the world—frequently ignored, presumed, or misunderstood.<sup>32</sup>

In this respect, gender-sensitive approaches to TJ that include victim participation tailored to the specific needs of male and female victims after violence can have important benefits. With respect to criminal trials, Wemmers (2009: 412) thus states that the very recognition that victims receive by being offered legal counsel can help to empower victims and ‘combat the sense of powerlessness that many victims feel during criminal proceedings.’ For vulnerable victims, Wemmers (2009) also suggests that vicarious forms of participation offer greater safety and protection to victims than participating as a witness, since the process of interrogation can lead to additional trauma.

### Presumed Benefits for the Institution

We have already referred to some of the presumed benefits of victim participation in TJ mechanisms. Whether greater transparency and accessibility to affected communities (de Hemptinne, 2010), bringing the process “closer” to victims (SáCouto & Cleary, 2008) or even supporting the very legitimacy of the TJ institution (Sperfeldt, 2012), the presumed benefits are said to be numerous. It is for this reason

<sup>31</sup> VRWG, The Importance of Victim Participation, *Submission to the Hague Working Group of the Assembly of States Parties*, 8 July 2013.

<sup>32</sup> Women’s Caucus for Gender Justice, *Recommendations and Commentary for August 1997 Prepcom on the Establishment of an International Criminal Court*, 1997.



that FIDH stated in 2010 that the ICC must fully acknowledge that the participation of victims ‘in no way jeopardizes the functioning of the ICC but on the contrary legitimizes its very existence’.<sup>33</sup>

For truth commissions and international criminal proceedings, participation is moreover suggested as a way to ensure that these institutions achieve their ambitious objectives. It is for this reason that Triponel & Pearson (2010: 131) conclude that engaging with victims from the outset of the creation of an institution can ensure that the TJ system that is created ‘responds to local needs’. Whilst more difficult to effectuate at the ICC (though, it should be said, not impossible with a little creativity in interpretation, including of outreach procedures), truth commissions have much greater latitude to put this presumed benefit into practice. The same is true with respect to the direct, meaningful participation of local actors leading to the creation of a TJ mechanism that may ‘increase the chances of successful reconciliation’ and that may garner greater public support (Triponel & Pearson, 2010). Again, for both truth commissions and criminal justice institutions, local ownership will be important for the achievement of objectives that directly implicate the victims and society, as will wider support and confidence in the institution. Meaningful participation is presumed to contribute to this.

Beyond public support for the institution, the belief exists that victim participation can also contribute to the wider impact of the TJ process. In the case of those institutions that are based in the country of transition, this presumed benefit will likely be more applicable. In this sense, victims, affected communities and even a society at large are considered to have their confidence in processes of institution-building and norm-setting renewed through participation, ultimately contributing to the non-recurrence of violence.<sup>34</sup>

Finally, whether at truth commissions or in the courtroom, the presumed benefit that victim participation is said to have with respect to truth-telling / -seeking is a common justification for its inclusion in TJ. Whether the simple clarification of facts,<sup>35</sup> conveying ‘factual and cultural elements’ that can assist in the comprehension of the context of violence,<sup>36</sup> ‘bringing a unique perspective to [criminal] proceedings’ (Pena & Carayon, 2013: 523), or the very revelation of the truth about past crimes, participation is presumed to have multiple benefits. In fact, in examining some of the lessons learnt following the ICC’s first trial, Catani (2012) suggests that the ‘determination of the truth’ was to all intents and purposes the ‘most direct, and arguably most meaningful form of participation’. The wider implications of this will be examined later, but suffice it to say, opinions such as these attach great importance to the interconnection between truth and participation in TJ processes.<sup>37</sup>

<sup>33</sup> FIDH, *Victims’ Rights before the ICC, Chapter IV: Participation*, May 2010.

<sup>34</sup> For example, see: Victims’ Rights Working Group Bulletin, *Interview with Kheat Bophal, Head of the Victim’s Unit at ECCC*, Spring 2008, Vol. 11.

<sup>35</sup> For example, see: Situation in Uganda, *Response of Legal Representative of Victims a/01 19/06 to the Prosecutor’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0 111/06 to a/0127/06*, Case No. ICC- 02/04-106, 31 August 2007.

<sup>36</sup> VRWG, *The Importance of Victim Participation, Submission to the Hague Working Group of the Assembly of States Parties*, 8 July 2013.

<sup>37</sup> Of course, the different ‘types’ of truth are important to take into consideration, but space restrictions do not allow for this issue to be addressed in any detail. But see *supra* note 28 for the four types distinguished in the South African TRC Report.

## Anticipated Harms of Participation in Transitional Justice

In principle the benefits of victim participation in TJ may appear self-evident. This is especially so when we consider criticisms of the *ad hoc* tribunals that they caused the ‘secondary victimisation’ of victims, or the criticisms of truth commissions for having facilitated only a tiny percentage of victims to tell their stories. Yet, we must be careful that laudable ends such as victim participation do not become mere ‘window dressing’, with the means of its implementation acting to negate its very purpose (Lundy & McGovern, 2008: 292). Indeed, as Mohan (2012: 182) argues with respect to the ECCC, the idea of victim participation can easily ‘devolve into a rhetorical device [...] that soothes the ECCC’s affiliates and donors, but not all victims’, especially when participation is only ‘token’.

Likewise, we should be careful when making assumptions about the benefits of victim participation in the absence of real evidence. One high-profile sceptic – ICC Trial Judge, Van den Wyngaert – has thus quite clearly stated her scepticism about whether victim participation at the ICC is an ‘appropriate remedy’ for the alleged problems of the ICTY (Van den Wyngaert, 2011: 477). Van den Wyngaert’s colleague at the ICC, Judge Adrian Fulford, is likewise on record as having stated his scepticism. For him, the participation of persons without legal training in criminal proceedings ‘could have a real capacity for destabilising these court proceedings’.<sup>38</sup>

Similar concerns exist elsewhere too, with Solange (2013: 621) suggesting that the system is ‘extremely onerous’ and ‘detracts from the ICC’s principal mandate of prosecuting and punishing perpetrators’. Sizeable question-marks also exist around the issue of whether the participation of a small number of victims can indeed be equated with restorative practices. In this sense, the well-cited criticisms of the Lubanga trial with respect to the scope of the charges lead Solange (2013: 648) to suggest that ‘participating child soldiers who suffered crimes of sexual violence will have found little restorative solace’ since their specific experiences were not recognised. This touches upon a particularly under-explored area of ‘participation’ – the potential harmful effects upon ‘unrecognised’ victims and the dynamics that this introduces into societies and affected communities. We currently know little about the effects of excluding large numbers of victims – or indeed of the individual and societal effects of rejecting applications to participate. Garkawe’s (2003) research in South Africa sheds some light on the 90% of victims not selected to publicly testify, as does more recent research such as Agger & Chhim’s (2013) findings that rejection of civil party applications was psychologically damaging. Yet, more research is acutely needed here.

On a more general TJ level, Lundy & McGovern (2008: 292) recognise that participation has other challenges – ‘who the locals are, who speaks for whom, and what exactly participation means’ as well as the ‘wholesale valorization of “insiders” to the exclusion of “outsiders”’ are just some of the challenges that they suggest may lead to potential harm.

In the remainder of this section we will highlight some of the anticipated harms in two main categories: for victims; and for the TJ institution or process. Once again, empirical evidence conducted among affected communities is needed for further substantiation. As Mohan (2012: 182) notes:

The notion that victims benefit from participation is powerful, but it should be closely examined if tribunals wish to send the right message to victims.

### Anticipated Harms for Victims

‘If one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.’ This was the assessment of Herman (2003: 159) in her examination of the mental health of crime victims, that parallels the typologies of psychological dynamics distinguished by O’Connell (2005), who himself finds that trials can be counterproductive.

<sup>38</sup> Presiding Judge Adrian Fulford, ICC, Transcript of 12 January 2009, ICC-01/04-01/06-T-101-ENG, ICC, at 43-44, lines 15-3.

Stress and strain, in particular for victims who are present in the courtroom, are cited, as are the consequences for victims not afforded the opportunity to participate.

Critics argue that many of the justifications for victim participation simply do not add up. The survey conducted by Brounéus (2010) among *gacaca* witnesses in Rwanda provides clear evidence to challenge the claim that public truth-telling is healing. She found no psychological benefits among her sample when compared to other persons and communities; in fact the very contrary appeared to be the case, with the consequences of truth-telling extremely grave for the emotional and physical well-being of witnesses. On the latter point, Picker (2005: 11) finds corresponding evidence in South Africa, stating that testifying was a ‘double-edged sword’ because of the serious consequences that victims experienced when returning to their communities (citing fear of retaliation, conflict within the community, loss of employment, and feelings of exploitation). Moreover, studies by Backer (2007) and Kaminger et al. (2001) in South Africa found no psychological benefits having resulted from public truth-telling, with disappointment, stigmatisation and threats from others more commonly found. Daly (2008: 31) likewise suggests that ‘many victims may not be psychologically able to deal with public attention to the truth or the process of remembering and recounting violations.’

For a number of these reasons, Daly (2008: 30) is forced to conclude from her examination of the goals commonly attributed to truth commissions that ‘it is not at all clear that commissions actually help those most in need’. She continues:

Only a tiny fraction of the world’s victims participate personally in truth-seeking programs: many are not aware of the process; live in too remote an area; are too wounded to talk or their stories are redundant. Few, if any, commissions have the time or resources to obtain every victim’s story.

She goes on to suggest that whilst the very presence of a truth commission may in first instance vindicate the suffering of victims and affected communities, ‘the smaller the percentage directly heard by the commission the less likely it would seem that this positive benefit will be felt’ (Daly, 2008: 31). Bonacker (2011: 133) even suggests that mobilisation around victim identities, especially in ethnically divided societies, can be especially detrimental and an unintended consequence of victim participation in TJ mechanisms.

With respect to criminal justice institutions, arguments that the justifications for victim participation simply do not add up are even stronger. Trumbull IV (2008) questions the ‘secondary victimisation’ thesis, arguing that the manner of victims’ treatment in the courtroom – attitudes of courtroom actors, intrusive or harassing cross-examination, etc. – is more important than whether they are permitted to participate. After examining the ECCC, Mohan (2012: 182) similarly suggests that criminal justice ‘is often too “thin” to support therapeutic goals’, with victims at the ECCC complaining that ‘token participation’ led to individual damage and a loss of faith in the Court. He further concludes that other than as witnesses, victims do not have a natural place in the criminal process since they ‘recount their stories of pain and distress to an audience that is more interested in seeing how these facts neatly fit evidentiary matrices’ (Mohan, 2012: 202). This observation resonates with Hoven’s (2013) suggestion that the attribution of legal standing is not needed for guaranteeing meaningful participation. SáCouto’s (2012: 350) analysis is also telling, that victim participants ‘have suffered some of the very same challenges victim-witnesses faced at the *ad hoc* and hybrid tribunals’, with little evidence that victim participation has contributed to a more nuanced picture of the experiences of gender-based violence.

SáCouto (2012) therefore raises the spectre that victim participation may be leading to a number of unintended consequences for victims in criminal proceedings. As indicated, Brounéus (2008) has drawn similar conclusions with respect to public truth-telling. The latter includes psychological suffering such as ‘traumatisation, ill-health, isolation’ after *gacaca*, as well the finding that ‘insecurity as a result of the truth-telling process emerges as one of the most crucial issues at stake’. Corresponding empirical

evidence from victims who have participated at the ICC or ECCC is not yet available, though we may logically assume that there is at least the risk of the same psychological and physical consequences.

In the absence of empirical evidence from criminal prosecutions, we must also draw from the experiences of victims at truth commissions in other respects. In research conducted among victims who testified at the Human Rights Violations Hearings in South Africa, Picker (2005) found that reparations was a common frame of reference for expressions of disappointment and 'broken promises' that victims felt ten years after testifying. Although this finding must be considered in light of the fact that reparations was a topical issue at the time the research was conducted, Picker (2005) nonetheless found that the expectations that had been raised by the TRC and the consequent disappointment that victims felt, was not only tied to a lack of monetary reparations. Many victims felt that the TRC has not finished its job, had failed to communicate with them after they testified, had failed to provide counselling to offset the stress of testifying, and had generally failed to respond to their needs. Whilst the contexts and mechanisms are different, SáCouto (2012) and Chung (2008) have already pointed to similar risks at the ICC, unduly raising victims' expectations. Chung (2008: 539) has argued that victims must not 'over-estimate the responsiveness of the ICC victim participation system, or the degree of expression or vindication that can be obtained'. She moreover suggests that over-emphasis of the system can detract from wider initiatives that can promote victims' voices, with efforts needed to use the ICC as a 'platform' from which to develop such initiatives.

Theories of the potential harm resulting from victim participation in criminal proceedings also critique the very concept of representation in the courtroom. Drawing on the work of Pitkin (1972: 144) who examines the philosophical underpinnings of political representation to suggest that, 'Representation means the making present of something which is nevertheless not literally present', we can contextualise victim participation by means of a lawyer in the courtroom. The 'substantive acting for others' that results introduces an inherent paradox since the victims are absent. Bourdieu (1992) refers to the phenomenon as 'usurpatory ventriloquism' when an actor speaks on behalf of an absent person or group. According to critical perspectives, what this means in practice is that the current limited operationalisation of victim participation (see earlier on the ICC jurisprudence) produces a situation whereby 'victims are unlikely to have a form of participation or decision-making power that is any more direct than what they have in common law jurisdictions' (Trumbull IV, 2008: 806). According to McGonigle Leyh (2012: 404) this is a logical consequence of mass victimisation, meaning that it is unrealistic to expect that victims can participate in their individual capacity, but that, 'Unfortunately, it appears that the participatory schemes in place at the ECCC and ICC greatly inflate the expectations of victims.'

Finally, Mohan (2009: 737) goes as far as suggesting that the ECCC process has even 'begun to degrade victims' by promising them a voice, but leaving them 'feeling silenced or frustrated'. The assumption that victims have a collective, uniform story to recite, leads to the essentialisation of victimhood, with the following consequence:

By clothing civil parties with a uniform legal identity because of their victimization, the ECCC's legal process, just as it lowers the perpetrator's identity, has also begun to ignore or conflate the victims' varied personal identities, memories, and desires for vindication. Paradoxically, the very identity that victims coveted when applying to become civil parties has prompted some to claim that they have been degraded by it.' (Mohan, 2009: 768)

Though now more than five years old, there are grounds for suggesting that the conclusion of (Chung, 2008: 462) remains pertinent:

At the time of the writing of this article, the true nature of the right being provided to individuals seeking to participate in ICC proceedings is the entitlement to stand in a queue, for longer than

a year, to obtain a theoretical participation privilege which most likely will never be converted to an actual right to express views and concerns in court proceedings.

### Anticipated Harms for the Institution or Process

As we have already seen, there are a number of presumed harms that victim participation in TJ may bring to the institution or process, which are especially apparent when we examine courtroom proceedings. Let us once more consider the opinion of ICC Trial Judge, Van den Wyngaert, who is pointed in her assessment that:

[...] 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. (Van den Wyngaert, 2011: 489)

Van den Wyngaert (2011: 489) continues by posing the questions, ‘Can legal representation be anything more than symbolic? And if it is only symbolic, how meaningful can it be?’ The issue here is the extent to which the participation of victims beyond the traditional common law role of witnesses leads to detrimental effects for courtroom decorum and procedure.

Certainly these opinions are borne somewhat from the frustration of witnessing, for example, that even before the hearings began in the ICC’s second case, ‘for several months, more than one third of the Chamber’s support staff was working on victims’ applications’ (Van den Wyngaert, 2011: 493). But the underlying accusation that victim participation has proven to be ‘cumbersome and problematic’ is shared elsewhere (McGonigle Leyh, 2012: 397). In her comprehensive examination, McGonigle Leyh (2012) thus suggests that the lack of ‘conceptual understanding about the proper role for victims’ has been to the detriment of ‘the efficient and effective functioning of the courts’. These sceptics are led to conclude that alternative measures should be found to respond to the needs of victims.

To be sure, one of the key alleged harms has been with respect to the fairness of the proceedings, where we see a basic tension between proponents of victim-centrism and a more classical criminal justice, human rights approach. Whereas Zappala (2010) determines that giving primacy to the rights of the accused is now an established principle, others instead suggest that the participation of victims has been a direct challenge to the principle of equality of arms, with even the mere fact that the defence must respond to additional questions and evidence creating an undue burden (Chung, 2008). According to these opinions, the participation of victims disrupts some of the very foundations of criminal proceedings. A number of these debates parallel those surrounding the fair-mindedness of allowing ‘victim impact statements’ during sentencing hearings. The latter have proved controversial in national proceedings, for example for the alleged ‘strong emotive reaction’ that they may provoke in the decision-maker, which may ‘dangerously erode the role of the state in taming private revenge’ (Aldana, 2006: 111).

We have already noted some of the fundamental tensions facing the judges at the ICC as they struggle to interpret the vague provisions for victim participation and the consequences that this has had for the coherence of the approach to victim participation before the Court. In this sense, as suggested, the move towards collective participation raises numerous questions that have yet to be answered. At the ICC, we are witnessing a process of ‘learning by doing’ (– or perhaps the blind leading the blind?). Whatever the interpretation, an Independent Panel of Experts recently concluded that the system is ‘currently failing to achieve its potential’, leading to damaging questions of the ‘sustainability, effectiveness and efficiency of the system, as well as its meaningfulness for victims.’<sup>39</sup>

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<sup>39</sup> REDRESS, *Independent Panel of experts report on victim participation at the International Criminal Court*, July 2013, available at: <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>.

For the Court as an institution, the different interpretations of the Chambers has created the impression of a muddled and confused system. According to Solange (2013: 628), 'It is questionable whether this complex, and at times inconsistent, system of victim participation will remain a meaningful and workable system'. Chung (2008: 497) provides an equally unfavourable assessment, suggesting 'three noteworthy aspects of the ICC's track record':

(1) the inability of the Chambers to render timely or effective decisions on applications to participate; (2) the volume and depth of litigation regarding matters related to the process of adjudicating applications to participate, and the effect of that litigation on Court proceedings generally; and (3) the failure of the Court to provide meaningful victims' participation to more victims, or outside the instances of participation that are explicitly set forth in the Rome Statute.

These assessments are damaging for the ICC as they indicate possible core problems with one of the founding principles of the Rome Statute, which experts contend is leading to a significant burden on the Court being able to achieve the basic goals of criminal justice. And for victims, commentators such as Catani (2012) suggest that the effects have been merely symbolic. As one observer to the Review Conference in Kampala notes:

The road to Kampala for victims has been steep and arduous, with victims' rights having come a long way in a relatively short period of time [...] Nevertheless, the outcomes of Kampala demonstrate that victims' concerns, for better or worse, while good for speeches, have a more uncertain position in reality.

This uncertainty, and the number of potential harms for both the institution and the victims themselves, suggests a system experiencing extreme growing pains.

With this in mind, we can now move to examine various typologies of participation in TJ.

## Typologies of Victim Participation

The UN Special Rapporteur on TJRNR has clearly stated that without the meaningful participation of victims, TJ mechanisms will be unable to achieve their objectives. In his view, ‘meaningful participation’ can take different forms:

**Truth-seeking:** ‘requires the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred. Truth-seeking will only be regarded a justice measure if civil society, in particular victims organizations, is adequately represented in the composition of a truth commission.’

**Prosecutions:** ‘can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings.’

**Reparations:** ‘will only be successful if victims and civil society at large have been involved in the design of the schemes, so the measures are commensurate to the harm inflicted and contribute to the recognition of the victim as rights holders.’

**Non-recurrence measures:** ‘institutional and personnel reform needs to have a firm grounding in the views of the population and specifically of the victims, who should be actively involved in the related processes so that legislation and institutions are built to prevent future violations and public officials selected in a manner in which the principle of the rule of law is given force.  
(UN Doc. A/HRC/21/46)

From these different conceptions, it is clear that victim participation is not easily defined and may involve different levels of involvement, input and/or control over proceedings. It may be described as ‘having a say, being listened to, or being treated with dignity and respect’ (Doak, 2005: 295), but the above conceptions indicate that participation may also extend beyond this understanding. Indeed, in the description that the Special Rapporteur gives for truth-telling we find participation related to an expressive function as well as a more passive representational one; for prosecutions we find both involvement and the receipt of information; whilst with respect to reparations and non-recurrence we find participation associated with a more direct power to control the design of TJ schemes.

These different conceptions of participation can also be seen from the foregoing analysis.

Perhaps part of the ambiguity can be traced to the original question posed earlier of what exactly *is* participation. There are a number of different schools of thought on this question, within which participation can be considered as both an end in itself and as a means to an end. Writing on the theory of participatory development, for example, Rahnema (1992: 121) distinguished three core elements of participation: cognitive, to generate different understandings of a particular reality; political, to empower the voiceless; and instrumental, to propose new alternatives. Indeed in much of the development literature we can trace the rise of participation to the understanding that the marginalised and alienated must be included in the design and implementation of processes intended to assist them. As Chambers (1997: 103) notes:

The essence [...] is change and reversals - of role, behaviour, relationship and learning. Outsiders do not dominate and lecture; they facilitate, sit down, listen and learn. Outsiders do not transfer technology; they share methods which local people can use for their own appraisal, analysis, planning, action, monitoring and evaluation. Outsiders do not impose their reality; they encourage and enable local people to express their own.



As Edwards (2004: 972) recognises, these notions of participation also resonate with ideas of citizenship, whereby individuals have the freedom to make decisions, and have the opportunity to influence the social and political structures that affect his/her life.

Nonetheless, these theories recognise the risk of ‘tokenism’, whereby rhetoric replaces real empowerment, as well as risks such as treating ‘beneficiaries’ as homogenous, a fact recognised earlier. As Arnstein (1969) noted in her well-cited ‘ladder of participation’, the danger here is that participation can involve different levels of empowerment, ranging from real power to affect a process to something akin only to empty ritual. In the latter case participation serves only to enhance the legitimacy of the institution or the process, with few if any benefits for the alleged beneficiaries. We should recall the earlier idea of norms being hijacked to create a ‘veneer of legitimacy’ (Snyder & Vinjamuri, 2003/2004: 33) and the associated risks of instrumentalisation of victims.

Thus for TJ mechanisms, the question remains open. To be sure, ‘there is little clear thought, and even less consensus’ on the question of what participation seeks to achieve (Tenove, 2012). According to Wemmers (2010) this should come as little surprise given that victimologists have long agonised over the question of how to include the ‘forgotten party’ – victims. But for Edwards (2004: 971) a key problem has often been the tendency to couch debates in terms of ‘balance’ between the rights of victims and the rights of the accused, simplifying the issues into ‘zero-sum games, in which you are either for or against victims’. As we have seen, and as the typologies below will suggest, victim participation is substantially more complex than such simplifications. Nevertheless, much discourse in favour of participation is framed in this simplistic way, which fails to capture the nuances of participation, giving rise to the danger that ‘by using the term “participation”, and in vaunting its appeal, we fail to capture its real significance’ (Edwards, 2004: 973). Put another way:

[...] participation is a little like eating spinach: no one is against it in principle because it is good for you. (Arnstein, 1969)

What these simplifications also fail to capture are some of the different theoretical underpinnings of participation and different approaches to according victims a central role. In this respect, Wemmers (2010) identifies three approaches for criminal justice – abolitionism, in which criminal justice is replaced altogether; adding restorative programmes onto criminal proceedings; and integrating restorative values. Similarly, Tenove (2012) suggests three general concepts of victim participation at the ICC – victims as legal clients; victims as secondary to the criminal trial; and a transitional justice approach. According to the latter:

[...] a victim-centred approach shifts attention from the courtroom to the lives of victims. It asks whether participation contributes material or normative resources to help victims pursue justice, and it is attentive to ways that victim participation could cause disappointment or even conflict between those allowed to participate and those who are not.

With these ideas in mind, we can consider different typologies of victim participation in TJ. To do so, we draw on the theories of Edwards (2004) in particular. Despite being grounded in the criminal justice system of England and Wales, the distinctions still provide one of the best approaches to understanding participation since they are based on explaining the roles of victims and their relationship with institutional decision-makers. We can therefore outline various forms of direct participation. But unlike Edwards, who makes clear that participation should necessarily be active, we also include an examination of types of *indirect* and *passive* participation. The latter become especially relevant when we consider the recent interpretations of victim participation under the Rome Statute emerging from the ICC, but which do not naturally fall within Edwards’ typologies.

## Forms of Direct Participation

The forms contained hereunder are necessarily provisional, drawn from an analysis of the available literature, and requiring further empirical testing.

### I. Full Empowerment: Participation as Decision-Makers

The most direct, active form of participation in a TJ mechanism can be understood as full *empowerment*. This draws upon the participatory development literature and covers Edwards' (2004) concept of *control*.

According to this form of participation, victims would participate at each stage of a TJ mechanism – from conception to design to implementation – as decision-makers, with real decision-making power. Powers are thus conferred on victims, with corresponding obligations on state and/or international implementing authorities to give form to these powers. Equally, with such powers would come responsibilities, in the form of obligations upon victims themselves. Participating in this manner confers agency upon victims.

Edwards (2004: 974) refers to *control* in this regard as the 'most extreme form of participation possible' in criminal justice. In the transformative justice discourse, this form of participation is the most complete form of 'democratisation of the transitional justice process' resulting in ownership and empowerment (Lambourne, 2010: 47). Similarly, White (1996) refers to this form of participation as 'transformative' offering mechanisms that are driven by victims. It engages what Lundy & McGovern (2008) deem as the 'transfer of power', so that victims and affected communities do not only participate at the implementation stage of TJ, nor are they the passive recipients of decisions taken elsewhere, by others.

Victims are thus empowered as genuine primary stakeholders, with 'decision-making clout' (Arnstein, 1969) over processes and mechanisms that directly affect them and their communities. They are equal partners throughout the process, with control over decision-making. This form of participation engages Kenny's (2000) understanding of 'the right to participate in decisions which affect one's life'. And this form of empowerment is what the UN Special Rapporteur on TJNR understands as populations being represented in the establishment and composition of truth commissions, and being involved in the design of reparations schemes (UN Doc. A/HRC/21/46).

Empowerment is the most complete form of participation for realising victims' rights.

### II. Collaboration: Direct Participation during Implementation

Although not achieving the same level of decision-making power as full empowerment, *collaboration* can be understood as a form of direct, active participation, occurring primarily during the implementation stage of TJ. Here, victims are accorded powers to influence the process and the outcome, without decision-making powers. According to Edwards (2004), this form of participation is non-dispositive.

This conception lies somewhere between what Edwards (2004) refers to as consultation and what we find in the participatory development literature referred to as *collaboration*. Victims and affected communities must be consulted by the implementing authorities, but are under no obligations themselves to participate. The process is in part extractive, with victims providing input, but the process preserves the decision-making power in the hands of the authorities. Here, although the decision-maker is under an express obligation to collaborate and consult with victims, *collaboration* will not necessarily be determinative of the outcomes, nor will those outcomes necessarily be in line with the wishes of victims. Nevertheless, victims have wide scope for exercising their right to collaboration in the way they see fit, subject only to institutional rules and procedures.

This form of participation is active and direct, covering traditional notions of civil parties in criminal proceedings, as well as the process at truth commissions. It engages Humphrey's (2003: 184) interpretation of the power of a truth commission process being that it is participatory and locates truth outside of the state within the people; and it also engages Teitel's (2000) notion of a 'democratising truth' through enabling victims to participate in a process of constructing societal truths and in a collective shift in re-imagining and re-interpreting the past. Moreover it covers some of the earlier interpretations of victim participation at the ECCC and ICC, which granted significant rights to participating victims present in the courtroom.

The value of this form of active participation ranges from the purported benefits of allowing victims to provide testimony, to have a say in implementation and decision-making processes, and to participate in the reconstruction of their country, whilst not burdening them with obligations or powers that they may not wish to exercise.

According to Arnstein (1969), anything other than full empowerment can introduce degrees of tokenism – token participation or empty ritual. Similarly, White (1996) suggests that the typical form of participation at a truth commission can be characterised as 'instrumental', meaning that no real agency is conferred upon victims, leading to participation that is direct but not effective.

### III. Providing Information

Another form of non-dispositive participation, which increases the risk of 'tokenism', is the *provision of information*. Both the authorities and victims may be under obligations in this form of participation, the former to seek information from victims, and the latter to provide information. In contrast to *collaboration* victims provide information according to the parameters set by the authorities or decision-makers, and according to a corresponding need, rather than a more open process.

Edwards (2004) characterises this form of participation as resembling that of witnesses in criminal trials, given the restrictions that this places on participation. It is this form of participation that was utilised at Nuremberg, the ICTY and ICTR. To some extent this form of participation has also been found in truth commissions with subpoena powers, or in those truth commissions where the participation of victims has been tightly restricted. This form of participation would also resemble participation in TJ commissions of inquiry, where the victims become sources of information only, rather than the primary group with a stake in shaping that information.

Traditional common law conceptions of criminal justice would lean towards this participatory function for victims. As we have seen, for example, this conception lay at the heart of the comments of the former Prosecutor at the ICC in expressing concerns at wide-ranging participatory powers leading to victims 'intruding into the investigation process'. Here, victims and affected communities are considered outsiders to the process.

### IV. Incidental Expression

The final form of active participation is *incidental expression*. According to the typologies developed by Edwards (2004), participation in this manner – which he refers to simply as *expression* – is akin to providing victim impact statements. The participatory role in TJ is limited here, limited to certain moments in a procedure or process.

The level of influence that a mere expressive form of participation entails is much more limited than participation through providing information. For a criminal process, this may be related to the stage at which the expression comes; whereas for a truth commission it may be related to simply expressing

ones grievances with no follow-up or consequences. It is this type of participation that White (1996) refers to as being 'nominal'.

Although the authorities are still obliged to provide the opportunity for expression to victims, victims themselves have no obligation or duty to respond. The level of impact that incidental expression has upon the proceedings is the weakest of all of the participatory forms. We find this form of participation under Article 19 of the Rome Statute, concerning the right to submit observations during an admissibility or jurisdictional challenge to a case, but also to some extent if participation is interpreted as being limited to opening and closing statements.

## Forms of Indirect Participation

As with the forms of participation identified above, those contained hereunder are necessarily provisional, requiring further empirical testing.

In his typologies of participation, Edwards (2004) considers that participation is necessarily active and in essence, direct. He notes that participation 'involves an interaction between victim and decision-maker that is not passive'. Accordingly, it must always involve action by the victim him/herself. Unlike Edwards, with what we now understand – and are beginning to understand from the TJ literature more and more – we include indirect participation and even passive participation as nonetheless potentially crucial for victims. The reasons for this will be explained through the two forms of participation identified below.

### V. Collaboration: Indirect Participation during Implementation

We understand *collaboration* here as denoting indirect, but nonetheless active participation during the implementation stage of TJ. Given the recent decisions at the ICC and ECCC, this form of participation may well become a crucial one for victims in the future.

As we have seen from the ICC, victim participation is increasingly construed as being vicarious. Victim lawyers and Legal Representatives will most often be physically present in the courtroom, with recent decisions restricting the interventions of victims unless through their lawyer or representative. Whilst in the Kenya I and Kenya II decisions an important distinction is made between 'direct individual participation' and 'indirect participation through a common legal representative', here we recognise the differences but associate them each with indirect forms of participation. However, for the latter in particular, the collective nature of the participation necessarily reduces the influence that an individual has – and thus the scale of *collaboration* – especially when the interests of individuals are subsumed within more homogenised group interests, or where the 'legitimate voice' put forward in this collaboration does not represent each individual.

Here this form of participation by nature includes the limitations of 'representation' that have led to parallels being drawn with 'usurpatory ventriloquism' (Bourdieu, 1992) or the risks that 'victims are unlikely to have a form of participation or decision-making power that is any more direct than what they have in common law jurisdictions' (Trumbull IV, 2008: 806). Perhaps a natural consequence of mass victimisation, McGonigle Leyh (2012) draws attention to the risk of inflated expectations resulting from this form of participation, particularly if it is not explained correctly or if information and outreach is lacking.

Yet this form of participation may also enable the same level of influence, without the negative consequences of *direct collaborative* participation. Tenove (2012) suggests that it can still ensure the general interests of victims are advanced to offset those of the prosecutor, and that it does not necessarily lead to any less impact. For vulnerable groups, Wemmers (2009: 412) argues that vicarious forms of participation may even be better tailored to their specific needs, suggesting that for certain categories of victims it can 'offer greater safety and protection' as well as protection against trauma or

secondary victimisation. In a post-conflict situation, the importance of these considerations, and the related considerations of safety and personal security should not be underestimated. Evidence from South Africa and Rwanda, for example, demonstrates the lack of safety felt by many victims after testifying.

Finally, commentators including Wemmers (2009) suggest that the very fact of having a recognised legal representative or counsel can lead to empowerment, without the need for direct participation in the proceedings. In this sense, we can draw from principles of restorative justice, whereby recognition and support from indirect participation may help re-establish a victim's self-worth.

## VI. Notification

The most indirect, passive form of participation is *notification*. Here we refer to the process of keeping victims informed of a TJ process or their particular case. The same form of participation is recognised in the development discourse.

This form of participation is recognised under Rule 50(1) of the ICC Rules of Procedure and Evidence, that victims have the right to be informed when the Prosecutor intends to seek authorisation to initiate an investigation using her *proprio motu* powers. According to this form of participation, victim participation at the ICC also includes receiving notification of all public filings and those confidential filings that affect the personal interests of victims.

Though excluded by Edwards (2004) as non-participation and 'lacking the essential characteristic of a participatory act', we should not underestimate the value of participation in this form. Much like the *indirect collaborative* form of participation, *notification* can send a message, however symbolic, that victims are involved and that 'they are not forgotten and that their interest in the case is recognized by [the] authorities' (Wemmers, 2010: 635). Being informed of one's rights and developments in the TJ process may be the most that some victims seek. Moreover, as we have seen from criticisms of the TRC in South Africa, the lack of follow-up and information after testifying was crucial to shaping victims' perceptions and experiences of the overall TRC process.

And in the same way as *indirect collaboration* can protect the safety and interests of vulnerable groups, so too can participation through *notification*.

## Towards a Research & Policy Agenda: Discussion Points

From the foregoing analysis, we have seen that victim participation in TJ mechanisms raises a multitude of unresolved issues, tensions, dark spots for research, as well as outstanding needs among victims, affected communities, practitioners and policymakers. We have distilled here a number of discussion points and research questions that are by no means exhaustive, but that we hope can contribute to focusing TJ policymaking by opening avenues for discussion that will ultimately benefit victims and affected communities. Moreover, IW's own research project will aim to provide input on these discussion points, with the research questions to be used to inform our comparative research framework in Burundi, Cambodia, Guatemala, Honduras and Kenya.

We are hopeful that this course of action will contribute to better TJ policies in the manner that they grapple with victim participation. In this sense, we are encouraged by the finding from Tenove (2013b) that there is a clear desire among practitioners at institutions such as the ICC to find ways to improve victim participation, something that we ourselves also recently found among criminal justice practitioners.<sup>40</sup> In this sense, research can be incredibly useful as the first step towards concretising the needs of victims and communities affected by violence ready for translation into responsive policy.

### A Reality Check...

In the ICC's first case against Thomas Lubanga, victim participation entailed legal representatives making opening and closing statements, participating on behalf of victims in hearings, questioning witnesses, advancing oral and written submissions, and an (unsuccessful) request to modify the legal characterisation of facts. As Stover, Balthazard & Koenig (2011: 544) note, the ICC's 'transformative' value for victims may be limited – even when compared to the ECCC – by the reality that many victims 'will never set foot in the courtroom'. Added to this, Elander (2012: 13) suggests that despite the rhetorical centrality of victims, the ECCC (and the ICC) 'seems confused about what to do with the victim once it is inside'. Whether this participation is what the victims expected and whether it satisfied their demands should be examined by empirical research.

The research emerging from truth commissions including studies conducted among victims such as research by Clark (2012), Hamber (2009), Mendelhoff (2009), Backer (2007), Byrne (2004) and Garkawe (2003) paints a disappointing picture in many respects concerning the participation of victims. Part of these problems originates in TJ policies being 'driven by pragmatism and political compromises' (Valinas & Vanspauwen, 2009: 283), meaning that participation is curtailed as soon as a TJ mechanism's mandate is defined.

It behoves us to therefore recognise that although there are many stated virtues of participation, 'it can be staged, manipulated for political ends, and frustrated by unrealistic mechanisms, a lack of follow-through or by eliciting engagement without sharing information' (Correa, Guillerot & Magarrell, 2009: 4). As the principle becomes more important as an international norm in TJ, there are risks that it may be hijacked for political ends, but also risks that its operationalisation will be conditional upon the will and capacities of the implementing authorities. We must consequently try to find a balance between demands for more extensive and wide-ranging participation, and the depths of the pockets or the level of willingness of those who must provide the funds. That being said, Pena & Carayon (2013: 535) argue that:

While a certain degree of realism is required to avoid creating false hopes among victims, it is time for the Court to be creative in the way it seeks to address challenges related to the participation of victims.

<sup>40</sup> See IW Policy Brief, *The Expanding Societal Impact of International Criminal Justice - Exploring the Links with Memory Initiatives*, February 2014, available at <http://www.impunitywatch.org/html/index.php?alinealD=135>.

The same line of reasoning could be easily applied to truth commissions and TJ policymaking more generally.

If we step for a moment outside of the TJ paradigm and the associated restrictions that it implies, we can consider wider notions of ‘transformative justice’ that were touched upon when examining participatory typologies. This paradigm of justice after violence seeks measures that not only tackle the outward expression of violence, but also measures that tackle the underlying structures and dynamics that create the enabling conditions for violence and for the continuation of impunity. Allied in many ways with development theories, the argument is forwarded that TJ mechanisms should be part of a larger socio-economic and socio-political project. Following their research in the DRC, Vinck & Pham (2008: 411) thus suggest that:

[...] promoting the participation and ownership of the affected population is crucial if transitional justice mechanisms are to be part of a larger approach to socioeconomic development and, eventually, social reconstruction.

The discussion points presented below are set against this backdrop.

### **More empirical evidence is needed: (a) on the ‘virtues’ of participation; and (b) whether, and how, participation leads to the benefits that are commonly assumed**

The virtues of participation are seemingly self-evident, a tautology of TJ discourse and practice. But once again we may be repeating the same mistakes of basing a core principle of TJ on faith rather than fact, reproducing what Ignatieff (1996) refers to as ‘articles of faith’ whereby core claims animating policy and advocacy are insufficiently grounded in empirical research.

There are already noteworthy allegations being made that participation at the ICC is a ‘worthy goal’ but was ultimately ‘more ideological than realistic’ (Tonellato, 2012: 322). One vocal critic, Judge Van den Wyngaert (2011), argues that participation can never be more than symbolic, which may in turn lead to one of the very problems that the system is intended to avoid: secondary victimisation. Herman (2013: 469) likewise questions whether the consolidation of civil parties into one group is ‘in fact an admission of the limits of trial participation’, echoing the sentiments of Kendall & Nouwen (2013: 29) that there is a huge rhetorical gap between the presentation of victims ‘as the *raison d’être* of international criminal law and the very limited role of victims in international criminal proceedings’. Whether we agree with her stance or not, Van den Wyngaert (2011: 495) is right that ‘the jury is still out’ on victim participation.

But many observations are hypothetical, with little empirical basis. Even after the longer history that truth commissions have had with victim participation, we still know very little about the impact of participation and truth-telling. Mendelhoff’s (2009) claims ring true here, that:

Despite nearly two decades of experience with prosecutions of war crimes and genocide, the existence of many post-war truth commissions, and the frequency of claims about the commissions’ psychological benefits, there are almost no systematic studies of truth-telling’s psychological impact on victims of war and atrocity and the implications for post-conflict peace building.

TJ must be grounded in empirical evidence. Surveys, interviews and focus groups are needed to substantiate claims and probe the meaning that is attached to participation, including from among those victims who have participated. We need research on the impact of participation (Tenove, 2013b), including its negative impact and consequences for unrecognised victims. As Tenove (2013b) also suggests:

[...] if legal participation can have a significant and positive impact on victims and their communities, then the ICC would be wise to devote more resources for the inclusion of large



numbers of participants. Alternatively, if legal participation has little positive impact on victims, and/or adds little to trials, then ASP members may be wise to seek to empower victims through other institutions. Victims deserve effective programs rather than expensive symbolism.

McGonigle Leyh (2012: 407) is correct in her suggestion that the international courts are ‘experimenting laboratories’. But the same applies to truth commissions. And from the evidence that we do have, some common assumptions associated with participation are directly challenged.

Pham et al. (2011: 284) found that despite civil parties in Case 001 at the ECCC experiencing participation positively, ‘many effects of participation that advocates expected were not observed’. In Sierra Leone, Shaw (2005) found that the TRC valorised truth-telling, but that this was based on the problematic assumption that there are universal benefits to verbally and publicly recounting violence. And Clark (2012: 194) found that ‘the ambivalent answer to the question of whether truth-telling is healing is that it depends’, mirroring Hamber’s (2009) research findings that the banner of truth at South Africa that ‘Revealing is Healing’ was too simplistic and ‘fed victims with false expectations.’

And so we may find much truth in Doak’s (2011: 264) cautious note, that ‘there remains no meaningful consensus as to what victims can, or should, be able to expect from the process, and the few studies with empirical data concerning both their needs and expectations are laced with mixed results.’ Yet still, in TJ discourse and policymaking, victim participation in its principal mechanisms may at present still be a ‘rhetorical construct’ that ‘obscures the representative challenges faced by conflict-affected individuals in accessing the form of justice that is practiced in their (abstract) name’ (Kendall & Nouwen, 2013: 30). These are dangerous and harmful dynamics in policymaking and in practice that require our urgent attention.

The remainder of the discussion points are implicit recognitions of this evidentiary shortcoming, providing a number of dark spots where more nuanced policy discussions and research could illuminate the principle and practice of participation.

### **Can participation in the courtroom ever be restorative?**

Much of the discourse around the victim participation schemes at the ICC and ECCC engages the claim that participatory models introduce restorative justice principles and practices into the criminal justice procedure. According to Findlay (2009: 203), shortcomings of the retributive justice model mean that the very legitimacy of international criminal justice depends upon a ‘victim constituency’ being centrally recognised, meaning that ultimately, criminal justice has no choice but to embrace restorative practices ‘if its legitimacy and functional relevance are to be confirmed beyond the authority of legislative instruments and sponsor agencies.’ There is no consensus on these claims.

On the one hand, experts including McGonigle Leyh (2012) defiantly state that the victim participation scheme at the ICC is not the same as a restorative justice process, and that victims cannot, and do not, experience it as such. On the other hand, there is another camp that suggests that ‘participation in criminal proceedings is restorative on its own, with victims regarding the criminal proceedings themselves as a form of reparations’ (Tonellato, 2012: 320).

In their study among civil parties in Cambodia, Pham et al. (2011) not only found an increased likelihood of PTSD symptoms, but found that compared to the adult population, civil parties were less positive about whether their experience had helped them to deal with the loss of loved ones and find peace with the past. Experience from truth commissions may be instructive here. Indeed Ross (2003: 332) found in South Africa that despite the value to be derived from public processes, ‘recounting harm does not guarantee that it will be received in ways testifiers might wish’ and the complex ‘social fields’ into which participation is thrown stirs up a whole manner of emotions, reactions and consequences. These aftereffects require attending to, which cannot be done through the mechanism alone. It is in this light that Tenove (2013a: 25) found among affected communities in Kenya and Uganda that ‘justice’ was

considered as more than accountability, ‘to include assistance and reparation’. In the absence of the latter we may wonder about the restorative value of participation, particularly when we recall that in South Africa victims have complained that testifying was on its own not enough (Picker, 2005).

### **Participation can take different forms during the lifespan of a TJ mechanism; more information to understand the basic ‘enabling conditions’ for participation is needed**

We have distinguished a number of forms of participation ranging from *full empowerment* to *notification*, informed by the work of Edwards (2004), Arnstein (1969) and participatory development theorists. But rather than attempting to categorise victim participation according to one or another of these forms, it may be more instructive to recognise that participation may take on a number of forms during the lifespan of a TJ mechanism.

Examining truth commissions in Chile, Peru and South Africa, Correa et al. (2009: 11) thus identify ‘key moments’ for participation that include when the scope of truth-seeking is defined and when reparations are being recommended. They argue not only that ‘greater possibilities exist’ here, but also that there can be ‘greater impacts from participation’ (Correa et al., 2009: 14). Attention to these *key moments* of participation would assist institutions such as the ICC in avoiding situations where victims have been ‘left without any possibility of substantially contributing to matters that go to the core of their interests’ (Pena & Carayon, 2013: 531). Participation at the outset that reaches towards the decision-making level – i.e. defining mandates, defining the scope of charges, etc. – may thus be more important for more victims than direct participation at a later stage. If trials ‘can signal society’s new solidarity with victims’ (O’Connell, 2005: 317), a larger number of indirectly participating victims – even through *notification only* – who have a stake in the TJ process, may have greater impact than a small number of direct participants. The dynamics of information and direct participation are explored further below, but Tenove (2013a: 29) suggests that a combination of giving an opportunity to influence the judicial process, attentive listening, and information can lead to enhanced justice at the ICC.

It is in this respect that Vinck & Pham (2008: 399) make the case for the ‘will of local actors and affected populations [to] inform the design of TJ mechanisms’ in a process of ‘formative evaluation’. This, they argue, ‘increases the impact of TJ mechanisms on sustainable human development’. Triponel & Pearson (2010) furthermore argue that early public participation leads to TJ that ‘better responds to local needs’, and creates a system that is fairer and more likely to garner public support. Clark (2012: 196) thus suggests that in South Africa the TRC would have had greater success ‘had the process included an element of consultation’, contending that beyond victims’ stories it was ‘their ideas, their concerns, their needs, and so on’ that needed to be heard. Still others take the contention further, arguing for the full ‘democratisation’ of the TJ process (Lambourne, 2009: 47).

We should not underestimate the value of participation at these early stages, nor perhaps overestimate its value during the truth-telling or judicial process. Although the instinct would perhaps be to promote more active participation during the hearings, there are strong indications that provided the form of participation is akin to *decision-making* or at least *collaboration* during the early phase, the form of participation at a later stage can be impactful even if it is indirect. For policymaking, a victim-centred mechanism may thus be defined by ‘the nature of its mandate, the resources at its disposal, how well it is equipped to address victims’ multiple needs’ rather than the truth or justice *per se* (Clark, 2012: 202). In other words, for a truth commission, ‘it is the overall process and the extent to which victims’ needs are given priority that are critical to the question of whether truth is healing’ (Clark, 2012: 202). And the same may apply to the implementation of mechanisms that build upon socio-cultural values and practices, more likely to be experienced by victims as responding to their needs (Shaw, 2005).

But still we must be cautious of the risks of tokenism, of participation being ‘staged, manipulated for political ends’ (Correa et al., 2009: 4). As we have seen, one of the most effective ways to ensure the legitimacy of an institution, process or policy is to claim that it is participatory. Therefore to ensure that participation is meaningful will require victim involvement at the very beginning of the design of TJ, but

also an understanding of how different forms of participation can respond to different or changing circumstances. It is here that we can raise the importance of understanding context and the ‘enabling conditions’ for participation. As we saw in Sierra Leone, the reluctance of people to verbalise their admissions of the truth was apparently grounded in deep-seated cultural norms (Kelsall, 2005: 390). In contexts like Burundi where impunity is firmly entrenched, people have expressed a preference for testifying in private at a proposed TRC, eschewing traditional notions of the power of public testimony.<sup>41</sup> In situations like Guatemala, a prevailing context of revisionism and attacks perpetrated by the state will curtail any social and political space that may otherwise be opened as a result of victim participation in TJ. And in contexts where the simple fact of participation would entail a heavy socio-economic burden, the form of participation cannot be taken for granted. In this light, Correa et al.’s (2009: 4) conclusion is appropriate, even though initially related to time frames that may restrict the conditions for participation:

An assessment of enabling conditions for participation and steps taken to facilitate those conditions may need to be undertaken, while participation is adjusted to evolving capacity over time.

### **Representation, Indirect Participation and Notification *are* forms of participation**

Especially at the ICC, recent developments have strengthened the vicarious nature of participation. A shift has been seen whereby greater focus on victim participation has correspondingly led to greater restrictions on the modalities of that participation (Spiga, 2012). Like it or not, at the ICC the underlying basis for this has been the very *balance* of victim rights with the rights of the accused that Edwards (2004) sought to dispel. There are of course strong supporting arguments, that the essence of the criminal trial should be the protection of the rights of the accused (McGonigle Leyh, 2012), but these logically clash with the rhetoric that victims are now the *raison d’être* of criminal trials. Within this newfound approach, opinions differ as to whether representation is participation (Kendall & Nouwen, 2013; Pena & Carayon, 2013; Wemmers, 2010; Edwards, 2004).

We argue that representation *is* participation. Moreover, other forms of indirect participation and even the form of *notification* are participatory. Whilst we acknowledge the challenges that these forms of participation present – including the inherent risks of subjectivity on the part of the representative (Kendall & Nouwen, 2013) – such challenges require effective solutions to be found, rather than dismissing these forms of participatory practice altogether. Clearly there are significant risks: Pham et al. (2011) for example found that some of the civil parties in Cambodia could not even name their legal representative, while Kendall & Nouwen (2013: 17) argue that in the process of filtering, weighing and selecting views, legal representatives risk working ‘against some of the interests of individual victims’. But there are solutions to be found. One of those is the provision of sufficient time and resources for developing close working relationships between representatives and the victims they represent. This is one of the main recommendations of the Independent Panel of Experts (2013) that should not be underestimated, since for many victims this will be their only contact with the Court, shaping their experience of the criminal process.

Whilst we may instinctively feel that participation through a representative is too abstract, too impersonal and too inactive, it is important also to consider that it may be what victims themselves prefer, particularly in light of wider ‘enabling conditions’. Wemmers (2010) suggests that this preference corresponds with the perceptions of the majority of criminal justice practitioners in her interviews that even *notification*, if done effectively, will constitute meaningful participation.

Implied from the foregoing is the importance of safety, whether real or imagined. For victims this may be an important consideration for the form of participation sought. As we have seen, direct, active and public participation is not always in the best interests of victims, nor what they themselves seek. Thus

<sup>41</sup> Interviews conducted by the author, Bujumbura Rural, April 2013.

the form of participation will be shaped by safety concerns, which is what we see in Burundi where the preference has been expressed for participation behind closed doors.<sup>42</sup> But safety also constitutes a necessary ‘enabling condition’, meaning that associated provisions may be required before and after participation, ‘without which there can be no meaningful participation’ (Bewicke, 2010). This will include provisions for protection, with specific attention needed for gender-sensitive arrangements or arrangements that enable the participation of marginalised groups.

But safety and protection extend beyond physical safety for victims, to the ‘social pressures and stigmas, which can often be far more damaging to their identity and place in society’ after participation (Mohan, 2012: 211). As Ross (2005), Shaw (2007) and Clark (2012) have noted in South Africa, victims have found ‘the aftermath of the process extremely difficult, while some even regretted testifying’ (Shaw, 2007: 193). According to Mohan (2012: 206) one of the requirements for victim participation is therefore that victims are protected by the law.

### **Victim participation has inflated expectations, and has simultaneously divided and homogenised victims**

The promise of victim participation has inflated expectations of victims, both at the international(ised) tribunals and at truth commissions. This has led to disappointments with truth commissions for failing to fulfil the promise of truth-telling, with the ECCC for curtailing the ability of victims to express themselves, and with the ICC for the consequences that result from prosecutorial discretion. Nevertheless, there are indications that how victims are received has just as much influence on their levels of satisfaction than the form of participation. For example, de Brouwer & Groenhuijsen (2009: 153) suggest that ‘being treated with respect and dignity, being kept informed about a process and receiving support are crucial’, which is mirrored in the findings of Stover et al. (2011: 541) that participation can be positive, ‘so long as the process is largely perceived as safe, respectful, and dignified’. Here, O’Connell (2005: 342) suggests that, ‘Judges and lawyers may benefit from training on cross-cultural communication and the specific cultures of the survivors with whom they have most contact.’

But whilst being treated with respect will reap rewards in the courtroom, it cannot counteract some of the political and symbolic dynamics that victim participation creates outside of the courtroom. Aptel (2012: 1364) states the problem thus:

The choices of international prosecutors as they exercise their discretionary power have fundamental ethical, political and historical consequences [...] Whether or not they want it or recognize it, the decisions made by international prosecutors in exercising their discretionary powers impacts on the politics (within the ravaged states and globally), on the perception of individual and collective guilt and innocence, on the historical recognition of the crimes, and also of course on the victims.

Recognising certain victims and therefore excluding others is an unfortunate corollary of TJ mechanisms. This may be creating divisions within societies and within affected communities that are little explored, and even less understood. It may be very likely that the official recognition of and granting status to certain victims creates hierarchies, with those ‘unrecognised’ victims somehow considered less important. The normative value that such recognition entails is likely introducing new divisions as a consequence of TJ. In those societies that have been divided along ethnic, political or religious lines, we may assume that these dynamics will be especially damaging.

Discrimination between victims will necessarily affect the ‘restorative value’ of a mechanism (Solange, 2013). It can lead to frustrations among those who are excluded from designated definitions of ‘victims’ (Garkawe, 2003), and among those who have their victim status denied it will produce ‘anger,

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<sup>42</sup> *Ibid.*

helplessness, shame, and worthlessness' (Pham et al., 2011: 274). Support systems for rejected applicants (Pham et al., 2011), alternative measures for victims unable to produce the necessary evidence to prove their victimhood (Stover et al., 2011), and the need to 'develop avenues other than the court proper for victims' status to be recognized and for victims to tell their stories' (Stover et al., 2011: 541) are just some proposals to counter this. These proposals also demonstrate that victim participation must be supported by other measures and processes, explored in more detail later.

In this sense, TJ mechanisms necessarily construct identities of victims through victim participation. Findlay (2009: 194) refers to this as a sort of 'victor's justice' which can be 'responsible for the designation of those victims worthy of protection, imbued with the rights of citizenship and therefore standing before formal justice institutions'. The 'worthy victim' in this sense is defined by the TJ mechanism, necessarily denying both normative and official victim status to others (Findlay, 2009). Here again we see the hierarchy of victimhood, with the parameters circumscribed by TJ mechanisms limiting who can access the mechanism and who is defined as an 'official victim' allowed to participate. Once again, we can readily imagine the consequences in societies already divided along ethnic, religious or political lines.

At the ECCC, Mohan (2009: 758) shows how the 'subversive speaker', that is, survivors who are outspoken and do not comply with the traditional expectation of a passive victim, have been effectively excluded by such demarcation of victimhood. At the TRC in South Africa, Leebaw (2008: 113) similarly notes that official victimhood was designed to avoid 'destabilizing conflict', giving the example of 'those who did not view themselves as victims, but rather as unrepentant soldiers of a just struggle' with the TRC doing little to incorporate their narratives. And at the ICC, we hear little of those victims who oppose the process (Kendall & Nouwen, 2013: 10). These 'window cases' (Chapman & Ball, 2011: 7) of victimhood, not only marginalise others (and their experiences), but as Tenove's (2013a: 10) research in Kenya has shown, lead to feelings that their 'normative claims to justice' are denied and that the institution has abandoned them.

Interestingly, Tenove (2013a: 13) has also found evidence of perhaps a certain level of competition among victims introduced by the victim participation regime at the ICC. In both Kenya and Uganda he finds that:

Because victim status entails normative recognition and possible material assistance, focus group participants in both countries were very concerned that only "real victims" be recognized.

By searching for and constructing the 'victim', participation at TJ mechanisms also leads to homogenisation – both of who is a victim and of the experiences of victims. Victims become somewhat of an 'abstract collectivity' through the very process intended to give them a voice (Kendall & Nouwen, 2013: 17). This great paradox of victim-centrism and victim participation 'has begun to degrade victims even as it claims to soothe them' (Mohan, 2009: 737) by assuming that victims have 'a collective story, a unitary, bounded and unchanging narrative of trauma' (Mohan, 2009: 737). In this sense, victim participation can overlook the diverse stories and competing demands that victims may hold (Tenove, 2013a), with mechanisms such as the truth commission in East Timor criticised for objectifying and disempowering victims (Robins, 2012). In operationalising participation, mechanisms thus risk treating victims as if they indeed speak with one voice. The same goes for deferring to *local* demands during consultation phases, which necessarily overlooks the diversity of opinions at the 'local' level, creates the risk of coming to rely on more educated, vocal members from a particular community, and overlooks the heterogeneity of 'violations, harm, and geography, but also differences in terms of political clout or sympathy' (Magarrell, 2007: 4).

## Information and outreach are crucial for meaningful victim participation

A key tool at the disposal of TJ mechanisms is information and outreach. These are not only fundamental to meaningful participation, but are crucial to avoiding some of the harms that result, particularly those related to expectations.

In spite of the well-known challenges facing outreach strategies at the *ad hoc* tribunals and affirmations that information is a prerequisite for effective TJ, we still consistently find evidence that victims lack sufficient access to information (Tenove, 2013a). The same is true of victim participation. The simple provision of explanations would have tackled the ‘disarray’ that Pham et al. (2011) and Elander (2012) found among civil parties, some of whom were confused about their official status. They suggest that meaningful and effective participation requires that mechanisms engage participants ‘in a dialogue over procedures and expectations’ (Pham et al., 2011).

With regard to the former, to participate meaningfully and effectively, victims and affected communities must understand the procedures of a mechanism, including its process and terminology (Byrne, 2004). They must understand the procedural and personal consequences of participating, but also the limitations of the mechanism (Garkawe, 2003). Such dialogue would learn the lessons from South Africa, Sierra Leone and elsewhere with respect to managing victims’ expectations, including misunderstandings as a consequence of misrepresentation through ill-chosen terminology (Millar, 2010), or the lessons from Cambodia that people needed to be made aware that applications to participate may be unsuccessful (Stover et al., 2011). In order to participate, people must thus know about a mechanism, must understand its function and must be honestly prepared from the outset, including discussing the advantages and disadvantages of the chosen form of participation (Byrne, 2004).

These are the lessons that participants themselves recommended in South Africa, including a ‘clear information policy before, during and after the hearings’ (Picker, 2005: 16). They are found in expert recommendations for the ICC that victims must ‘understand fully the scope of their right to participate, including any constraints or limitations on the exercise of this right’ and giving special attention to marginalised groups and communities.<sup>43</sup> And they have been reiterated by those such as Suchkova (2011) who argue that participation requires reaching victims physically and through information, tailored to the local realities. Finally heeding all of these lessons and finally giving outreach and information the attention and financing it is due is thus crucial to victim participation. It should take place as early as possible, and continue for as long as it is needed. As mentioned, we should not underestimate the importance of indirect, even passive forms of participation through *notification*, since they still enable victims and affected communities to be engaged. Early evidence suggests that victims who are informed are generally more satisfied (Stover et al., 2011; Wemmers, 2010).

Given the physical and cultural distance that often separates victims and affected communities from TJ mechanisms, information and outreach conducted in a two-way dialogue is fundamental to participation, and may be a fundamental form of participation.

## To make it meaningful, victims’ participation in a TJ mechanism should be complemented by other measures and processes

We have indicated in the foregoing that TJ mechanisms should be situated within a broader approach to social-economic and socio-political justice as part of a transformative justice agenda. The same applies when we zoom in to look at the participation of victims in a TJ mechanism.

Even with the participation of victims, ‘it is an illusion that either trials or truth commissions are sufficient in themselves to address the complexities of victims’ “healing”’ (Aldana, 2006: 107). Justice

<sup>43</sup> REDRESS, Independent Panel of experts report on victim participation at the International Criminal Court, July 2013, available at: <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>.



demands more than a criminal process, and truth and reconciliation require more than one-off participation. This is what we have seen in South Africa where victims who had hoped for fundamental change after the TRC ‘felt let down by the TRC process’ (Clark, 2012: 194) and where dissatisfaction with the TRC grew over time (Aldana, 2006), each owing to the lack of concrete changes or follow-up. Chung (2008: 536) likewise warns that, ‘victims must be cautious about coming to regard ICC proceedings as the sole or primary means by which they should raise views and concerns, or seek justice, accountability, and reparations’. Thus too much emphasis on the virtues of participation in itself can be damaging for victims.

For these reasons, Pham et al. (2011: 284) argue that the ECCC experience shows that ‘participation alone is unlikely to bring about healing, closure, and reconciliation’, with trials seen as a first step towards other dimensions of social reconstruction. Chung (2008: 540) calls for the ICC investigations to be used as a ‘platform’ for other efforts, ‘building on the interest and profile created by the ICC investigation’, and Laplante & Theidon (2007) argue that testimony at a truth commission ‘must be followed by concrete actions’. In other words:

[...] such processes should be conceived as individual elements of a more complex package of measures that should be put in place to propel peacemaking and healing at both individual and societal levels. (Doak, 2011)

According to Laplante & Theidon (2007: 231), this package would honour the ‘implicit contract’ that truth-tellers make with their interlocutors ‘to respond through acknowledgement and redress’; otherwise victim participants are left with ‘truth without consequences’ and ‘will view their participation as a mere exercise in data collection and see no concrete benefits in their own struggle for recovery and justice’ (Theidon & Laplante, 2007: 240). But as Stover et al. (2011) and Mohan (2009) note with respect to victims excluded from participating in Cambodia, this broader package of measures could offset some of the damaging consequences of victim participation, for example by providing alternative fora for story-telling and for participation outside of the formal mechanism. SáCouto (2012: 353) proposes the same at the ICC, noting that we should not abandon victim participation, but acknowledge its shortcomings with a view to investing time and resources in ‘exploring alternative ways to complement the limited trial process by providing space for victims to tell their stories in other venues’. Designed to reach more victims, she notes that for victims of sexual violence in particular:

[...] these programs could provide survivors of sexual and gender-based violence a new and important venue to tell their stories on their own terms, thus complementing the inevitably limited narratives that emerge through criminal proceedings. (SáCouto, S. (2012: 354)

In addition to these programmes that complement the TJ mechanism, we must not forget the lived realities of victims that may not only limit the impact of participation – as in South Africa – but that may prevent it altogether. As one case manager at the ICC for the Legal Representative for Victims in the Kenya I case has asked, ‘Is the participation of victims in the process meaningful if their dignity is not first restored and their social and economic rights upheld? Indeed, how will victims be able to participate in a meaningful manner if they continue to eke out a meagre existence almost five years after the violence ended?’ (Sehmi, 2013).

A number of proposals have been forwarded as complementary processes and measures towards making victim participation more meaningful. These may be measures that are formally tied to the resources and mandate of a particular mechanism, or those that are more loosely connected, but that are of no less importance.

First of all, the way the mechanism is designed and resourced will be crucial (Clark, 2012), which includes sufficient attention to information and outreach in support of the less direct forms of participation. Attention to follow-up, psychological support and counselling are needed at all stages of a process



(Doak, 2005), including for victims who have come forward but have been unable to participate formally (Garkawe, 2003). Later consultations may be needed to cement any benefits that participation has had, but also to ‘ensure the utility and reparative meaning of measures that are recommended’ (Correa, Guillerot & Magarrell, 2009: 14). Garkawe (2003: 370) moreover suggests that victims who fall outside of legal mandates or who are excluded from participating at truth commissions ‘should benefit from special arrangements’ to allow at least some limited participation in the TJ process. And despite its well-known vulnerabilities, participation at the local level, if appropriately and sensitively administered, ‘may yield more impact’ especially when complementing, and complemented by, national arenas for participation (Magarrell, 2007: 10).

For the ICC, this local deference may include putting greater efforts into ensuring positive complementary, to ensure that a greater range of cases are pursued, to counteract the inherently exclusionary consequences of prosecutorial discretion (Aptel, 2012). It may include giving greater time and resources to common legal representatives to support and engage with victims (Tenove, 2012), or it may involve looking at more creative ways to engage the Rome Statute’s provisions, such as Van den Wyngaert’s (2011: 495) proposal to transform the Trust Fund for Victims into a ‘Reparations Commission’ open to all victims. Such processes may learn from the positive and negative experiences of NGOs at the ECCC, where these organisations essentially operationalised victim participation (Sperfeldt, 2012). And as Kelsall (2005) notes, attention to cultural notions of truth and justice, including examining the possibilities of integrating local practices into TJ mechanisms can be a way to enhance and bolster victim participation.

Finally, we must take more time to examine how TJ mechanisms can interact with complementary initiatives, particularly those in closer proximity to victims and affected communities. Robins (2012: 103) has shown how in East Timor local memory practices ‘fit with a long tradition amongst rural communities and appear to be a more valuable coping mechanism than public testimony’. Likewise, Byrne (2004: 254) notes the importance of recognising that TJ mechanisms are a first step, quoting Hamber & Wilson (2002) who state that:

Clearly to address a history of mass violations is not an issue that will simply be resolved by a two-year truth commission, or when reparations are granted. Reparations and symbolic acts are useful markers in the first stages of recognizing and dealing with formerly silenced memory [but] will never be sufficient. Resolution depends on how individuals personally engage in “trauma work” at their own idiosyncratic pace.

Thus in order to support victim participation in TJ mechanisms, we must devote more attention to grassroots initiatives. This must be undertaken in the full knowledge that whilst these initiatives may logically appear more effective in ensuring active participation, they are simultaneously restricted in their broader impact (Valinas & Vanspauwen, 2009). Hence the need for a package of measures designed to be transformative, with a mix of the active, passive, direct and indirect participation of victims.

## Research Questions

We end with a series of non-exhaustive preliminary questions designed to assist policymaking, but which will moreover guide our research into victim participation.

### Value and Impact

- What evidence do we have of the impact of victim participation for victims, affected communities and for transitional and transformative justice?
- Does victim participation take the most effective form? Does it come at the most appropriate time?
- Is there evidence that truth commissions are more victim-centred than criminal trials?
- Is victim participation leading to empowerment? Or it is disempowering and institutionalising victimhood?
- Does 'official' victimhood introduce negative dynamics or hierarchies into communities? If so, does this have an impact on community relations and 'reconciliation'? Can victim participation consequently lead to the entrenching of ethnic, religious or political divisions?
- What 'enabling conditions' facilitate or hamper the effectiveness of victim participation?
- Under what circumstances and in what contexts can participation be meaningful and effective?

### Victims and Affected Communities

- What are the motivations for victims to seek official participation in TJ mechanisms?
- How have 'official' participants experienced participation? Do they consider that their participation has been meaningful?
- Do victims consider that the process of participation is itself reparative? Does it contribute to healing?
- What 'form' of participation do victims consider to be the most meaningful? Are there differences between women and men, generations, and between victims and policymakers?
- Is there evidence that vulnerable or marginalised groups (women, youth, etc.) gain added benefits from participation?
- Is the promise of victim participation unduly raising the expectations of victims?
- What are the experiences of victims denied 'official' participant status?
- Do victims experience participation positively when independent and democratic state structures and institutions are not in place to sustain the impact of truth-seeking and criminal justice?

### Policymaking

- What early lessons can we draw to inform ideas of a 'victim-centred approach'?
- How can we best accommodate the diverse needs and interests of victims?
- What can be done to avoid the explicit and implicit essentialisation and homogenisation of victimhood?
- Building on the needs of victims and affected communities, what is needed to design and implement effective outreach and information strategies?
- What practical examples can be built upon for designing and implementing complementary measures and initiatives for victim participation?
- Is victim participation in criminal trials too costly and cumbersome, thus demanding that we find alternatives?

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Impunity Watch is a Netherlands-based, international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts periodic and sustained research on the root causes of impunity that includes the voices of affected communities to produce research-based policy advice on processes intended to enforce their rights to truth, justice, reparations and non-recurrence. IW works closely with civil society organisations to increase their influence on the creation and implementation of related policies. The present Discussion Paper is the first output of a multi-year comparative project aimed at supporting and strengthening the participation of victims and affected communities in transitional justice processes.

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