



Research Report

‘Restricted Access’

Promises and Pitfalls of Victim
Participation in Transitional Justice
Mechanisms

A Comparative Perspective

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July 2017

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Acknowledgements:

The author and editor wish to acknowledge David Taylor who developed the framework for this comparative research and country case studies on which this report is based. The research and the report also greatly benefited from the insight and substantial feedback provided by Denis Martínez, Marlies Stappers and Thomas Unger. Impunity Watch is grateful for the invaluable input provided by the participants of the expert workshop, ‘victim participation: defining goals’, held on 7-8 December 2016, which we organised in cooperation with the Dutch Ministry of Foreign Affairs. Equally, the author is thankful for the editorial support provided by Marina Oliver-Tomic, Megan O’Riordan, and Safi van 't Land.

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Executive summary

As victim participation is becoming absorbed by transitional justice (TJ) mainstream policy, the actual impact and effectiveness of particular victim participation measures and models remains uncertain and illusive. At the same time, in view of the diverse political and socio-economic realities surrounding victims and victimhood in some of the most devastated conflict zones of the last two decades, the idea of victims as empowered actors driving TJ is slowly giving way to processes in which victims appear as marginalised and disempowered. Rather than acting at the forefront of TJ processes, victims are at risk of becoming seen as one of too many ‘stakeholders’ in the process, as beneficiaries of the process or as ‘assisted’ spectators of its proceedings. While political elites hammer out the political settlements and TJ measures, and international experts and professionals act as advisors or staffers of the institutions being set up, in reality victims only appear, if at all, in the last stages of the process and largely in unfavourable conditions, with limited leverage.

Indeed, whilst the benefits of participation appear self-evident – victim participation having become an axiom of TJ – there has been little evidence to support many of the supposed benefits of participation or indeed to understand its full implications. Added to this, the possible downsides of participation – what Impunity Watch (IW) in a previous report called ‘the darker side of participation’ – remain underexplored. There is a real risk that without better comprehension of the real-life dynamics of victim participation, this core component of TJ policy may evolve into a hollow principle or an empty ritual.

The present report looks at six cases of victim participation in TJ mechanisms that can be defined as still unfolding processes: Guatemala, Cambodia, Tunisia, Burundi, Honduras and Kenya. It compares the findings of the case studies that IW did for each of these countries, developing an overarching analysis and reaching conclusions regarding the actual practical experiences of victim participation in TJ, with an emphasis on participation in official or state-sanctioned TJ mechanisms.

The findings from the country studies show that real-life experiences of victim participation in TJ mechanisms lag far behind the promises of the ‘mantra’ of victim participation. Though benefits from participation certainly exist, negative consequences of participation for victims are also common. Security problems, political pressures and continued discrimination faced by victims prevent participation from becoming an empowering, dignifying and healing experience. In some cases, they overshadow the process to the extent that the opposite occurs. Other problems around victim participation include the often disempowering manner in which participation is actually embedded in official TJ institutions, and how such institutions fail to generate forms of victim participation that are culturally and contextually sound. While victim participation principally takes place in the implementation phase of a particular mechanism, participation in the design phase or in the follow-up phases tends to be either too constrained or non-existent.

Following their involvement in TJ mechanisms, it is not uncommon for victims’ trust in the usefulness of participation to become severely damaged. In order to develop victim participation

in the best possible way, careful attention to the voices and concerns of different and diverse groups of victims is needed – not only in the implementation phase, but also throughout the whole process. The case studies demonstrate that victim participation is primarily a political process, not a technical exercise, and its success is contingent on the ability of the process to generate empowering dynamics for victims, without extinguishing differences or cultural particularities.

Victim participation often fails to develop convincing guarantees of inclusiveness to ensure that different subgroups of victims are adequately represented and issues like ethnicity and religious affiliation are taken into account. Generational dynamics (e.g. youth participation) are also often ignored. Connecting to the previous point, gender considerations in victim participation merit priority attention, as female victims continue to struggle to get recognition and attention for their specific needs.

The all-too-common lack of follow-up to TJ measures in general and to victim participation in particular needs to be counteracted by the development of strong follow-up components, with guarantees for victim participation included in them. This includes assuring the continued relevance and long-term benefits of participation.

Impunity has a strong detrimental effect on victim participation, as it grants perpetrators room for manoeuvre, which inevitably undermines the political position of victims. If victims are successful in advancing TJ, this can lead to perpetrators acting to achieve re-marginalisation, intimidation or even engage in renewed violence. Hence, impunity, the resulting power position of perpetrators and the protection of victims all need to be addressed so as to prevent these dynamics. Effective security and protection mechanisms need to be acknowledged as a crucial element of victim participation. Measures need to be taken to counteract power imbalances, and thus protect victims from re-marginalisation.

TJ institutions will need to invest in building up victims' trust through an enduring recognition of their rights and a commitment to deliver effective and substantial outcomes. In support of this trust, when victims are weakened by unfolding political developments, national and international TJ actors need to make protection and support of victims a priority.

Channels of participation offered to victims by official TJ bodies are often overly controlled or regulated and tend to reduce the role of victims to passive recipients of services and benefits. Conversely, when victims take action themselves outside of formal TJ mechanisms, they operate like real political forces that have the capacity to significantly influence the process. While additional research is still required in the area of informal participation and its relationship to formal institutions, this study could identify two salient trends. On the one hand, nothing seems to be more empowering for victims than their ability to organise and advocate for their rights as fully autonomous political actors. On the other hand, the stronger victims' activism and informal participation is, the more effective and meaningful their participation in official TJ processes would be.

Hence, any progress in the field of victim participation requires more than a technical approach or a strong normative framework. It entails developing a concrete support infrastructure for victims and protecting their free space for activism. It also requires an enhancement of national and international solidarity with victims, strengthening networks of victims' organisations, as well as providing them with the additional resources and political support that would allow them to operate autonomously.

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1. Introduction

In the aftermath of mass violence, seeking the truth about the past, holding perpetrators of violence to account, providing reparations and establishing measures that guarantee the non-recurrence of violence are deemed vital for victims, affected communities, and for the future of the state and society at large. In recent decades, TJ has become firmly established as the field of policy and practice charged with taking on these challenges. As the practice of TJ has gradually evolved and branched out, certain novel approaches and new principles have been given greater importance. Victim participation is one such example, representing both an approach and a principle. It refers to the role that victims exercise in all of the different constituent elements of a TJ process, which can include formal as well as informal initiatives and mechanisms.

The growing attention for victim participation has changed the way that policymakers and practitioners conceive TJ. In its absence, it is assumed that the process will be detached from affected individuals or communities, lack legitimacy, face difficulties in generating local ownership and grassroots impact, and fail to address the grievances of the victims of serious crimes under international law. In his first report, the UN Special Rapporteur (SR) 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* condition for providing recognition, fostering trust and strengthening the rule of law.¹ The report insists that, ‘none of the proclaimed goals [of transitional justice] can happen effectively with victims as the key without their meaningful participation’. The SR reiterates this position in his report to the 34th session of the Human Rights Council in which he ‘urges those responsible for the design of transitional justice measures not to think of victim participation as marginal, but to incorporate it as an essential element of transitional justice policy-making’.²

This emphasis on victim participation can be placed in the broader context of what has been called a ‘crisis of legitimacy and effectiveness’.³ It is clear that extraordinary approaches are required to deal with the legacy of mass abuse, and the merit of the TJ field is that over the years it has developed a broad and comprehensive set of such approaches. Nonetheless, in many countries, TJ processes are perceived as being ‘stuck’, or as barely coming off the ground. Even in cases sometimes cited as success stories of TJ, like Rwanda or South Africa, pitfalls and shortcomings have become quite evident in recent years. As its use has become widespread, TJ has struggled to generate lasting results that not only effectively tackle the structures of impunity and establish a basis for a new and reconciled national order, but also provide redress for those most affected by violence. In sum, in what Paul Gready calls ‘the era of transitional

¹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46, 9 August 2012, para. 58.

² Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/34/62, 27 December 2016, para. 97.

³ Nesiah, V. (2016) *Transitional Justice Practice: Looking Back, Moving Forward*, Impunity Watch Scoping Study, available at http://www.impunitywatch.org/docs/scoping_study_FINAL1.pdf [last accessed 30 April 2018].

justice', the outcomes of TJ – and in particular of official TJ mechanisms – have more often than not been disappointing for victims and societies involved.⁴

In 2014 IW started a two-year research project to provide empirical evidence based on experiences of victim participation in TJ processes, focusing particularly on participation in official or state-sanctioned TJ mechanisms, with the aim to inform and improve policymaking on victim participation in TJ, and ultimately to strengthen the impact of TJ mechanisms for victims and affected communities. In the framework of the project, qualitative research was conducted on victim participation within specific unfolding TJ processes in Burundi, Cambodia, Guatemala, Honduras and Kenya. An additional research project on victim participation was conducted in Tunisia in collaboration with the Tunis-based Al-Kawakibi Democracy Transition Center (KADEM) and the University of York.

All of this research favoured the perspective of victims and affected communities, relied on partnerships with local civil society organisations, and used participatory methods when possible. These reports, available in multiple languages on the IW website, were launched in each country, with its findings serving as input for advocacy efforts towards improving victim participation regimes in TJ efforts in each of the countries involved. By systematising the expressed needs and expectations of affected communities, IW hopes that the victim participation reports have a lot to contribute to in the development of more responsive policies, both at the national level as well as in the broader field of international TJ practice.

The comparative research report starts off with the presentation of a conceptual framework on victim participation that IW developed specifically for this research, based on a review of existing studies on the subject of victim participation and a range of other sources. It subsequently explains the methodology used for the case studies and the comparative report. This is followed by a comparative analysis chapter, where differences and commonalities between country case studies are highlighted and analysed in light of the conceptual framework. The report ends with conclusions and policy recommendations geared at enhancing the transformative impact of victim participation in TJ.

⁴ Gready, P. (2011) *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, London: Routledge.



2. Victim participation in transitional justice: an interpretative framework

2.1 A brief history of victim participation in transitional justice

Over the years, victim participation, particularly informal collective participation, has played a crucial role in the development of TJ as a field of practice, as victims' voices have strived to gain national and international resonance. When TJ emerged as a field of practice (in the early 1980s to the mid-1990s), victim participation was deeply intertwined with the unfolding TJ politics and in many ways shaped it. The cases of Argentina, Chile and South Africa serve as examples of the relatively prominent role of victims during the 'early years' of TJ. However, with the growing institutionalisation and bureaucratisation of the field, concerns over the increasingly limited roles played by victims arose.⁵ Hence, in recent years, TJ proposals have started to place more emphasis on the value of victims' voices, including notions of 'victim-centred' processes. Victim participation has recently developed into somewhat of a 'mantra' in TJ, representing both an approach and a principle.

Concerns over the position and the rights of victims have also increasingly found their way into human rights instruments and principles, including the 1985 United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁶ and the 2006 'Van Boven-Bassiouni Principles' on the right to a remedy.⁷ Furthermore, treaty-based human rights courts have interpreted treaty provisions as creating broad victim rights, leading to a rich body of case law.⁸ In particular, the Inter-American Court of Human Rights has advanced notions of victim-centred justice, ordering remedies in the wake of violence that contributed to bridging the traditional gap between retributive and restorative justice.⁹ Finally, criticisms of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for doing too little for victims have impacted how the International

⁵ Nesiah (2016), *supra* note 3; Zegveld, L. (2010) Victims' Reparations Claims and International Criminal Courts: Incompatible Values?, *Journal of International Criminal Justice* 8(1): 79-111.

⁶ United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm> [last accessed 30 August 2018].

⁷ United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [last accessed 30 April 2018].

⁸ 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 *Velasquez-Rodriguez v. Honduras* from as early as 1988. For further explanation, see: Trumbull IV, C.P. (2008) The Victims of Victim Participation in International Criminal Proceedings, *Michigan Journal of International Law*, 29(4): 777-826; Aldana-Pindell, R. (2002) In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes, *Vanderbilt Journal of Transnational Law*, 35(5): 1399-1501.

⁹ Antkowiak, T.A. (2011) An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice, *Stanford Journal of International Law*, 47: 279-33, at 282.

Criminal Court (ICC) and other international or hybrid tribunals like the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Lebanon (STL) have since tried to find ways to incorporate victim participation measures into their work.

Also in a broader sense, beyond tribunals, the idea of victim participation has gradually been developing into a central component of TJ policymaking, whilst TJ increasingly shifts ‘from a more state-based to a more individual-centred focus’, in which individuals are empowered as ‘active demanders’.¹⁰ Even as these developments have put victims at centre stage like never before, there is still the need for enhanced understanding of the implications of current discourses and practices surrounding victim participation. The shift towards victim participation may also disguise dynamics in which states gain legitimacy from the mimicry of ‘politically correct’ behaviour, whereas in reality the participation of victims may be exploited to provide a ‘veneer of legitimacy’ to a process.¹¹ Indeed, invoking ‘victims’ in an abstract sense and claiming that they now ‘have a voice’ may well have the paradoxical effect of instrumentalising, essentialising, and even disempowering victims.¹² Thus, as victim participation is becoming absorbed by TJ mainstream policies, the actual impact and effectiveness of particular victim participation measures and models remains uncertain and even illusive.

At the same time, in view of the diverse political and socio-economic realities surrounding victims and victimhood in many conflict zones of the last two decades, the idea of victims as empowered actors pushing for TJ has also become partially illusive, and the dominant perception has turned to seeing victims as disempowered groups and treating them as such. Rather than acting at the forefront of TJ processes, as was for example the case in the Southern Cone transitions, victims are at risk of becoming seen as one of the many ‘stakeholders’ of the process, or as mere beneficiaries. While political elites hammer out the political settlements, often including scant TJ measures, and international experts and professionals act as advisors or staffers of TJ institutions being set up, victims in turn appear – if they appear at all – in the last stages of the process and largely in unfavourable conditions, with limited leverage. Hence, the question remains as to what extent current policies and practices around victim participation have actually been able to move TJ processes in the direction of becoming processes ‘steered by the needs of affected communities rather than the priorities of elites’.¹³

¹⁰ See Bonacker, T., Form, W., and Pfeiffer, D. (2011) Transitional Justice and Victim Participation in Cambodia: A World Polity Perspective, *Global Society*, 25(1): 113-134, at 130-131.

¹¹ Snyder, J. and Vinjamuri, L. (2003) Trials and Errors: Principle and Pragmatism in Strategies of International Justice, *International Security*, 28(3): 5-44, at 33.

¹² See, for example, 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), available at: https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/pr928.aspx [last accessed 30 April 2018].

¹³ Robins, S. (2011) Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal, *International Journal of Transitional Justice*, 5(1): 75-98, at 98.



2.2 Victim Participation: Concepts and Definitions

In its most encompassing sense, the definition of ‘victim’ can be applied to ‘any individual, group, or institution harmed or damaged by others or by events’.¹⁴ The United Nations define victims as follows:

‘[v]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’¹⁵

Nonetheless, formally established TJ mechanisms and measures may include more specific parameters of who qualifies as an ‘eligible’ victim and who does not. Defining such parameters may play a decisive role in determining who participates in official processes. Parameters include types of violations considered, the perpetrators of the violations and the timeframe in which the violations have taken place. They may also take formal registration procedures and the like into account.

However, this report is not about victims or victimhood per se, but rather about the participation of victims in TJ processes. ‘Transitional justice’ is a term commonly used for the process of addressing the legacies of massive human rights violations. According to the UN Secretary General:

‘Transitional justice [...] comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’¹⁶

In recent years, the importance of victim participation in TJ processes has been underlined time and again by leading institutions in the field. Pablo de Greiff, the United Nations Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence,

¹⁴ Landau, S. and Freeman-Longo, R. (1990) Classifying Victims: a Proposed Multidimensional Victimological Typology, *International Review of Victimology*, 1(3): 267-286, at 272.

¹⁵ UN Doc. A/RES/60/147, *supra* note 7.

¹⁶ Report of the Secretary-General on the rule of law and transitional justice in societies in conflict and post-conflict. United Nations Security Council, UN Doc. S/2004/616, 23 August 2004, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 [last accessed 30 April 2018].

prioritised victim participation during his mandate. He argues that none of TJ's imputed benefits can effectively be achieved 'on the backs of victims, without their meaningful participation'.¹⁷

But how should we define 'meaningful participation'? What might this mean in practice? And how does it relate to existing examples and experiences of victim participation? The term 'participation' is broad and able to account for a wide array of activities. Since TJ is a deeply political process, participation in TJ can best be conceived of as a form of political participation. Indeed, though the field of TJ has become regulated, professionalised and 'technified' to a certain extent – excessively so some would argue –, it cannot be denied that, at its heart, TJ is a fundamentally political process.¹⁸ The disconnection of TJ from the broader political dimension of post-war or post-authoritarian transition would be self-defeating. In this sense, victim participation relates directly to the space that TJ processes allow for victims to make their mark on this broader political process.

In political science, the term 'participation' is often associated with empowerment and entitlements. Participation in the public cause implies that there is something at stake, though what the stakes are exactly is often a matter of contention. Political participation can be defined as 'the efforts of ordinary people in any kind of political system to influence the actions of their rulers, and sometimes to change their rulers'¹⁹ or even broader as 'behavior influencing or attempting to influence the distribution of public goods'.²⁰

From a political perspective, participation in TJ is thus a form of having a say in the process – a form of exercising influence on it. Consequently, participation that is not connected to power in one way or another is inconceivable. Even in the cases where participation does not translate into increased power for those participating, it still has a political effect, namely by serving to reproduce existing power relations or reinforce symbolic hierarchies. Indeed, the degree of influence and power exercised through participation varies significantly and some forms of political participation can be much more effective and consequential than others.

In this sense, White makes a distinction between different forms of participation that constitute a 'ladder of participation', representing ascending degrees of influence²¹:

- *Nominal*: Participation that seeks to legitimise a process through its visibility, but delivers little if anything to participants;
- *Instrumental*: Participation that is necessary for a process to occur but in which participants have no influence;
- *Representative*: Participation in which groups of people can play a role in

¹⁷ UN Doc. A/HRC/21/46, *supra* note 1.

¹⁸ Nesiah (2016), *supra* note 3.

¹⁹ Nelson, J.M. (1979) *Access to Power: Politics and the Urban Poor in Developing Nations*, Princeton: Princeton University Press, at 104.

²⁰ Booth, J.A. and Seligson, M.A. (1987) "Images of Political Participation in Latin America", in Booth, J.A. and Seligson, M.A. (eds.) (1987) *Political Participation in Latin America: Volume 1, Citizen and State*, New York: Holmes and Meier, at 6.

²¹ White, S.C. (1996) Depoliticising development: the uses and abuses of participation, in Pearce, J. (2000) *Development, NGOs, and Civil Society: Selected essays from Development in Practice*, Oxford: Oxfam.



- determining the nature of a project or process;
- *Transformative*: Participation as empowerment, in which a process is moulded and driven by participants and can transform people's realities.

In this conceptualisation, nominal and instrumental modes of participation engage victims in TJ mechanisms as witnesses or providers of testimony (as in trials or truth commission hearings). However, they offer them no agency in determining what mechanisms occur or how they are implemented. On the other end of the spectrum, a transformative approach to TJ holds the benefit of ensuring that change is made by recognising victims' power to act themselves, authorising them to engage on their own terms in ways that are empowering, and providing a route to political change driven by victims.²²

But even if opportunities for victims to participate on different levels exist, the question remains as to how victims will choose to make use of these possibilities when they occur. Albert Hirschman's three-way exit-loyalty-voice model can be useful here.²³ As TJ struggles unfold, it is likely that some victims will choose 'exit' (disengaging with TJ for a variety of reasons), others may prefer 'loyalty' (following the indications demanded of them by official channels) while yet others will opt for 'voice', engaging in activism for their cause. These are not fixed positions. Over time, individual victims may move between the three options. In turn, responding to victim participation, authorities may seek to marginalise, ignore, or intimidate victims (as is mostly the case) or they might allow them to gain strength and power, as sometimes happens. In either case, however, victims' struggles will be subsumed in the larger political dynamics of the unfolding post-dictatorship or post-conflict transition.

When using the term 'victim participation', the present report thus refers to the public or publicly acknowledged participation in TJ efforts by those who have individually or collectively suffered harm as a result of large-scale human rights violations. According to this definition, victim participation thus refers to the modalities in which victims, both individually and collectively, play a role in the shaping of TJ processes, either directly or through legitimate representation. The TJ efforts in which participation takes place can consist of formal state-sanctioned TJ mechanisms, or of informal civil society-led initiatives geared at TJ objectives.

Based on empirical observation, it is possible to identify different forms of victim participation. A basic typology of victim participation distinguishes between formal and informal, active and passive, individual and collective and direct and indirect.²⁴ These categories stand as

²² For an elaboration of the notion of transformative justice see Nocella, A.J. (2011) An Overview of the History and Theory of Transformative Justice, *Peace & Conflict Review*, 6(1): 1-10.

²³ Hirschman, A. (1970) *Exit, voice, and loyalty: responses to decline in firms, organizations, and states*, Cambridge: Harvard University Press.

²⁴ See Brewer, J. (2010) *Peace Processes: A Sociological Approach*, Cambridge: Polity Press. Brewer also makes a distinction between public and private victimhood. Though TJ processes unfold in the public sphere, they may certainly also have an impact on the private sphere. The unfolding of victim participation in TJ is furthermore likely to hold impact on the existing boundaries between public and private victimhood. Nonetheless, being a political act of engagement, victim participation in TJ is by definition something that pertains to the public sphere. It furthermore presupposes the existence of public victimhood or publicly acknowledged victimhood. One could argue that without the existence of some form of public acknowledgement, there is no basis for TJ

conceptually distinct, but partial overlapping is common. While in some instances of victim participation the categorisation along the lines of formal-informal, active-passive, individual-collective, direct-indirect and/or nominal-instrumental-representative-transformative may be clear-cut, in most cases the distinction might be more aptly interpreted as a matter of degree. In this sense, it is useful to think of a basic typology for victim participation as consisting of five interconnected categories:

(i) Formal – Informal

Formal victim participation takes place in official TJ mechanisms, where victims' roles and responsibilities are normed and regulated. Examples include the regime for victim participation in the proceedings of the ECCC in Cambodia, the ICC or before official truth commissions.²⁵ TJ processes often also generate opportunities for informal participation, such as in efforts emanating from social movements or NGOs. Examples include the Mothers of the Plaza de Mayo in Argentina or the human rights movement in Guatemala. Historically speaking, informal victim participation has been of great importance in pushing the TJ agenda forward.

(ii) Active – Passive

There is a difference between victims participating proactively in the process or simply benefiting from TJ processes as rights holders. Active roles include decision-making or testifying, and passive roles include being informed or notified about the unfolding process.

(iii) Individual – Collective

It is possible to distinguish between individualised and collectivised forms of victim participation, with some aspects of TJ functioning around individual or exemplary cases, and others addressing victims as a group or a collective entity. Also, activism and public mobilisation by victims around their grievances can be done individually as well as collectively, though the latter is certainly more common.

(iv) Direct – Indirect

Direct participation refers to the victim participating without the mediation or representation of that victim. Indirect participation refers to participation through a selected representative of an individual victim or of a group of victims, including forms of legal representation.

(v) Nominal – Instrumental – Representative – Transformative

This final aspect refers to the perceived political impact of participation. Does it serve to legitimise the status quo (nominal), does it provide new outcomes without victims influencing these (instrumental), do organised victims play a role in shaping the process (representative) or does the process driven by victims lead to the transformation of political realities (transformative)?

to take place, let alone for victim participation. Hence the present study focuses on what Brewer would refer to as public victimhood.

²⁵ Much more can be found on these examples in Chapter 4, below.



The typology does not distinguish between different aspects or pillars of TJ, but reflects distinctions in participation that can take place in relation to all aspects of TJ. However, as we can see, in relation to some measures, specific types of participation are more common than others. For example, victims often play quite a proactive role with regard to truth-finding, while the participation of victims in relation to justice processes is often conditioned by formal constraints, rules of evidence and procedures in the justice process. When analysing the case studies, an additional distinction can be made with regard to the specific aspect of TJ concerning what type of victim participation takes place, i.e. in regards to truth, justice, reparations or guarantees of non-recurrence, as well as in relation to specific mechanisms or measures established.

An additional distinction can be made in relation to phases of development of TJ processes or measures: **design phase**, **implementation phase** and **follow-up phase**. In the design phase of TJ processes or measures, possibilities of participation often emerge. This participation can take shape informally through demonstrations, conferences, public statements and other advocacy, memorialisation or documentation activities, but also in more formally established formats like official consultation mechanisms. In the implementation phase of TJ processes the possibilities for victim participation are contingent in part on the formally established mechanisms for participation, and in part on the mobilisation by collective and individual victims geared at enhancing implementation and its impact. Finally, in the follow-up phase of certain TJ measures, victim participation can play new roles, for example in communicating the results and outcomes of TJ measures, or in advocating follow-up to the recommendations produced by a truth commission, for example.

Victim participation in TJ can take many forms, and is best understood as a politically, historically and culturally shaped phenomenon, in which socio-economic factors also play a key part. The challenge of promoting victim participation in TJ relates to the ability to accommodate context specificities, while also offering principled support for subaltern victims. This is so that victims can improve their general position and situation through their participation in TJ efforts. If during the unfolding of TJ victims continue to suffer large degrees of political marginalisation, then redress remains far out of sight, and instead, the process is at risk of re-affirming the political order or social hierarchies that made the abuse possible in the first place.

In sum, the different case studies on which this report is based deal with various forms of victim participation that can be subdivided according to: the typology of participation (formal-informal, individual-collective, passive-active, direct-indirect); the specific mechanisms or measures in relation to which type of victim participation unfolds (trials, truth-seeking initiatives, reparation programmes etc.); and according to the phases in the development of the TJ process or measures (design, implementation, follow-up).

2.3 Victim Participation: Attributed Impact and Dilemmas

As David Taylor outlined in an IW discussion paper on victim participation in TJ, answers to the question of how victim participation plays out in practice vary significantly, with the most optimistic assessments referring to ‘real power’ and the most pessimistic ones to ‘empty ritual’.²⁶ In our analysis of attributed benefits and harms of victim participation, we can make a distinction between impact, either negative or positive, on the victims themselves and impact on the TJ process at large. These two identified aspects of impact (endogenous and exogenous) tend to be mutually reinforcing. Hence, the subdivision we present is not intended as presenting two separate spheres, but rather as two partially overlapping dimensions of the impact of victim participation.

To start with, the endogenous impact of victim participation (often cited as a benefit of victim participation for the victims themselves) includes ensuring that victims’ interests are taken into account, dignifying victims, trauma healing, and diminishing victim marginalisation (a facet also often expressed as ‘victim empowerment’). Including victims ‘can help reconstitute the full civic membership of those who were denied the protection of the law’ and ‘may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government’.²⁷ An independent panel of experts reported in their review of victim participation at the ICC that participation can ‘empower victims and contribute to their healing’.²⁸ Kenny supports this by saying 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’.²⁹ A victim-centred approach allows 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’.³⁰

The benefits of victim participation for the broader process of TJ include the strengthening of TJ’s legitimacy, boosting transparency, visualising hidden aspect of abuse and enhancing the

²⁶ Taylor, D. (2014) *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* Impunity Watch Discussion Paper, available at: http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf [accessed 30 April 2018].

²⁷ Orentlicher, D. (2004) Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, UN Doc. E/CN.4/2004/88, 27 February 2004, para. 11.

²⁸ REDRESS, Independent Panel of experts report on victim participation at the International Criminal Court, July 2013, para. 32, available at: <http://www.vrwg.org/downloads/1307independentpanelexpertsreportvictimparticipationicc.pdf> [last accessed 30 April 2018].

²⁹ Kenny, K. (2000) The Right to Participate in International Human Rights Fieldwork, *International Human Rights Network*, at 18, available at <http://www.ihrnetwork.org/files/3.IHRN%20Rt%20to%20Particip%202004%20full.PDF> [last accessed 11 May 2018]. See also, Lundy, P. and McGovern, M. (2008) Whose Justice? Rethinking Transitional Justice from the Bottom Up, *Journal of Law and Society*, 35(2): 265-292, at 281.

³⁰ Roht-Arriaza, N. (1995) *Impunity and Human Rights in International Law and International Law and Practice*, Oxford: Oxford University Press, at 19.



overall results of the TJ measures. As Sperfeldt has pointed out, the broader the gap between TJ processes and the victims, the more difficulty TJ encounters to establish legitimacy in the eyes of local and international stakeholders.³¹

Victim participation can help reduce the gap between the justice mechanisms and society, both physically and symbolically. De Hemptinne argues with respect to the Special Tribunal for Lebanon that victim participation can have a reparative, symbolic, and 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.³² The independent panel of experts in their review of participation at the ICC notes that victim participation contributes to developing ‘a strong connection between the Court and those most directly affected by the crimes it is investigating and prosecuting. Victims can provide important factual and cultural context regarding the crimes and their impact, which can also contribute to establishing the truth, as well as an historical record of events’.³³ Victim participation can also contribute to visualising ignored aspects of abuse, for example in relation to ‘victims of sexual and gender violence whose perceptions and needs are – in all cultures of the world – frequently ignored, presumed, or misunderstood’.³⁴

Possible benefits of victim participation extend to aspects of TJ other than criminal justice, such as reparations and guarantees of non-recurrence. Victim participation allows to identify victims’ needs and desires, and to customise reparation programmes accordingly. It can help to create spaces for non-participating victims to come forward. Victim participation can also help to design and implement measures related to guarantees of non-recurrence that respond to the context, the needs and the ideals of the victims, including for example the agenda of institutional reform processes that have to take place.

Thus, the attributed benefits of victim participation are very significant, both for the victims themselves as well as for the broader development of the TJ process. 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, whilst a number of important empirical studies provide a fuller picture of participation in practice,³⁵ these studies remain in the minority when

³¹ Sperfeldt, C. (2012) Cambodian Civil Society and the Khmer Rouge Tribunal, *International Journal of Transitional Justice*, 6(1): 149-160.

³² de Hemptinne, J. (2010) Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon, *Journal of International Criminal Justice*, 8(1): 165-179, at 167-168.

³³ REDRESS (2013), *supra* note 28, para. 4.

³⁴ Women’s Caucus for Gender Justice, Recommendations and Commentary for August 1997 Preparatory Committee on the Establishment of an International Criminal Court, 1997, available at: <http://iccnow.org/documents/WomensCRecomm.pdf> [last accessed 2 May 2018].

³⁵ See, for example, Hoven, E. (2014) Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia, *Journal of International Criminal Justice*, 12(1): 81-107; Tenove, C. (2013) *International Criminal Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*, Africa Portal, Research Paper No. 1, September 2013; Pham, P.N. et al. (2011) Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia, *Journal of Human Rights Practice*, 3(3): 264-287; and Stover, E., Balthazard, M., and Koenig, K.A.

compared to their theoretical or technical-legal counterparts. Added to this, the possible downsides of participation – what IW in an earlier report referred to as ‘the darker side of participation’ –, including potentially damaging consequences for victims, affected communities and TJ mechanisms, are under-explored.³⁶ There is a real risk that without better comprehension of the dynamics of victim participation on the ground, this core component of contemporary TJ policymaking may evolve into a hollow principle or an empty ritual.

Indeed, several authors have also pointed at the possible harm associated with victim participation, including insecurity, re-victimisation or re-traumatisation, and even disempowerment. When victims publically participate in a highly politicised and often controversial process ‘insecurity [...] emerges as one of the most crucial issues at stake’.³⁷ Mohan, for example, claims that criminal justice ‘is often too “thin” to support therapeutic goals’, with victims complaining that ‘token participation’ led to individual damage and a loss of faith.³⁸ Daly 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’.³⁹ Disempowerment and further marginalisation can emerge as a result of the difficulties associated with involving a representative sample of victims, including some while excluding others, but may also occur if victims’ expectations are not fulfilled by the unfolding TJ mechanisms. The attributed harms of victim participation for the institutions involved gear around the possibility that strong roles for victims might be seen as compromising legal guarantees regarding objectivity and impartiality, or refer to the lack of institutional capacity to respond adequately to the demands of large amounts of victims simultaneously.⁴⁰

It is furthermore important to take into account that present-day conceptions of victimhood current in TJ practice have been strongly informed by Western cosmopolitan cultural precepts and normative frames and do not always connect well to the experience of victimhood as lived by local victims. Rosalind Shaw makes a distinction between internationally established repertoires of victim participation and local interpretations of victim participation.⁴¹ Cultural friction may arise when victims are asked to perform victimhood in a way that is not consonant with their culture, for example by focusing on truth-telling in a context where most people perceive ritualistic commemoration as a more appropriate manner of dealing with the legacy of abuse and loss. Economic friction may arise when the performance of victimhood takes place in interactions and settings tinged by stark socio-economic inequality, setting the providers of TJ services deeply apart from the participating victims. In practice, such scenarios make it difficult

(2011) Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia, *International Review of the Red Cross*, 93(882): 503-546.

³⁶ See Taylor (2014), *supra* note 26, at 4.

³⁷ Brounéus, K. (2008) Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts, *Security Dialogue*, 39(1): 55-76, at 71.

³⁸ Mohan, M. (2012) ‘The Messaging Effect’: Eliciting Credible Historical Evidence from Victims of Mass Crimes, in Bergsmo, M. and C. Wui Ling (eds.) (2012) *Old Evidence and Core International Crimes*, at 183.

³⁹ Daly, E. (2008) Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition, *International Journal of Transitional Justice*, 2(1): 23-41, at 31.

⁴⁰ Taylor (2014), *supra* note 26.

⁴¹ Shaw, R. (2007) Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone, *International Journal of Transitional Justice*, 1(2): 183-207.



for victims to help shape an agenda that attends to their needs. For example, as demonstrated by Shaw, it may force victims into formally ignoring their current situation of abject poverty, and engage in a type of truth-telling participation in formal TJ mechanisms that is actually driven by the hope of eventually achieving some kind of economic aid. The result of such dynamics can be highly unsatisfactory for victims.⁴²

This is underscored by the acknowledgment that the roles of victims and victim organisations in TJ processes have been quite varied. In Guatemala and South Africa, victims have been, and continue to be the driving force behind TJ efforts. In other countries, the history of conflict has partially blurred distinctions between victims and perpetrators, or has even allowed perpetrators to try and frame themselves as victims. In some cases, conflict and poverty have caused such deep and widespread human suffering that making the distinction between victims and non-victims is difficult and may be perceived as contentious or arbitrary. Hence, the politics of victimhood and the modalities and rationale of victim participation differ greatly across contexts. The support for victim participation in TJ needs to take these contextual and political specificities into account, while at the same time understanding that TJ outcomes must fundamentally relate to repairing and redressing the suffering of victims.

In sum, key dilemmas around victim participation include how to embed victim participation adequately in TJ institutions, how to strengthen not only formal but also informal avenues for victim participation, and how to generate forms of victim participation that are culturally and contextually sound. Another challenge is how to establish forms of victim representation that avoid dividing but also homogenising victims.

In order to develop victim participation in the best possible way, careful attention to the voices and concerns of different – and diverse – groups of victims is needed, not only from the outset of the process, but also throughout its development. Victim participation is primarily a political process, not a technical or legal exercise, and its success is very much contingent on the ability of the process to generate empowering dynamics for victims, without extinguishing differences or cultural particularities.

⁴² *Ibid.*

3. Research questions and methodology

3.1 Goals, hypothesis and research questions

The country case studies that were developed in the framework of the IW victim participation research project shared the following research goals:

- Researching and documenting how a sample of victims and affected communities experience participation in TJ mechanisms.
- Analysing how these victims and affected communities perceive participation, including their views and expectations of it, identifying the meaning and significance of participation and non-participation.
- Producing a broad picture of how victim participation is experienced in practice, including by non-participating victims.
- Contributing to greater comparative understanding of the dynamics and effects of victim participation in TJ, as experienced by victims and affected communities.
- Formulating advice for practitioners and policy recommendations.

The present comparative report takes its starting point in the research hypotheses developed by IW at an earlier stage of the project that were presented in the IW Discussion Paper on Victim Participation. In that paper, the following hypotheses were identified:

- 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.
- Participation can take different forms during the lifespan of a TJ mechanism; more information to understand the basic ‘enabling conditions’ for participation is needed.
- Representation, indirect participation and notification are forms of participation.
- Some forms of victim participation may run the risk of simultaneously dividing and homogenising victims.
- Information and outreach are crucial for meaningful victim participation.
- To make it effective, victim participation in a TJ mechanism should be complemented by other measures and processes.

In order to operationalise these research goals and hypothesis in each of the country studies, a broader research questionnaire was developed. For this comparative report, the findings from the six country case studies were subjected to a common analysis by use of the following central questions: How do experiences on victim participation compare across different contexts? What can be identified as benefits and obstacles to victim participation in each context? What opportunities can be identified to enhance the transformative impact of victim participation in TJ? What measures can be taken to enhance victim participation in a context-specific and in a politically sensitive manner?

3.2 Methodology

In conducting the different case studies, three research methods were combined: semi-structured interviews, focus groups, and a review of relevant literature. Where possible, participatory action research techniques were applied. The case study research projects were coordinated by experienced human rights researchers, and with appropriate sensitivity to the impact and implications of the research activities and outcomes for those participating, including mental health and ethical considerations. Whenever possible, the case study research findings were given back to the communities and the victims through presentations, workshops or individual follow-up. Further details on the implementation of the methodological framework in each country, including the size and shape of the sample, can be found in each of the six case studies.

The bulk of the interviews and focus groups involved victims that were actively participating in TJ efforts, complemented by experts or other stakeholders in TJ and victim participation. The exception to this is the Kenya case study. Out of concern for victims' security it was not possible to conduct interviews with Kenyan victims directly involved in the ICC processes. Instead, the Kenya case study relied on secondary sources complemented by interviews with experts and human rights activists.

All of the studies were developed in close cooperation with leading human rights organisations and activists in the case study countries. In several of those countries where IW does not have a field office, the research was developed as part of a consortium effort, as was the case in Honduras, Kenya and Tunisia. In the case of Honduras, the Center for Research and Promotion of Human Rights (CIPRODEH) participated in the implementation of the research project. In the case of Kenya, the International Center for Policy and Conflict (ICPC) provided different forms of support for the implementation of the project. In the case of Tunisia, the victim participation research project was implemented by IW alongside KADEM and the Centre for Applied Human Rights at the University of York. All the different country research reports on victim participation can be found on the Impunity Watch website.

The present report was crafted based on a comparative reading of the different case studies, relating the findings from the country case studies with the broader conceptual approach and victim participation, which is outlined above.

4. A comparative analysis of experiences with victim participation

4.1 The political dynamics of victim participation

‘Many people did not participate because of the culture of distrust, because of fear that you give them your personal information and there will be retaliation, but above all because of disbelief that justice will truly be applied.’ [Honduras case study]

‘In the strongly worded filing, the LRV [Legal Representative of Victims] noted that surviving victims have received no justice from the Kenyan criminal justice system, and that if the ICC Prosecution now also walks away from them, it will betray thousands who have already had their lives torn asunder.’ [Kenya case study]

The case studies implemented in the framework of this comparative research project demonstrate that victim participation in TJ mechanisms has been for many victims either comforting or empowering, or both. In several instances, participatory elements in TJ have managed to break through victims’ – often longstanding – exclusion and isolation. For example, in Tunisia, victim participation was an important element in the design of the ‘Organic Law’ on Transitional Justice adopted in 2013, and victims played an important role in pushing for the recognition of the grievances of groups systematically marginalised by the totalitarian regime.

Indeed, the case studies show that participation in TJ mechanisms has been beneficial for most of the victims that have been able to participate; being recognised and heard gave them a sense of purpose. However, formal participation opportunities only include a fraction of the total number of victims, like in Cambodia. This leads to a rather unequal distribution of possible benefits among victims.

It is rather sobering to have to recognise that, in effect, the different case studies indicate that the recorded gains in terms of empowerment are fragile, and its long-term impact hampered by the lack of follow-up, feedback, and solutions to the cases and demands of victims. Though certain technical or formal conditions can play a role in facilitating victim participation (more about this is discussed later), it is clear that at its core victim participation in TJ is a political process. It is through the political implications of participation that the key impacts of victim participation, such as empowerment and accountability, can be obtained. It is also through these political dynamics that victim participation can be denied, become marginalised or have counterproductive effects for the TJ process at large, and for the victims in particular. For example, in Kenya, victims that joined the ICC registration process subsequently found themselves subject to strong domestic political pressure, which created a situation of vulnerability that continued, though with different implications, when the ICC cases collapsed.

Victim participation in the context of systems of exclusion

What all case studies demonstrate is that issues of victim participation cannot be disconnected or subtracted from the broader political implications of unfolding TJ processes. The legacy of massive abuse that TJ aims to address does not stand isolated from historical legacies of injustice and broader political processes. The root causes of the human rights violations are ingrained in such developments, and include deeply entrenched socio-economic inequalities, authoritarianism, racial discrimination, and the elites' disregard for the rule of law.

As evident for example in the case of Guatemala, most victims of the massive abuses come from segments of the population that have been historically disempowered and excluded. The severe violations that took place during Guatemala's internal conflict can be seen as an extreme expression of such unequal power relations and an attempt at perpetuating the entrenched privileges of those in power. The violent abuse was directed at defeating and annihilating those sectors of the population that the elite in power had identified and labelled as their enemies.

Thus, in such cases, the regime's abuse is best understood as an extreme manifestation of historical exclusion and at the same time serves to perpetuate this marginalisation. The point of departure from which TJ processes have to unfold is best characterised as one of deeply unequal and discriminatory power relations. The crucial existing political fault lines in a given society, often composed of elements like ethnicity, religious affiliation, gender or class, translate into obstacles for victim participation that need to be addressed. This is done in order to stop TJ from reproducing or reinforcing the exclusionary power dynamics that it was actually supposed to help overcome.

Victim participation acquires its meaning and rationale largely in the historical context of that broader process. This holds several implications. The first, and most important one, is that support for victim participation needs to acknowledge the existence of unequal and discriminatory relations and address this with measures ensuring that victims participate in the process on equal terms. In the context of Guatemala, this would have included the extensive use of Maya languages spoken in most of the victimised communities, and the participation of victim organisations – not just in the implementation of TJ measures as mere recipients, but also in the design phase and decision-making processes.

Another implication of the acknowledgement of context-specificity is that the meaning and significance of victim participation is to a large degree unique in each context. The modalities of victim participation have to be consonant with the context's historical legacies, while providing guarantees established in national and international norms. This means that victim participation has to resonate with the country's existing political culture and dynamics while offering the opportunity to enhance inclusiveness.

Taking account of political dynamics also connects to one of the key benefits imputed to victim participation: enhancing the political legitimacy of a TJ process. However, this is precisely where victim participation may expose and increase the vulnerability of victims. As the participation of victims potentially serves to symbolise or legitimise TJ processes that seek to determine who

was right and who was wrong during a conflict, victims in practice become exposed to strong political pressure – explicit or implicit – that aims to suppress their victimhood and challenge their credibility. How the legitimising function of victim participation can turn against victims is evident in the case of Kenya, where political pressure on victims became so strong that many lamented having registered for the ICC process.

Pacts of impunity

In assessing victim participation experiences, we have to take into account that most contemporary conflicts end with the establishment of power sharing arrangements and often the provision of amnesty laws.⁴³ Such negotiations offer former warring parties an avenue to reconvert into post-war political actors. Subsequently, such actors who are involved in abuses rely on impunity to insure their smooth reconversion to civilian life and protect their political leadership.

In sum, contemporary peace processes often rely on pacts of impunity to ensure their sustainability. In such cases, the political space for victims to participate becomes strongly constrained, since dominant political elites have important reasons to deny claims for justice and recognition. Post-conflict forgive-and-forget policies adopted explicitly or implicitly in countries as diverse as Algeria, Uganda, El Salvador, Lebanon, Nepal, Burundi and Mozambique are examples of this. In lieu of a ‘justice cascade’, the idea of an ‘impunity slide’ might be a more accurate rendering of the reality most victims are confronted with in such contexts.⁴⁴ Indeed, key political actors make use of the unfolding peace processes to safeguard their impunity, thus protecting their power and influence in the post-war period.

It is therefore crucial to place victim participation within the precarious political context of most unfolding transitions. The vulnerability of victims is particularly clear in the case studies on Kenya and Burundi. However, it is also evident in contexts such as Guatemala, where victims participating in TJ efforts have faced intimidation, threats, smear campaigns and harassment. Such a precarious situation puts a strain on the victims and exposes them to significant security problems and risks of re-marginalisation.

Thus, the political context of a given country may turn participation into something negative for victims. In the Kenyan context, victim participation actually increased victimisation and reinforced a lack of security by exposing them to political pressure and stigma. Without lasting guarantees of safety and security for participants, victim participation remains elusive or even impossible. The case studies show that in several unfolding TJ contexts, namely Burundi, Kenya and Guatemala, participation remains a high-risk venture for victims.

⁴³ See e.g. Selby, J. (2013) The myth of liberal peace-building. *Conflict, Security & Development*, 13(1): 57-86.

⁴⁴ For an elaboration of the idea of the justice cascade, see Sikkink, K. (2011) *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: Norton and Company.



In these contexts, it is key to acknowledge that participation in TJ efforts often places victims at the heart of unfolding political struggles, with all the risks this entails. How comfortable or equipped victims are when facing such challenges varies significantly, but what is clear is that the risks their participation generates need to be addressed by local efforts and international support for TJ.

Arguably, the most important issue however is trust. If victims have faith in the TJ process, the main condition would then be in place for victims to engage with it, and the likelihood for them to step up to participate is higher. If trust is lacking and victims doubt the integrity of TJ efforts and their ability to deliver, victim participation will be seriously compromised. The degree of trust that victims may have depends on their reading of the political context and their assessment of how much commitment national and international stakeholders have to the justice process.

Victims as political force

At the same time, the case studies show that empowering dynamics and important advances in TJ rarely occur without victims being a key force in them. For example, in Guatemala, the slow, painstaking advances that have been obtained in TJ over the past two decades have mostly been achieved through victim participation in different forms of anti-impunity activism, alongside the strong role of civil society organisations in the struggle. In Honduras, the establishment of a truth commission would have been unlikely if victims and civil society groups had not persistently insisted on the need for truth-seeking, to the point of setting up their own truth commission parallel to the official one.

It is important in this context too to acknowledge that ‘success’ of victims’ pro-justice efforts is itself dependent upon the broader socio-political dynamics. Victims are well aware that their attempt to gain influence in TJ processes and their outcomes have strong political consequences, and that it could sometimes backfire. These dynamics appear with most clarity around the participation in efforts aimed at taking perpetrators to trial. Since it is in this particular aspect of TJ that the personal and political interests of perpetrators are the most concretely threatened, victim participation in criminal justice initiative leads to the most virulent response, as is clear in the cases of Guatemala and Kenya.

The only cases in which such pressure on the victims seems to be less acute is when the political power of the perpetrators has diminished to such an extent that they are no longer capable of mobilising such an ‘intimidation counteroffensive’, as seems to be the case in the early days of the process in Tunisia or when the ECCC started its proceedings in Cambodia. However, even in the case of Cambodia, it appears that certain cases that would have affected current power holders are kept out of the ECCC process through political pressure.

Instead of recognising victims as a political force, contemporary TJ practice all too often tends to treat them as passive objects of violation and subsequently of inquiry, denying or obscuring the

fact that they are also agents of change. In that way, TJ may become a rather ‘technocratic’ process designed and managed by international professionals, using ‘technical’ modalities that remain detached from the realities that victims face. As a result, TJ processes rarely reach those of the victims that are the most marginalised and vulnerable. Thus, those most in need, but with limited capacity, often become the victims who are the least involved or informed.

In sum, the strong political implications of victim participation have to be a central concern in TJ efforts, both in terms of levelling the space for victims to participate in conditions of respect, dignity and equality, as well as in offering a range of guarantees that strengthen victims’ trust, while protecting them from possible negative effects and potential harm. Guarantees around personal security are an important component of that.

Recognising the importance of a ‘friendly’ political environment for victim participation also implies acknowledging that participation in the process, while a need and demand of the victims, can also be eminently burdensome for victims. The pressures victims face, the precarious conditions under which their participation takes place, and the uncertainty of the outcomes of a process often translate into increased disillusion and scepticism among many of the victims, with many of them withdrawing from the process or refusing to participate in it. In this sense, it is important to acknowledge that impunity constitutes the most profound obstacle to victim participation, since it allows for perpetrators to maintain a position of dominance that perpetuates the vulnerability of the victims. The recognition of the political stakes of participation implies providing victims with forms of support that can help them shape participation in their own terms, while mitigating the possible negative effects for the victims resulting from their political actions.

4.2 Victim participation and victimhood

‘The victims are the victims. I think we should not fall into the logic of classification. By what standard will we classify them? Politically? Ideologically? Chronologically? I think the victims should be studied as a whole, treated on an equal footing, applying the same methodology to [all of] them to achieve the same result.’ [Tunisia case study]

‘I have a different concept of victim. I consider that my father was a victim, but I differ from the academics. They say that victims are civilians who were unarmed, and poor things, and the re-victimization recurs. I think it’s not like that [...] I always vindicate my father’s militancy... The people had been pushed to the edge, to rebellion, and that is a universal sacred right [...] To deny a family member’s political participation out of fear of repercussions is to violate their memory. With this rationale, we have reclaimed that our victims were not passive victims, because the term victim depoliticizes actions.’ [Guatemala case study]

Crucial to the notion of victim participation is how victims view themselves, and how they are perceived by other stakeholders. The idea of victimhood is complex, and cannot only be captured by a more or less objective UN-established standard of ‘persons who individually or



collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law'.⁴⁵ It is also a highly political category that is shaped through socio-cultural and political interaction, and that connects to a country's particular history.

Furthermore, when considering victims of massive abuse, we are talking about people who were subjected to repression and sometimes annihilation for political reasons. The perpetrators often justified their actions through slander and defamation of the victims or groups to which the victims allegedly belonged. While being victimised, their existence, along with their identities, were simultaneously obliterated. At and around the time these events were taking place, it was often impossible to speak out against the perpetrators, because this would have entailed immediate retaliation and persecution. Thus, surviving victims were often made invisible, forced to suppress their victimhood for years or even decades. Victimhood often implies intense and prolonged vulnerabilities. At the same time, victims develop a range of different, divergent, and sometimes contradictory strategies in order to cope with their situation and move on with their lives.

The complexity of victimhood is enhanced further when victims interact with TJ processes in which they can rarely anticipate the retributive or restorative value of their suffering. Not only is the political outcome of the process contentious, difficult to foresee, and often precarious, the particular consequences for individual victims are even more difficult to anticipate. For one, in the aftermath of war, the scope of victimisation is such that, if measures are taken, they rarely suffice to address all wrongs and to include all victims in the same way. Hence, some victims might play crucial public roles, for example in relation to paradigmatic cases, including national or international trials, while others might remain largely invisible. Such dynamics may be inevitable, and have different sides to them. While those among victims who perform leadership roles may generate solidarity and open space for broadening acknowledgement, at the same time there is a risk of facilitating the emergence of an implicit hierarchy of victims, which can strengthen the marginalisation of some of the victims.

Unfolding political dynamics may also lead to the acknowledgment of certain categories of victims and not others. While emerging political conditions allow for the public recognition of some of the victims, individuals and families who may have suffered abuse at the hands of other perpetrators may not be allowed the same space for recognition. This is particularly clear for example in the case of Tunisia, where different 'sub-segments' of victims were ignored by some of the measures taken. Such developments were not merely technical omissions, but instead responded to a partisan political logic and post-revolutionary identity politics, whereby the idea was to use TJ to strengthen the currency of certain historical victimisation episodes, turning them into recognised sacrifices for the fatherland, while ignoring the political value of episodes of victimisation that affected other competing political groups. The implications of this for the TJ process in Tunisia were manifold. On the one hand, it contributed to creating a hierarchy of victims, expressed not just in a symbolic sense, but also quite concretely, as some victims were

⁴⁵ See UN Doc. A/RES/60/147, *supra* note 7, para. 8.

able to access compensation and others were not. On the other hand, it generated a public perception of TJ as a vehicle for political ascendancy, and an arena of political manipulation. This in turn negatively impacted perceptions of TJ in Tunisia. Such dynamics ultimately contributed to a gradual side-lining of TJ within the Tunisian political process.

Exclusionary dynamics often implied in TJ processes pose a severe risk for victim participation, as it creates valorisation of certain victims at the expense of others. The exclusion is sometimes made explicit in the mandate of the TJ mechanisms in place, or it can be understood implicitly. This is the case for example, of those victimised by non-Khmer Rouge perpetrators in Cambodia or of the victims of the Rwandan Patriotic Front (RPF) in Rwanda.⁴⁶ For those victims that become completely or partially ignored in TJ processes, the implicit message is that their victimhood is less truthful or valuable than that of others.

All of these dynamics around selection and hierarchy of victims impact on the ability and the willingness of victims to participate. Logically, victims tend to become disillusioned by the process of TJ when their expectations are not met. While some will respond to the disappointment through vocal protests, other victims prefer to withdraw from the process. The Honduras case study provides an example of how unfulfilled expectations ended up demobilising victims that were struggling for TJ measures to be implemented. A similar dynamic has unfolded around victim participation in Tunisia.

The lived experience of victimhood is complex, and cannot be reduced to a single element. A key element is the fact that for an individual victim as well as for groups and communities, the notion of 'victimhood' is always contingent and co-exists in a complex and contentious way with other socio-cultural and political identities. For example, in the case of Tunisia, numerous victims actually rejected the 'victim' label and instead sought to assert their agency and political identity as activists that struggled for a better future. Similar debates exist among groups of victims in other countries like Guatemala, and may lead to divergent perspectives among victims themselves. In this context, it is particularly empowering for victims to highlight some of their positive experiences as well. For example, TJ mechanisms should pay attention to victims' resistance to oppression, their fight for justice, and their achievements.

The interconnections of victimhood with other (political) identities can lead to some entanglements. For example, victims pertaining to different ethnic groups can operate separately and in antagonism to each other, particularly so when ethnic categories also played a role in how wartime violence was organised.⁴⁷ An additional complication is that the framing of

⁴⁶ See Ear, S. and Doung, V. (2009) Transitional Justice Dilemma: The Case of Cambodia, *Peace and Conflict Review*, 4(1): 18–36, and Thompson, S. (2011) The darker side of transitional justice: the power dynamics behind Rwanda's Gacaca courts, *Africa*, 81(3): 373–390, respectively.

⁴⁷ Thus, the performance of victimhood of Tutsis victimised by Hutu nationalists in the Rwandan genocide takes a very different shape from that of the Hutu victims of Kagame's RFP. As Susan Thompson points out, the Rwandan Gacaca courts are 'a mechanism of state power that works to reinforce the political power of the ruling RPF and to ply international audiences with the idea that Rwanda is "a nation rehabilitated" from "the scourge of genocide"'. See Thompson, S. (2011). The darker side of transitional justice: the power dynamics behind Rwanda's Gacaca courts, *Africa*, 81(3): 373–390, at 373. In Tunisia's TJ process, victim participation has become so entwined with partisan politics that insiders assign each victim collectively with partisan identities.



victimhood can even be a component of the perpetrators' narratives.⁴⁸ When (some of) the victims of the conflict engaged themselves in violence, becoming victims and perpetrators at once, the dynamic becomes even more complex as was the case for peasant families who participated in the civil patrols (PAC) or in the guerrillas in Guatemala.⁴⁹ Another complicated, and potentially harmful, dynamic can come into play when victim identities become manipulated for partisan purposes, as has arguably been the case in Tunisia.

Victimhood is a feature of identity that is subject to strong political pressures. Often, these pressures are directed at the victims to suppress their victimhood. Powerful stakeholders can use negation and intimidation to push victims towards the suppression of victimhood. Reverse pressure also exists when certain stakeholders may encourage or push victims to perform their victimhood in backing of certain political claims and aspirations. Both dynamics place the victim in a difficult position of performing victimhood in a politically-charged minefield of competing interests. Finally, some victims may also consciously seek to connect their victimhood to their political activism, as this may have been the reason they were victimised in the first place. Protecting victims from political pressure, or counterbalancing such political pressure by creating room for victims to operate as they choose (autonomously, on their own terms or in association with other political identities) is an important challenge that needs to be further incorporated and thought through when considering victim participation measures in TJ processes.

4.3 Victim participation in relation to transitional justice 'pillars'

4.3.1. Truth

'The victims are accused of being the victimisers; it's backwards.' [Honduras case study]

'Without the work by the [victims] organisations, there would have been twenty times fewer cases than the ones they [the official truth commission] managed to document [...].' [Guatemala case study]

Victim participation in truth-seeking initiatives was examined most specifically in the case studies of Guatemala, Honduras, Tunisia and Burundi. In spite of the valuable role that victims played in the truth-finding initiatives, a common denominator that emerges from these cases is that victim participation in truth-seeking implies enormous political, logistical and organisational challenges, and that, as a result, only a relatively small portion of victims could participate. The lack of trust in official truth-finding initiatives emerged as the single most important obstacle to

⁴⁸ For example, the Salvadoran military, responsible for the vast majority of violent abuse during the country's civil war, nonetheless represents itself as 'being victimized by communist terror' and as responding to that terror by stepping up to defend the fatherland. See, in this respect, Sprenkels, R. (2011) Roberto d'Aubuisson versus Schafik Handal. Militancy, memory work and human rights, *European Review of Latin American and Caribbean Studies* 91: 15-30. Uğur Üngör's research demonstrates how the Serb militia leaders justified ethnic cleansing by recurring to narratives of historical victimisation of Serbs by other ethnic groups. See, in this respect, Üngör, U.Ü. (2015) "Mass violence against civilians during the Balkan Wars", in Geppert, D., Mulligan, W., and Rose, A. (eds.) (2015) *The Wars before the Great War*, Cambridge: Cambridge University Press.

⁴⁹ Moffett (2016) examines these dynamics for the cases of Northern Ireland, Columbia and Peru.

victim participation in truth-seeking mechanisms in all of the three cases. The parallel functioning of a non-official but professional and credible truth commission initiative, as occurred in Guatemala and in Honduras, may be effective in opening up additional spaces for victim participation, while at the same time serving to establish a minimum standard for truth-seeking. The official commission has to take this into account and live up to it.

The experience in Guatemala exemplifies this dynamic most clearly. Before the official Historical Clarification Commission (CEH) started its work, the Catholic Church publicly presented *Nunca Mas*, an encyclopaedic report, resulting from an enormous truth-seeking effort involving thousands of victims and their families across the country. The Catholic Church-run project called REHMI was able to build on the Church's extensive nation-wide institutional networks. Therefore, it inspired enough trust among victims in order to generate a relatively high degree of participation while the country was still facing a polarised and repressive political context.⁵⁰ The *Nunca Mas* report provided the CEH with an extremely valuable basis for its own efforts. It also imposed a standard for quality and scope that inspired the UN-sponsored CEH, persuading it to be relatively ambitious in its efforts and outcomes, at least within the confines of the mandate the commission had been granted in the peace accords.

The CEH allowed for victims to participate as witnesses, providers of information, and proponents of recommendations, resulting in a report clearly reflecting victims' voices. The CEH also proposed in its recommendations that victims occupy a central role in applying its recommendations in the area of truth and reparations policies. However, this has not been fulfilled, since the Guatemalan state has done very little to comply with the CEH recommendations. Nonetheless, both REHMI and the CEH report have served as a basic reference for the involvement of victims and civil society organisations in on-going truth-finding initiatives in Guatemala, such as the identification of clandestine cemeteries, the search for missing persons and the documentation of abuse cases.

The model of having an unofficial truth commission functioning alongside an official one was also applied in Honduras. The Truth and Reconciliation Commission (TRC), which comprised three foreigner commissioners and two Hondurans, was created by the administration of President Porfirio Lobo (2010-2014) as part of the Tegucigalpa/San José Accord that sought a pacific solution to the crisis instigated by the 2009 coup d'état. The Truth Commission (TC), meanwhile, was created by the Human Rights Platform, a coalition of Honduran civil society organisations, as an alternative to the TRC due to lack of trust in the Porfirio Lobo administration. Unlike the case of Guatemala, in Honduras the interaction between the two commissions was virtually non-existent. This was due in part to timing as the report of the civil society commission was presented a year later than the one of the official commission. Also, the political circumstances were much less conducive to mutual exchange, with the official commission seen by many as too closely connected to the Honduran government to be objective. The case study research findings indicate that victim participation in the TRC was very limited, due to a lack of trust among many of the victims. In contrast, victim participation in the (non-official) TC was extensive. The main critique that participating victims in the TC have had is

⁵⁰ Nonetheless, REHMI only involved a fraction of the total number of victims.



that little follow-up has been given to the report in relation to victims but also in a broader political sense. The perception is that both truth commissions (TRC and TC) have been unable to rein in the on-going political polarisation in the country, which has perpetuated the political crisis and stalled further TJ efforts.

In the two Tunisian inquiry commissions that operated right after the fall of Ben Ali's regime (one on human rights abuses that occurred during the uprising and the other on corruption under the previous regime) victims played a role mainly in the form of providing information and acting as witnesses. Part of this participation took place through telephone hot lines opened by the inquiry commissions. However, a key problem rested in the formulation of the mandates of the inquiry commissions, limiting the scope of inquiry to specific periods and thereby was perceived by the public to favour some victims over others. However, the issue was addressed later on when the Truth and Dignity Commission was established with a much broader mandate to look into abuses committed between 1955 and 2013.

In the Burundi case study, victims complained about the very limited information and clarity on the recently established Burundian Truth and Reconciliation Commission (TRC). They also expressed that they could not participate as freely as they wanted out of fear of being persecuted. This was a fear that they explained was caused by the presence of perpetrators in positions of power, as well as the assumed malevolent motivations of the political elite to serve their own interests through the TRC. Though Burundians expressed the desire for truth-telling (and thus some form of participation at the TRC), they have simultaneously been fearful of the consequences that (publicly) speaking the truth may entail.

Given the political stakes at play at the Burundian TRC, it is furthermore unlikely that the Commission will remain immune from pressures, which may leave victims exposed and vulnerable as a result of their participation. With the unfolding political crisis, which has already generated hundreds of thousands of refugees, many communities in Burundi are mostly concerned about shielding themselves from the growing violence and threats. As victim participation in the TRC is likely not to be seen as conducive to increased security – but rather the opposite – the victims are faced with an impossible dilemma. Furthermore, unlike the cases of Guatemala and Honduras, there is no alternative or parallel unofficial commission victims can recur to in Burundi.

The different case studies show that unofficial, civil society-led truth-seeking initiatives are likely to be more effective in generating victim participation than official, government sanctioned instances. Why is this the case? The country studies suggest that this occurs in part by involving institutions as churches or NGOs to draw on existing networks able to involve people in remote places that might have been affected by the violence. As becomes amply clear from the case studies on Burundi and Honduras, victims have to overcome a large degree of distrust in order to recur to an official truth commission, while the outcomes of such an action remain very uncertain. In an extremely delicate political context like Burundi today, it is not unthinkable that the main concern for victims might be how to avoid participation, rather than how to participate. In such a context, victims need alternatives, and they need powerful and loyal (national and sometimes international) allies in order to diminish their levels of vulnerability.

Since participation in truth-seeking efforts is closely connected to trust, in those settings where there is limited or no trust in state-run institutions, an informal set-up might be more effective in involving victims. Things are generally different in situations of radical regime change where suspicion towards official TJ mechanisms is less acute.

To develop sufficient trust for victim participation to occur in a politically-charged context is a difficult matter. Victims are well aware that the stories they have to tell hold negative implications for powerful interests. Hence, they know that telling their story can increase their vulnerability. This perspective complicates the notion that truth-telling often has a positive impact for victims, by generating acknowledgement, empowerment and healing. Such positive effects might only be viable if sufficient trust exists between the truth-seeking institution and the participating victims, and if sufficient measures are taken to protect victims' integrity before, during and after the process. Indeed, any truth-seeking initiative must integrate such concerns and provide enough measures to shield victims from possible harm and retaliation. This is why complementing an official truth commission with an unofficial civil society-led initiative that victims in many contexts could more easily trust may constitute a potentially useful model that should be considered further, since it offers more possibilities for victim participation to materialise in a safer, flexible and more localised manner. It also reduces the possibilities of manipulation of the findings and instead could help set a higher standard for truth-seeking, particularly in settings where no complete regime change has taken place.

As shown in the Tunisia case study, which examined the process in its early days, victim participation in truth initiatives is likely to suffer if these initiatives are not inclusive of the entire scope of victims, and instead tend to focus on specific groups of victims, eventually leading to the divisions and devaluation of the entire TJ process. The lack of inclusion of marginalised or discriminated against groups, such as indigenous people in Guatemala, is also problematic, and should be pro-actively anticipated and dealt with in truth-finding initiatives. Any such exclusion may lead to the emergence of incomplete narratives that hinder a more nuanced account and understanding of the historical events and their root causes. This eventually prevents the adoption of adequate responses in terms of other TJ approaches such as prosecutions, reparations and guarantees of non-recurrence.

Finally, a key lesson that the Honduran case study clearly illustrates is that TJ for victims cannot be reduced to truth-seeking. Such a narrow approach is irreconcilable with victims' expectations and only generates frustration and disillusionment among them.⁵¹

⁵¹ Rosalind Shaw's work on Sierra Leone usefully elaborates on this point, examining the distance between local needs and perceptions of victims and the internationally-supported 'redemptive' truth-telling process. See Shaw, R. (2007), *supra* note 41.



4.3.2. Criminal Justice

‘To this day I have not found my daughter, and the perpetrators have not yet been punished [...]. When we presented the remedy of habeas corpus in the Supreme Court, the persecution against us increased.’ [Guatemala case study]

‘the Court [ICC] has delivered to the victims of this case not one of the three basic elements of justice that victims are entitled to expect: a formal declaration of the truth by the Court regarding the crimes committed against them [...]; to have those who victimized them held accountable; and to receive just and prompt reparation.’ [Kenya case study]

In the case studies for this research project, several experiences with victim participation in criminal justice processes were examined. Though these experiences have all developed within a framework of TJ, they pertain to different jurisdictions, namely domestic courts (Guatemala), a hybrid court (Cambodia) and the ICC (Kenya). In all three cases, the research identified specific challenges to victim participation related to the limited scope of the concerned trials, limitations in the flow of information around them, gaps in the legal frameworks on victim participation, and, most importantly perhaps, the mounting political pressure and security threats that victims may endure when facing perpetrators who still possess power. The enhancement of victim participation in judicial processes depends on robust security guarantees given to victims as well as their ability to rely on influential allies in order to effectively resist perpetrators’ challenges. Victim and witness protection regimes are a crucial part of such guarantees.

In Guatemala, several important domestic trials have taken place. Victim participation in these processes was shaped in part by the possibilities granted by the Guatemalan legal system and in part by the historical and political prominence and symbolism of the cases that were tried. Trials took place only a few years after the peace accords were signed, and indeed decades after the abuses occurred. Domestic trials were made possible by a combination of factors, of which the most important were: (1) continuous and relentless efforts by national and international human rights groups and victims associations to continue to pressure for justice; (2) decade-long efforts of the Inter-American Court of Human Rights translating into important rulings;⁵² and (3) the gradual – though still fragile – development of judicial independence in the country with the pivotal support of the International Commission Against Impunity in Guatemala (CICIG, by its Spanish acronym). Victim participation played a crucial role in Guatemala’s prosecutorial efforts, particularly in relation to the first factor described above, and subsequently went on to play a central role in the trials themselves.

One particularly important avenue for victim participation encountered in Guatemala was the status of ‘querellante adhesivo’ or co-plaintiff, which allows victims to join the prosecutor’s case,

⁵² The most important of these rulings concern the cases of Maritza Urrutia (27 November 2003); the forced disappearance of María Tiu Tojín (26 November 2008); massacre of Las Dos Erres (24 November 2009); Chitay Nech (Ruling May 2010); García y familiares (29 September 2012); and forced disappearance of Marco Antonio Molina Theissen (4 May 2014).

and have an active role in the procedure.⁵³ Experiences of participation through this mechanism have been mostly positive with co-plaintiffs being often able to break case deadlocks and to contribute to the strengthening of the legal process. It also functions as an important symbolic form of redress for the victims. The experiences with the status of the co-plaintiff in Guatemala stands out as one of the key positive elements in the compared case studies, and merits further consideration and development.

Unfortunately, political and security-related pressure on the victims in Guatemala remained very strong, and included orchestrated smear campaigns in domestic media, combined with covert threats and other forms of intimidation. The presence of the CICIG, UN institution which has operated since 2007 in support of Guatemala's weak judicial system, has functioned as a counterweight, and provided an indirect safeguard for victims participating in the trials.⁵⁴ The CICIG has indeed limited the ability of still powerful perpetrators and their allies to react to TJ progress with the kind of illegal actions these groups have used at other times. Moreover, CICIG has played a key role in supporting necessary reforms of Prosecutor offices and the courts, a process that has made prosecutions of human rights abusers possible.

The ECCC in Cambodia has demonstrated the potential and limitations of hybrid courts in matters of victim participation. It is important to highlight that the ECCC provided the victims with an important platform for redress, and that victims interpreted their experience of participation as empowering and positive. However, some significant challenges were identified. First, the victim participation regime was not clearly defined, allowing for hesitations in its implementation and leading to confusion and unfulfilled expectations among victims. An additional challenge is the practical limitations of the ECCC to address the concerns and cases of all victims, with the total number of victims far surpassing the number of those included in the participation regime. The ECCC experience is indeed seen as a missed opportunity to develop a stronger and innovative framework for victim participation.

Furthermore, and perhaps most fundamentally, the cases that could be tried are extremely limited. Hence, in practice, key cases of human rights violations linked to powerful domestic interests remain outside of the purview of the ECCC. This means that many victims are left out, and become effectively marginalised in the TJ process.

The Cambodian experience around victim participation in the ECCC constitutes a useful model to build on and develop further if the enumerated problems are properly addressed. Clearer contours for the victim participation system, improved outreach and follow-up, more attention to socio-economic issues, more adequate resource allocation and increased attention to victims whose cases fall outside of the jurisdiction of the ECCC are required.

⁵³ The Guatemalan Criminal Procedure Code allows the participation of victims or their representatives in criminal proceedings through the legal status of co-plaintiffs (Article 116), including in human rights-related criminal cases. More information can be found in the Guatemala case study.

⁵⁴ For background on the CICIG, see Briscoe, I. and Stappers, M. (2012) *Breaking the wave: critical steps in the fight against crime in Guatemala*, Impunity Watch and Clingendael, available at: http://www.impunitywatch.org/docs/Breaking_the_wave_Crime_in_Guatemala_Report.pdf [last accessed 11 May 2018].



The experiences of victim participation in the ICC cases connected to the post-election violence in Kenya succinctly highlight the challenges and dilemmas that the Court's victim participation regime entails. As it involved powerful domestic interests, the political dynamics that developed around the ICC cases exposed some of the gaps and weaknesses in its victim participation regime. In Kenya, challenges relating to taking the cases forward and the hostile attitude of the Kenyan authorities towards the ICC have significantly undermined victim participation. Negative factors include the perceptions from the outset that the ICC cases are 'falling apart'; a perception that the process is ethnically biased and that the Kenyan Government is manipulating it; and the lack of compensation and other measures to address the situation of often disenfranchised victims.

As charges have been withdrawn or not confirmed against suspects, the Kenya ICC process has materialised as one of 'non-justice'. In fact, victims' perception of the value of participation was very negative throughout the process. Indeed, the government's failure to take adequate measures to protect witnesses and victims (it was even suspected of encouraging the intimidation of witnesses and victims) led many victims to reconsider their willingness to participate in the ICC cases.⁵⁵ Furthermore, since victims could not obtain reparation through the process many became indifferent towards the ICC cases or chose not to participate.

The case study outlines how the ICC witnesses' and victims' protection in the Kenyan cases has generally been poor, in part because the Court lacks resources to protect them and in part because the ICC was slow to recognise that stronger protection mechanisms were needed in the Kenyan context. And when finally put in place, the protection mechanisms were set up in such a technically blind manner that they paid insufficient attention to the real dangers in the local political context. Furthermore, the fact that the ICC can only provide registered victims with protection inevitably presents security challenges for other categories of victims in a situation such as Kenya, where strong anti-ICC sentiments prevail among the political class and community members. The case study findings indicate that the lifespan of the ICC process in Kenya has been problematic from the viewpoint of victims, in particular because the length of the process has exposed them to significant uncertainty and security risks when the Court has been unable to fully protect them.

The failure of the ICC cases in Kenya, and its negative implications for participating victims, is likely to generate significant backlash for future ICC cases. It is important for the Court to extract the lessons that allow it to responsibly engage victims in politically-charged cases, without increasing their vulnerability by exposing them to persecution or harassment. The collapse of the ICC cases has translated into widespread victim disillusionment, which is likely to further undermine their trust in TJ processes and particularly in criminal justice initiatives.

The findings from the case studies suggest that victim participation in criminal justice processes exposes the participating victims to significant risks and political pressure. Indeed, the risk of

⁵⁵ Regardless of whether the accused and/or the Kenyan government are directly involved in the intimidation of witnesses and victims, it is important to note that participating victims in the Kenyan ICC cases have frequently been harassed. See Kenya study.

retaliation actions by perpetrators – especially those who still hold power – against victims is very high, which requires the incorporation of strong security guarantees in the victim participation regime.

Clearly regulated and well-communicated rules of engagement for victims can be very helpful to boost the process. Another key point is that justice processes need to develop further sensitivity to the plight of victims – beyond accountability – to include redress approaches in their work. For this, it is important for justice processes to connect to reparations and guarantees of non-recurrences initiatives, promoting empowering roles for victims in such adjacent efforts.

4.3.3. Reparations

‘The PNR (National Reparation Programme) is a slow-moving and politicized institution, so that people get tired and stop demanding what is owed to them. It is politicized in the sense of wanting to sell election votes. It shouldn’t be that way. This is another type of affront; people’s dignity is not to be played with.’ [Guatemala case study]

The case studies show that one of the key motivations for victims in the different countries considered to participate in TJ mechanisms is their demand for reparations, or some form of redress. The lack of effective reparation is one of the commonly shared frustrations among the victims interviewed in the case studies. Though victims certainly value aspects like truth-finding, convictions of perpetrators and guarantees of non-repetition, they also connect such achievements to their demands for redress and reparations, and rightly consider these difficult to separate from each other. Indeed, international human rights law solidly backs up such demands for reparation. However, in practice, reparations for victims in TJ often lag behind or do not materialise at all. Also, among many TJ practitioners there is still a tendency to ‘look down’ on these types of demands, or not value them as much as demands for justice, truth and non-recurrence. This is unfortunate, as it strengthens the inequality between different participants in the TJ process and it distances practitioners (with little socio-economic concerns of their own) from the bulk of the victims – many of them struggling to survive economically. The research shows that in the eyes of many victims the desire for participation is fuelled in part by the perception or the hope that they might receive some form of reparation at the end. In sum, it is important to acknowledge that reparation constitutes a legitimate demand that needs to be taken seriously when placing victims at the centre of TJ processes.

Unfortunately, victims in Kenya, Burundi and Honduras are still very far removed from obtaining any form of reparations. In the case of Cambodia, the case study highlighted the limited experience with reparations within the ECCC framework, which did not allow for significant victim participation. The clearest examples of victim participation in reparation efforts were found in the case studies of Tunisia and Guatemala, although even in these cases, the degree of participation is constrained by numerous factors.

When it comes to the broader political dynamics of the Tunisian TJ process, the temporary reparation measures implemented by the government in the wake of the country’s uprising



received mixed reviews from the victims who were interviewed for the Tunisia country case study. Professional rehabilitation or reintegration schemes were praised by some as a more dignified form of reparations, as they encouraged long-term capacity building, and implied an active role for the victims in rebuilding the country. However, such measures also sparked controversy among victims. Some of the compensation measures implemented in Tunisia were perceived by some of the victims as designed to favour mainly one particular category of victims associated with a specific political party. This therefore begged the question whether the reparations were meant to reward political activists or compensate suffering under the previous regime, independent of political affiliation.

The perception of political convenience of reparations was reinforced by the implementation of the professional rehabilitation plans included in the first amnesty decree, seen by opposition parties at the time as a primary means for Islamists to place their supporters in key government positions. Some of those who benefitted from this programme also pointed out its shortcomings, with jobs sometimes being unsuitable, or victims feeling stigmatised by their colleagues.

There were also practical problems related to accessing reparation mechanisms. Victims had to report to government headquarters with a medical certificate to confirm their status as victim; these are expensive and easily falsified. Standardised compensation for travel and medical costs, regardless of distance and severity, also meant that the compensation was excessive for some but insufficient for others. Poverty and marginalisation caused on-going hampering of victim participation. Furthermore, no effective measures were taken to assure the participation of women in the process, leading to strong underrepresentation.

The dynamics of victim participation in Tunisia's provisional reparation measures thus became largely determined by struggles over inclusion and exclusion of certain subgroups of victims. Such dynamics led to reparation measures becoming perceived by a significant part of the population as a form of political clientelism. This had a detrimental effect on victim participation in reparation efforts, and on the broader conception of TJ as a whole. It also led to the stigmatisation of victims who benefitted from the measure, and were accused of being unjustly rewarded because of their political affiliation.

In Guatemala, the victims evaluate the performance of the PNR quite negatively. The scope of the programme does not correspond properly to the scope of reparation needed, both in term of benefits as well as in coverage. Many victims as of yet have not received benefits. Moreover, instead of incrementing the budget for the programme, the Guatemalan government has gradually made further cutbacks, to the extent that the bulk of the present budget for the programme is absorbed by the salaries of the staff and operation costs, and only a fraction of the funds actually reach the victims. Furthermore, the case study findings indicate that the choices both for staffing the programme as well as for choosing the communities to be attended to have responded mostly to political criteria. In other words, these choices primarily serve to strengthen the government's support base, and not to maximise the benefits of the victims. Though following a political logic slightly different from the one in Tunisia, also in Guatemala reparations have in practice become permeable to clientelism.

Part of the reason why this was possible is that victims and victim organisations in Guatemala have had no influence over the coordination and implementation of the programme, which for all practical purposes is fully run by the government. This experience demonstrates how important it is for reparation programmes to incorporate institutional guarantees that assure the reparation programme cannot be subject to partisan interests. The participation of victims in the coordination of the programme could help assure victims' right to participate in the design and implementation of the programme. It also demonstrates how imperative it is for the programme to develop a solid financial basis, to avoid constantly being subjected to opportunistic cutbacks that in the case of Guatemala have ended up hollowing out the programme.

The experience of the PNR in Guatemala shows how the State may in practice end up implementing a reparation mechanism in much the same way that other assistance and development projects might be implemented in the local context. The victims are solely treated as beneficiaries, the bulk of the available resources remain in the hands of state operators, and the project can easily become subject to the same kind of patronizing approaches or clientelist dynamics that development projects regularly suffer from in the hands of a dysfunctional state. The PNR serves to prop up Guatemala's uptake of the TJ agenda, and victims serve to legitimise the PNR, but the programme results remain far removed from its stated aspirations. By law, the programme in Guatemala will continue until 2023, so there is still time to put the programme back on the rails and make it work for the victims. Significant room for victim participation should play a central role in this reform process and its outcomes.

4.3.4. Guarantees of Non-Recurrence

'[...] they say that there were hundreds of victims, but there were no victims.' [Informant from Honduras case study who denies the abuses committed during the coup]

'I am a victim, a person in a wheelchair. What do you think I can do? I have no means to act. I should not be forced to assert my rights, to fight to get them. Logically, this should be done alone. As a victim, all that I should do is worry about my health, not run after my rights.' [Tunisia case study]

The case studies do not refer directly to experiences of victim participation with regard to guarantees of non-recurrence. A partial exception can be found in the case study on Guatemala, which highlights the strong role that victims play in disseminating the history of the conflict and in educating future generations. While this is mostly done by means of local and more or less informal activities, it is also done, with some limited impact, through the official government entities in charge of education and historical documentation.

As pointed out by Saffon and Tacha, experiences of victim participation in guarantees of non-recurrence as of date are still quite rare. This corresponds also to a broader appreciation that the

pillar of non-recurrence is, as of yet, the least developed aspect of TJ.⁵⁶ In part this connects with the common conception of non-recurrence not as a measure or a series of measures, but as an objective of TJ.

Nonetheless, the participation of victims in the framework of guarantees of non-recurrence provides a promising new avenue for enhancing the effectiveness of TJ processes. For example, victims can play a role in helping shape institutional reform processes, and in shaping educational curricula to include valuable new human rights perspectives. The creation of a strong and resilient organisational network representing victims' interests can be seen as a measure of non-recurrence in itself, as it can help provide political counterweight to measures and interests that might increase vulnerability towards abuse. It also provides an avenue for victims' voices to play a role in the political development of the country.

Promoting an active role for victims in guarantees of non-recurrence dovetails with Pablo de Greiff's focus in his report on guarantees of non-recurrence: "Guarantees of non-recurrence" should be considered not as a rhetorical device but as an object of policymaking',⁵⁷ thus leading to much more substantial and concrete measures being implemented in the context of different unfolding TJ processes. Since 'there is no such thing as a general non-recurrence policy [...], an effective policy designed to prevent systemic violations will need to adjust form to function and choose the proper instruments'.⁵⁸ De Greiff particularly highlights the important role of civil society in the prevention of human rights violations, proposing a range of measures around protection, (legal) empowerment and an enabling environment. Together, these would enable civil society, including victims, to step up their contribution to TJ, particularly in the area of non-recurrence.

4.4 Victim participation in different phases of transitional justice

As outlined in Chapter 2, victim participation can connect to different phases of development of TJ processes or measures: the design phase, implementation phase and follow-up phase. Most of the country case studies focused on the implementation phase, since this is the phase in which, in spite of all the problems identified in this study, victim participation tends to take place most intensely and consistently. In contrast, victim participation experiences in the design phase are much more limited – with other stakeholders like experts and the international community taking control of the process –, while the follow-up phases, on the other hand, tend to be weakly developed in an institutional sense, leaving the burden of follow-up to victims and civil society groups, often with limited leverage and resources.

⁵⁶ Saffon, M.P. and Tacha, V. (2013) La participación en las medidas de justicia transicional. Un estudio comparado, Bogotá, Centro de Estudios de Derecho, Justicia y Sociedad –DeJusTicia–.

⁵⁷ Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/30/42, 7 September 2015, summary, available at <http://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf> [last accessed 11 May 2018].

⁵⁸ *Ibid.*, para. 27.

The most important experiences with victim participation in the design phase are reflected in the Tunisia and Burundi case studies. In both cases more or less extensive official consultations took place as part of the TJ process. In spite of their flaws, and the strong political complexities that have emerged in the implementation phase, it has to be acknowledged that victims qualify the consultation experiences and initial outcomes as quite positive. In turn, what they are concerned about is what has actually been done with the outcomes of the consultation process. If the consultation process succeeded in bringing the victims and institutions closer together, the way the follow-up was managed, tended to drive them apart again and kept them in the dark as to what had happened to the input they had provided.

The experiences of Burundi and Tunisia also indicate that victim participation in consultation processes requires careful attention to issues of representation, and to the inclusion and exclusion of (sub)groups and individuals. In the case of Tunisia, for example, the lack of attention to gender aspects led to a strong underrepresentation of female voices in the process. In the case of Burundi, the lack of involvement and representation of victims in an organised manner, in combination with the lack of outreach, led to the consultation process not being widely known or recognised among victim communities.

Nonetheless, in the case of Tunisia, the victims highlight that they contributed substantially to the consultation process which eventually resulted in the ‘Organic Law’ on Transitional Justice. Though discontent exists with the results of the law and how it is implemented, this does qualify as a strong experience for victim participation in the design phase. It is worthwhile looking at how this process could be further improved in other settings by making it more inclusive; paying attention to issues of representation; improving follow-up and victims’ involvement in subsequent phases; stepping up outreach; and increasing transparency of the consultation results.

In the case of Burundi, the methodologically flawed consultations on TJ that were held in 2009 did little more than provide a ‘snapshot of popular demands’. Unfortunately, these demands have since been largely ignored. In fact, the whole TJ process did not start to come off the ground until years later, in 2015, when the political situation had changed quite dramatically, and the country appeared on the brink of a new cycle of violence. It is highly questionable to what extent the consultation of 2009 holds any relevance today. In order to be able to speak of victim participation in the design phase of Burundi’s TJ process, a new form of consultation would have to be developed and updated to the present circumstances.

The case studies demonstrate that the lack of participation in the design phase already puts victim participation at a disadvantage in subsequent phases. It leads to a lack of sensitivity for victims’ needs, and it makes TJ measures even more vulnerable to political pressure. In practice, what unfolds in the implementation phase is often a struggle of victim and civil society organisations to keep TJ measures alive and make them as effective as possible, albeit in a generally unfavourable political climate. Such dynamics are evident for example in the slow dismantling of the PNR in Guatemala, or in the stalemate around the truth commission reports in Honduras.

It is in the implementation phase of TJ that victim participation can hardly be eluded, since virtually all of the implementation aspects rely on victims or have to deal with victims in one way or the other. Hence, the bulk of the analysis offered in this report refers to the experiences with victim participation in the implementation phase. As clarified above, victim participation during this phase often puts victims at the mercy of strong political pressure, particularly in the case of international and domestic trials touching upon powerful domestic interests. Even in instances where victim participation could be organised in a relatively straightforward manner, like around reparation programmes, adjustment of educational curricula, commemorative measures and other similar initiatives, victim participation provisions often do not exist or may not be endowed with sufficient leverage. The reparation programmes in Guatemala and Tunisia are illustrative of these dynamics.

In sum, in the broad panorama of implementing TJ measures, victim participation provisions are often limited or flawed, while the lack of trust in official and/or state institutions together with limited information undermines the potential that different measures could have offered for participation. Instead, civil society-organised participation can be much more effective in mobilising the trust necessary for effective participation. One way this materialises is by civil society organisations closely connected to victim groups organising parallel measures of TJ that, even though lack the official status of state-sanctioned measures, are nonetheless able to bring the agenda forward. The truth-finding reports in Guatemala (REHMI) and in Honduras (*La voz más autorizada es la de las víctimas*) are examples, though with divergent impacts.

In most countries, civil society organisations closely aligned with victim groups also often function as entities that monitor the progress and impact of TJ measures, sometimes in association with international organisations. This monitoring role is essential as civil society organisations and their international supporters tend to make efforts to include the voice and perspective of the victims when measuring the actual outcomes of the TJ processes and policies. It also demands international organisations to be aware of the pitfalls of possibly ‘crowding out’ the victims – by taking the role of speaking on behalf of them or by strengthening the elitist character of TJ.

The ‘aftermath’ of TJ is generally not characterised by the fulfilment of TJ objectives, but rather by the abandonment of the TJ agenda due to political pressures or ‘lack of political conditions’ to move the agenda forward. As a result the victims and civil society organisations, in spite of disillusionment, often continue to push for follow-up and completion of TJ processes, but without much official support, neither on the national nor international level. The lack of attention for the follow-up mechanisms is an endemic problem in the field of TJ, and more structured and intensified attention to victim participation in this phase could indeed plausibly be conducive to strengthening the follow-up aspects. The fact that victims and civil society groups often already play a key part in this, even without much institutional backing, testifies to this.

In sum, the main issue with the design phase is whether victims will be taken into account to provide input on the set-up of the TJ process at all, which is certainly not a given. Subsequently, in the cases in which victims are allowed to participate, it often remains unclear what happens

with their input afterwards. This undermines the trust that may have been built in the consultation process and leads to scepticism and deception in the process. By now, there have been enough experiences with consultation processes to make victim participation in the design of TJ a mainstream requirement, and to develop specific victim-friendly follow-up mechanisms after the consultation process.

The main issue with the second phase, that of implementation, is the scope and quality of victim participation, which can vary significantly across cases, and which, as we have seen, is strongly dependent on political factors.

The key issue with the third phase, that of follow-up, is that this phase often lacks institutional backing, with victims and civil society organisations attempting to keep the agenda going, while political will and international support has diminished significantly. The follow-up of TJ measures qualifies as a common weak spot. As a result, stakeholders involved in follow-up processes, including victims, are left in an increasingly disadvantageous position.

5. Conclusions

5.1 Main findings

‘The victims have suffered numerous harassments, which have made them lose confidence in everything and they find themselves unable to claim their rights. Physically, psychologically, they do not have the strength to do it, especially since they know that the chances are slim that their requests will be met. [...] You can continue to sensitise them but there is a huge crisis of confidence.’ [Tunisia case study]

Victim participation in TJ mechanisms can take many different forms and shapes, and have diverse outcomes and effects, both positive and negative. Among the positive effects, it is possible to identify recognition and inclusion of victims’ concerns in TJ measure (including their outcomes), closer links between victim participation and forms of redress and reparation. All of this translates into victims’ empowerment. Among the negative outcomes we can distinguish victims being targeted for renewed abuse, disillusionment, continued marginalisation of victims (and/or certain subgroups of victims), instrumentalisation of victimhood for partisan interests, or the downplaying of the socio-economic plight of victims, all of which translate into increased vulnerability for victims.

In their diversity, all of the six case studies considered (Burundi, Cambodia, Guatemala, Honduras, Kenya, and Tunisia) show that recent experiences with victim participation have entailed both positive as well as negative effects for the wellbeing of victims. However, the degree of either positive or negative impact varies significantly, with Kenya standing out as a case in which victims’ vulnerability actually increased as a result of participation; although some positive aspects around victim participation were documented initially. These were obliterated by the subsequent developments in the ICC cases, which eventually left the victims out on a limb. Beyond Kenya, the other cases show mixed outcomes, with the empowering dynamics of participation for victims involved showing an identifiable, albeit not a very solid trend.

Victim participation has also rendered quite distinct outcomes for different categories of victims. For example, the victims that became protagonists in the courtroom featuring prominently in the Cambodia case study have experienced benefits that the bulk of victims in Cambodia (not involved in court cases) have not experienced, or at least clearly not to the same degree. In contrast, many of the Kenyan victims that participated ended up wishing they had not.

Formats, possibilities and constraints of participation also create a significant variety of outcomes for the victims, necessarily turning most claims (with regard to victim participation) in a broader sense into reflections of general trends, but not of all experiences per se.

Indeed, as the most important general trend, victims (broadly conceived) work hard to influence the TJ process, in particular its official or state-sanctioned mechanisms, and to obtain benefits from these mechanisms. It is not surprising then that they also have a hard time keeping faith in the process. The more dysfunctional the TJ process, the more victim participation may become steeped in scepticism. In the case of Burundi, victim participation is infused with a particularly

high degree of uncertainty connected to the political context, and the lack of trust the victims have in the process. It is too early to draw any conclusions in relation to the effects of this dynamic on Burundian victim participation, but victims' vulnerability is indeed a key matter of concern to be addressed in the process.

Though the lack of consideration for victim participation in the set-up and implementation of TJ also sometimes responds to a lack of knowledge, the case studies suggest that it mostly responds to a political logic. This means that key decision makers and political stakeholders are reluctant to share control over key aspects of the transitional processes with subaltern groups. Most of the negative outcomes of victim participation are associated with victims becoming subject to political pressures, which they are unable to effectively counteract or counterbalance, disillusionment connected to the many constraints on their participation and the limited outcomes of TJ efforts for the victims.

5.1.1. Vulnerability

The most important finding from this comparative report is that victim participation, when it becomes meaningful, exposes victims to significant political pressures for which the victims often do not have available adequate responses or defences. Hence, the development and implementation of a comprehensive agenda for victim participation in all aspects of TJ can only be truly effective if it is accompanied by strong protection mechanisms for victims that truly help them to resist such pressures. For this, formal mechanisms and regimes are important, but insufficient. Victims need to be able to build on the support of national and international allies that they can trust not to leave them behind when the 'going gets tough'. This (external) support infrastructure for victims is thus far insufficiently developed.

The above is true for all aspects and stages of TJ, but becomes most evident in the implementation of key features of TJ. These generate the most concrete political impact, and are meant to break with impunity. What kind of political pressures might come into play by (international) prosecutions, and how difficult it is to counteract these, is clear in the Kenya and Guatemala case studies. Though some victims and human rights activists can remain committed to bringing cases forward in spite of political pressures and intimidation, it is important to acknowledge that many victims disengage with participation as a result of fear.

Victim participation in potentially controversial cases has to be carefully accompanied by measures of confidentiality and a range of protection and security measures. The local legitimacy of the process has to be carefully considered, constructed and earned by those involved, in order to prevent perpetrators from framing the process as 'foreign intervention', with the victims being presented as agents 'manipulated by foreign interests' or involved in 'treason'. Hence, the need for stronger (outreach) strategies that take into account the political context in which TJ is implemented in order to develop a strategy able to counteract harmful political propaganda and smear campaigns geared at undermining TJ and demeaning victims.

5.1.2. *Scepticism*

Another crucial finding of this comparative study is that, more often than not, victims are sceptical about the outcomes of the unfolding TJ process. For one, they doubt whether it will be able to definitively tackle prevailing impunity. Indeed, so many examples exist where this has not been the case. To illustrate, the Guatemala genocide trial led to a conviction of Rios Montt after many years of hard work by human rights groups and victims. However, this sentence was subsequently overruled by the country's Supreme Court. In other countries, like Honduras or Burundi, the possibility of effectively trying perpetrators of human rights abuses is still very far removed. Victims are concerned with the continued political dominance of perpetrator factions, and of the limited political will of international stakeholders to actually do something about it.

In addition, victims are sceptical about TJ processes effectively addressing their pressing concerns. Most victims live in dire socio-economic circumstances, worsened by the impact of violent abuse. Despite this, reparation measures tend to be non-existent or minimal. Decision-makers often use the pretext of lack of government funding or the high number of victims to deny individual compensation or payments for the victims as shown in the case of Cambodia. And in those cases in which victim reparation programmes nonetheless are set up, like in Guatemala and Tunisia, the outcomes tend to be very disappointing in the eyes of the victims.

Thus, victims' scepticism is well-founded and understandable. It must also be pointed out that it does not preclude the possibility of victim participation in TJ, as shown in the many experiences with victims participating in small-scale, mostly local initiatives on truth finding and remembrance (as highlighted in the Guatemala case study). The scepticism does however make it more difficult to organise victims' interests more consistently in order to gain leverage over TJ outcomes.

In sum, victims often consider it unlikely that core elements of TJ such as convictions for perpetrators and reparations for victims actually materialise. This position reflects both what victims may think of the real-life political constraints present in their country as well as global trends and limitations in the field of TJ. The possibilities for strengthening victim participation thus depend on generating a dialogue between victims (including victim organisations) and (international) stakeholders that would help to restore the somewhat tarnished reputation of TJ.⁵⁹

Though a crucial factor, it would be a mistake to attribute the current vulnerability and limited participation of victims solely to the strong political pressures victims are facing in unfolding TJ processes. The increasing marginalisation of victims also correlates to the fact that local grassroots actors (including victims) are losing ground in TJ processes and that international 'experts', technicians and donors mostly dominate the agenda instead. It is therefore critical to rehabilitate and reinforce informal ways for victims to participate so that they set their own

⁵⁹ For further elaboration on what has been called a crisis of legitimacy and effectiveness in TJ, see Nesiah (2016), *supra* note 3.

rules of participation, and which allows them in many contexts to actively push for TJ and shape the process.

Moreover, it appears in the examined case studies that the space to participate offered to victims by official TJ bodies is often overly controlled or regulated and tends to reduce their role to passive recipients of services and benefits. Conversely, when victims take action outside of formal TJ mechanisms, they operate like a real political force that has the potential to significantly influence the process. While additional research is still required in the area of informal participation and its relationship to formal institutions, two salient trends could already be identified when examining victim participation dynamics in our cases studies. On the one hand, nothing seems to be more empowering for victims than their ability to organise and advocate for their rights as fully autonomous political actors. On the other hand, the stronger victims' activism and informal participation is the more effective and meaningful their participation in official TJ processes would be. Another area that requires additional research in the future, which emerged when completing the case studies, is victim participation in the transition's broader political process. This includes looking at victims' existing or potential role in processes such as peace negotiations and constitutional building, and how such role may correlate with their involvement in TJ.

Hence, any progress in the field of victim participation requires more than a technical approach or a strong normative framework. It entails developing a concrete support infrastructure for victims and protecting their free space for activism. It also requires an enhancement of national and international solidarity with victims, strengthening networks of victims' organisations as well as providing them with the additional resources and political support that would allow them to operate autonomously.

5.2 Attention for specific identity groups and gender

To the extent that victim participation provisions and dynamics are able to include all different groups and subgroups in the process, victim participation stands to become both more resilient as well as more effective towards developing empowering dynamics. Though not all of the case studies make explicit reference to gender dynamics in victim participation in different TJ mechanisms, it is clear that gender politics plays an important role in structuring participation. In Tunisia, the Truth and Dignity Commission has since its inception engaged in significant efforts to address the lack of inclusion of women victims, which was identified as one of the shortcomings of victim participation in the previous phase. In the study on Guatemala, the extent to which women play a central role was highlighted. This role is evident in victims' organisational efforts and in giving follow-up to the TJ agenda. Nonetheless, the marginalisation of victims of sexual violence has only recently begun to be questioned in the process. In the case study of Burundi, gender dynamics, including the salience of militarised masculinities, was also identified as an important obstacle to victim participation.

Special attention and consideration is also warranted for specific identity groups, such as indigenous people, ethnic groups, people from certain regions, etc. Pervasive political inequalities can easily become reproduced in victim participation dynamics, with indigenous people in Guatemala needing to overcome numerous barriers in terms of language and prejudice in order to claim their rights. In Tunisia, years of dictatorship contributed to the stigmatisation of people from certain regions of the country as backwards and insubordinate.

The urban-rural divides also play a key role in the unfolding of victim participation. Though in many conflicts the rural population suffers the brunt of the violence, rural victim participation tends to lag behind in relation to that of urban victims. Rural victims also often face more obstacles in terms of distance, educational barriers and prejudice to participate in the TJ process. Hence, victim participation arrangements in TJ must apply principals of inclusiveness, as well as offering specific groups that might need it additional resources that make participation on equal terms possible.⁶⁰

5.3 Final remarks

In recent years, victim participation has developed into somewhat of a ‘mantra’ for TJ. There is growing recognition that the objectives of TJ demand sustainable efforts of empowerment of victims and civil society organisations. This development should translate into fresh opportunities for victims to enhance their influence in TJ processes. However, victim participation is often pushed as something that needs to be done, but without much thought going into how it is being done. Examples in which formally acknowledged victim participation has effectively increased victims’ influence in TJ processes are still rather scarce, and the actual impacts of participation – including benefits and obstacles for the victims – are insufficiently measured and documented.

This comparative study underscores the urgency not only of granting victim participation a larger role in different aspects of TJ, but also of developing more concrete international policies to make this possible. The findings offer insight into how TJ mechanisms and processes can be improved in order to advance the positive aspects of victim participation. Concrete attention for how to strengthen victim participation not only in different TJ mechanisms, but also in different institutions, networks and civil society initiatives concerned with TJ is strongly needed.

As the case studies demonstrate, it continues to be a daunting task for victims to achieve real impact in the TJ process. Much is to be gained by allowing for meaningful participation in different stages and mechanisms of TJ, offering victims not just a symbolic role but real influence and leverage in decision-making on TJ. Most crucially, effective and meaningful victim participation in justice processes requires victims to have trust in the process. This trust is often diminished by historical experience, both on a national as well as an international level. Hence,

⁶⁰ IW together with PAX is currently implementing a project to strengthen rural victim participation in Guatemala and Colombia. The development of dedicated proposals and methodologies to enhance rural victim participation is one of the expected outputs of the project.

to limit the victims' vulnerability, it is necessary for them to be able to rely concretely on powerful national and international allies and protection mechanisms should they become subjected to pressures as a result of their participation. Clearly regulated and well-communicated rules of engagement for victims can be very helpful to boost the process. Another key point is that justice processes need to develop further sensitivity to the plight of the victims beyond accountability to include redress in their performance. For this, it is important for justice processes to connect to reparations and guarantees of non-recurrences, promoting empowering roles for victims in such adjacent efforts.

Nonetheless, it is important to affirm that victim participation alone cannot 'save' TJ. In other words, the quality of TJ does not depend solely on victim participation, but without participation, the quality is likely to be very low. Stronger attention for victim participation has to be accompanied by other substantial efforts aimed at increasing legitimacy and effectiveness of TJ processes.⁶¹

An agenda for the enhancement of victim participation in TJ has to be geared at strengthening and broadening the positive impacts of victim participation, while offering protection or remedies for possible negative impacts. It is important to place general considerations on the question of victim participation in relation to the actual results obtained in recent years in TJ processes, which have often been very limited and politically compromised. Victim participation is contingent in part on the trust that victims have in the TJ process coming to a just end. Since this trust is currently low in most contexts where TJ processes unfold, the contemporary outcomes of TJ processes for victims have been disappointing. Regaining the trust of the victims is one of the key challenges that the field of TJ currently faces.

Listed below are some elements to be considered for an agenda towards the strengthening of victim participation in TJ. It is based on different issues brought forward by victims in the case studies and the findings of this report. These elements require further deliberation with victims and victim organisations as well as other stakeholders.

These elements include:

(i) Enhancing trust

TJ institutions will need to invest in building up victims' trust through an enduring recognition of their rights and a commitment to deliver effective and substantial outcomes. In support of this trust, when victims are weakened by unfolding political developments, national and international TJ actors need to make protection and support of victims a priority.

(ii) Increasing national and international support of victims' efforts to organise

In light of the complementarity between formal and informal participation, civil society organisations, policymakers and donors must increase their support for victims' activism and advocacy, and their unofficial initiatives to pressure official TJ bodies or complement their work. Such support includes stepping up national and international solidarity efforts with victims,

⁶¹ Nesiah (2016), *supra* note 3.



assisting the creation of networks of victim organisations and providing additional resources and political support for the victim's movement.⁶²

(iii) Victim participation in light of the ICC experience

The experience with victim participation in the Kenyan ICC cases offers some crucial lessons, particularly on the question of security and protection. It also leaves open the question of the ICC responsibility towards victims in cases that have been closed. A thorough evaluation of victim participation in the Kenyan ICC cases, which also takes into account the aftermath of the closed cases, should help the ICC strengthen its victim participation approach.

(iv) Addressing impunity

Impunity has a strong detrimental effect on victim participation, as it grants perpetrators room for manoeuvre, which ineluctably undermines the political position of victims. If victims are successful in advancing TJ, this can lead to perpetrators acting to achieve re-marginalisation, intimidation or even engage in renewed violence. Hence, impunity, the resulting power position of perpetrators, and protection of victims need to be addressed as to prevent these dynamics. Effective security and protection mechanisms need to be acknowledged as a crucial element of victim participation. Measures need to be taken to counteract power imbalances, and thus protect victims from re-marginalisation or renewed victimisation.

(v) Respect for victim autonomy

It is important not to burden victims with the obligation or responsibility of participation. In most cases, victims should be allowed to choose whether they want to engage or disengage, and what kind of modality of participation they would favour. Choices of victims are bound to be diverse, and respect for such diversity of choices by other stakeholders is paramount if the TJ process seeks to earn the trust of victims. In general, the more control victims have over participation arrangements, the more likely it will be that victims would want to engage.

(vi) Acknowledge non-active participation

It is a mistake to dismiss less active forms of participation as non-relevant. Those more passive forms are important as well, and some victims may favour them over active or too visible forms of involvement. Participation does not always have to be direct and active; the research has shown that in certain circumstances or contexts such as Cambodia and Tunisia, victims also enjoyed the benefits of 'participation' through actions that are indirect and passive such as outreach programmes and awareness-raising campaigns targeting the victims.

(vii) Legitimisation of the victims' socio-economic demands

Victims have the right to claim financial compensation and other forms of socio-economic reparations. Victims should not be obstructed, stigmatised or otherwise denigrated for wanting or claiming such forms of reparations.

⁶² Experiences like that of the Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos (FEDEFAM) and the Asian Federation Against Involuntary Disappearances (AFAD) can be useful examples to draw on.

(viii) Inclusiveness

Victim participation approaches should contain guarantees of inclusiveness of the different subgroups or categories of victims represented in the process. Questions of ethnicity, language (including terminology used) and religious affiliation must be taken into account. Also, generational dynamics (e.g. youth participation) should be integrated into any inclusiveness strategy.

(ix) Attention to the gender dynamics

In connection with the previous point, gender considerations in victim participation require priority attention, as female victims continue to struggle to get recognition and attention to their specific needs and demands.

(x) Victim organisations

Victim organisations are expected to play an important role in victim participation arrangements. In some cases, such arrangements lead victims to create organisations in order to facilitate their participation. However, victim organisations may not be able to represent all victims and capture their diversity. Therefore, inclusiveness concerns must be taken into account when devising strategies to involve victim organisations or representatives.

(xi) Context-specific support

Victim participation is partially constrained or determined by the socio-cultural dynamics of political participation in a given context, as well as by the dynamics of the conflict and the unfolding post-war transition. Part of the challenge of promoting victim participation in TJ relates to the ability to accommodate these context-specificities, while also offering principled support for subaltern victims to improve their general position and situation through the participation in TJ efforts.

(xii) Avoid overburdening victims

If demands placed on victims in terms of time-commitment, responsibilities, political pressures and resources are too high, victim participation runs the risk of overburdening victims. Participation in TJ mechanisms and procedures is time-consuming, may be financially burdensome for victims, and could expose them to re-traumatisation and possibly health risks. It is therefore essential to take into account in any participation strategy the practical impact it would have on victims and their families and plan to provide them with all the adequate resources and necessary assistance to make their participation less burdensome.

(xiii) Safety and protection of victims (and other key stakeholders)

This aspect stands out as one of the weakest points in the victim participation experiences reviewed. Protection regimes need to be developed so as to offer victims – and other key stakeholders like witnesses – effective and adequate protection from the different pressures and forms of violence they could be exposed to.

(xiv) Strengthen overall participation

Stronger victim participation should be accompanied by efforts to ensure that others in society would also participate (directly and indirectly) in the process. Broadening participation to others in civil society should serve to enhance solidarity with victims, reduce the risk of their stigmatisation and avoid the creation of barriers between ‘victims’ and the rest of society.

(xv) Designated outreach

In order to stimulate victim participation, outreach and communication strategies need to be developed in a way that fits the context and is able to reach as many victims as possible. Victims should be encouraged to actively participate in the design and implementation of outreach strategies.

(xvi) Follow-up

The all-too-common lack of follow-up to TJ measures in general and to victim participation in particular needs to be counteracted by developing strong follow-up components with guarantees for victim participation in them. This includes ensuring the continued relevance and long-term benefits of participation.

(xvii) More research on victim participation dynamics

Victim participation experiences have generated mixed outcomes. New research is needed in order to understand other aspects of the unfolding dynamics of victim participation, including in the area of informal participation and how it interacts with formal TJ mechanisms. Additional research is also needed on the participation of victims in the transition’s broader political process or processes such as peace negotiations and constitutional drafting.

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This publication has been made possible by:



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