

VICTIM PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT
AND THE EXTRAORDINARY CHAMBERS IN THE COURTS
OF CAMBODIA: A FEMINIST PROJECT?

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Seeing women, and seeing their particular experiences in wartime, is not, it turns out, easy to do.
Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International
Criminal Law*, 25 WINDSOR Y.B. ACCESS JUST. 3, 4 (2007).

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Introduction

Over the last couple of decades, and particularly since 1998, incredible advances have
been made in the effort to end impunity for sexual and gender-based violence¹ committed in the

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context of war, mass violence or repression. Before this, crimes committed exclusively or disproportionately against women and girls during conflict or periods of mass violence were largely either ignored, or at most, treated as secondary to other crimes.² However, evidence of the large-scale and systematic use of rape in conflicts over the last couple of decades helped create unprecedented levels of awareness of sexual violence as a method of war and political repression.³ As a result, great strides have been made in the investigation and prosecution of rape and other forms of sexual violence at the international level. Indeed, rape and other forms of sexual violence have been successfully prosecuted as war crimes,⁴ crimes against humanity,⁵ and

1. Generally speaking, gender-based violence is rooted “primarily in socially constructed roles, manifestations, and stereotypes,” while sexual violence is reflected “primarily in biological differences.” Dorean M. Koenig & Kelly D. Askin, *International Criminal Law: The International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 5 (Askin and Koenig eds., 2000). While these terms “overlap and intersect,” there is an increasing trend to use these terms more precisely. *Id.*

2. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 294-96 (2003) [hereinafter “*Prosecuting Wartime Rape*”]; Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 66 (1999) (noting that “in the tribunals established after the Second World War to prosecute German and Japanese war criminals, gender crimes were not pursued with the same degree of diligence as other crimes. Rape was included in the indictments of some of the individuals tried by the Tokyo Tribunal but not in any of the indictments of the Nuremberg Tribunal.”); ANNE TIERNEY GOLDSTEIN, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW 2 (1993) (“When . . . atrocities are perpetrated against men, or against women in the same form as they are perpetrated against men, they constitute and are universally recognized as war crimes. . . . But when they are committed against women in the form of sexual abuse, no matter how perfectly they fit the legal definition of a particular war crime, historically they have been treated as less serious than nonsexual atrocities.”).

3. Hilary Charlesworth and Christine Chinkin, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 309 (2000) (noting that extensive media coverage in the early 1990s helped create “sufficient outrage . . . about the extensive rapes and other violent assaults against women [in the conflicts accompanying the disintegration of the former Yugoslavia] to ensure that they could not be ignored, or discounted as normal phenomenon of armed conflict.”).

4. See, e.g., *Prosecutor v. Zejnir Delalic et al.*, Judgment, IT-96-21-T, ¶¶ 475-96, 511, 544 (Nov. 16, 1998) [hereinafter “*Celebici Trial Chamber Judgment*”] (affirming that sex crimes are covered by the grave breaches provisions of the 1949 Geneva Conventions, in particular by the prohibitions of “torture,” “inhuman treatment,” “willfully causing great suffering,” and “serious injury to body or health”); *Prosecutor v. Furundzija*, Judgment, IT-95-17/1-T, ¶¶ 165 n. 248, 196 (Dec. 10, 1998) [hereinafter “*Furundzija Trial Chamber Judgment*”] (recognizing that rape may amount to violation of common Article 3 and a grave breach of the Geneva Conventions); *Prosecutor v. Kunarac et al.*,

even genocide⁶ by the *ad hoc* international criminal tribunals established to prosecute such crimes in the former Yugoslavia (ICTY) and Rwanda (ICTR). In addition, the 1998 Rome Statute establishing the International Criminal Court (ICC) incorporates many of these advances, enumerating a broad range of sexual and gender-based crimes as war crimes and crimes against humanity.⁷

Despite these advances, feminist activists and others have critiqued these tribunals for being inconsistent in their efforts to adequately investigate and prosecute crimes of sexual and gender-based violence.⁸ A separate critique has come from feminist scholars who have

Judgment, IT-96-23-T & IT-96-23/1-T, ¶ 436 (Feb. 22, 2001) [hereinafter “*Foca* Trial Chamber Judgment”] (noting jurisdiction to prosecute rape as a violation of common Article 3 is “clearly established”).

5. See, e.g., *Foca* Trial Judgment, *supra* n. 4, at 539-43 (recognizing rape as well as contemporary forms of slavery, such as sexual slavery, as crimes against humanity); *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, ¶ 731 (Sept. 2, 1998) [hereinafter “*Akayesu* Trial Judgment”].

6. See, e.g., *Akayesu* Trial Judgment, *supra* n. 5, ¶ 731 (recognizing that “rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such”).

7. See Rome Statute of the International Criminal Court, art. 7(1), U.N. Doc. A/CONF.183/9, July 17, 1998, 37 I.L.M. 1002, 1030 (*entered into force* July 1, 2002) [hereinafter “Rome Statute”] (defining a “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”); *id.*, art. 8(2)(b) (defining “war crimes” as including: “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”); *id.*, art. 8(2)(e) (defining “war crimes” as including “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . . (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.”); see also International Criminal Court, Elements of Crimes, art. 6(b)(1) n.3, Doc. PCNICC/2000/1/Add.2 (2000) (noting that although rape was not listed as a form of genocide under Article 6 of the Rome Statute, genocide committed by acts causing “serious bodily or mental harm” may include “acts of torture, rape, sexual violence or inhuman or degrading treatment”).

8. See, e.g., Binaifer Nowrojee, “*Your Justice Is Too Slow*”: *Will the ICTR Fail Rwanda’s Rape Victims?*, U.N. Research Inst. for Soc. Dev., Occasional Paper No. 10 (Nov. 2005); Suzan M. Pritchett, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for*

highlighted the unintended consequences of prosecuting such crimes before the Yugoslav and Rwanda tribunals, arguing that the prosecution of such crimes by these tribunals has resulted in the under- or misrepresentation of the actual experience of survivors of gender-based violence in the context of war, mass violence or repression.⁹ These problems have arisen largely because the need to establish the guilt or innocence of the accused and to protect due process rights, as well to abide by the rules of evidence and procedure and to conserve judicial resources, all cut against victim-witnesses being able to tell their stories at these tribunals.¹⁰ Thus, the trials provide a limited record of victims' experience. Indeed, while prosecution of rape and other forms of sexual violence has contributed to the feminist goal of securing recognition of such violence as among the most serious international crimes, it has arguably failed to achieve another strategic feminist aim: making the actual experiences of survivors of gender-based violence and gender inequality fully visible.¹¹

Gender-Based Violence at the International Criminal Court, 17 TRANSNAT'L L. & CONTEMP. PROBS. 265 (2008); Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 339 (2009). See also GENDER REPORT CARDS ON THE INTERNATIONAL CRIMINAL COURT, published by the Women's Initiatives for Gender Justice from 2005 to 2010, available at <http://www.iccwomen.org/publications/index.php>; Sara Kendall & Michelle Staggs, *Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone*, U.C. Berkeley War Crimes Studies Center, 28 June 2005 (describing the decision of the Special Court for Sierra Leone in the case against three members of the Civilian Defense Forces to expunge witness testimony regarding sexual violence from the record, and to exclude the planned testimony of additional victims recounting acts of sexual violence, on the grounds that the Prosecutor had failed to allege rape and sexual violence as specific offences under the indictment).

9. See, e.g., Karen Engle, *Feminism and Its Discontents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005); Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 817-819 (2006); Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 WINDSOR Y.B. ACCESS JUST. 3, 5 (2007) ("The intersection of gender and ethnicity in the [*ad hoc*] Tribunals' jurisprudence . . . reveals some of the mechanisms through which sexual violence and gender inequality are highly visible but only superficially so.").

10. Franke, *supra* n. 9, at 818.

11. Christine Chinkin, Shelley Wright and Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in INTERNATIONAL LAW: MODERN FEMINIST

The question this paper poses is whether one of the most recent developments in international criminal law—victim participation—has increased the visibility of the actual lived experience of survivors of sexual and gender-based violence in the context of war, mass violence or repression. Under the Rome Statute, victims of the world’s most serious crimes were given unprecedented rights to participate in proceedings before the Court.¹² Nearly a decade later, a similar scheme was established to allow victims to participate as civil parties in the proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC or Extraordinary Chambers), a court created with UN support to prosecute atrocities committed by leaders of the Khmer Rouge during the period of 1975 to 1979.¹³ Although there are some significant differences in how the schemes work in each of these tribunals, both systems allow victims to participate in criminal proceedings independent of their role as witnesses for either the prosecution or defense. In other words, both schemes are intended to give victims a voice in the

APPROACHES 27-28 (Doris Buss and Ambreena Manji, eds., 2005) (citing as “a major concern of those promoting women’s international human rights: avoiding essentialising women and recognizing the diversity in the situations and priorities of women around the world”); Buss, *supra* n. 9, at 4 (“For feminist women and scholars, making women visible to international policy makers has been a central strategic goal.”).

12. See Rome Statute, *supra* n. 7, art. 68(3).

13. See Extraordinary Chambers for the Courts of Cambodia, Internal Rules (Rev. 7), R. 23, 91(1), *adopted* 12 June 2007, *as revised Feb. 23, 2011* [hereinafter “ECCC Internal Rules”]. Note that Article 17 of the Statute of the Special Tribunal for Lebanon (“STL”) – set up to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons – also permits victims to participate in proceedings. Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), Art. 17 (“Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.”). While the STL’s Victims’ Participation Unit recently issued a call for applications for victims to participate in proceedings relating to the joint case against Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra, *see* STL Press Release, “‘Don’t be a victim twice’ / Victims’ participation in STL proceedings” (July 12, 2011), this paper will not address victim participation at the STL, as the Tribunal has yet to issue any jurisprudence related to how the scheme will work in practice.

proceedings. Significantly, women's rights activists supported the creation of these victim participation schemes, particularly at the ICC, because, among other things, they thought that it might help address the under- or misrepresentation of the experiences of women in situations covered by the Court's jurisdiction.¹⁴

My aim is to explore whether this novel victim participation scheme, as implemented by the ICC and ECCC thus far, has actually allowed for greater recognition of victims' voices and experiences than was possible in proceedings before their predecessor tribunals. Have these schemes actually allowed women to communicate a fuller and more nuanced picture of their experiences than they would have been able to as victim-witnesses before the Yugoslav and Rwanda tribunals? Have they contributed to a richer understanding of the different and complex ways in which sexual violence and inequality are experienced by women in the context of war, mass violence or repression? In other words, are the victim participation schemes at the ICC and the Extraordinary Chambers "feminist projects"?

Admittedly, this is a difficult exercise, as the ICC has yet to complete its first case and the ECCC has issued only a single trial judgment thus far. Moreover, my assessment is based primarily on a review of the tribunals' rules and decisions regarding victim participation, victims' submissions, transcripts of the proceedings and commentary on the experience of victim participants. Although the analysis would undoubtedly benefit from more direct empirical research, I have not personally interviewed witnesses. Nevertheless, the preliminary conclusions from this analysis are significant and warrant debate. First, women's rights activists supported these schemes, at least in part, because of their expectation that participation would render more visible the actual experiences of women in periods of conflict, violence or repression. Victims

14. See *infra* n. 95-96 and accompanying text.

whose interests these schemes were intended to serve—particularly victims of sexual and gender-based violence, whose experiences have historically been ignored or underrepresented—should not have to wait for a frank, even if preliminary, assessment of whether participating in these schemes will, in fact, enable them to tell their stories in ways they were unable to at other tribunals. Furthermore, if the victim participation schemes at these tribunals, as implemented, have fallen short of expectations, perhaps we should reassess whether the feminist goal of visibility can ever be fully achieved through direct participation in proceedings before international criminal bodies and invest more in exploring other possibilities that might be as, if not better, suited to fulfilling that goal. My point here is not to suggest that victim participation ought to be abandoned altogether, but rather that we should acknowledge the limits of what can be achieved through these schemes and engage in a broader discourse about other alternatives that might help us advance the project of surfacing the myriad ways in which sexual violence and inequality are experienced by women in the context of war, mass violence or repression.

I will begin with a brief discussion of the significance of “visibility” as a feminist goal. From there, I will outline the victim participation schemes at the ICC and ECCC and briefly examine the concerns that animated the support for the victim participation scheme by feminist scholars and activists.¹⁵ Next, I will describe how victim participants, particularly survivors of

15. The discussion is largely focused on the ICC, as the role of victim participants in proceedings before the ECCC was not explicitly discussed during the negotiations leading up to the adoption of the agreement between Cambodia and the United Nations which set up the basic framework for the prosecution of Khmer Rouge leaders. See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 220, 253 (3d ed. 2008) (noting that the “ECCC was never conceived of by those who negotiated its creation as an instrument of direct relief for victims, although the protection and use of victims as witnesses in the investigations and trials is addressed in detail.”). Moreover, there is no express provision in the agreement, as adopted, entitling victims to participate. See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, signed 6 June 2003 in Phnom Penh, Cambodia [hereinafter “Framework Agreement”]. Similarly, while the Cambodian law implementing the agreement and establishing the ECCC references a right of victims to appeal against decisions of the

gender-based violence, have fared under these schemes. Although the ICC and ECCC have only heard a limited number of cases, the history of participation before these tribunals thus far suggests that victim participants face some of the same limitations victim-witnesses encountered at the *ad hoc* tribunals, particularly in cases against senior leaders and those most responsible for serious international crimes, which are the focus of the ICC and ECCC today. In the final section, I consider the implications of this conclusion on the feminist goal of visibility and, more generally, on the larger question of whether alternatives to direct participation in criminal trials might be as, if not better, suited to achieve the realization of this goal. While a full exploration of possible alternatives is beyond the scope of this paper, I suggest that the establishment and operation of the ICC and ECCC has opened up space for the emergence of other mechanisms that offer a unique opportunity to further this goal. For instance, both the ICC and ECCC have expanded their victim-related activities to include non-judicial programs designed to assist victims.¹⁶ Because they are not part of the formal trial process, participation in these programs might enable women to tell their stories unfettered by the limitations inherent in criminal proceedings. At the same time, because these programs were created by the ICC and ECCC, they remain connected to the work of those courts, meaning they may have stronger moral condemnation power than mechanisms, such as truth commissions, which operate independently

ECCC Trial Chamber, it does not otherwise expressly permit victims to participate in ECCC proceedings. Royal Gov't of Cambodia, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Republic of Kampuchea, NS/RKM/1004/006 (October 2004) [hereinafter "ECCC Establishment Law"].

16. See ECCC Internal Rules, *supra* n. 13, R. 12bis(3) (expanding the mandate of the ECCC's Victim Support Section ("VSS") to include "the development and implementation of non-judicial programs and measures addressing the broader interests of victims"); ICC Trust Fund for Victims, *Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations*, Programme Progress Report, at 4 (Fall 2010), at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf> (characterizing the TFV's second mandate as "providing victims and their families with physical rehabilitation, material support, and/or psychological rehabilitation where the ICC has jurisdiction").

of the criminal justice process. Although these programs are currently underfunded and underdeveloped, I suggest that they are worth exploring, as they hold out the possibility of complementing the inevitably limited narratives which emerge through criminal proceedings and bringing us closer to making the more complex and subtle narratives of women's experiences "fully visible."

I. "The Task of SEEING Women:"¹⁷ Visibility as a Feminist Goal

Feminist scholars have long highlighted the underrepresentation, if not complete absence, of women's experiences or perspectives in the construction and implementation of international law.¹⁸ This critique has been applied to a number of areas in international law,¹⁹ including international criminal law. Critics have highlighted, for instance, that despite the widespread use of rape and other forms of sexual violence during World War II, the term rape is completely absent from the 179 page judgment of the International Military Tribunal (IMT), created after World War II to try the most senior civilian and military leaders of Nazi Germany.²⁰ Moreover, while rape was prosecuted by the International Military Tribunal for the Far East (IMTFE)—established after the war to try Japanese leaders—that tribunal failed to bring charges against any

17. The phrase is taken from Doris Buss' article entitled *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*. See Buss, *supra* n. 9, at 4.

18. See generally Charlesworth and Chinkin, THE BOUNDARIES OF INTERNATIONAL LAW; *supra* n. 3; Christine Chinkin, Shelley Wright and Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 17-46 (Doris Buss and Ambreena Manji, eds., 2005). See also Fionnuala Ní Aoláin, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies*, 35 QUEEN'S L. J. 219, 220 (2009) ("Feminist scholars have long identified the limited capacity of law to fully capture the experiences of women.").

19. See generally INTERNATIONAL LAW: MODERN FEMINIST APPROACHES, *supra* n. 18.

20. Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 664 (1995). Note, however, that evidence of rape was introduced during the trial. *Id.* 662-64.

of the accused for the rapes and sexual slavery committed against an estimated 200,000 women detained by the Japanese military across the Asia-Pacific region in the 1930s and 1940s.²¹

Despite the limited recognition of sexual violence by the post-war International Military Tribunals, the wartime experiences of women have gained increasing visibility since the 1990s. Indeed, feminist activism helped ensure that wartime rape and other abuses against women in situations of mass violence were successfully prosecuted by the Yugoslav and Rwandan tribunals as serious international crimes.²² As a result, wartime sexual violence against women has become, as one scholar notes, “clearly visible and established as an issue of concern in the emerging international criminal apparatus.”²³

Nevertheless, feminist activists and others began to question how much of women’s experiences were actually being captured by the international criminal apparatus.²⁴ For instance, inconsistent investigation and prosecution of sexual and gender-based violence resulted, in some cases, in the absence of these offenses from the proceedings altogether, even where credible evidence of such violence was available.²⁵ A stark example of this occurred in the *Cyangugu* case,²⁶ tried by the ICTR. In that case, two prosecution witnesses spontaneously testified about

21. Chinkin, Wright and Charlesworth, *supra* n. 18, at 26. Significantly, no victims of rape were called to testify at either the IMT or the IMTFE. Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT’L J. OF TRANSITIONAL JUST. 114, 115 (2009).

22. Buss, *supra* n. 9, at 4.

23. *Id.*, at 4.

24. *See, e.g., id.*, at 4-5.

25. *See, eg.,* Nowrojee, *supra* n. 8, at 8 (noting that at the ICTR “[s]ome cases have moved forward without rape charges, sometimes even when the prosecutor is in possession of strong evidence [of such crimes]”).

26. *See Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, André Ntagerura*, Case No. ICTR 99-46-T ([hereinafter “*Cyangugu* case”]).

uncharged acts of sexual violence during the trial.²⁷ The Coalition for Women’s Human Rights in Conflict Situations (Coalition)²⁸ moved to be heard as *amicus curiae*, urging the Tribunal to request that the prosecution consider amending the indictment against the accused²⁹ to include sexual violence charges.³⁰ However, the prosecution opposed the motion, arguing that charging decisions were a matter of prosecutorial discretion³¹ and indicating its intention to file a new indictment with rape allegations at a later date.³² Ultimately, the Trial Chamber not only denied the Coalition’s motion but also excluded evidence of the uncharged crimes of sexual violence, suggesting that permitting such evidence might result in unfair prejudice to the accused.³³ Notably, the prosecution failed to file the promised new indictment. As a result, victims of sexual violence were silenced and their experiences excluded from the record.

27. See *Cyangugu* case, *supra* n. 26, Brief for Coalition for Women’s Human Rights in Conflict Situations as Amicus Curiae Respecting the Need to include Sexual Violence Charges in the Indictment, § II.A. (Mar. 1, 2001), <http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Cyangugu/amicusBrief.php> [hereinafter “Coalition’s *Cyangugu* Amicus Brief”]

28. See Coalition for Women’s Human Rights in Conflict Situations, http://www.womensrightscoalition.org/site/main_en.php (explaining the Coalition goals as “promot[ing] the adequate prosecution of perpetrators of gender violence in transitional justice systems based in Africa, in order to create precedents that recognise violence against women in conflict situations [and] help[ing] find ways to obtain justice for women survivors of sexual violence”).

29. See Although the accused were originally indicted in two separate cases, the case against Emmanuel Bagambiki and Samuel Imanishimwe was eventually joined with case against André Ntagerura. See *Prosecutor v. Ntagerura*, Case No. ICTR 96-10-I, *Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, Decision on the Prosecutor’s Motion for Joinder, ¶ 60 (Oct. 11, 1999).

30. Coalition’s *Cyangugu* Amicus Brief, *supra* n. 27, § I.B.

31. See *Cyangugu* case, *supra* n. 26, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations, ¶ 9 (May 24, 2001).

32. See *id.* ¶ 10.

33. See *id.* ¶¶ 20-25.

A similar situation occurred in the case against the Civil Defense Forces (CDF),³⁴ a pro-government militia that fought during Sierra Leone's eleven year civil war.³⁵ The case was tried by the Special Court for Sierra Leone, a so-called "hybrid" court set up by agreement between the United Nations and the government of Sierra Leone to prosecute atrocities committed in Sierra Leone during its civil war.³⁶ There, the prosecution omitted any allegations with respect to sexual or gender-based violence in its initial indictment against the three leaders of the CDF.³⁷ While subsequent investigations led the prosecution to seek to amend the indictment to add charges based on evidence regarding the subjection of women and girls to various forms of sexual violence, the Trial Chamber refused to allow the amendment.³⁸ In its decision, the Chamber noted it was "pre-eminently conscious of the importance that gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts,"³⁹ but held that adding the new charges would result in undue delay and would prejudice the rights of the accused to a fair and expeditious trial.⁴⁰ The prosecution then moved to introduce evidence of sexual violence to support the charges of inhumane acts as a crime against humanity and/or violence to life,

34. *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T [hereinafter the "*Civil Defence Forces Case*"].

35. *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-I, Indictment, ¶¶ 4,6 (Feb. 4, 2004).

36. Statute of the Special Court for Sierra Leone, arts. 1, Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter "*SCSL Statute*"].

37. *See Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-03-14-I, Indictment, ¶¶ 22-29 (Feb. 4, 2004) (describing multiple charges filed against Norman, Fofana, and Kondewa, including murder).

38. *See Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 10 (May 20, 2004) (describing various crimes that were committed, including rape, sexual slavery, and other inhumane acts).

39. *Id.* ¶ 82.

40. *See id.* ¶ 86 (stating that the prosecution did not provide sufficient evidence).

health and physical or mental well-being of persons as a war crime, which had been included in the original indictment.⁴¹ Yet the Trial Chamber rejected the request, noting that the indictment did not allege any facts relating to sexual violence in support of the relevant charges and that permitting the evidence would cause undue prejudice to the accused.⁴² As a result, evidence of sexual violence was completely excluded from the case. Indeed, even though seven women took the stand to testify about acts of violence, none of them was permitted to speak about the acts of sexual or gender based violence they had endured, arguably “the principal manner in which they were victimized during the Sierra Leonean conflict.”⁴³ As two researchers who interviewed the witnesses noted, the “ruling . . . had a kind of ripple effect whereby wider and wider circles of the women’s experience had to be eliminated from their testimony.”⁴⁴

Even in cases in which sexual violence was prosecuted by the tribunals, many victims’ voices were either not heard or only partially heard. Although numbers do not tell the whole story, it is noteworthy, for instance, that despite the prosecution of rape as a war crime and crime against humanity by the ICTY,⁴⁵ only about 18 percent of the 3,700 witnesses who appeared before that tribunal from 1996 to 2006 were female.⁴⁶ Similarly, although more than half of the indictments issued by the ICTR between 1995 and 2002 included counts of sexual violence,

41. See *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 3 (May, 24 2005) (explaining that when sexual violence has been perpetrated against a civilian, the ICTR has routinely found that the acts fall within crimes against humanity).

42. See *id.* ¶ 19 (delineating a separate category of sexual offenses under Article 2(g) that the accused must have been charged with to allege acts of sexual violence).

43. Staggs and Kendall, *supra* n. 8, at 356.

44. *Id.*, at 364.

45. See *supra* n. 4-5 and accompanying text.

46. Henry, *supra* n. 21, at 120 (citing Wendy Lobwein, *Experiences of Victims and Witnesses Section at the ICTY*, in *LARGE-SCALE VICTIMISATION AS A POTENTIAL SOURCE OF TERRORIST ACTIVITIES: IMPORTANCE OF REGAINING SECURITY IN POST-CONFLICT SOCIETIES* (Uwe Ewald and Ksenija Turkovic eds., 2006)).

“only 1/6 of the witness statements taken by the investigation teams concerned acts of sexual violence.”⁴⁷

Moreover, of the limited number of victims who did play a role in prosecuting sexual violence at these tribunals, many were often repeatedly interrupted and unable to tell their story on their own terms.⁴⁸ The following excerpt from the *Celibici* case⁴⁹ tried by the ICTY is illustrative:

- Q. Mrs Cecez, during the ten minutes that you were being raped, what were you doing during that time?
- A. I could not do anything. I was lying there and he was raping me. There was—I had no way of defending myself. I couldn’t understand what was going on, what was happening to me.
- Q. Were you crying, Mrs Cecez?
- A. Yes, yes, I was, of course. I was crying. I said: “My God, what have I come to live through?” He said: “It is all because of [your husband] Lazar. You wouldn’t be here if he were around,” but I was completely beside myself. To trample a woman’s pride like that. I come from a good family. It was a large clan. That is the fate. . . .
- Q. I want to stop you. Let me just clarify: when you were in the room, you were in the room by yourself and then this person Sok came; is that correct? Was there just the two of you in the room?⁵⁰

Clearly, the focus of the prosecutor was on the facts necessary to secure a conviction for the rape rather than on letting the witness tell her story. Likewise, in the *Foca* case,⁵¹ which

47. Gaëlle Breton-Le Goff, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) From November 1995 to November 2002: A Study of the McGill Doctoral Affiliates Working Group on International Justice, Rwanda Section* (November 28, 2002), available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php.

48. Henry, *supra* n. 21, at 126-27; Julie Mertus, *Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency*, 6 INT’L FEMINIST J. POL. 110, 115-16 (2004).

49. *Celibici* Trial Chamber Judgment, *supra* n. 4.

50. *Prosecutor v. Zejnil Delalic et al.*, Transcript, IT-96-21-T, 494-95 (Mar. 17, 1997) [hereinafter “*Celibici* Transcript”].

51. *See supra* n. 4-5 and accompanying text.

focused exclusively on the rape, torture and mistreatment of women during the conflict in Bosnia and Herzegovina, witnesses were “compelled to narrowly define what happened to them in line with the rules of evidence and the legal definition of rape.”⁵²

Victims of sexual violence during the Rwandan genocide who testified before the ICTR experienced similar restrictions. As one commentator who interviewed numerous rape survivors, including six rape victims who testified before that tribunal, notes, “Rwandan women express[ed] deep concern that the ICTR is not fully and properly prosecuting the crimes that occurred against them: that the court is not acknowledging their pain, not telling their story, not enshrining their experience of the genocide.”⁵³

Perhaps the limitations faced by victims of sexual and gender-based violence in the context of these tribunals is not surprising given the nature of these criminal trials. Based primarily on the adversarial model,⁵⁴ neither the *ad hoc* tribunals nor the Special Court for Sierra Leone were designed as truth-telling mechanisms. Rather, they were established to assess the guilt or innocence of accused for particular crimes⁵⁵ that the prosecution decides to pursue.⁵⁶

52. Mertus, *supra* n. 48, at 116. *See also* Franke, *supra* n. 9, at 818 (“Forced to testify to their experiences by answering prosecutors’ questions in a ‘yes’ or ‘no’ manner, and interrupted by the judges when their testimony veered beyond the immediate question of the culpability of the individual defendant, many victims of sexual violence who have testified before the ICTY have found their experiences as witnesses humiliating and disrespectful.”).

53. Nowrojee, *supra* n. 8, at 4.

54. *See* David Hunt, *The UN International Tribunal for the former Yugoslavia and International Justice: The Judges and Their Role*, Europe and the Balkans, Occasional Paper No. 18, available at <http://137.204.115.130/activities/download/18.pdf> (“To a large extent, by making the Prosecutor responsible for the investigation and prosecution of the accused, the statute [of the ICTY] had adopted the common law adversarial system in preference to the civil law inquisitorial system, and this fact is reflected in the Rules which were adopted.”). The same is true of the statute of the ICTR. *See also* SCSL Statute, *supra* n. 36, art. 15(2) (providing that the Prosecutor will “have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.”).

55. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 1, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) (“The International Tribunal shall

Witnesses are called to prove or disprove elements of the crimes with which the accused are charged. Thus, victims' stories are limited by the evidentiary needs of the party calling the victim as a witness.⁵⁷ As a result, story-telling is often "fragmented and frequently interrupted."⁵⁸

Admittedly, the inability of victims to tell their story because of the tribunal's refusal to charge the crimes they suffered or because of the truncated nature of witness testimony in adversarial systems is not unique to survivors of sexual and gender-based violence. Nevertheless, in light of the historical silence surrounding sexual and gender-based crimes in situations of conflict, mass violence or repression,⁵⁹ a significantly limited picture of women's experiences remains even after the jurisprudential gains made by international criminal tribunals in this area.

have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”).

56. See, *eg.*, Statute of the International Tribunal for Rwanda, art. 15(1), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (“The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda . . .”).

57. See Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 320 (Dominic McGoldrick, *et al.*, eds. 2004); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings?*, *Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 154 (2004) (“In the judicial arena... story-telling can only take the form of giving legal evidence. It is constrained by the judicial endeavour to establish a legally authoritative account of ‘what happened.’”). Dembour and Haslam note, for instance, that in the *Prosecutor v. Krstic* case – where 18 victim-witnesses testified about the role Radislav Krstic had in the forcible displacement of women, children and elderly from the Bosnian town of Srebrenica and the subsequent execution of about 8000 men and boys – the “Tribunal frequently interrupted victim-witnesses when their narratives became irrelevant to the purpose of assessing the guilt of the accused.” *Id.*, at 158.

58. Henry, *supra* n. 21, at 125. See also Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. OF LAW & SOCIETY 294, 298 (2005) (“[Victim-witnesses'] testimony must be shaped to bring out its maximum adversarial effect, and witnesses are thereby confined to answering questions within the parameters set down by the questioner. The victim is denied the opportunity to relay his or her own narrative to the court using his or her own words...”).

59. See *supra* n. 2 and accompanying text.

Indeed, feminist scholars have highlighted a number of ways in which the visibility of women's experiences remains superficial at best.⁶⁰

First, the focus of the prosecution, particularly at the *ad hoc* tribunals, has tended to be largely on sexual violations.⁶¹ Yet, women often experience gendered violence in the context of conflict or mass violence that is not sexual. For instance, if widowed or forced to flee their homes because of conflict, women often face more severe economic hardship than men, as in many societies discriminatory laws or policies mean that women have little or no access to credit, land, capital or other services.⁶² Moreover, there is evidence that violence against women by members of their own family and community escalates during periods of conflict or unrest.⁶³ As one commentator has noted, the discrimination and violence women face under “normal circumstances” makes their “experience of harm more acute and their capacity to recover much more limited.”⁶⁴ Indeed, a number of psychological studies indicate that women's experience of trauma suffered as a result of conflict differs significantly from that of men.⁶⁵ For instance, one study which focused on traumatized women asylum-seekers, refugees, and war and torture victims “demonstrated that the incidence of PTSD in women was twice as high as in men, and that women tended to exhibit a more chronic course of PTSD over their lifetimes.”⁶⁶

60. See *infra* n. 61-82 and accompanying text.

61. See Catherine O'Rourke, *The Shifting Signifier of “Community” in Transitional Justice: A Feminist Analysis*, 23 WIS. J. L. GENDER & SOC'Y 269, 284-85 (2008); Ní Aoláin, *Exploring a Feminist Theory of Harm*, *supra* n. 18, at 239-41. See also Franke, *supra* n. 9, at 822-23.

62. See Judith Gardam and Michelle Jarvis, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 41 (2001).

63. See Gardam and Jarvis, *supra* n. 62, at 30.

64. Ní Aoláin, *Exploring a Feminist Theory of Harm*, *supra* n. 18, at 230-31.

65. *Id.*, at 228-29.

66. *Id.*, at 228. For a discussion of other examples of the gender-differentiated impact of conflict, see Gardam and Jarvis, *supra* n. 62, 19-51.

Nevertheless, these types of harms are rarely surfaced in the proceedings before international criminal tribunals. With some notable exceptions,⁶⁷ the tribunals have concentrated on a narrow range of sexual acts, resulting in the “essentialization of women’s experiences of injury”⁶⁸ during periods of conflict. As one survivor explains, the near-exclusive focus on sexual violence has had an identity-reducing effect: “it hurts because you are branded a raped woman and it becomes your only identity.”⁶⁹ Moreover, as one feminist scholar notes, the “narrow focus on bodily violation can obscure the wider social context in which the abuse occurs,”⁷⁰ making less visible the socioeconomic and other violations women routinely experience as direct harms in situations of conflict or repression.

Second, because proving the crimes within the jurisdiction of the *ad hoc* and hybrid criminal tribunals requires that the prosecution show that the offense occurred in the context of an armed conflict,⁷¹ an attack against a civilian population,⁷² or the targeting of a particular group

67. See, e.g., *The Prosecutor v. Brima, et al.*, Appeals Judgment, SCSL-2004-16-A, n. 327 (22 February 2008) (finding the crime against humanity of forced marriage distinct from the crime against humanity of sexual slavery on the grounds that: “While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.”).

68. Ní Aoláin, *Exploring a Feminist Theory of Harm*, *supra* n. 18, at 232-33.

69. Henry, *supra* n. 21, at 131 (citing *Calling the Ghosts: A Story about Rape, War and Women* (Mandy Jacobson and Karmen Jelincic, dirs., 1996)

70. Ní Aoláin, *Exploring a Feminist Theory of Harm*, *supra* n. 18, at 240.

71. See, e.g., Rome Statute, *supra* n. 7, art. 8.

72. See, e.g., *id.*, art. 7.

for destruction,⁷³ sexual violence prosecutions by these tribunals have often characterized the harm experienced by the victim-witness as part of broader struggle against a rival community. As a result, “the mass rape of women becomes visible only within the narrow . . . constrained framework of [a] . . . conflict between two [groups].”⁷⁴ Seen this way, the “sexual violence may be *visible* . . . [but] gender inequality is not, and nor are the other systemic variables that produced a situation in which the mass sexual violence of women was made possible in the first place.”⁷⁵ For instance, in *Prosecutor v. Gacumbitsi*,⁷⁶ Sylvestre Gacumbitsi, former mayor of Rusumo in Eastern Rwanda, was tried for his role in the rape, murder and extermination in the Rusumo commune.⁷⁷ Witness TAS, a Hutu woman married to a Tutsi man, testified she had been raped by a Hutu attacker.⁷⁸ Given the context of the 1994 Rwandan genocide, where those identified as Hutu overwhelmingly attacked those perceived as Tutsi, the Tribunal characterized the rape as an attack on the Tutsi civilians in this way: “through the woman, it was her husband, a Tutsi civilian, who was the target. Thus, the rape was part of the widespread attacks against Tutsi civilians . . .”⁷⁹ What gets lost in the Tribunal’s analysis, as one feminist scholar notes, is that Witness TAS was the direct victim of the crime and, more importantly, that certain gendered

73. *See, e.g., id.*, art. 6.

74. Buss, *supra* n. 9 at 15.

75. *Id.*

76. *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment (Jun. 17, 2004) [hereinafter “*Gacumbitsi* Trial Judgment”].

77. *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-I, Indictment (Jun. 20, 2001) [hereinafter “*Gacumbitsi* Indictment”].

78. *Gacumbitsi* Trial Judgment, at ¶ 209.

79. *Id.*, at ¶ 222.

dynamics that predated the genocide enabled the conditions for the genocide and resulting mass sexual violence.⁸⁰ As she explains:

In the sexual economy that accompanied ethnic stratification in Rwanda, Tutsi women, at least symbolically, were idolized and highly sexualized. Having a Tutsi mistress or secretary was seen as a sign of social capital for Hutu men. In the propaganda accompanying the build up to and conduct of the genocide, Tutsi women's sexuality was central . . . And yet, there is very little space in [the *Gacumbitsi*] and other decisions to accommodate a consideration of the sexual economy that facilitated and marked the genocide.⁸¹

The result of emphasizing, above all else, the connection between the victim and the ethnic context of the conflict is that “other forms of oppression, in this case gender, are manoeuvred out of the frame of analysis.”⁸² What remains in the record is, thus, only a superficial portrait of women's experience.

Because international criminal prosecutions have resulted in the limited visibility of the full spectrum of harms women face in situations of conflict and repression, some feminist scholars have questioned what, after all, has been achieved—and what is achievable—through the international criminal apparatus.⁸³ The question this paper poses is whether the new victim participation schemes at the ICC and ECCC, which give victims unprecedented rights to participate in the proceedings, have allowed survivors of sexual and gender-based violence to communicate a more complex and comprehensive picture of their experiences than they were able to in the context of the *ad hoc* tribunals or the Special Court for Sierra Leone. Have they, in fact, helped us in the “task of seeing women?”

80. Buss, *supra* n. 9 at 16.

81. *Id.*, at 16-17.

82. *Id.*, at 17.

83. *Id.*, at 22.

II. Victim Participation

The idea that victims should be allowed to participate in international criminal proceedings stems from a broader movement over the last several decades advocating for restorative—as opposed to merely retributive—justice.⁸⁴ Proponents of this movement argue that “justice should not only address traditional retributive justice, *i.e.*, punishment of the guilty, but should also provide a measure of restorative justice by, *inter alia*, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries.”⁸⁵ In other words, advocates of this movement believe that criminal justice mechanisms should not only punish wrongdoers but also serve the interests of victims and that the participation of victims in criminal proceedings is an integral part of serving their interests.

84. See, e.g., War Crimes Research Office, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 8 (Nov. 2007) [hereinafter: “WCRO 2007 Victim Participation Report”] (citing Haslam, *supra* n. 57, at 315 (noting that the Rome Statute marked a “major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order,” towards a “more expansive model of international criminal law that encompasses social welfare and restorative justice.”); Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 2001) (“The model for victims’ participation thus developed in the [Rome] Statute... was seen as an important achievement because the Court’s role should not purely be punitive but also restorative.”)). See also Women’s Caucus for Gender Justice, *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence*, Submitted to the Preparatory Commission for the International Criminal Court, 12-30 June 2000, at 20 [hereinafter “WCGJ 2000 PrepCom Recommendations”] (“The codification of victim participation in article 68(3) in the Rome statute reflects the fact that many court systems around the world have successfully allowed victims to participate in criminal trials . . . This reflects a growing recognition that justice requires more than putting someone in jail.”). Note that, as mentioned *supra* n. 15, this discussion is largely focused on the history of victim participation in relation to the ICC, as the role of victim participants in proceedings before the ECCC was not explicitly discussed during the negotiations leading up to the adoption of the agreement between Cambodia and the United Nations which set up the basic framework for the prosecution of Khmer Rouge leaders.

85. Judges’ Report, *Victims Compensation and Participation*, Int’l Criminal Tribunal for the Former Yugoslavia, CC/P.I.S./528-E, 13 September 2000, at 1, available at <http://www.un.org/icty/pressreal/tolb-e.htm>, cited in WCRO 2007 Victim Participation Report, *supra* n. 84, at 8. As discussed in the WCRO report, the term “restorative justice” is a broad term used in a variety of contexts, including to describe programs designed to facilitate victim-offender mediation outside the traditional criminal justice context. However, the use of the term here is limited to the movement *within* the field of criminal justice that advocates the position that criminal justice mechanisms should serve the interests of victims, as opposed to strictly punishing perpetrators of crimes.

Although not easily defined, the concept of victim participation in criminal proceedings has been described as victims “being in control, having a say, being listened to, or being treated with dignity and respect.”⁸⁶ Women’s rights activists supported the concept for several reasons. Many believed, as did victim advocates more generally,⁸⁷ that participation in criminal proceedings has a number of potential restorative benefits, including the promotion of victims’ healing and rehabilitation.⁸⁸ Indeed, in its recommendations to the Preparatory Committee on the Establishment of an International Criminal Court [PrepCom I],⁸⁹ the Women’s Caucus for Gender Justice (WCGJ)—a network of women’s rights activists and organizations dedicated to advocating for the incorporation of “gender perspectives in the ongoing process of setting up the International Criminal Court”⁹⁰—argued that “[p]articipation is significant not only to protecting the rights of the victim at various stages of the proceeding, but also to advancing the process of

86. Doak, *Victims’ Rights in Criminal*, *supra* n. 58, at 295 (citing I. Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 BRIT. J. OF CRIM. 967, 973 (2004)). *See also* Mikaela Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME: A STUDY OF THE STATUS OF VICTIMS BEFORE INTERNATIONAL CRIMINAL TRIBUNALS AND OF FACTORS AFFECTING THIS STATUS, 141-42 (2004) (“For the healing process of victims, it is... important that they have a sense of control over how their case is being dealt with, but also, more generally, that they are treated with dignity and respect.”).

87. *See* WCRO 2007 Victim Participation Report, *supra* n. 84, at 8-9 (citing, *inter alia*, Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide*, REDRESS, 1999, at 15, available at <http://www.redress.org/documents/inpract.html>; Victims’ Rights Working Group, *Victims’ Rights in the International Criminal Court*, at 4, available at <http://www.vrwg.org/Publications/01/VRWG%20flyer2000.pdf> (“The possibility afforded to victims to contribute to fact-finding and truth-telling in the judicial process before the ICC may contribute to their healing after victimization and trauma.”)).

88. *See* Women’s Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters, 4-15 August 1997, at 33 [hereinafter “WCGJ 1997 PrepCom Recommendations”].

89. The Preparatory Committee was the successor to the *ad hoc* Committee set up in 1995 to discuss a draft statute for the creation of an international criminal court.

90. *See* Women’s Caucus for Gender Justice, available at <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm>.

healing from trauma and degradation.”⁹¹ Relatedly, some believed that victim participation would bring the Court “closer to the persons who have suffered atrocities”⁹² and, thus, increase the likelihood that victims would be satisfied that justice was done.⁹³ As the Women’s Caucus for Gender Justice noted in a later set of recommendations on the ICC Elements of Crimes and Rules of Procedure and Evidence, “[t]he right of victims to participate in the proceedings was included in the Rome Statute to ensure that the process is as respectful and transparent as possible so that justice can be seen to be done . . .”⁹⁴ Finally, and significantly for the purpose of this analysis, women’s rights activists thought that victim participation might help address the under- or misrepresentation of the experiences of women.⁹⁵ As the WCGJ explained in its recommendations to PrepCom I:

The active involvement, enhanced respect and protection afforded by participation and representation is particularly significant for victims of sexual and gender violence whose perceptions and needs are—in all cultures of the world—frequently ignored, presumed, or misunderstood.⁹⁶

91. WCGJ 1997 PrepCom Recommendations, *supra* n. 88, at 33.

92. WCRO 2007 Victim Participation Report, *supra* n. 84, at 9 (citing Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 84, at 457).

93. WCRO 2007 Victim Participation Report, *supra* n. 84, at 9 (citing WCGJ 2000 PrepCom Recommendations, *supra* n. 84, at 20; Victims’ Rights Working Group, *Victim Participation at the International Criminal Court: A Summary of Issues & Recommendations*, November 2003, at 2, available at http://www.vrwg.org/Publications/01/VRWG_nov2003.pdf (“Taking into account the perspectives of victims will help to ensure that victims have a positive relationship with the Court, and that the processes will neither retraumatise them nor undermine their dignity.”)).

94. WCGJ 2000 PrepCom Recommendations, *supra* n. 84, at 20.

95. *See, e.g., Court Must Fill Gender Gap in International Law, Insists Women's Caucus*, in ICC ON THE RECORD, Vol. 1, Iss. 2 (Jun. 16, 1998) (noting argument by the Women’s Caucus for Gender Justice that the ICC must “have the capacity to ensure that crimes against women are not ignored or treated as trivial or secondary,” “take account of the disproportionate or distinct impact of the core crimes (e.g. genocide, crimes against humanity) on women,” and “be equipped and enabled to eliminate common assumptions about and prejudices against women and their experiences,” in part by ensuring that the Court is empowered to afford women survivors the “necessary protection and participation” in proceedings.).

96. WCGJ 1997 PrepCom Recommendations, *supra* n. 88, at 33.

Not surprisingly, perhaps, advocates of victim participation had high expectations that this new scheme would allow victims to tell their story in a way they were unable to do as victim-witnesses before the Yugoslav and Rwanda tribunals.⁹⁷

A. Victim Participation at the ICC

As ultimately adopted, the victim participation scheme at the ICC, reflected primarily in Article 68(3) of the Rome Statute, establishes a general right of victims whose personal interests are affected to present their “views and concerns” to the ICC and have them “considered” by the Court at appropriate stages of the proceedings.⁹⁸ Significantly, this right is separate from the right of victims to seek reparations.⁹⁹ Indeed, under the Rome Statute, victims are not required to participate in pre-trial or trial proceedings before the ICC in order to make a claim for reparations, and victims may participate in proceedings without pursuing reparations.¹⁰⁰ Thus,

97. See, e.g., Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, *supra* n. 57, at 320 (noting that it was “the failure of the [Yugoslav and Rwanda] Tribunals to take the interests of victims sufficiently into account that motivated many NGOs, individuals and some governments to argue for a new approach that would safeguard the interests of victims at the ICC” and that this approach represented “an attempt to avoid the problems that victims encountered when they testified before the ad hoc War Crimes Tribunals”); David Donat-Cattin, *Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 871 (Otto Triffterer ed., 1999) (“[T]he inclusion of norms on victims’ participation in the Court’s proceedings... was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals.”); Vahida Nainar, *Giving Victims a Voice in the International Criminal Court*, UN Chronicle, Issue 4 (1999), available at <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/resources/unchronicle.htm> (noting that in designing rules to implement the victim participation scheme at the ICC, the “[e]xperiences of victims of the ad-hoc Tribunals must be taken into account and the shortcoming of the existing systems must be rectified for future”).

98. See Rome Statute, *supra* n. 7, art. 68(3).

99. See *id.*, art. 75 (allowing the Court to issue an order “specifying reparations to, or in respect of, victims” without any indication that such victims must have participated in proceedings pursuant to Article 68(3) of the Statute).

100. See, e.g., Victims’ Participation and Reparation Section Booklet, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*,

unlike victim participation in many domestic criminal systems—the primary purpose of which is to join a victim’s claim for civil damages with a criminal action¹⁰¹—victim participation at the ICC was envisioned as something more than a means by which victims could seek reparations.¹⁰²

In addition to the general Article 68(3) framework for victim participation, the Rome Statute includes two provisions granting victims the explicit right to participate in proceedings at the investigation stage of the Court’s work, that is even before a particular suspect or crime is identified by the prosecution.¹⁰³ The first relates to the Prosecutor’s powers under Article 15 of the Statute to “initiate investigations *proprio motu* on the basis of information on crimes within

Int’l Criminal Court, *available at* http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf (describing the different roles of victims before the ICC and distinguishing between participation and seeking an order of reparations from the Court); La Fédération Internationale des Droits de l’Homme, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter 4: Participation, p. 5, April 2007, *available at* http://www.fidh.org/article.php3?id_article=4208 (“It is important to note that the procedure for requesting reparations is an independent procedure. Victims do not have to participate in pre-trial or trial proceedings in order to make a claim for reparations.”).

101. See, e.g., Judges’ Report, *Victims Compensation and Participation*, Int’l Criminal Tribunal for the Former Yugoslavia, CC/P.I.S./528-E, 13 September 2000, at 6, *available at* <http://www.un.org/icty/pressreal/tolb-e.htm> (“[M]ost legal systems based on civil law allow for the participation of a victim as a *partie civile*; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused.”).

102. Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 219-220 (2006) (noting that Rome Statute marks “a significant departure from the mere conceptualization of victim’s rights in terms of reparation.”).

103. In the context of the ICC, the Court’s operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006) [hereinafter “*Situation in DRC*, PTC I, 17 January 2006”]. In other words, the “situation” refers to the operations of the ICC within a given country that are *not* directed at a particular suspect identified by the Prosecutor as having allegedly committed particular crimes. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

the jurisdiction of the Court,”¹⁰⁴ which includes information received from victims.¹⁰⁵

Specifically, Article 15(3) provides:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation [*proprio motu*], he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*¹⁰⁶

The second provision granting victims the right of participation at the investigation phase is Article 19(3) of the Rome Statute, which authorizes victims to “submit observations to the Court”¹⁰⁷ regarding challenges to the admissibility or jurisdiction of a case brought under that article.¹⁰⁸

104. Rome Statute, *supra* n. 7, art. 15(1). *See also id.*, art. 15(2) (“The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”).

105. *See* WCRO 2007 Victim Participation Report, *supra* n. 84, at 20 (citing M. Bergsmo & J. Pejic, *On Article 15*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 364-69 (Otto Triffterer *ed.*, 1999) (arguing that, although there is no express right of victims to submit information to the Prosecutor, the drafters “clearly contemplated that the Prosecutor could receive information from victims pursuant to Article 15, paragraphs 1 and 2.”); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 *Am. J. Int’l L.* 510, 516 (July 2003) (“[T]he Prosecutor may himself trigger the ICC’s jurisdiction by commencing an investigation on the basis of information he has received; the source of the information is irrelevant. It is widely assumed that NGOs and victims’ groups will provide this kind of information to the Prosecutor.”)).

106. Rome Statute, *supra* n. 7, at art. 15(3) (emphasis added).

107. *Id.*, at art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, *as well as victims*, may also submit observations to the Court.”).

108. The first two sub-parts of Article 19 provide as follows:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

Nevertheless, there are significant limitations on the participation of victims even under the ICC scheme. As a general matter, the Rome Statute and the Court's procedural rules require that Court proceedings be conducted expeditiously and fairly.¹⁰⁹ Indeed, while a desire to serve the interests of victims was crucial to the founding of the ICC,¹¹⁰ the drafters of the Rome Statute also “considered [it] necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.”¹¹¹ Moreover, the drafters of the Rome Statute were concerned with the potential effects that victim participation could have on the rights of the accused.¹¹² As Judge

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- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.

See Rome Statute, *supra* n. 7, at art. 19(1) & art. 19(2). In addition, under Rule 93 of the Court's procedural rules, a Chamber “may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue . . . In addition, a Chamber may seek the views of other victims, as appropriate.” ICC Rules, *supra* n. 107, at R. 93.

109. For example, Article 64 of the Rome Statute requires Trial Chambers to ensure that proceedings be conducted in “a manner that is fair and expeditious.” See Rome Statute, *supra* n. 7, at arts. 64(2) and 64(3)(a). See also ICC Rules, *supra* 107, R. 101 (“In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.”); Rome Statute, *supra* n. 7, at arts. 67(1) (providing for right of accused to be tried without “undue delay.”).

110. See, e.g., Theodore van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, 77 (Herman von Hebel, *et al.* eds., 1999) (“The suffering and the plight of victims undoubtedly contributed to the motivation of all the persons and institutions who advocated the establishment of an effective ICC as a reaction against widespread patterns and practices of impunity for the perpetrators of the most serious international crimes.”).

111. See WCRO 2007 Victim Participation Report, *supra* n. 84, at 26 (citing Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 429 (Roy S. Lee ed., 2001)). See also Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 102, at 223 (noting that “an extensive interpretation of victims' rights could conflict with two cardinal principles which are vital to the work and functioning of the Court: the function of the Court as a judicial institution, and the imperative of impartiality.”).

112. See, e.g., Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 84, at 457 (“[M]any delegations were concerned that the potential numbers of victims might make their participation practically impossible and, thus, the modalities for exercising their right to participate in a given case

Claude Jorda, former President of the ICTY and former Pre-Trial Judge at the ICC, explained in the context of the *ad hoc* criminal tribunals in the former Yugoslavia and Rwanda:

“It is true that to authorize a victim to intervene in the proceedings in his personal capacity, with a view to expressing his concerns and obtaining reparation, is not in itself inconsistent, in formal terms, with the International Covenant on Civil and Political Rights. However, having regard to the nature and scope of the crimes over which the *ad hoc* Tribunals possess jurisdiction, such a prerogative may undermine the rights of the accused if it is not strictly defined and meticulously organized.”¹¹³

Thus, perhaps the most significant limitation on victims’ right to participate in proceedings before the ICC appears in the wording of Article 68(3) itself, which provides that victims’ views and concerns will be presented and considered “at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹¹⁴ This limitation is also reflected in the ICC’s procedural rules, which establish the basic procedure by which victims apply to participate under Article 68(3).¹¹⁵ Significantly, Rule 89 provides that it is the Chamber that shall “specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.”¹¹⁶ Rule 89 further provides that copies of victims’ applications shall be made available to both the prosecution and defense

were left in the hands of the Court. Since the practices and experiences regarding victims’ participation are different in different legal traditions, some delegations were also uncertain what impact such an individual role would have on the rights of the accused . . .”).

113. See WCRO 2007 Victim Participation Report, *supra* n. 84, at 27-28 (citing Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1393 (Cassese, *et al.* eds., 2002)).

114. Rome Statute, *supra* n. 7, at art. 68(3). See also Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 84, at 457 (noting that “[i]n order to overcome [potential efficiency and fairness] concerns, [Article 68(3)] states that victims’ participation shall take place ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’”).

115. See, generally, ICC Rules, *supra* n. 107, at R. 89-91.

116. ICC Rules, *supra* n. 107, at R. 89(1).

counsel, who have the opportunity to comment on the applications¹¹⁷ and to request that the Court deny an application to participate on the grounds that the applicant is not a “victim” under Rule 85,¹¹⁸ or otherwise does not fulfill the criteria of Article 68(3).¹¹⁹

Moreover, a number of other procedural rules constrain both when and how victims can participate. For instance, even if victims are granted participation rights by the Court, the scope of their participation is not infinite, as victim participants do not become parties to the proceedings.¹²⁰ Indeed, victims’ representatives must apply for leave from the Court in order to examine witnesses, experts and the accused, and representatives may be restricted to making

117. *Id.*, at R. 89(1) (“Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.”). Applicants may request that the Court redact their name and other information likely to reveal the applicants’ identity prior to transmitting an application to the Defence. *See* Rome Statute, *supra* n. 7, at art. 68(1) (“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”).

118. ICC Rules, *supra* n. 107, at R. 85.

119. *Id.*, at R. 89(2) (“The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.”).

120. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial,” ¶¶ 47-48 (July 16, 2010) (noting that, unlike parties, “victims do not have the *right* to present evidence during the trial; the *possibility* of victims being requested to submit evidence is contingent on them fulfilling numerous conditions.”) (emphasis added). *See also* Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 113, at 1405 (“a victim does not become a true party to the trial”); Karen Corrie, *Victims’ Participation and Defendants’ Due Process Rights: Compatible Regimes at the International Criminal Court*, American Non-Governmental Organization Coalition for the ICC, 10 January 2007, at 17-18, available at <http://www.amicc.org/docs/Corrie%20Victims.pdf> (“Unlike those domestic judicial systems in which participating victims actually become third parties to the case, victims before the ICC do not gain the status of fully participating third parties at any phase of the investigation or proceedings.”).

written observations.¹²¹ When victims are permitted to make submissions, the prosecution and defense are entitled to file replies.¹²² Additionally, unlike victim participants in some civil law systems, victim participants in the ICC context do not have the express right to initiate an investigation, or to compel the Prosecutor to pursue any particular suspect or crime.¹²³ Significantly, the rules provide that it is the legal representative—and not the victim—that has a right to attend and participate in the proceedings of the Court.¹²⁴ Finally, although victims are entitled to choose their own legal representative, the Court “may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims . . . to choose a common legal representative or representatives”¹²⁵ or appoint a common legal representative if the victims are “unable to choose” one.¹²⁶

Thus, while Article 68(3) establishes a general right of victims to participate in ICC proceedings, concerns regarding the efficiency of the process and the rights of the accused resulted in a number of significant restrictions on the modalities and scope of victims’ participation in proceedings before the ICC.

121. ICC Rules, *supra* n. 107, at R. 91. *See also* Corrie, *Victims’ Participation and Defendants’ Due Process Rights*, *supra* n. 120, at 7 (noting that these provisions “help to protect the integrity of the Prosecutor’s case and the rights of the accused.”).

122. ICC Rules, *supra* n. 107, at R. 91(2).

123. *See, e.g.*, WCRO 2007 Victim Participation Report, *supra* n. 84, at 32 (citing Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 84, at 457 (noting that, “[c]ontrary to what is the case in, for example, French and Swedish municipal systems, victims do not have the right to initiate criminal proceedings.”)).

124. ICC Rules, *supra* n. 107, at R. 91(2) (“A legal representative of the victim shall be entitled to attend and participate in the hearing . . .”).

125. *Id.*, at R. 90(2).

126. *Id.*, at R. 90(3).

B. Victim Participation at the ECCC

Nearly a decade after the victim participation scheme was established at the ICC, a similar scheme was set up to allow victims to participate in the proceedings before the ECCC. Notably, neither the agreement between Cambodia and the United Nations on the framework of the ECCC¹²⁷ nor the Law on the Establishment of the Extraordinary Chambers (ECCC Establishment Law)¹²⁸ explicitly provide for a right of victims to participate in proceedings. However, the ECCC Establishment Law requires the ECCC to conduct proceedings in accordance with Cambodia's existing criminal procedures,¹²⁹ which at the time the Establishment Law was passed included a mechanism by which victims of the crime being prosecuted could participate in the proceedings as civil parties.¹³⁰

Thus, the Chamber's Internal Rules, drafted by the judges in 2007, permit victims to exercise a right to take "civil action" during the criminal proceedings,¹³¹ giving civil parties a right to be "heard" by the Chambers.¹³² Nevertheless, as in the context of the ICC, victim

127. See Framework Agreement, *supra* n. 15.

128. See ECCC Establishment Law, *supra* n. 15.

129. *Id.*, art. 33 new (providing in part that trials be "conducted in accordance with existing procedures in force"). This is consistent with the 2003 agreement between the United Nations and the Royal Government of Cambodia that sets out the framework of the ECCC, which states that ECCC procedure "shall be in accordance with Cambodian law." Framework Agreement, *supra* n. 15, art. 12(1).

130. At the time, there were two Cambodian procedural codes to which the ECCC could have referred: the 1992 Transitional Law adopted by the United Nations Transitional Authority in Cambodia (UNTAC Law) and the 1993 Law on Criminal Procedure (SOC Law). See Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (Sept. 10, 1992), available at <http://www.cdpcambodia.org/untac.asp> [hereinafter "UNTAC Law"]; State of Cambodia Law on Criminal Procedure (March 8, 1993), available at <http://www.cdpcambodia.org/soclaw.asp> [hereinafter "SOC Law"]. Since then, a new Code of Criminal Procedure was passed, which similarly provides that victims have a right to participate in criminal proceedings as civil parties. Mark Wojcik, *False Hope: Rights of Victims Before International Criminal Tribunals*, L'OBSERVATEUR DES NATIONS UNIES, vol. 28, at 11 (2010).

131. See ECCC Internal Rules, *supra* n. 13, R. 23.

132. See, e.g., *id.*, R. 91(1) ("The Chamber shall hear the Civil Parties . . .") (emphasis added).

participation at the ECCC is not without limits. Indeed, although one might expect that as, “parties” to the proceedings, civil parties at the ECCC would have more extensive rights than victim participants at the ICC, the ECCC’s Internal Rules—as well as ECCC jurisprudence, which will be discussed more fully below—indicate that this is not necessarily the case.¹³³

For instance, while one of the two purposes articulated in the Rules for a “civil party action” is so that victims may participate in the proceedings, the Rules add that victims who participate must do so “by supporting the prosecution.”¹³⁴ Thus, victims’ requests or interventions must be made, if not in support of the prosecution’s case, then with the prosecution’s consent. For example, if a civil party uncovers new evidence not alleged in the prosecution’s submissions to the investigating chamber—which, at the ECCC, is the organ responsible for investigating the case¹³⁵—after the prosecution’s preliminary investigation into potential crimes, suspects, and witnesses,¹³⁶ the new evidence cannot be investigated unless the prosecution submits a supplementary submission to the investigating chamber requesting it to pursue that evidence.¹³⁷ Therefore, as in the ICC context, civil parties at the ECCC do not have a right to initiate an investigation without the prosecution’s consent, or to compel the Prosecutor to pursue any particular suspect or crime.¹³⁸

133. See Charline Yim, *The Scope of Victim Participation Before the ICC and the ECCC*, SEARCHING FOR THE TRUTH (Documentation Center of Cambodia, January 2011).

134. ECCC Internal Rules, *supra* n. 13, R. 23(1)(b). The other purpose listed in the Rules for a civil party action is so that victims “may seek collective and moral reparations.” *Id.*, at R. 23(1)(a). This is similar to the rationale for civil party participation in many civil law system, namely to allow victims to consolidate their claim for damages with the criminal action. See *supra* n. 101 and accompanying text.

135. The ECCC has an investigating chamber modeled on the French civil law system. See ECCC Internal Rules, *supra* n. 13, R. 14, R. 55.

136. *Id.*, at R. 15, R. 50.

137. *Id.*, at R. 55(3).

138. Notably, civil parties can also appeal a verdict handed down by the Trial Chambers, but only when the prosecution has also appealed. See *id.*, at R. 105(c).

Moreover, a number of other rules restrict how victims can participate. For instance, although civil parties have, as mentioned earlier, a right to be “heard” by the Chambers,¹³⁹ as in the ICC, victims’ representatives must apply for leave from the Chambers in order to examine witnesses.¹⁴⁰ Additionally, the Chamber is empowered to determine the order in which they will be heard¹⁴¹ and any questions by civil parties not put forward through their representatives must be asked “through the President of the Chamber.”¹⁴²

Furthermore, victims are encouraged to form groups to present their interests in a collective manner before the ECCC.¹⁴³ If victims do not form groups, the investigating chamber may group them or assign them to existing groups and designate a common lawyer to represent the group(s).¹⁴⁴ More significantly, although victims can participate in proceedings directly or through their own representative at the pre-trial stage, the Rules were recently changed to require that, at the trial stage and beyond, not only must civil parties be represented by civil party lawyers¹⁴⁵ but they also must comprise a “single, consolidated group, whose interests are represented by the Civil Party Co-Lead Lawyers.”¹⁴⁶ Thus, it is the Civil Party Co-Lead Lawyers—and not the civil parties or their individual legal representatives—that are “responsible . . . for the overall advocacy, strategy, and in-court presentation of the interests of the . . . Civil

139. *Id.*, at R. 91(1) (“The Chamber *shall* hear the Civil Parties . . .”) (emphasis added).

140. *Id.*, at R. 91(2).

141. *Id.*, at R. 91(1).

142. *Id.*, at R. 91(2).

143. *Id.*, at R. 23*ter*(3) and 23*quarter*.

144. *Id.*, at R. 23*ter*(3). A group of victims can also organize as members of a Victims Association and be represented by the Association’s lawyers. *See id.*, at R. 23*quarter*.

145. *Id.*, at R. 23*ter*(1).

146. *Id.*, at R. 23(3). The role of the Civil Party Co-Lead Lawyers is described in Rule 12*ter*.

Parties during the trial stage and beyond.”¹⁴⁷ Notably, the Civil Party Co-Lead Lawyers must discharge these obligations “whilst balancing the rights of all parties and the need for an expeditious trial . . .”¹⁴⁸ Therefore, while the Civil Party Co-Lead Lawyers must “seek the views” of civil party representatives and “endeavor to reach consensus in order to coordinate representation of Civil Parties at trial,”¹⁴⁹ they must ultimately organize civil party interventions so as not to undermine the fairness and expeditiousness of the trial. The result of these new rules is that the ability of individual civil parties to communicate with the Chambers, even through their own legal representative, is significantly restricted, particularly in cases with large numbers of victims.

In sum, while the ECCC Internal Rules establish a right of victims to participate in ECCC proceedings as civil parties, they also limit victim participation in ways similar to the restrictions imposed on victims at the ICC.

III. Experience of Victim Participants before the ICC and ECCC

So have these new participation schemes, in fact, helped us in the “task of seeing women”¹⁵⁰? What impact have they had on the ability of survivors of sexual and gender-based violence to tell their story and to talk about their experiences in their own terms? In particular, has victim participation enabled more of them to tell their stories than would have been possible under the more traditional adversarial model employed by the *ad hoc* tribunals and the Special

147. *Id.*, at R. 12ter(5)(b).

148. *Id.*, at R. 12ter(1). *See also id.*, at R. 12ter(2) (noting that Civil Party Lead Co-Lawyers are “obliged to promote justice and the fair and effective conduct of proceedings.”).

149. *Id.*, at R. 12ter(3).

150. As noted earlier, the phrase is taken from Doris Buss’ article entitled *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*. *See Buss, supra* n. 9, at 4

Court for Sierra Leone? Has it allowed them to expand the historical record produced by these tribunals with narratives that would otherwise have been left out because of prosecutorial or judicial decisions not to prosecute violations committed against them? Has it enabled them to communicate a richer, more nuanced picture of their experiences than they were able to in the context of those tribunals?

A. The Promise of Victim Participation before the ICC and ECCC

The early history of victim participation in these tribunals indicates considerable interest by victims in making use of their new participation rights. At the ICC, for instance, from 2005 until the end of March 2011, 4,773 victims had applied to participate in either one of the five situations currently before the Court—the Democratic Republic of Congo (DRC), Uganda, Central African Republic (CAR), Darfur, or Kenya—or one of the cases arising out of those situations.¹⁵¹ Of those, 2,317, or nearly 50 percent, had been authorized to participate.¹⁵² Interestingly, the largest number of applicants were authorized to participate in the case against Jean-Pierre Bemba, a case arising out of the CAR situation and focused almost exclusively on

151. ICC Registry Facts and Figures, at 4 (Apr. 8, 2011), *available at* <http://212.159.242.181/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf>. Note that these figures do not include applicants in the case against Callixte Mbarushimana (arising out of the DRC situation) or the two cases against six individuals arising out of the Kenya situation, the charges against whom had yet to be confirmed as of the date of this writing. *See Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Prosecution's request for the postponement of the confirmation hearing, 11 (May 31, 2011) (postponing the commencement of the confirmation hearing to 17 August 2011); *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, *available at* <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090111/ICC01090111.htm> (noting date of confirmation hearing as Sept. 1, 2011); *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, *available at* <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090211/ICC01090111.htm> (noting date of confirmation hearing as Sept. 21, 2011).

152. *Id.*

crimes of sexual violence.¹⁵³ Indeed, as of March 31, 2011, 1,366 victim applications had been granted in *Bemba*.¹⁵⁴ Comparatively, only 122 persons had been granted victim status in the case against Thomas Dyilo Lubanga,¹⁵⁵ 366 in the joint case against Germain Katanga and Mathieu Ngudjolo,¹⁵⁶ and 89 in the joint case against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,¹⁵⁷ the only other cases currently at trial before the ICC.

Although the Court does not regularly provide figures on the gender breakdown of victim participants, according to figures provided by the ICC's Victim Participation and Reparation Sections ("VPRS"), as of September 2010, approximately one third of all victims admitted to participate in proceedings before the Court were women.¹⁵⁸

153. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Pre-Trial Chamber II, 15 June 2009). Bemba was a former vice president in the DRC and the leader of the Movement for Liberation of Congo (MLC) rebel group, but he is charged with crimes allegedly committed in the CAR. *Id.* See also Kelly Askin, *International Criminal Court Takes on Gender Crimes*, Open Society Blog, Nov. 23, 2010, available at <http://blog.soros.org/2010/11/international-criminal-court-takes-on-gender-crimes/> (noting while murder and pillage are also charged, the *Bemba* case is "first and foremost a rape crimes trial"). While the case against Germain Katanga and Mathieu Ngudjolo, currently before the ICC's trial chamber II, does include significant rape and sexual slavery charges, "the gender crimes in that case are incorporated as part of an array of crimes—including conscripting child soldiers, murders and attacks against the civilian population, and property crimes—they are not front and center as with Bemba." *Id.*

154. ICC Registry Facts and Figures, *supra* n. 151, at 4. Note that the number of victim participants had increased to a total of 1620 as of July 8, 2011, and that more are expected given the Trial Chamber's decision to extend the deadline for victim participation applications to September 16, 2011. *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry, ¶ 38(h) (Jul. 9, 2011).

155. ICC Registry Facts and Figures, *supra* n. 151, at 4.

156. ICC Registry Facts and Figures, *supra* n. 151, at 4. Both the Lubanga case and the joint case against Katanga and Ngudjolo arise out of the DRC situation.

157. ICC Registry Facts and Figures, *supra* n. 151, at 4. The joint case against Banda and Jerbo arise out of the situation in Darfur, Sudan.

158. See Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2010* 191 (Nov. 2010), available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf [hereinafter "WIGJ 2010 Gender Report Card"] (noting figures were based on information provided by the VPRS by email to the WIGJ dated 2 September 2010). See also Women's Initiatives for Gender Justice, *Legal Eye on the ICC* (March 2011), available at

Significantly, a number of additional victims made representations to the Court in connection with the prosecutor's *proprio motu* investigation of the situation in Kenya under Article 15(3) of the Rome Statute.¹⁵⁹ Of the 396 victims who made such representations,¹⁶⁰ 237 requested that the investigation include incidents of sexual violence.¹⁶¹ Moreover, of the victims who made individual representations, 40 percent were women.¹⁶²

At the ECCC, a total of 90 victims applied to participate as civil parties in the first case prosecuted by that tribunal, the case against Kaing Guek Eav, also known as Duch.¹⁶³ Duch was found guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions in connection with his role as the commander of the detention and torture center known as S-21 during the Khmer Rouge period.¹⁶⁴ In contrast, nearly 4,000 victims applied for civil party status in the second case before the ECCC, a joint case against the four most senior living members of

http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html [hereinafter "WIGJ Legal Eye on the ICC (March 2011)"]. Interestingly, however, none of the victim participants admitted in the case against president of Sudan Omar Hassan Ahmad Al'Bashir, as of the same date, had been women, despite the fact that the charges against him include sexual violence charges. *See WIGJ 2010 Gender Report Card, supra*, at 204.

159. *See supra* n. 106.

160. Situation in the Republic of Kenya, No. ICC-01/09, Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5, ¶¶ 1-2 (Mar. 29, 2010) [hereinafter "*Situation in the Republic of Kenya, Report on Victims' Representations*"].

161. *Id.*, at ¶ 110 (Mar. 29, 2010). *See also id.*, at ¶ 112 ("176 of the individual representations and 61 of the collective representations mention an act of sexual violence.").

162. *Id.*, at ¶ 41 (Mar. 29, 2010).

163. ECCC Victim Support Section, *Victims Participation: Presentation on VSS & LCL* (Nov. 8, 2010) (on file with author). Although in the final judgment against Duch, the Trial Chamber ultimately decided that 24 of these civil parties had not produced sufficient evidence to support their claims and, thus, denied them civil party status, they were conditionally admitted, and thus participated, as civil parties during the trial. *See Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ _ (Jul. 26, 2010) [hereinafter "*Duch Trial Judgment*"].

164. *See Duch Trial Judgment, supra* n. 163.

the Khmer Rouge regime.¹⁶⁵ Of those, 3,850 were granted the right to participate in the case.¹⁶⁶ Notably, of the total number of applicants in these two cases, 61 percent were women.¹⁶⁷

Thus, the numbers indicate not only strong interest by victims in making use of their new participation rights but also that a significant percentage of that interest has come from either women or victims of sexual violence. When compared to the relatively small number of female witnesses who testified before the ICTY from 1996 to 2006 and the low percentage of witness statements focused on sexual violence at the ICTR from 1995-2002,¹⁶⁸ the numbers alone suggests that these schemes may, in fact, enable *more* survivors of sexual and gender-based violence to tell their stories than would have been possible at the *ad hoc* tribunals or the SCSL.

Moreover, a review of the initial cases tried by these tribunals indicates that, for some victims, these schemes have made a difference. Through their participation, they have been able to communicate a significant aspect of their story to the court in a way that likely would not have been possible at the other tribunals.

165. ECCC Press Release (Sept. 16, 2010) (indicating the court had received 3988 civil party applications). The four Khmer Rouge leaders are: 1) Ieng Sary, Khmer Rouge deputy prime minister for foreign affairs; 2) Nuon Chea, second in command under Khmer Rouge leader Pol Pot; 3) Khieu Samphan, Khmer Rouge head of state; and 4) Ieng Thirith, Khmer Rouge minister of social affairs. See *Co-Prosecutor v. Nuon Chea et al.*, 002/19-09-2007/ECCC-PTC, Case Information Sheets, *available at* <http://www.eccc.gov.kh/english/case002.aspx>. The case is referred to by the ECCC as Case 002. Note that as of May 18, 2011, the Court had also received 318 civil party applications in a third case, known as Case 003. ECCC Press Release, *Statement from the Co-Investigating Judges* (May 30, 2011). However, thus far, no persons have been charged in the case. A fourth case, Case 004, is also under investigation by the ECCC but, again, thus far, no persons have officially been charged in that case.

166. ECCC Press Release, *Pre-Trial Chamber Overturns Previous Rejection of 98% of Appealing Civil Party Applicants in Case 002* (Jun. 24, 2011) (noting decision by Pre-Trial Chamber reversing previous denial of 1,728 civil party applications, bringing total number of civil parties in the case to 3,850).

167. ECCC Victim Support Section, *Victims Participation: Presentation on VSS & LCL* (Nov. 8, 2010) (on file with author). Note that these figures do not include applicants in Case 003.

168. See *supra* n. 46-47 (noting only about 18 percent of the 3,700 witnesses who appeared before the ICTY from 1996 to 2006 were female and that although more than half of the indictments issued by the ICTR between 1995 and 2002 included counts of sexual violence, “only 1/6 of the witness statements taken by the investigation teams concerned acts of sexual violence”).

Most significantly, in the first case to come before the ICC, against Thomas Lubanga Dyilo—a Congolese militia leader charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict¹⁶⁹—the Trial Chamber affirmed the unique role victim participants have in proceedings before the Court by allowing three victims to address the Court directly, without being called as witnesses by either the prosecutor or the defense.¹⁷⁰ There, the three victim participants had requested to speak to the court about, *inter alia*, “their individual histories, within the context of the charges faced by the accused” and “the harm they individually experienced.”¹⁷¹ Although Article 68(3) does not explicitly mention the right of victims to address the Court in person and Rule 91(2) expressly refers to the right of victim legal representatives – rather than of victims – to attend and participate in proceedings,¹⁷² the Chamber noted that Article 68(3) “establishes the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected...”¹⁷³ Moreover, the Trial Chamber held that apart from “expressing their

169. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 319 (Jan. 29, 2007).

170. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence during the Trial, ¶¶ 17, 40 (Jun. 26, 2009) [hereinafter “*Lubanga Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person*”].

171. *Id.*, ¶ 15.

172. *See infra* n. 123.

173. *Lubanga Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person*, *supra* n. 170, ¶ 17 (emphasis added). Notably, the Chamber does not provide support for this contention other than noting “[b]y Article 68(3) of the Statute it is clear that victims have the right to participate directly in the proceedings, since this provision provides that when the Court considers it appropriate the views and concerns of victims may otherwise be presented by a legal representative.” *Id.*, ¶ 18 (quoting an earlier decision by the same Trial Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims’ Participation, ¶ 115 (January 18, 2008)).

views and concerns,” victims had a right, under certain conditions, to “give evidence,”¹⁷⁴ explaining that this right stemmed from the general right of the Court, pursuant to Article 69(3) of the Statute, “to request the presentation of all evidence necessary for the determination of the truth.”¹⁷⁵ While the Prosecutor argued that the testimony of at least two of the victims would “merely duplicate evidence that has already been given,”¹⁷⁶ the Chamber dismissed the argument, emphasizing that “the account of each [victim] is unique – none of their personal histories are the same...”¹⁷⁷ and that, in any event, the victims proposed to deal with issues not yet addressed in previous testimony.¹⁷⁸ Eventually, all three victims – two former child soldiers and a schoolmaster who tried to prevent the abduction of children – addressed the Chamber directly.¹⁷⁹ Notably, the decision to allow victims to address the Court directly was followed by the Trial Chamber in the *Katanga and Ngudjolo* case.¹⁸⁰

Secondly, although Lubanga was not charged with sexual or gender-based crimes, four legal representatives of victims specifically referred to sexual and gender-based violence suffered

174. *Id.*, ¶¶ 19, 20 and 25.

175. *Id.*, ¶ 19 (citing *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims’ Participation, *supra* n. 174, ¶ 108 (January 18, 2008)). The right of victim participants to tender and examine evidence was upheld by the Appeals Chamber. *See Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶¶ 3-4 (July 11, 2008).

176. *Id.*, ¶ 37.

177. *Id.*

178. *Id.*, ¶¶ 37-38.

179. Although much of the testimony given by these three victims occurred in closed session, part of their testimony can be read in the transcripts of the case. *See, generally* *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcripts (Jan. 12, 13, 14, 15, 19, 21, 22, and 26 2010).

180. *See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09 (Nov. 9, 2010) (allowing four victims who had not been called by either party to address the Chamber).

by girl soldiers during their opening statements.¹⁸¹ As mentioned earlier, Lubanga was charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict.¹⁸² Despite strong advocacy by women's rights groups and others, the prosecutor did not specifically charge the accused with any sexual or gender-based crimes.¹⁸³ Nevertheless, legal representatives of female child soldiers spoke at length during their opening statements not only about the fact that girl soldiers had been subjected to various forms of sexual

181. See Women's Initiatives for Gender Justice, *Legal Eye on the ICC (March 2009)*, available at http://www.iccwomen.org/news/docs/LegalEye_Mar09/index.html#drc [hereinafter "WIGJ Legal Eye on the ICC (March 2009)"].

182. *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, *supra* n. 182, ¶ 319.

183. See generally Joint Letter from Avocats Sans Frontières et al. to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern (July 31, 2006), available at http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm.

We are disappointed that two years of investigation by your office in the DRC has not yielded a broader range of charges against Mr. Lubanga We believe that you, as the prosecutor, must send a clear signal to the victims in Ituri and the people of the DRC that those who perpetrate crimes such as rape, torture and summary executions will be held to account.

Id.; see also Press Statement, Redress, ICC Prosecutor Leaves Unfinished Business in Ituri, DRC (Feb. 13, 2008) (Revised Feb. 20, 2008) <http://www.redress.org> (click link to "News & Events," click link to "New Releases," click on link to Press Statement dated Feb. 15, 2008) [hereinafter "Press Statement, Redress"] ("There is resentment that Thomas Lubanga and the UPC militia . . . are getting away too lightly. Arrested by the ICC in March 2006, Lubanga is said to be responsible for widespread killings and countless incidents of sexual violence. Yet, Lubanga has only been charged with recruiting and using child soldiers."); Press Release, Women's Initiatives for Gender Justice, Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga (Oct. 18, 2007), available at http://www.iccwomen.org/news/docs/Arrest_of_Katanga.pdf.

The lack of charges for sexual violence against Lubanga was seen by many local DRC NGOs and ourselves to be a significant omission given the availability of information, witnesses and documentation from multiple sources including the United Nations and various human rights organizations showing the widespread commission of rape and other forms of sexualized violence by the UPC militia group.

Id. As discussed below, victims also sought, unsuccessfully, to include charges of sexual slavery and inhuman and/or cruel treatment *after* the Pre-Trial Chamber confirmed charges against Lubanga for the war crimes of enlistment, conscription and use of child soldiers. See *infra* n. 199-205

and gender-based violence, but also about the broader context and the long-term effects of such violence.¹⁸⁴ For instance, as one of these representatives, Ms. Carine Bapita, noted,

Rape was ... an integral part of the daily life of girls recruited and listed by [Lubanga's militia]. The reality in the DRC and in Africa in general is that women and girls are second-class citizens. They are subordinate to men and they are afforded far few opportunities to study . . . many families living in rural areas prioritise [sic] sending boys to school at the cost of girls. . . . Before the war there was already great discrimination as regards schooling. The recruitment of child—of girl soldiers has had very negative consequences on their lives. They have been denied the right to a childhood, to be schooled, a right to safety, a right to be protected, a right to physical integrity, a right to reproductive health and sexual autonomy.¹⁸⁵

Similarly, victims who made representations to the ICC in connection with the prosecutor's *proprio motu* investigation of the situation in Kenya under Article 15(3) of the Rome Statute,¹⁸⁶ were able to speak to staff of the Court's VPRS about "issues . . . not within the Chamber's power to resolve or respond to,"¹⁸⁷ including various ways in which victims continued to suffer long after the post-December 2008 election violence, the primary subject of the prosecutor's investigation in Kenya.¹⁸⁸ Although such issues would likely not have come to the attention of the court in the more traditional adversarial proceedings before the *ad hoc* tribunals or the SCSL, the VPRS included them in its report to the Pre-Trial Chamber because it was their "understanding that these issues . . . are raised because this process has provided a rare

184. WIGJ Legal Eye on the ICC (March 2009), *supra* n. 181.

185. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript at 54-55 (Jan. 26, 2009).

186. *See supra* n. 160–162 and accompanying text.

187. *Situation in the Republic of Kenya*, Report on Victims' Representations, *supra* n. 160, at ¶ 115.

188. *Id.*, ¶ 120 (quoting one victim as saying: "Many people were affected, just for voting and many families left without breadwinners and are suffering today. Victims have lost their lives. Personally, I see no future for myself and Children. I hope our Kenyan government would help us and compensate and we are tired and suffering because of this government. Many women raped were infected with HIV aids virus, (r/0370/10).").

opportunity for victims to speak frankly about their needs and wishes”¹⁸⁹ and “it was clearly the wish of victims to have these messages conveyed to the Chamber.”¹⁹⁰

Likewise, at the ECCC, some of the victims participating as civil parties in the *Duch* trial found that they were able to address issues other than those strictly required to convict the accused for the crimes with which he was charged. Particularly significant for some victims was the ability to question Duch directly about, among other things, why he had ordered their loved ones to be tortured or killed.¹⁹¹ Indeed, for some victims, the ability to learn about these details and to communicate their story to the court, irrespective of whether either was necessary for the successful prosecution of the accused, was quite meaningful.¹⁹² This view was echoed by a civil party lawyer, who noted in his closing that the ECCC had already provided victims with the “most valuable reparation:” an acknowledgement of their right to be present and to participate and an opportunity for solidarity.¹⁹³

189. *Id.*, ¶ 115.

190. *Id.*, ¶ 116.

191. *See* Interview with Eric Stover, Berkeley Human Rights Center (Dec. 9, 2010). *See also, e.g., Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 6, at 55-57 (Aug. 19, 2009) (quoting Hav Sophea, a civil party whose father, a soldier, was imprisoned at S-21, as saying: “Who were the masterminders who actually took my father to S-21? . . . where did my father die? . . . how can [you] . . . really heal the wounds of the victims who lost their loved ones?”).

192. Stover, *supra* n. 191. *See, e.g., Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 61, at 86 (Aug. 19, 2009) (quoting Mr. Seang Vandy, a civil party whose brother was imprisoned and executed at S-21: “After participating in the proceedings before this Chamber on many occasions my feeling has become better in the hope that justice is being found for my brother . . . Brother Phan, I truly believed that you are here to listen to the proceedings before this Chamber because this afternoon I prayed to you to come here and to participate in the proceedings so that you can witness and hear and that I have attempted to find the justice for the criminal act committed upon you. So may your soul receive the peace and that you rest in peace.”).

193. *Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 73, at 80 (Nov. 23, 2009).

B. The Reality of Victim Participation: Significant Limitations Remain

Unfortunately, however, neither the considerable number of participants thus far nor the examples I just described tell the whole story. Indeed, a more comprehensive examination of victims' experiences in the initial cases tried by these tribunals indicates that although there is some reason for optimism, victims' voices are still limited in a variety of significant ways at these tribunals.

First, as a general matter, victims do not get an opportunity to participate in proceedings unless the harm they experienced is linked to the charges being prosecuted by the court against the accused. This requirement has been explicitly stated in the rules and/or jurisprudence of both the ICC¹⁹⁴ and the ECCC.¹⁹⁵

194. See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims's Participation of 18 January 2008, ¶ 2 (Jul. 11, 2008); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-579, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case', ¶¶66-67 (Jun. 10, 2008); *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09-121, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ¶¶ 12-13, (Sept. 25, 2009). Although in the *Lubanga* case, legal representatives of female child soldiers were able to speak about various forms of sexual and gender-based violence that their clients suffered despite the absence of specific gender-based charges against the accused, the harm at issue was arguably connected to the existing charges against the accused in the sense that it arose in the context of either child recruitment or the use of children in hostilities. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-107-ENG, Transcript, at 11 (Jan. 26 2009) (quoting Prosecutor Moreno-Ocampo as saying "Let me address the particular issue of sexual violence in the context of child recruitment and the fate of girl soldiers enlisted, conscripted, and used in combat by Thomas Lubanga's militia.").

195. See ECCC Internal Rules, *supra* n. 13, R.23bis(1)(b) (In order for Civil Party action to be admissible, the Civil Party applicant shall. . . b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based."). See also *See Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, ¶ 51 (Apr. 27, 2010) [hereinafter "Case 002 PTC 27 April 2010 Decision on Admissibility of Civil Party Applications"] (holding that "[t]he participation of victims before the ECCC is not unlimited. . . [rather, it] provides the possibility for victims alleging injuries as a direct consequences of crimes alleged against the Charged Persons to . . . become part of the ECCC proceedings at the investigating stage and beyond.") (emphasis added). Note that a recent decision by the Pre-Trial Chamber in Case 002 adopted an expansive interpretation of the

Second, the charges against the accused still depend on what the prosecution chooses to pursue. Indeed, neither at the ICC nor at the ECCC do victims have the ability to independently initiate an investigation,¹⁹⁶ or to compel the prosecution to either pursue particular charges or

phrase “crimes alleged against the Charged Person” to include crimes relating to policies “in areas other than those chosen to be investigated [by the OCIJ],” reasoning that “[t]he admission as a civil party in respect of mass atrocity crimes should . . . be seen in the context of dealing with wide spread [sic] and systematic actions resulting from the implementation of nation wide [sic] policies in respect of which the individual liability alleged against each of the accused also takes collective dimensions due to allegations for acting together as part of a joint criminal enterprise.” See *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, ¶¶ 77-78 (Jun. 24, 2011) [hereinafter “[“Case 002 PTC Decision on Appeals Against Orders on Admissibility of Civil Party Applications”].

196. In relation to the ICC, see Rome Statute, *supra* n. 7, Art. 53(1) (“The Prosecutor shall . . . initiate an investigation unless he or she determines there is no reasonable basis to proceed under this Statute.”) (emphasis added). See also *Situation in Democratic Republic of the Congo*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ¶58 (Appeals Chamber, Dec. 19, 2008) (holding that victims do not have a general right to participate at the investigation stage of a situation). The ruling confirms that the role of victims during the investigation stage is limited to the specific rights given to them in the Rome Statute at that stage, and these do not include a right to initiate criminal proceedings.. See *supra* n. 87-92 and accompanying text. See also Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 84, at 457 (noting that, “[c]ontrary to what is the case in, for example, French and Swedish municipal systems, victims [at the ICC] do not have the right to initiate criminal proceedings.”). In relation to the ECCC, see ECCC Internal Rules, *supra* n. 13, R. 49(1) (“[p]rosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint”). See also *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Svay Rieng Province, ¶¶ 17-19 16 (Sept. 9, 2010) (“17. Under ECCC procedure, contrary to Cambodian Criminal Procedure, an applicant cannot launch a judicial investigation simply by being joined as a Civil Party: being limited to action *by way of intervention*, he or she may only join ongoing proceedings through the application, and not widen the investigation beyond the factual situations of which the *Co-Investigating Judges are seized by the Co-Prosecutors (in rem seisin)*. 18. The Civil Party application is therefore limited in the sense that it may not allege new facts during the judicial investigation without first receiving a Supplementary Submission from the Co-Prosecutors. 19. Accordingly, in order for a Civil Party application to be admissible, the applicant is required to demonstrate that his or her alleged harm results only from facts for which the judicial investigation has already been opened.”). Although on appeal, the Pre-Trial Chamber indicated that the Co-Investigating Judges had erred when limiting civil parties to those who could show harm resulting “from facts for which the judicial investigation has already been opened” – noting that the correct standard was whether they could show a link between the harm suffered and the crimes (rather than the facts) alleged – it affirmed the notion that “Civil Parties may not, on their own, allege new facts for the purposes of the investigation.” *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, ¶¶ 41-42 (Jun. 24, 2011).

amend existing charges against the accused.¹⁹⁷ Although, as discussed below, victims have tried to challenge this, the rules and jurisprudence of the tribunals have made clear that victims do not have the power to force the prosecution's hand.

For instance, as mentioned earlier, in the *Lubanga* case before the ICC, women's rights groups criticized the prosecution for failing to include sexual violence charges in the indictment against Lubanga, despite evidence that girls had been kidnapped into Lubanga's militia and often raped and/or kept as sex slaves.¹⁹⁸ After the Pre-Trial Chamber confirmed charges against Lubanga for the war crimes of enlistment, conscription, and use of child soldiers, victims participating in the trial petitioned the court to include charges of sexual slavery and inhuman and/or cruel treatment.¹⁹⁹ Although the Trial Chamber initially ruled that additional facts and circumstances not described in the original charging document could be used to re-characterize the charges against the accused anytime during trial,²⁰⁰ the decision was overturned by the Appeals Chamber,²⁰¹ which held that Regulation 55 – the regulation the Trial Chamber had relied on to reach its conclusion – did not permit the Chamber to re-characterize the charges based on

197. See *infra* n. 198-212 and accompanying text.

198. See *supra* n. 183.

199. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (May 22, 2009).

200. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ¶¶ 27-32 (Jul. 14, 2009) (quoting Regulation 55(1)). Note that the victims' lawyers had contended that the new charges could be substantiated based on existing witness testimony and evidence. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55, *supra* n. 199, at ¶ 42.

201. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (Dec. 8, 2009).

facts and circumstances not already included in the charging document.²⁰² As one commentator noted, the Appeals Chamber decision made clear that Regulation 55 could “not be used to circumvent the Prosecutor’s charging document.”²⁰³ Indeed, the case exposed a significant limit on the rights of victims participating in proceedings before the ICC.²⁰⁴ Despite the intense dissatisfaction that victims’ rights groups felt with the limited scope of the charges against Lubanga and the compelling case they made for inclusion of gender-based charges, the Court made clear that victims do not have the express right to compel the Prosecutor to pursue a particular crime.²⁰⁵

Similarly, as mentioned earlier, at the ECCC, the Internal Rules make clear that the “purpose of Civil Party action . . . is to . . . participate in proceedings . . . *by supporting the prosecution.*”²⁰⁶ Thus, requests or interventions made by victims²⁰⁷ must be made, at the very least, with the prosecution’s consent.²⁰⁸ Notably, in Case 002, against the most senior surviving

202. *Id.*, ¶¶ 100, 112.

203. Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, 14 ASIL Insight 1, at 5 (Jan. 8, 2010).

204. *Id.* Significantly, the Trial Chamber rejected a subsequent request by the victims to re-characterize the charges against the accused based on existing evidence, finding that the charges of sexual slavery and and inhuman and/or cruel treatment could only be proved by reference to evidence not in the charging document. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ¶¶ 37-38 (Jan. 8, 2010).

205. It is worth noting that even if victims had petitioned the Court before it confirmed the charges against the accused, it would still be up to the Prosecutor to decide whether to add those charges. Indeed, Article 61(7) of the Statute makes clear that if the Pre-Trial Chamber is convinced that the charges should be amended, it must suspend the confirmation hearing and request that the Prosecutor consider amending the charges. *See Rome Statute, supra* n. 7, art. 61(7). Thus, the Prosecutor retains ultimate authority regarding whether to add the new charges.

206. ECCC Internal Rules, *supra* n. 13, R.23(1).

207. Note that the Internal Rules permit parties, including civil parties, to request that the Co-Investigating Judges “make orders or undertake such investigative action as they consider useful for the conduct of the investigation.” *Id.*, at R.55(10).

208. *See, e.g., Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons

Khmer Rouge leaders, victims were successful in moving the court to expand its investigation to include incidences of forced marriage.²⁰⁹ However, the investigating chamber could not have expanded the investigation without the prosecution's consent. As mentioned earlier, if a civil party uncovers new evidence not alleged in the prosecution's submissions to the investigating chamber after the prosecution's preliminary investigation into potential crimes, the new evidence cannot be investigated unless the prosecution submits a supplementary submission to the investigating chamber requesting it to pursue the new evidence,²¹⁰ which is what happened here.²¹¹ Therefore, as in the ICC context, civil parties at the ECCC do not have a right to initiate an investigation, or to compel the prosecution to pursue any particular suspect or crime.²¹²

named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, ¶ 11 (Jul. 21, 2010) (holding that “while Civil Parties and Civil Party Applicants may request the [Co-Investigating Judges] to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation, the scope of the investigation is defined by the [Co-Prosecutors’] Introductory and Supplementary Submissions” and that, as a result, while civil parties can bring new facts to the attention of the Co-Investigating Judges or the Co-Prosecutors, they “have no standing for requesting investigative actions of such facts unless these are included by the Co-Prosecutors in a Supplementary Submission.”).

209. *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations (Dec. 18, 2009) [hereinafter “Case 002 Order on Investigative Action Concerning Forced Marriage”].

210. *See* ECCC Internal Rules, *supra* n. 13, R. 55(3).

211. Case 002 Order on Investigative Action Concerning Forced Marriage, *supra* n. 209, at ¶¶ 1-2. *See also* *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on appeal of Co-lawyers for civil parties against order on civil parties' request for investigative actions concerning all properties owned by the charged persons, ¶¶ 14-15 (Aug. 4, 2010) (holding that if a request for investigative action related to facts that are outside the scope of investigation, the Co-Investigating Judges must bring the new facts to the attention of the Co-Prosecutors, but may not conduct any investigation in relation to those facts unless and until the Co-Prosecutors submit a Supplementary Submission); *Case 002*, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* n. 195, ¶ 97 (noting that participation of additional victims in Case 002 would “not have a direct effect on decisions that would directly and adversely affect the position of the Accused, such as whether to prosecute or not, [i.e.] they do not explicitly have a say in possible amendments to the charges. . .”).

212. Notably, civil parties can also appeal a verdict handed down by the Trial Chambers, but only when the Co-Prosecutor's have also appealed it. *See* ECCC Internal Rules, *supra* n. 13, R. 105(c).

Of course, what the Prosecution chooses to pursue often depends on factors unrelated to the wishes of the victims. Indeed, even at the ICC and the ECCC, where victims have been acknowledged as an integral part of the process, the prosecutors routinely take into account factors other than the interests of victims in deciding whether to pursue certain charges, including, among other things, the gravity of the crimes, the strength and credibility of the evidence, whether the accused can be apprehended and arrested, and the current workload and resources of the court.²¹³ Thus, if the prosecution chooses to bring charges unrelated to sexual and gender-based violence, the story these victims have to tell, no matter how compelling, will likely not be heard.

Moreover, the fact that the primary purpose of these tribunals remains to determine the guilt or innocence of an accused has meant that many of the restrictions facing victim-witnesses at the *ad hoc* tribunals and the SCSL also limit the way in which victims, as a practical matter, have been able to participate at the ICC and ECCC. Thus, many victims' voices continue to be either not heard or only partially heard.

For instance, although victim participants have been allowed to present their views and concerns to the Court in person when their personal interests are affected,²¹⁴ the Court has emphasized that such presentations must not be “prejudicial to, or inconsistent with, the rights of

213. See, e.g. Jérôme de Hemptinne & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, J. INT'L CRIM. JUST., 342, 347-48 (April 2006) (“Indeed, the Statute requires that the investigation be carried out in an independent and objective manner, with equal care given to incriminating and exonerating circumstances... Furthermore, it should be noted that, in conducting the investigations, the Prosecutor, in addition to the interests of victims, has to take into account several other factors (such as the gravity of the crimes, complementarity and other interests, e.g. reconciliation, excessive workload of the Court, etc.”). See also Henry, *supra* n. 21, at 120.

214. See *supra* n. 170-179 and accompanying text.

the accused and a fair and impartial trial.”²¹⁵ Indeed, considerations affecting the fairness and expeditiousness of proceedings must be taken into account, including, for instance, the number of victims wanting to communicate their views and concerns to the Court.²¹⁶ Recognizing that the participation of a large number of victims could negatively impact the fair trial rights of the accused, the Court has stressed that victims’ common views might best be expressed through a common legal representative.²¹⁷

Notably, although in the *Lubanga case*, seven legal representatives were allowed to attend and participate in the proceedings on behalf those granted victim status,²¹⁸ in the *Katanga and Ngudjolo case*, the Trial Chamber considered it necessary to divide participating victims, which numbered 366 by end of March 2011,²¹⁹ into just two groups – the first consisting of former child soldiers alleged to have participated in attacks against other victims and the second consisting of all other victims – and to assign each a common legal representative.²²⁰ Citing, *inter alia*, the Court’s duty to ensure that “the proceedings are conducted efficiently and with the

215. See *Lubanga Decision on the Request of Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person*, *supra n. 170*, ¶ 17. Similarly, in a decision issued in July 2010, the Appeals Chamber emphasized that victims do not have a general “right to present evidence during the trial,” rather, “the possibility of victims being requested to submit evidence is contingent on . . . numerous conditions,” including that victims’ participation in this manner is consistent with the Trial Chamber’s obligation to “ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the so accused.” *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled, *supra n. 120*, ¶ 48 (citing Article 64 (2) of the Rome Statute).

216. *Id.*, ¶ 18 (citing *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims’ Participation, ¶ 116 (January 18, 2008)).

217. *Id.*

218. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, at 36-37 (Jan. 26, 2009), available at <http://www2.icc-cpi.int/iccdocs/doc/doc623638.pdf> (noting order of opening statements to be given by seven legal representatives). Note that, as of March 31, 2011, 122 victims had been granted victim status in the *Lubanga case*. See *infra n. 155*.

219. See *infra n. 156*.

220. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-579, Order on the Organisation of Common Legal Representation of Victims, ¶ 13 (Jul. 22, 2009).

appropriate celerity”²²¹ and that “victims' participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,”²²² the Chamber concluded that “although victims are free to choose a legal representative, this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court.”²²³ Following the Trial Chamber’s reasoning in *Katanga and Ngudjolo*,²²⁴ the Trial Chamber in *Bemba* adopted a similar approach, assigning two common legal representatives to represent victim participants at trial,²²⁵ which, as of the end of March 2011, numbered 1,366.²²⁶

As Executive Director of the Women’s Initiatives for Gender Justice, Brigid Inder, has noted, “organising the legal representation into only two groups may not be in the best interests of victims given the large number of individuals the two legal representatives will have responsibility for during the trial.”²²⁷ Indeed, although the Court is required to ensure that the distinct interests of victims – particularly those of victims of crimes involving sexual or gender violence – are represented when selecting a common legal representative,²²⁸ this is unlikely to have occurred in *Bemba*, where despite the large number of sexual violence victims participating

221. *Id.*, ¶ 10.

222. *Id.*

223. *Id.*, ¶ 11.

224. *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on Common Legal Representation of Victims for the Purposes of Trial, ¶¶ 9, 15 (Pre-Trial Chamber II, Nov. 10, 2010) [hereinafter “*Bemba Decision on Common Legal Representation*”].

225. *Id.*, ¶ 10.

226. *See infra* n. 154.

227. Women's Initiatives for Gender Justice, *Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo*, 4 (Nov. 22, 2010), available at http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf.

228. ICC Rules, *supra* n. 107, R. 90(4). Note that the rule specifically highlights the interests of victims as provided in Article 68 of the Rome Statute, which references victims of crimes involving sexual or gender violence. *See Rome Statute, supra* n. 7, art. 68(1).

in the case, the Chamber arranged the two groups on the basis of geography²²⁹ rather than on the basis of the nature of the crimes allegedly committed against the victims. Significantly, in a more recent case with far fewer victim participants – against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, arising out of the situation in Darfur, Sudan²³⁰ – the Registry indicated that although consulting with victims directly on their choice for common legal representation would allow Registry staff to provide victims with a forum for their input and to develop a sense of their situation and concerns, such consultations would be too costly,²³¹ suggesting that direct consultations with victims for the purpose of selecting a common legal representative are unlikely to occur in the future, particularly in cases with large numbers of victims.²³²

229. *Bemba* Decision on Common Legal Representation, supra n. 224, ¶ 21 (appointing one legal representative to represent Group A (victims whose applications relate to alleged crimes committed in, or around, Bangui and PK 12), and a second legal representative to represent Group B (victims whose applications relate to alleged crimes committed in, or around, Damara and Sibut), Group C (victims whose applications relate to alleged crimes committed in, or around, Boali, Bossembélé, Bossangoa and Bozoum) and Group D (victims whose applications relate to alleged crimes committed in, or around, Mongoumba)).

230. *See supra* n. 157.

231. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Report on the implementation of the Chamber’s Order instructing the Registry to start consultations on the organisation of common legal representation, ¶¶ 7-8 (Jun. 21, 2011). Instead, the Registry recommended that it rely on information received when victims originally applied to participate in proceedings. *Id.*, at ¶ 9.

232. Note that resource and time constraints have led the Court to cut back in other ways on the potential rights of victims to participate in proceedings, even where they might otherwise have been qualified to participate. For instance, in the case against Callixte Mbarushimana, insufficient resources led the Registry to indicate that it could not meet the deadline set by the Court to process 470 victim applications to participate in the accused’s confirmation of charges hearing, *see Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Proposal on Victim Participation in the Confirmation Hearing, ¶ 9 (Jun. 6, 2011), resulting in a decision by the Pre-Trial Chamber to exclude those applicants from participating in those proceedings, *see Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision Requesting Parties to Submit Observations on 124 Applications for Victims’ Participation in Proceedings, 6 (Jul. 4, 2011). *See also* Redress Press Release, *Hundreds of Victims Prevented from Participating in Crucial Hearings Due to lack of Resources at the International Criminal Court* (Jul. 15, 2011).

Moreover, as indicated earlier, in *Lubanga*, only three victims – two former child soldiers and a schoolmaster – addressed the Court directly without being called by either the prosecutor or the defense.²³³ In addition, only two of the four victims permitted to address the Chamber directly in the case against Katanga and Ngudjolo ended up taking advantage of the opportunity.²³⁴ Notably, the way in which victims participated in these trials was quite similar to the way they would have testified before the Court had they been called as witnesses by one of the parties. Indeed, while the initial questioning of victim participants was conducted by their legal representative, rather than the prosecutor or defense counsel, these victims “gave evidence”²³⁵ and were effectively cross-examined by the defense.²³⁶ Much like witnesses testifying on

233. See, generally, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcripts (Jan. 12, 13, 14, 15, 19, 21, 22, and 26 2010).

234. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant legal (Jan. 31, 2011); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant legal (Feb. 10, 2011); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Décision relative à la Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal (Jan. 31, 2011); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal, rendue le 11 février 2011 (Feb. 21, 2011).

235. As discussed earlier, in its June 2009 decision, the *Lubanga* Trial Chamber distinguished between the right of victim participants to express their views and concerns and their right, under certain conditions, to give evidence. See *infra* n. 174-175 and accompanying text. More specifically, the Chamber noted that the expression of “views and concerns” – either by the victim in person or through legal representatives – does not form part of the evidence of the trial, but may be used to help the Chamber in its approach to the evidence in the case. *Lubanga* Decision on the Request of Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person, *supra* n. 170, ¶ 25. On the other hand, victim participants wishing to “give evidence” in the trial must first be placed under oath. *Id.* In both the *Lubanga* case and the case against Katanga and Ngudjolo, victim participants were placed under oath before addressing the Chamber. See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, at 6 (Jan. 12, 2010) (swearing in victim); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Transcript, at 12 (February 21, 2011) (same).

236. See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcripts (Jan. 19 and 21, 2010) (examination of second participating victim by Lubanga’s defense counsel); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Transcript, at 14 (February 21, 2011) (Presiding Judge Cotte) (indicating that after questions posed to victim participants by their representative and the prosecution, “the Defence team for Mr. Katanga will take the floor, followed by the Defence team for Mr. Ngudjolo”); see also *id.*, at 67-77 (cross-examination

behalf of the parties before the *ad hoc* tribunals, victim participants addressing the Court were frequently interrupted and unable to tell their story in their own words. For instance, as the excerpt below from the transcript in the *Katanga and Ngudjolo* case indicates, the first victim participant to address the Chamber in that case was reminded several times to answer the questions posed rather than being permitted to narrate her story in her own terms:

PRESIDING JUDGE COTTE: (Interpretation) Madam Witness, you have just been asked to tell us, as you undertook to say the truth, whether the person whose name is beside the letter 1 is a person whom you know and with whom you travelled to The Hague. That is Mr. O'Shea's question, and you just have to answer that question.

THE WITNESS: (Interpretation) I just said this. I thought that I was there -- here to talk about my personal story. That is why I gave you the previous answer.

PRESIDING JUDGE COTTE: (Interpretation) Madam Witness, I understand very well, but as I've said several times, some of the questions that are being asked of you may seem to be rather odd or off-putting and may not appear to be related to what you saw and what you experienced . . . but these are questions that may be important to one of the parties or participants, and perhaps even for the Chamber itself. So please give the best answer you can, to the best of your recollection . . .

THE WITNESS: (Interpretation) Yes, now I understand. I thought that I was going to be talking about my personal story. . . ²³⁷

Further, although the Court had indicated that it was open to listening to victims' views and concerns after they had finished giving evidence under oath,²³⁸ none of the victims appear to have taken advantage of this opportunity.²³⁹

by defense counsel for Katanga); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Transcripts (February 22 and 23, 2011) (cross-examination by defense counsel for Katanga and Ngudjolo).

237. See, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Transcript, at 49-50 (February 23, 2011).

238. See Lubanga Decision on the Request of Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person, *supra* n. 170, ¶ 40.

239. Although, as indicated earlier, much of the testimony given by the three participating victims occurred in closed session, there is no indication in the public record, at least, that victims' expressed any views and concerns after they finished giving evidence under oath. See, generally, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcripts (Jan. 12, 13, 14, 15, 19, 21, 22, and 26, 2010) and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Transcripts (February 21, 22, 23, 24 and 25, 2011).

Finally, as mentioned earlier, legal representatives of female child soldiers spoke at some length during opening statements in the *Lubanga* trial not only about the fact that girl soldiers had been subjected to various forms of sexual and gender-based violence, but also about the broader context and the long-term effects of such violence.²⁴⁰ However, the fact that some of these remarks exceeded the scope of the charges against the accused escaped neither defense counsel's nor the Court's notice. As defense counsel noted in her opening statement,

Our main concern about a fair trial is also in relation to the participation of victims . . . Now, why is the Defence [sic] very worried at present? . . . Yesterday . . . I listened to much more than just reference to the crime of enlisting and conscripting. I heard the word “rape” and “sexual slavery” mentioned. However, those aren't charges brought against our client. The Legal Representatives of Victims cannot accuse our client of crimes which he isn't prosecuted for here.²⁴¹

The presiding judge of the trial bench expressed a similar concern, cautioning one legal representative as follows,

Mr. Diakiese, I know it was to a very large extent something of a flourish of oratory, but it was in a sense an example of something that we've got to be very careful about in this case in that the ambit of participation by the victims in this case must be focused [sic], must be really directed at the evidence that we're going to be dealing with in this trial and, in particular, the charges which this accused faces.²⁴²

240. See *supra* n. 185 and accompanying text. See also *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, at 49 (Jan. 26, 2009) (Victim Representative Mr. Diakiese) (noting “[t]his trial is an opportunity for the victims to learn the truth and to have right -- a right to justice. The truth about the real motives that caused them to be torn from their families and sent to fight and to die for the cause of defending their community.”); *id.* (noting “Women and children have been the hostages of warlords in Ituri while the ship of their destiny has been submerged by blood. Women and children first. Yes, women and children were given special treatment. That is to say the women were raped. That is to say the children were sent into combat in the case of boys, and also used as sex slaves when it came to girls. These victims respectfully hope that their views and concerns will be taken into account at this trial.”).

241. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, at 16, 18 (Jan. 27, 2009).

242. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, at 70 (Jan. 26, 2009).

Likewise, at the ECCC, judges have at times limited the ability of civil parties to bring certain issues or facts to the attention of the court because of fair trial or efficiency concerns.²⁴³ For example, in the *Duch* case, the Chambers refused to admit evidence from a civil party about a particular incident of rape, in part, because “these allegations were raised at a late stage in the proceedings . . . [, and that, therefore,] evidence relevant to them will be impossible to obtain within reasonable time.”²⁴⁴ Moreover, judges regularly interrupted civil parties who were allowed to address the court, often asking them to restrain themselves emotionally or to restrict their testimony in other ways. For instance, after one civil party became visibly upset on the stand following his testimony about being beaten at the S-21 detention center, the presiding judge asked him to “try to be strong” and to “recompose” himself so that he would be in a better position to recount what happened to him,²⁴⁵ adding that:

Today is the opportunity for you to reveal, to describe your sufferings [sic] to the Chamber so that the Chamber can understand. If your emotion overwhelms you, then it's unlikely that we have another time to hear your account because the Chamber has scheduled other witnesses to provide the[ir] testimonies...²⁴⁶

Similarly, after another civil party testified about how she struggled to understand why her husband had been so mistreated by the Khmer Rouge, the presiding judge cautioned her to “concentrate on the linkages of the time when your husband was detained and tortured, for example, at S-21. And please don't stray far away from that matter.”²⁴⁷

243. See, e.g., *infra* n. 244 and accompanying text..

244. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Decision on Parties Requests to Put Certain Matters before the Chamber Pursuant to Rule 87(2), ¶ 14 (Oct. 28, 2009).

245. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript, at 14 (Jul. 1, 2009).

246. *Id.*, at 14-15.

247. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript, at 71 (Aug. 24, 2009).

Not surprisingly, perhaps, victims' participation rights have, in some respects, actually been scaled back over the last few years, as these tribunals have struggled with how to give victims a meaningful voice in the process without undermining either the efficiency of proceedings or the fair trial rights of accused. At the ICC, for instance, while an early Pre-Trial Chamber decision characterized victims' rights quite broadly, even at the investigation stage,²⁴⁸ a later Appeals Chamber decision held that victims do not, in fact, have a general right to participate at the investigation stage of a situation.²⁴⁹ Similarly, judges at the ECCC have issued a number of decisions constraining the manner in which civil parties can participate.²⁵⁰ For instance, during Duch's trial, the Trial Chamber cautioned civil parties that although they were entitled to pose questions to witnesses, they were not to be repetitious, "long-winded" or ask

248. See *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 12 (Pre-Trial Chamber I, 17 January 2006).

249. See *Situation in Democratic Republic of the Congo*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings, *supra* n. 196, at ¶ 58; see also *Situation in Darfur, Sudan*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, at 16 (Feb. 2, 2009). Interestingly, in June 2010, two victims granted participation status in the DRC situation before the Appeals Chamber issued these decisions requested that the Pre-Trial Chamber review a decision by the Prosecutor not to investigate Bemba for crimes, including crimes of sexual violence, allegedly committed by his troops in the DRC. See *Situation in Democratic Republic of the Congo*, ICC-01/04-564, Demande du representant legal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualite de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont presumees coupables en Ituri (Jun. 28, 2010). While the Pre-Trial Chamber did not address whether the victims had standing to submit their request in light of the Appeals Chamber decisions rejecting victims' general right to participate at the investigation stage, it rejected the request on the grounds that the Chamber had no basis under the Rome Statute to invoke its review powers over the decision of the Prosecutor in that instance. See *Situation in Democratic Republic of the Congo*, ICC-01/04-582, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, at 4-5 (Oct. 25, 2010). In a subsequent decision, the Pre-Trial Chamber made clear that in view of the Appeals Chamber decisions, the "procedural status" granted to victims at the investigation stage by earlier decisions of the Pre-Trial Chamber could no longer be sustained. See *Situation in Democratic Republic of the Congo*, ICC-01/04-593, Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo, ¶ 15 (Apr. 11, 2011).

250. See *infra* n. 251-261 and accompanying text.

questions outside the confines of the relevant topic.²⁵¹ Moreover, in response to complaints by defense counsel regarding the scope of questioning by civil parties during the *Duch* trial, judges introduced new time limits on questioning mid-trial.²⁵² As one observer noted, “[a]lthough some Civil Parties felt that this limited their role, the judges were under pressure to manage the trial process more efficiently.”²⁵³ Later, the Trial Chamber issued a decision holding that civil parties could not question the character witnesses for the accused or make submissions concerning the sentencing of the accused.²⁵⁴ Significantly, the Chamber reasoned that although the civil party system at the ECCC is based on Cambodian Criminal Procedure, it is not identical to the way that system works at the national level and “must be consistent with the specific nature of criminal proceedings before the ECCC.”²⁵⁵ “In this context,” the court continued, “features of more traditional Civil Party models, devised for less complex proceedings with fewer victims, require[] adaptation . . . [Thus, a] restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.”²⁵⁶

251. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 31, at 98 (Jun. 22, 2009).

252. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 35, at 81 (Jun. 29, 2009) (imposing a limit of ten minutes on each of the four civil party groups for questioning witnesses); *id.*, Transcript of Trial Day 37, at 86-86 (Jul. 1, 2009) (denying request by civil party lawyer for an extra ten minutes to pose questions to a survivor of S-21, despite the fact that seven civil party lawyers were required to question witness on behalf of over 90 civil parties in 40 minutes).

253. *Reaching for Justice: The Participation of Victims at the ECCC 5* (University of East London, The Center on Human Rights in Conflict, Sept. 2010).

254. *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Decision on Civil Party Co-lawyers’ joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character (Oct. 9, 2009.)

255. *Id.*, at ¶ 12.

256. *Id.*, at ¶ 12-13.

Even more significantly, perhaps, in anticipation of Case 002 against the surviving senior leaders of the Khmer Rouge—in which nearly 4000 victims applied to participate as civil parties²⁵⁷—the ECCC radically revised its rules on civil party participation in an effort to streamline the process.²⁵⁸ As described in Section III.B. above, the rules were changed to require that, at the trial and appeal stages, all civil parties must comprise a single, consolidated group, which will be represented by Lead Co-Lawyers, who in turn will be supported by the lawyers representing individual civil parties.²⁵⁹ As noted earlier, under these new rules, the “Civil Party Lead Co-Lawyers [are to] ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context.”²⁶⁰ This effectively means that victims will have to relay their views and concerns to the Chambers not only through their own lawyer but through yet another person whose job it is to represent not only that victim but all other victims in the case, which in Case 002 amount to 3,850 people.²⁶¹ Notably, at the initial hearing held by the Trial Chamber in that case, one of the civil party representatives was given an opportunity to address the Chamber on the proposed witness list for the trial.²⁶² However, when she tried to explain why the proposed witnesses might not adequately be able to address

257. See *supra* n. 165 and accompanying text.

258. See ECCC Press Release, 7th Plenary Session of the ECCC Commences Monday 2 February 2010 (Jan. 28, 2010) (noting proposed revisions to ECCC Internal Rules relating to the representation of Civil Parties are intended to “streamline and consolidate Civil Party participation in advance of the commencement of the trial [in Case 002].”).

259. See *supra* n. 145-149 and accompanying text.

260. ECCC Internal Rules, *supra* n. 13, R. 12*ter*.

261. See *supra* n. 166 and accompanying text.

262. See *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, Transcript, at 27 (Jun. 30, 2011).

the Khmer Rouge’s policy regarding the regulation of marriage,²⁶³ she was cut off by the Chambers and reminded that civil parties were to be “led by the lead co-lawyers, who should have the primary role in these proceedings in representing the consolidated group.”²⁶⁴

In sum, it appears that victim participants at these tribunals have suffered some of the very same challenges victim-witnesses faced at the *ad hoc* and hybrid tribunals. At the end of the day, these proceedings remain criminal trials with significant time and logistical constraints, making it difficult to accommodate the desire of victims to tell their story or to talk about their experiences in their own terms. Indeed, in light of the recent restrictions on victim participation, particularly in cases where large numbers of victims are expected to participate, it is not at all clear that victims will be able to communicate a richer, more nuanced picture of their experiences than they were able to in the context of the *ad hoc* tribunals or the SCSL.

C. Unintended Consequences of Victim Participation Schemes

One of the most troubling aspects of these findings is that these schemes raised—and continue to raise—high expectations that the ICC and ECCC will serve the interests of victims better than did the *ad hoc* or hybrid tribunals and that, therefore, more victims will be heard, and more of their stories told, than would have been possible at those tribunals. Indeed, such expectations were articulated as recently as last year by some of the victims who made representations to the ICC in connection with the prosecutor’s *proprio motu* investigation of the situation in Kenya under Article 15(3).²⁶⁵ In its report to the Court’s Pre-Trial Chamber assigned to the Kenya situation, the Registrar noted “[o]n some issues it appears that unrealistically high

263. *Id.*, at 27, 29-31.

264. *Id.*, at 33.

265. *See infra* n. 266 and accompanying text.

expectations already exist about what the ICC can achieve in Kenya,” mentioning as an example of this “[t]he desire of many victims to give evidence about their experiences . . . and the belief that most or many victims and eye-witnesses will have a chance to testify at the ICC.”²⁶⁶ As the Registrar’s comments and my initial assessment suggest, this is not likely to happen.

Furthermore, these expectations seem particularly problematic in cases against those most responsible for planning, organizing or masterminding serious international crimes, the focus of the ICC’s and ECCC’s prosecution efforts today.²⁶⁷ The mass number of victims

266. *Situation in the Republic of Kenya*, Report Concerning Victims’ Representations, *supra* n.160, at ¶ 18. Notably, the ICC’s own Victim Participation Guide, available on its website, notes in response to the question “What might a victim expect from participating in proceedings?” the following: “By presenting their own views and concerns to the judges, victims are given a voice in the proceedings that is independent of the Prosecutor. This will help the judges to obtain a clear picture of what happened to them or how they suffered . . . This may lead to having an impact on the way proceedings are conducted and in the outcomes.” *Booklet on Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, at 16, available at <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>.

267. Both the ICC and the ECCC limit their ability to conduct comprehensive prosecutions of the massive crimes within their jurisdiction to high level perpetrators through some combination of statute, mandate, prosecutorial policy, and limited resources. With respect to the ECCC, *see* ECCC Establishment Law, *supra* n. 15, at art. 1 (“The purpose of this law is to *bring to trial senior leaders of Democratic Kampuchea and those who were most responsible* for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”). With respect to the ICC, *see* Paper on Some Policy Issues Before the Office of the Prosecutor, p. 7, September 2003, http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (noting that, as early as 2003, that “[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission” and announcing in September 2003 that, as a matter of policy, it would “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”). The OTP has repeatedly reaffirmed its adherence to this policy, including in its September 2006 “Report on Prosecutorial Strategy.” Office of the Prosecutor, *Report on Prosecutorial Strategy*, p. 5, International Criminal Court, 14 September 2006 (“The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions. Based on the Statute, the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes.”) *See also* Office of the Prosecutor, Statement by the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, p. 4, International Criminal Court, 12 February 2004 (“We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility for crimes committed on or after 1 July 2002. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals.”); Office of the Prosecutor, *Statement by the Chief Prosecutor on*

potentially affected in these cases means that the number of victims who might qualify to participate in proceedings²⁶⁸ may well reach into the thousands. Indeed, as mentioned earlier, while 122 and 366 persons have been granted victim status in the *Lubanga* and *Katanga* cases, respectively, 1,366 victim applications were granted in the case against Bemba,²⁶⁹ the highest level accused to be tried by the ICC thus far.²⁷⁰ Similarly, while only 90 victims participated in the *Duch* case, over 3,800 have been accepted as civil parties in Case 002 against the most senior surviving Khmer Rouge leaders.²⁷¹ As the recent rule changes at the ECCC suggest, when the number of victims reaches this level, the ability of individual victims to tell their story on their own terms is significantly restricted.²⁷² Thus, the expectation that the victim participation schemes will allow survivors of sexual and gender-based violence to communicate a more comprehensive picture of their experiences than they would have been able to as victim-witnesses before the Yugoslav and Rwanda tribunals seems unrealistic. In light of the extensive harm victims of these crimes likely already suffered, unduly raising expectations that are unlikely to be met seems inappropriate at best.

the Uganda Arrest Warrants, p. 3, International Criminal Court, 14 October 2005 (“[O]ur mandate is to investigate and prosecute those who bear the greatest responsibility.”)

268. See ICC Rules, *supra* n. 107, R. 85(a) (defining “victim” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC”).

269. See *supra* n. 154 and accompanying text.

270. As mentioned *supra*, Bemba was a vice president in the DRC and the leader of the Movement for Liberation of Congo (MLC) rebel group. See *supra* n. 153 and accompanying text.

271. See *supra* n. 166.

272. See Interview with Eric Stover, *supra* n. 191 (noting that although one of most positive developments of civil party participation at the ECCC was the formation of victim associations who were able to speak with a collective voice, this also resulted in the loss of individual victims’ voices).

IV. “The Task of SEEING Women:”²⁷³ Other Alternatives?

If, as the preceding discussion suggests, victim participation schemes at the ICC and ECCC have fallen short of expectations, perhaps we should acknowledge the limits of participation during criminal proceedings and engage in the exercise of exploring alternative possibilities that might be as, if not better, suited to the “task of seeing women.” In doing so, I do not want to suggest that we throw the baby out with the bathwater. Victim participation, as I mentioned, has made a difference for some victims.²⁷⁴ Indeed, many of the victims who participated in the *Duch* trial indicated some level of satisfaction with their participation in those proceedings.²⁷⁵ Moreover, as others have cautioned, “extricating [victims] from the process altogether may leave many of them asking whose justice is being administered, and for whom?”²⁷⁶

Yet, while I do not believe that victim participation ought to be abandoned altogether, I think it is critical that we acknowledge the limits of what can be achieved through these schemes and begin investing in exploring alternative ways to complement the limited trial process by

273. The phrase is taken from Doris Buss’ article entitled *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*. See Buss, *supra* n. 9, at 4

274. See *supra* n. 182-193 and accompanying text. Commentators have, likewise, suggested that even the more traditional form of participation as a victim-witness has been meaningful for some victims. See, e.g., Henry, *supra* n. 21, at 118 (noting noted, for some victims, “participation in war crimes trials may provide some degree of satisfaction unavailable to [victims] in the nonlegal realm”); Staggs and Kendall, *supra* n. 8, at 366 (maintaining that if the SCSL had extricated – rather than just limited – the testimony of victims of sexual violence from the proceedings in the CDF case altogether, the witnesses would have been rendered “entirely voiceless at a critical juncture in [their] journey towards justice.”); Dembour & Haslam, *supra* n. 57, at 156 (contending that ending victim participation in international trials because of the inherent weaknesses in system “may silence victims even further unless new platforms are created where victims can recount their stories in a socially significant way.”).

275. See Stover, *supra* n. 191.

276. See Staggs and Kendall, *supra* n. 8, at 366.

providing space for victims to tell their stories in other venues.²⁷⁷ While a full exploration of possible alternatives is beyond the scope of this paper, I would like to offer a few initial thoughts on this question.

Truth and reconciliation commissions (“TRCs”)—designed to establish a historical record of human rights violations without necessarily leading to individual criminal prosecution—are clearly one option. Although critiques of early TRCs highlighted that “[i]ssues of gender” were generally “not . . . seen as relevant to their mandate,”²⁷⁸ more recent TRCs have been praised for addressing gender issues in a comprehensive manner. Referring to the TRC set up in Sierra Leone after the civil war there in the 1990s, for instance, one commentator lauded the final report produced by that Commission, noting that it “offered a complex account of the social, legal, political and cultural forces that conspired to render women more vulnerable to a range of outrages and degradations in [that conflict].”²⁷⁹ Notably, in 2002, a report commissioned by the United Nations Development Fund for Women proposed the establishment of an international TRC on violence against women in armed conflict, in part to “develop a more comprehensive record and understanding of the full scale of violations [against women in armed

277. This question has certainly been raised by feminist activists and others in response to the serious challenges victim-witnesses faced at the *ad hoc* tribunals. See, e.g., Dembour and Haslam, *supra* n. 57, at (“We ask whether the creation . . . of a space for the victims to tell their stories in non-legal arenas would be at least as, if not more, beneficial to them than their participation at the ICTY.”).

278. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 391 (1999). See also Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building*, at 99 (2002) (noting that “[r]eportedly most truth commissions have not been proactive in seeking out, encouraging or facilitating testimony from women”). The authors also point out that commissioners have sometimes “perceive[d] crimes against women as non-political, or unrelated to the type of violence that they are investigating,” which “was the case in South Africa where some members of the South African Amnesty Committee are said to have believed that rape was a non-political crime, outside the reach of their investigation.” *Id.*

279. Franke, *supra* n. 9, at 827.

conflict.]”²⁸⁰ At the same time, however, other commentators have noted that one reason victims prefer trials over these commissions is that trials are perceived as providing stronger moral condemnation than TRCs, which have been characterized as transitional justice mechanisms with low expressive power.²⁸¹ Moreover, at the national level, a number of TRCs have suffered from significant political pressure as well as accusations of corruption, both of which have tended to undermine their legitimacy and effectiveness.²⁸² If the point of the feminist goal of visibility is not just so that women can tell their stories but so that they can do so in a meaningful and socially significant way, TRCs alone may not be the ideal option.²⁸³

The critical question, then, is how to make the more complex and subtle narratives of women’s experiences “fully visible” to those whose actions and decisions affect the lives of women emerging from conflict, mass violence or repression? Although there are undoubtedly a number of possibilities – including educational efforts by civil society groups, international organizations and the media aimed at publicizing the plight of survivors of sexual and gender-based violence more broadly²⁸⁴ – the establishment and operation of the ICC and ECCC has opened up space for the development of other tribunal-related mechanisms that offer a unique opportunity to further this goal. Indeed, as discussed below, both the ICC and ECCC have

280. Rehn and Johnson Sirleaf, *supra* n. 278, at 99.

281. See *Feminism v. Feminism: What is a Feminist Approach to Transnational Criminal Law*, ASIL Proceedings of 102nd Annual Meeting, 274-278 (2008) (remarks of panelist Ron Slye). See also Alexander Servos, *The Case for an International Truth and Reconciliation Commission*, *bepress Legal Series Paper 1210*, at 15 (2006) (noting that “a major problem facing TRCs when compared to ICTs is a relative lack of prestige.”).

282. See Servos, *supra* n. 281, at 14-17.

283. Buss, *supra* n. 9, at 3 (noting that it is the process of “making women visible to international policy actors” that “has been a central strategic goal” for feminist scholars and activists).

284. See, e.g., *Our Bodies - Their Battle Ground: Gender-based Violence in Conflict Zones* (Integrated Regional Information Networks (IRIN), UN Office for the Coordination of Humanitarian Affairs, Sept. 2004), available at <http://www.irinnews.org/film/?id=4128>.

expanded their work with victims to include the creation of “non-judicial programs” designed to reach a broader category of victims than can participate in trial proceedings. If properly resourced, these programs could provide survivors of sexual and gender-based violence a new and important venue to tell their stories on their own terms, thus complementing the inevitably limited narratives which emerge through criminal proceedings.²⁸⁵

For instance, in 2010, the ECCC expanded the mandate of the Victim Support Section (“VSS”) to include “the development and implementation of non-judicial programs and measures addressing the broader interests of victims.”²⁸⁶ “Such programs,” the Rules note, “may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organizations external to the ECCC.”²⁸⁷ Although it is still unclear how the VSS will implement this new mandate, the VSS has organized a series of forums designed to reach out to civil parties in Case 002 and to discuss, among other things, proposals and resources necessary for the implementation of non-judicial measures.²⁸⁸ Interestingly, in the context of one such forum, Mr. Pich Ang, the new Cambodian Civil Party Lead Co-Lawyer, invited forum

285. One other obvious way to increase victims’ opportunity to tell their stories is by allowing them to present their views and concerns to the court during the sentencing phase of proceedings. However, it is unclear how the ICC will address the issue of sentencing, as it has yet to reach the sentencing stage in any of the cases now before it. More significantly, as mentioned above, the ECCC issued a decision in the *Duch* case holding that civil parties could not make submissions concerning the sentencing of the accused. See *Co-Prosecutor v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Decision on Civil Party Co-lawyers’ joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character (Oct. 9, 2009). Thus, while this remains a possibility worth exploring in the future, it is not addressed here.

286. ECCC Internal Rules, *supra* n. 13, R. 12bis(3)..

287. *Id.*

288. See, e.g., ECCC Press Alert, *The VSS Provided Training to Additional 148 Focal Persons in Case 002 At Grand Ballroom, Imperial Hotel Phnom Penh*, 26 November 2010, available at vss.eccc.gov.kh/en/.../61-the-vss-provides-training-on-5-november-2010.

guests to share their stories about how they had suffered under the Khmer Rouge regime.²⁸⁹ Of the four victims who responded, three spoke of incidences of gender violence:

One victim recounted how she was taken to be killed after refusing to be forcibly married. She was very lucky to escape.

The second recounted how she had been forcibly married on two separate occasions, and lost 10 siblings.

The third told of how her father was killed in front of her while all her brothers were killed in Tuol Sleng. She was forcibly married at 14, and feels sick to recall these events.²⁹⁰

Although geared in large part toward civil parties, these forums represent an opportunity, as one report has noted, to “reach a broader range of victims than the Civil Parties.”²⁹¹ If such opportunities are formally incorporated into the work of the VSS and such stories are memorialized and distributed broadly, they may well contribute to a deeper understanding of the ways in which gender violence was experienced by women during the Khmer Rouge, without subjecting them to the limitations facing civil parties during proceedings.²⁹²

The ICC’s Trust Fund for Victims (“TFV”), which operates in situations where the prosecutor has opened investigations, has a similarly broad mandate. Although the TFV’s

289. *Id.*, at 6.

290. *Id.*

291. *Reaching for Justice: The Participation of Victims at the ECCC*, *supra* n. 253, at 7. The report also suggests that “providing victims with opportunities to get information, be heard and engage with others will reduce the impact of those who were rejected as Civil Parties and help many more who did not apply.” *Id.* Notably, Pre-Trial Chamber Judge Marchi-Uhel makes a similar point in her partially dissenting opinion to the Chamber’s decision overturning the OCIJ’s rejection of 1,728 civil party applications in Case 002. *See Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* n. 195, Partially Dissenting Opinion of Judge Marchi-Uhel, ¶ 5 (“I have no doubt that the non judicial measures in question may have a broader scope and benefit to the victims in parallel to the judicial process, including to those who do not qualify as civil parties.”).

292. Notably, Mr. Van Nat, one of the civil parties who participated in the *Duch* case, indicated during the forum that “[a]lthough he was grateful to have his story told and recorded [during the Duch trial], he found the testimony process difficult and traumatic.” ECCC Press Alert, *supra* n. 288, at 2.

primary mandate is to assist the Court in administering court-ordered reparations awards,²⁹³ it also has a second mandate, which is to assist victims in situation countries under the Court's jurisdiction who do not necessarily have a link to the particular crimes or suspects under investigation by the Court.²⁹⁴ Currently, "the TFV is providing a broad range of support under its second mandate - including vocational training, counselling [sic], reconciliation workshops, reconstructive surgery and more - to an estimated 70,000 victims of crimes under the ICC's jurisdiction."²⁹⁵ Notably, the TFV employs several strategies in implementing this mandate, including tailoring "projects . . . to meet the needs of victims of specific crimes."²⁹⁶ For instance, in 2008, the TFV issued a global appeal for funds to support survivors of sexual and gender-based violence in Uganda and the DRC.²⁹⁷ More recently, the TFV launched a similar initiative to assist victims of sexual violence in the CAR.²⁹⁸

293. ICC Rules, *supra* n. 107, at R. 98(2),(3) and(4) .

294. See ICC Trust Fund for Victims, *Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations*, Programme Progress Report, at 4 (Fall 2010), at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf> (characterizing the TFV's second mandate as "providing victims and their families with physical rehabilitation, material support, and/or psychological rehabilitation where the ICC has jurisdiction"); Heikelina Verrijn Stuart, *The ICC Trust Fund for Victims: Beyond the Realm of the ICC* (April 2, 2009), available at <http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/commentary/090204-ICC-TFV-redirected>. The TFV can assist this broader category of victims as long as it notifies the ICC about its projects and receives approval for its proposed activities. *Id.*

295. ICC Trust Fund, available at <http://www.trustfundforvictims.org/> (last visited August 5, 2011).

296. *Id.*

297. *Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, at 5 (Aug. 1, 2011) [hereinafter "2011 TFV Report to ICC"].

298. ICC Press Release, Trust Fund for Victims Launches Programme in the Central African Republic (Jun. 16, 2011), available at <http://www.icc-cpi.int/NR/exeres/82C5A557-5B17-432C-8F43-CC5C68FEC4A9.htm> (pledging to support organizations dedicated to rendering "holistic services of the highest quality relevant to the needs and expectations of victims of sexual violence . . .").

The TFV regularly consults with the victim population in designing their programs.²⁹⁹ As discussed above, it appears that the ECCC has begun a process of consultation with the victim community as well, including with those not officially participating in the trial process.³⁰⁰ Perhaps in the context of these consultations, victims might be able to tell their story, unfettered by selective prosecutorial strategies or limiting rules of procedure and evidence that have rendered participation less than meaningful for victims before the ICC and ECCC, particularly victims of sexual and gender-based violence..

One of the impediments to taking advantage of this opportunity is that both programs are currently underfunded and underdeveloped. Although assistance to victims participating in the course of proceedings is currently supported through the official budget of each court,³⁰¹ the expanded victim assistance mandate of each court is only partially funded through the courts'

299. 2011 TFV Report to ICC, *supra n. 297*, at 2 (noting that a “participatory programme planning process provides the basis for designing rehabilitation activities so that local partners and victim survivors are involved in designing local interventions” and that the TFV, therefore, “continued its practice of working with local grassroots organizations, victims’ survivor groups, women’s associations,” among others, in “administering the general assistance mandate.”).

300. Indeed, in a recent report, the ECCC noted that “[t]hroughout March and April, the VSS Reparations and Non-Judicial Measures Team met with several stakeholders [including NGOs working with victims) in order to build up its future framework for the implementation of non-judicial measures for victims.” ECCC Court Report, at 8 (May 2011), available at <http://www.eccc.gov.kh/sites/default/files/publications/May%202011%20Court%20Report%20FINAL.pdf>.

301. Regarding the ICC, *see, e.g., Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 82, (Jul. 21, 2011), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (proposing budget of €537,800 for the ICC’s Office of Public Counsel for Victims and €1,873,000 for the ICC’s Victims Participation and Reparations Section) [hereinafter “ICC 2012 Proposed Programme Budget”]. Regarding the ECCC, *see* ECCC Revised Budget Requirements - 2010-2011, at 6, 14-15 (Jan. 24, 2011), available at http://www.eccc.gov.kh/sites/default/files/revised_budget_eccc_2010-2011.pdf [hereinafter “ECCC Revised Budget 2010-2011”](proposing United Nations budget \$296,100 for Civil Party Lead Co-Lawyers Section and additional monies from Cambodia for that Section and the Civil Party Lawyers Team).

core budgets.³⁰² Much of it has been or is expected to be funded through voluntary contributions.³⁰³ Perhaps encouraging states and other stakeholders to invest in these forums—both of which remain connected to the work of the tribunals and, therefore, might be perceived as having greater condemnatory power than TRCs operating independently of the criminal justice process—will help challenge the dominant narratives visible through international criminal trials, even through their novel victim participation schemes. Indeed, if enough resources are dedicated to the ICC’s and ECCC’s expanded victim assistance mandate, they may well contribute to a richer understanding of the complex ways in which sexual violence and inequality is experienced by women in situations of war or mass violence and, ultimately, assist us in our task of better “seeing” women.

302. Although the ICC TFV’s administrative costs are funded through the Court’s official budget, *see ICC 2012 Proposed Programme Budget*, *supra* n. 301, at 152 (proposing budget of €1,755,800 for the TFV’s Secretariat), the specific projects it supports pursuant to its general assistance mandate are funded entirely through external voluntary contributions. *See The Two Roles of the TFV: Reparations and General Assistance*, available at <http://www.trustfundforvictims.org/two-roles-tfv> (last visited Sept. 21, 2011) (noting that the TFV’s general assistance mandate is funded using voluntary contributions from donors). Similarly, while the ECCC’s Victim Witness Unit is funded through the ECCC’s official budget, *see ECCC Revised Budget 2010-2011*, *supra* n. 301, at 14-15 funding for projects related to the VSS’s expanded mandate to develop “non-judicial” programs will have to “come from outside the court’s core budget,” *see Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia* 17 (December 2010), available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.

303. *Id.*