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Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project

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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.*
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> Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in Internationalm, Criminal Law*, 25 WINDSOR Y.B. ACCESS JUST. 3, 4 (2007).

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 violence[1] committed in the context of war, mass violence, or

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1. Generally speaking, gender-based violence is rooted "primarily in socially constructed roles, manifestations, and stereotypes," while sexual violence is "reflected primarily in

repression. Before this, crimes committed exclusively or disproportionately against women and girls during conflict or periods of mass violence were either largely 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 two 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 even

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biological differences." Dorean M. Koening & Kelly D. Askin, *International Criminal Law: The International Criminal Court Statute: Crimes Against Women, in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 5 n.7 (Dorean M. Koening & Kelly D. Askin 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, 296–97 (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, 71 (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).

3. HILARY CHARLESWORTH & 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 a normal phenomenon of armed conflict").

4. *See, e.g.*, Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-T, Judgment, ¶¶ 475–96, 511, 544 (Int'l Crim. Trib. for Former Yugoslavia Nov. 16, 1998) [hereinafter Čelebići 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. Anto Furundžija, Case No. IT-95-17/I-T, Judgment, ¶¶ 165, 172 (Int'l Crim. Trib. for Former Yugoslavia Dec. 10, 1998)[hereinafter Furundžija Trial Chamber Judgment] (recognizing that rape may amount to violation of common Article 3 and a grave breach of the Geneva Conventions); Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 436 (Int'l Crim. Trib. for Former Yugoslavia Feb. 22, 2001)[hereinafter Foča Trial Chamber Judgment] (noting jurisdiction to prosecute rape as a violation of common Article 3 is "clearly established").

5. *See, e.g.*, Foča Trial Chamber Judgment, *supra* note 4, at 539–43 (recognizing rape as well as contemporary forms of slavery, such as sexual slavery, as crimes against humanity); Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998) [hereinafter Akayesu Trial Judgment].

genocide[6] by the ad hoc international criminal tribunals established to prosecute such crimes in the former Yugoslavia (ICTY) and Rwanda (ICTR). Furthermore, 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

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6. *See, e.g.*, Akayesu Trial Judgment, *supra* note 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, July 17, 1998, 2187 U.N.T.S. 90, art. 7(1), [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* Int'l Criminal Court, *Elements of Crimes*, art. 6(b)(1) n.3, U.N. 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.*, U.N. Research Inst. for Soc. Dev., *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, Occasional Paper No. 10 (Nov. 2005) (by Binaifer Nowrojee) [hereinafter *Rwanda's Rape Victims*]; Suzan M. Pritchett, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for 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*, WOMEN'S INITIATIVES FOR GENDER JUSTICE (2005–2010), 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* (2005), U.C. BERKELEY WAR CRIMES STUDIES CTR.,

separate critique has come from feminist scholars who have 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 their due process rights, to abide by the rules of evidence and procedure, and to conserve judicial resources all cut against victim-witnesses' ability to tell their stories at these tribunals,[10] thereby resulting in a limited, and sometimes inaccurate, 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 inequality fully visible.[11]

The question this Article poses is whether victim participation—one of the most recent developments in international criminal law—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

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www.ocf.berkeley.edu/~changmin/Papers/Silencing_Sexual_Violence.pdf (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 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.*, 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."); 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, 817–19 (2006).

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

11. Christine Chinkin, Shelley Wright & Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, *in* INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 17, 27–28 (Doris Buss & Ambreena Manji eds., 2005) (citing as "a major concern of those promoting women's international human rights: avoiding essentialising women and recognising the diversity in the situations and priorities of women around the world"); Buss, *supra* note 9, at 4 ("For feminist women and scholars, making women visible to international policy makers has been a central strategic goal.").

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 at the ICC and ECCC, both courts allow victims to participate in criminal proceedings independent of their role as witnesses for either the prosecution or defense. In other words, both have victim participation schemes intended to give victims a voice in the 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 doing so might help address the under- or misrepresentation of women's experiences in those situations covered by the Court's jurisdiction.[14]

My aim is to explore whether these novel victim participation schemes, as implemented by the ICC and ECCC thus far, have 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

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

13. *See* Extraordinary Chambers for the Courts of Cambodia, Internal Rules (Rev. 7), R. 23, 91(1) (June 12, 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, U.N. Doc.S/RES/1757, art. 17 (2007) ("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."). The STL's Victims' Participation Unit recently began receiving applications for victims to participate in proceedings relating to the joint case against Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra. *See* "Don't Be a Victim Twice:" Victims' Participation in STL Proceedings, PRESS RELEASE (Special Tribunal for Lebanon) July 12, 2011. However, this Article 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.

14. *See infra* notes 96–97 and accompanying text.

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, can the victim participation schemes at the ICC and the Extraordinary Chambers answer the feminist call for increased visibility of the actual lived experience of survivors of sexual and gender-based violence in the context of war, mass violence, or repression? Can they, in this sense, be considered "feminist projects"?

Admittedly, answering these questions 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 victims. Nevertheless, the preliminary conclusions from this analysis are significant and warrant debate for a couple of reasons. First, victims whose interests these schemes were intended to serve should not have to wait for a frank, albeit preliminary, assessment of whether participating in these schemes will truly enable them to tell their stories in ways that were not possible at other tribunals. This is particularly important for victims of sexual and gender-based violence, whose experiences have historically been under- or misrepresented. Second, 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. If the victim participation schemes at these tribunals, as implemented, have fallen short of expectations, then perhaps we should acknowledge that the feminist goal of visibility may never 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 alternatives that might help us advance the project of surfacing[15] the myriad ways in which sexual violence and inequality are experienced by women in the context of war, mass violence, or repression.

15. I have taken this term from the late Professor Rhonda Copelon: Rhonda Copelon, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994). Copelon used the term to demonstrate the need to make apparent previously overlooked gender issues within international criminal law.

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 support for the victim participation scheme by feminist scholars and activists.[16] Next, I will describe how victim participants, particularly survivors of 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 Article, 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.[17] Because they are not part of the formal trial process,

16. 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* 3 INTERNATIONAL CRIMINAL LAW 220, 253 (M. Cherif Bassiouni ed., 2008) (noting that "[t]he 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, June 6, 2003, 2329 U.N.T.S I-41273 [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 ECCC Trial Chamber, it does not otherwise expressly permit victims to participate in ECCC proceedings. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Republic of Kampuchea, NS/RKM/1004/006 (Oct. 27, 2004) [hereinafter ECCC Establishment Law].

17. *See* ECCC Internal Rules, *supra* note 13, at R. 12(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

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 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:"[18] 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.[19] This critique has been applied to a number of areas of international law,[20] 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.[21] Moreover, while rape was prosecuted by the Interna-

victims"); ICC TRUST FUND FOR VICTIMS, LEARNING FROM THE TFV'S SECOND MANDATE: FROM IMPLEMENTING REHABILITATION ASSISTANCE TO REPARATIONS, 4 (2011), 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").

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

19. *See generally* CHARLESWORTH & CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW, *supra* note 3; Chinkin, Wright & Charlesworth, *supra* note 11; *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.").

20. *See generally* Chinkin, Wright & Charlesworth, *supra* note 11.

21. 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.* at 662–64.

tional Military Tribunal for the Far East (IMTFE), established after the war to try Japanese leaders, that tribunal failed to bring charges against any 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.[22]

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 as serious international crimes by the Yugoslav and Rwandan tribunals.[23] 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."[24]

Nevertheless, feminist activists and others began to question how much of women's experiences were actually being captured by the international criminal apparatus.[25] 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.[26] A stark example of this occurred in the *Cyangugu* case,[27] tried by the ICTR. In that case, two prosecution witnesses spontaneously testified during the trial about uncharged acts of sexual violence.[28] The Coalition for Women's

22. Chinkin, Wright & Charlesworth, *Feminist Approaches*, *supra* note 11, 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).

23. Buss, *supra* note 9, at 4.

24. Buss, *supra* note 9, at 4.

25. Buss, *supra* note 9, at 4–5.

26. *See, e.g.*, *Rwanda's Rape Victims*, *supra* note 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]").

27. *See* Prosecutor v. André Imanishimwe, Emmanuel Bagambiki & Samuel Ntagerura, Case No. ICTR 99-46-T, Judgment and Sentence (Int'l Crim. Trib. for Rwanda Feb. 24, 2004) [hereinafter *Cyangugu case*].

28. *See* 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 at § II(A), Prosecutor v. Imanishime, Bagambiki & Ntagerura, Case No. ICTR 99-46-T (Int'l Crim. Trib. for Rwanda Mar. 1, 2001), http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Cyangugu/amicusBrief.php [hereinafter Coalition's Cyangugu Amicus Brief].

Human Rights in Conflict Situations (Coalition)[29] moved to be heard as *amicus curiae*, urging the Tribunal to request that the prosecution consider amending the indictment against the accused[30] to include sexual violence charges.[31] The prosecution opposed the motion, however, arguing that charging decisions were a matter of prosecutorial discretion[32] and indicating its intention to file a new indictment with rape allegations at a later date.[33] Ultimately, the Trial Chamber not only denied the Coalition's motion,[34] but also excluded evidence of the uncharged crimes of sexual violence, suggesting in dicta that permitting such evidence might result in unfair prejudice to the accused.[35] 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.

A similar process of exclusion occurred in the case against the Civil Defense Forces (CDF),[36] a pro-government militia that fought during Sierra Leone's eleven-year civil war.[37] The case was tried by the Special Court for Sierra Leone, a "hybrid" court set up by agreement between

29. *See* COALITION FOR WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS, http://www.womensrightscoalition.org/site/main_en.php (last visited Nov. 13, 2011) (describing the Coalition goals as "promot[ing] the adequate prosecution of perpetrators of crimes 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").

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

31. Coalition's Cyangugu Amicus Brief, *supra* note 28, § I(B).

32. *See* Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR 99-46-T, 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 (Int'l Crim. Trib. for Rwanda May 24, 2001), http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Cyangugu/decisionMay2001.pdf.

33. *See id.* ¶ 10.

34. *See id.* ¶ 20.

35. *See id.* ¶ 23 ("Although no additional rule of law need be invoked to support the Chamber's decision, additional buttress may be found in a well settled common law principle which, for the sake of forestalling the possibility of prejudice [to the defendant], forbids the prosecution from leading evidence on a crime that is not charged in the indictment at issue.").

36. Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T.

37. Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Indictment, ¶¶ 4, 6 (Feb. 4, 2004).

the United Nations and the government of Sierra Leone to prosecute atrocities committed in Sierra Leone during its civil war.[38] 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.[39] 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.[40] 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."[41] It held, however, that adding the new charges would result in undue delay and would prejudice the rights of the accused to a fair and expeditious trial.[42] 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, health, and physical or mental well-being of persons as a war crime, both of which had been included in the original indictment.[43] Yet the Trial Chamber rejected the request, reasoning 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.[44] 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, the Chamber did not permit any of them to speak about the acts of sexual or gender-based violence they had endured, which arguably constituted "the principal manner in which they were victimized during the

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

39. *See* Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Indictment, ¶¶ 22–29 (describing multiple charges against Norman, Fofana, and Kondewa, but none relating to sexual or gender-based violence).

40. *See* Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 86–87 (May 20, 2004).

41. *Id.* ¶ 82.

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

43. *See* Prosecutor v. Norman, Fofana & 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) (noting the prosecution's argument that the ad hoc tribunals have routinely recognized acts of sexual violence as constituting crimes against humanity and/or war crimes when committed in the relevant context).

44. *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).

Sierra Leonean conflict."[45] 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."[46]

Even in cases in which the tribunals have prosecuted sexual violence, 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,[47] only about 18 percent of the 3,700 witnesses who appeared before that tribunal from 1996 to 2006 were female.[48] Similarly, 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."[49]

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.[50] The following excerpt from the *Čelibići* case[51] 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?

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45. Kendall & Staggs, *supra* note 8, at 356.
46. Kendall & Staggs, *supra* note 8, at 364.
47. *See supra* notes 4–5 and accompanying text.
48. Henry, *supra* note 22, at 120 (citing Wendy Lobwein, *Experiences of Victims and Witnesses Section at the ICTY, in* LARGE-SCALE VICTIMISATION AS A POTENTIONAL SOURCE OF TERRORIST ACTIVTIES: IMPORTANCE OF REGAINING SECURITY IN POST-CONFLICT SOCIETIES (Uwe Ewald and Ksenija Turković eds., 2006)).
49. 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* (Nov. 28, 2002), http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php.
50. Henry, *supra* note 22, 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).
51. Čelebići Trial Chamber Judgment, *supra* note 4.

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?[52]

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 *Foča* case,[53] which 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."[54]

Victims of sexual violence during the Rwandan genocide who testified before the ICTR experienced similar restrictions on their testimony. As one commentator who interviewed numerous rape survivors, including six rape victims who testified before the ICTR, noted, "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."[55]

Perhaps the limitations faced by victims of sexual and gender-based violence in the context of international criminal tribunals is not surprising given the nature of these criminal trials. Based primarily on the adversarial model,[56] neither the Special Court for Sierra Leone nor the

52. Prosecutor v. Delalić et al., Case No. IT-96-21-T, Transcript at 494–95 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 1997) [hereinafter Čelebići Transcript].

53. *See supra* notes 4–5 and accompanying text.

54. Mertus, *supra* note 50, at 116. *See also* Franke, *supra* note 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.").

55. *Rwanda's Rape Victims*, *supra* note 8, at 5.

56. *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, at 2 ("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

ad hoc tribunals were designed as truth-telling mechanisms. Rather, they were established to assess the guilt or innocence of accused for particular crimes[57] that the prosecution decides to pursue.[58] 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.[59] As a result, story-telling is often "fragmented and frequently interrupted."[60]

Admittedly, the inability of victims to tell their stories 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 situa-

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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* note 38, 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").

57. *See, e.g.*, 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, S.C. Res. 827, art. 1, U.N. Doc. S/25704, at 36 (May 25, 1993) ("The International Tribunal shall 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.").

58. *See, e.g.*, Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 15(1), 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 . . .").

59. *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 endeavor to establish a legally authoritative account of 'what happened.'"). Dembour and Haslam note, for instance, that in *Prosecutor v. Krstić*, where 18 victim-witnesses testified about the role Radislav Krstićhad in the forcible displacement of women, children and elderly from the Bosnian town of Srebrnica and the subsequent execution of about 8000 men and boys, the "Tribunal frequently interrupt[ed] victim-witnesses when their narratives [became] irrelevant to the purpose of assessing the guilt of the accused." *Id.* at 158.

60. Henry, *supra* note 22, at 125. *See also* Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 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 . . . .").

tions of conflict, mass violence, or repression,[61] a significantly limited picture of women's experiences remains even after the jurisprudential gains made by international criminal tribunals in this area. Indeed, feminist scholars have highlighted a number of ways in which the visibility of women's experiences remains superficial at best.[62]

First, the focus of the prosecution, particularly at the ad hoc tribunals, has tended to be largely on sexual violations.[63] Yet, women often experience gendered violence in the context of conflict or mass violence that is not sexual. For instance, when widowed or forced to flee their homes because of conflict, women often face more severe economic hardship than men. This is because in many societies, discriminatory laws or policies mean that women have little or no access to credit, land, capital, or other services.[64] Moreover, there is evidence that violence against women by members of their own family and community escalates during periods of conflict or unrest.[65] 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."[66] 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.[67] 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."[68] Nevertheless, these types of harms are rarely surfaced in the proceedings before international criminal tribunals. With some notable exceptions,[69] the

61. *See supra* note 2 and accompanying text.

62. *See infra* notes 63–83 and accompanying text.

63. *See* Ní Aoláin, *supra* note 19, at 239–41; 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); *see also* Franke, *supra* note 9, at 822–23.

64. *See* JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 41 (2001).

65. *Id.* at 30.

66. Ní Aoláin, *supra* note 19, at 230–31.

67. Ní Aoláin, *supra* note 19, at 228–29.

68. Ní Aoláin, *supra* note 19, at 228. For a discussion of other examples of the gender-differentiated impact of conflict, see GARDAM & JARVIS, *supra* note 64, at 19–51.

69. *See, e.g.*, The Prosecutor v. Alex Tamba Brima et al., Case No. SCLS-2004-16-A, Appeals Judgment, ¶¶ 195, 202 (Feb. 22, 2008) (finding that forced marriage constitutes the crime against humanity of "other inhumane acts" and distinguishing it from the crime against humanity of sexual slavery on the grounds that: "[w]hile forced marriage shares certain elements with sexual slavery such as nonconsensual sex and deprivation of liberty, there are also distinguishing factors"). The Appeals Chamber went on

tribunals have concentrated on a narrow range of sexual acts, resulting in the "essentialization of women's experiences of injury"[70] during periods of conflict. As one survivor explains it, 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."[71] Moreover, as one feminist scholar notes, the "narrow focus on bodily violation can obscure the wider social context in which the abuse occurs,"[72] making less visible the socioeconomic and other violations women routinely experience as direct harms in situations of conflict or repression.

Second, 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,[73] an attack against a civilian population,[74] or the targeting of a particular group for destruction.[75] Sexual violence prosecutions by these tribunals have therefore often characterized the harm experienced by the victim-witness as part of a 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]."[76] 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."[77] For instance, in *Prosecutor v. Gacumbitsi*, Sylvestre Gacumbitsi, former mayor of Rusumo in Eastern Rwanda, was tried for his role in, among other things, sexual violence against Tutsi women in the Rusumo

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to explain "[f]irst, 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 a [sic] 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." *Id.*, ¶ 195.

70. Ní Aoláin, *supra* note 19, at 232–33.
71. Henry, *supra* note 22, at 131 (quoting 35 mm film: CALLING THE GHOSTS: A STORY ABOUT RAPE, WAR AND WOMEN (New York: Women Make Movies 1996)).
72. Ní Aoláin, *supra* note 19, at 240.
73. *See, e.g.*, Rome Statute, *supra* note 7, art. 8.
74. *See, e.g.*, Rome Statute, *supra* note 7, art. 7.
75. *See, e.g.*, Rome Statute, *supra* note 7, art. 6.
76. Buss, *supra* note 9, at 15.
77. Buss, *supra* note 9, at 15.

commune.[78] Witness TAS, a Hutu woman married to a Tutsi man, testified that she had been raped by a Hutu attacker.[79] 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 . . ."[80] 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 dynamics that predated the genocide enabled the conditions for the genocide and resulting mass sexual violence.[81] As this scholar 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.[82]

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 maneuvered out of the frame of analysis."[83] What remains in the record is, thus, only a superficial portrait of women's experience.

Because international criminal prosecutions have resulted in limited visibility of the full spectrum of harms women face in situations of conflict and repression, some feminist scholars have questioned what, after all, can be achieved through the international criminal apparatus.[84] The question this Article 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

78. Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 198 (June 17, 2004).
79. *Id.* ¶ 209.
80. *Id.* ¶ 222.
81. Buss, *supra* note 9, at 16.
82. Buss, *supra* note 9, at 16–17.
83. Buss, *supra* note 9, at 17.
84. Buss, *supra* note 9, at 22.

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?"

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.[85] Proponents of this restorative justice movement maintain 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.'"[86] In other words, advocates of this movement believe that

85. *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. 59, at 315) (noting that the Rome Statute marked a "major departure from a hitherto limited theory of international criminal justice, which is centered 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 20 (June 12–30, 2000) http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm, [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* note 16, 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. For further discussion of the genesis of victim participation in the context of the ICC, see Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 76–88 (2008).

86. *See* Judges' Report, *Victims Compensation and Participation*, CC/P.I.S./528-E, at 1, Int'l Crim. Trib. for the former Yugoslavia (Sept. 13, 2000), http://www.un.org/

criminal justice mechanisms should serve the interests of victims in addition to punishing wrongdoers, and that the participation of victims in criminal proceedings is an integral part of serving victims' interests.

Although the concept of victim participation in criminal proceedings is not easily defined, it has been described as victims "being in control, having a say, being listened to, or being treated with dignity and respect."[87] Women's rights activists supported the concept for several reasons. Many believed, as did victim advocates more generally,[88] that participation in criminal proceedings has a number of potential restorative benefits, including the promotion of victims' "healing and rehabilitation."[89] Indeed, in its recommendations to the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom I),[90] 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

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icty/pressreal/tolb-e.htm, *cited in* WCRO 2007 Victim Participation Report, *supra* note 85, at 8. As discussed in the WCRO Report, the term "restorative justice" is a broad term used in a variety of contexts, including as a way to describe programs designed to facilitate victim-offender mediation outside the traditional criminal justice realm. However, the use of the term here is limited to the movement *within* the criminal justice context that advocates the position that criminal justice mechanisms should serve the interests of victims, as opposed to strictly punishing perpetrators of crimes.

87. Doak, *supra* note 60, at 295 (citing Ian Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 BRIT. J. OF CRIMINOLOGY 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.").

88. *See* WCRO 2007 Victim Participation Report, *supra* note 85, 8–9 (citing Fiona McKay, Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide, REDRESS, June 30, 1999 at 15, http://www.redress.org/documents/inpract.html; Victims' Rights Working Group, Victims' Rights in the International Criminal Court, at 4, 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.")).

89. 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 33 (Aug. 4–15, 1997) [hereinafter WCGJ 1997 PrepCom Recommendations].

90. 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.

of setting up the International Criminal Court"[91]—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 healing from trauma and degradation."[92] Relatedly, some believed that victim participation would bring the Court "closer to the persons who have suffered atrocities"[93] and, thus, increase the likelihood that victims would be satisfied that justice was done.[94] 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. . . ."[95] 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.[96] 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

91. *See* WOMEN'S CAUCUS FOR GENDER JUSTICE, http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm (last visited Sept. 16, 2011).

92. WCGJ 1997 PrepCom Recommendations, *supra* note 89, at 33.

93. WCRO 2007 Victim Participation Report, *supra* note 85, at 9 (citing Bitti & Friman, *supra* note 85, at 457).

94. WCRO 2007 Victim Participation Report, *supra* note 85, at 9 (citing WCGJ 2000 PrepCom Recommendations, *supra* note 85, at 20; Victims' Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations*, Nov. 2003, at 2, 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.")).

95. WCGJ 2000 PrepCom Recommendations, *supra* note 85, at 20.

96. *See, e.g., Court Must Fill Gender Gap in International Law, Insists Women's Caucus, in* 1 ICC ON THE RECORD, Iss. 2 (June 16, 1998) (noting argument by the Women's Caucus for Gender Justice that the ICC must "'have the capacity the 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).

> perceptions and needs are—in all cultures of the world—frequently ignored, presumed, or misunderstood.[97]

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.[98]

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.[99] Significantly, this right is separate from the right of victims to seek reparations.[100] 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.[101] Thus, unlike victim participation in many domestic

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97. WCGJ 1997 PrepCom Recommendations, *supra* note 89, at 33.

98. *See, e.g.*, Haslam, *supra* note 59, at 320 (noting that "[i]t 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 CHRON., Issue 4 (1999), 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").

99. *See* Rome Statute, *supra* note 7, at art. 68(3).

100. *See* Rome Statute, *supra* note 7, at art. 75 (allowing the Court to issue an order "specifying appropriate 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).

101. *See, e.g.*, Booklet, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, http://www.

criminal systems—the primary purpose of which is to join a victim's claim for civil damages with a criminal action[102]—victim participation at the ICC was envisioned as something more than a means by which victims could seek reparations.[103]

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 ICC's work, that is, even before particular suspects or crimes are identified by the prosecution.[104] The first relates to the Prosecutor's pow-

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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*, Apr. 23, 2007, Chap. IV, p. 5, 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.*"(emphasis in original)).

102. *See* Judges' Report, *Victims Compensation and Participation*, CC/P.I.S./528-E, at 6, Int'l Crim. Trib. for the former Yugoslavia (Sept. 13, 2000), 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 civil*; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused."); Doak, *supra* note 60, at 310–11 (explaining that, under the *partie civile* systems commonplace in countries such as France and Belgium and the "adhesion" procedure used in Germany, the "ability to pursue civil damages in the criminal trial should, in theory, improve speed, cost, and time involved given that both civil and criminal issues are resolved in the same forum"). In fact, according to Doak, participation by victims within the French system "tends to be limited to the pursuit of the civil claim [for damages]." Doak, *supra* note 60, at 311.

103. 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 the Rome Statute marks "a significant departure from the mere conceptualization of victim's rights in terms of reparation").

104. 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*, No. ICC-01/04-tEN-Corr, ¶ 65, [Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6] (Pre-Trial Chamber 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.*

ers under Article 15 of the Statute to "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court,"[105] which may include information received from victims.[106] 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.*[107]

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"[108] regarding

105. Rome Statute, *supra* note 7, at art. 15(1). *See also id.* at 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.").

106. *See* WCRO 2007 Victim Participation Report, *supra* note 85, 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 (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.").

107. Rome Statute, *supra* note 7, at art. 15(3) (emphasis added).

108. Rome Statute, *supra* note 7, 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.") (emphasis added). Note that Article 15(3) refers to "representations" by victims, while Article 19 refers to "observations." The Statute does not define either term or distinguish one from the other. However, Rule 50 (providing the procedure for Article 15) and Rule 59 (providing the procedure for Article 19) both speak of a victim's right to provide "representations" and both require such representations to be submitted in writing. *Compare* International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), R. 50(3) [hereinafter ICC Rules] *with* ICC Rules, R. 59(3). This may indicate that although these articles use different terminology, they both contemplate only written submissions on behalf of victims at these early stages of the proceedings.

challenges to the admissibility or jurisdiction of a case brought under that article.[109]

Nevertheless, even under the ICC scheme, there are significant limitations on the participation of victims. As a general matter, the Rome Statute and the ICC's procedural rules require that Court proceedings be conducted in a manner that is expeditious and fair.[110] Indeed, while a desire to serve the interests of victims was crucial to the founding of the ICC,[111] 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

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109. 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;
> (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.

Rome Statute, *supra* note 7, at art. 19(1)–(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* note 108, at R. 93.

110. For example, Article 64 of the Rome Statute reflects a clear concern for Court efficiency by generally requiring Trial Chambers to ensure that proceedings be conducted in "a manner that is fair and expeditious." *See* Rome Statute, *supra* note 7, at arts. 64(2), 64(3)(a). *See also* ICC Rules, *supra note* 108, at 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."). Article 67 covers the rights of the accused, which include the right to a fair hearing conducted impartially, to be informed of the charges against him or her, to have adequate time and facilities to prepare a defence with counsel of the accused's choosing, and to be tried without "undue delay." Rome Statute, *supra* note 7, at art. 67(1).

111. *See, e.g.*, Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court, in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, 77 (Herman A.M. 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 International Criminal Court (ICC) as a reaction against widespread patterns and practices of impunity for the perpetrators of the most serious international crimes.").

against those who had committed the crimes."[112] Moreover, the drafters of the Rome Statute were concerned with the potential effects that victim participation could have on the rights of the accused.[113] As Judge 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.[114]

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 reflects the drafters' concerns regarding fairness and expeditiousness. Article 68(3) 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

112. WCRO 2007 Victim Participation Report, *supra* note 85, 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* note 103, 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").

113. *See, e.g.*, Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* note 85, 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 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.").

114. WCRO 2007 Victim Participation Report, *supra* note 85, at 27–28 (citing Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1388, 1393 (Cassese et al. eds., 2002)).

and a fair and impartial trial."[115] 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).[116] For instance, 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."[117]

Moreover, a number of other procedural rules constrain both when and how victims can participate. For instance, Rule 89(1) provides that copies of victims' applications to participate in proceedings shall be made available to both the prosecution and defense counsel, who have the opportunity to comment on the applications.[118] Under Rule 89(2), either the prosecution or defense may request that the Court deny an application to participate on the grounds that the applicant is not a "victim" under Rule 85,[119] or otherwise does not fulfill the criteria of Article 68(3).[120]

Even if victims are granted participation rights by the Court, the scope of their participation is not infinite, as victim participants do not

115. Rome Statute, *supra* note 7, at art. 68(3). *See also* Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* note 85, 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' ").

116. *See generally* ICC Rules, *supra* note 108, at R. 89–91.

117. ICC Rules, *supra* note 108, at R. 89(1).

118. ICC Rules, *supra* note 108, 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* note 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.").

119. ICC Rules, *supra* note 108, at R. 85.

120. ICC Rules, *supra* note 108, 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.").

become parties to the proceedings.[121] For example, victims' representatives must apply simply to obtain leave from the Court to examine witnesses, experts, and the accused, and furthermore, representatives may be restricted to making written—as opposed to oral—interventions.[122] Moreover, to the extent that victims are permitted to make submissions, the prosecution and defense are entitled to file replies.[123] 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.[124] 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.[125] Finally, although victims

121. 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) [hereinafter Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Katanga] (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* note 114, 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, Jan. 10, 2007, at 17–18, 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."). *Accord* Situation in the Democratic Republic of the Congo, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ¶ 55 [hereinafter Situation in the Democratic Republic of the Congo, Judgment on Victim Participation] (noting that "[p]articipation pursuant to article 68(3) . . . does not equate victims, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber. . . .").

122. ICC Rules, *supra* note 108, at R. 91. *See also* Corrie, *supra* note 121, at 7 (noting that these provisions "help to protect the integrity of the Prosecutor's case and the rights of the accused").

123. ICC Rules, *supra* note 108, at R. 91(2).

124. WCRO 2007 Victim Participation Report, *supra* note 85, at 32 (citing Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* note 85, at 457 n. 67 (noting that, "[c]ontrary to what is the case in, for example, French and Swedish municipal systems, victims do not have the right under the Rome Statute to initiate the criminal proceedings")).

125. ICC Rules, *supra* note 108, at R. 91(2) ("A legal representative of the victim shall be entitled to attend and participate in the proceedings. . . .").

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"[126] or appoint a common legal representative if the victims are "unable to choose" one.[127]

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.

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 ECCC[128] nor the Law on the Establishment of the Extraordinary Chambers (ECCC Establishment Law)[129] 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,[130] 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.[131]

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126. ICC Rules, *supra* note 108, at R. 90(2).

127. ICC Rules, *supra* note 108, at R. 90(3).

128. *See* Framework Agreement, *supra* note 16.

129. *See* ECCC Establishment Law, *supra* note 16.

130. ECCC Establishment Law, *supra* note 16, at art. 33 (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* note 16, at art. 12(1).

131. 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 Dated September 10, 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (Sept. 10, 1992), www.eu-asac.org/programme/arms_law/UNTAC%20Law.pdf; Law on Criminal Procedure (Mar. 8, 1993) (Cambodia), http://www.wipo.int/wipolex/en/text.jsp?file_id=181004 [hereinafter SOC Law]. Since then, a new Code of Criminal Procedure was passed, which similarly provides that victims have a right

Thus, the Chamber's Internal Rules, drafted by the ECCC's judges in 2007, permit victims to exercise a right to take "civil action" during the criminal proceedings,[132] giving civil parties a right to be "heard" by the Chambers.[133] Nevertheless, as in the context of the ICC, victim 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.[134]

For instance, while one of the purposes articulated in the Rules for a "civil party action" is to allow victims to participate in the proceedings, the Rules add that victims who participate must do so "by supporting the prosecution."[135] 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 case[136]—after the prosecution's preliminary investigation into potential crimes, suspects, and witnesses,[137] the new evidence cannot be investigated unless the prosecution submits a supplementary submission to the investigating chamber requesting it to pursue that evidence.[138] 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

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to participate in criminal proceedings as civil parties. Mark E. Wojcik, *False Hope: Rights of Victims Before International Criminal Tribunals*, 28 L'OBSERVATEUR DES NATIONS UNIES, 11 (2010).

132. *See* ECCC Internal Rules, *supra* note 13, at R. 23.

133. *See, e.g.*, ECCC Internal Rules, *supra* note 13, at R. 91(1) ("The Chamber *shall* hear the Civil Parties . . .") (emphasis added).

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

135. ECCC Internal Rules, *supra* note 13, at 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." ECCC Internal Rules, *supra* note 13, at R. 23(1)(a). This is similar to the rationale for civil party participation in many civil law systems, namely to allow victims to consolidate their claim for damages with the criminal action. *See supra* note 102 and accompanying text.

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

137. ECCC Internal Rules, *supra* note 13, at R. 15, R. 50.

138. ECCC Internal Rules, *supra* note 13, at R. 55(3).

pursue any particular suspect or crime.[139] Therefore, victim participation at the ECCC is similarly constrained by the decisions of the prosecution.

Victim participation at the ECCC is further procedurally limited by the decision-making power of the Chambers. For instance, as mentioned earlier, although civil parties have a right to be "heard" by the Chambers,[140] victims' representatives must apply for leave from the Chambers in order to examine witnesses, as in the ICC.[141] Additionally, the Chamber is empowered to determine the order in which victims' representatives will be heard[142] and any questions civil parties want to ask themselves—as opposed to through their representatives—must be asked "through the President of the Chamber."[143]

Furthermore, victims are encouraged to form groups to present their interests in a collective manner before the ECCC, thereby limiting the ability of victim participants to make their individual experiences heard.[144] If victims do not form groups on their own, the investigating chamber may group them or assign them to existing groups and designate a common lawyer to represent the group(s).[145] More significantly, although victims can participate in proceedings directly or through their own representatives at the pre-trial stage, ECCC judges recently changed the Rules to require that, at the trial stage and beyond, not only must civil parties be represented by civil party lawyers,[146] but they also must comprise a "single, consolidated group, whose interests are represented by the Civil Party Co-Lead Lawyers."[147] 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 Parties during the trial stage and beyond."[148] Notably, the Civil Party Co-Lead Lawyers

139. Notably, civil parties can also appeal a verdict handed down by the Trial Chambers, but only when the prosecution has also appealed. *See* ECCC Internal Rules, *supra* note 13, at R. 105(c).

140. ECCC Internal Rules, *supra* note 13, at R. 91(1) ("The Chamber *shall* hear the Civil Parties . . .") (emphasis added).

141. ECCC Internal Rules, *supra* note 13, at R. 91(2).

142. ECCC Internal Rules, *supra* note 13, at R. 91(1).

143. ECCC Internal Rules, *supra* note 13, at R. 91(2).

144. ECCC Internal Rules, *supra* note 13, at R. 23*ter*(3), 23*quater*.

145. ECCC Internal Rules, *supra* note 13, 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*.

146. ECCC Internal Rules, *supra* note 13, at R. 23*ter*(1).

147. ECCC Internal Rules, *supra* note 13, at R. 23(3). The role of the Civil Party Lead Co-Lawyers is described in Rule 12*ter*.

148. ECCC Internal Rules, *supra* note 13, at R. 12*ter*(5)(b).

must discharge these obligations "whilst balancing the rights of all parties and the need for an expeditious trial. . . ."[149] 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,"[150] 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

Have these new participation schemes before the ICC and ECCC, in fact, helped us in the "task of seeing women"?[151] 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 words? 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 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 victims of sexual and gender-based violence to communicate a richer, more nuanced picture of their experiences than they were able to in the context of prior tribunals?

149. ECCC Internal Rules, *supra* note 13, at R. 12*ter*(1). *See also* ECCC Internal Rules, *supra* note 13, at R. 12*ter*(2) (noting that Civil Party Lead Co-Lawyers are "obliged to promote justice and the fair and effective conduct of proceedings").

150. ECCC Internal Rules, *supra* note 13, at R. 12*ter*(3).

151. As noted earlier, this phrase is taken from Doris Buss's article entitled *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*. *See* Buss, *supra* note 9, at 4.

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

The early history of victim participation at the ICC and ECCC indicates considerable interest by victims in making use of their new participation rights. At the ICC, for example, from 2005 until the end of March 2011, 4,773 victims had applied to participate in either one of the five situations then 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.[152] Of those applicants, 2,317, or nearly 50 percent, had been authorized to participate.[153] Interestingly, the largest number of applicants was authorized to participate in the case against Jean-Pierre Bemba, a case arising out of the CAR situation and the only one focused almost exclusively on crimes of sexual violence.[154] As of March 31, 2011, 1,366 victim appli-

152. ICC Registry Facts and Figures, at 4 (Apr. 8, 2011), 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, http://www.icc-cpi.int/Menus/ICC/ Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090111/ICC01090111.htm (noting date of confirmation hearing as Sept. 1, 2011); Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Related+Cases/ICC01090211/ICC01090111.htm (noting date of confirmation hearing as Sept. 21, 2011).

153. ICC Registry Facts and Figures, *supra* note 152, at 4.

154. *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), 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.*

cations had been granted in *Bemba*.[155] Comparatively, only 122 persons had been granted victim status in the case against Thomas Dyilo Lubanga;[156] 366 in the joint case against Germain Katanga and Mathieu Ngudjolo;[157] and 89 in the joint case against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,[158] the only other cases currently at trial before the ICC. The high number of participants in the only case focused almost exclusively on sexual violence—as opposed to cases where sexual violence was either not charged or included as one of several other crimes—indicates a high demand for participation by victims of sexual and gender-based violence. Indeed, 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.[159]

Significantly, a number of additional victims of sexual and gender-based violence 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,[160] further demonstrating the demand for participation by victims of such crimes. Of the 396 victims who made such representations,[161] 237 requested that the

155. ICC Registry Facts and Figures, *supra* note 152, 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. 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) (July 9, 2011).

156. ICC Registry Facts and Figures, *supra* note 152, at 4.

157. ICC Registry Facts and Figures, *supra* note 152, at 4. Both the Lubanga case and the joint case against Katanga and Ngudjolo arose out of the DRC situation.

158. ICC Registry Facts and Figures, *supra* note 152, at 4. The joint case against Banda and Jerbo arose out of the situation in Darfur, Sudan.

159. *See* Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2010*, 191 (Nov. 2010), 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*, Mar. 2011, http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html. 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* note 159, at 204.

160. *See supra* note 107 and accompanying text.

161. 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)

investigation include incidents of sexual violence.[162] Moreover, of the victims who made individual representations, 40 percent were women.[163]

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."[164] 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.[165] 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 the Khmer Rouge regime.[166] Of those, 3,850 were granted the right to participate in the case.[167] Notably, of the total number of applicants in these two cases, 61 percent were women.[168]

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and annexes 1 and 5, ¶¶ 1–2 (Mar. 29, 2010) [hereinafter Situation in the Republic of Kenya, Report on Victims' Representations].

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

163. *Id.* ¶ 41 (Mar. 29, 2010).

164. 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-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment(July 26, 2010) [hereinafter *Duch* Trial Judgment].

165. *See Duch* Trial Judgment, *supra* note 164.

166. Co-Investigating Judges Issue Closing Order in Case 002, PRESS RELEASE (ECCC) 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-Prosecutors v. Nuon Chea et al., 002/19-09-2007/ECCC-PTC, Case Information Sheets, http://www.eccc.gov.kh/english/case002.aspx. The case is referred to by the ECCC as Case 002. As of May 18, 2011, the Court had also received 318 civil party applications in a third case, known as Case 003. Statement from the Co-Investigating Judges, PRESS RELEASE (ECCC) 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.

167. Pre-Trial Chamber Overturns Previous Rejection of 98% of Appealing Civil Party Applicants in Case 002, PRESS RELEASE (ECCC) June 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).

168. *Victims Participation: Presentation on VSS & LCL* (ECCC Victim Support Section) Nov. 8, 2010 (on file with author).

These applicant 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 or gender-based 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,[169] the numbers alone suggest 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 real 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.

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 conflict[170]—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.[171] 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."[172] 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 victims' legal representatives—rather than of victims—to attend and participate in proceedings,[173] the Chamber noted that Article 68(3) "establishes the unequivocal statutory right for victims to present their

169. *See* Kendall & Staggs, *supra* note 8, at 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").

170. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 319 (Jan. 29, 2007), http://www.icc-cpi.int/NR/exeres/0814EEB0-8251-47A3-AB41-3F149BADB187.htm.

171. 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 (June 26, 2009) [hereinafter Lubanga Decision on the Request by Victims].

172. *Id.* ¶ 15.

173. ICC Rules, *supra* note 108, at R. 91(2).

views and concerns *in person* when their personal interests are affected. . . ."[174]

Moreover, the Trial Chamber held that apart from "expressing their views and concerns," victims had a right, under certain conditions, to "give evidence,"[175] 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.' "[176] While the Prosecutor argued that the testimony of at least two of the victims would "merely duplicate evidence that has already been given,"[177] the Chamber dismissed the argument, emphasizing that "the account of each [victim] is unique—none of their personal histories are the same. . . ."[178] In addition, the Chamber stressed that in any event, the victims proposed to deal with issues not yet addressed in previous testimony.[179] Eventually, all three victims—two former child soldiers and a schoolmaster who tried to prevent the abduction of children—addressed the Chamber directly.[180] Notably, the decision to allow victims to address the Court directly was followed by the Trial Chamber in the *Katanga and Ngudjolo* case.[181]

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174. Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 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.' " Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 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 (Jan. 18, 2008)).

175. Lubanga Decision on the Requst by Victims, *supra* note 171, ¶¶ 19–20, 25.

176. Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 19 (citing Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Victims' Participation, ¶ 108 (Jan. 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).

177. Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 37.

178. Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 37.

179. Lubanga Decision on the Request by Victims, *supra* note 171, ¶¶ 37–38.

180. 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* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcripts (Jan. 12, 13, 14, 15, 19, 21, 22, and 26, 2010), http://www.icc-cpi.int (follow "Situations and Cases" hyperlink; then follow "Cases" hyperlink; then follow "Case The Prosecutor v. Thomas Lubanga Dyilo" hyperlink; then follow "Transcripts" hyperlink).

181. *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,

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 by girl soldiers during their opening statements.[182] 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.[183] 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.[184] Nevertheless, legal representatives of female child soldiers spoke at length during their opening statements not only about the fact that girl

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a/0191/08 et pan/0363/09 agissant au nom de a/0363/09 (Nov. 9, 2010), http://www.icc-cpi.int/iccdocs/doc/doc964978.pdf (allowing four victims who had not been called by either party to address the Chamber).

182. *See The Prosecutor v. Thomas Lubanga Dyilo: Trial Finally Underway*, LEGAL EYE ON THE ICC, WOMEN'S INITIATIVES FOR GENDER JUSTICE (Mar. 2009), http://www.iccwomen.org/news/docs/LegalEye_Mar09/index.html#drc [hereinafter WIGJ LEGAL EYE ON THE ICC (Mar. 2009)].

183. Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, ICC-01/04-01/06, *supra* note 170, ¶ 319.

184. *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), 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* ICC Prosecutor Leaves Unfinished Business in Ituri, DRC, PRESS STATEMENT (Redress) Feb. 13, 2008, http://www.iccnow.org/documents/REDRESS_press_release_on_Ngudjolo_eng.pdf [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."); Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga, PRESS RELEASE (Women's Initiatives for Gender Justice) Oct. 18, 2007, 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* notes 200–206.

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.[185] For instance, Carine Bapita, one of these legal representatives, 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 [sic] 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 [sic] 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.[186]

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[187] were able to speak to staff of the Court's VPRS about "issues . . . not within the Chamber's power to resolve or respond to,"[188] 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.[189] 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 opportunity for

185. WIGJ LEGAL EYE ON THE ICC (March 2009), *supra* note 182.

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

187. *See supra* notes 162–164 and accompanying text.

188. Situation in the Republic of Kenya, Report on Victims' Representations, *supra* note 161, ¶ 115.

189. Situation in the Republic of Kenya, Report on Victims' Representations, *supra* note 161, ¶ 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").

victims to speak frankly about their needs and wishes"[190] and "it was clearly the wish of victims to have these messages conveyed to the Chamber."[191]

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.[192] 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.[193] This view was echoed by a civil party lawyer, who noted in his closing that the ECCC had already provided victims with a "most valuable reparation:" an acknowledgement of their right to be present and to participate, and of their solidarity.[194]

B. The Reality of Victim Participation: Significant Limitations Remain

Unfortunately, neither the considerable number of participants thus far nor the examples I just described tell the whole story of victim

190. Situation in the Republic of Kenya, Report on Victims' Representations, *supra* note 161, ¶ 115.

191. Situation in the Republic of Kenya, Report on Victims' Representations, *supra* note 161, ¶ 116.

192. *See* Interview with Eric Stover, Berkeley Human Rights Center (Dec. 9, 2010). *See also, e.g.*, Co-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 60 at 55–57 (Aug. 18, 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?").

193. Stover, *supra* note 192. *See, e.g.*, Co-Prosecutors v. Kaing Guek Eav, alias 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.").

194. Co-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 73, at 80 (Nov. 23, 2009).

participation before the ICC and ECCC. 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 ICC[195] and the ECCC.[196]

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195. While Rule 85 of ICC Rules defines "victims" as, *inter alia*, "any natural persons who have suffered harm as a result of *any* crime within the jurisdiction of the Court," ICC Rules, *supra* note 108 (emphasis added), in the context of an individual case against the accused—as opposed to an investigation of a situation, see *supra* note 104—the harm must be connected to the offense(s) alleged against the accused. *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 (July 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 (June 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, "[l]et 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").

196. *See* ECCC Internal Rules, *supra* note 13, R. 23 *bis* (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."). A recent decision by the Pre-Trial Chamber in Case 002 adopted an expansive interpretation of the 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-Prosecutors 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

Second, the charges against the accused still depend on what the prosecution chooses to pursue. Indeed, victims do not have the ability to independently initiate an investigation at either the ICC or the ECCC.[197] Victims also lack the ability to compel the prosecution to either pursue particular charges or amend existing charges against the accused at both the ICC and the ECCC.[198] Although victims have tried to challenge these

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Civil Party Applications, ¶¶ 77–78 (June 24, 2011) [hereinafter Nuon Chea et al., Decision on Appeals Against Orders].

197. In relation to the ICC, *see* Rome Statute, *supra* note 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, Judgment on Victim Participation, *supra* note 121, ¶ 58 (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 generally 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* note 124 and accompanying text. *See also* Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* note 85, 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* note 13, at 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-Prosecutors 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 (Sept. 9, 2010) ("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*). . . . 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. . . . 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." Nuon Chea et al., Decision on Appeals Against Orders, *supra* note 196, ¶¶ 41–42.

198. *See infra* notes 124, 135–139 and accompanying text; *see also, e.g.*, Nuon Chea et al., Decision on Appeals Against Orders, *supra* note 196, ¶ 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, they do not explicitly have a say in possible amendments to the charges . . .").

limitations, 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, 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.[199] 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.[200] 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,[201] the decision was overturned by the Appeals Chamber,[202] which held that Regulation 55—the regulation that the Trial Chamber had relied on to reach its conclusion—did not permit the Chamber to re-characterize the charges based on facts and circumstances not already included in the charging document.[203] As one commentator noted, the Appeals Chamber decision made clear that Regulation 55 could "not be used to circumvent the Prosecutor's charging document."[204] Indeed, the *Lubanga* case exposed a significant limit on the rights of victims participating in proceedings before the ICC:[205] despite the intense

199. *See supra* note 184.

200. 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) [hereinafter Lubanga Joint Application].

201. 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 (July 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. Lubanga Joint Application, *supra* note 200, ¶ 42.

202. 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).

203. *Id.* ¶¶ 100, 112.

204. 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), http://www.asil.org/insights100108.cfm.

205. *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

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.[206]

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.*"[207] Thus, requests or interventions made by victims[208] must be made, at the very least, with the prosecution's consent.[209] Notably, in Case 002 against the most senior surviving Khmer Rouge leaders, victims were successful in moving the court to expand its investigation to include incidences of forced marriage.[210] However, the investigating chamber could not have expanded the investigation without the prosecution's consent. As mentioned

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that the charges of sexual slavery 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).

206. 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* note 7, art. 61(7). Thus, the Prosecutor retains ultimate authority regarding whether to add the new charges.

207. ECCC Internal Rules, *supra* note 13, at R. 23(1).

208. 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." ECCC Internal Rules, *supra* note 13, at R. 55(10).

209. *See, e.g.*, Co-Prosecutors 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 named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, ¶ 11 (July 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").

210. Co-Prosecutors 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].

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. The only exception to this is if the prosecution submits a supplementary submission to the investigating chamber requesting it to pursue the new evidence,[211] which is what happened here.[212] 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.[213]

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. These factors include, 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.[214] Thus, if the prosecution chooses to bring charges unrelated to sexual and gender-based violence, victims' stories, 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 ICC in person when their per-

211. *See* ECCC Internal Rules, *supra* note 13, at R. 55(3).

212. Case 002 Order on Investigative Action Concerning Forced Marriage, *supra* note 210, ¶¶ 1–2.

213. Notably, civil parties can also appeal a verdict handed down by the Trial Chambers, but only when the Co-Prosecutors have also appealed it. *See* ECCC Internal Rules, *supra* note 13, at R. 105(1c).

214. *See, e.g.*, Jérôme de Hemptinne & Francesco Rindi, Notes and Comments, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, J. INT'L CRIM. JUST., 342, 347–48 (Apr. 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* note 22, at 120.

sonal interests are affected,[215] the Court has emphasized that such presentations must not be "prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial."[216] 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.[217] 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.[218]

Notably, despite the fact that eight legal representatives were allowed to attend and participate in the proceedings on behalf of those granted victim status in the *Lubanga* case,[219] in the *Katanga and Ngudjolo* case, the Trial Chamber considered it necessary to divide participating victims, who numbered 366 by the end of March 2011,[220] into just two groups. The first consisted of former child soldiers alleged to have participated in attacks against other victims, and the second consisted of all other victims. The Court assigned each group a common legal representative.[221] Citing, *inter alia*, the Court's duty to ensure that "the proceedings are conducted efficiently and with the appropriate celerity"[222]

215. *See supra* notes 171–174 and accompanying text.

216. *See* Lubanga Decision on the Request of Victims, *supra* note 171, ¶ 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. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Katanga, *supra* note 121, ¶ 48 (citing Article 64(2) of the Rome Statute).

217. Lubanga Decision on the Request of Victims, *supra* note 171, ¶ 18 (citing Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Victims' Participation, ¶ 116 (Jan. 18, 2008)).

218. Lubanga Decision on the Request of Victims, *supra* note 171, ¶ 18.

219. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcript at 36–37 (Jan. 26, 2009), http://www2.icc-cpi.int/iccdocs/doc/doc623638.pdf (Victim Representative Ms. Bapita listing order of opening statements to be given by seven legal representatives and noting absence of eighth representative). *See also* BRIANNE MCGONIGLE LEYH, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS 327 (2011). As of March 31, 2011, 122 victims had been granted victim status in the *Lubanga* case. *See supra* note 152.

220. *See supra* note 157.

221. 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 (July 22, 2009).

222. *Id.* ¶ 10.

and that "victims' participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,"[223] 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."[224] The assignment of a limited number of common legal representatives for large numbers of victims has continued. Following the Trial Chamber's reasoning in *Katanga and Ngdujolo*,[225] the Trial Chamber in *Bemba* adopted a similar approach, assigning two common legal representatives to represent all of the victim participants at trial,[226] who as of the end of March 2011, numbered 1,366.[227]

The high ratio of victim participants to legal representatives may have negative ramifications for victims. As Executive Director of the Women's Initiatives for Gender Justice, Brigid Inder, has noted, "organising [sic] 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."[228] Notably, the Court is required to ensure that the distinct interests of victims—particularly victims of crimes involving sexual or gender-based violence—are represented when selecting a common legal representative.[229] Yet, it is unlikely this occurred in *Bemba*, for instance, where—despite the large number of sexual violence victims participating in the case—the Chamber arranged the two groups on the basis of geography,[230]

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223. *Id.*

224. *Id.* ¶ 11.

225. 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 (Nov. 10, 2010) [hereinafter Prosecutor v. Bemba, Decision on the Common Legal Representation of Victims].

226. *Id.* ¶ 10.

227. *See supra* note 155.

228. 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), http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf.

229. ICC Rules, *supra* note 108, at R. 90(4). 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* note 7, art. 68(1).

230. Prosecutor v. Bemba, Decision on Common Legal Representation of Victims, *supra* note 225, ¶ 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)).

rather than on the basis of the nature of the crimes allegedly committed against the victims. 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[231]—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.[232] The statement suggests 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.[233]

Moreover, as indicated earlier, in the *Lubanga* case before the ICC, only three victims—two former child soldiers and a schoolmaster—addressed the Court directly without being called by either the prosecutor or the defense.[234] 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.[235] Notably, the way in

231. *See supra* note 158.

232. 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 (June 21, 2011). Instead, the Registry recommended that it rely on information received when victims originally applied to participate in proceedings. *Id.* ¶ 9.

233. 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 (June 6, 2011) (resulting in a decision by the Pre-Trial Chamber to exclude those applicants from participating in those proceedings); 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 (July 4, 2011); *see also* Hundreds of Victims Prevented from Participating in Crucial Hearings Due to lack of Resources at the International Criminal Court, PRESS RELEASE (Redress) July 15, 2011.

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

235. *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. 28, 2011); 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, Décision relative à la Notification du retrait de la victim a/0363/09 de la liste des témoins

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"[236] and were effectively cross-examined by the defense.[237] Much like witnesses testifying on 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 was reminded several times to answer the specific 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 trav-

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du représentant légal (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/0363/09 de la liste des témoins du représentant légal, rendue le 11 février 2011 (Feb. 21, 2011).

236. 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 supra* notes 175–176 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 by Victims, *supra* note 171, ¶ 25. On the other hand, victim participants wishing to "give evidence" in the trial must first be placed under oath. Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 25. 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.*, 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 (Feb. 21, 2011) (same).

237. *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcripts (Jan. 19 & 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 (Feb. 21, 2011) (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 by defense counsel for Katanga); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Transcripts (Feb. 22 & 23, 2011) (cross-examination by defense counsel for Katanga and Ngdujolo).

> elled 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 . . .[238]

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,[239] none of the victims appear to have taken advantage of this opportunity.[240]

Finally, in cases where victims' representatives have tried to present their clients' stories of sexual and gender-based violence to the Court despite the absence of such charges against the accused, the Court has been quick to remind them that exceeding the scope of the charges is inappropriate. 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

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

239. *See* Lubanga Decision on the Request by Victims, *supra* note 171, ¶ 40.

240. 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 the victims expressed any views and concerns after they finished giving evidence under oath. *See generally* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcripts (Jan. 12, 13, 14, 15, 19, 21, 22, & 26, 2010) and Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Transcripts (Feb. 21, 22, 23, 24 & 25, 2011).

broader context and the long-term effects of such violence.[241] 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.[242]

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, 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.[243]

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. For example, in the *Duch* case,

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241. *See supra* note 186 and accompanying text. *See also* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcript at 47–49 (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 [sic]—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. . . . 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.").

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

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

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, 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: "[t]oday 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]

Not surprisingly, perhaps, victims' participation rights have, in some respects, actually been scaled back over the last few years, as the ICC and the ECCC have struggled with how to give victims a meaningful voice in the process without undermining either the efficiency of proceedings or 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

244. Co-Prosecutors 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-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 37 at 14 (July 1, 2009).

246. *Id.*, at 14–15.

247. Co-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 63 at 71 (Aug. 24, 2009).

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

249. *See* Situation in Democratic Republic of the Congo, Judgment on Victim Participation, *supra* note 197, ¶ 58; *see also* Situation in Darfur, Sudan, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the

ECCC have issued a number of decisions constraining the manner in which civil parties can participate. 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 questions outside the confines of the relevant topic.[250] 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.[251] 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."[252] Later, the Trial Chamber issued a decision holding that civil parties could not question the character witnesses for the accused or

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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 qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont presumées coupables en Ituri (June 28, 2010). Although 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. Co-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 31 at 98 (June 22, 2009).

251. Co-Prosecutors v. Kaing Guek Eav, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 35 at 81 (June 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 (July 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).

252. Johanna Herman, *Reaching for Justice: The Participation of Victims at the ECCC*, CONFLICT POLICY PAPER No. 5 (The Centre on Human Rights in Conflict, University of East London), Sept. 2010.

make submissions concerning the sentencing of the accused.[253] 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."[254] "In this context," the Chamber 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."[255]

Even more significantly, perhaps, in anticipation of Case 002 against the surviving senior leaders of the Khmer Rouge—in which nearly 4,000 victims applied to participate as civil parties[256]—the ECCC radically revised its rules on civil party participation in an effort to streamline the process.[257] 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, to be represented by Lead Co-Lawyers, who in turn will be supported by the lawyers representing individual civil parties.[258] 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."[259] 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 also all other victims in the case—which in Case 002 amounted to 3,850 people.[260] Indeed, this has already resulted in challenges to victim representatives who wish to express their concerns to the Court directly. For example, at the initial hearing

253. Co-Prosecutors 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).

254. *Id.* ¶ 12.

255. *Id.* ¶¶ 12–13.

256. *See supra* note 166 and accompanying text.

257. *See* 7th Plenary Session of the ECCC Commences Monday 2 February 2010, PRESS RELEASE (ECCC) Jan. 28, 2010, at 1 (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).

258. *See supra* note 147 and accompanying text.

259. ECCC Internal Rules, *supra* note 13, at R. 12*ter* (1).

260. *See supra* note 167 and accompanying text.

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.[261] When she tried to explain why the proposed witnesses might not adequately be able to address the Khmer Rouge's policy regarding the regulation of marriage,[262] however, 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."[263]

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 stories or to talk about their experiences on 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).[264] 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 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

261. *See* Co-Prosecutors v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC/TC, Transcript of Trial Day 36 at 27 (June 30, 2011).

262. *Id.* at 27, 29–31.

263. *Id.* at 33.

264. *See supra* notes 160–163 and accompanying text.

victims and eye-witnesses will have a chance to testify at the ICC."[265] 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.[266] The mass number of victims

265. Situation in the Republic of Kenya, Report on Victims' Representations, *supra* note 161, ¶ 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*, 16, http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf.

266. 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* note 16, 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 Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, p. 7, International Criminal Court, Sept. 2003, http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (noting that, as early as 2003, "[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, Sept. 14, 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, Feb. 12, 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 the Uganda Arrest Warrants*, p. 3,

potentially affected in these cases means that the number of victims who might qualify to participate in proceedings[267] 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,[268] the highest-level accused to be tried by the ICC thus far.[269] 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.[270] 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.[271] 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.

IV. "THE TASK OF *SEEING* WOMEN:"[272] 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 explore 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 partic-

International Criminal Court, Oct. 14, 2005 ("[O]ur mandate is to investigate and prosecute those who bear the greatest responsibility.").

267. *See* ICC Rules, *supra* note 108, at 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").

268. *See supra* note 155 and accompanying text.

269. 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* note 154 and accompanying text.

270. *See supra* note 167.

271. *See* Interview with Eric Stover, *supra* note 192 (noting that although one of most positive developments of civil party participation at the ECCC was the formation of a victim association that was able to speak with a collective voice on behalf of victims, this also resulted in the loss of individual victims' voices).

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

ipation, as I mentioned, has made a difference for some victims.[273] Indeed, many of the victims who participated in the *Duch* trial indicated some level of satisfaction with their participation in those proceedings.[274] 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?"[275]

Yet, while I do not believe that victim participation schemes 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 to invest in exploring alternative ways to complement the limited trial process by providing space for victims to tell their stories in other venues.[276] While a full exploration of possible alternatives is beyond the scope of this Article, 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,"[277] more recent

273. *See supra* note 170–194 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* note 22, at 118 (noting, for some victims, "participation in war crimes trials may provide some degree of satisfaction unavailable to [victims] in the nonlegal realm"); Kendall & Staggs, *supra* note 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* note 59, at 156 (contending that ending victim participation in international trials because of the inherent weaknesses in the system "may silence victims even further unless new platforms are created where victims can recount their stories in a socially significant way").

274. *See* Stover, *supra* note 192.

275. *See* Kendall & Staggs, *supra* note 8, at 366.

276. 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 & Haslam, *supra* note 59, at 171 ("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.").

277. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 391 (1999). *See also* ELISABETH REHN & 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 99 (Gloria Jacobs ed., 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

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]."[278] 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 conflict.]"[279] 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.[280] 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.[281] 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.[282]

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

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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.*

278. Franke, *supra* note 9, at 827.

279. REHN & JOHNSON SIRLEAF, *supra* note 277, at 99.

280. *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").

281. *See* Servos, *supra* note 280, at 14–17.

282. Buss, *supra* note 9, at 4 (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).

of survivors of sexual and gender-based violence more broadly,[283] 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 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 that emerge through criminal proceedings.[284]

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."[285] "Such programs," the Rules note, "may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organizations external to the ECCC."[286] 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.[287] Interestingly, in the context of one such forum, Mr. Pich Ang, the new Cambodian Civil Party Lead Co-Lawyer, invited forum guests to share their stories about how they had suffered under

283. *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), http://www.irinnews.org/film/?id=4128.

284. 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-Prosecutors 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.

285. ECCC Internal Rules, *supra* note 13, at R. 12*bis*(3).

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

287. *See, e.g.*, The VSS Provided Training to Additional 148 Focal Persons in Case 002 At Grand Ballroom, Imperial Hotel Phnom Penh, ECCC, Press Alert (Nov. 26, 2010), vss.eccc.gov.kh/en/component/docman/cat_view (follow "Report and Study" hyperlink; then follow "Training for Trainers 26 November 2010" hyperlink).

the Khmer Rouge regime.[288] 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.[289]

It appears that this forum provided victims of sexual and gender-based violence with a space where they felt able to share their experiences without being silenced by the rigid procedures required by trial proceedings. Indeed, although geared in large part toward those granted civil party status, these VSS forums represent an opportunity, as one report has noted, to "reach a broader range of victims than the Civil Parties."[290] 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 women experienced gender violence during the Khmer Rouge, without subjecting them to the limitations facing civil parties during trial proceedings.[291]

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 primary mandate is to assist the

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288. *Id.* at 6.

289. *Id.*

290. Herman, *supra* note 252, at 7. The report also suggests that "[p]roviding 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." Herman, *supra* note 252, at 7. 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* Nuon Chea et al., Decision on Appeals Against Orders, *supra* note 196, 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.").

291. 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* note 287, at 2.

Court in administering court-ordered reparations awards,[292] it also has a second mandate, which is to assist victims in situation countries under the Court's jurisdiction, even if they do not have a link to the particular crimes or suspects under investigation by the Court.[293] 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."[294] The TFV employs several strategies in implementing this mandate, including tailoring "projects . . . to meet the needs of victims of specific crimes."[295] 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.[296] More recently, the TFV launched a similar initiative to assist victims of sexual violence in the CAR.[297]

The TFV is particularly attentive to giving victims a voice and regularly consults with the victim population in designing their programs.[298] As discussed above, it appears that the ECCC has also begun a process of consultation with the victim community to discuss proposals and resources necessary for the implementation of non-judicial

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292. ICC Rules, *supra* note 108, at R. 98(2)–(4).

293. *See Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations*, PROGRAMME PROGRESS REPORT (ICC Trust Fund for Victims), 4 (2010), http://www.trustfundforvictims.org/sites/default/files/imce/TFV Programme Report Fall 2010.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*, RADIO NETHERLAND'S WORLDWIDE, Apr. 2, 2009, http://www.rnw.nl/international-justice/article/icc-trust-fund-victims-beyond-realm-icc. 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.*

294. INTERNATIONAL CRIMINAL COURT TRUST FUND, http://www.trustfundforvictims.org/ (last visited Aug. 5, 2011).

295. *Id.*

296. *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].

297. Trust Fund for Victims Launches Programme in the Central African Republic, PRESS RELEASE (ICC) June 16, 2011, www.icc-cip.int/NR/exeres/82C5A557-5B17-432C-8F43-CC5C68FEC4A9.htm.

298. 2011 TFV Report to ICC, *supra* note 296, 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").

measures,[299] including with those not officially participating in the trial process.[300] Perhaps in the context of these consultations, victims will be able to tell their stories unfettered by selective prosecutorial strategies or the 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 using these consultation processes as venues for survivors of sexual and gender-based violence to tell their stories is that both the ICC's TFV and the ECCC's VSS 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' core budgets.[302] Much of it has been, or is expected to be, funded through

299. *See supra* note 287 and accompanying text.

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, 8 (May 2011), 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 (July 21, 2011), http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf [hereinafter ICC 2012 Proposed Programme Budget] (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). Regarding the ECCC, see ECCC Revised BudgetRequirements—2010–2011, at 6, 14–15 (Jan. 24, 2011), 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).

302. Although the ICC TFV's administrative costs are funded through the Court's official budget, the specific projects it supports pursuant to its general assistance mandate are funded entirely through external voluntary contributions. *Compare* ICC 2012 Proposed Programme Budget, *supra* note 301, at 152 (proposing budget of €1,755,800 for the TFV's Secretariat), *with* The Two Roles of the TFV: Reparations and General Assistance, 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, 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." *Compare* ECCC Revised Budget 2010–2011, *supra* note 301, at 14–15, *with Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE, 17 (Dec. 2010), http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-report-

voluntary contributions, which until now have been limited.[303] Perhaps encouraging states and other stakeholders to invest in the ICC's TFV and the ECCC's VSS—both of which remain connected to the work of the tribunals and might therefore be perceived as having greater condemnatory power than TRCs operating independently of the criminal justice process—will help challenge the dominant narratives that remain visible through international criminal trials, even through their novel victim participation schemes. Indeed, if enough resources are dedicated to the expanded victim assistance mandate at the ICC and ECCC, the consultation processes they engage in may well contribute to a richer understanding of the complex ways in which sexual and gender-based 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. ⚘

20101207/cambodia-khmer-rouge-report-20101207.pdf [hereinafter *Recent Developments at the ECCC*].

303. For recent ICC TFV figures, see Financial Info, http://www.trustfundforvictims.org/financial-info (last visited Nov. 7, 2011). With respect to the ECCC's VSS, note that even its primary mandate has been underfunded. *See Recent Developments at the ECCC*, *supra* note 302, at 18 ("The court, funded by voluntary contributions from UN member states and the government of Cambodia, remains in a dire financial situation. Fundraising shortfalls for 2010 have resulted in cutbacks in some court operations, such as VSS activities, and in delays in replacing staff who resign.").