

A VICTIM'S RIGHT TO TRUTH AND THE INTERNATIONAL CRIMINAL COURT (ICC)

Summary Project Report

INTRODUCTION

This project seeks to identify and explore the practical and jurisprudential difficulties that may follow from attempting to integrate the 'right to truth' into the procedures of the ICC. Its main research question is: what are the central problems, practical and theoretical, of giving effect to victims' rights to truth in the context of the juristic-forensic approach to transitional justice; specifically - the investigation, trial and remedial procedures of the International Criminal Court? Stake holder attitudes attempting to further our understanding surrounding the issue were obtained and assessed through semi-structured, in depth, interviews with 23 individuals from the Office of the Prosecutor, Judges, defence lawyers, court advisors, victim representatives and NGO representatives between November 2012 and May 2013. Accounts which interviewees gave were assumed to reflect their 'real' views and experiences and thus provide important insights into their assessment of the subject. Thematic analysis was employed to fully examine and explore the data and to identify, analyse and report recurring themes.

It has been stated that "[t]he primary, and perhaps most important, right of victims in the context of international criminal proceedings is their right to the truth".¹ According to the Court's Revised strategy in relation to victims, one of the key reasons for victim participation is that it "empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred"². That said, the victim participation system has been critiqued from inside (and outside) the ICC as being too costly and lacking in effectiveness.³ Against this background participants were asked to give discursive answers to a series of general questions on the relevance of a victim's right to the truth in the ICC context, the significance of the right in respect of the control of investigations and prosecution decisions to charge, its possible impact on the fairness of a trial, its effect on victim participation rights, and its importance for reparations and for progress in restorative justice generally.

DIFFERENT CONCEPTIONS OF TRUTH⁴

Not an epistemological question: a reasonably credible account

The issue discussed by participants was not to do with the nature of truth in the abstract. P17 Defence suggested that a statement was "true" for the purposes of a criminal court if it gave a "reasonably credible account" of the events under examination and other participants stressed that the account needed to be "reliable" (P04 OTP) and be authoritative (P15 Judge). The implication is that necessary and sufficient credibility, reliability and authority emerge from the investigative and adversarial procedures of the ICC. In a trivial sense the ICC must ensure it is always able to speak the truth in this way (P04 OTP).

"Positional" perspectives

For participants the focus of the right to the truth concerned the appropriate scope, the objective, of statements all of which are "true" in the sense of giving a reasonably credible account of some event or experience. The focus is on the purpose of the statement and this relates to its perspective, context and intention. In their responses, participants seemed to work with three different conceptions of "truth".

Criminal court truth. This is the truth predicated on the legal or criminal justice process. This is the reasonably credible, authoritative account of what happened in respect of those events which were the direct subject of the charges (though this can include relevant aspects of the context of those charges).

Victims' truth. Participants were aware that this criminal court truth was narrower than the truth predicated on the interests and wishes of victims. These were not only the direct victims of the offences charged but also of a wider, less determinate, range of victims identified in terms of the "situation" being investigated by the ICC but also by the wider scope of the investigation of "cases" in

¹ G Mettraux, "Victims' participation in international criminal law", *Journal of International Criminal Justice*, 2010, 8 (1): 75-78, 77.

² ICC Court's Revised strategy in relation to victims, ICC-ASP/11/38, 5 November 2012, 3.

³ C Van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", *Case Western Reserve Journal of International Law*, 2012(44): 475-496. See also G Mettraux, *supra* n 1.

⁴ Participants were asked to answer discursively: 1. How important is the 'right to truth' in an international criminal context? 2. Would you see the truth to be the primary outcome of the ICCs processes?

the early stages which is then progressively narrowed in line with prosecution policy and the assessment of whether a realistic prospect of conviction exists. Victims' truth is linked to rendering justice to victims (P13 Victims' Rep). An account satisfactory to victims could be proved on the basis of a less demanding standard of proof than required for a criminal conviction (P13, P19 Victims' Rep) as where "everyone knows this person was to some extent involved" but the standard of proof and other factors essential to the criminal court's truth prevents this from being disclosed.

Historical truth. Participants also acknowledged the existence of an historical truth defined as providing a full, contextual and balanced account of the events in issue - after the fashion of a history. Participants pointed out that a general, social, historical account of a set of events is likely to be contested and thus an authoritative account is hard to obtain. This was another reason, in addition to the focus of the ICC on criminal court truth, why historical truth was doubtful as a product of the ICC's activities (P04 OTP; P20 NGO).

What is the Criminal Trial for?

Participants took different views of the relative importance of these different conceptions of the truth-expounding role of the ICC. They involved different express or implied views of the purpose of a criminal trial (these are general perspectives and should not be over-schematised).

Endorsing separation. One view was to insist on a clear conceptual separation between the legal truth and the victim's truth. The criminal justice process is subject to various prominent side-constraints: the need to identify and focus on particular charges, the need to prove them beyond reasonable doubt and the need at all times to ensure fairness to the defendant. Pursuing the victim's truth is inappropriate for a criminal court and to pretend otherwise is to raise false expectations amongst victims (e.g. P05 Judge⁵; P07 Defence).

Separation as an absolute position. For some, the tension between the aims of criminal justice and expounding truth for victims may be irreconcilable (P14 Defence).

A more nuanced position. For most participants, however, the contrast was not so stark. The criminal justice process could serve the interests of victims in the truth but in ways which are limited and partial. It can declare guilt and responsibility and punish perpetrators, which is an important interest and desire of victims (P15 Judge); it can give a "slice" of the broader truth (P15 Judge; P04 OTP; P08 OTP). A criminal justice approach is to be understood as one of a number of processes that contribute to transitional justice – the aim is reconciliation which can be served in many ways. Those seeking victim's truth should not put "all their eggs in just one basket" (P12 OTP).

Promoting truth. On another view the conceptual gap between the court's truth and the victims' or even the historical truth is less. This is because one of the main purposes of a criminal trial, at least in the international context, is to satisfy the interests of victims in knowing the truth of what happened. This can commit the Court, as part of its criminal justice role, to a more victim-centred approach. The end served includes the declaration of full and relevant truths to victims. It follows, specifically, that the provisions of the Rome Statute which relate to the participation of victims need to be interpreted, developed and even adjusted (by amendment) to facilitate this end. P11 Court Advisor, indeed, saw this as including a responsibility not just to victims but to declare a wider historical truth beyond the confines of particular charges "how can you establish the truth for history" -this was seen as central to the ICC's mission. Other participants focused more on victims specifically. For P12 OTP getting at the truth was the "essence of justice" and a way of assisting the healing process for victims; it was a way of satisfying a fundamental interest of victims (P19 Victims' Rep). Promoting truth, in their view, is a major part of what the criminal justice process is for.

The Civil v. the Common Law approach

A key question was posed by one participant: 'Is the judge an observer of the adversarial process...or does the judge actively control the process?' (P21 OTP). This question related to an awareness, expressed by some participants, of a distinction between the assumptions of the "common law", adversarial, theory of a criminal trial contrasted with the assumptions of the "civilian", inquisitorial, theory. The civilian tradition was taken to be one in which victims have greater prominence (P21 OTP;

⁵ P05 referred to the dissent of Judge Benito. This sought to define crimes inclusively so that harm to all victims can be a "fundamental aspect of the Chamber's evaluation of the crimes committed" (*Prosecutor v Lubanga*, Judgment, ICC 01/04-01/06-2842, 14 March 2012, Separate and Dissenting Opinion by Judge Odio Benito, para 8.) However it embodied the position which, if adopted, would cause the ICC to lose its focus on the purposes of criminal justice.

P19 Victims' Rep; P03 Defence), the declaration of truth is a central purpose of the process (P11 Court Advisor; P05 Judge) and judges have a role independent of the prosecutor to seek the truth (P11; P02 Court Advisor; P21). Ancillary differences, such as those dealing with disclosure and the role of expert witnesses, were also seen as significant (P18 Victims' Rep; P15 Judge). Although the ICC's system is mixed (see below) some participants from the civilian tradition suggested that, in fact, an adversarial theory and practice was dominant (P05; P08 OTP). Various degrees of frustration were expressed at what were seen as procedural barriers to the emergence of the truth. In particular the role of the prosecutor in selecting cases and evidences and the overriding definition of fairness in terms of defendant's rights rather than fairness to all, including victims, were cited as inhibitions restricting the emergence of the truth (P15 Judge; P11).

For other participants (noticeably those from a common law background) the distinction between the two traditions was not particularly important (P06 OTP; P17 Defence; P18 Victims Rep). And others pointed out what they saw as inhibitions to finding out the truth that might flow from an inquisitorial system – a judge being misled by his or her inaccurate theory (P18) or being over-influenced by sympathy for victims (P05 Judge).

Background or Institutional right?

The question whether the victim's right to truth was an institutional right correlating with duties on the OTP and others to be enforced by the ICC judges or whether it was more of the nature of an aspiration which, at best, was of persuasive influence on the judges, was an issue on which there was little clarity.

Human rights context. Some participants saw parallels with states' duties to investigate found in human rights law (P09 Defence; P15 Judge). But it is the translation of this into the forms of an international criminal court that is the problem.

Evolving right. Other participants saw the right to truth as an evolving ("fourth generation" – P16 Judge) right which was gaining "more footage" (P10 Victims Rep)⁶. It was there, in the ICC statute, and needed to be brought forward by the judiciary. In particular the obligation, in Article 54, on prosecutors to seek the truth (P08 OTP), the judicial power to seek additional evidence (article 69(3) in itself and coupled with Regulation 55 which allows the court to change the legal characterization of facts (P09 Defence)), were cited as provisions which should be interpreted in the light of the right to the truth.

Doubters and skeptics. But others were more doubtful. The Rome Statute gives victims certain rights but not, expressly, the right to truth (P05 Judge); likewise it places a duty on the OTP to pursue the truth but without there being a clear, correlating, right of victims to be told; or gives powers to victims, through representatives, to seek information but with no correlating duty on the OTP or others to provide it (P07 Defence); it was hard to see the appropriate remedy in the context of a criminal court (P06 OTP). Even participants who had a strong moral sense that victims should know the truth doubted the point and purpose of translating this into a legal right – to talk in rights terms could be meaninglessly legalistic (P13 Victims' Rep) and, in the ICC context, could be merely "platitudinous" (P14 Defence).

One participant, however, argued strongly for enhanced victims' rights to have the truth pursued at the pre-trial stage. It might in that context be possible, for example, to make declarations of the truth to a lower standard of proof (P10 Victims' Rep).

An institutional right

The public and contrasting positions of Steiner J and Van den Wyngaert J⁷ were mentioned by participants as indicating the different positions adopted in respect of the institutionalization of the right to the truth. This divide relates to the truth seeking role of judges (e.g. the exercise of powers under article 69(3)). It focuses on (a) the modalities of victim participation and (b) the re-characterisation of charges under Article 74 and Regulation 55. Both have ramifications for the court in respect of declaring a victim's truth. P09 Defence and P03 Defence both thought that this power gave opportunities to victims to be involved.

⁶ See cases listed by Judge Steiner in *Prosecutor v. Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para 32.

⁷ Eg: *Prosecutor v. Katanga and Ngudjolo* (*ibid.*); confer with Wyngaert, *supra* n 3 and *Prosecutor v Ruto and Sang*, Decisions on victims' representation and participation, ICC-01/09-01/11-460, 3 October 2012, para 25.

But it is a controversial matter. In a re-characterisation decision, the majority used Regulation 55 to further “la manifestation de la vérité”⁸ subject to a dissent by Van den Wyngaert J in the “strongest of terms”⁹. Invoking Regulation 55 is seen by Participants as highly problematic (P2 Court Advisor), as a re-characterisation of charges at the pre-trial stage may result in the prosecutor not having the relevant evidence to support those charges (P09 NGO) thus jeopardising the subsequent trials and the emergence of truth, no matter how limited; secondly, a re-characterisation at the deliberation stage inevitably poses challenges for the defence.

Article 69(3) is the power of judges to request additional evidence in order to determine the truth. Of course this is not necessarily exercised solely to facilitate victim’s rights to the truth. Some participants wanted a more active use of the power - one participant claimed that judges at times did not fulfill their obligation under the Statute to call evidence (P08 OTP) and get to the truth. Other participants, on the other hand, emphasised the obligation on the victim representative to find a way to effectively and sustainably facilitate participation whilst ensuring the integrity of the proceedings (P01 Judge).

INVESTIGATIONS AND THE ROLE OF VICTIMS¹⁰

At the heart of the question is whether there should be a greater capacity for victims to be involved in decisions about investigations (particularly those flowing from the OTP’s *proprio motu* powers). Many participants pointed out that the OTP was committed to victims. Through her powers under the Statute, as well as the influence she can exert over cooperating states, the OTP is best placed to unearth the truth, at least the truth about the situation and cases with which the court is concerned.

Support for OTP independence and monopoly

The majority of participants accepted the need for the OTP’s monopoly over the control of investigations and that the victims’ rights were properly confined to a right to be informed and to make representations and to have their interests considered by the OTP¹¹. Participants recognized the practical need for selection of cases (e.g. P23 OTP). A broad investigation meeting the interests of victims would stretch resources too far (P10 Victims’ Rep) and have a negative impact on the ability of the OTP investigators to gather evidence to a sufficient depth to justify proceeding with particular charges. Likewise it was appropriate for the OTP to follow its policies on the selection of cases even though this may involve moving an investigation away from the interests of direct victims (e.g. the policy of prosecuting senior officials which focuses on the experience of “insiders”). The interests of victims in respect of knowing the truth and the interests of the OTP in pursuing likely cases were not always the same (P23).

Not inconsistent with enhancing victim’s influence

But these arguments (that victims’ rights at the investigation stage should not be enhanced) were seen as not being inconsistent with encouraging the emergence of a wider “victim relevant” truth. Participants pointed out the vast accumulation of evidence collected through an investigation which may be made available to the public (P04 OTP; P06 OTP; P14 Defence). Others stressed the continuous influence that victims can have over investigators (P07 Defence); an influence which can be enhanced the more organized victims are and the more willing they are to provide usable evidence. P04, OTP,

⁸ *Situation in the DRC*, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, ICC-01/04-01/07-3319, 21 November 2012, para 8.

⁹ *Situation in the DRC*, Dissenting Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07-3319, 21 November 2012, para 1.

¹⁰ Participants were asked to answer discursively: 3. Does the case or situation focused scope of investigations limit the possibility of realising the right to truth?

¹¹ See in particular the Appeal Chamber decision *Situation in the DRC*, 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, ICC-01/04 556, 19 December 2008. The Appeals Chamber makes it clear that there are plenty of opportunities within the ICC Scheme for victims to pass information on the OTP and to make representations (e.g. under articles 15(2) and (3), article 19(3) and article 42(1). What the Appeals Chamber denied is that these powers require formal, judicial recognition of a right to participate in a “situation” investigation under which, perhaps, victims would have rights to compel the OTP to consider or act upon information victims submit.

(taking a view somewhat at odds with the theory that investigations are policy driven) thought that, given limited resources, the OTP will be disposed to accept such “low hanging fruit”.

Legal rights for victims over the investigation should be enhanced

Enhanced legal rights would include procedural rights before the Pre-Trial Chamber (PTC) such as the right to be heard, to lay information before the PTC and to have the case examined¹². At the heart of this argument was the concern, caused by national experiences, that political pressures on prosecutors undermined victims' rights and prevented the full investigations and prosecutions that a situation demanded. Many participants pointed out how the political realities often shape the strategies of the Prosecutor (and therefore, the scope of truth seeking). The need for state cooperation and the influence of the UN had an impact on investigations and prosecution decisions. It was important that victims should be able to act as a control over and a point of pressure on the prosecution (P11 Court Advisor; P14 Defence; P18 Victims' Rep).

Victims' influence over the investigation should be enhanced

Another view was to stress the positive impact of victims on the investigation of crimes both in a situation and a case context. Victims (through representative agencies) could conduct their own investigations and, though these might be a “sideline”, could contribute to the prosecution case (P19 Victims Rep). Victim sponsored investigations are better able to get to places and parts of the country that may be inaccessible to the OTP investigators (P08 OTP); the OTP is a more “institutionalised” investigator constrained, for example, by issues of safety and security as well as political cooperation (P03 Defence). Victim driven investigations can deliver a more effective understanding of cultural and contextual factors (particularly in non-bureaucratic societies (P18 Victims Rep)). Such arguments do not necessarily require greater legal rights for victims but, rather, are in favour of promoting the interests of victims at the investigation stage and giving more resource and opportunity to victim led investigations (P19). Perhaps also to be able to investigate where there was an opened situation but no activity by the OTP (as in Uganda).

Scepticism on enhanced victims' investigations

Some participants expressed concern at any policy of promoting and facilitating independent investigations by victims' groups. Whilst ICC organs, such as the OPVC, were fully aware of institutional issues affecting investigations, NGO and private victims' groups investigations might not be. The formal investigation might be undermined by incompetence (P23 OTP; P10 Victims' Rep) or by being inconsistent with procedural obligations and safeguarding duties placed on the OTP (P21 OTP). In addition many participants pointed out that the OTP's obligation to disclose exonerating evidence did not apply to victims and their representatives (P21 OTP) – though some participants alleged a temptation to focus on incriminating evidence (P03 Defence).

PROSECUTION AND THE SELECTION OF CHARGES¹³

The role of the prosecution (OTP) in relation to the right to truth was discussed, particularly whether there was a tension between the prosecutions duty in a criminal justice process and the emergence of victims' truth.

Participants were aware of victims' concerns at what could seem arbitrary decisions by the OTP on who to charge, with what crimes and what mode of liability (P02 Court Advisor; P05 Judge). The focus on “important crimes”, on prosecuting the leaders, a representative selection of crimes and modes of liability, over a geographical spread and a broad time period meant that the truth, for the victims of those atrocities not the subject of prosecution, would not emerge.

As with the investigative process, most participants defended some degree of selection of this kind as a necessity of the criminal justice process (P06 OTP; P12 OTP; P21 OTP). It was necessary

¹² These rights were accepted by Pre-Trial Chamber I in *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings by VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01-04-101- tEN-Corr, 17 January 2006, para 71, but reversed on appeal (see supra n. 11).

¹³ Participants were asked to answer discursively: 4. Prosecutors make decisions about who to prosecute, how many to prosecute and for what crimes: how, if at all, is the making of these decisions influenced by the victims' rights to truth?

given available resources and it was not arbitrary to follow a coherent policy¹⁴. The prosecution's interest in seeking convictions is not identical to the victim's desire for the truth (P19 Victims' Rep). But prosecutors also insisted that they had a truth seeking duty and that victims should be at the forefront of his or her duty (P06 OTP).

But other participants expressed sometimes strong criticism of the OTP. It was felt that some selection decisions were hard to understand ("obscure" P11 Court Advisor). Participants also stressed the consequences of decisions reflecting the political context, external pressures and the unarticulated factors flowing from the "deal" with the cooperating state (P11 Court Advisor). As in the context of investigations, some participants sought greater power for victims, including enhanced or at least clearer legal rights, in order to keep proper pressure on the OTP. At the very least there should be an enforceable right to an explanation of a decision not to prosecute¹⁵.

The majority of participants, though supporting a greater role for victims, did not support or expect to see enhanced legal rights of victims if they could result in the OTP being in some way compelled to investigate or prosecute in the victims' interests. Such a move would require the judges to be involved directly in deciding what cases should be prosecuted and this would impair judicial impartiality (P01 Judge) and lead the judges into politically charged areas (P07 Defence). Participants from the civilian tradition were less worried that this would result and would appreciate a greater role over charging (P15 Judge). There could also be the unfairness of victims becoming "prosecutor bis", placing extra burdens on the defence (P06 OTP). Again there was the sense that in this respect the truth-seeking role of the ICC had to be subordinate to the demands of the criminal justice process.

FAIR TRIAL CONCERNS¹⁶

Little impact

Participants discussed whether the victim's rights at the ICC to pursue the truth had an impact on the fairness of the proceedings, especially the rights of the accused. For the majority of participants there was little impact given the close control over non-witness victim participation that had been exerted by the judges (P21 OTP; P11 Court Advisor and others) (though P22, Defence, suggested that there were considerable differences between chambers). P14, Defence, thought judicial control was too tight and meant that victim participation was somewhat a "charade".

Some impact

Other participants did identify some impact on the effectiveness of the defence caused by victim participation, though it was not clear that this related to the fairness of the trial. In particular it was the process of proving or commenting on the large numbers of participating victims (as in Bemba) which caused burdens for the defence. Other issues were also mentioned - such as how the evidence of participating victims can affect the mood of a trial, concern for judicial independence and the worry of victim's tending to be prosecutor bis – reinforcing a faltering prosecution, for instance (P04 OTP and P22 Defence).

Impact on the right to the truth

Some participants associated with the defence felt there were particular difficulties in challenging a victim as to the truth of her or his statement – both relating to the questioner's own emotions but, more significantly, to the prejudicial mood this might engender in the Court (P17 Defence). In relation to the emergence of truth in the criminal trial at the ICC, many participants mentioned (as said above) the lack of an obligation on participating victims to disclose exculpatory evidence. This contributed to a sense of the unreliability of some victims held by some participants.

¹⁴ The OTP's policy includes prosecuting the most important crimes moderated by a representative selection of crimes and modes of liability, a focus on the leaders rather than those directly responsible and a spread of offences in terms of geography and time: see OTP Prosecutorial Strategy 2009-2012 (2010 The Hague).

¹⁵ Although some participants pointed out that sometimes the OTP make postponing non-decisions.

¹⁶ Participants were asked to answer discursively: 5. Is it possible to ensure both that the trial is conducted fairly and also that the victims' rights to truth are realised?

VICTIM ROLE AND PRESENCE¹⁷

Who is a victim?

According to interviewees, the definition of a victim (despite the existing three part test¹⁸) was inherently problematic. The term victim itself presupposes that a crime has been committed and that the victim is innocent as the wronged person (17 Defence). Furthermore, there are risks of distorting the truth through an inability to verify the identification of victims (P22 Defence) or indeed ascertaining whether applicants are victims of a situation and later a case, or other events (P23 OTP). The distinction between victims of a situation and victims of a case seems to result in the bizarre proposition ‘that only the victims of the case would be entitled to know the truth about what happened’ (P10 Victims’ Rep). And a too narrow definition of victim is exclusionary in other ways too: there may be a victim witness whose theory of the events does not correspond with those brought by the prosecutor and the charges faced by the accused (P17 Defence). The notion of victim therefore hinges around the prosecution theory, excluding an alternate acknowledgement of victimhood and the corresponding version of the truth.

Victim Motive

It was stated by one of the participants that whilst victim participation gives them a platform to raise their views and concerns, it ‘creates expectations that go much beyond what criminal justice systems can deliver’ (P05 Judge). On analysing participants’ responses, three main motives for victim participation were identified: a) to receive an acknowledgement of suffering, b) to secure reparations and c) to achieve a sense of truth and justice. It was suggested (P13 Victims’ Rep) that to further a) carefully crafted judgments that acknowledge victim suffering despite a focus on judicial and forensic truth, would be beneficial. To ensure b) did not distort proceedings it was suggested to separate victims who want to participate from those who are interested in reparations (P06 OTP) whilst in the pursuit of c) it was acknowledged that as well as contributing to the truth, the desire for revenge may adversely affect truth-telling (P19 Victims’ Rep).

Do Victims Advance the Truth?

Judge Van den Wyngaert has openly questioned the usefulness of victim participation by pointing out that victim participation “may, unwittingly, undermine the case of the prosecution, in situations where common legal representatives bring victims to The Hague whom the prosecutor, for strategic reasons, decided not to call”¹⁹. In fact, she fears that victims’ views of the case “may, or may not, be conducive to the truth-finding process”²⁰ thus suggesting that victim’s interests would be better advanced through the prosecution and mechanisms outside the criminal court. This view was shared by some participants during interviews (P07 Defence, P05 Judge) emphasising also that international judges are generally victim-aware. This point was rebutted by those saying that victim participation adds to the truth finding process as victims can raise important concerns (P08 OTP) triggering actions by the judges to demand further information and evidence and understand the context better given that the proceedings are remote from where the alleged crimes happened (P16 Judge). That said, it was acknowledged that to date the impact on trials has been small and not significant (P09 NGO). In fact, one of the major themes emerging from the data is the difficulty for practitioners at the ICC to make victim participation effective, a challenge that is expressed by the proposition that victim participation is little more than a gesture. For participants there were issues surrounding the grouping of victims in that they may not have a common interest, participation almost presupposes that victims give client instructions to realise the right to truth when they may not (P13 Victims’ Rep) and even if victim representatives seek to influence the trial, some believe that the judges act like a censor by reviewing the questions victim representatives wish to put forward in advance so as not to be openly seen to restrict victim representation (P07 and P14 Defence).

¹⁷ In relation to victims, participants were asked discursively to answer: 6. If the trial focuses on the defendant, does that mean that the right of victims to ascertain the truth can still be realised? 7. Is victim participation in the trial necessary in order to vindicate the right to truth? 8. Is the right to truth one that victims can invoke as a right in order to influence investigations, pre-trial proceedings and the trial?

¹⁸ *Prosecutor v Muthaura, Kenyatta and Ali*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, 26 August 2011, para 40.

¹⁹ C van den Wyngaert, *supra* n 3 at 485.

²⁰ *Ibid.*

From a receiver of information to an imparer of information: Giving Evidence

At appropriate stages of the proceedings, as determined by the Chamber, individual victims may appear 'so that their voice may be heard directly'.²¹ The moment for victims to give evidence enables them to become an imparer of information (as opposed to the receiver of information) and therefore it was apt for participants to contemplate whether becoming a victim-witness may advance the realisation of the right to truth. Concerns were raised about the reliability of victim-witnesses during trials.²² It is, however, crucial to note that the participants felt both the Lubanga and the Ngudjolo judgments should not provide an argument against victim participation per se. As witnesses are not always truthful, it is perhaps worth pointing out that – in a more general sense – testimonies during international criminal proceedings may not provide the useful and credible facts desired by the fact-finders.²³ A potential explanation for a lack of truthfulness on behalf of a victim-witness was offered by associating the motive of a victim to achieve reparation through a conviction as possibly overriding their motive of getting and telling the truth (P03 Defence). In fact, seeking and telling the victim's truth may hinder the objective of gaining a conviction. Needless to say that participants were well aware that victim-witnesses are likely to be biased (political, social, personal, emotional or cultural, whether consciously or unconsciously) if not have an agenda. Furthermore, the challenges for witnesses coming from a differing judicial, cultural system with differing educational backgrounds must be acknowledged (P04 OTP).²⁴

REPARATIONS²⁵

Without a conviction there can be no reparation. This triggered the question as to whether there is pressure on judges to produce a conviction, which was vehemently denied by some participants (P02 Court Advisor, for example), but somewhat less sceptically contemplated by others (P14 Defence, for example). In any event, the court's record to date dismisses the suggestion that the judges feel such pressure²⁶ and participants were asked to contemplate the relationship between the reparations phase and its potential to realising the right to truth. In light of a lack of a clear reparations decision by the court²⁷ it is fair to say that participants were cautiously discussing reparations, only reluctantly venturing into the realm of possibilities and hypotheticals. It was, however, noted that the decision on principles and procedures has the capacity to somewhat broaden the notion and types of harm (P20 NGO, P02 Court Advisor) to include victims of gender violence, for example, and the reparations decision of August 2012 indicates a willingness to be guided by the Basic Principles.²⁸ This would mean that there is greater scope for acknowledgement of victims' suffering and with it a wider

²¹ *Prosecutor v Ruto and Sang*, Decision on victims' representation and participation, ICC-01/09-01/11, 3 December 2012, para 26.

²² *Prosecutor v Lubanga Dyilo*, Judgment, ICC-01/04-01/06, 14 March 2012, para 499. The recent Ngudjolo judgment in its analysis discusses unreliability of witnesses (*Prosecutor v Ngudjolo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, 18 December 2012).

²³ N Armour Combs, *Fact-finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge University Press, 2010. Studies have also demonstrated the limits and inaccuracies of eyewitness testimony especially by those witnesses that have been exposed to extensive trauma. Years after the events memories can fade or be altered depending on information received post-events. Nancy Comb purports that 'testimony of international witnesses often is vague, unclear and lacking in the information necessary for fact finders to make reasoned factual assessments' (*ibid.*, 5) and that deficient testimony during international criminal proceedings are more prevalent than in domestic cases.

²⁴ The January 2013 decision on witness preparation was welcomed as a useful opportunity for the prosecutor to understand the challenges faced by witnesses that are also victims and called by the Prosecution. See *Prosecutor v Ruto and Sang*, Decision on witness preparation, ICC-01/09-01/11, 2 January 2013, para 35.

²⁵ Participants were asked discursively to answer: 9. Should the victims' right to truth influence the way the court decides on reparations?

²⁶ "Of the 14 cases the Prosecutor has taken to the Confirmation Hearing stage, four have been rejected. When that is added to the Ngudjolo acquittal ad the collapse of the case against Muhtaura, the Prosecutor has a batting average of <60%" (W Schabas, "The banality of international justice, Journal of International Criminal Justice", 11 (2013): 545-551).

²⁷ To date there is the decision on principles and procedures to be applied to Reparations²⁷ only and this decision is currently under appeal

²⁸ *Prosecutor v. Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August, 2012, para 185. Principle 8 of the Basic Principles, as noted by P02, is not expressly included in the Statute.

acknowledgment of what happened. For some (P05 Judge, for example) this might be a difficult decision to reconcile with the trial where gender crimes did not feature as part of the charges and thus not of the conviction. Therefore some see the Reparations element as a 'complete no win situation' (P04 OTP). Whilst the Trust Fund is in a position to consider further evidence and different materials, the necessary link with the charges of the accused must remain thus dispelling the hope that it might present substantially new opportunities for victims to ascertain the truth.

Article 75(2) of the Rome Statute provides a list of reparative forms, but the Court noted that this list was viewed as non-exhaustive allowing for '[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.'²⁹ To what extent these measures would advance the realisation of a right to truth, however, remains largely speculative. In fact, it was suggested that an important distinction needs to be made between what a reparation award might look like and what the reparative value of this award may be (P20 NGO). To this end, it is possible that from an award, the truth might be advanced due to its reparative value.

Interestingly, none of the participants referred to Article 75(4) of the Rome Statute which enables the Court to require State cooperation for the enforcement of reparations orders made under the provision, through the application of Article 93.³⁰ Only one participant contemplated such reparation efforts only to dismiss the idea straight away as facing political barriers at the national level where these measure ought to be implemented.

CONCLUDING THOUGHTS: WHERE CAN VICTIMS INFLUENCE TRUTH-SEEKING BEST?

The Prosecutor's investigative duty comprises an obligation to seek to establish the truth, and in particular, to consider whether there might be criminal responsibility under the terms of the Statute.³¹ The duty, however, is confined to an examination of the crime base and the accused's link to it. Information needed by the victims, including, for example, identification evidence, might be superfluous to the Prosecutor's case. In addition, prosecutorial strategy and jurisdictional limits may have an inherently restricting effect on the nature of truth uncovered.³² According to article 15(3) victims are entitled to 'make representations to the Pre-Trial Chamber' if investigations are initiated by the Prosecutor *proprio motu*.³³ These victims' representations can influence Pre-Trial Chamber decisions regarding the gravity threshold, geographical region, time range, widespread nature, category and elements of crime, nature of conflict as well as interest of justice considerations.³⁴ One interviewee (P07 Defence) sees the greatest scope for victims' interest to shape the remit of truth finding at the ICC as the confirmation of charges stage to ensure victims have input as to who is charged and for what crimes. However, the NGO REDRESS assesses in its review of victim participation at the ICC that "victims are unlikely to impact on what arguably impacts them the most – the nature and scope of the Prosecutor's investigation".³⁵ Furthermore, reviews of prosecutorial decisions not to continue with an investigation have not been possible due to the fact that the prosecution has not

²⁹ Ibid. para. 222.

³⁰ The Inter-American Court has demonstrated that such reparation demands may be realisable.

³¹ Article 54.

³² M De Guzman, "Choosing to Prosecute: Expressive Selection at the International criminal Court," Michigan Journal of International Law (2012): 265-320.

³³ In the Kenya situation, Pre-Trial Chamber II issued an order for the VPRS to "(1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in Rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto." (*Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 Dec 2009, para 9). See also *Situation in Cote D'Ivoire*, Order to the VPRS Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-02/11-6, 6 July 2011.

³⁴ *Situation in the Republic of Kenya*, Decision Pursuant to Articles 15 of the Rome Statute on the Authorization of an Investigations into the situations in the Republic of Kenya, ICC-01/09-19, 13 March 2010 and *Situation in Cote D'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote D'Ivoire, ICC-02/11-14, 3 October 2011.

³⁵ REDRESS, The Participation of Victims in International Criminal Court Proceedings. A Review of the Practices and Consideration of Options for the Future. Oct 2012, p.44.

formally closed but only suspended investigations³⁶, therefore essentially avoiding having their prosecutorial discretions questioned or overseen. An explanation of the latter was provided by P11 (Court Advisor) citing political as opposed to legal reasons on behalf of the OTP for not wishing to interfere with the case selection and charges. Other participants contended that participation during the trial has the potential to be helpful (P15 Judge and P16 Judge) especially when it comes to injecting the necessary cultural and historical context into proceedings with victim representing the conscience of the Court (P04 OTP). That said, some interviewees see victim participation as a façade (P07 Defence, P11 Court Advisor) within the judicial truth-finding process as their participatory rights are kept to a minimum taking on predominately the role of a spectator. Whilst the trial process with its provisions for testing the truth may provide a validated (perhaps to the victims acceptable) account, to date victim participation has provided very little opportunity to influence the processes and with it the realisation of the right to truth.

Unquestionably a conviction has to be based on the beyond a reasonable doubt required by Art 66(3). However, it was put forward, that this requirement may not necessarily need to extend to preliminary information contained in a judgement. Instead, a “judgment should set out exhaustively everything, every piece of evidence that it finds credible which describes what happened” (P10 Victims’ Rep) by applying the test of balance of probabilities. This approach might work towards victim satisfaction by providing an acknowledgement of the preliminary event that happened whilst also advancing the realisation of a right to truth on behalf of victims by including a plausible account of circumstances into the court record.

Whilst neither the Rome Statute nor the accompanying documents include express reference to the right to truth, arguably there is enough flexibility within the Rome Statute to warrant an exploration of the relationship between the right to truth and the truth seeking obligations contained within the Rome Statute to increase our understanding of the extent to which this is theoretically possible. All participants acknowledged the importance of victims having available procedures for ascertaining the truth of what happened to them and to their society. However, there are clear differences (to differing degrees) between participants on the appropriateness of international criminal justice as a means to achieve this. To some extent these reflect the various functions (judicial, defence, prosecution, victim representation) being performed, but they also reflect more general differences concerning the point and purpose of a criminal trial. These are conceptual and intellectual differences expressed by participants but also illustrated in dissenting judgments and in different approaches taken by the chambers. There is no reason to think these differences are negative factors; rather they appear as effective points of dialogue within the Court through which the most appropriate realisation of victims’ rights to the truth can emerge through a criminal process; to complement, perhaps, its emergence in other forms through other processes such as human rights law.

For now, despite the fact that the right to truth is firmly embedded within human rights law and the transitional justice discourse, the Statute obligations may only lead to a limited realisation of this right. It should, however, be noted that the right is implicitly acknowledged in the Statute in the more limited context of enforced disappearances (see Article 7(1)(i)) and there are voices at the ICC, most notably Judge Steiner,³⁷ who associate the right to truth on behalf of victims of serious human rights violations with the Court cases. Given the OTP’s current preliminary investigations in Honduras, Colombia and Guinea expressly referring, *inter alia*, to enforced disappearance, the issues surrounding the right to truth are likely to be subject to future judicial analysis and decision at the Court.

³⁶ *Situation in the DRC*, Decision on the Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/04-373, 17 Aug 2007, para 5.

³⁷ In a decision concerning the procedural rights of victim participants, for example, the single judge noted that “the victims’ core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility’ formed the basis of the right to truth in respect of serious human rights violations” (*Prosecutor v. Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 32).