

Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity

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Summary

In an effort to address the legacies of massive human rights abuses and to restore the harms that have been caused, access to justice in the Democratic Republic of the Congo should be seen within a broad context. Central to the fulfilment of such a broad understanding of access to justice is victim participation. The legal framework of the DRC permits a wide range of participatory rights for victims in criminal proceedings. However, until recently the authority to prosecute serious violations of international human rights law, namely, genocide, crimes against humanity and war crimes, were exclusively held by the DRC's military courts. With the adoption of legislation in 2016 amending the Congolese Criminal Code and the Code of Criminal Procedure, what remains unclear is how victim participation will be operationalised once domestic courts start prosecuting these international crimes. The purpose of this article is to respond to these concerns.

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1 Introduction

Since 1993, the Democratic Republic of the Congo (DRC) has been marked by numerous major political crises, wars and multiple ethnic and regional conflicts that brought about the deaths of millions of people from war-related causes, making the conflict the deadliest since World War II. Very few people living within the borders of the DRC managed to escape the violence and were the victims of grave international crimes, including mass murder, sexual and gender-based crimes, forced displacement and pillage. For years, victims have demanded accountability at the national and international levels.¹ Despite such widespread atrocities, only a small number of serious crimes committed in the DRC have been brought to court, with the proceedings mainly taking place in military courts, leading one to surmise that there has been an inability on the part of the DRC government to effectively lead the pursuit towards justice.² Whether it is the limited engagement of the authorities in strengthening the rule of law, the tolerance of interference by political and military authorities in judicial affairs, the poor judicial practice of military courts and tribunals over recent years, the result, in the eyes of many victims, is that the judicial system in the DRC has neither the capability nor the credibility required in order to step up efforts to fight against impunity for the many violations of fundamental rights committed against them in the past.³

While rebuilding trust in the judicial system to be used as a tool to tackle the climate of impunity will undoubtedly require time and effort, one of the most important avenues by which to do this will be by strengthening the rule of law. Critical to such an endeavour is ensuring access to justice for victims. In an attempt to redress the legacies of massive human rights abuses and to restore the harm that has been caused, access to justice for victims through prosecutions should be seen in a broad context, which includes access to a trial; access by those within the trial; and access to the community by the

1 At the international level, the DRC in April 2004 invited the office of the Prosecutor of the International Criminal Court to investigate alleged crimes in the context of an ongoing armed conflict in its territory. After a brief preliminary examination, the ICC opened its investigations in June 2004. See <https://www.icc-cpi.int/drc> (accessed 21 February 2018).

2 See United Nations Office of the High Commissioner for Human Rights Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (Mapping Report), August 2010, http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf (accessed 1 June 2016).

3 Mapping Report (n 2 above) para 979.

trial.⁴ Central to the fulfilment of such a broad understanding of access to justice is victim participation. As Hobbs explains: 'Victim participation has the potential to empower survivors and engender individual healing and social trust, promoting accountability and the rule of law in post-conflict transitioning societies.'⁵

As is the case in most countries that follow the civil law tradition, the legal framework of the DRC permits a wide range of participatory rights for victims in criminal proceedings. However, until recently the authority to prosecute serious violations of international human rights law, namely, genocide, crimes against humanity and war crimes, were exclusively reserved for the military courts in the DRC. With the adoption of legislation in 2016 amending the Congolese Criminal Code and the Code of Criminal Procedure, effectively transposing the Rome Statute⁶ into national law, what remains unclear is how victim participation will be operationalised once domestic courts start prosecuting these international crimes. The purpose of this article is to respond to these concerns and, in an effort to do this effectively, the article is divided into four parts: First, the article starts by highlighting the importance of victim participation as a post-conflict justice mechanism. Subsequently the article examines international and regional human rights decisions in relation to the rights of victims to participate in criminal proceedings for serious human rights violations. Third, the article analyses the domestic legal framework of the DRC and the recent jurisprudence arising from the military tribunals, highlighting the more restrained participatory rights available to victims within the military justice system. Finally, the article turns to the Extraordinary Chambers in the Courts of Cambodia (ECCC) in an effort to anticipate any possible shortcomings in the DRC domestic framework when trying to accommodate the rights of what could amount to numerous victims.

2 Development of victim participation as a post-conflict justice mechanism

Post-conflict justice mechanisms, such as criminal prosecutions, truth commissions and reparation programmes, are principally concerned with a societal response to collective violence motivated by the search for truth and justice.⁷ While there are no exhaustive definitions for the terms 'truth' and 'justice', in practice the best way forward in

4 R Henham 'Conceptualising access to justice and victims' rights in international sentencing' (2004) 13 *Social and Legal Studies* 48.

5 H Hobbs 'Victim participation in international criminal proceedings: Problems and potential solutions in implementing an effective and vital component of justice' (2014) 49 *Texas International Law Journal* 3.

6 Rome Statute of the International Criminal Court, 2187 *UNTS* 90, entered into force 1 July 2002.

7 M Minow *Between vengeance and forgiveness* (1998) 9.

achieving these appears to be implementing a set of judicial and non-judicial measures in order to redress the legacies of massive human rights abuses. Most importantly for the victims, prosecutions can operate as a form of release or have a cathartic effect, where injustices are dealt with and not left to fester to be the catalyst for continued violence.⁸ Moreover, a failure to prosecute may result in damaging the legitimacy of the new regime since lawlessness most likely was a characteristic of the repressive regime.⁹ Prosecutions can have the power to provide societies in the process of rebuilding a reaffirmation in the rule of law, which respects the dignity of all people.¹⁰ In addition, through stigmatisation, trials can internalise that certain behaviours are not acceptable.¹¹ In this way, during periods of transition law not only is informed by past injustices but is prospective, forward-looking, creating the boundaries of law in the 'new' community and helping to shape it.¹²

Although victims' rights and, in particular, the rights of victims to participate in criminal proceedings, has garnered much attention internationally, the principle that individuals who have suffered personal harm or material injury as a result of another's conduct should be permitted personal and direct redress had traditionally been at the heart of the social contract between the individual and the collective.¹³ Generally speaking, ancient customary laws were almost exclusively victim-centric, with disputes being addressed by the collective and providing not only for restorative damages, but also punitive ones.¹⁴ As Funk explains, 'making the victim whole was, indeed, ancient law's paramount purpose'.¹⁵

Eventually, however, the focus of Western customary law on the victim began to change: With the centralisation of authority, the state took on the responsibility of administering criminal justice as law breakers were viewed to have committed offences against the 'crown' or 'society' as opposed to an individual victim.¹⁶ Once the central figure (the victim) became relegated to a distinctly secondary role, this was little more than a source of evidence to be used against the accused and to secure the welfare of the community at large.¹⁷

8 NJ Kritz 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59 *Law and Contemporary Problems* 128.

9 DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1990-1991) 100 *Yale Law Journal* 2542.

10 As above.

11 P Akhavan 'Justice in The Hague, peace in the former Yugoslavia? A commentary on the United Nations war crimes tribunal' (1998) 20 *Human Rights Quarterly* 749.

12 R Teitel 'Transitional jurisprudence' (1997) 106 *Yale Law Journal* 2077-2080.

13 MT Funk *Victims' rights: An advocacy at the International Criminal Court* (2010) 19-20.

14 Funk (n 13 above) 20.

15 Funk 24.

16 As above.

17 Funk (n 13 above) 25.

Underlying the above-mentioned conceptual shift in criminal law and criminal justice institutions was the development of criminal justice theories, which eventually transcended from its earlier, and more narrow, focus on punishment to a broader and more comprehensive appreciation of the nature of law, legal systems and legal institutions.¹⁸ The traditional criminal law theory of retributivism has been particularly influential in shaping criminal proceedings that seek to determine individual criminal responsibility for the commission of heinous acts.¹⁹ The retributive approach at the international level, which can be transposed to the domestic framework, posits that crimes such as genocide, crimes against humanity and war crimes are acts that shock the conscience of mankind, deserving of society's condemnation. The main role of courts, therefore, should be to publicly pronounce upon the moral wrongdoings of the accused.²⁰ The wrongfulness of the deed is dependent solely on the actions of the accused and their state of mind, the *actus reus* or *mens rea*.²¹ Under the retributive approach, the voice of the victim, and the harms they have suffered, are silenced in an effort to remain impartial, to respect the rights of the accused, and to keep the focus of criminal proceedings on the alleged wrong that has taken place.²² Although central to the norm violation, the retributive approach does not offer any procedural role for the victim in the criminal process, aside from providing information pertaining to the wrong committed.²³ After determining culpability, which effectively provides the justification for punishment of the perpetrator, the content of the punishment should be designed in a manner that is proportional to the crime committed.²⁴ As McGonigle summarises:²⁵

Retributive theories view punishment as a response to a wrong and not a response to the harm experienced by the victim. Rather than focusing on the subjective suffering of the victim, the punishment focuses on the objective element of the act itself so as to avoid disparate sentencing of similarly situated defendants ... the victim's suffering is difficult to measure and can be disproportionate to the crimes.

However, beginning in the 1960s, campaigners for victims' rights expounded the importance of giving victims a 'voice' in the criminal process, which would serve as a formal acknowledgment that victims of a crime have a stake in the criminal procedures, one that differs from that of the judicial authorities or the prosecutor.²⁶ Victims

18 BL McGonigle *Procedural justice? Victim participation in international criminal proceedings* (2011) 36.

19 BL McGonigle 'Victim-oriented measures at international criminal institutions: Participation and its pitfalls' (2012) 12 *International Criminal Law Review* 379.

20 As above.

21 McGonigle (n 18 above) 40.

22 McGonigle (n 18 above) 41.

23 McGonigle (n 18 above) 40-41.

24 McGonigle (n 19 above) 379.

25 McGonigle (n 18 above) 39.

26 McGonigle (n 18 above) 50.

wished their interests to be taken into account, and to do this they had to be given an opportunity to share their views and concerns. For victims, fairness, satisfaction and procedural justice could only be achieved in this manner.²⁷

Reflecting on these developments, scholars of transitional justice agree that allowing victims to participate in the criminal proceedings, in addition to promoting accountability and the rule of law in post-conflict transitioning countries, can also offer significant benefits.²⁸ First of all, providing a role for the victims within the criminal justice process can promote knowledge, awareness and understanding of the often opaque process involved in criminal proceedings in addition to the results obtained from criminal proceedings.²⁹ Second, victim participation can promote individual healing by providing the victims with a sense of agency, empowerment and closure, leading to higher levels of overall satisfaction with the criminal justice system.³⁰ In effect, if the victim is given the opportunity to take a leading role in obtaining redress, victim participation has the power to make abstract justice personal.³¹ Third, participation can contribute to reconciling a community by promoting truth finding in criminal proceedings.³² With any society or community seeking to understand and to come to terms with mass atrocities, there must be a platform provided to victims to relate their stories and to allow their suffering to be publicly acknowledged.³³ Allowing these truths to permeate the dialogue of the courts serves to inform the content of the historical record that trials can create, permitting the survivors to feel as though their experiences gave birth to the narratives that underpin the legal proceedings.³⁴ In this sense the power of the judiciary is immense as it can officially sanction expressions of pain, shine a light on truth, and document human rights violations for the historical record.³⁵

27 McGonigle (n 18 above) 47.

28 Hobbs (n 5 above) 9.

29 Hobbs 10.

30 As above. See also S SàCouto & K Cleary 'Victims' participation in the investigations of the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* (2008) 76-77; J Doak 'Victims' rights in criminal trials: Prospects for participation' (2005) 32 *Journal of Law and Society* 312.

31 Hobbs (n 5 above) 10.

32 Hobbs 10; Doak (n 30 above) 312.

33 H Bertelman 'International standards and national ownership? Judicial independence in hybrid courts: The Extraordinary Chambers in the Courts of Cambodia' (2010) 79 *Nordic Journal of International Law* 365.

34 J Mertus 'Only a war crimes tribunal: Triumph of the 'international community', pain of the survivors' in B Cooper (ed) *War crimes: The legacy of Nuremberg* (1999) 239-240.

35 Hobbs (n 5 above) 10.

3 Rule of law, the right to an effective remedy and victim participation

With victim participation being understood as a means of making criminal proceedings more meaningful to directly-victimised communities by fostering a sense of involvement and ownership, by allowing their suffering to be publicly acknowledged, and by promoting truth finding, it should be kept in mind that the civil law tradition of the DRC allows for a wide range of participatory rights to victims. While this will be explained in more detail below, it is important to note here that the participation of victims in criminal proceedings is firmly based on the widely-recognised rights to an effective remedy and the principle of the rule of law, which in this case refers to a state's obligation to prosecute serious human rights violations. In other words, victim participation is the logical extension to several closely-related matters, such as the obligation on states to investigate and prosecute human rights violations, to provide remedies in the event of any infringements, and to protect the rights of victims of such violations in criminal proceedings.³⁶ Moreover, by helping to ensure that gross human rights violations are investigated and prosecuted, victim participation contributes to countering the impunity usually surrounding these infringements and reaffirms the importance society attaches to the infringed rights and the authority of law.³⁷

Traditionally, claims of sovereignty espoused by states over the individual rights of citizens have impeded victims' justiciable rights to prosecution. However, since the revelation of the state-sponsored atrocities during World War II, the international human rights norm that states have a duty to prosecute certain grave crimes has progressively become settled, regardless of whether governments are in a period of transition from civil war or under an authoritarian regime.³⁸ Seeing prosecutions as a victim's right has emerged mainly from the interpretation by international and regional human rights bodies of norms in comprehensive human rights treaties that establish a right to an effective remedy, the right to access justice or the right to be heard.³⁹

The Human Rights Committee (HRC), the body of independent experts charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR)⁴⁰ and

36 JC Ochoa *The rights of victims in criminal proceedings for human rights violations* (2013) 265.

37 Ochoa (n 36 above) 266.

38 R Aldana-Pinell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1402.

39 Aldana-Pinell (n 38 above) 1414.

40 International Covenant on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

with providing authoritative interpretations of the norms contained in this instrument, has determined that article 2(3) of the ICCPR requires states to conduct an effective prosecution to remedy the harm caused to victims that have suffered violations of the right to life and personal integrity.⁴¹ For victims of various offences, such as arbitrary detention,⁴² torture,⁴³ forced disappearances⁴⁴ and extrajudicial executions,⁴⁵ the HRC has concluded that criminal investigations that bring to justice those most responsible will satisfy the victims' effective remedy noted in article 2(3).⁴⁶

The United Nations (UN) has also adopted several specialised human rights instruments containing the right to an effective remedy. For example, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)⁴⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴⁸ both are human rights conventions containing an 'unambiguous duty to prosecute'.⁴⁹ By signing and ratifying the Genocide Convention, states have confirmed that genocide is a crime under international law,⁵⁰ and that no one is immune from prosecution.⁵¹ Similarly, a state party to the CAT requires that torture be made criminal under national law⁵² and requires that a torturer be tried or extradited.⁵³

At the Inter-American level, the American Convention on Human Rights (American Convention)⁵⁴ provides for a right to a fair trial⁵⁵ and a right to judicial protection.⁵⁶ When read in conjunction with

41 Aldana-Pinell (n 38 above) 1416.

42 Communication 612/1995, *Vicente & Others v Colombia*, UNHR Committee (14 June 1994), UN Doc CCPR/C/60/D/612/1995 (1997) para 10; Communication 322/1988, *Rodriguez v Uruguay*, UNHR Committee (9 August 1994), UN Doc CCPR/C/51/D/322/1988 (1994) para 14; Communication 366/1989, *Tshiongo v Zaire*, UNHR Committee (8 November 1993), UN Doc CCPR/C/49/D/366/1989 (1993) para 7.

43 As above.

44 Communication 540/1993, *Atachachua v Peru*, UNHR Committee (1993), UN Doc CCPR/C/56/D/540/1993 (1996) para 10; Communication 563/1993, *Bautista v Colombia*, UNHR Committee (14 June 1993), UN Doc CCPR/C/55/D/563/1993 (1995) para 10.

45 Communication 821/1998, *Chonwe v Zambia*, UNHR Committee (7 November 1997), UN Doc CCPR/C/70/D/821/1998 (2000) para 7.

46 Aldana-Pinell (n 38 above) 1416.

47 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 227, adopted 9 December 1948, entered into force 12 January 1951.

48 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1465 UNTS 85, adopted 10 December 1984, entered into force 26 June 1987.

49 Orentlicher (n 9 above) 2537.

50 Genocide Convention (n 47 above) art 1.

51 Arts 3 & 4 Genocide Convention.

52 Art 4 CAT.

53 Art 7 CAT.

54 American Convention on Human Rights, 144 UNTS 123, 22 November 1969.

55 Art 8(1) American Convention.

56 Art 25(1) American Convention.

article 1(1), which imposes a general duty on state parties to ensure the fulfilment of the rights enumerated in the Convention, the above-mentioned articles require states to provide victims of human rights violations with an effective prosecution as a remedy for those violations.⁵⁷ More specifically, the Inter-American Court of Human Rights (Inter-American Court) has interpreted article 8 of the American Convention to mean that victims have the right to an investigation into violations and that those responsible must be prosecuted and punished, all of which must take place with the guarantee of due process, within a reasonable time, and by a competent, independent and impartial tribunal.⁵⁸ Similarly, the Inter-American Court has interpreted article 25 of the American Convention to hold that victims' access to criminal proceedings forms part of a victim's right to timely recourse before a competent tribunal for the protection of the right to life and against violations of personal integrity.⁵⁹ Moreover, prosecutions allow family members of the victim the possibility to obtain knowledge concerning the circumstances surrounding the violation, as well as the identification of those responsible, effectively satisfying the right to truth.⁶⁰ The above-mentioned developments at the Inter-American Court may be considered a monumental shift in that a state's duty to prosecute serious crimes no longer is merely a duty owed to the public. Instead, the Inter-American Court has leaned towards a more victim-oriented perspective, where prosecution transforms into a private right that can be enforced by individual victims.⁶¹ As the Court indicated in the ground-breaking case of *Velásquez-Rodríguez v Honduras*.⁶²

The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify

57 Aldana-Pinell (n 38 above) 1417.

58 See *Castillo Páez v Peru* IACtHR (1998) Case 43/Ser C para 106; *Paniagua Morales v Guatemala* IACtHR (1998) Case 37/Ser C paras 155-156; *Genie Lacayo v Nicaragua* IACtHR (1998) Case 30/Ser C para 76.

59 *Castillo Páez v Peru* (n 58 above) paras 105-107. See also Aldana-Pinell (n 38 above) 1418.

60 See *Bámaca Velásquez v Venezuela* IACtHR (2000) Case 70/Ser C para 201; see also *Castillo Páez v Peru* (n 59 above) para 85 and Aldana-Pinell (n 38 above) 1419.

61 CP Trumbull 'The victims of victim participation in international criminal proceedings' (2008) 29 *Michigan Journal of International Law* 785.

62 IACtHR (1988) Case 4/Ser C para 174. At the European level, the European Court of Human Rights has interpreted arts 2(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 213 UNTS 221, 1995) as integral to demonstrating a victim's justiciable right to prosecute. The European Court has found violations of the right to an effective remedy when there was a failure to investigate and prosecute right to life violations. See *Kaya v Turkey* (1998) EHRR 1 paras 86 and 107; *Yasa v Turkey* (1998) 28 EHRR 408 paras 98 & 114; *Ergi v Turkey* (1998) 32 EHRR 18 para 98; *Tanrikulu v Turkey* (1999) 30 EHRR 950 para 117; *Cakici v Turkey* (1999) 31 EHRR 5 para 113; *Kili v Turkey* (2000) 33 EHRR 58 para 91; *Timurtas v Turkey* (2000) 33 EHRR 6 para 111; *Salman v Turkey* (2000) 34 EHRR 17 para 121; *Akkoc v Turkey* (2000) 34 EHRR 51 para 103; *Tas v Turkey* (2000) 33 EHRR 15 para 91.

those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Demands for criminal justice reforms in the area of victim participation made by the surviving victims of human rights abuses at the domestic level transcended borders, creating an impetus for the establishment of international or regional norms for the rights of victims.⁶³ The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims' Declaration)⁶⁴ has been the most prominent document demonstrating the willingness of the international community to agree upon the extent of victims' rights in criminal proceedings.⁶⁵ Furthermore, the Victims' Declaration was the first UN instrument to encourage victim participation in domestic criminal proceedings, and was worded broadly enough to be applicable in a wide range of legal systems. Article 6(b) of the Victims' Declaration states:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

...

- (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

Almost 20 years after the Victims' Declaration, the UN General Assembly adopted the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law (Basic Principles),⁶⁶ drafted from a victim-based perspective designed to provide mechanisms, procedures and methods for the implementation of existing legal obligations under international human rights and humanitarian law.⁶⁷ While not explicitly calling for victim participation, the Basic Principles implicitly support the notion of victims having some form of participatory rights in the criminal process by emphasising the following: equal and effective access to justice; access to relevant information concerning

63 R Pindell-Aldana 'An emerging universality of justiciable victims' rights in the criminal process to curtail impunity for state-sponsored crimes' (2004) 26 *Human Rights Quarterly* 610.

64 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34 (1985).

65 A-M de Brouwer & M Groenhuijsen 'The role of victims in international criminal proceedings' in G Sluiter & S Vasiliev (eds) *International criminal procedure: Toward a coherent body of law* (2009) 149-204.

66 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, UN Doc E/2005/23 (2005).

67 MC Bassiouni 'International recognition of victims' rights' (2006) 6 *Human Rights Law Review* 251.

violations and reparation mechanisms; adequate, effective and prompt reparation; and the right to truth.⁶⁸

At the regional level, the European and African human rights systems have drawn upon the above-mentioned UN documents by outlining the ways in which they support the idea of allowing victims the opportunity of sharing their views and expressing their concerns at appropriate stages.⁶⁹

4 Victim participation in the Democratic Republic of the Congo

Traditionally there has been a divide with respect to the role of victims in criminal procedures before domestic courts between those countries where the law is based on the civil law tradition, and those states where the law is based on the common law tradition.⁷⁰ In understanding the civil law tradition, special attention should be paid to the influence of French law where, most notably, Napoleon's Code of Criminal Procedure of 1808 conferred wide rights on crime victims in criminal proceedings once they had started.⁷¹ Subsequently, the role of the victim widened in criminal proceedings to include the right to initiate criminal proceedings; the right to participate during the trial and the appeal proceedings; the right to offer and examine evidence pertaining to the guilt or innocence of the accused; the right to put questions through the presiding judge to the defendant, the witnesses, and all persons who have been called to the proceedings; and the right to appeal against the orders and decisions made during the investigation and against the trial decision in relation to their civil claim.⁷²

68 McGonigle (n 18 above) 104. See also Basic Principles (n 71 above) arts 11-24.

69 McGonigle (n 19 above) 381-382. At the European level, see Council of Europe, Recommendation of the Committee of Ministers, On Participation of the Public in Crime Policy, Doc R (1983) 7, 1983; Council of Europe, Recommendation of the Committee of Ministers, On the Position of the Victim in the Framework of Criminal Law and Procedure, Doc R (1985) 11 1985; and Council of the European Union, Council Framework Decision, 2201/220JHA, 2001 OJ (L 82) 1-4, 2001. At the African level, see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AU Doc DOC/05XXX(247) 2001. In addition, the European Court has interpreted provisions in the European Convention as providing for procedural rights of victims in criminal proceedings. With regard to the right to participate, the European Court regards art 2 as not only imposing a duty on states to prosecute 'right to life' violations, but also requires sufficient public scrutiny of criminal investigations in order to ensure accountability in the process. See *Jordan v United Kingdom* ECtHR (2001) App 24746/94 paras 105-109; *McKerr v United Kingdom* (2002) 34 EHRR 20 2002 paras 111-115; *Kelly v United Kingdom* ECtHR (2001) App 30054/96; *Shanaghan v United Kingdom* ECtHR (2001) App 37715/97 paras 88-92. See also Aldana-Pinell (n 38 above) 1434.

70 Ochoa (n 36 above) 136.

71 As above.

72 Ochoa (n 36 above) 136-137.

Before civil tribunals in the DRC, the prosecutor is the main actor in criminal proceedings, meaning that they have the power to initiate judicial proceedings or to opt for alternatives, such as requesting the payment of a fine when prescribed by law, or even deciding that no further action is necessary. However, when the prosecutor is unwilling to initiate proceedings, the victim of a crime⁷³ has the right to address such inaction and to bring the matter directly to the competent authority by filing a complaint to the Court,⁷⁴ thereby constituting himself as a civil party. Criminal proceedings, therefore, can begin by a summons being given to the suspect at the request of the prosecutor or the victim himself.⁷⁵ As will be discussed in more detail below, the right of victims to initiate criminal proceedings applies only in cases brought before ordinary courts and tribunals. The military criminal justice system does not provide these same rights, with the result that victims before military tribunals can only participate in the proceedings after having been invited by the military prosecutor.⁷⁶

Besides initiating the criminal process, the victim can also become a party to the proceedings that have been initiated by the prosecutor. At any time during the criminal proceedings, before the closure of the debates, a victim can request to become a civil party by intervention. Constituting oneself as a civil party is not subject to specific formalities. This can be done in the form of a written statement, submitted by the victim or their lawyer, but can also be done orally by making a declaration in court.⁷⁷ Victims of crime, once formally recognised as a civil party, have numerous rights conferred upon them, including calling witnesses or experts to appear before the court and requesting the court to perform a variety of investigations. Moreover, civil parties have the right to oppose a judge, to appeal all decisions, and to invoke procedural and factual exceptions. At the end of the proceedings, the civil party can, in their closing statement, request the court to confirm the facts as proven, to confirm that a harm has been suffered, and to confirm that the causal link has been established.⁷⁸

73 Congolese law uses the terms *partie civile* (civil party) or *partie lésée* (injured party) to designate a victim.

74 Art 54(1) Code of Criminal Procedure.

75 Arts 54 & 56 Code of Criminal Procedure.

76 Official Journal of the DRC, art 77(1) of Law 23/2002 of 18 November 2002 concerning the Military Judicial Code, Special Issue of 20 March 2003.

77 Official Journal of the DRC, art 69 of the Ordinary Code of Criminal Procedure and arts 226(2)-(3) of Law 23/2002 of 18 November 2002 concerning the Military Judicial Code, Special Issue of 20 March 2003.

78 L Bambi Lessa & B Ba Meya *Manuel de procédure pénale* (2011) 304.

5 Victims' rights and the military justice system in the Democratic Republic of the Congo

Considering the number of serious human rights violations that have been committed during the last decades, it is remarkable that only a handful of cases relating to these crimes have been brought before DRC military tribunals.⁷⁹ The level of impunity when it comes to the prosecution of international crimes remains extremely high. One of the explanations for this could be that, despite victims having a wide range of participatory rights, many legal and practical hurdles make it extremely difficult to fully exercise these rights.

Despite efforts to give civilian courts jurisdiction over international crimes, until recently the DRC's military courts have retained authority over the prosecution of international crimes. Genocide, war crimes and crimes against humanity were not criminalised by the regular criminal code, which is applicable to civilians, mainly because its provisions predate international crimes as a legal category.⁸⁰ The so-called Law Ordinance 72/060 of 25 September 1972 promulgating the Military Justice Code was the first instrument to transpose international crimes into the domestic legal order.⁸¹ Articles 501 to

79 Military Garrison Tribunal of Mbandaka, *Case of Mutineers of Mbandaka*, Military Garrison Tribunal of Mbandaka, RP 086/05, Judgment, 12 January 2006, and Military Court of Equateur, Appeal, RPA 615/2006, 15 June 2007; Military Court of Equateur, *Case of Songo Mboyo*, RP 084/2005, Judgment, 12 April 2006 and Military Court of Equateur, Appeal, RPA 014/2006, 7 June 2006; Military Garrison Tribunal of Mbandaka, *Case of Waka Lifumba*, RP 134/2007 / RMP 575, Judgment, 18 February 2007; Military Garrison Tribunal of Ituri, *Case of Kahwa*, RP 039/2006, Judgment, 2 August 2006; Military Garrison Tribunal of Uvira, *Case of Lamera*, RP 132/ RMP 0933/KMC/10, Judgment, 30 October 2010; Military Garrison Tribunal of Bukavu, *Case of Maniragaha Jean Bosco alias Kazungu et consorts*, RP 275/09 & 521/10/RMP 581/07 & 1573/KMC/10, Judgment, 16 August 2011; Military Garrison Tribunal of Bukavu, *Case of Pantovee*, RP 372, Judgment, 2 October 2011; Military Garrison Tribunal of Bunia, *Case of Kakado Barnaba*, RP 071/09, RP 009/010 & RP 074/010, Judgment, 9 July 2010; Military Garrison Tribunal of Ituri, *Case of Bongji*, RP 018/06, Judgment, 18 March 2006; Military Court of Katanga; *Case of Ankoru*, RP 01/2003&RP 02/2004, Judgment, 20 December 2004; Military Garrison Tribunal of Bukavu, *Case of Biyoyo*, RP 096/006 & RP 101/2006, Judgment, 07 March 2006; Military Garrison Tribunal of Ituri, *Case of Gety/Bavi*, RP 101/06, Judgment, 19 February 2007 and Military Court of the Oriental Province, Appeal, RPA 101/06, 28 July 2007; Military Garrison Tribunal of Kindu, *Case of Kalonga Katamasi*, RP 011/05, Judgment, 26 October 2005; Military Court of Katanga, *Case of Kilwa*, RP 010/2006, Judgment, 28 June 2007; Military Garrison Tribunal of Bunia, *Case of Milobs*, Judgment RP 103/2006, 9 February 2007; Military Court of Katanga, *Case of Mituaba*, RP 011/2006, 25 April 2006; Operational Military Court of North Kivu, *Case of Minova*, RP 003/2013 RMP 0372/BBM/01, 5 May 2014.

80 Despite crimes such as murder and rape being punishable by law in the DRC, they do not capture the universally abhorrent nature of the mass atrocities committed that affect the peace and security of humankind, that are contrary to fundamental humanitarian values, and that form part of an organisational policy to direct attacks against a certain group or population. See MC Bassiouni *Introduction to international criminal law* (2003) 118-133.

81 Official Journal of Zaïre, Ordinance-Law 72/060 of 25 September 1972 concerning the institution of a Code of Military Justice 6, 15 March 1973

505 of its Title IV provided for the prosecution of war crimes and crimes against humanity. Genocide, however, did not get the status of an autonomous crime as it was listed as a crime against humanity.⁸² Later, in the framework of the ratification of the Rome Statute, the Congolese legislature promulgated Law 24/2002 of 18 November 2002 listing under the same military justice system the adjudication of war crimes, genocide and crimes against humanity.⁸³ Until recently, this law, which effectively transposes the Rome Statute into the military justice system, has been applied by the military tribunals in their efforts to prosecute international crimes committed in the territory of the DRC.⁸⁴

The exclusive competence of military tribunals to prosecute genocide, crimes against humanity and war crimes has been criticised by many.⁸⁵ The critics point to the nature of military tribunals and to the fact that military justice often is linked more to the necessity to obey military discipline than to guarantee the rights of the parties involved. In an effort to respond to the critics, the Congolese legislature, with the promulgation of Law 13/011-B of 11 April 2013, decided to also grant the 12 provincial Courts of Appeals competence to hear cases concerning war crimes, crimes against humanity and genocide.⁸⁶ However, until recently⁸⁷ the legislature has neglected to adopt the necessary implementation legislation required to transpose elements of the Rome Statute and amend the DRC Criminal Code. As

82 Art 505 Official Journal of Zaïre (n 81 above).

83 Arts 131-175 of Law 24-2002 of 18 November 2002 concerning the Military Criminal Code.

84 Military Court of Equateur, *Case of Songo Mboyo*, RP 084/2005, Judgment of 12 April 2006 and the appeal before the Military Court of Equateur RPA 014/2006 of 7 June 2006.

85 MS Nyabirungu *Les crimes de guerre au regard du statut de la CPI et en Droit Congolais, projet de renforcement du système de justice militaire (Résolution 1888 du Conseil de Sécurité des Nations Unies)*, Goma, 21-29 May 2012 6; M Wets'h'Okonda Koso *La justice militaire et le respect des droits de l'homme, l'urgence du parachèvement de la réforme, République démocratique du Congo* (2009) 9 42; Avocats Sans Frontières *Etude de jurisprudence: L'application du Statut de Rome de la cour pénale internationale par les juridictions de la République démocratique du Congo* (2009) 8.

86 Art 91(1) of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of the Jurisdictions of the Judicial Order.

87 Law 15/022 of 31 December 2015, which entered into force on 30 March 2016, incorporated war crimes, crimes against humanity and genocide into the Ordinary Criminal Code of the DRC. See Official Journal of the DRC, Law 15/022 of 31 December 2015 modifying and completing the Decree of 30 January 1940 on the Criminal Code 57, 20 February 2016. Moreover, military tribunals must also apply the Ordinary Criminal Code when prosecuting war crimes, crimes against humanity and genocide. See art 1(1) of Law 15/023 of 31 December 2015 modifying Law 24-2002 of 18 November 2002 on Military Criminal Code, in the Official Journal of the Democratic Republic of the Congo 57, 29 February 2016. The Appeals Court of Lubumbashi is the first ever ordinary court to prosecute an individual or individuals for crimes against humanity and genocide since the entry into force of the above-mentioned law. See *Attorney-General and Civil Parties v Mukalayi Wa Kumbao Adalbert, Banza Guylain, Mbuyu wa Mubole & Others* Court of Appeal (Lubumbashi), RP.116, 30 September 2016.

a result, with the lack of recognition of specific crimes under national law, the principle of legality prevented the Court of Appeals from judging these cases.

As explained above, there is no doubt that the DRC recognises extended rights for victim participation. The rights of victims to participate in criminal proceeding nevertheless are better protected before ordinary courts than before their military counterparts. Military tribunals are competent to hear cases relating to military offences and crimes in the territory of the DRC punishable under the Military Criminal Code (MCC). When the MCC defines and limits offences and crimes committed by persons outside the army, military tribunals solely remain competent to prosecute the author or accomplice except where the law provides differently.⁸⁸ The competence *ratione personae* is based on the quality and rank of the author of the crime at the moment of the commission of the act or, alternatively, at the moment of appearance before the judge.⁸⁹ The prerogatives of the military hierarchy require that the presiding judge in the military tribunal, and the magistrate who represents the office of the military prosecutor, must have a rank equal or superior to that of the suspect.

As such, only the High Military Court is competent to judge superior officers of the DRC armed forces and the DRC national police with the rank of general. The 12 military courts focus on other senior officers of the army and police, and the Military Garrison Tribunals are competent to judge all the lower-ranked personnel, from the rank of recruit to the rank of captain.⁹⁰ The principle of equivalence of rank is one of the reasons why military tribunals malfunction: Military magistrates generally are inferior in rank to the commanding officers in the military region or units of their jurisdiction, with the result that they are 'legally' prevented from seeking their prosecution. Therefore, higher-ranked officers often escape prosecution, while lower-ranked personnel of the armed forces, militias and (former) members of armed groups have been targeted.⁹¹ In the *Cebeya* case, where the civil parties had lodged a complaint against the Commissar General of the Police, General John Numbi Banza Ntambo, no judicial instructions followed even though the civil parties requested the nomination of military magistrates with the required rank so that he could be judged for his role in the murder of the human rights activist.⁹²

88 Arts 76(1)-(2) & 79 of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

89 Arts 104-105.

90 Arts 120-122.

91 Wetsh'Okonda Koso (n 85 above) 6.

92 See '*RDC: Les veuves Chebeya et Bazana demandent un commissionnement de magistrats militaires de haut rang pour juger le général Numbi*', Fédération Internationale des Droits de l'Homme, <https://www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/afrique/republique-democratique-du-congo/14130-rdc-les-veuves-chebeya-et-bazana-demandent-un-commissionnement-de> (accessed 30 May 2017).

At the pre-trial stage, two criticisms emerge: First, despite there being a movement to protect victims during the criminal proceedings, as will be discussed below, at the pre-trial stage the military justice offers no such protection.⁹³ Second, the interests and views of the victims are not taken into consideration when the competent authorities are asked to determine whether the suspect should be released on bail.⁹⁴ Articles 209 and 211 of the Military Judicial Code gives authority on custody to one military prosecutor only, without taking into account the views of the victims.⁹⁵ During the trial stage, the Military Judicial Code is also ambiguous on the rights of victims to have access to court files, to present observations, and to question witnesses brought by the defence.⁹⁶ Articles 249 and 250 of the Military Judicial Code do not provide any clarity on these matters but, instead, seem to suggest that the president of the court hearing the case has the discretionary power in the discovery of the truth and in the conduct of the hearings, with the victims seemingly forgotten in the process.

Moreover, even where victims have declared themselves a civil party before an operational military court, they do not have a right to appeal the judgments of this court. Decisions of the operational military tribunals are not subject to appeal when initiated by a civil party.⁹⁷ It could be argued that this prevents victims and their families from exercising their right to an effective remedy as provided for in article 21 of the DRC Constitution. As discussed above, before ordinary courts victims are considered parties to the court proceedings, and nothing hinders them from exercising their right of appeal.

In addition, when the prosecutor elects not to pursue a prosecution, the Minister of Justice can use his injunction right and request the Attorney-General of the Court of Cassation, or its counterpart at the level of the Court of Appeal, to initiate or continue criminal investigations to replace or support public action before lower courts and tribunals.⁹⁸ The Minister of Justice does not have that injunction right *vis-à-vis* the military tribunals. It is the Minister of Defence who exercises that right under the military justice system as he can request the Auditor-General of the armed forces to act,⁹⁹ but only on the condition that military imperatives require this.

93 JB Mbokani *La jurisprudence congolaise en matière de crimes de droit international* (2016) 353.

94 Mbokani (n 93 above) 354.

95 As above.

96 Mbokani (n 93 above) 367.

97 Arts 87 & 279 of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

98 Arts 70 & 72 of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of Jurisdictions of the Judicial Order.

99 Art 47(1) of Law 23/2002 of 18 November 2002 concerning the Military Judiciary Code.

If the limits of military justice constitute important legal hurdles for victims to exercise their rights, additional legal constraints restrict the effective exercise of their right to participate in the legal proceedings. National law provides that the parties in the proceedings must pay court costs. Courts will only accept a complaint or a request by a civil party if a sum defined by the registrar is consigned to the court. Moreover, judges may request additional payments throughout the proceedings. Article 128 of the Code of Criminal Procedure also provides for the fee to be doubled in an appeal.¹⁰⁰ A failure to pay the fees is considered a barrier to further action, in turn resulting in the judge setting aside the request for a civil party. With a significant part of the population living under the poverty threshold, it is easy to see that most victims cannot afford the luxury of a court case. In addition, in the event of a favourable judgment granting compensation for the harm caused, the victim must pay the state a sum proportional to the compensation granted prior to the execution of the judgment.¹⁰¹ A failure to pay these costs results in the judgment not being executed and the victim not being granted reparations.¹⁰²

In addition, victims often are in a vulnerable position, particularly in countries where a high degree of impunity reigns and where victims can be intimidated and confronted with reprisals. In the *Songo Mboyo* case, after having been prosecuted by the Military Court on 7 June 2006, all six convicts escaped military prison on the night of 21 October 2006 and never returned to prison, potentially posing a threat to the victims. Similarly, following the conviction of Gudgeon Kyungu Mutanga,¹⁰³ the convicted militia leader escaped from the Kasapa prison in Lubumbashi, returned to his militia and committed

100 See arts 122-135 of Ch VIII of the Code of Criminal Procedure.

101 Art 129 of the Code of Criminal Procedure.

102 In the *Songo Mboyo* case, the Military Garrison Tribunal of the City of Mbandaka convicted seven members of the Congolese armed forces on 12 April 2006 to life imprisonment on the basis of crimes against humanity. The tribunal recognised the action of 14 civil parties who alleged having been raped by the convicts and rejected the claims of 15 others, considering their allegations unfounded. Every victim of rape was granted US \$5 000 as compensation, and for the family of the victims who had not survived the brutal acts, US \$10 000 was provided. In an appeal judgment of 7 June 2006, the Military Court of the Equateur Province confirmed the condemnation of six of the earlier convicted soldiers and decided that all 29 civil parties be granted a sum equal to what was provided by the tribunal in *Mbandaka* as compensation. However, the cost of obtaining the execution of the judgment prevented the civil parties from receiving their damages. To receive the indemnities awarded by the Court, they had to pay a total sum of US \$28 000 as a proportional levy, augmented by US \$684 (justice charges) and US \$756 (judgment charges), a sum the civil parties found impossible to pay. See the statement of costs established by the Principal Registrar of the Military Court of the Equateur Province in the *Case of Songo Mboyo* RPA 014/2006, Judgment, 7 June 2006.

103 Military Garrison Tribunal of Haut-Katanga, *Case of Gédéon Kyungu Mutanga*, RP 0134/07, 5 March 2009; Military Court of Katanga, *Case of Gédéon Kyungu Mutanga*, RPA 025/09, 16 December 2010.

new atrocities.¹⁰⁴ Victims need to be protected but, contrary to what is provided for under by the Rome Statute,¹⁰⁵ the DRC does not have specific legislation or a national programme to protect victims and witnesses involved in criminal proceedings.¹⁰⁶ The unwillingness of the DRC government to provide adequate protection measures increases the reluctance of victims to participate in court cases. In cases of sexual violence, the legislation explicitly refers to the need to apply measures to protect victims, which can be done by holding the proceedings in closed sessions or keeping the names of victims confidential.¹⁰⁷ In the *Minova* case, the Operational Military Court of North Kivu noted that article 74*bis* of the Code of Criminal Procedure places an obligation on the judge to take the necessary measures to protect the security, the physical and psychological well-being, the dignity and the privacy of the victims of sexual violence. However, as the Code does not specify in detail what measures must be taken, the Court referred to article 68 of the Rome Statute and decided to allow the veiling of protected persons, addressing them through pseudonyms, allowing them to testify from behind a curtain, and having psychologists assist them. In an effort not to violate the rights of the accused, the defence lawyers were informed of the measures and they did not object to these.¹⁰⁸

Moreover, there is the question of an adequate system of legal representation. Most victims of international crimes who have participated in criminal proceedings are financially insecure, and some

104 See 'Mgr Fulgence Muteba demande l'arrestation immédiate de Gédéon Kyungu', Forum des AS, <http://forumdesas.org/spip.php?article1419> (accessed 1 May 2017); 'Katanga: Les combattants de Gédéon attaquent Kalenge', Le Potentiel http://www.lepotentielonline.com/index.php?option=com_content&view=article&id=9471:katanga-les-combattants-de-gedeon-attaquent-kalenge&cat1 (accessed 1 May 2017).

105 See art 68(1) Rome Statute (n 6 above); ICC Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000), Rules 17(2)(b), 87 & 88.

106 In an effort to address the lack of protective measures for victims and witnesses, authorities adopted Law 15/024 of 31 December 2015. This law contains general provisions on the protection of victims and witnesses and states that in the context of prosecuting war crimes, crimes against humanity and genocide, the competent court should take measures to protect the safety, the physical and psychological well-being, the dignity and the privacy of victims, witnesses and intermediaries. However, this provision is rather general and does not indicate the mechanisms of operationalisation. Therefore, it will be necessary for the Ministry of Justice, the Ministry of Internal Affairs and the Ministry of Defence to adopt regulations that would detail for judges and prosecutors the appropriate measures that need to be taken during investigations, prosecutions, and even after the pronouncement of judgments, that would ensure the protection of victims, witnesses and intermediaries, with the necessary flexibility to adapt these to possible particularities. See Official Journal of the Democratic Republic of the Congo, Law 15/024 of 31 December 2015 modifying and completing the Decree of 6 August 1959 relating to the Code of Criminal Procedure, 29 February 2016. See also art 26*ter* of the Code of Criminal Procedure.

107 Art 74*bis* Code of Criminal Procedure. See L Mutata Luaba *Droit pénal militaire congolais* (2012) 44-45.

108 Operational Military Court of North Kivu, *Case of Minova*, RP 003/2013 RMP 0372/BBM/01, 5 May 2014.

have been reliant upon *pro bono* lawyers or *défenseurs judiciaire*¹⁰⁹ assigned by the courts. Some of these legal professionals often are young and not sufficiently experienced to handle such complex cases. In addition to these legal professionals only having a basic legal education, the curriculum of DRC law faculties very rarely contain courses specifically addressing the international crimes of genocide, crimes against humanity and war crimes. The way in which crimes are defined and the criteria used for establishing individual criminal responsibility often require lawyers to present the case and its evidence in a complex and unfamiliar way.¹¹⁰ This undoubtedly has an impact on how international crimes are assessed and treated in the domestic courts.

With the lack of resources provided by the state in confronting the existing impunity, various non-governmental organisations (NGOs) (the American Bar Association, *Avocats sans Frontières*, the International Committee of the Red Cross), international organisations (the UN), and bilateral development co-operation projects (*Restauration de la Justice à l'Est du Congo* (REJUSCO), the *Programme d'Appui à la Restauration de la Justice à l'Est*) have been involved in ameliorating the military judicial system by building court houses, paying the fees of the lawyers of the victims, providing training to lawyers and judges,¹¹¹ and supporting the hearings of military tribunals outside the military headquarters.¹¹² The distance between the courts and tribunals from the place where the crimes were committed is often seen as a serious problem as the high cost of travelling inhibits the ability of the victims and their lawyers to participate in the proceedings if organised in the provincial capital or the military base.¹¹³ Holding court hearings in close proximity to their normal activities is essential as victims are reluctant to travel hundreds of kilometres to be present at the hearings.

109 The profession of *défenseur judiciaire* was created in 1979 as a provisional measure to address the lack of qualified lawyers. It requires the person to have a basic law degree of two years (*graduat*) and to take the oath before the Tribunal of High Instance. See Official Journal of Zaïre, Title II of Ordinance-Law 79-028 of 28 September 1979 concerning the Organisation of the Bar, the Profession of Judicial Defenders, and the Profession of State Attorneys, 19, 1 October 1979.

110 Fédération Internationale des Droits de l'Homme, *RDC: Les victimes de crimes sexuels obtiennent rarement justice et jamais réparation, Changer la donne pour combattre l'impunité* (2013) 53.

111 See AC Grayson 'Delivering justice for sexual violence in the DR Congo and beyond: Co-operation, education, and capacity-building through national and international courts' (2012) 2 *Journal of Global Citizenship and Equity Education* 136; T Khan & J Wormington 'Mobile courts in the DRC: Lessons from development for international criminal justice' (2012) *Oxford Transitional Justice Research Working Paper Series* 1-42.

112 One is referring to an *audience foraine* when the tribunal is holding its hearing outside the place where it normally has its seat, but within the area of geographic competence. See arts 45-47 of Law 13/011-B of 11 April 2013 concerning the Organisation, Functioning and Competences of the Jurisdictions of the Judicial Order.

113 Fédération Internationale des Droits de l'Homme (n 110 above) 52.

Even in a civil law country such as the Congo where traditionally victims have broad rights to participate in criminal proceedings as fully-fledged parties, there still are too many impediments for victims of international crimes, thus preventing them from effectively exercising their rights under international and national law. Yet, as the Secretary-General of the UN confirmed, it is essential that the interests of the victim be taken into account at both the international and national levels in the Congo.¹¹⁴

6 Victim participation at the Extraordinary Chambers in the Courts of Cambodia: Lessons to be learned?

Traditional civil party models undoubtedly were devised for less complex proceedings with fewer victims. In adapting to cases involving genocide, crimes against humanity and war crimes, the ECCC provides us with an example of how a state is attempting to bridge the gap between national and international law in attempting to deal with mass atrocities, while also balancing the rights of victims with the rights of the accused. In researching the fate of victim participation in the DRC for cases of genocide, crimes against humanity and war crimes where there could be mass victimisation, the ECCC could prove of utmost relevance and importance.

As early as 1998, the UN brought together a group of experts to assess the feasibility of bringing the Khmer Rouge leaders to justice proposing the creation of an *ad hoc* tribunal modelled almost entirely on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹¹⁵ The government of Cambodia promptly rejected this proposal, insisting that the future tribunal be based on Cambodian law, and allocated a large role for Cambodian nationals, most notably judges, lawyers and victims.¹¹⁶ The result was a hybrid tribunal, mixing international and domestic elements in its laws, structures and staff, designed to prosecute the top-ranking officials of the Khmer Rouge regime. An examination of the ECCC could prove fruitful for the purposes of this article, as it reflects the civil law tradition similar to that in the DRC and is currently tackling the dilemmas of trying to provide a meaningful role for victims considering the likelihood of numerous victims desiring to participate in criminal proceedings.

The ECCC presents an interesting alternative to the traditional mechanisms of criminal justice with the Cambodian Code of Criminal Procedure, a relic of Cambodia's colonial past following the French civil law tradition, heavily influencing the Internal Rules of the ECCC

114 Mapping Report (n 2 above) para 116.

115 JP Bair 'From the numbers who died to those who survived: Victim participation in the Extraordinary Chambers in the Courts of Cambodia' (2009) 31 *University of Hawai'i Law Review* 518.

116 As above.

(Internal Rules),¹¹⁷ which are the authoritative source of procedural law for the ECCC.¹¹⁸ The Cambodian legal structure includes extensive procedural rights for victims, with victim participation stemming mainly from the right of victims' ability to petition the courts to become a civil party, making them a party to the proceedings. This civil law tradition is reflected in Internal Rule 23, where victims of crimes within the jurisdiction of the ECCC are afforded the right of civil party petition in order to support the prosecution of those responsible, as long as the victim has proven their identity; shown the existence of a causal link between the charged crime and the physical, material or psychological injury; and demonstrated a certain level of proof.¹¹⁹ When participating as a civil party, the victim becomes a party to the criminal proceedings, by supporting the prosecution of those responsible, being afforded protection by the tribunal; being entitled to representation by a lawyer;¹²⁰ and being able to request that the co-investigating judge collect evidence on his or her behalf.¹²¹

The first case to be heard, that of *Co-Prosecutors v Kaing Guek Eav*,¹²² resulted in the ECCC's first verdict on 26 July 2010, finding the accused guilty of crimes against humanity and grave breaches of international humanitarian law in connection with his role as the commander of a detention and torture centre during the Khmer Rouge period. This case is notable for the simple reason that it was the first trial in international criminal law where victims were able to participate as civil parties, with the understanding that this implicitly created expectations of a more victim-centred approach with strong participatory rights.¹²³ A total of 90 victims applied, and were subsequently granted approval, to participate as civil parties, with some commentators noting that 'neither the defence nor the prosecution challenged victim participation rights ... proceed[ing] with little judicial intervention'.¹²⁴

The second case, originally a joint case against the four most senior living members of the Khmer Rouge regime, *Co-Prosecutors v Nuon*

117 Internal Rules of the ECCC, <http://www.eccc.gov.kh/en/document/legal/internal-rules> (accessed 21 February 2018).

118 BL McGonigle 'Strengthening the participation of the victims at the ECCC? A look at the revised legal framework for civil party participation' Oxford Transitional Justice Research Working Paper Series, http://www.csls.ox.ac.uk/documents/McGonigle_TheLegalFrameworkofVParttheECCC.pdf (accessed 12 May 2017) 1.

119 Internal Rules (n 117 above) Internal Rule 23*bis* (1). However, earlier versions of Internal Rule 23 required victims only to have suffered harm from a crime under the jurisdiction of the ECCC.

120 Internal Rule 23(6)-(7).

121 Internal Rule 23(5).

122 Judgment Case 001, *KAINING Guek Eav alias Duch* ECCC (2012) Trial Chamber.

123 I Stegmiller 'Legal developments in civil party participation at the Extraordinary Chambers in the Courts of Cambodia' (2014) 27 *Leiden Journal of International Law* 467.

124 C Ferstman 'International criminal law and victim' rights' in W Schabas & N Bernaz (eds) *Routledge handbook of international criminal law* (2011) 412.

Chea and Khieu Samphan,¹²⁵ was much larger in scope, with over 4 000 victims applying for civil party status of whom, in the end, 3 866 were successfully admitted.¹²⁶

In both cases, victims granted civil party status have exercised numerous participatory rights. However, as will be shown, after an early favourable decision, it has become apparent that the Pre-Trial Chamber has been reluctant to recognise civil parties as equal parties to the prosecution and defence, continuously curtailing civil participatory rights.¹²⁷

Once having gained civil party status, many important participatory rights are afforded to victims during the pre-trial stage. First, there is the right to consult and examine the case file, which has proceeded in Case 001 and Case 002 without much contest. Second, civil parties have the right to request the co-investigating judges to carry out specific investigations on their behalf.¹²⁸ While this is a powerful right, it is not without limits. Victims participating in the proceedings must do so by supporting the prosecution. Therefore, although civil parties may request specific investigations, these investigations must be made with the consent of co-prosecutors or in support of the prosecution's case.¹²⁹ In addition to accessing the case file and requesting investigations, civil parties may also participate in some, but not all, pre-trial proceedings through written and oral interventions.¹³⁰ For example, Internal Rule 63(1), dealing with provisional detention, makes it clear that co-investigating judges shall hear the co-prosecutors and lawyers representing the accused, but no mention is made of civil parties. At the hearing on the appeal by Nuon Chea against a provisional detention order, lawyers representing the accused asserted that civil party participation presupposed an interest in the outcome of the proceedings and that a restrictive approach should be adopted in order not to infringe upon the rights of the accused to a fair hearing.¹³¹ The co-prosecutors submitted that Internal Rule 23 did not limit the meaning of proceedings and that guidance could be taken from recent international criminal practice, which is favourable towards victim participation at the investigation stage of criminal proceedings.¹³² The civil parties themselves expressed their need to disclose the effects that releasing the accused could have on society.¹³³ The Pre-Trial Chamber agreed with the co-

125 Judgment Case 002/01, *NUON Chea and KHIEU Samphan* ECCC (2014) Trial Chamber.

126 Stegmiller (n 123 above) 467.

127 McGonigle (n 18 above) 185.

128 Internal Rules (n 117 above) Internal Rule 59(5).

129 Internal Rule 23(1)(b).

130 McGonigle (n 18 above) 188.

131 *Case 002: Decision on Civil Party Participation in Provision Detention Appeals* ECCC (20 March 2008).

132 *Decision on Civil Party Participation* (n 130 above) para 6.

133 *Decision on Civil Party Participation* para 7.

prosecutors and the civil parties, stating that 'civil parties have active rights to participate starting from the investigative stage of the procedure',¹³⁴ and that including civil parties 'is in recognition of the stated pursuit of national reconciliation'.¹³⁵

Despite this landmark decision, questions concerning the effectiveness and appropriateness of a liberal set of participatory rights, especially as far as adjudicating individual criminal responsibility for such grave crimes is concerned, began to be raised, particularly because of the sheer number of civil parties.¹³⁶ In response, judges, concerned with more expeditious trial proceedings, made modifications to the Internal Rules designed to meet the requirements of trials of mass crimes, the specific Cambodian context, and to respond more fully to the needs of victims.¹³⁷

One of the most significant amendments made to the Internal Rules requires that civil parties can only participate as a 'consolidated group' once the trial stage is reached, and that a Civil Party Lead Co-Lawyer (CP-LCL) will be tasked with representing the interests of the consolidated group in order to co-ordinate the overall advocacy, strategy and in-court presentations of all civil parties.¹³⁸ While grouping according to common interests and goals can prove to be a sound idea, there will inevitably be tensions between individual rights and group rights, most likely resulting in limiting the ability of victim participants to make their individual experiences heard.¹³⁹ In trials where mass human rights violations are involved, there will undoubtedly be numerous victims and, therefore, trial management needs to be taken into consideration. However, there should be room for divergent views among victims: Unification as one group and one voice derives from a narrow understanding of the role of victims in the courtroom, focused only on efficiency and expediency.¹⁴⁰

What followed the above-mentioned normative regulation is what can only be classified as evidence of judicial restraint and procedural limitations. In an effort to ensure expeditious proceedings, the Pre-Trial Chamber made it clear that the 'Internal Rules should ... be read to provide that civil parties who have elected to be represented by a lawyer shall make their brief observations related to the application or appeal through their lawyers'.¹⁴¹ Moreover, the Chamber made it clear that the prosecution, defence and civil parties had different

134 *Decision on Civil Party Participation* para 36.

135 *Decision on Civil Party Participation* para 38.

136 C Ryngaert 'The Cambodian Pre-Trial Chamber's decisions in the case against Nuon Chea on victims' participation and bias' *The Hague Justice Portal*, <http://www.haguejusticeportal.net/eCache/DEF/9/135.html> 3 (accessed 12 May 2017).

137 Stegmiller (n 123 above) 471.

138 Internal Rules (n 117 above) Internal Rule 12*ter*.

139 S SàCouto 'Victim participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist project?' (2012) 18 *Michigan Journal of Gender and Law* 326; Internal Rules (n 117 above) Internal Rules 23*ter* and 23*quater*.

140 Stegmiller (n 123 above) 472.

positions in the criminal process and, accordingly, the modalities of participation for the victims need not to be the same as those exercised by the other parties.¹⁴²

The overall satisfaction of the victims with the hybrid tribunal is mixed.¹⁴³ However, importantly for the future of victim participation in the DRC, a number of lessons can be learned: First, numerous external factors can hamper the criminal procedures. The sheer scale of the atrocities makes it difficult to assign guilt to specific parties which, in turn, means that not every victim can be acknowledged, leading to the dilemma of determining which victims are included or excluded.¹⁴⁴ Moreover, the ECCC has continued to grapple with considerable legal and procedural obstacles relating to civil party participation, underlining the difficulty of determining the scope and purpose.¹⁴⁵ Another factor is the endemic corruption in Cambodia as well as the limited accountability of public officials.¹⁴⁶ In addition, many of the Cambodian judges, legal officers, members of the prosecution, the defence and civil party lawyers are not familiar with international law and the substantive procedural rules that govern the ECCC.¹⁴⁷ Finally, civil party participation is costly, in terms of direct expenditure and the additional time required for participation to function smoothly.¹⁴⁸

7 Conclusion

Finding ways of reconciling the interests of society, the accused and the victim has always been a difficult endeavour. Human rights law, for its part, has attempted to address this issue by emphasising that the adherence to the rule of law and the right to an effective remedy includes the rights of victims to participate in criminal proceedings, particularly when prosecuting gross human rights violations. The prosecution of international crimes, however, has seemingly not been a high priority for the DRC government. Impulsively responding to the unacceptable degrees of impunity, the DRC ratified the Rome Statute

141 *Case 002: Directions on Civil Party Oral Submissions During the Hearing of the Appeal Against Provisional Detention Order* ECCC (20 May 2008) paras 1 & 4-5

142 *Case 002: Decision on Preliminary Matters Raised by Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention Order* ECCC (1 July 2008) para 4.

143 See R Killean 'Procedural justice in international criminal courts: Assessing civil parties' perceptions of justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 *Criminal Law Review* 1-38. See also Impunity Watch *Victim participation and transitional justice in Cambodia: The case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)* [http://www.impunitywatch.org/docs/IW_Report_Victim_Participation_in_Cambodia_\(April_2016\).pdf](http://www.impunitywatch.org/docs/IW_Report_Victim_Participation_in_Cambodia_(April_2016).pdf) (accessed 2 April 2017).

144 Impunity Watch (n 142 above) 57.

145 As above.

146 Impunity Watch (n 142 above) 5.

147 Impunity Watch 57.

148 Impunity Watch 58.

but for numerous years stalled in adopting the necessary implementation legislation that would transpose the relevant international criminal law provisions into the DRC's domestic legal framework. Similarly, initiatives to create temporary specialised tribunals, modelled after the ECCC, failed to materialise without any government officials providing convincing arguments as to why this was the case. Unfortunately, if victims were privileged enough to access justice mechanisms, it could only be done through military tribunals, where the participatory rights of the victims were constrained when compared to ordinary criminal proceedings. With the recent adoption of legislation that amends the Congolese Criminal Code and the Code of Criminal Procedure, effectively transposing the Rome Statute into national law, now permitting victims to initiate proceedings themselves and permitting a right of appeal, it is hoped that the level of impunity will start to decrease.

Moving forward, it is important to keep in mind that *lacunae* exist in the criminal procedure of the DRC: First, despite there being a movement towards protecting victims of sexual violence during criminal proceedings, one wonders whether the DRC will offer protection equivalent to that offered by the Rome Statute.¹⁴⁹ Moreover, the criminal procedure seems to be silent on the issue of keeping victims informed of their rights and the progress of the investigations.¹⁵⁰ As discussed above, such information is clearly enumerated as a state obligation when prosecuting serious human rights violations and as the right to an effective remedy for the victim. Finally, at the moment there are many NGOs that are able to finance the legal representation of victims. However, when this is not available, what assurances are governmental authorities providing to ensure that the lawyers provided will be trained to be able to handle trials of this magnitude?¹⁵¹

Moreover, in looking towards understanding what problems one can anticipate with the prosecution of international crimes in a domestic setting that allows for a robust set of participatory rights for the victims, the ECCC offers at least one important contribution: common legal representation. The DRC legal framework does not adequately address this issue, as it does not recognise the collective participation of victims in criminal proceedings. However, it seems quite pertinent as the number of victims in cases involving serious human rights violations is typically large, which could have a negative effect on the efficiency of criminal proceedings as well as infringing on the rights of the accused.

At the International Criminal Court, for example, common legal representation has emerged as a compulsory path: As the number of victims involved increased, every single case involved collective

149 Mbokani (n 93 above) 353.

150 Mbokani 354.

151 Mbokani 365-366.

participation by victims. In the *Katanga* case,¹⁵² the judges decided that the victims would be split into two groups, and one legal representative would represent all participants except for the child soldiers. The grouping according to the harm suffered allowed the legal representatives to formulate more targeted questions.¹⁵³ In the *Bemba* case,¹⁵⁴ thousands of victims were to be represented by two legal representatives from the Central African Republic as the ICC had not been persuaded that additional representation was necessary. However, unlike *Katanga*, the Trial Chamber in *Bemba* opted not to group victims by the harm suffered but instead decided that victims would be grouped according to the geographical location of the crimes.¹⁵⁵

However, will the protection of the integrity of the trial come at the expense of victims' interests and rights? Will the agency of the victims be restrained if it is institutionally inconceivable to accommodate the participation of a large number of victims?

Only time will tell.

152 *The Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui* ICC (22 July 2009) ICC-01/04-01/07/-1328, Order on the Organisation of Common Legal Representation paras 9-13.

153 McGonigle (n 18 above) 328.

154 *The Prosecutor v Jean-Pierre Bemba* ICC (11 November 2010) ICC-01/05-01/08-1005, Decision on common legal representation of victims for the purpose of trial, para 18.

155 McGonigle (n 18 above) 328.