


ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The ‘ideal victim’: A cage for victims’ narratives at the International Criminal Court

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Abstract

Despite Article 68(3) of the Rome Statute of the International Criminal Court (ICC) granting victims an autonomous standing in proceedings, victims’ participatory rights have often been tailored to fit within the retributive structure of the trials. This contribution aims to provide a different perspective on victims’ role and their narratives in proceedings at the ICC, building upon the expressivist model of international criminal justice and focusing on a specific strand that engages with the adjudication process’s performative and communicative features. In providing a better understanding of how victims’ narrative unfolds in trials at the ICC, the article addresses two issues: how the concept of the victim is constructed at the ICC; and whether and, eventually, how this construct impedes progress in recognizing their narratives in proceedings at the ICC. Concerning the first issue, drawing on criminologist Nils Christie’s theorizing of the ‘ideal victim’, it will be observed that the construct of victims in proceedings at the ICC reflects three main attributes: weakness; innocence; and dependency. The second issue shed light on the extent to which the emphasis on the ‘ideal victim’ can serve as a tool in the hands of institutional actors at the ICC to preempt, constrain and subordinate victims’ narratives, in a manner that oversimplifies victimhood. To impose a particular narrative upon victims’ experiences, three main procedural mechanisms have been identified: appropriation of victims’ interests; legal representation of abstract victimhood; and exclusion from the trial of victims who do not conform to the ideal victim.

Keywords: expressiveness; International Criminal Court; ideal victim; narratives; victim participation

1. Introduction

On 5 of April 2022, in his opening statement in the case of the *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (*‘Ali Kushayb’*), Mr Karim Khan, the Chief Prosecutor of the International Criminal Court (hereafter the ICC or the Court), stated that:

[y]ou will hear in the course of this trial, Madam President, your Honours, from many witnesses, and we will do our best as the Office of the Prosecutor to highlight the effect these crimes have had on children and how children were directly targeted.¹

*A special thanks to my supervisor, Prof. Dr. Clara Burbano Herrera (Ghent University), for her encouragement and guidance. Her generosity and expertise have improved this study in innumerable ways. I am also grateful for the insightful comments offered by the two anonymous peer reviewers. I extend my gratitude to the Research Foundation - Flanders which provides financial support for the larger project from which this article grew, research project n. FWO-12C8323N.

¹*Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (*‘Ali Kushayb’*), Opening Statements, ICC-0205-0120, Trial Chamber I, 5 April 2022, at 12.

In quoting a mother ‘describing anguish as her 10-month-old child died of dehydration and malnutrition after fleeing from their home’,² the Prosecutor maintained that ‘again I’m raising it deliberately to highlight the plight of families’.³ The prosecution’s opening statement seems to construct the image of the victims drawing from what Umberto Eco defined as the ‘stereotyped iconographic unit’,⁴ as Mr Khan deployed a catalogue of images of victims that entails individuals generally located in the Global South, mainly women and children, who are vulnerable and exposed to brutalities. This case serves to reveal an interesting question concerning whether and how the construct of the victim shaped by the ICC’s judges, Prosecution and victims’ legal representatives produces a particular image and understanding of victims.

The Rome Statute (RS) establishing the ICC represents a ‘significant step forward’⁵ in international criminal justice since its Article 68(3) grants victims an autonomous standing in proceedings to present their views and concerns where their personal interests are affected.⁶ This innovative victim-oriented provision suggests that the opportunity for victims to have their voices heard permits them to represent and pursue their interests,⁷ aiming to expand the notion of ‘interest of justice’ to be more attuned to ‘justice for victims’, recognized as the *raison d’être* of the ICC.⁸ Despite this normative move towards a more ‘victim-oriented justice’⁹ which produced a broad range of literature on victims’ related issues, including participation in proceedings, reparations and procedural justice,¹⁰ victims’ participatory rights have often been tailored to fit within the retributive structure of the proceedings before the ICC.¹¹ Having as its primary goal seeking the accountability of the defendant, the retributive justice model trims the forms of participation and narration of victims to instrumentally serve the scope of the charges brought by the Prosecution.¹² The stories of victims are relevant only by virtue of their evidentiary value and, thus, are used to support the

²*Ibid.*, at 12.

³*Ibid.*, at 13.

⁴U. Eco, ‘“Casablanca”: Cult Movies and Intertextual Collage’, (1985) 14 *SubStance* 3, at 5.

⁵C. Stahn, H. Olásolo and K. Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’, (2006) 4 *Journal of International Criminal Justice* 219, at 219; A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, (1999) 10 *European Journal of International Law* 144, at 167–8; J. De Hemptinne and C. Jorda, ‘The Status and Role of the Victim’, in A. Cassese, P. Gaeta and J. R. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), vol. 2, 1387, at 1388; E. Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?’, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 315, at 316.

⁶1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 68(3).

⁷T. van Boven, ‘Victims’ Rights and Interests in the International Criminal Court’, in J. Doria, H-P. Gasser and M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko (1930–2000)* (2009), 893, at 902.

⁸Opening Speech by French Justice Minister Elisabeth Guigou at the International Meeting on ‘Access of Victims to the International Criminal Court’, quoted in Haslam, *supra* note 5, at 332.

⁹S. Vasiliev, ‘Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), vol. 48, 635, at 677.

¹⁰See, e.g., G. Bitti and H. Friman, ‘Participation of Victims in the Proceedings’, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crime and Rules of Evidence and Procedure* (2001), 456; C. Van den Wyngaert, ‘Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, (2011) 44 *Case Western Reserve Journal of International Law* 475; A. M. de Brouwer and M. Heikkilä, ‘Victim Issues: Participation, Protection, Reparation, and Assistance’, in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (2013), 1299; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (2011).

¹¹C. Garbett, ‘The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice’, (2017) 5 *Restorative Justice* 198, at 215.

¹²K. McEvoy and K. McConnachie, ‘Victims and Transitional Justice: Voice, Agency and Blame’, (2013) 22 *Social & Legal Studies* 489, at 495; J. Doak and L. Taylor, ‘Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing’, (2013) 64 *Northern Ireland Legal Quarterly* 25, at 25.

context of the legal plot, illustrating the details of the case, speaking about the gravity of the offences and demonstrating the harm.¹³

This contribution aims to provide a different perspective on victims' role and their narratives in proceedings at the ICC, by building upon the expressivist model of international criminal justice. Expressivism, which has gained modern reception in the academic debate,¹⁴ frames international criminal justice primarily as bearing a normative, didactic endeavour since the trial is conceived as a site for impacting present and future societal understandings of mass violence.¹⁵ This article will focus on a specific strand of expressivism that engages with the adjudication process's performative and communicative features, paying attention to the storytelling function of the international criminal trial, where the courtroom interactions of actors in the justice process (judges, prosecutors, defence, and victims) shape the narrative of the events under adjudication.¹⁶ While scholarship has been quite attentive to investigating how the messaging about historical narratives is constructed during the trial by both prosecution and defence¹⁷ and how judges cut through those adversarial narrative contestations to render a single, authoritative judgment that can invalidate unpersuasive interpretations of the past,¹⁸ little effort has been made to explore the potential for victims to play a similar role in the construction of narratives.

This article seeks to address this gap, providing a better understanding of victims' performance in international criminal proceedings and the narrative that such performance embodies. In doing that, the argument of this contribution addresses two issues which are fundamental to understanding the victims' performance in trials at the ICC: (i) how the concept of victims is constructed in the international criminal justice discourse; and (ii) whether and, if it is the case, how this construct impedes progress in recognizing their narratives in proceeding at the ICC. In other words, what is at stake here is to understand to what extent framing a specific construct of the victim in proceedings at the ICC contributes to creating 'a victim constructed procedurally as a category from whom a certain rational legal performance is expected'.¹⁹

Concerning the first issue, it will be observed that the construct of victims in proceedings at the ICC has been influenced by the concept of the 'ideal victim' developed by the Norwegian

¹³S. Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', (2015) 13 *Journal of International Criminal Justice* 973, at 988; C. Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (2020), 304–5; Garbett, *supra* note 11, at 216.

¹⁴See Stahn, *ibid.*, at 251.

¹⁵M. Glasius and T. Meijers, 'Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case', (2013) 35 *Human Rights Quarterly* 720, at 725–6; D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', (2008) *Georgetown Public Law Research Paper No. 1154117* 1, at 9; M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', (2012) 33 *Michigan Journal of International Law* 265, at 316; S. Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', (2015) 124 *Yale Law Journal* 1628, at 1676–7; M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), 17; M. Damaška, 'What Is the Point of International Criminal Justice?', (2008) 83 *Chicago-Kent Law Review* 329, at 345.

¹⁶See Damaška, *ibid.*, at 346; M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1997), 3.

¹⁷See, e.g., M. A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', (2007) 75 *George Washington Law Review* 1165; see deGuzman, *supra* note 15; M. Glasius and T. Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', (2012) 6 *International Journal of Transitional Justice* 229; M. Glasius, "'It Sends a Message': Liberian Opinion Leaders' Responses to the Trial of Charles Taylor', (2015) 13 *Journal of International Criminal Justice* 419.

¹⁸See, e.g., B. Sander, 'History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts', (2018) 67 *International and Comparative Law Quarterly* 547; B. Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law', (2019) 19 *International Criminal Law Review* 1014; T. W. Waters, 'A Kind of Judgment: Searching for Judicial Narratives After Death', (2010) 42 *George Washington International Law Review* 279.

¹⁹C. Brants, 'Emotional Discourse in a Rational Public Sphere: The Victim and the International Criminal Trial', in C. Brants and S. Karstedt (eds.), *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (2017), 41, at 57; L. Moffett, 'Reparations for "Guilty Victims": Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms', (2016) 10 *International Journal of Transitional Justice* 146, at 149.

criminologist Nils Christie.²⁰ This article specifically focuses on three characteristics of the ideal victim: weakness; innocence; and dependency. In unpacking these three attributes, this article provides a critique of the construction of victims consolidated through the proceedings at the ICC, which conveys a particular image and understanding of victims, at the detriment of those victims who diverge from it, who are often left outside the justice process.

The analysis of the construct of the victim is intertwined with the second issue, as it is instrumental to shed light on the extent to which victims' voices are realized or impeded in the context of the ICC. It will be discussed that the emphasis on the image of the passive and innocent victims, unable to help themselves, works toward serving the legal subordination of victims to the normative claims of the ICC, which derives its legitimacy through its service to the victims' constituency. To shore up the legitimacy of their actions, the Prosecution, Judges, and victims' legal representatives resort to three main procedural mechanisms, namely appropriation of victims' interests; legal representation of abstract victimhood; and exclusion from the trial of those victims who do not conform to the stereotype of the ideal victim. These mechanisms are instrumental in imposing a particular narrative upon victims' experiences.

At this point, some final remarks on the concept of the ideal victim in proceedings at the ICC are necessary. The article neither aims to undermine the victims who meet the attributes of the ideal victim, nor suggest the existence of the category of an 'actual victim' as somehow a more authentic victim. While acknowledging that any understanding of the victim always is mediated through acts of interpretation, this article focuses on the construction of the theoretical concept of the victim and, by engaging with the emerging literature, tries to think through how this construct can serve as a tool to understand the constraints to victims' ability to exercise agency and voice within the proceedings at the ICC. Critical discourse analysis is beyond the scope of this article; nevertheless, legal texts, reports and hearing transcripts can serve to identify a common discourse about victims of atrocity crimes.

This article is structured as follows. The second section illustrates the main features of the expressivist model, delving into the performative and communicative features of the international criminal proceeding. In the third section, the discussion builds up on the performative feature of the expressivist justice model to provide a better understanding of victims' performance in international criminal proceedings. The following section analyses three characteristics of the ideal victim. The fifth section investigates three main procedural mechanisms that create and impose a particular narrative upon victims' experiences. The last section concludes that the concept of victimhood developed at the ICC has constrained and instrumentalized victims' narratives and performance at trial, utterly limiting victims' potential for shaping the expressivist message of international criminal trials.

2. Trials as performance

The 'doing of justice' and the 'showing of justice' do not solely rely on the fair and expeditious application of the law to criminal conduct, but they are inherently intertwined with the performative dimension of international crimes. Such crimes are not simply a set of actions which entail a message about the bipolar relationship between the perpetrator (the agent) and the victim (the target) but they are the expression of a specific social, political and historical context, often directed (either directly or indirectly) towards an audience, being the local society and/or the international community at large.²¹ International crimes involve large-scale

²⁰N. Christie, 'The Ideal Victim', in E. A. Fattah (ed.), *From Crime Policy to Victim Policy* (1986), 17.

²¹M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', (2002) 15 *Harvard Human Rights Journal* 39, at 46; J. Stevenson Murer, 'Understanding Collective Violence: The Communicative and Performative Qualities of Violence in Acts of Belonging', in I. Bantekas and E. Mylonaki Bantekas (eds.), *Criminological Approaches to International Criminal Law* (2014), 287, at 288.

organized participation of groups or individuals who²² act on behalf of a collective criminal project such as eliminating an ethnic, religious, national, or racial group, or undertaking systematic attacks against civilians, and so on.²³ As part of the ideology, international crimes are generally committed to recode social norms and legitimize violence.²⁴ A classic example of the inherent performative character of international crimes can be found in the crime of genocide. Genocide entails acts ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’,²⁵ which are driven by political and ideological dynamics (the decline of state institutions, failures of post-colonial policies, internal conflicts) and seek to convey a particular message about civic value. It creates or reinforces a dichotomy between the members of a given society, producing what Day and Vandiver defined as ‘in-groups’ and ‘out-groups’.²⁶ The ‘in-groups’, the offenders, act to mark a distinction and reinforce their own identity and, through the process of ‘othering’, seek to wipe away the culture, identity and the mere existence of the out-groups.²⁷ Moreover, the ‘how’ genocidal plans are enacted sends a message to the international community about the collective structure of the criminal enterprise that is tied together by the shared political ideology, the use of hierarchies and the networks of power.²⁸ The expressivist account of the trial as performance carries the important function of providing a counter-performance to the inherent message of international crimes, which aims to reconstruct the social and legal meaning of crimes and, most importantly, promote social commitment to the respect of the rule of law.

The performative value of the trial is enacted through performative elements, such as the stage, the script, and the actors.²⁹ International criminal proceedings are staged in a particular space, namely the courtroom, which gives the proceedings a defined identity and visibility. The trials are ‘scripted’ in that they are governed by legal sources and procedural rules, which give the proceedings objectivity and authority conducive to persuasion and enforcement. The performative value is strengthened by taking the form of the judicial process, which is governed by the fair trial principles and the rules of evidence that guarantee impartiality, reliability, and authority to the whole process.³⁰ Last but not least, the actors in the proceedings are Prosecutors, Judges, Defence counsel, witnesses, and victims, who are assigned specific roles and serve different functions. The international criminal process, as an institution that produces certain ‘designations of reality’,³¹ is driven by courtroom interaction of the above-mentioned actors, who carry a communicative force that – besides delivering legal outcomes concerning the guilt or innocence of the defendant – forms a system of narration. The procedural framework of the trial is significantly suited to facilitating the presentation of diverse and often conflicting

²²L. Moffett, *Justice for Victims before the International Criminal Court* (2014), 10.

²³R. D. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, (2007) 43 *Stanford Journal of International Law* 39, at 56.

²⁴See Moffett *supra* note 22, at 11. See also S. Harrendorf, ‘How Can Criminology Contribute to an Explanation of International Crimes?’, (2014) 12 *Journal of International Criminal Justice* 231, at 243; O. Diggelmann, ‘International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology’, (2016) 14 *Journal of International Criminal Justice* 1073, at 1093.

²⁵See Rome Statute of the International Criminal Court, *supra* note 6, Art. 6.

²⁶M. Vandiver and E. L. Day, ‘Criminology and Genocide Studies: Notes on What Might Have Been and What Still Could Be’, (2000) 34 *Crime, Law and Social Change* 43, at 50.

²⁷See Murer, *supra* note 21, at 314. See more in general, J. Semelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (2007).

²⁸H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2009), 87.

²⁹See Stahn, *supra* note 13, at 268.

³⁰See Drumbl, *supra* note 15, at 17.

³¹T. Mathiesen, *Prison on Trial* (2006), 67.

storytelling³² of the whole range of actors in the justice process, who shape a narrative based on their knowledge of the events.³³

3. The role of victims: Performance and storytelling

The performative and communicative features of the trial, have a deep impact on the articulation of the functions and procedural roles of the different actors in the proceedings. The expressivist assumption that international criminal trials provide a platform for framing the narrative of gross human rights violations urges victims to express their independent voices and bring their perspectives to the proceedings. Expressivism, thus, becomes a vehicle for effectively tailoring victims' participation, which should be informed by the idea that victims act as 'participants' in criminal proceedings, whose voices are not tied to that of the parties. Expressivism enhances the 'legal subject-hood'³⁴ of victims, as it recognizes that the status of the victim goes beyond the simple recognition of the harmful character of the crime suffered. Victims are no longer 'the outcome of hardship and adversity',³⁵ useful only to achieve a more favourable outcome of the criminal justice process; instead, they are active agents in proceedings.³⁶

Building up on Stahn's work on performative theories, it is possible to identify three features that provide a better understanding of victims' performance in international criminal proceedings. Going back to the Aristotelian concept of classical drama, victims' performative dimension can be broken down into *mimesis* (imitation), *poiesis* (construction), and *kinesis* (transformation).³⁷ Victims' performance imitates the action of life (*mimesis*) in two ways: by re-enacting the crime in the form of the law, and by reproducing real-life events to disclose what happened.³⁸ Secondly, victims' performance in the proceedings embodies an active process of construction (*poiesis*), given that it not only reproduces the crime but also constructs reality, by making sense of violence and 'transforming [social conflict] into the system of social representations, exchanges, surrogacies that make up the law'.³⁹ Lastly, the performative feature of victims' participation brings about a transformation (*kinesis*) that can alter society, since new information may emerge or decisions can attach new meanings to the law, and affirm or create legal authority.⁴⁰ Victims' performance produces an authoritative acknowledgement that the action victims were subjected to is a specific and extremely serious kind of wrong, strictly speaking, a crime under international law.⁴¹ Thus, the performative feature of the role of victims allows them to counter the claim of superiority made by the defendant through the commission of the crime and regain self-respect, dignity, and status as rights holders and political subjects.⁴²

A thorough understanding of how such performance unfolds in proceedings at the ICC needs to first explore the concept of victimhood, which has been shaped around a particular model of the victim. The framing of a specific construct of victimhood affects the procedural role of victims and, thus, the performance that they can carry out. In the following section, the analysis of the

³²See Glasius and Meijers, *supra* note 15, at 725–6; A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 *European Journal of International Law* 2, at 10.

³³See Osiel, *supra* note 16, at 3.

³⁴S. Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', (2001) 27 *Critical Inquiry* 201, at 228, 233.

³⁵C. McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?', (2012) 10 *Journal of International Criminal Justice* 351, at 366.

³⁶See Stahn, *supra* note 13, at 301.

³⁷*Ibid.*, at 253.

³⁸*Ibid.*

³⁹J. Stone Peters, 'Legal Performance Good and Bad Law', (2008) 4 *Culture and the Humanities* 179, at 185.

⁴⁰See Stahn, *supra* note 13, at 254.

⁴¹*Ibid.*, at 301.

⁴²C. Murphy, *The Conceptual Foundations of Transitional Justice* (2017), 176.

construction of the victim will shed light on the extent to which victims' voices are realized or impeded in proceedings at the ICC.

4. Characteristics of the 'ideal victim'

The discourse around how victimhood is framed in international criminal justice has been highly influenced by the seminal work of the Norwegian criminologist Nils Christie. In his groundbreaking work, he explained that an ideal victim is 'a person or category of individuals who – when hit by crime – most readily is given the complete and legitimate status of being a victim'.⁴³ According to Christie, the characteristics underpinning the ideal victim reflect the specific 'social and cultural construct'⁴⁴ of what a victim should be: weak, carrying out a respectable activity, blameless for her/his victimization, powerful enough to make her/his case known and claim the victim's status but 'weak enough not to become a threat to other important interests', victimized by a 'big and bad' offender, who does not have any personal relationship with the victim.⁴⁵

The ideal victim model put forward by Christie has been rather influential at the level of domestic criminal law because he endeavoured to identify a process through which some individuals or groups easily acquire the label of victims, while others are not acknowledged as such.⁴⁶ Van Dijk observed that in Western domestic criminal justice systems, the victim's label often reflected socially constructed cultural values, which are associated with a set of preconceptions about the ideal victim's emotions and behaviour, including a set of moral imperatives or role expectations entailing connotations of passivity and helplessness.⁴⁷

This construct of the victim has been successful because it suited the retributive discourse. The framing of the victim as weak, innocent, and helpless, in strong contrast with the strong, evil perpetrator, was utilized (and still is) to inflict punishment as a response to violence.⁴⁸ However, this characterization of the victim, based on the notions of innocence, legitimacy and deserving, produced a binary framework, where a person either is a victim or an offender, which did not fully match the findings of empirical works on victims' identities and attitudes.⁴⁹ The complex and heterogeneous nature of the victim's category was neglected,⁵⁰ as the ideal victim perpetuated a powerful moral concept of victimhood.⁵¹ Carrabine et al. observed that the process of assessing individuals or groups' potential victims' status is based on a 'hierarchy of victimization',⁵² where at the top were vulnerable, weak, and helpless victims. At the bottom of this hierarchy were those

⁴³See Christie, *supra* note 20, at 18.

⁴⁴*Ibid.*, at 22–3.

⁴⁵*Ibid.*, at 19.

⁴⁶S. Walklate and R. McGarry, *Victims: Trauma, Testimony and Justice* (2015), 16. See also A-M. McAlinden, 'Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic', (2014) 54 *British Journal of Criminology* 180, at 182; F. Furendi, *Moral Crusades in an Age of Mistrust: The Jimmy Savile Scandal* (2013), 56; S. Walklate, 'Reframing Criminal Victimization: Finding a Place for Vulnerability and Resilience', (2011) 15 *Theoretical Criminology* 179; S. Walklate, *Imagining the Victim of Crime* (2006).

⁴⁷J. Van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood', (2009) 16 *International Review of Victimology* 1, at 24.

⁴⁸See Moffett, *supra* note 19, at 149; K. McEvoy and K. McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy', (2012) 9 *European Journal of Criminology* 527, at 527, 530; P. O'Malley, 'The Uncertain Promise of Risk', (2004) 37 *Australian & New Zealand Journal of Criminology* 323, at 323.

⁴⁹See, e.g., Van Dijk *supra* note 47, at 22; J. Dignan, *Understanding Victims and Restorative Justice* (2004), 167; R. Young, 'Testing the Limits of Restorative Justice: The Case of Corporate Victims', in C. Hoyle and R. Young (eds.), *New Visions of Crime Victims* (2002), 133, at 146.

⁵⁰C. Cunneen, 'The Limitations of Restorative Justice', in C. Cunneen and C. Hoyle (eds.), *Debating Restorative Justice* (2010), 101, at 133.

⁵¹See Moffett, *supra* note 19, at 149.

⁵²E. Carrabine et al., *Criminology: A Sociological Introduction* (2009), 159.

individuals who could hardly, or not at all, be acknowledged as victims because their actions or personal circumstances exposed them to victimization.⁵³

The work of van Wijk illustrated that this hierarchy of victimization can be applied in the context of international criminal justice, by testing the ideal victim's concept as developed by Christie.⁵⁴ Besides the above-mentioned attributes of the ideal victim, the successful acquisition of victim status for these kinds of crimes depended also on meeting certain conditions concerning the political and social background in which the violence occurred and the role and use of the media in making a symbolic and public display of the victims' suffering and emotions.⁵⁵

Borrowing these insights, it is possible to observe how victims are conceptualized in the discourse of the ICC. Nevertheless, it must be observed that in transposing Christie's construct of the ideal victim to the context of international criminal justice, the current analysis will adapt and focus on three attributes of victims of international crimes, namely (i) weakness; (ii) innocence; and (iii) dependency. Understanding how victims are conceptualized and theorized in the international criminal justice discourse tells something about how these justice institutions treat victims. Based on these attributes, the construct of the victim introduced by the ICC's judges, Prosecution and victims' legal representatives produces a particular image and understanding of victims at the detriment of those who diverge from it, often overlooked.

4.1 Weakness

Christie described a weak victim as a 'sick, old or very young' person, who, because of these characteristics, cannot defend himself/herself and, thus, is particularly well suited to be victimized.⁵⁶ In the field of international criminal justice, the concept of weak victims tends to be associated mainly with women, children and the elderly, who are civilian and non-combat bystanders caught in the crossfire of conflicts.⁵⁷ While it cannot be denied that women and children are particularly vulnerable, such reconstruction of the weak victim pictures an incomplete reality of victimization in the context of international crimes. The association of 'womenandchildren'⁵⁸ with weakness portrays a gendered picture of victimhood, often related to the family link, such as being a mother, a widow, a daughter, or an orphan.⁵⁹ An example of this victim's construction can be tracked in the case of the *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*. The defendant, a senior leader of the Militia/Janjaweed in the Wadi Salih and Mukjar Localities (West Darfur State), is charged with 31 counts of war crimes and crimes against humanity allegedly committed between August 2003 and at least April 2004 in Darfur.⁶⁰ The trial opened before Trial Chamber I in April 2022 and is currently ongoing, the common legal representatives of the victims made their opening statements and called their witnesses on 5–7 June 2023, while the Defence made opening statements and started presenting its case on 28 August 2023.⁶¹

In the opening statements for the Prosecution, Chief Prosecutor Karim Khan, while affirming that he will present the 'whole spectrum of evidence in the course of this trial in support of the

⁵³*Ibid.*; see Walklate and McGarry, *supra* note 46, at 16.

⁵⁴J. van Wijk, 'Who Is the "Little Old Lady" of International Crimes? Nils Christie's Concept of the Ideal Victim Reinterpreted', (2013) 19 *International Review of Victimology* 159, at 162–7.

⁵⁵*Ibid.*, at 167.

⁵⁶See Christie, *supra* note 20, at 19.

⁵⁷A. Rudling, 'I'm Not That Chained-Up Little Person': Four Paragons of Victimhood in Transitional Justice Discourse', (2019) 41 *Human Rights Quarterly* 421, at 425; C. Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law', (2018) 29 *European Journal of International Law* 703, at 710; E. Bouris, *Complex Political Victims* (2007), 36.

⁵⁸A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003), 66.

⁵⁹K. M. Franke, 'Gendered Subject of Transitional Justice', (2006) 15 *Columbia Journal of Gender and Law* 813, at 823.

⁶⁰*Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Confirmation of Charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), ICC-02/05-01/20, Pre-Trial Chamber II, 9 July 2021.

⁶¹*Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Case Information Sheet, ICC-02/05-01/20, 11 May 2023.

charges',⁶² expresses his 'wish to emphasise children'⁶³ as they are 'the most innocent, the most vulnerable members of humanity'.⁶⁴ Additionally, the Chief prosecutor explicitly stated that many examples 'of the human tragedy that your Honours will be listening to in the course of this trial'⁶⁵ will be raised 'to deliberately highlight the plight of families'.⁶⁶ In doing so, he introduced the statements of several witnesses that are labelled as 'mothers'. The prosecutor quotes a woman's statement that in 'describing anguish as her 10-month-old child died of dehydration and malnutrition after fleeing from their home', recalls that '[m]any children of a young age as well as elderly people and pregnant women died during this time due to the harsh conditions they had to live under'.⁶⁷ Another witness quoted by the Prosecutor is a mother who describes her '... inability to provide shelter for the many, many young children that she was travelling with'.⁶⁸ Finally, to demonstrate 'the responsibility of Mr Abd-Al-Rahman and also understand the depth of suffering that has been caused',⁶⁹ the Prosecutor highlights that he will select among the many accounts those of women and young girls being raped.⁷⁰

This construct of the victim is the expression of two faces of the same coin. On one hand, this image of weak victims assumes they are lacking any agency and can only play 'the role of objects: victims of rape, objects of religious control, victims of the sex trade, victims of drought and famine'.⁷¹ On the other hand, it strengthens the concept, which is dominant in many societies, that the understanding of masculinity is not consistent with the victimization of men during conflicts.⁷² Men are expected to act as defenders of the group and their exposure to high-risk situations turns out to be an intrinsic part of their experience that is not regarded as abnormal.⁷³ However, Bouris observes a discrepancy between how a weak victim is often described and the empirical realities of victimization. Men are more likely to be victims of arms conflicts as they can be involved as combatants or non-combatants.⁷⁴

Academic literature has slowly begun to engage with this gendered construction of the victim, which makes it difficult to consider men-civilian as victims of conflict-related violence and, almost impossible, to conceive that militarized men can be also victims.⁷⁵ The debate focused specifically on conflict-related sexual violence against men because:

⁶²See *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, *supra* note 1, at 11.

⁶³*Ibid.*

⁶⁴*Ibid.*, at 12.

⁶⁵*Ibid.*

⁶⁶*Ibid.*, at 13.

⁶⁷*Ibid.*, at 12.

⁶⁸*Ibid.*, at 13.

⁶⁹*Ibid.*, at 22.

⁷⁰*Ibid.*, at 21–2.

⁷¹See Orford, *supra* note 58, at 66.

⁷²See Rudling, *supra* note 57, at 426.

⁷³*Ibid.*, at 427.

⁷⁴See Bouris, *supra* note 57, at 36.

⁷⁵See, e.g., L. Ullrich, "But What about Men?" Gender Disquiet in International Criminal Justice', (2021) 25 *Theoretical Criminology* 209; T. Charman, 'Sexual Violence or Torture?: The Framing of Sexual Violence against Men in Armed Conflict in Amnesty International and Human Rights Watch Reports', in M. Zalewski et al. (eds.), *Sexual Violence against Men in Global Politics* (2018), 198; C. Dolan, 'Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict', (2014) 14 *Briefing Paper Prepared for a Workshop Held at the Overseas Development Institute* 1, available at reliefweb.int/report/world/mainstream-addressing-sexual-violence-against-men-and-boys-conflict; S. Solangon and P. Patel, 'Sexual Violence against Men in Countries Affected by Armed Conflict', (2012) 12 *Conflict, Security & Development* 417; A. Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', (2013) 46 *New York University Journal of International Law and Politics* 635; S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', (2007) 18 *European Journal of International Law* 253.

this form of violence exemplifies the disjuncture between widely held assumptions about male invulnerability and understandings of perpetratorship on the one hand, and men's lived experiences of vulnerability on the other.⁷⁶

Oosterveld unpacked the factors of the 'gender "blind spot"'⁷⁷ that affect the understanding of sexual violence directed at men in international criminal courts and tribunals. She observed that the failure to charge male sexual violence is due mainly to the dearth of information on this kind of violence; the social construct of masculine gender norms that discouraged boys and men from revealing their victimization; and the gap in the legal recognition and classification of certain conducts as acts of sexual violence against men.⁷⁸ These factors are strictly interconnected with each other, since the underreporting of male sexual violence stems from and, at the same time, perpetuates the societal assumptions around masculinity according to which men have failed cultural norms of manhood for being victims of sexual violence and not being able to cope as men.⁷⁹ Both the dearth of information and the social barriers lead to an insufficient codification and categorization of acts of male-directed sexual violence. Due to the lack of overt recognition, international criminal tribunals and courts have tended to overlook the sexual nature of forms of violence other than rape, like, for instance, forced circumcision, penile amputation, castration, sexual mutilation, and genital electrocution that were categorized under the crime against humanity of torture or other inhumane acts.⁸⁰

The reiteration of the binary model of woman/victim and men/perpetrator has been criticized also in recent studies conducted mainly on the practice of forced marriage in the context of the Lord's Resistance Army (LRA).⁸¹ Such gendered categorization of victim/perpetrator is instrumental to the 'right-based' approach to forced marriage that, with the specific goal of drawing a clear-cut line of accountability of those responsible through trials and reparations, decontextualizes and reduces these experiences to forms of harm and injuries that men inflict on women.⁸² The data collected through interviews with men who experienced forced marriages during their affiliation with the LRA provided a far more complex picture of the reality. Forced marriages and the subsequent creation of LRA families with children born of these marriages were a tool to prevent abductees from escaping, by creating a sense of belonging and deepening their bonds and ties with the LRA.⁸³ Marriage and family life in the LRA were strictly regulated by those in positions of power and influence, mainly a small group of commanders close to Kony and Kony himself.⁸⁴ The majority of boys and men affiliated with LRA, including senior commanders, had limited or no choice about when and who they would marry, as senior commanders used to assign

⁷⁶C. Dolan, 'Victims Who Are Men', in F. Ní Aoláin et al. (eds.), *The Oxford Handbook of Gender and Conflict* (2017), vol. 1, 86, at 93.

⁷⁷V. Oosterveld, 'The Construction of Gender in Child Soldiering in the Special Court for Sierra Leone', in M. A. Drumbl and J. C. Barrett (eds.), *Research Handbook on Child Soldiers* (2019), 74, at 75.

⁷⁸V. Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal', (2014) 10 *Journal of International Law and International Relations* 107, at 109.

⁷⁹*Ibid.*, at 119; see Sivakumaran, *supra* note 75, at 255.

⁸⁰See Oosterveld, *supra* note 78, at 123.

⁸¹See M. S. Denov and M. A. Drumbl, 'The Many Harms of Forced Marriage', (2020) 18 *Journal of International Criminal Justice* 349, at 353; O. Aijazi, E. Amony and E. Baines, "'We Were Controlled, We Were Not Allowed to Express Our Sexuality, Our Intimacy Was Suppressed": Sexual Violence Experienced by Boys', in M. A. Drumbl and J. C. Barrett (eds.), *Research Handbook on Child Soldiers* (2019), 95.

⁸²O. Aijazi and E. Baines, 'Relationality, Culpability and Consent in Wartime: Men's Experiences of Forced Marriage', (2017) 11 *International Journal of Transitional Justice* 463, at 467.

⁸³M. Denov et al., 'Complex Perpetrators: Forced Marriage, Family and Fatherhood in the Lord's Resistance Army', (2019) 94 *Revista de Historia Jerónimo Zurita* 139, at 148. See also M. Denov and A. Cadieux van Vliet, 'Children Born of Wartime Rape on Fatherhood: Grappling with Violence, Accountability, and Forgiveness in Postwar Northern Uganda', (2021) 27 *Peace and Conflict: Journal of Peace Psychology* 597.

⁸⁴See Aijazi, Amony and Baines, *supra* note 81, at 101; Denov and Drumbl, *supra* note 81, at 357.

girls to specific men based on their loyalty and compliance to the movement.⁸⁵ Some men reported accepting to enter a forced marriage only to guarantee their personal safety. Any reluctance to marry their forced wives and/or to produce a family and offspring could lead to a range of consequences: from suspicion, insubordination and demotion to execution.⁸⁶ In this coercive setting, which forged the most intimate and sexual relations, the nature of the husband-wife relationship was multifaced as '[v]iolence, vengeance, co-dependence, responsibility and love could all exist within the same relationship'.⁸⁷ Despite it seemed that husband and wife developed co-dependency and somehow closeness, given that they depended on each other for their survival and that of their children, the stability of these coerced relationships was not guaranteed. Senior leaders could separate wives from their husbands, by assigning them to a new unit, and take possession of the children born of forced unions since they were considered to belong to the LRA.⁸⁸

These studies' findings represent an important contribution to addressing the gendered delineation of the victim-perpetrator and rethinking the common idea of who the affected parties in forced marriages are.⁸⁹ While there is no doubt that forced marriage and compelled parenthood most disproportionately affect girls and women, it emerged that men in LRA were not simply perpetrators and victimizers, but they were also captives, victims, husbands, and fathers.⁹⁰ The imposition of private relations, the militarization of private life and the weaponization of families in the context of 'the socially engineered strictures of public life'⁹¹ based on fidelity to the organization affect also men.

4.2 Innocence

The concept of the innocent victim can be unpacked in two features: the absence of wrongdoing because the victim is 'carrying out a respectable project'; and the lack of blame for the victimization endured. The concept of a 'respectable' project is quite blurred, depending often on the social construction of what respectable and unrespectable projects are. Victimological terms, such as 'victim precipitation' and 'victim provocation', can help to define an unrespectable project. The American sociologist and criminologist Marvin Wolfgang, who introduced the concept of 'victim precipitation', posited that some individuals were more prone to victimization and to consciously or unconsciously precipitate the crime through their lifestyle.⁹² The concept of 'victim provocation' refers to those situations where the victim engages in criminal conduct that eventually leads to his/her victimization.⁹³ Thus, actions leading to the victim's precipitation and provocation can be regarded as unrespectable projects carried out by the victim himself/herself.

In the context of international criminal justice, this implies that victims should neither be involved in any action as combatants nor carry out any behaviour that invites or provokes their victimization. Van Wijk instead of using the terms 'respectable/unrespectable projects', observed that victims of international crimes are often portrayed as civilians carrying out a 'neutral project', like sleeping in their homes or fetching water at a well.⁹⁴ This view was confirmed, for instance, in

⁸⁵See Aijazi and Baines, *supra* note 82, at 476; Denov and Drumbl, *ibid.*, at 357.

⁸⁶See Denov and Drumbl, *ibid.*, at 360.

⁸⁷See Aijazi and Baines, *supra* note 82, at 478.

⁸⁸*Ibid.*, at 472; see Denov and Drumbl, *supra* note 81, at 357.

⁸⁹See Aijazi, Amony and Baines, *supra* note 81, at 100.

⁹⁰See Denov and Drumbl, *supra* note 81, at 358.

⁹¹*Ibid.*, at 367.

⁹²M. E. Wolfgang, 'Victim Precipitated Criminal Homicide', (1957) 48 *Journal of Criminal Law, Criminology, and Police Science* 1, at 1-2. See also M. E. Wolfgang, *Patterns in Criminal Homicide* (1958).

⁹³D. A. Timmer and W. H. Norman, 'The ideology of victim precipitation', (1984) 9 *Criminal Justice Review* 63, at 65. See also J. M. Sgarzi and J. McDevitt, *Victimology: A Study of Crime Victims and Their Roles* (2002).

⁹⁴See van Wijk, *supra* note 54, at 163.

the opening statements of the Prosecution in *Ali Kushayb*, where the Chief Prosecutor recalled that Darfuri people:

have shown for – well, since antiquity, a remarkable resilience to work that land, to have the stamina to survive in those inclement conditions. What prised them away from their land were not the elements or the soil or the climate, it was a deliberate targeting of them⁹⁵

To provide a picture of the defendant's crimes, the Prosecutor quotes statements from witnesses who portrayed scenarios matching the concept of the victims carrying out a neutral project. For example, one witness recalled that he was in his house with his wife and children when the soldiers attacked his town.⁹⁶ Another affirmed that:

I was in bed and my father was awake and washing to prepare for prayers. The call to prayer was always around 4 a.m. and this was happening when I heard gunshots . . . My father shouted to the family to get up . . . I came out of our home and saw flames around the village.⁹⁷

There is no discussion over the fact that the victims engaged in a respectable project are the most blameless. However, the term 'blameless victim' suggests not simply the absence of wrongdoing on the part of the victims but also conveys a message about the victims' irreproachability. According to Meyers, the paradigm of the irreproachable innocent victim requires the victim to be involuntarily and passively subject to atrocious suffering, because only those 'whose capacities for choice and action have been so completely neutralized that there can be no doubt that they are innocent'.⁹⁸ Thus, the passivity and blamelessness of victims are interconnected features that reflect their utter innocence.

Conceiving the attribute of innocence based on the absence of any wrongdoing and blame on the part of the victims carries several implications. Acknowledging victims as being devoid of any responsibility for gratuitous violence and needless suffering confers on victims the cloak of 'moral superiority',⁹⁹ which can contribute to drawing attention to the violations, bringing to justice the offenders and calling for redress for those who have been abused.¹⁰⁰ However, such an account of the victim's innocence has also some drawbacks. It can set a tremendously high standard against which to evaluate the victim's innocence. Victims who actively resisted violence or simply acted improperly can easily fall short of the innocence requirement. International crimes often occur in situations of civil conflict that set community against community,¹⁰¹ and in this background marked by dysfunctional institutions, and serious disruptions of the judicial system it is quite likely that victims can act in contravention of national legal norms to encourage the implementation of international human rights standards that are unpopular with local authorities.¹⁰² The association of victimhood with innocence can be used to withdraw the status of victims for a certain category of individuals, providing a legal defence that exonerates (or serves as a mitigating factor) perpetrators from criminal responsibility.¹⁰³

⁹⁵See *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, *supra* note 1, at 15.

⁹⁶*Ibid.*, at 20.

⁹⁷*Ibid.*, at 27.

⁹⁸D. Tietjens Meyers, *Victims' Stories and The Advancement of Human Rights* (2016), 34–5.

⁹⁹See Bouris, *supra* note 57, at 42.

¹⁰⁰See Rudling, *supra* note 57, at 427.

¹⁰¹P. Massidda, 'Retributive and Restorative Justice for Victims and Reconciliation: Considerations on the Lubanga Case before the ICC', (2015) 1 *Peace Processes Online Review* 1, at 4.

¹⁰²S. von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War against Terrorism' (2003), 14 *European Journal of International Law* 265, at 270.

¹⁰³See Rudling, *supra* note 57, at 426.

In this perspective, the idea of the victim based on innocence can be instrumentalized to further validate the dehumanization process to which victims have been already subject. International crimes are often ideologically driven because individuals or groups are targeted based on their race, ethnicity, religion, and political beliefs, and, as part of the ideology, they are dehumanized to legitimize the violence.¹⁰⁴ For instance, when considering genocidal acts, denying the humanity of the targeted group by equating its members with animals, insects or diseases overcomes the human revulsion against murder. Discourses emphasizing that some victims are less innocent than others can be used to delegitimize them in a way which is consistent with the dehumanization processes above mentioned.¹⁰⁵ A less innocent victim can be seen as a gateway to the acknowledgement that some victims are less entitled to claim redress and protection based on their equal membership in a given society.

4.3 Dependency

The above-analysed attributes of victims of international crimes by conveying the image of a passive individual whose suffering is ‘the outcome of hardship and adversity’,¹⁰⁶ place them in an impasse. As victims are considered less innocent if they are involved in any action, similarly, they are perceived as a threat when they show some agency before international criminal justice institutions.¹⁰⁷ The ideal victim should have the mental resolution to acknowledge their identity and status as victims but still completely dependent on an external bystander to act in their name.

The dependence on external help is further consolidated by the representation of victims as individuals physically and psychologically scarred by their experiences, which render them ‘essentially incapacitated’.¹⁰⁸ Victims are often portrayed as having body features, like gruesome injuries, that make their status even more recognizable. It goes to the core of the heinous nature of international crimes that involve mutilations and brutal killings that cause suffering and mental trauma to the victims. Schwöbel-Patel observes that visual representations of victims in and outside the ICC’s courtroom often express an aesthetical ‘taste’ for the grotesque, which emphasizes disturbing and unpleasant victims’ bodily features, like mutilations, burn marks or other injuries.¹⁰⁹ The Prosecution and victims’ legal representatives often indulge in providing a very vivid description of the scars of violence because ‘the more spectacular the conjuring of victim, the more urgent the call to support – morally, fiscally, legally – the rule of law’.¹¹⁰ For instance, in the opening statements of *Ali Kushayb* the Prosecutor stated:

another witness will describe how Ali Kushayb’s men shaved – forcibly shaved, I should say, two detainees with knives to the scalp, thereby injuring them. And he watched and saw three detainees have their ears cut off in front of his eyes, their ears fall to the ground, and profuse bleeding of course naturally occurred.¹¹¹

Victims endure particularly serious violence, not just at the physical level, but they can also carry deep emotional suffering. The literature on the suffering of victims brought about by mass

¹⁰⁴See Moffett, *supra* note 22, at 11.

¹⁰⁵See Bouris, *supra* note 57, at 49; D. Bar-Tal, ‘Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism’, (1990) 46 *Journal of Social Issues* 65, at 73. See also H. Kimura, W. Zartman and P. Berton (eds.), *International Negotiation: Actors, Structure/Process, Values* (1999).

¹⁰⁶See McCarthy, *supra* note 35, at 366.

¹⁰⁷See Schwöbel-Patel, *supra* note 57, at 713; Rudling, *supra* note 57, at 429.

¹⁰⁸See Rudling, *ibid.*, at 428.

¹⁰⁹See Schwöbel-Patel, *supra* note 57, at 715.

¹¹⁰K. M. Clarke, ‘The Rule of Law through Its Economies of Appearances: The Making of the African Warlord’, (2011) 18 *Indiana Journal of Global Legal Studies* 7, at 11.

¹¹¹See *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), *supra* note 1, at 24.

conflicts illustrates that victims experience a high tendency to develop depression and anxiety as a result of the internalization of negative feelings, such as self-blame, outrage, alienation, and exclusion during any subsequent legal proceedings.¹¹² In the above-mentioned opening statements, the Prosecutor describes the extreme psychological sufferings of victims through the metaphor of ‘emotional scars’, which are ‘less visible but equally painful scars from their experience’.¹¹³ The use of the word ‘scar’ to describe emotional suffering can be seen as a symbolic attempt to mirror the grotesque bodily features of the kind previously described.

Defying victims ‘by the mark that has been made on them rather than the mark that they have made’¹¹⁴ presents a picture of victims as powerless because they depend on outside bystanders to provide them with a recovery solution.¹¹⁵ The opening statement of the Prosecutor in *Ali Kushayb* typifies this concept. The Prosecutor compares the victims of this case to the millions of Muslims who, during Ramadan, look forward to breaking the fast in the evening (Iftar), affirming that:

[t]here has been another fast that they have been partaking, not because of their choice, but is the fast waiting for justice. And from that perspective, this is a momentous day. It is an Iftar of sorts for the millions of Sudanese throughout the world that have been yearning for this day to come and for independent and impartial judges of the International Criminal Court to start a process of deliberations of hearing evidence, weighing evidence to assess criminal responsibility.¹¹⁶

The marginalization and vulnerability in which victims found themselves in the aftermath of atrocities place them in a subordinate position, leaving them with little voice and choice in the matter of claiming their rights, needs and interests.¹¹⁷ Victims seem doomed to passively wait for actors at the ICC, such as the Prosecutor, the judges, and victims’ legal representatives, to invoke victimhood on their behalf. To assume victims as helpless brings some problematic consequences. When the shaping of the victims’ narratives is monopolized by actors in the justice process, the very context-based needs of victims can be overlooked in favour of an abstract human rights discourse. The risk is not simply to disempower victims by imposing on them narratives which are constructed for them and not by them, but also to delegitimize those victims who do not fit in this framework because they challenge a *status quo*.¹¹⁸ Koskeniemi describes this phenomenon, characterized by the replacement of public scrutiny and debate about social justice with technocratic matters, as a ‘process of depoliticization’. The victim ‘is worthy of humanitarian support as long as he remains a helpless victim – but turns into a danger the moment he seeks to liberate himself’.¹¹⁹ The appropriation of victims’ voices may set limits to those in decision-making positions to fulfil general, instead of particular, interests, creating the expectation that claims made by other members of that community will be taken into account.¹²⁰ However, a more likely result is that ‘the victims’ cause and pain is “stolen” by the transitional justice entrepreneurs without a true exchange’.¹²¹

¹¹²J. Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’, (2011) 11 *International Criminal Law Review* 263, at 265.

¹¹³See *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, *supra* note 1, at 79.

¹¹⁴C. Gilligan, ‘Constant Crisis/Permanent Process: Diminished Agency and Weak Structures in the Northern Ireland Peace Process’, (2003) 3 *Global Review of Ethnopolitics* 22, at 30.

¹¹⁵T. Govier, *Victims and Victimhood* (2015), 5.

¹¹⁶See *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, *supra* note 1, at 10.

¹¹⁷See McEvoy and McConnachie, *supra* note 12, at 489.

¹¹⁸J. Subotić, ‘The Transformation of International Transitional Justice Advocacy’, (2012) 6 *International Journal of Transitional Justice* 106, at 121; L. E. Fletcher, H. M. Weinstein and J. Rowen, ‘Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective’, (2009) 31 *Human Rights Quarterly* 163, at 214.

¹¹⁹M. Koskeniemi, ‘“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law’, (2002) 65 *Modern Law Review* 159, at 173.

¹²⁰*Ibid.*, at 174.

¹²¹See Rudling, *supra* note 57, at 431; T. Madlingozi, ‘On Transitional Justice Entrepreneurs and the Production of Victims’, (2010) 2 *Journal of Human Rights Practice* 208, at 211.

5. Procedural limitations

The view of victims as vulnerable, innocent, silent and in need of care poses a challenge to how victims' performances unfold in trials before the ICC. At first look, it seems that institutional actors recognize a performative role for victims, as they value victims' participation and narration as a tool that potentially enhances the quality of the narrative shaped during the proceedings and contributes to the establishment of the truth. For instance, the *Court's Revised Strategy in Relation to Victims* affirms that:

victims' participation 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. Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process. Moreover, their participation in the justice process contributes to closing the impunity gap.¹²²

On the same page, Paolina Massidda, the Principal Counsel of the Office of the Public Counsel for Victims at the ICC, held that 'victims are independent actors in the proceedings before this Court . . . [whose] position is to contribute to the establishment of the truth'.¹²³ Similarly, the Office of the Prosecutor in its *Policy Paper on Victims' Participation* emphasized that:

victims bring a unique and necessary perspective to the activities of the ICC and contribute to fair and efficient trials. Under the Rome Statute, victims are actors of international justice rather than passive subjects.¹²⁴

However, in practice, the frame used to portray victims and victimization is characterized by a high degree of instrumentalization by judges and prosecution to shore up the legitimacy of their actions. Because of their sufferings, victims become the deserving recipient of justice, but, at the same time, their weakness is used to vest the judges and the Prosecutor with the legal and symbolic authority to speak on their behalf. In other words, the synthesis between the duty to prosecute and punish perpetrators and the image of victims as innocent, vulnerable, silent, and in need of care, serves the discourse justifying the work of the ICC as providing justice for victims. The rhetoric describing the meaning of the work of the Court in terms of delivering justice on behalf of the victims has been quite appealing to institutional actors. For instance, in 2011 the then-president of the ICC, Judge Sang-Hyun Song, in his address to the UN General Assembly, urged states to 'redouble their efforts' to implement arrest warrants issued by the ICC because the failure to bring the perpetrators to justice was 'deeply distressing for the victims'.¹²⁵ The first Chief Prosecutor Moreno Ocampo often recalled the centrality of victims to his mandate¹²⁶ and, on the same page, his successor Mrs Fatou Bensouda, maintained that the 'sole *raison d'être* of the ICC's activities in Côte d'Ivoire is the victims and the justice they deserve'.¹²⁷ More recently, in January 2023, the

¹²²Assembly of States Parties, *Court's Revised Strategy in Relation to Victims*, ICC-ASP/11/38 (2012), available at asp.icc.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf, para. 10.

¹²³*Prosecutor v. Thomas Lubanga Dyilo*, Opening Statement, ICC-0104-0106, 26 January 2009, at 41.

¹²⁴The Office of the Prosecutor, *Policy Paper on Victims' Participation* (2010), at 1.

¹²⁵S. H. Song, 'Address by Judge Sang-Hyun Song, President of the International Criminal Court to the United Nations General Assembly', 26 October 2011, at 4, available at www.icc-cpi.int/news/address-judge-sang-hyun-song-president-international-criminal-court-united-nations-general. See also ICC Press Release, 'ICC Launches Commemorations for 17 July International Criminal Justice Day', 6 July 2012, available at asp.icc-cpi.int/press-releases/pr822.

¹²⁶ICC Press Release, 'ICC Prosecutor Visits Egypt and Saudi Arabia', 9 May 2008, available at www.icc-cpi.int/news/icc-prosecutor-visits-egypt-and-saudi-arabia.

¹²⁷ICC Press Release, 'Statement to the Press by the Prosecutor of the International Criminal Court (Abidjan, Côte d'Ivoire, 20 July 2013)', 20 July 2013, available at www.icc-cpi.int/news/statement-press-prosecutor-international-criminal-court-abidjan-cote-divoire-20-july-2013.

present ICC Prosecutor Mr. Karim Khan in his report on the Situation in Darfur to the UN Security Council reminded the plights and stigma experienced by victims of sexual and gender-based violence and emphasized the imperative of delivering:

justice in a manner that will allow us to tell the victims, to look them in the face, to say, “There has been justice, your lives matter, your experience matters to all members of the Council”.¹²⁸

The invocation of the ‘ideal’ victims as the *telos* of the quest for justice by the ICC has shown ‘dark sides’¹²⁹ though, as it took any prospect of agency in shaping the trial message away from victims, by constraining their performance during the different stages of the proceedings. It is undeniable that victimhood to a certain extent needs to meet the procedural requirements of the trial and the evidentiary needs of the prosecution.¹³⁰ Nevertheless, the concept of the ideal victim is used and, perhaps, abused by the Prosecution, Judges, and victims’ legal representatives, to pre-empt and constrain victims’ narratives in a manner that simplifies and distorts the occurrence of violations. To create and impose a particular narrative upon victims’ experiences, three main procedural mechanisms have been put forward, namely the appropriation of victims’ interests; the legal representation of abstract victimhood; and the exclusion from the trial of those victims who do not conform to the ideal victim.

5.1 Appropriation of the victims’ interests

Behind victims’ representation through one-sided lenses of the object of harm, there is the idea that it is a specific task of the Prosecutor to represent the interest of the victims in every stage of the proceeding because his/her interest entirely coincides with that of the victims.¹³¹ However, this is not always the case. An example of the discrepancy between the interests of the victims and the interests of the Prosecution is portrayed by the narrow approach to charges in *Lubanga*. The accused was charged with the offence of enlisting and conscripting children under the age of 15 years and using them to participate actively in both international and non-international hostilities.¹³² Indeed, this showed the commitment of the ICC to condemn this kind of heinous crime, nevertheless, the Prosecutor failed to take into consideration many offences that Mr. Lubanga allegedly committed in the Democratic Republic of Congo (DRC). Victims expressed their indignation at the limited set of charges, which did not mirror the events they experienced.¹³³ Despite the widespread documentation of gender-based crimes, including rape, sexual violence, and sexual slavery,¹³⁴ such crimes were not effectively investigated in the *Lubanga* case. On the

¹²⁸K. A. A. Khan, ‘Statement of ICC Prosecutor, Karim A. A. Khan KC, to the United Nations Security Council on the Situation in Darfur, Pursuant to Resolution 1593 (2005)’, 26 January 2023, available at www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-united-nations-security-council-situation-darfur.

¹²⁹See Stahn, *supra* note 13, at 287.

¹³⁰See Haslam, *supra* note 5, at 320.

¹³¹See De Hemptinne and Jorda, *supra* note 5, at 1394–5.

¹³²*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, Pre-Trial Chamber II, 29 January 2007, para. 156.

¹³³ASF, Center for Justice and Reconciliation, DRC Coalition for the ICC, FIDH, HRW, REDRESS, and the Women’s Initiative for Gender Justice, ‘DR Congo: ICC Charges Raise Concern, Joint Letter to the Chief Prosecutor of the International Criminal Court’, 31 July 2006, available at www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern.

¹³⁴K. A. Annan, ‘Letter Dated 16 July 2004 from the Secretary-General Addressed to the President of the Security Council’, July 2004, available at <https://digitallibrary.un.org/record/527418>, para. 80; UN General Assembly, Report of the International Criminal Court, A/60/177 (2005), para. 37; Assembly of States Parties, Report on the Activities of the Court, ICC-ASP/4/16 (2005), para. 53; Amnesty International, Democratic Republic of Congo – Mass Rape: Time for Remedies, AFR 62/018/2004 (2004), available at amnesty.org/en/documents/af62/018/2004/en/; Human Rights Watch, ‘Seeking Justice: The Prosecution of Sexual Violence in the Congo War’, 2005, available at hrw.org/reports/2005/drc0305/drc0305.pdf.

grounds of prosecutorial discretion, the Prosecutor decided to focus on charges of recruitment and use of child soldiers, closing the door to the participation of victims of gender-based crimes. In a later decision, the Trial Chamber I seemed to broaden the narrow approach to the charges of the Prosecutor since it affirmed that it would give greater consideration to the allegations of rape, sexual violence, and sexual slavery for sentencing and reparations.¹³⁵ This may open up some recognition of the interests of victims of gender-based crimes, but it is hard to reconcile this opening of the Trial Chamber I with the fact that the Prosecutor subordinated victims to the vision of justice he decided to achieve. More recently, in denying the authorization to investigate the situation in Afghanistan, the Pre-Trial Chamber II stated that its decision served the interests of victims because starting an investigation with limited prospects of a successful prosecution would 'be far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration'.¹³⁶

The decision is based on the assumption of the overlap between the interests of victims and the interest of justice, which is 'a statutory legal parameter governing the exercise of the prosecutorial discretion'.¹³⁷ In their reasoning, the Judges clarified the meaning of 'interest of justice', holding that 'an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame'.¹³⁸ Subsequently, the Court observed that authorizing an investigation in Afghanistan can hardly be considered in the interests of justice because the specific features of the situation in Afghanistan are such as to make the investigation not feasible and inevitably doomed to failure.¹³⁹ However, the judges failed to clearly explain how such interests in justice coincide with the interests of victims. They simply concluded that an investigation with limited prospects for a successful prosecution is unlikely to meet the interest of victims because:

only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised.¹⁴⁰

Legal Representatives of victims have strongly criticized this decision, submitting that it was arguably the worst decision this Court took concerning victims. They challenged the instrumentalization of the concept of the interests of victims advanced by the judges, by observing that, as the ICC is a court of last resort, not authorizing the start of the investigation placed victims in the situation of losing:

their rights to have access to justice, to contribute to a process that seeks to end impunity and contribute to the prevention of crimes, to know the truth, and to request reparations – fundamental rights which have been acknowledged in the jurisprudence of this Court.¹⁴¹

¹³⁵*Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04–01/06, Trial Chamber I, 14 March 2012, paras. 630–631.

¹³⁶*Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Pre-Trial Chamber II, 12 April 2019, para. 96.

¹³⁷*Ibid.*, para. 88.

¹³⁸*Ibid.*, para. 89.

¹³⁹*Ibid.*

¹⁴⁰*Ibid.*, para. 96.

¹⁴¹*Situation in the Islamic Republic of Afghanistan*, Victims' Notice of Appeal of the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', ICC-02/17-38, Legal Representative of Victims, 10 June 2019, para. 22.

What seems difficult to reconcile in the Pre-Trial Chamber decision is, on one hand, the judges' claim that the ICC 'is a victim-centred court' and 'very concerned about them' and, on the other hand, the lack of acknowledgement that the authorization to start an investigation is more crucial for victims than any other decision taken by a Chamber of this Court. When the judges affirmed that the 'Chamber, which is sensitive to the victims' situation, has taken such a decision also in their interests',¹⁴² they seemed to disregard the major consequences that the authorization to open a formal investigation can have on victims. De facto, it is at this phase of the proceeding that the decisions that are most important for the victims, like the choice of the defendants to be prosecuted and the events to be investigated, are made. Those examples have illustrated the extent to which the discourse on victims becomes instrumental in pursuing justice as defined by judges or prosecution.

5.2 Framing an abstract victimhood

The rhetoric of the 'ideal victim' transcends the individual victim with his/her distinctive narrative. In the above-reported statements by the ICC Judges and Prosecutors, the victims are mainly referred to as an abstraction, 'the victim'. To a certain extent, this account of victimhood portrays the mass victimization nature of the crimes under the jurisdiction of the Court. International crimes often occur in situations of civil conflict that set community against community,¹⁴³ involving a large number of criminal actions committed against a group of individuals over a protracted period.¹⁴⁴ For instance, the norms of crimes against humanity refer to 'a widespread or systematic attack directed against any civilian population',¹⁴⁵ while the crime of genocide includes 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.¹⁴⁶ Article 8 of the RS on war crimes, by referring to acts against persons or property protected under the provisions of the relevant Geneva Conventions of 12 August 1949, seems not to involve collective victims in the sense above-discussed concerning crimes against humanity and genocide. However, the same article of the RS on war crimes, stating that the ICC has jurisdiction on war crimes 'when committed as part of a plan or policy or as part of a large-scale commission of such crimes',¹⁴⁷ expresses the need to prosecute such crimes in a systematic, rather than in an isolated way.¹⁴⁸ However, the collective nature of the victim does not correspond to an individual existing referent, but it rather captures victims as a 'homogeneous unity'¹⁴⁹ or, using Bourdieu's analysis on representative practices, it represents:

a series of juxtaposed individuals ... exist[ing] in the form of a fictitious person, a *corporatio*, a body, a mystical body incarnated in a social body, which itself transcends the biological bodies which compose it.¹⁵⁰

As a result, on one hand, the abstract victims become the 'untouchables' but, on the other hand, this abstraction cannot have any agency. With regards to the first remark, it needs to be observed that the individual suffering, whether physical or psychological, cannot easily be evaluated because it is a

¹⁴²*Situation in the Islamic Republic of Afghanistan*, Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, ICC-02/17-33, Pre-Trial Chamber II, 12 April 2019, para. 53.

¹⁴³See Massidda, *supra* note 101, at 4.

¹⁴⁴See Moffett, *supra* note 22, at 10.

¹⁴⁵See Rome Statute of the International Criminal Court, *supra* note 6, Art. 7.

¹⁴⁶*Ibid.*, Art. 6.

¹⁴⁷*Ibid.*, Art. 8.

¹⁴⁸See Sloane, *supra* note 23, at 7.

¹⁴⁹S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', (2013) 76 *Law and Contemporary Problems* 235, at 254.

¹⁵⁰P. Bourdieu, *Language and Symbolic Power* (1991), 208.

deeply personal experience. It becomes even more complex to assess and eventually challenge on trial the suffering of the abstract victim, because this collective suffering does not represent an individual pain that can be traced back to a single individual. As such, the construct of the abstract victim is convenient for justifying the work of the ICC, considering that it is hard to contest and question the claims made on behalf of such a highly symbolic entity. However, if it is true that 'the victim' confers authority to those who represent their interests, it is also true that abstraction cannot exercise any agency because it does not exist unless it is discursively represented. An abstract entity cannot contest its representation or articulate its desires.¹⁵¹ The concept of the abstract victim is based on the passivity and helplessness of victims, but, at the same time, reinforces this construct of the victim as there is the need for a subject to act for them and in their name.¹⁵²

The representation of an abstract victim is exacerbated by the practices of common legal representation (CLR) before the ICC. While Article 68(3) of the RS and Rule 90(1) of the Rules of Procedure and Evidence (RPE), respectively state that victims' views and concerns may be presented by legal representatives and victims are 'free to choose a legal representative', in the event of a wide number of prospective participants, Rule 90(2) of the RPE empowers the Chamber to request victims to choose a common legal representative. In *Bemba*, the Trial Chamber III, relying heavily on the criteria of the geographical location of the crimes, divided 1,335 victims into two groups represented by only two common legal representatives. Women's Initiatives for Gender Justice noted that the Chamber and the Registry in the appointment of common legal representatives did not take all reasonable steps to safeguard the distinct interest of the victims. The focus on the geographical criteria rather than on the nature of the crimes committed and the harm may not ensure that victims' interests are represented and that any conflict of interest is avoided. Particularly, with regard to those who are victims of sexual violence, there is no indication that the geographical criteria can 'serve the victims' interests in relation to the high number of victims of sexual violence expected to participate in the Bemba Case'.¹⁵³ In *Banda and Jerbo*, the appointment of the common legal representative has been particularly debated. The Trial Chamber IV approved the Registry proposal to represent all 89 victims by one legal team.¹⁵⁴ The Chamber was not persuaded that a conflict of interest between the Darfuri victims and the non-Darfuri victims exists which would justify a different grouping. Although the Chamber acknowledged that the Darfuri victims have particularities that distinguish them from other victims, namely they speak Arabic and are nationals of a non-party state, it 'does not *per se* imply that the two victims have distinct interests that would warrant separate representation'.¹⁵⁵ Such orientation towards practices of collective representation 'seems to rest on a problematic assumption that victims share largely homogenous interests in participation',¹⁵⁶ glossing over the range of potential interests that victims might have as well as the different ways those interests (such as justice and reparations) were to be understood. Despite common legal representation is closely related to issues of the fair trial right, such as efficiency, and appropriate expeditiousness of the proceedings,¹⁵⁷ it can be perceived as an attempt at masking the filtering of victims that are

¹⁵¹S. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (2012), 327, at 340.

¹⁵²M. Mutua, *Human Rights: A Political and Cultural Critique* (2002), 38.

¹⁵³Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', 2010, at 4, available at www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.

¹⁵⁴*Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Order Inviting the Registrar to Appoint a Common Legal Representative, ICC-02/05-03/09, Trial Chamber IV, 6 September 2011.

¹⁵⁵*Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on Common Legal Representation, ICC-02/05-03/09, Trial Chamber IV, 25 May 2012, para. 34.

¹⁵⁶E. Haslam and R. Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?', (2012) 12 *International Criminal Law Review* 871, at 888.

¹⁵⁷*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07, Trial Chamber II, 22 July 2009, paras. 10–11. See also *Prosecutor v. Jean-Pierre*

non-ideal from those that are ideal, as arguably occurred in *Banda and Jerbo* and *Bemba*, when victims tried to exercise agency in choosing their legal representative.

CLR narrows down the concept of victimhood in line with notions of the ideal victim, leaving 'very little space for victims to exert ownership or participation at the Court'.¹⁵⁸ It can be said that the CLR has the task of condensing victims' interests into 'generalizable interests'.¹⁵⁹ In practice, the CLR enjoys considerable discretion, because, in drawing the victims' 'generalizable interests', the representative filters, weighs and selects the diverging personal interests of the victims. This evaluation risks damaging some of the interests of individual victims, because of the diversity of interests that CLR represent, which sometimes may be paradoxically in conflict with each other. Bruno Latour referred to CLR as a 'mediator', rather than an 'intermediary'. The difference is that, while 'intermediaries' merely channel views, 'mediators' 'transform, translate distort, and modify that meaning of the elements they are supposed to carry'.¹⁶⁰ The CLR changes drastically the nature of the role of victims in the proceedings before the ICC because it contributes to developing the idea of an 'abstract collectivity' or, better, an abstract concept of victimhood. Participation through the CLR, which merges the interests and views of the individual victim within thousands of views of a broad number of victims, contributed to reinforcing the institutionalized concept of the ideal victim.

5.3 Exclusion of victims who do not conform to the 'ideal victim' model

The development and employment of a certain model of the 'ideal victim' can adequately depict the situation of victims, who 'draw on such frames, like meta-narratives more generally, to make sense and give meaning to their own situation'.¹⁶¹ However, some difficulties can arise for those victims whose stories do not conform to the model, as the frame used to portray victimhood determines who is a victim and who is not a victim and, consequently, which voices are heard in the courtroom and which are not. The construct of the ideal victim leads to a clear-cut and sometimes unrealistic distinction between victims and offenders. An emblematic example of this mechanism can be observed in the way the Court has dealt with the issue of child soldiers in *Lubanga* and *Ongwen*, which shows 'discomfort with victim-perpetrator concatenation'.¹⁶² The *Lubanga* case, where the defendant was found guilty of war crimes of conscripting and enlisting children under the age of 15 into the Patriotic Forces for the Liberation of Congo, and using them to participate actively in hostilities in Ituri (north-eastern DRC),¹⁶³ built a narrative based on the ongoing effect of being compelled as a child into a violent armed group. The Prosecution's emphasis on the crime of conscripting child soldiers and the constant reference to the harsh conditions they endured, sought to create a striking contrast between the defendant and his victims and eventually to amplify Mr. Lubanga's criminal liability. However, representing the child soldiers as innocent victims places the Prosecution in the difficult position of exposing conducts for which the victims can also be considered perpetrators. The narrative strategy put forward by the Prosecutor emphasized the lack of agency of the victims, as the child soldiers were

Bemba Gombo, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08, Trial Chamber III, 11 November 2010, para. 15; *Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, ICC-01/05-01/08, Trial Chamber III, 12 July 2010, para. 47.

¹⁵⁸R. Killean and L. Moffett, 'Victim Legal Representation before the ICC and ECCC', (2017) 15 *Journal of International Criminal Justice* 713, at 738.

¹⁵⁹See Kendall and Nouwen, *supra* note 149, at 250.

¹⁶⁰B. Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2007), 39.

¹⁶¹A. Pemberton, P. G. M. Aarten and E. Mulder, 'Stories as Property: Narrative Ownership as a Key Concept in Victims' Experiences with Criminal Justice', (2019) 19 *Criminology & Criminal Justice* 404, at 410.

¹⁶²M. A. Drumb, 'Victims Who Victimize', (2016) 4 *London Review of International Law* 217, at 242.

¹⁶³*Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, Trial Chamber II, 14 March 2012, para. 1358.

described as ‘those with the least power among us’.¹⁶⁴ The children conscripted by Lubanga were represented as ‘people who, if not supervised, lapse into criminality’¹⁶⁵ and whose naivety allows their will [to be] extracted by the warlord’.¹⁶⁶ This image of the helpless child is accentuated by the description of Congo as ‘a breeding ground where anyone can come and recruit potential child soldiers’ who, actually constituted ‘a time bomb’ since they were ‘ripe for the re-recruiting’.¹⁶⁷ Based on this delineation between victims and perpetrators, both the Trial and Appeals Chambers that adjudicated the *Lubanga* case constructed a linear and continuous bond between the then-child soldier and the present former child soldier. The experience of child soldiering was cast as ongoing, *de facto* turning the children into victims damaged for life, whose present reality derived from their previous suffering.¹⁶⁸

Quite the opposite, in the *Ongwen* case, the Court took a different approach when evaluating the link between Ongwen’s conduct as an adult and his experience as a kidnapped, orphaned, and abused child soldier. Ongwen’s path is peculiar among those of the defendants before the ICC since he has been convicted of the war crime of cruel treatment, conscription and use of child soldiers, and the crime against humanity of enslavement and sexual and gender-based violence,¹⁶⁹ but, at the same time, he suffered some of those crimes. Ongwen’s defence sought to link his conduct as an adult to the fact that, from the age of nine years old, he lived under duress and his ‘so-called rank was demonstrative of one thing: that he was surviving better than others while under duress’.¹⁷⁰ In rejecting the defence argument, the Pre-Trial Chamber II held that ‘the circumstances of Dominic Ongwen’s stay in the LRA . . . cannot be said to be beyond his control’ and that he ‘could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement LRA policies’.¹⁷¹ The Pre-Trial Chamber II dismissed Ongwen’s past as a child soldier, invalidating the entangled link between his childhood, specifically, the type of indoctrination that he received at such a young age, and his leading role in the LRA as an adult. Whereas *Ongwen* illustrates the circular nature of the victim and victimizer spectrum, the narrative of the Court failed in unpacking the complexities of child soldiering, favouring ‘the binary reductionism of criminal law’s categorism of the pure victim and ugly perpetrator’.¹⁷²

6. Concluding remarks

This article aimed to provide a different perspective on issues related to the role of victims’ voices in proceedings at the ICC. The starting point was laying out an understanding of the role of victims within the context of the expressivist model of international criminal justice and, specifically, focusing on its strand emphasizing the performative and communicative features of the trial. As the latter aims to counter the performance inherent in international crimes, victims become actors whose performative character is pivotal in re-enacting the crime in the form of the law, constructing reality by making sense of violence and transforming social conflict into the system of social representations that affirm legal authority.

¹⁶⁴See *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 123, at 35.

¹⁶⁵*Ibid.*, at 56.

¹⁶⁶*Ibid.*, at 58.

¹⁶⁷*Ibid.*, at 56.

¹⁶⁸See Drumbl, *supra* note 162, at 242.

¹⁶⁹*Prosecutor v. Dominic Ongwen*, Trial Judgment, ICC-02/04-01/15, Trial Chamber IX, 4 February 2021, para. 3116.

¹⁷⁰*Prosecutor v. Dominic Ongwen*, Further Redacted Version of ‘Defence Brief for the Confirmation of Charges Hearing’, filed on 18 January 2016, ICC-02/04-01/15, Pre-Trial Chamber II, 3 March 2016, para. 4.

¹⁷¹*Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges against Dominic Ongwen, ICC-0204-0115, Pre-Trial Chamber II, 23 March 2016, para. 154.

¹⁷²See Drumbl, *supra* note 162, at 240.

In providing an understanding of victims' contribution to structuring 'how the accounts of what happened unfold and are given meaning'¹⁷³ in the proceedings, this article has illustrated that victims' performance is procedurally constructed based on a specific idea of victimhood shaped by ICC's prosecutors, Judges, and victims' legal representatives. Highly influenced by the discourse on victimhood in the domestic context, the 'ideal victim' of international crimes has been pictured as weak, innocent, and dependent. This article suggested that this ideal image of the victim undermines the understanding of victims as the heterogeneous group that they are. The three attributes of victims presented here clash with the realities of victimhood, unjustly denying to some victims the status of 'victim' and consequently their rights to participate in the proceedings, as set in Article 68(3) of the Rome Statute. The idealized victim model emphasizes the link between a gendered image of victims, based on the 'womenandchildren'¹⁷⁴ construct, vulnerability, and lack of agency, implicitly cutting men out of the picture. Additionally, the representation of victimhood imposes undue burdens on victims who are required to comply with a high standard of blameworthiness, which goes as far as portraying victims almost exclusively as passive and involuntary objects of atrocious suffering.

The ICC's practices of representation of the ideal victim have put forward a rhetoric that justifies the whole endeavour of the Court as providing justice for victims, thus, vesting the judges and prosecutors with the authority to speak on their behalf. This article has identified three main procedural mechanisms, which serve victims' legal subordination to the ICC's Prosecution, Judges, and legal representatives. Through the appropriation of victims' interests; legal representation of abstract victimhood; and exclusion from the trial of those victims who do not conform to the model of the ideal victim, institutional actors at the ICC highly constrained victims' performance during the trial. They subordinate and pre-empt victims' narratives to the vision of justice that they decided to achieve, which generally focuses on the defendant's accountability in a manner that simplifies and distorts the complexity of victimhood.

In conclusion, this article, by throwing light on the extent to which the concept of victimhood developed in the ICC courtroom, has constrained and instrumentalized victims' narratives and performance at trial, calls for further research to study alternatives aimed at unsettling the model of the ideal victim. While this article does not offer prescriptive solutions, it has emphasized that victims' narration can potentially enhance the quality of the narrative shaped during the proceedings. Allowing victims to speak without complying with a given model, can provide them with a greater sense of justice and, most importantly, offer a broader view of the prevailing ideas, standards, and trends of victims' related issues on the international criminal justice horizon.

¹⁷³D. Buss, 'Knowing Women: Translating Patriarchy in International Criminal Law', (2014) 23 *Social & Legal Studies* 73, at 75.

¹⁷⁴See Orford, *supra* note 58, at 66.