Whose Number is it anyway?: Common Legal Representation, Consultations and the "Statistical Victim"

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Abstract

Ensuring effective and meaningful participation by large numbers of victims of international crimes continues to pose significant challenges for the International Criminal Court (ICC). This is evident in the implementation of provisions in the ICC's Rules of Procedure and Evidence concerning the appointment of lawyers to represent victim participants. These allow the Chamber to request victims to choose common representation. Making provision for victims to choose is, however, far easier than ensuring that that choice is appropriately achieved in practice. Typically the ICC's Registry consults with victims before presenting a report for consideration by the Chamber. These reports may, as in the proceedings in the Ntaganda case considered here, contain statistical indicators to express some of the outcomes of its consultations with victims. This practice, has, we suggest, resulted in the emergence of what can be termed the 'statistical victim'. Consultations with victims are important and welcome. However, we strike a cautionary note about the turn to statistics. The use of statistics can bolster institutional interests in debates about representation, thereby impacting upon the portrayal (and therefore the management) of dissent on the part of victim participants at the ICC. This is a matter of particular concern when what is at stake is how victims might be able to contest the current arrangements in place for their legal representation. In highlighting the emergence of the 'statistical victim' we seek to contribute to wider debates about the representation of victims in international criminal law as well as indirectly to discussions about measuring victim satisfaction.

1. Introduction

On 16 March 2015 the Registry of the International Criminal Court (ICC) issued a report on a set of consultations it had carried out with victim participants in the Ntaganda case.[1] This Report formed part of the process for determining what, if any, changes should be made to victims' legal representation for the trial phase of the proceedings. It recorded that 81% of the victim participants consulted indicated that they wished to continue with the arrangements for representation that the Chamber had earlier put in place for the pre-trial phase. The Report also noted other striking statistical information arising from the consultation exercise. Taking this and other factors into account the majority of the Trial Chamber decided that there were 'no compelling reasons' to replace the victims' current legal representatives with alternative counsel.[2] Expressing the results of consultations about arrangements for victims' legal representation numerically represents a new and interesting departure from existing practice, one which has featured – albeit less prominently - in other ICC cases.[3] We suggest this development heralds the potential advent of the 'statistical victim'.[4] The appearance of the statistical victim can be seen as a by-product of a well-intentioned desire to ensure that consultations with victim participants contribute to the choice of their legal representative.

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[1] Registry's Report on Consultations with Victims Pursuant to Decision ICC-01/04-02/06-449, Ntaganda (ICC-01/04-02/06-513), Registry, 16 March 2015 (hereafter the 'Registry's Report').

[2] Second decision on victims' participation in trial proceedings, Ntaganda (ICC-01/04-02/06-650), Trial Chamber VI, 16 June 2015, § 28 (hereafter the 'Second decision on victims' participation').

[3] See Directions on the conduct of the proceedings, Laurent Gbagbo and Charles Blé Goudè (ICC-02/11-01/15-205), Trial Chamber I, 3 August 2015, § 69; and First Report on Applications to Participate in the Proceedings, Ongwen (ICC-02/04-01/15-303), Registry, 18 September 2015.

[4] On the 'real' and 'imagined' victim see L. E. Fletcher, 'Refracted justice: The Imagined victim and the International Criminal Court' in C. De Vos, S Kendall and C. Stahn (eds), Contested Justice: The Politics and Practice of International Criminal Court Interventions (Cambridge: CUP, 2015) 302-325. On the 'juridified' and 'abstract' victim, see S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 Law and Contemporary Problems (2013) 235-262. On statistical indicators and human rights, see S. E. Merry, 'Measuring the World Indicators, Human Rights, and Global Governance', 52, Supplement 3, Current Anthropology (2011), S 83-95.

However, we suggest that the emergence of the statistical victim is not without its dangers. It contributes to a wider climate of institutional management within the ICC, which seeks to bridge the gap between the formal emphasis on victims' right to choose legal representation, on the one hand, and what the Registry and the Chambers regard as achievable in practice on the other. That is not to claim that the Court must never limit victim participation, nor is it to deny that one of the Court's important tasks is to balance the interests of different participants, including victims, in international criminal justice. However, how it sets about meeting the considerable challenges of doing this invites critical scrutiny. Statistics have a particular quality that can affect, in fundamental ways, the representation of what they seek to measure and portray. Within this context the emergence of the statistical victim can have the effect of shifting the terms of debates about representation in favour of institutional interests. Effective representation is vital to meaningful victim participation. Achieving it depends in no so small measure on involving victims as fully and directly as possible in choosing their representative. There is a risk that recording preferences statistically may do more to promote the appearance of choice than it does to help focus upon how best to realise its achievement in practice. By raising questions about the effect of the ICC's turn to statistical indicators we seek to contribute to ongoing scholarly discussions about the ways in which victims are represented in international criminal law,[5] as well as, albeit indirectly, to generate further discussion on how to measure victim satisfaction.

A key part of international criminal law's claim to authority and legitimacy has come to be linked to the idea that it represents and speaks for the interests of victims of international

[5] See, for example, Kendall and Nouwen, supra note 4. For an empirical study of representation practices at the ICC and ECCC, see R. Killean and L Moffett, 'Victim Legal Representation before the ICC and ECCC', 5 Journal of International Criminal Justice (2017) 1-28.

crime.[6] Victim participation at the ICC is one of the main sites for the realisation and testing of this claim. Despite the general enthusiasm with which the institution of victim participation was initially welcomed, it is widely accepted that in the years since it has become operational, the ICC has struggled to make victim participation effective. Questions of representation are central in this struggle. These questions operate on at least two different levels. Victims are highly represented subjects in a number of different senses. First, in most cases legal representation will be vital if victim participants are to participate effectively.[7] This is one of the many reasons why recent judicial developments at the ICC concerning the appointment of legal representatives for victims have proved to be controversial. Second, when different actors – whether they be intermediaries, judges, the Registry, counsel and NGOs - claim to speak for or about victims they make a depiction (explicitly or implicitly) of victims. These portrayals are, however, representations that may more or less reflect the actual victim(s) encompassed in these claims.[8] The argument put forward here - that the advent of the statistical victim has the potential to shift debates about representation in favour of institutional interests - draws on the practices of representation in each of these two, interlinked senses, namely: the practice of representation in the sense of the legal technique of speaking for another; and, the practice of representation in the sense of portraying another subject, in this case, victims at the ICC.

[6] See Kendall and Nouwen, supra note 4. On the tension between this claim and a 'shareholder' logic of international criminal justice see S. Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', 13 Journal of International Criminal Justice (2015) 113-134. On the constituencies of international criminal law and their invocations, see F. Mégret, 'In whose name? The ICC and the search for constituency in, C. De Vos, S. Kendall and C. Stahn (eds.), Contested Justice: The Politics and Practice of International Criminal Court Interventions (Cambridge: CUP, 2015) 23-45 (and, on victims more particularly, at 36-42).

[7] Not least because victims who are legally represented benefit from greater participatory rights, see Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Kony et al (ICC-02/04-01/05-134), Pre-Trial Chamber II, 1 February 2007, § 7.

[8] Fletcher, supra note 4, at 312-313. See further Killean and Moffett, supra note 5; W. G. Werner, '"We cannot allow ourselves to imagine what it all means": Documentary Practices and the International Criminal Court', 76 Law and Contemporary Problems (2013) 319-339; and C. Schwőbel-Patel, 'Spectacle in international criminal law: the fundraising image of victimhood', 4 London Review of International Law (2016) 247-274.

The article proceeds as follows. Section 2 traces the current legal position and practice surrounding the appointment of common legal representation at the ICC. The organisation of legal representation for victim participants at the ICC has become highly controlled and managerial. This tendency is likely to intensify as the search continues for ways to balance meaningful victim participation on the one hand against an efficient and fair trial on the other. The third section sets out the procedure that was followed for the arrangement of common legal representation in the trial phase in the Ntaganda case. This section explores the consultation exercise the Registry conducted with victims and, specifically, the way in which the Report the Registry presented to the Chamber expressed some of victims' views through the shorthand form of statistics. In the fourth section we identify potential pitfalls in relying upon statistics and argue that the recourse to statistical indicators to encapsulate victims' preferences has the potential to shift the balance of the debates concerning representation further towards institutional interests. This is especially concerning when what is at stake is the question of representing victims who contest the current arrangements about their legal representation. In these ways we sound a cautionary note about the emergence of the statistical victim. Notwithstanding its origins in a well-meant and important move to consult with victims, the focus on data may inadvertently deflect attention from the substantive challenge of how best to maximise victims' choice in the selection of their legal representative. The turn to statistics is not however without an ironic twist. The final section argues that by putting statistical indicators on the record, the emergence of the statistical victim has the paradoxical consequence of highlighting the existence of contestation about representation, enabling the figures to be read back against the Court.

2. The Challenges of Managing Representation under the Rome Statute

Effective legal representation is central to ensuring successful victim participation at the ICC. Providing such representation depends in part upon appointing high quality legal professionals who are accessible to victim participants. It follows that how victims are involved in selecting their lawyers is critical. However, perhaps surprisingly, the Rome Statute and Rules of Procedure and Evidence (RPE) contain relatively little about legal representation itself. Moreover, over time, the Court has increasingly come to construe the relevant provisions in ways that prioritise the managerial needs of the trial process, constrained, as they are, by budgetary and other resource pressures, over ensuring that victims are actively involved in selecting their own counsel.[9] Admittedly the institutional interest in delivering efficient and speedy trials is also likely to be in the interests of many victims. However, there remains a risk that the way the Court currently sets about implementing the provisions for the appointment of common legal representation, including the level of direct involvement of victims in the process, may have the effect of presenting victims' interests as homogenous, and of minimising the space for the expression of dissent. Excising the complex range of voices and perspectives from the legal record and decision-making processes can be problematic,[10] not just for individual victims, but also for international criminal justice more broadly.

[9] See E. Haslam and R. Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?', 12 International Criminal Law Review (2012) 871-903; M.-L. Hebert-Dolbec, 'Towards Bureaucratization: An Analysis of Common Legal Representation Practices Before the International Criminal Court', 34 Revue Quebecoise de Droit International (2015) 35-61; L. Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead', 16 International Criminal Law Review (2016) 995-1017; and S. Vasiliev, 'Victim Participation Revisited: What the ICC is Learning about Itself', in Carsten Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford: OUP, 2015), 1133-1201. On the 'neoliberal orientation' of international criminal law, see Kendall, supra note 6, at 117.

[10] See Haslam and Edmunds, supra note 9, at 886-889; and 'Victim participation, politics and the construction of victims at the international criminal court: Reflections on proceedings in Banda and Jerbo', 14(2) Melbourne Journal of International Law (2013) 727-747.

Choice of counsel is recognised in the ICC's legal framework. Rule 90(1) RPE ICC provides that victims are 'free to choose a legal representative'. However, under Rule 90(3) RPE ICC Chambers can request victims to choose a common legal representative. Although the Rule refers to the possibility of Registry assistance in making their choice, this assistance is not extensive.[11] Where victim participants are themselves unable to choose a common legal representative within a set time period, the Chamber can ask the Registry to select one for them. The Chambers decide when the effectiveness of the proceedings calls for such common legal representation. According to Rule 90(4) RPE ICC they must take into account the 'distinct interests of the victims' and avoid conflicts of interest. The emphasis in the text of Rule 90 RPE ICC might be taken to suggest that the standard procedure is that victims collectively select their representative(s) and the Court intervenes only as a default mechanism. But the institutional practice to date suggests otherwise.

Faced with growing numbers of victim participants since the Lubanga case, in which a relatively small number of victim participants were represented at the trial essentially by two teams,[12] the Chambers have increasingly instructed the Registry to devise a proposal on representation without first requesting victims to make their own selection and without charging the Registry to assist victims to do so.[13] The position is complicated further because Rule 90 RPE ICC is not the only legal power by which the Chamber may appoint common

[11] See Regulation 112 of the Registry ICC-BD/03-03, 6 March 2006 (Approved by the Presidency), as amended on 25 September 2006 and 4 December 2013.

[12] With four victims outside those teams being represented by the OPCV: Lubanga (ICC-01/04-01/06-T-105-ENG ET WT 1-63 NBT), Trial Chamber I, 22 January 2009, at 12-13. More recently, in the Al Mahdi case, Trial Chamber VIII accepted the six victims' choice of CLR: see Decision on Victim Participation at Trial and on Common Legal Representation of Victims, Al Mahdi (ICC-01/12-01-01/15-97-Red), Trial Chamber VIII, 8 June 2016, § 36-39, and Public Redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016, Al Mahdi (ICC-01/12-01-01/15-156-Red), Trial Chamber VIII, 12 August 2016, § 11.

[13] Haslam and Edmunds, supra note 9. For a recent survey that identifies three approaches to organising common legal representation in the ICC's case law, see Human Rights Watch, *Who Will Stand for Us? Victims'* Legal Representation at the ICC in the Ongwen Case and Beyond (2017), at 14-20, available on line at https://www.hrw.org/sites/default/files/report_pdf/ijongwen0817_web.pdf (visited 5 September 2017).

legal representation. It may instead prefer to rely on Regulation 80,[14] which allows it, in consultation with the Registrar, to make an appointment 'where the interests of justice so require.' Here, although the victims may be heard 'when appropriate', this stops short of creating a right for them to be consulted, and leaves the circumstances, nature and extent of their inclusion in the decision-making firmly within the control of the Chamber.[15]

Whilst the judges have yet to devise a uniform approach on what amounts to best practice in the process of appointing legal representatives,[16] common legal representation has become increasingly viewed as something of an unavoidable necessity. Typically, this has entailed the Court determining the criteria and identity of the victims' lawyers and putting in place such supporting field presence as it thinks appropriate. As the ICC continues to develop its practice it appears to favour bringing victims' legal representation 'in-house' by entrusting it to the Office of Public Counsel for the Victims (OPCV), in moves that are emblematic of a more institutionally managed approach to common legal representation and victim participation more generally. Such measures might be considered procedurally attractive to the extent that they minimise the number of lawyers appearing for victims in the courtroom

[14] Regulation 80(1), Regulations of the Court (2004), Official documents of the International Criminal Court Official ICC-BD/01-03-11. The Pre-Trial Chamber used this provision in Ntaganda: Decision concerning the organisation of the Common Legal Representation of Victims, Ntaganda (ICC-01/04-02/06-160), Pre-Trial Chamber II, 2 December 2013, at § 25. For some other instances where Reg 80 has been invoked, see Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, Laurent Gbagbo (ICC-02/11-01/11-138), Pre-Trial Chamber I, 4 June 2012, § 42 (where the Single Judge appointed the OPCV in preference to the Registry's proposal made under Rule 90(3) RPE ICC); Decision on victims' representation and participation, Ruto & Sang (ICC-01/09-01/11-460), Trial Chamber V, 3 October 2012, § 44; and Decision on Contested Victims' Applications for Participation, Legal Representation of Victims and their Procedural Rights, Ongwen (ICC-02/04-01/15-350, Pre-Trial chamber II, 27 November 2015, § 19.

[15] See further Human Rights Watch, supra note 13, at 18-20.

[16] By contrast with the way in which they have recently identified best practice in respect of the procedures for the admission of victim participants in proceedings, see Chambers Practice Manual, February 2016, available online at https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf (visited 5 September 2017), at 20. The Victims' Rights Working Group has proposed 'that the Manual be amended further to clarify the criteria and process for the appointment of legal representatives.': see VRWG, Recommendations to the 15th Session of the Assembly of State Parties, November 2016, available online at http://www.redress.org/downloads/publications/2016_VRWG_ASP.pdf (visited 5 September 2017), at 3.; and see also Human Rights Watch, supra note 13, at 54.

thereby reducing the volume of submissions and curtailing unwieldy and protracted trials that are detrimental to the ICC's standing and claims to legitimacy. That said, the reliance on common legal representation, and the increasing centralisation of the appointment process within the ICC, have proved to be controversial, not least because of the way in which these developments belie the emphasis on choice promised by the text of Rule 90 RPE ICC.[17] This divergence between the promise and reality of choice is also evident when the Court confines access to discretionary financial assistance from the Registry to instances where the common legal representative is chosen by the Court rather than by the victims themselves under Rule 90(1) RPE ICC.[18]

The institution-centric nature of these developments emphasises the importance of consulting with victims when common legal representation is being organised so that victims' interests can be incorporated into decision-making processes. Unsurprisingly then, calls have been made for greater consultation with victims in a bid 'to establish some understanding of victims' preferences regarding their legal representation.'[19] For Killean and Moffett the

[17] See, for instance, REDRESS, Representing Victims before the ICC: Recommendations on the Legal Representation System (2015); and Human Rights Watch, supra note 13.

[18] See Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of the victims, Ongwen (ICC-02/04-01/15-445), Trial Chamber IX, 26 May 2016; Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, Ongwen (ICC-02/04-01/15-350), Pre-Trial Chamber II, 27 November 2015, at § 18; and for tacit support in earlier decisions of other chambers, see Decision concerning the organisation of the Common Legal Representation of Victims, Ntaganda (ICC-01/04-02/06-160), Pre-Trial Chamber II, 2 December 2013, at §§ 23-24. Subsequently the Pre-Trial Chamber acknowledged that the Registrar could authorise financial assistance form the Court under Regulation 85(1), see Decision on the Registry's Request for the clarification on the Issue of Legal Assistance Paid by the court for the Legal Representatives of Victims, Ongwen (ICC-02/04-01/15-591), Trial Chamber IX, 14 November 2016; The Registry, exercising its discretion, subsequently found funding for the external counsel chosen by 2,600 of the 4,170 participating victims. See further, Killean and Moffett, supra note 5, at 16-17; and C. Denis, Victims' Choice vs. Legal Aid? Time for the ICC to Re-think Victims*'* Participation as a whole, Avocats San Frontieres, (2016) available on line at http://www.asf.be/wp-content/uploads/2016/05/ASF_VictimsParticipationAsAWhole_20160526_EN.pdf (visited 5 September 2017).

[19] Proposal for the common legal representation of victims, Laurent Gbagbo (ICC-02/11-01/11-120), Registry, 16 May 2012, § 5. An expert report commissioned by the Registry as part of a review of the Court's legal aid system has recommended a legal aid policy for victims' representation: R. J. Rogers, *Assessment of the ICC's* Legal Aid System, Global Diligence LLP, (January 2017) available on line at https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf (visited 5 September 2017).

capacity of victims to select a representative is a fundamental aspect of victims' legal agency.[20] However, consultations have not always taken place when appointments for common legal representation have been made. So, for instance,[21] in Banda, Trial Chamber V accepted the Registry's explanation that logistical and resource problems rendered the Registry unable to consult with victims to assist them to select a common legal representative(s) within the timeline set by the Chamber. It also accepted that the Registry might therefore draw on views that victims had expressed at an earlier stage of the proceedings.[22]

In interpreting the terms of the Rome Statute that make provision for the arrangement of common representation, the Chambers and Registry have lacked consistency, predictability and transparency about when and if consultation is to occur and the form any such consultation should take. In particular victims have not always been consulted directly. This is unfortunate. Consultations with victims about who is to represent their interests in the courtroom are important even though they give rise to challenges concerning their execution,[23] and in the usage of the information that is gathered from them. One concern is that whilst the Chambers' call for consultation, and, so, too, its consequential decision

[20] Drawing distinctions between legal, moral and political agency, Killean and Moffett argue that choosing a legal representative is an important part of the exercise of victims' legal agency and may also contribute to their moral agency, Killean and Moffett, supra note 5, at 10.
[21] There was also no consultation ahead of the Chambers' decision to alter the pre-trial arrangements for common legal representation for the purposes of the trial proceedings in each of the two Kenya cases, see: Ruto & Sang, supra note 19; and Decision on Victims' Representation and Participation, Muthaura and Kenyatta, (ICC-01/09-01/11-460), Trial Chamber V, 3 October 2012. See further, M. Pena and G. Carayon, 'Is the ICC Making the Most of victim Participation?', 7 The International Journal of Transnational Justice (2013) 518-535, at 532.
[22] See Decision on common legal representation, Banda (ICC-02/05-03/09-337), Trial Chamber IV, 25 May 2012; and Report on the implementation of the Chamber's order instructing the Registry to start consultations on the organisation of common legal representation, Banda (ICC-02/05-03/09-164-RED), Registry, 21 June 2011, §§ 13-14.
[23] In Ruto & Sang the Registry found it regrettable that 'resource constraints' and other work priorities meant it was only able to hold 'a tailored and specific consultation' with victims: Proposal for the common legal representation of victims, Ruto & Sang (ICC-01/09-01/11-243), Registry, 1 August 2011, § 8.

determining common legal representation, are invariably matters of public record, the same cannot always be said for the Registry's Reports on consultations.[24] It is therefore welcome that, although initially treated as confidential, the Registry's Report containing the consultation response that contributed to the determination of common legal representation for the confirmation of charges hearing and related proceedings in Ntaganda is now on the record.[25] The unavailability of such documents compounds the difficulty of assessing the consultation and its outcome, leaving, as it does, important gaps in the information about victim satisfaction as well as the indicators by which it was measured.

Other recurring points of contestation have also arisen in the course of proceedings to determine common legal representation. These include: determining the numbers of groups into which victims should be divided;[26] settling the appropriate balance between international and local personnel making up the legal team;[27] deciding if the OPCV should be appointed as an 'internal' common legal representative or whether an external lawyer who satisfies the ICC's eligibility criteria should be appointed.[28] Running through these debates is the question of what kinds of expertise and knowledge (such as international or local) are, and should be,

[24] See, for example, Proposal for the common legal representation of victims, Laurent Gbagbo (ICC-02/11-01/11-120), Registry, 16 May 2012, § 5.
[25] See Public Redacted version of the "Registry's Interim Report on the organisation of common legal representation" (ICC-01/04-02/06-141-Conf-Exp) dated 13 November 2013, Ntaganda (ICC-01/04-02/06-141-Red2), Registry, 4 August 2014.
[26] See Haslam & Edmunds, supra note 9, at 885. The presumptive approach favours having one group (see, for example, Decision on Victims' Participation and Victim's common Legal Representation at the Confirmation of Charges Hearing and in Related Proceedings, Laurent Gbagbo (ICC-02/11-01/11-138), Pre-Trial Chamber I, 4 June 2012, § 40) unless there are good reasons to the contrary.
[27] And whether the CLR should be the victims' primary point of contact locally with the OPCV attending most hearings on the CLR's behalf (see, for example, Decision on Victims Representation, Muthaura and Kenyatta (ICC-01/09-02/11-498), Trial Chamber V, 3 October 2012, §§ 40-44 and 70) or vice versa. For a critical perspective, see Judge Fulford, International Criminal Courts: Progress Made, Progress Needed (Sir Richard May Memorial Lecture, Chatham House, London, 29 October 2014), at 4. Summary available at https://www.chathamhouse.org/event/sir-richard-may-memorial-lecture-international-criminal-courts#sthash.8qU9kGji.dpuf (visited 5 September 2017).
[28] The controversy gained momentum because of reform proposals originally included as part of the ICC's ReVision project: see Walleyn, supra note 9, at 1014-15; FIDH, *Comments on the ICC Registrar's ReVision* proposals in relation to victims (2014) available on line at https://www.fidh.org/IMG/pdf/letter_registar_icc.pdf (visited 5 September 2017); and Judge Fulford, supra note 27, at 3-4.

prioritised. Here we develop one particular concern: the extent to which common legal representation impacts upon the scope for the expression of contestation by victim participants.[29] The possibility that the appointment of common legal representation could affect the expression of dissentient views on the part of victims in the course of proceedings prompts the need to consider how the dissent of victims, particularly dissent about current or potential representation, is depicted in this more managed approach to organising representation. This is a question that has come to the fore in Ntaganda with the appearance of the statistical victim.

3 Common Legal Representation in the Ntaganda Case and the Emergence of the Statistical Victim

Bosco Ntaganda has been charged with having committed 13 counts of crimes against humanity and five of war crimes between August 2002 and December 2003 during the conflict in the Ituri province of the Democratic Republic of the Congo (DRC). A large number of victims have sought to participate in the case: by June 2017, there were 2,144 who had the right to participate.[30] In May 2013, the Pre-Trial Chamber II ordered the Registry to conduct consultations with victim applicants to gauge their views about the appointment of legal representation for them during the pre-trial phase of the proceedings.[31] The Registry's Report included an analysis of victim applicants' views about legal representation expressed in the application forms of 462 applicants, who, it was anticipated, would constitute 'a significant proportion of the total applicants expected.'[32] Although the Registry carried out consultations in the field with victims and intermediaries, it explicitly noted that there were methodological reasons why these should not be viewed 'as a technical

[29] See Haslam and Edmunds, supra note 10.
[30] Seventh Periodic Report on the Victims and their General Situation, Ntaganda (ICC-01/04-02/06-1938), Registry, 6 June 2017, § 3.
[31] Decision Establishing Principles on the Victims' Application Process, Ntaganda (ICC-01/04-02/06-67), Pre-Trial Chamber II, 28 May 2013, § 46.
[32] Supra note 25, §7, at footnote 12.

survey of opinion'; and it noted its 'reservations on the representativeness and reliability of the results provided', recommending, therefore, that they should be considered 'as preliminary and for informative purposes only.'[33] In December 2013 Pre-Trial Chamber II accepted the Registry's recommendations for legal representation. The Registry had recommended the formation of two separate victim groupings for the purposes of legal representation, that is one set comprising former child soldier victims and the other consisting of victims of the attacks, each to be represented by its own separate legal team.[34] In line with a growing trend in the Court's practice, two counsel from within the ICC's OPCV were selected over external lawyers as common legal representatives,[35] and the Chamber provided that each of them should be assisted by field counsel based in the DRC who were appropriately equipped 'to communicate directly and closely with the victims on the ground'.[36] In putting these arrangements in place under Regulation 80, the Chamber rejected the explicit choice of six counsel that some of the victims had made when they had applied to participate in the proceedings. The Chamber took into account a number of factors, including the fact that victims had 'expressed divergent views' about representation,[37] 'the limited scope of the confirmation of charges hearing', and the potentially significant financial burden that paying for up to six counsel would place on the Court.[38]

[33] Ibid, at §7 (footnote 11). The Registry (ibid, § 9) supplemented its consultations in the field with victims and intermediaries by having recourse to the results of a survey with victim applicants that had been carried out by Avocats Sans Frontières, *Victims' Consultation on the Grouping for their Legal Representation in the Bosco Ntaganda case*, November 2013, available on line at http://www.uianet.org/sites/default/files/ASF_IJ_Grouping%20victims%20in%20the%20Bosco%20Ntaganda%20Case.pdf (visited 5 September 2017).
[34] Decision Concerning the organisation of the Common Legal Representation of Victims, Ntaganda (ICC-01/04-02/06-160), Pre-Trial Chamber II, 2 December 2013, §§10 and 23.
[35] Ibid., § 25. The OPCV had already indicated its ability and willingness to organise two teams if requested by the Chamber: see Decision Requesting the VRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of the charges hearing and in related proceedings, Ntaganda (ICC-01/04-02/06-150-Conf-Ex), Pre-Trial Chamber II, 20 November 2013, §§ 12-13; and Observations of the OPCV in accordance with the Single Judge's decision issued on 20 November 2013, Ntaganda (01/04-02/06-156), OPCV, 16 January 2014.
[36] Supra note 34, § 26.
[37] Ibid., § 23.
[38] Ibid., §§ 11 and 24.

As the case progressed beyond the pre-trial phase the question arose as to whether there was a need to modify the victims' existing representation arrangements. The Trial Chamber therefore asked the Registry to consult with those victims who had participated in the confirmation of charges stage about the prospect of their current legal representatives continuing to represent them, and to report back to the Chamber. As a result the Registry undertook a second consultation exercise between 25 February and 3 March 2015. This consultation involved following up group consultations with individual questionnaires. Then on 16 March 2015 the Registry issued its Report to the Chamber.[39] This report contained statistical information about preferences, with a headline finding that 81 % of the victims who had been consulted indicated that they wished to continue with the current arrangements for representation. At the same time the consultation revealed that: 10% wished to change legal representation; 14% were not happy with the quality of service; and 27% complained that there was not enough contact with their legal representative. Furthermore, 53% felt they were not given the opportunity to communicate their views to lawyers – with 1 in 4 women raising concerns about their ability to convey their views in a group.[40]

On 16 June 2015 the majority of the Chamber considered that there was no reason to depart from the current system on representation, in particular no reason to replace the current legal representatives with counsel from the DRC.[41] This was the case even though the Registry had actually recommended that the organisation of representation be modified 'to ensure closer proximity' between victims and counsel, and 'a more continuous flow of information'

[39] Registry's Report, supra note 1.
[40] A figure that Judge Ozaki emphasised in her dissenting opinion, Partly Dissenting Opinion of Judge Ozaki, Ntaganda (ICC-01/04/02/06-650-Anx), Trial Chamber VI, 16 June 2015, § 9.
[41] Second decision on victims' participation, supra note 2.

between lawyers and clients.[42] Although the Registry's consultation – and the statistical indicators it produced - was not the only justification the Chamber relied upon in settling the arrangements for common legal representation, it was one factor. The majority cited the Registry's survey of victim preferences to support its conclusion in favour of maintaining the status quo. It did so in general terms without commenting upon, or unpacking, the statistical details contained in the Registry's survey. Recognising that the survey captured the views of the sample under difficult circumstances, the majority:

> … considered it important that the vast majority of the victims consulted expressed the wish to retain the current LRVs, and a significant majority appears 'overall content' with their current legal representation.'[43]

Ultimately it found that there was no 'concrete reason' to modify a system that 'appeared to be functioning very well so far',[44] by appointing counsel from the DRC who were geographically closer to the victims.

There are other instances where the Registry has included statistical measures in its reports of consultations with victims about their legal representation. When the Registry carried out its consultation exercise in Prosecutor v Laurent Gbagbo and Charles Blè Goudé it reported that 91% of those victims who completed questionnaires expressed a wish to maintain the same representative for the Trial phase as had previously acted on their behalf.[45] The Chamber

[42] Registry's Report, supra note 1, at §§ 2 and 26.
[43] Second decision on victims' participation, supra note 2, at § 30.
[44] Ibid., § 31.
[45] Public Redacted version of "Registry's Report on the Legal Representation of Victims for the Purpose of the Trial pursuant to Decision ICC-02/11-01/11-800", notified on 30 April 2015, Laurent Gbagbo and Charles Blé Goudè (ICC-02/11-01/15-49-Conf-Exp), Registry, 15 May 2015, § 23. It also found that around 86% 'said they believed their legal representative represents them well': ibid., § 24.

noted the statistic.[46] Similarly, with the Report accompanying each batch of applications to participate in the pre-trial phase of the Ongwen case, the Registry supplied statistical information about victims' preferences regarding legal representation.[47] The Ntaganda case is therefore not the only one in which statistics have been used to capture the views and preferences of victims, but it is striking in terms of the detail and depth of the numerical data made available on the record. It may also signal something of a new departure in the way that the ICC consultation findings are depicted.

Statistics are being looked to elsewhere as a performance management tool at the ICC. Most notably the ICC is turning to quantitative measures as one aspect of its initiative to develop Court-wide performance indicators as a means to improve efficiency and 'demonstrate better its achievements and needs as well allowing State Parties to assess the Court's performance in a strategic manner….'[48] As part of this on-going project the number of victims assisted and represented by the OPCV and/or external representatives in each case is identified as a relevant indicator in determining the access victims have to the Court, [49] which is one of four goals currently being assessed.[50] The Court has deferred its consideration of establishing a

[46] Directions on the conduct of the proceedings, Laurent Gbagbo and Charles Blé Goudè (ICC-02/11-01/15-205), Trial Chamber I, 3 September 2015, § 69.
[47] First Report on Applications to Participate in Proceedings, Dominic Ongwen (ICC-02/04-01/15-303) Registry, 18 September 2015, §§ 21-23; Second Report on Applications to Participate in Proceedings, Dominic Ongwen (ICC-02/04-01/15-327), Registry, 26 October 2015, §§ 5-8; and Third Report on Applications to Participate in Proceedings, Dominic Ongwen (ICC-02/04-01/15-344), Registry, 18 November 2015, §§ 5-7.
[48] Strengthening the International Criminal Court and the Assembly of state Parties ICC-ASP/13/Res. 5, 17 December 2014, Annex I, § 7(b).
[49] Second Court's report on the development of performance indicators for the International Criminal Court (2016), available on line at https://www.icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf (visited 5 September 2017), at § 80 (c) and Annex IV II (hereafter 'Second Court's report'). Originally the goal to be assessed was expressed as 'adequate' access: Report of the Court on the development of performance indicators for the International Criminal Court (2015) available on line at https://www.icc-cpi.int/itemsDocuments/Court_report-development_of_performance_indicators-ENG.pdf (visited 5 September 2017), at § 7(d) (hereafter 'Report of the Court'). However the qualifier 'adequate' was 'abandoned' because of feedback that, as a term of art, the concept of 'access to justice' should not be qualified: Second Court's report, at footnote 5.
[50] For the other three goals see Report of the Court, supra, note 49, at § 7; and the Second Court's report, supra, note 49, at § 5.

further indicator 'regarding the selection of victim counsel and relevant consultations with clients' to the next phase of the project because of the 'diversity of relevant factors and limited availability of data'.[51] Therefore, when set in this broader context, what happened in the Ntaganda case invites more general consideration of the impact of the emergence of the statistical victim on practices concerning the representation of victims.

At one level, the determination of common legal representation in the Ntaganda case can be seen as supplying further evidence of a more managed approach towards the organisation of collective representation at the ICC. The production and use of such data may be a justifiable way to balance the Court's overall mandate of ensuring timely and fair proceedings whilst at the same time striving to fulfil the promise found in Rule 90(2) RPE ICC that victims are to choose, or be assisted in choosing, their lawyer. However, what is notable about this episode is how the institutional process for appointing common legal representatives for victims is bolstered by the creation of statistical indicators that purport to record victims' wishes. By relying in this way on the statistical data it has produced, the Court may have effected a shift in how the idea of choice should operate in the context of the RPE.

4 Representing the Victim Statistically

Capturing victim participants' views numerically may be seen as an efficient and attractive way to satisfy Rule 90(3) RPE ICC, at least when viewed from the perspective of a resource-limited institution that is under immense pressure to deliver timely and fair proceedings.

[51] Second Court's report, supra note 49, at § 83.

However, as this section shows, relying on statistics is riven with potential pitfalls. First, the Court has greater control over the production and deployment of statistical information than those from whom it obtains such information. Second, the reliance on a headline statistical figure may have the effect - albeit unintentionally – of minimising the significance of other important concerns victims may raise about their representation, or indeed their situation more generally. Third, the turn to statistics may have a subtle impact upon practices of legal representatives, in part because satisfaction ratings may come to be seen as an appraisal of legal representation, even if that is not their intended purpose. Fourth, statistical indicators can de-emphasise the broader political questions that underpin contestation about representation. Taken together the introduction and reliance upon statistical data can operate as an additional technology of institutional management, which has the potential to shift the terms of the debates concerning representation in favour of institutional interests.

A. Controlling the Production and Use of Statistics

The Court has greater control over how and what statistical information is collected, and how it is used, than those from whom it seeks the information. In the Ntaganda case the Registry framed the consultation questions, and it produced and supplied the resulting statistical data which the Chamber then drew upon as a contributory factor in making, or at least in support of, its decision to re-appoint the common legal representatives (CLRs). In effect then the ICC relied on statistical information it produced as part of the way it justified its practice around Rule 90 RPE ICC regarding victims' choice of legal representation. The key statistical indicator of 81% might be seen as a clear majority preference about representation, and therefore a neat way of encapsulating the support in favour of the outcome. This is presumably how the Registry and the Chamber understand the statistical measure. There

were, however, fundamental limitations to the consultation and survey that produced the statistical findings, some of which were acknowledged. First, the consultation was inevitably confined to only those victims who were already accepted as victim participants during the pre-trial stage, [52] therefore omitting the views of those – potentially large numbers - who might subsequently gain participatory rights. Second, understanding and interpreting the statistical results requires some analysis of the questions asked. The Victims Participation and Reparations Section (VPRS) devised a written questionnaire that the Registry used as part of its consultation exercise. In so doing, the VPRS sought advice from intermediaries who had been assisting the legal representatives on 'how best to frame the questions so as to be understood by the victims'.[53] As a result they settled on the following five questions:

> 1. Does the victim think that she/he has a good understanding of the case because of the explanations provided by the lawyer?
>
> 2. Does the victim have the opportunity to communicate his or her opinions to the lawyer?
>
> 3. Does the victim feel that the lawyer treats her/him with respect and consideration?
>
> 4. Is the victim happy with the quality of the services provided by the lawyer?
>
> 5. Does the victim want the lawyer to continue representing her/him in the proceedings? [54]

It is striking that victims were essentially being asked about their experience of the legal service they had received thus far, rather than being canvassed on any alternatives for their future representation, or being offered assistance in exercising a choice in the sense suggested

[52] Registry's Report, supra note 1, at § 6.
[53] Ibid., § 8.
[54] Ibid. (footnotes omitted).

by Rule 90 RPE ICC. None of the five questions included in the questionnaire are open-ended. Moreover, in varying degrees, they relate to the incumbent lawyers and the way they have conducted themselves professionally in representing their clients up to this point in the proceedings. That said, it seems that in the meetings with victims that preceded the administration of the questionnaire, the VPRS got a 'strong sense that the victims did have ideas about what they saw as important qualities, and what they wanted from their legal representatives'.[55] Whatever merits there may be in this set of closed questions, and however much care the Registry took in devising them, there is a risk that ultimately they reflect the views and assumptions of other actors, including the institution, about the interests of those being consulted. They may not therefore constitute the optimum vehicle for engaging victims as fully and directly as possible in selecting their legal representative.

Third, the Registry noted the general disempowerment experienced by many victims - an unspecified number - which negatively affected their ability to assess the calibre of representation.[56] They also considered that an insufficient number of meetings with their lawyer and a lack of information about their work at The Hague contributed to victims feeling uneasy about evaluating the experiences of their legal representatives.[57] Fourth, the timing of the consultation was problematic. It occurred when the legal proceedings had not given rise to many visits to victims on the ground.[58] Fifth, of the total of 1,120 victims who might have been consulted, 'practical challenges' of time and geography meant that the

[55] Ibid., § 14: 'These included frequent interactions, the opportunity for individual meetings, regular information, outcomes, being treated as individuals and not just another file, to feel that they are known personally by their lawyers and that their lawyer recognizes and understands their daily reality.'
[56] Ibid.
[57] Ibid.
[58] Ibid., at § 9. This point is echoed by the LRV in their observations on the Registry's Report: Public Redacted Version of the "Joint Submission on Issues Related to the Legal Representation of Victims", Ntaganda (ICC-01/04/02/06-532-Red), Office of Public Counsel for Victims, 24 June 2015 (hereafter 'Joint Submission'), at § 29.

Registry decided to try to meet a sample of 10-15 %.[59] The Registry's Report considered that this was 'broadly representative of the overall participating population'.[60] Yet, it is notable that as things turned out it was only able to consult with two women from the category of child soldiers. Finally, the Registry noted, amongst other things, that common legal representation is a 'complex and abstract concept for many victims',[61] and that there was a 'low level of understanding about the Court, the different actors of the Court, participation of victims and the role of common legal representatives'.[62] Indeed the questionnaire referred in generic terms to the victims' 'lawyer', it being 'too complicated to ask victims to make a distinction between the CLR from the OPCV and the Legal Assistant based in the DRC', a difference which the Registry reported was often not present in the responses it received.[63]

By itself then the headline figure of 81% provides at best a partial and incomplete picture because it excises the critical context in which it was obtained. When viewed in the wider context and circumstances of the survey, it becomes clear that it is no more than an imperfect representation of victims' views, and one which is likely to change over time. Statistics that create a majority and minority are themselves a representation of views that is sensitive both to time and context. The fact that opinions are susceptible to fluctuate in the course of legal proceedings and beyond, complicates future justifications for legal representation that are rooted in past statistical indicators. Admittedly, by detailing its methodology, the Registry's Report in the Ntaganda case acknowledges these factors that qualify the statistics it produces. However, over time it is likely that they will be forgotten, or become less visible and prominent than the headline indicators of victim preference.

[59] Registry's Report, supra note 1, at § 6.
[60] Ibid., at note 14.
[61] Ibid, at § 12.
[62] Ibid.
[63] Ibid, at notes 16 and 23.

B. Victims' Concerns Statistically Sidelined?

The deployment of statistics leaves a number of immediate questions unanswered such as how small a majority would have been regarded as enough to support the outcome; or, in other words, how low would the Court have been prepared to go in accepting the statistical indicator of preference? The lower the Court is prepared go the more collective victim representation – and therefore participation – becomes.[64] The reliance on statistics also brings an additional concern. Relying on a headline statistical figure may have the effect - albeit unintentionally – of minimising the significance of other important concerns victims may raise about their representation, or indeed their situation more generally. This is not simply a problem that results from the turn to statistical indicators. In undertaking their work at the Court legal representatives must arrive at a common position across a large number of victims. As the Chamber observed in its Second decision on victims' participation in the trial:

> …victims participating solely through a common legal representative only engage with the Court through that legal representative. In such cases, the LRVs must ultimately adopt a uniform position across a vast number of participating victims.[65]

The Chamber therefore appears to recognise, if not tacitly endorse, the fact that minority views are inevitable casualties in the representation of large numbers of victims. Yet, even if it is inescapable that some victims' concerns may be side-lined in this way, statistical indicators can compound this. The emergence of the statistical victim may therefore contribute to the view, that from the perspective of legal representation, a minority is seen as

[64] Discussing representation at the ECCC, Killean and Moffett observe that representation practices require us to ask 'who constitutes a party to the trial: the civil parties as individuals or a 'consolidated group'', Killean and Moffett, supra note 5, at 21.
[65] Supra note 2, at § 35. Emphasis added.

inevitable. This raises the question whether legal representatives will end up accepting the need to cater for the interests and concerns of 81% - or however low an indicator the Court is prepared to accept - assuming these interests and concerns can be identified. This is not a criticism of counsel. Rather, these comments are intended to highlight and spark a debate about the ways in which the emergence of the statistical victim may impact upon, and shift, expectations around representation.

C. Statistics and the Impact on Legal Representation

The Registry's consultation exercise was not designed to be an appraisal of the work the legal representatives had done;[66] and neither are our comments. But at the same time statistical and other satisfaction ratings can be viewed in that way. This becomes all the more unavoidable when, as in the Ntaganda case, decisions about appointments are made more than once, with a consultation taking place part way through the proceedings when victim participants have already been represented by counsel and their teams. Here the context of the appointing decision seems tantamount to determining if the existing lawyers should be replaced. A perception that the process may be viewed in this way gains traction when one remembers the terms of the five questions chosen by the Registry for its consultation with victims.[67] All this may well place their legal representatives in a potentially invidious position. In the Ntaganda case, the two existing victims' legal representatives produced a joint submission,[68] in which they responded to the Registry's Report. They emphasised that they had met with their clients and had checked with them that they were content with the arrangements for representation; and they claimed that the victims appreciated the work the legal

[66] A point Judge Ozaki makes in the preliminary remarks in her Partly Dissenting Opinion, supra note 40, at § 4.
[67] Registry's Report, supra note 1, at § 8 (set out, supra, in the text following note 53).
[68] Joint Submission, supra note 58.

representatives had done and felt that attention was given to their concerns.[69] The representative of the victims of the attack challenged the Registry's Report in so far as it questioned the accessibility and expertise of counsel in the field,[70] but, understandably, not its statistical findings about the victims' wishes or the way in which those statistical results had been derived. To this end, they, too, had recourse to statistical indicators to convey the nature and extent of their engagement with those they had been representing. In this way they recorded how they and the field counsel had travelled to Ituri 29 times to meet with victims in 2014; met 960 of the 980 victims of the attacks numerous times; and also held one or more meetings with 134 of the 140 child soldier victim participants involved in the pre-trial stage.[71] It is almost as if counting these interactions are effectively being used, to borrow the words of Sally Engle Merry from a different context, as 'proxies' for not measuring – or being able to measure - client satisfaction with the prevailing arrangements for legal representation more fully.[72]

All this raises the broader question of how might affected victims, whether consulted or not, be able to argue against the indicator and its use? Victims not only lack influence in how the statistical indicator is produced, they are not in a position to challenge it directly. The most obvious conduit for victims' objections is their legal representative. Yet, if their legal representatives' continued appointment is in question this may raise concerns about a conflict of interest and may result in legal representatives feeling the need to justify the ways in which they have conducted their duties.

[69] Ibid., § 21-22.
[70] Ibid., § 30
[71] Ibid., § 18.
[72] For example, Merry argues (supra note 4, at S 84) that NGOs faced with the need to measure 'increased awareness of human rights' resort to counting 'training sessions' as 'proxies for these accomplishments'. As part of its work on devising performance indicators at the ICC the Second Court's report has identified the '[d]egree of satisfaction expressed by victims about their participation' as an indicator that is 'inherently difficult to measure': Second court's report, supra note 49, at § 81(d).

D. Decontextulised Statistics

The turn to statistical indicators can de-emphasise the broader political questions that underpin contestation about representation, thereby contributing to more managerially driven decisions. As Sally Engle Merry argues, statistics 'replace judgments on the basis of the values or politics with apparently more rational decision-making on the basis of statistical information'.[73] In the Ntaganda case, a key question that ran through the judicial debate about representation - a question that divided the majority view from the minority - was whether local or international personnel should represent victims. This is a political question in its broadest sense.

In her partly dissenting opinion Judge Ozaki emphasised that 'proximity' of representation was key.[74] 'Proximity' of representation – in a broadly conceived sense [75] - was especially important because of the risk that victims' perspectives 'can become filtered out in the relay from a village in Ituri to the courtroom in The Hague'.[76] For these reasons she emphasised the potential importance of victims being represented by counsel who are independent of the court structure and based in the DRC not least because 'victims' interests may not always

[73] Merry, supra note 4, at S 85.
[74] For Judge Ozaki the existing legal representatives had been appointed for the confirmation of charges hearing only and whilst 'continuity of representation' throughout the proceedings was desirable, it was not determinative; and since the charges had been confirmed it was 'incumbent' on the Chamber to conduct a review: supra note 40, at § 2.
[75] Going beyond 'geographic closeness' and 'the accessibility of LRV to their clients' to include, 'importantly, the LRV's understanding of the culture, context, and personal situation of the victims – each being essential to the development of trust between the victims and their counsel': ibid., § 7. See also the Majority's reference to these considerations: Second decision on victims' participation, supra note 2, at § 29.
[76] Supra note 40, at §14. The majority also considered the importance of proximity but noted that proximity 'does not necessarily require physical proximity': Second decision on victims' participation, supra note 2, at § 28.

correspond to those of the Court as an institution'.[77] The appointment of representatives raises broader questions of fairness relating to the designation of local counsel as legal assistants within the LRV team structure when, ordinarily, 'it would be of mutual benefit both to the proceedings and to local counsel, for victim representation to be led from the ground'.[78] Clearly, the whole question of how to balance internal and external representation has become highly charged with the ICC's approach to it shifting over time. As the Registry's Report in the Ntaganda case recognises, different Chambers have taken different approaches to these matters in different cases.[79] Based on his interviews with lawyers and ICC staff for his expert report on legal aid at the ICC, Rogers observed that the:

> evolving and unpredictable nature of victims' representation has led to an unhealthy competition between the external counsel and the OPCV primarily relating to who should lead the representation and manage teams.[80]

These issues and concerns also formed a strand that ran through the debates surrounding the Registry's ReVision project's proposals, which initially included proposals to make the provision of in-house representation of victims the norm, and doing so within the broader context of the establishment of a single Victim's Office.[81] Although this plan for structural re-organisation is currently on hold,[82] the complex issues of policy and practicalities surrounding the appropriate model for victim representation at the ICC look set to remain

[77] Supra note 40, at §13.
[78] Ibid., at § 17. For the Registry's perspective, see Registry's Report, supra note 1, at § 24.
[79] Registry's Report, supra note 1, at § 4.
[80] Rogers, supra note 19, at § 279.
[81] Draft, Registry, ReVision Project: Basic Outline of Proposals to Establish Defence and Victims Offices (2014) available on line at http://www.uianet.org/sites/default/files/Registry_ReVision_BasicOutline_Defence_Victims_Offices_0.pdf (visited 5 September 2017), at 4-5.
[82] Registry, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court (2016) available on line at https://www.icc-cpi.int/legalAidConsultations?name=ICC-Registry-CR (visited 17 August 2017), at §§ 410-415, at 414. See further Walleyn, supra note 9; and Killean and Moffett, supra note 5, at 7.

contentious and in a state of flux for the foreseeable future.[83] However, what is abundantly clear is that these broader questions are not easily reducible to statistical evaluation, nor can they, or should they, be divorced from their practical and political context. This is particularly important because their determination undoubtedly impacts significantly upon the effectiveness of the representation provided.

5. An Ironic Twist

The Chambers' reliance on a majority, expressed in the form of a de-contextualised headline figure, risks glossing over dissenting views held by victims about their representation. At the same time the legitimacy of the consultations, upon which the managerial approach depends, requires some dissent. The result is that whilst consultations may contribute to the move towards a more managed approach to determining representation they have an additional and doubtless unintended consequence. They put on the legal record – in part through statistical indicators - the existence of dissentient voices about representation. These in turn present a significant and visible challenge to the more managerial and efficiency-driven legal climate. This opens up a gulf between the statistical victim and dissenting victim, a gulf that serves to challenge the extent to which the ICC's regime of victim participation can and does fulfil the claim of offering meaningful representation for victim participants. Admittedly, to some extent the explanation for this disconnect can be found in factors to which the legal representatives - and the Court – have limited capacity to respond. This much can be seen in the Ntaganda case where the legal representatives of the victims emphasised some of the challenges and obstacles in the way of the representation they had been able to provide in the

[83] As Rogers observes in his Report proposing reform to legal aid at the ICC, 'Finding the right system for victims' representation is not an easy task. There are few useful precedents if any. And each case tends to present new challenges. It is not surprising that judges have tested a range of models and that the Registrar's ReVision process has attracted a variety of views': Rogers, supra note 19, at § 274.

proceedings up until that point.[84] These included some of the expectations their clients expressed to them. For instance, as regards child soldier victims, their legal representative explained:

> Indeed, when meeting their lawyers, their first interest is not always to listen to the latest developments of the proceedings but for their lawyers to contribute financially to alleviate their daily struggles. The explanations provided as to why this is impossible might be seen by victims as a non-recognition or a refusal to understand their daily reality as suggested by the results of the consultation conducted by the Registry but the explanation is obviously very far from this perception.[85]

However reasonable the expectations victims have of the international community, and, more specifically the ICC, the gap between them and what is deliverable undoubtedly presents a significant and real challenge to providing representation in practice. As the other common legal representative, who had been appointed to represent victims of the attacks, pointed out, the representatives' obligation was 'not to address the primary needs of the victims due to the fact they had suffered repeated human rights violations over a long period of time' but 'the substantive issues related to victim participation'.[86] In this context it was observed that victims had 'wrong expectations', particularly around the tangible help they could expect from the Court at this stage.[87] Despite this, the representative thought that 'the victims in their majority have understood their interest to participate in the proceedings, as well as the need to

[84] To take another example from the broader context of representation, the Second Periodic Report on the Victims and Their General Situation emphasised that alongside their ongoing economic and psychological difficulties, many victims of the attack simply did not have the resources or access to telephones to communicate with their legal team. It also emphasised that not only had they received no help from TFV or NGOS, the security situation had forced many to relocate: Second Periodic Report on the Victims and Their General Situation, Ntaganda (ICC-01/04-02/06-889-AnxA), Registry, 6 October 2015.
[85] Joint Submission, supra note 58, at § 28.
[86] Ibid., § 39.
[87] Ibid., § 41.

contribute to the research for the truth.' [88] Clearly the role of the legal representative is directed at giving legal advice about participation and presenting his or her client's interests and concerns in the courtroom via the recognised procedural avenues. The challenge for the lawyer is to navigate the thin line between giving such legal advice, and doing so without glossing over victims' actual interests as victims' themselves perceive them. Victims' specific interests in participation may not always correspond with the legal rationale that underpins victim participation.

At one level this gulf that the Ntaganda case reveals between the ICC and the subjects of its practice may not tell us much that is new about the challenges of representing victims.[89] However, it is precisely through consultations with victims about how they are to be legally represented that many of these concerns, to which the ICC has only limited capacity to respond, are now permanently captured and documented. In some small way, then, these statistics may be read back against the Court, putting the limitations of international criminal justice firmly on the legal (and statistical) record.

6. Conclusion: The Way Ahead

How victims are represented in debates about their own representation plays a central role in determining the extent to which victims are treated as autonomous agents in international criminal law. This is equally true in respect of each of the two senses of what it means to be represented. How victims get a voice in decision-making processes about who is to legally

[88] Ibid., § 43.
[89] See further the Periodic Reports on Victims. Examples include the First Periodic Report on the Victims and Their General Situation, Ntaganda (ICC-01/4-02/06-632-AnxA), Registry, 8 June 2015; and the Second Periodic Report on the Victims and their General Situation, Ntaganda (ICC-01/04-02/06-889), Registry, 6 October 2015.

represent them, and how victims are depicted in such decision-making processes, are not matters that simply relate to the mechanics of the courtroom, nor are they confined to determining how to make the best of limited resources of institutional time and money. They are ultimately about the power to speak for and on behalf of victims, and they impact upon the way in which the ICC portrays victims both within its processes and also to the wider world. The sorts of consultations with a sample of victim participants that took place in the Ntaganda case might be considered welcome to the extent that they appear to involve those who are to be represented in the choice of who is to represent them. However, we sound a cautionary note about the recourse to statistics resulting from such consultations. Not only do figures produced by a consultation exercise of this kind necessarily remain, at best, a representation, but the emergence of the statistical victim also offers the potential to shift the terms of debates concerning representation in favour of institutional interests. This is because of the particular quality of statistics and indicators. The advent of the statistical victim, resulting as it does from a well-intentioned desire to ensure greater consultations about victims' wishes, has the potential to buttress a more managerial approach towards representation that is based on an institutional claim to be acting with the interests and wishes of the majority in mind. By its very nature the claim recognises that there may be a minority whose dissentient views about their representation may have to be sacrificed. This gulf between the statistical and dissenting (or contesting) victim poses a challenge to a system of victim participation that purports to rest upon the meaningful representation of its subjects.

The ICC must of course balance the interests of multiple participants in its quest to deliver timely and fair trials. This may lead the Court to devise managerial initiatives that may in

fact be, or which at the very least may be perceived to be, in tension with maximising meaningful participation for victims. Timely and fair trials are also very likely to be in the interests of many victims and not simply about ensuring the efficiency and effectiveness of the institution. Our argument is not that individual victims' interests necessarily can and should always take priority over the interests of other participants, including other victims. Nor is it contended that there is anything inherently antipathetic to fulfilling the Rome Statutes' mandate to victims, when the ICC, especially the Registry and Chambers, devise or adjust its operational practices to provide for collective legal representation in the court room. But it is important to reflect critically on such developments. In this respect our concern is with the value of using statistics as a technique of representing and resolving debates about the representation of victims. One response to this concern might be to more fully recognise and identify the pitfalls of relying on statistical indicators as a means of capturing the views of victims. On this view statistics, if deployed with care and in a way that explicitly acknowledges any contextual limitations, could play a constructive and meaningful role in measuring victim satisfaction, and perhaps other areas of international criminal justice. That said, even if attaching caveats to the published numerical data is feasible, continuing to record statistics may still be enough to carry with it the risks we have identified in this article. Admittedly these may appear to be relatively low-level risks, where, as in Ntaganda, statistical indicators are but one determinant that Chambers rely upon when making decisions about common legal representation, especially where such indicators are a subsidiary rather than a principal basis for the determination. Yet, it could prove problematic if their use in making these important decisions became more widespread and pronounced. Therefore the more preferable way forward is for the burgeoning deployment of statistics that record the outcome of consultations – even as subsidiary means – to be abandoned altogether. For, by creating the appearance of having successfully engaged with those being consulted, statistical

indicators may actually help deflect attention from where the focus needs to be, which is on how the Court can best organise and represent its consultations with victims.