

Secondary Victimization of SGBV Women at the ICC: Are Sexually Assaulted Victim-Witnesses Adequately Protected?

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Abstract

Sexual and gender-based violence (SGBV) is used in many conflicts as a weapon, often targeting vulnerable women. Being required to testify about this crime in person before the International Criminal Court (ICC) in the Netherlands can be deeply traumatizing. Victim-witnesses may suffer additional mental harm due to the process - known as secondary victimization, caused by the criminal process. This can result from confronting the perpetrator in court, lengthy processes and the fact that there are no permanent convictions in sexual violence. Getting reparations is also challenging. For the above reasons, this study examines whether existing mental protections are sufficient and recommends reforms where they are found lacking. Using a doctrinal approach and incorporating qualitative and critical analysis of relevant legislation and court practices, this research employs interdisciplinary sciences to form a holistic picture of the traumatizing factors for SGBV victims.

Although the current mental protection measures at the ICC may appear sufficient, victim experiences vary: some testify bravely, but others are retraumatized. Moreover, the protection is conditional, and the defendant's fair trial rights work against the victim-witnesses. With revised rules, protections could become more effective. Requiring an in-person testimony in The Hague is also unreasonable for SGBV victim-witnesses; instead, a single videotaped testimony should suffice. Streamlining victim scope and participation, as well as widening the use of videotaped first testimony in SGBV cases, would benefit the victim-witnesses. It would also secure the testimony, as well as the Court's future, as streamlining processes would save its resources, namely money.

Keywords: International Criminal Court, prevention of secondary victimization, Rome Statute, SGBV victim-witnesses, sufficiency evaluation, suggestions for improvement.

Introduction to Secondary Victimization of Sexually Assaulted Victim-Witnesses

The ICC, the first permanent court for atrocity crimes, complements national courts when they are unable or unwilling to prosecute (Funk, 2015). Funded by somewhat unwilling state contributions and a €160 million annual budget (Wiebelhaus-Brahm & Ainley, 2023), it aims to serve victims seeking justice, accountability, and restoration (Olásolo, 2009). SGBV includes abuse rooted in gender, such as sexual, physical, or psychological harm (UN OCHA, November 13, 2023). When these vulnerable victims testify before the Court, they may face secondary victimization due to the criminal proceedings (Criminology Review).

The Rome Statute (the RS) or International Criminal Law lacks explicit mention of secondary victimization (RS, 2021), and the ICC has no police force to offer physical protection (ICC, 2020), increasing the need for mental safeguards. Victim-witnesses, especially those of SGBV, face traumatization during long, complex trials (Orth, 2002). The process can cause psychological distress, particularly during pre-trial and

cross-examinations, where they may be blamed or shamed (Maier, 2008). Despite the ICC protocols and RS Article 68 *Protection of the victims and witnesses and their participation in the proceedings* (2021), these harms persist (ICC in general, RS, 2021).

Therefore, the preliminary argument suggests that requiring SGBV survivors to testify in person at the ICC may be unreasonable and damaging. Considering the above factors, the main research question reads as follows:

How does the ICC prevent secondary victimization of the SGBV victim-witnesses?

The causes for secondary victimization are numerous, and mainly, the Pre-Trial examinations and courtroom cross-examinations are the most difficult phases for the victim-witnesses. They can feel blamed and shamed for acting "promiscuous" and therefore, causing the rape (Maier, 2008).

Despite the Victims and Witnesses Unit's (VWU) support, the process, travelling abroad, testifying in a foreign court, facing perpetrators, and enduring cross-examination can be traumatic and risky (Ingadottir et al., 2000). Due to lessened believability factors in sexual violence, the perpetrator is not punished or is frankly acquitted, like Mr. Bemba, for example (ICC, June 15, 2018). This research finds that some ambiguities exist, like the gender-neutral approach in rape under e.g. Article 8(2)(b)(xxii)-1 of ICC *Elements of Crimes*. The Article in its footnote 50 reads that "invasion" is meant to encompass people of *any gender* (ICC, 2013). It may overlook the reality that women are most often the victims, potentially diminishing the focus on their experiences. To explain the atrocity of rape, for example, the ICC's *Elements of Crimes*, Article 7(1)(g)-1, *Crime against humanity of rape*, defines it as any non-consensual penetration, regardless of gender (ICC, 2013). For the above reasons, the sub-questions for this research are:

1. *Are the protective measures sufficient to prevent secondary victimization?*
2. *If inadequate, what could be done to prevent secondary victimization?*

Key concepts include secondary victimization, victim scope, participatory rights, and the testimony phase of SGBV survivors. There is some ambiguity concerning the victim scope, which seems to burden the Court. This is also the case with participatory rights, thus, the Rules of Procedure and Evidence (RPE), Rule 85 *Definition of Victims*, Article 68 *Protection of the victims and witnesses and their participation in the proceedings*, and VWU protocols are vital for this research. Moreover, the suspected offender may be referred to as the accused, suspect, or perpetrator after conviction; this research primarily uses the term 'defendant'. Italics are employed to emphasize conditional terms such as 'may' in victim protection.

Interdisciplinary Materials with Doctrinal Legal Method

This research employs a doctrinal approach, critically analyzing legal texts and academic literature through a qualitative lens. It draws on interdisciplinary fields such as criminology, psychology, and International Criminal Law to provide a broader perspective on women's grassroots-level vulnerabilities in criminal proceedings, recognizing that no single law can fully address women's issues. Recent scholars have increasingly adopted comparative and theoretical approaches to strengthen reform proposals (Hutchinson, 2015), which is also the goal of this research. By utilizing doctrinal legal research, this study critically examines legal texts and academic scholarship, focusing primarily on the Rome Statute as binding hard law. The interdisciplinary focus is on secondary victimization and SGBV victim-witnesses who have suffered sexual violence in peacetime, under RS Article 7 *Crimes against humanity* or Article 8 *War crimes* (RS, 2021). Particular attention will be directed to ICC pre-trial and courtroom proceedings, potentially supporting the preliminary argument.

Secondary Victimization: Charge Withdrawal and False Promises of Reparation

This research focuses on dual-status victim-witnesses, those who are both victims and witnesses - rather than the legal definition of rape. Although the RS has adopted a gender-neutral approach (Easterday, 2012), this study centres on female victim-witnesses and the psychological impact of participating in SGBV trials. Van den Wyngaert states that some victims testify bravely (2011), but the process frequently causes additional mental harm. The gender-neutral framework under Article 8(2)(b)(xxii)-1 of ICC *Elements of Crimes* (ICC, 2013) may, in fact, inadequately protect females in cases of atrocity. Secondary victimization arises more from the treatment by the justice system than from the crime itself (Criminology Review). While the term often refers to 'avoiding' secondary victimization, this research prefers 'preventing' to emphasize proactive measures in safeguarding victims' mental well-being. Despite efforts, secondary victimization still appears to be a prevalent phenomenon in criminal trials concerning SGBV cases. To reflect this, the term "SGBV victim-witnesses" is used, and secondary victimization is defined as:

"[a]ny harmful act perpetrated against a person's will [...]. SGBV includes acts that inflict physical, sexual or mental harm or suffering, threats, coercion and deprivations of liberty" (OCHA, May 6, 2019).

Victims should be treated with dignity and respect, with measures in place to protect their safety and mental well-being. Domestic laws should also ensure that victims of violence or trauma receive special care to prevent re-traumatization during legal and administrative processes (UNGA, December 16, 2005). The Latin principle *ne bis in idem* means that a person cannot be prosecuted more than once for the same crime, but "witness fatigue" occurs in criminal trials due to the contrary, namely repetition and delays (Conway, 2003; King et al, 2016). This research thus argues that victims frequently lack access to the same legal principles and protections afforded to perpetrators. Consequently, witnesses must wait for trials to begin or conclude, often testifying repeatedly, which causes significant emotional stress - particularly during the testimony phase (King et al., 2016).

Secondary victimization may accordingly arise from the high threshold of evidentiary proof required in court from SGBV victim-witnesses. While victims require protection, the prosecution must still present strong evidence to secure a conviction for sexual violence (de Brouwer, 2009). Even if the RPE provisions appear adequate on paper, they often fall short in practice (de Brouwer, 2009). Notably, this research finds that impunity is mentally harmful, especially at the ICC regarding atrocity crimes. The ICC did not deliver its first conviction for sexual violence until the Bemba case in 2016 (Altunjan, 2021), but it later overturned that conviction (ICC, June 15, 2018).

The Bemba case highlights several aspects of secondary victimization, including the protracted ICC proceedings and the large number of female victims. The alleged sexual

crimes occurred between 2002 and 2003 in the Central African Republic (ICC, March 2019). Proceedings began in July 2008, the trial opened in November 2010, and lasted four years, involving 5,229 victims. Mr. Bemba was sentenced in March 2016, only to be acquitted by the Appeals Chamber in June 2018 (ICC, March 2019). Accordingly, most victims were women and girls (ICC, March 21, 2016). One rape survivor of this case, who contracted HIV after being raped by more than 12 militants before losing consciousness, has waited over 15 years for reparations, stating that the ICC is merely “going around in circles” (International Federation for Human Rights, FIDH, November 2017).

The Rome Statute and the Court: Victim-Witness Participation and Protection

The ICC has a poor track record of securing convictions for SGBV crimes, a trend that continued in the Yekatom & Ngaïssona cases (Grey et al., July 3, 2020). The RS is also vague about the purpose of victim participation, yet ideally, it should clearly define when, how, and to what extent victims can participate. Still, participation may promote fairness and help prevent secondary victimization by treating victims with dignity and respect (Cryer et al., 2010). A former ICC judge views the victim participation system as a notable achievement in modern international criminal justice (van den Wyngaert, 2011). Yet, the ICC and ICTY have been criticized for treating victims more as tools than as people in these atrocity crimes, with cross-examinations often being especially traumatic and victims having limited participation in trials (van den Wyngaert, 2011). However, many victim-witnesses testified courageously, and cross-examinations were conducted with restraint, following Rule 88(5) *Special measure* and under judicial oversight. Despite broad participatory rights, only about a third of victims could attend trials (van den Wyngaert, 2011; ICC, 2024).

Burdening the Court: Tens of Thousands of Victims with Applications

The RS aims to prevent re-traumatization, but even simple tools like videotaped first testimony or visual shields depend on approval, limiting their use (see RS generally). Scholars similarly debate the ICC’s purpose and the extent of victims’ participatory rights. Olásolo argues that the ICC leaves SGBV victims without justice, as it has not been able to convict perpetrators of SGBV crimes (Olásolo, 2009). Accordingly, victim participation is conditional, with the Court deciding its scope (RS, 2021, Art. 68(3); Olásolo, 2009). The vague reference in Article 68 to victims’ interests - often diverse - adds complexity. Still, victims’ goals remain: crime verification, prosecution, and restorative justice (RS, Art. 68(3); Olásolo, 2009). While anonymity can limit victims’ procedural rights, they may be restored if needed. The RS’s broad definitions allow flexibility, enabling victims to submit evidence or join disclosure, thus shaping the proceedings (Olásolo, 2009).

A trial attorney from the ICC Office of the Prosecutor, Milaninia, notes that a key feature of the Court is empowering victims as participants, not just observers. However, defining

who qualifies as a victim has proven difficult, especially with *tens of thousands of applications* since 2006 (Milaninia, 2019). Between 2013 and 2018 alone, applications for participation or reparations rose from 4,288 to 12,509, placing a heavy workload on the Court. Once accepted, victims can participate in all proceedings and must be kept informed (Milaninia, 2019). Participation helps victims rebuild their lives, unlike at the ICTY and ICTR, where limited victim involvement led to perceptions of remoteness and bias. The victim scope also remains a challenge; even when some drafters of the RS pushed for a broad definition, this was not adopted due to limited state support (Milaninia, 2019). The RS also lacks a clear causality link between crimes and victims, and Rule 85(a), *Definition of victims*, defines victims simply as those harmed by *any* crime. This can allow, for example, war crime victims to participate in genocide trials (Milaninia, 2019; ICC, 2024). For this, the Lubanga Chamber distinguished between direct and indirect victims, including those harmed through their connection to a direct victim (Milaninia, 2019).

Victims also apply for reparations, which are legally possible, but often underfunded due to the *enormous number of victims* of international crimes. Still, victim advocacy and feminist movements have improved justice policies by highlighting secondary victimization, especially during cross-examinations (Garkawe, 2003). These efforts emphasize victims’ mental well-being and humane treatment, partly to prevent them from seeking justice independently. Feminist advocacy has also shaped how SGBV victims testify, influenced by conflicts in Bosnia and Rwanda (Garkawe, 2003).

Testing Victim-Witnesses: The Bureaucratization of Victim Participation

Many factors and provisions impact victims’ participatory rights, making the process very bureaucratic for both victims and the Court. Cryer et al. align with this, stating that while the RS introduced victim participation in international criminal proceedings, it has faced criticism (Cryer et al., 2010). Firstly, the victim scope is ambiguous. This research defines victim-witnesses as individuals who have experienced SGBV during armed conflict (war) or peacetime crimes against humanity, as defined in Article 7(1)(g)-1 *Crime against humanity rape* and Article 8(2)(b)(xxii)-1 *War crime of rape* (ICC, 2013). Yet, the United Nations General Assembly (UNGA) also includes victims’ families (ICC, 2024; UNGA, 1985). Secondly, even though Rule 85(b) outlines victims also as hospitals (ICC, 2024), the Office of Public Counsel for Victims describes victims’ participatory rights at the Court in two ways: victims without rights and dual-status victim-witnesses with procedural rights, also known as participating victims (ICC, 2019).

Thirdly, the participatory rights under Rule 89(1)-(2) *Application for participation of victims in the proceedings* are not automatic and require a written application (ICC, 2024). The Registrar collects and evaluates the participatory applications under Rule 89(1). Chamber, Prosecutor and/or Defence decide if the witness is allowed to testify (Cryer et al, 2010; ICC, 2024). Accordingly, all these parties can also

decide who will be granted victim-witness protection (Cryer et al., 2010). The sheer number of applications, as Milaninia explains, also burdens the Court (Milaninia, 2019). Fourthly, even when participation is granted under Rule 89, it is limited to opening and closing statements (ICC, 2024). Fifthly, the fair trial rights cannot be violated under Article 68(3), meaning that if the applicant's testimony undermines the defendant, this person cannot be given participatory rights [sic!] (RS, 2021).

Victim-Witness Participation by VWU Familiarization and Vulnerability Protocols: Conditional and Limited in Scope

In addition to legislation, the ICC includes protocols from the Victims and Witnesses Unit (VWU) for assessing victims' vulnerability and preparing victim-witnesses for trial (ICC, Victims before the Court). In the Bemba case, for example, the VWU sought separate Court approval to apply these measures under its document, *additional observations on protective measures for vulnerable witnesses* (ICC, October 25, 2010). The Trial Chamber III (Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo) approved the protocol, limiting its use to victim-witnesses giving oral testimony (ICC, November 18, 2010). Witness familiarization protocols, like the *Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial* in question, typically involve preparing victim-witnesses for testimony and allowing them to visit the courtroom in advance and become acquainted with the setting, including the use of technical equipment. A VWU psychologist *may* also assess and monitor them (ICC, October 8, 2020).

Vulnerability assessments are executed if there's a risk the witness may suffer mental harm from testifying. These evaluations help decide if procedural or special measures are needed (ICC, October 8, 2020). Familiarization is set to begin when the witness arrives in the Netherlands or when a video link is set up. Witnesses must consent to appear in court, and once there, they may review their prior statements to refresh their memory (ICC, October 8, 2020). In the Lubanga case, *the Prosecutor v. Thomas Lubanga Dyilo*, (ICC, March 13, 2012) and its witness familiarization process, witnesses read their statements at the VWU site in the Netherlands before pre-trial investigations. However, the VWU raised concerns about the large number of people present and the lengthy reading sessions (ICC, December 31, 2008).

Victim-witnesses undergo initial and follow-up psychological assessments to ensure they can safely testify, determine support needs, and establish contact with the VWU. At the testimony site, further checks confirm mental readiness and special requirements, with consent requested to share evaluation content, and additional protective steps follow under the *Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses* (ICC, August 10, 2022). After the witnesses' vulnerability is evaluated, the *Special measures* under Rule 88 *may* begin (ICC, 2024). It is noteworthy, though, that the language of Rule 88 is weak and non-obligatory, and the Court

is not legally bound to give *Special measures* to protect the victim-witnesses in all cases. Only Rule 88(5) contains legally binding language concerning the SGBV victim-witnesses:

"[a] Chamber *shall* be vigilant in controlling the manner of questioning a witness [...] of crimes of sexual violence" (ICC, 2024) (added enhancement in italics).

Special measures under ICC Rule 88 (2024) support vulnerable witnesses during and after testimony. A psychologist *may* monitor the victim-witness in court and intervene if needed (ICC, August 10, 2022). Post-testimony mental health support is available at the testimony location, with long-term care offered at the witness's residence if required. Practical tools include using curtains to block eye contact, video or audio links from safer locations, and limiting courtroom presence to essential personnel like judges (ICC, August 10, 2022).

VWU Protocols Reveal: Vulnerable Witnesses Often Face Re-Traumatization

Although the VWU protocols are designed to safeguard victims psychologically, they simultaneously underscore the ongoing risks that vulnerable witnesses face across the prosecuted cases. Even when VWU's protocols clearly refer to secondary victimization, the term is nevertheless absent. The VWU noted in the Lubanga case, for example, that even the act of reading their statements could re-traumatize the victim-witnesses and intensify psychological pressure (ICC, December 31, 2008). It becomes evident from the Bemba case - and similar VWU protocols - how secondarily traumatizing the testimony phase can be, despite extensive protective measures (ICC, October 25, 2010). These protocols explicitly acknowledge this, defining vulnerable witnesses as those at increased risk from testifying or who already face psychosocial challenges, regardless of testimony (ICC, August 10, 2022). Vulnerability may stem from trauma-related issues or the heinous nature of the crime, particularly in SGBV cases. Moreover, stress and anxiety can be heightened by protective measures such as relocation and by *fears of retaliation* (ICC, August 10, 2022).

Gaps in the Rome Statute and the Court: Secondary Victimization and Police Force

The victim protection stipulations under RS are dispersed across various regulations and protocols, making a holistic view challenging. The absence of provisions on secondary victimization further justifies this research's focus on victim protection. Cryer et al. emphasize that safeguarding victim-witnesses in international criminal jurisdictions, such as the ICC, presents significant challenges and complexities - both during proceedings and in the post-trial phase. Accordingly, relocation, for example, depends on the cooperation of Member States; a potentially simpler and more effective approach is to *minimize direct contact with vulnerable victim-witnesses as much as possible* (Cryer et al., 2010). Although domestic authorities generally accept RS rulings, the principle of complementarity makes national courts primarily responsible for international crimes, thus influencing the RS. Yet, victim protection faces compliance issues due to a lack of unity and

dedicated police, making the RS more morally than legally binding (Cryer et al., 2010).

The problem with secondary victimization is exemplified in cases where protective measures for victims are conditional and can be challenged by the defence - namely the alleged perpetrator and their legal counsel. The protection under Rule 87(1) *Protective measures* should be granted with the consent of the victim-witness, whenever possible (ICC, 2024). However, the defence has the right to object to these measures under Rules 87(2)(b) and 87(2)(d). Requests for protective measures *may* be submitted under seal, as provided by Rule 87(2)(e), and will remain confidential unless the Chamber decides to disclose them (ICC, 2024). Furthermore, under Rule 87(3)(a), the Chamber *may* withhold a witness's identity from the public or media if revealing it would endanger the witness's safety. Rule 88 has the potential to offer the strongest protections for SGBV victim-witnesses; however, Rule 88(1) makes the application of these protections conditional (ICC, 2024).

Victim-Witnesses Restricted Protection: Article 68 vs. Defendant's Fair Trial

Victim participation is complex due to the involvement of multiple parties, and all the conditional provisions, not to mention the fair trial rights for the defendant. According to Cryer et al., it is the responsibility of the Court to protect victim-witnesses, and protective measures are specifically active during Pre-Trial investigations. Special units, especially within the Registry, offer support to prevent secondary victimization (Cryer et al., 2010). The RS Article 68 *Protection of the victims and witnesses and their participation in the proceedings* and RPE Rules outline protection and participation rights, even though Article 68 contains only a few participation provisions (RS, 2021; ICC, 2024). The Court must consider, under Article 68(1), factors like age, gender, and crime type, especially in SGBV cases, to ensure victims' safety and well-being (RS, 2021).

The right to a fair trial, a key principle rooted in international human rights law, protects individuals from unlawful or arbitrary loss of basic freedoms, particularly life and liberty (Sudhir). This research indicates that this right appears to work against the victims at the ICC. The ICC Prosecutor must ensure protective measures for victims during investigations and trials without undermining the fair trial rights of the defendant. In SGBV cases, hearings *may* be conducted via camera to safeguard both victims and defendants (RS, Art. 68(2), 2021). Victims' views *may* be considered if the fair trial rights are maintained. The VWU *may* advise on protective measures, and the Prosecutor *may* withhold evidence that jeopardizes witnesses, offering summaries instead - without violating fair trial standards (RS, Art. 68(4)-(5), 2021). Under Rule 89(1), victims apply for participatory rights through the Registrar, who forwards the application to the Office of the Prosecutor (OTP) and the defence. The Chamber, defence, and OTP *may* dismiss applications under Rule 89(2) (ICC, 2024).

Concluded Key Shortcomings and Modifications to Existing Provisions

The findings of this research can be divided into two major groups, and in both, there is a potential for secondary victimization. These groups are, firstly, the procedural factors endangering victim protection, and secondly, sources of secondary victimization. Thus, the response to the first sub-question on sufficiency is that *protection is insufficient*. Current protective measures are often overextended and poorly targeted. The conditional nature of protection makes the situation even worse for vulnerable victims. To address the second sub-question, the appropriate remedy is to amend the existing provisions.

Procedural Factors of the Court Jeopardizing Victim Protection

The factors that jeopardize victim protection are procedural. Requiring vulnerable SGBV victim-witnesses to testify in person at The Hague is problematic for several reasons. The sheer number of direct and indirect victims (Milaninia, 2019) makes it difficult to implement adequate protective measures. Additionally, if the Court cannot confidently determine whether these individuals are victims of the current prosecuted crime (Milaninia, 2019), compelling their testimony wastes the Court's resources (money) and risks causing them psychological harm. Yet, the Court continues to restrict the recorded (videotaped) testimonies, maintaining a preference for in-person appearances even though protective measures remain conditional and limited (RS, 2021; ICC, 2024).

Procedural Factors Jeopardizing Victim Protection

1. Too wide: Victim scope and participatory rights
2. Too narrow: The use of prior videotaped testimonies and conditional protective measures

Figure 1: Procedural Factors that Jeopardize Victim Protection

Causes of Secondary Victimization: Only Reduction Possible

This research finds it impossible to completely prevent secondary victimization; thus, it is more realistic to aim for its reduction, as Oosterveld highlights. As illustrated below, secondary victimization at the individual level primarily stems from the lack of permanent convictions for sexual violence at the ICC (ICC, June 15, 2018), which undermines justice for SGBV victim-witnesses. The high evidentiary threshold, particularly in chaotic conflict settings (de Brouwer, 2009), and the difficulties in confirming that crimes were perpetrated (Olásolo, 2009) further hinder prosecution. Additionally, lengthy trials that take years burden victims, and obtaining reparations remains a significant challenge (FIDH, 2017).

Causes of Secondary Victimization

1. No permanent sentence in SGBV crimes at the ICC
2. Without verification of the crime = no prosecution
3. Long processes taking years = witness fatigue
4. High threshold of probability
5. No restoration

Figure 2: Sources of Secondary Victimization

Altering Victim Scope, Participation, Prior Recorded Testimony, and Protection

Boas emphasizes that shortening trials, a legacy of earlier tribunals, is key to reducing secondary victimization (2000). This research finds that bringing victim-witnesses to The Hague is costly and resource-intensive, particularly with mass participation. This diverts focus from the ICC's core punitive mandate and heightens the risk of secondary victimization - something even extensive VWU measures cannot fully mitigate. Major reforms to streamline proceedings would involve narrowing the scope of victims and limiting participatory rights. Expanding the use of videotaped initial testimonies (forensic psychologist Korkman interviewed by Lehtinen, May 11, 2021) and making victim protection unconditional would particularly benefit SGBV victim-witnesses. However, trial protection becomes less relevant if participation and victim scope are significantly restricted. Finally, mandatory training should be implemented, as advocated by Korkman (in Lehtinen, May 11, 2021).

Limiting Victim Scope: Only Humans who Have Directly Endured Harm

This research suggests that the ICC should limit the victim scope and victims' participation in proceedings under Rules 85(a)-(b) (ICC, 2024) to only human victim-witnesses with dual status, excluding indirect victims and institutions. Victims may participate in court proceedings only if they are directly harmed by the specific crimes currently being prosecuted. Bringing SGBV victim-witnesses to the Netherlands poses serious risks, including secondary victimization. Despite VWU support, the whole process of travelling abroad, testifying in a foreign court, facing perpetrators, and enduring cross-examination can be traumatic (Ingadottir et al., 2000). While mass victim participation is ideal, the ICC lacks the capacity to support all individuals, risking false expectations (Cryer, 2010). Instead, justice could be served through, for example, remote testimony from victims' home countries. For SGBV victims, the first testimony must be videotaped. Hence, the proposal is:

→ Correction to Rule 85: Victims are natural persons who have *personally* suffered harm as a *direct result of the crime currently under prosecution before the Court*.

Limiting Attendance: Only Victim-Witnesses of Presently Prosecuted Crimes

Modifications should be made to RS Article 68 and Rule 89 for participation, allowing only victim-witnesses with dual status to participate; other witnesses could testify in writing or

through other simple means. This would reasonably streamline the proceedings. Most likely, in these atrocity crimes, there will be plenty of witnesses to secure a conviction or a fair process. Referring to the narrowed victim scope mentioned previously, it would also apply to participation, meaning that only direct and natural victims, and only those who are victims of the currently prosecuted crimes, are allowed to participate. Accordingly, victims could participate in a single proceeding, with Internet access enabling them to witness justice in their own country:

→ Correction to Rule 89: Application for the participation of *victim-witnesses* in the proceedings

1. *Victim-witnesses* with *dual status* who are *natural persons* and who have *directly suffered harm* as a result of the commission of the crime being prosecuted at the Court, can apply for participation in *the specific case only*
2. The Chamber, Prosecutor, and defence can limit the *victim-witnesses'* participation
3. Participation will only be allowed in *one proceeding when testifying*
4. Other participation shall be enabled in the *victim-witnesses'* own safe location via the Internet

→ Correction to RS Article 68. Protection of the *victim-witnesses* and their participation in the proceedings [...]

Expanding Testimony: Videotaped Testimony as the Sole Testimony in SGBV

A key contribution is Korkman's prior videotaped testimonies (in Lehtinen, May 11, 2021), proposed as the sole testimony in SGBV cases. These recordings could streamline proceedings and reduce secondary victimization by avoiding repeated recounting and unnecessary contact. Korkman emphasizes that time erodes memory and, since court cases often span years, revisiting pretrial statements is crucial (in Lehtinen, May 11, 2021). Amending Rule 68 to permit videotaped testimony from SGBV victim-witnesses during pretrial investigations at the site, as per Korkman's suggestion (in Lehtinen, May 11, 2021), would preserve critical evidence. Supported by Cryer et al. (2010), this approach minimizes victim contact and secures testimony in cases of death or trauma-induced incapacity. Recordings would serve as *sole testimony*, and the victim-witness would be examined remotely by the Prosecutor, Judges, and defence via modern technology. As investigations already occur at crime sites, this would be both practical and protective, sparing thousands of vulnerable participants from travel. Most importantly, it would prevent Rule 68(2)(b) (ICC, 2024) from obstructing testimony, bolstering lasting convictions for sexual violence. Currently, Rule 68(2)(b) means that a prior recorded testimony cannot be used if it incriminates the accused:

“[T]he prior recorded testimony goes to proof of a matter *other than the acts and conduct of the accused* [...] (ICC, 2024) (added enhancement in italics).

This videotaped approach would allow SGBV victim-witnesses to testify without the fear and uncertainty of travelling to The Hague. It promotes greater equality, as current practices under

Rule 68 appear to prioritize the defendant's rights over those of the victims. While national laws usually prosecute single murders, ICC defendants may be responsible for thousands, yet seem to receive broader protections, like the fair trial principle, for example. In light of this imbalance, Rule 68 should be revised to read as follows:

→ Correction to Rule 68: the prior *videotaped* testimony of SGBV victim-witnesses *shall be recorded* at the Pre-Trial investigations and later used as the *only testimony in all proceedings*.

- The recording shall be conducted with modern technology allowing the SGBV victim-witness to stay in his or her own safe location, while the Prosecutor, Judges, and the defence can examine the victim-witness during the videotaping by the Court
- The prior recorded testimony goes to prove all matters, including the conduct of the accused
- The SGBV victim-witness shall thus only be questioned once, namely during the videotaping.

Expanding SGBV Victim-Witness Protection and Training Obligation for All

While ICC Rules 87 *Protective measures* and 88 *Special measures* provide protective measures, they are conditional. Rule 88(1) may allow special measures in SGBV cases, while Rule 87(3) includes good options like withholding the victim's identity, using voice and image distortion, electronic testimony, and pseudonyms (ICC, 2024). Thus, making Rule 88(1) unconditional is important in sexual violence. However, victims' protection in trials becomes less relevant if participation and victim scope are substantially restricted:

→ Correction to Rule 87(1): a Chamber *shall* order measures to protect SGBV victims-witness [...] on account of testimony [...]

→ Correction to Rule 88(1): a Chamber *shall*, [...], order special measures such as, but not limited to, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence.

Training should also be made obligatory for all who enter the Court dealing with sexual violence, as encouraged by Korkman (Lehtinen, May 11, 2021). This is especially the case with defence and the accused, and the logic is employed in hazardous workplaces. Rule 17(2)(a)(iv) already references training, and this modification makes it compulsory:

→ Correction to Rule 17(2)(a)(iv): *securing that all parties at the Court shall have the training to work with SGBV traumatised victim-witnesses [...]*

Final Conclusion: Confronting Secondary Victimization in SGBV Cases

It is not only that horrific crimes have been inflicted upon vulnerable women - often involving extreme violence, coercion, and degradation - but the justice process itself can further compound their suffering. Victims are subjected to invasive processes, leading to what is known as secondary victimization (ICC, December 31, 2008). As if enduring the initial trauma and possible secondary victimization were not enough, victim-witnesses can also fear retaliation both during the legal process and after the crimes have been committed (ICC, August 10, 2022). Consequently, the alleged perpetrator appears to be afforded more rights and protections than the victim-witnesses themselves.

It is also evident that ICC proceedings are long and costly, and transporting tens of thousands of trial participants to the Netherlands, particularly when many may not be directly connected to the crimes being prosecuted, represents a questionable use of limited resources. If Member States are increasingly reluctant to bear such high costs (Milaninia, 2019; Wiebelhaus-Brahm & Ainley, 2023), steps must be taken to ensure the Court's continued operation, with the emphasis on getting convictions. Victim scope and participatory rights are also too wide (RS, 2021; ICC, 2024), easily making the processes mentally harmful. Reducing both scopes and reforming testimonial procedures is essential: videotaped first victim-witness testimonies must be admissible as sole evidence in SGBV cases. These measures can uphold defendants' rights while improving victim treatment. Given that this current method of processing victim-witnesses appears costly and secondarily victimizing, should the ICC consider returning to purely punitive purposes?

The Bemba case sharply highlights these ICC challenges regarding secondary victimization. Although the crimes began in 2002, pre-trial proceedings commenced only in 2008, with the trial lasting from 2010 to 2018. Over 5,000 victims were registered, yet the final acquittal denied them closure (ICC, March 2019). One rape survivor, infected with HIV, spent 15 years seeking justice - only to receive none (FIDH, 2017). The lengthy process, repeated questioning, and lack of conviction turned the pursuit of justice into a prolonged trauma.

Impunity for sexual violence at the ICC partly derives from limitations on the use of prior recorded testimony and fair trial rights for the defendant. Requiring in-person testimony in The Hague can inflict additional trauma, particularly in SGBV cases, reports VWU (ICC, August 10, 2022). Alternatives, such as videotaping the initial testimonies, as proposed by Korkman (in Lehtinen, May 11, 2021) and minimizing further contact, as supported by Cryer et al. (2010), could better protect victims' well-being without compromising evidence. While legal principles like 'in dubio pro reo' protect defendants, no equivalent safeguards exist for vulnerable victims. Thus, why not 'in dubio pro victima'?

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