Prosecution of War Crimes in Australia: Prospects for Victim Participation

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ABSTRACT

An Office of Special Investigator has been established to investigate alleged war crimes committed by Australian Defence Force personnel in Afghanistan. The development follows an unprecedented investigation by the Inspector-General of the Australian Defence Force into alleged criminal conduct of Australian Special Forces. While the investigations to date have been extensive, there has been little public discussion regarding the participation of victims and their families in the investigations and their ability to participate in the potential criminal prosecutions. This article outlines the legal jurisdictions in which Australian Defence Force personnel could be prosecuted in Australia and explores the legal framework for victim participation in those jurisdictions, including alternative third-party participation avenues such as amicus curiae and intervener applications.

The limited participation rights available for victims in Australian proceedings is contrasted with the wide-ranging participation rights that victims have in proceedings before the International Criminal Court. The underlying principles of the victim participation model at the ICC is explored as well as criticisms of the ICC model. In assessing both jurisdictions, the article considers the status of the victim in the proceedings; the stage of proceedings at which victims are permitted to participate; the scope of the victims' ability to contribute; the provision of legal representation; and the overall impact victims can have on the outcome of proceedings. Insights are drawn from the practical experience of victims in each jurisdiction including the physical location of trials, the process and scope for requesting reparations, the relative complexity of each victim participation model and the likely delay victims would encounter when attempting to participate in each jurisdiction. The article concludes that, while the ICC model for participation is subject to many criticisms, it provides greater agency and control for victims than the participation model provided in the Australian legal system. Overall, the ability of Afghan victims to meaningfully participate in potential criminal proceedings in Australia will be limited.

Keywords: Australian war crimes prosecutions, victim participation, victim reparations, third party intervention, amicus curiae, intervenors, International Criminal Court

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Introduction

Australia has launched a landmark special investigation into alleged war crimes committed by Australian Defence Force (ADF) personnel in Afghanistan.[1] The announcement of the investigation followed an extensive report prepared by the Inspector-General of the Australian Defence Force confirming that there is substance to recent rumours and allegations of criminal conduct by Australian Special Forces in Afghanistan (IGADF Report).[2] The report is based on five years of investigations by the Australian Defence Force into allegations of unlawful killings, inhuman treatment of prisoners, competition killings, cover-ups of unlawful conduct and other atrocities.[3] Incidents of interest involve a total of thirty-nine individuals killed and a further two cruelly treated, and implicate twenty-five ADF personnel as perpetrators.[4] The IGADF Report provides a detailed account of the investigative process that was followed during the inquiry.[5] It involved the review of over 20,000 documents and 25,000 images and the interview of 423 witnesses.[6] There is limited information in the IGADF Report on the extent to which victims and their families have been included in the investigations.[7] Some advocates have criticized the inquiry for failing to properly include victims and their families, with reports that families of victims were not interviewed or were not made aware that the IGADF Report was being released.[8] Advocates have called for greater participatory rights for victims and

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[1] "Joint media release with the Hon Scott Morrison MP and Senator the Hon Linda Reynolds CSC - Statement on IGADF inquiry", *Ministers for the Department of Home Affairs*, 12 November 2020, available at: https://minister.homeaffairs.gov.au/peterdutton/Pages/statement-on-igadf-inquiry.aspx (all internet references were accessed on 2 September 2021).

[2] Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, 10 November 2020, available at: https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf ("IGADF Report").

[3] *Ibid.*, pp. 3-4 and 49-50.

[4] *Ibid.*, p. 29.

[5] *Ibid.*, pp. 126-143.

[6] *Ibid.*, p. 37.

[7] *Ibid.*, p. 131 and 136. The IGADF Report states that an in-country call for information was not done in Afghanistan. Instead, the inquiry sought to obtain key documents, complaints and leads from liaison with external bodies, including United Nations Assistance Mission Afghanistan, International Committee of the Red Cross, the North Atlantic Treaty Organisation and the Office of the Prosecutor, International Criminal Court. The IGADF Report states that the inquiry sat in Kabul for a month in 2019 "to hear evidence from a number of Afghan nationals who could give evidence of relevance to the Inquiry."

[8] See Housnia Shams, "Much more' than 39 alleged unlawful SAS killings in Afghanistan, victims' families say", *ABC*, 27 November 2020, available at: https://www.abc.net.au/news/2020-11-27/families-of-slain-afghan-victims-say-many-more-killed-sas/12926592.

their families in further investigation procedures and the potential resulting criminal prosecutions.[9]

The extent to which victims can participate in a criminal prosecution process varies across countries and jurisdictions.[10] It can simply mean the provision of information on procedures and processes under the legal system, or entail obligations on the part of criminal justice agencies to request and consider victims' preferences regarding prosecutor decision-making. It can involve providing a victim an opportunity to be heard about the impact that a crime has had on their lives in order to influence sentencing decisions or providing a victim the opportunity to request reparation for loss and damage suffered. In more robust participation models, victims may be allowed to appear in court, provide evidence, make submissions and/or cross-examine witnesses.

This article provides an outline of the Australian legal framework for victim participation in potential war crime prosecutions of ADF personnel. It starts with an overview of the jurisdictions in which the alleged perpetrators could be prosecuted and the relevant procedural rules for victim participation. Thereafter, it explores the limited opportunities for victim participation available in the relevant Australian jurisdictions, including the difficulty of pursuing alternative third-party participation avenues such as *amicus curiae* and intervener applications. Such limited prospects for victim participation in Australia is contrasted with the extensive opportunities for victims to participate in criminal proceedings at the International Criminal Court (ICC). The underlying principles of the victim participation model at the ICC is explored as well as criticisms of the ICC model.

Background to war crimes investigations

The Australian contribution to the International Security Assistance Force in Afghanistan lasted from approximately 2001 to 2014.[11] The deployments were largely drawn from the Special Air Service Regiment, the Commando Regiment and the Special Operations Engineer Regiment.[12] The role of the Australian forces was to destroy terrorist networks in Afghanistan including disrupting Taliban command and

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[9] *Ibid*. See also Eva Buzo, "Australia, the Rome Statute and the War Crimes Proceedings: Where are the Victims", *Opinio Juris*, 30 June 2020, available at: https://opiniojuris.org/ 2020/06/30/australia-the-rome-statute-and-the-warcrimes-proceedings-where-are-the-victims/.

[10] See Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process", Consultation Paper, July 2015, available at: https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims_of_Crime_consultation_paper_for_web_0.pdf.

[11] IGADF Report, above note 2, pp. 243-251.

[12] *Ibid.*, p. 26.

supply routes, conducting combat patrols of remote regions and conducting reconnaissance and surveillance operations.[13] From approximately 2015 onwards, rumours of war crimes began to emerge in the Special Forces community.[14] The allegations primarily concerned unlawful killings and mistreatment of detainees.[15] The then Special Operations Commander commissioned a cultural review of the Command.[16] The reports prepared detailed "'deeply concerning norms' within Australian Special Forces, including the shift from 'unacceptable behaviour' to war crimes; the glorifying of these crimes as being a 'good' soldier; 'competition killing' and 'blood lust'; the inhumane and unnecessary treatment of prisoners; and cover-ups of unlawful killings and other atrocities".[17]

At the request by the Chief of Army, the IGADF in 2016 appointed a judge of the New South Wales (NSW) Court of Appeal to begin an inquiry to ascertain whether there was substance to the rumours and allegations.[18] Following an approximately four and a half year inquiry, Justice Major General Brereton wrote to the IGADF on 29 October 2020, confirming, in short, that there was substance to the rumours.[19] The inquiry found that there is credible information of twenty-three incidents in which one or more non-combatants or persons *hors de combat* were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors de combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment.[20] The incidents involved thirty-nine individuals killed and a further two cruelly treated, and implicated twenty-five ADF personnel as perpetrators.[21] The inquiry also found that there is credible information that some members of the Special Operations Task Group carried out "throwdowns"–foreign weapons or equipment to be placed with the bodies of "enemy killed in action" for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target.[22] Following the delivery of the IGADF Report, the Australian Prime Minister announced that a special investigator would be appointed to examine

[13] *Ibid.*, pp. 243-251.
[14] *Ibid.*, p. 119.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.* pp. 119-122.
[18] *Ibid.*, pp. 45-46.
[19] *Ibid.*, pp. 10-11.
[20] *Ibid.*, pp. 28-29.
[21] *Ibid.*, p. 29.
[22] *Ibid.*

its findings and, if appropriate, refer briefs of evidence for prosecution.[23] The Special Investigator and the Director-General of the Office of the Special Investigator were appointed in December 2020 with the office formally established in January 2021.[24]

Jurisdiction for prosecution in Australia

In order to assess the extent to which Afghan victims and their families could participate in potential war crime prosecutions of ADF personnel in Australia, it is necessary to determine the range of possible jurisdictions for these types of prosecutions. There are two jurisdictions under which the conduct detailed in the IGADF Report could be prosecuted. The first is a prosecution by the Director of Military Prosecutions (DMP) under the Defence Force Discipline Act 1982 (Cth) and the second is a prosecution by the Commonwealth Director of Public Prosecutions (CDPP) under the Criminal Code Act 1995 (Cth). While both jurisdictions are considered below, the Office of the Special Investigator has confirmed that it will focus on preparing briefs of evidence for referral to the CDPP for prosecution where appropriate.

Defence Force Discipline Act 1982 (Cth)

The Defence Force Discipline Act 1982 (Cth) (DFDA) is the primary legislation that establishes the service discipline component of the Australian military justice system, and is applicable to all branches of the ADF: the Australian Army, Royal Australian Navy and Royal Australian Air Force.[25] The DFDA defines, amongst other things, disciplinary offences,[26] and the mechanics and powers of the service tribunals that have the jurisdiction to try disciplinary offences.[27] The DFDA applies to ADF personnel conduct outside Australia and there is no doubt as to its application to the

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[23] Joint media release with the Hon Scott Morrison MP and Senator the Hon Linda Reynolds CSC, above note 1. Note however that in the course of the IGADF investigations, a number of "exceptional" matters were already referred by the Chief of the Defence Force and the Minister for Defence to the Australian Federal Police. See IGADF Report, above note 2, p. 129.

[24] Department of Home Affairs Media Release, "Office of the Special Investigator", 16 December 2020, available at: https://minister.homeaffairs.gov.au/peterdutton/Pages/office-of-the-special-investigator.aspx#:~:text=%E2%80%8BThe%20Morrison%20Government%20has,Office%20of%20the%20Special% 20Investigator.

[25] Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth), pp. 1-2.

[26] Defence Force Discipline Act 1982 (Cth), pt III (DFDA).

[27] *Ibid.,* pts VII-VIII.

conflict in Afghanistan.[28] Part III of the DFDA contains a range of disciplinary offences which can be divided into three broad categories:

- unique military offences, for example, "endangering morale", (s 18) or "prejudicial conduct" (s 60);
- offences based on civilian offences, such as assault (s 33); and
- "territory offences", which operate under s 61 of the *DFDA*.

Section 61(3) of the DFDA states:

A person who is a defence member or a defence civilian commits an offence if:

(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

Criminal Code Act 1995 (Cth)

The Criminal Code Act 1995 (Cth) (Criminal Code) codifies the general principles of criminal responsibility under laws of the Commonwealth. In 2002, the Commonwealth Parliament passed the International Criminal Court (Consequential Amendments) Act 2002 (Cth) to amend the Criminal Code in order to incorporate international crimes recognised by the ICC into Australian law. These offences include war crimes, crimes against humanity and genocide.[29] The amendments took effect on 26 September 2002 and were therefore applicable throughout the relevant period of the ADF's deployment in Afghanistan. Under Division 268 of the Criminal Code as inserted in 2002, Australia can prosecute individuals suspected of committing offences regardless of where, or by whom, the crimes were committed and whether the crimes were committed against Australian citizens or Australian

[28] *Ibid.,* s 9. See also IGADF Report, above note 2, p. 282.

[29] These crimes were incorporated into Australian domestic law in order to fulfil Australia's obligations under the Rome Statute, which it ratified on 1 July 2002: Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

property.[30] The consent of the Commonwealth Attorney-General is required to prosecute offences under Division 268 and offences can only be prosecuted in the name of the Attorney-General.[31]

While private citizens can institute private prosecutions for Commonwealth offences, the High Court has confirmed that this does not include the war crime offences under Division 268. In Taylor v. Attorney-General (Cth),[32] a private citizen attempted to bring a private prosecution for crimes against humanity against the Minister of the Office of the President and Foreign Minister of the Republic of the Union of Myanmar, Aung San Suu Kyi. The plaintiff sought the Commonwealth Attorney-General's consent to the commencement of the prosecution. The Attorney-General refused and the matter came before the High Court. The majority of the High Court noted that it was not legally open to the Attorney-General to consent to the private prosecution and held that persons with the capacity to prosecute an offence against Division 268 is limited to: the person for the time being holding or occupying the office of Attorney-General; such other Ministers or members of the Executive Council as the Attorney-General might authorize to prosecute; and such other persons who might have authority conferred on them to prosecute in the name of the Attorney-General, including the CDPP under s 9(1) of the Director of Public Prosecutions Act 1983 (Cth).[33] In other words, private citizens cannot institute private prosecutions for the war crime offences under Division 268.

Jurisdiction for prosecution

Depending on the nature of the preferred offences, alleged perpetrators could be prosecuted by: 1) the DMP before a service tribunal such as a court martial for: offences under the DFDA, or offences under the Crimes Act 1900 (ACT) or Division 268 of the Criminal Code (pursuant to territory offences provision in s 61(3) of the DFDA); or 2) the CDPP in a State or Territory court for offences under Division 268 of the Criminal Code. In a prosecution by the DMP under a Division 268 offence as a territory offence, both the consent of the Commonwealth Attorney-General and the CDPP would be required.[34] If prosecuted by the DMP for territory offences under the Crimes Act 1900 (ACT), the alleged perpetrators could be prosecuted for offences

[30] Sections 15.4 and 268.117 of the *Criminal Code* provide that the relevant offences under Division 268 are subject to "extended geographical jurisdiction" (Category D jurisdiction), which is the most extensive scheme of geographical jurisdiction available under the Code.

[31] Criminal Code, s 268.121.

[32] (2019) 372 ALR 58.

[33] *Ibid.* 583 (Kiefel CJ, Bell, Gageler And Keane JJ).

[34] Criminal Code, s 268.121(1); DFDA, s 63.

such as murder (s 12), manslaughter (s 15), intentionally inflicting grievous bodily harm (s 19), or assault occasioning actual bodily harm (s 24). If prosecuted by the DMP or the CDPP for offences under the Criminal Code, the alleged perpetrators could be prosecuted for war crimes under Subdivision F and G of Division 268.[35] These include the war crimes of murder, torture and cruel treatment.

As regards prosecutions for offences under the DFDA, some commentators have suggested that, with the ratification of the Rome Statute, the use of DFDA service offences to prosecute Rome Statute war crimes committed by ADF members may be inadequate for purposes of complementarity. This is, first, because it may be difficult to find a "matching" ordinary crime for certain ICC crimes and, second, because the sentencing regime for an ordinary crime may not be of sufficient gravity for Rome Statute crimes.[36] The IGADF Report notes:

> It is, therefore, at the very least arguable that prosecution as a Service offence (for example, s33A - assault occasioning actual bodily harm), of conduct that could come within the scope of a Criminal Code Division 268 offence (for example, 268.74 War crime - outrages upon personal dignity), could be problematic from the perspective of complementarity.[37]

The IGADF Report suggests that the use of the s 61 territory offences mechanism, with its direct linkage to the substantive offences in Division 268, might offer a safer course of action to satisfy complementarity requirements.[38] If prosecutions are to occur, it will be by the CDPP under the Criminal Code in the civilian criminal courts, rather than as service offences or in service tribunals.[39] This is consistent with the recommendation in the IGADF Report.[40] The reason provided was that:

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[35] The crimes set out in Subdivision F and G of Division 268 concern war crimes committed in the course of an armed conflict that is not an international armed conflict.

[36] Timothy McCormack, Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14 March 2001, 134, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/icc/hearin gs.htm. See also: Jann Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law", *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 95-97.

[37] IGADF Report, above note 2, p. 284.

[38] *Ibid.*

[39] Office of the Special Investigator Opening Statement, Additional Estimates Opening Statement, 22 March 2021, available at: https://www.osi.gov.au/news-and-resources/additional-estimates-22-march-2021.

[40] IGADF Report, above note 2, pp. 284 and 285.

> some of the suspected perpetrators are no longer serving and thus not amenable to DFDA jurisdiction, that there are considerable overlaps in the conduct and individuals in question so that a single agency should be responsible for any criminal investigation, avoiding any potential problem with complementarity, and any arguable constitutional complication (for example, with the constitutional guarantee under s 80 of trial by jury).[41]

Legal framework for victim participation

Opportunities for victim participation under the DFDA and the Criminal Code is limited. This reduced role for victims is reflected in several aspects described below, including: the circumscribed status of the victim in the proceedings; the late stage of the proceedings at which victims are permitted to participate; the confined scope of the victims' ability to contribute; the lack of formal legal representation provided to victims; and the overall limited impact that victims can have on the outcome of the proceedings. These constraints arise from Australia's common law tradition whereby the investigation, prosecution and punishment of crimes is controlled by the State. The State performs this role in the interest of the community, which includes vindication for the victim. However, the criminal trial is ultimately an adversarial contest between the State and the accused and the overriding element of state control inevitably pits the power of the State against the individual accused. The rules of criminal procedure are thus focused on protecting the accused's interests within this power imbalance to ensure that there is "equality of arms".[42] Victims are not parties to the legal proceedings and do not have a seat at the bar table during the prosecution proceedings in order to protect the accused's right to a fair trial including, in particular, the accused's right to the presumption of innocence.[43]

In the previous five decades, criminal justice systems in common law jurisdictions such as Australia have been criticised for their treatment of victims.[44] Advocates have argued that the exclusion of victims from the prosecution process

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[41] *Ibid.*

[42] See Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process", Report, August 2016, para. 3.30, available at: http://lawreform.vic. gov.au/sites/default/files/VLRC_Victims%20Of%20Crime-Report-W_0.pdf.

[43] *Ibid.*, para 3.32.

[44] See Bree Cook, Fiona David and Anna Grant, "Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia", *Research and Public Policy Series*, No 19, 1999, pp. 81–4.

renders victims marginalized, voiceless and demoralized.[45] Following a growing victims' rights movement in common law countries, some limited reforms have been gradually implemented to increase the participatory rights of victims. At the federal level in Australia, such reforms include the ability of victims to provide victim impact statements outlining the impact of the offence on the victim and the ability to make requests for reparations from the convicted offender during sentencing hearings. The reforms also include prosecution policies which require prosecutors to consult more widely with victims regarding key decisions in the prosecution process. These reforms are reflected in the victim participation provisions of the Criminal Code and CDPP policies, and to a lesser extent in the DFDA and DMP policies.

Prosecution by the CDPP under the Criminal Code

During the trial process in a prosecution by the CDPP or the DMP, the status of the victim is generally limited to that of a witness who gives evidence on behalf of the prosecution. If a victim is not a witness, they have no formal role at all. There are a number of CDPP policies and procedures which require the CDPP to informally consult with victims and witnesses in federal criminal prosecutions. For example, the Prosecution Policy of the Commonwealth sets out guidelines for the making of decisions in the prosecution process.[46] It defines a victim of crime as an individual who has suffered harm as the direct result of an offence or offences committed against Commonwealth law or prosecuted by Commonwealth authorities.[47] "Harm" includes physical or mental injury, emotional suffering or economic loss.[48] Where available and "appropriate", the policy requires the views of any victims to be considered and taken into account when deciding whether it is in the public interest to: commence a prosecution; discontinue a prosecution; agree to a plea negotiation; or decline to proceed with a prosecution after a committal.[49] Similarly, the CDPP Victims of Crime Policy states that victims should, "on request", be kept informed of the progress of the prosecution in a timely manner, including: a decision to commence a prosecution (and the charges laid); a decision not to commence a

[45] See Erin O'Hara, "Victim Participation in the Criminal Process", *Journal of Law & Policy*, Vol. 13, 2005, 239-40. See also, Rachel King, "Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences from Crime Victims", *University of Cincinnati Law Review*, Vol. 68, 2000, p. 362.

[46] Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, *Guidelines for the Making of Decisions in the Prosecution Process*, available at: https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf.

[47] *Ibid.*, para. 5.2.

[48] *Ibid.*

[49] *Ibid.*, para 5.3.

prosecution; the date and place of hearing of any charges laid; the outcome of any bail proceedings; plea negotiations; and the outcome of proceedings, including appeal proceedings.[50] The CDPP also has a Witness Assistance Service which provides assistance nationally to witnesses and victims of Commonwealth crimes.[51] The number of victims and/or witnesses who can be provided with a direct service is restricted.[52]

Pre-conviction and sentencing, the participation of victims in the proceedings is thus limited to informal consultation by the prosecution as required by the various CDPP policies. If the accused(s) are convicted, then only at that late stage of the proceedings does the ability of a victim to participate in the proceedings increase, in that the victim may provide a victim impact statement and make a request for financial reparations during the sentencing hearing. These opportunities are clear in a CDPP prosecution but less clear in a prosecution by the DMP. If the alleged perpetrators are prosecuted by the CDPP, the matter(s) will be heard before a State or Territory court.[53] State or Territory laws will therefore apply ''so far as they are applicable''.[54]

The Crimes Act 1914 (Cth) (Crimes Act) sets out the federal provisions for the prosecution and sentencing of federal offenders. The sentencing principles are set out in Part IB thereof, particularly in s 16A. The extensive nature of the provisions of Part 1B generally leave limited scope for State or Territory laws to apply.[55] Section 16A(2) of the Crimes Act sets out a non-exhaustive list of matters to which the court must have regard when passing sentence. These include matters which are of relevance to victims such as: the nature and circumstances of the offence (s 16A(2)(a)); the personal circumstances of any victim of the offence (s 16A(2)(d)); any injury, loss or damage resulting from the offence (s 16A(2)(e)); and any victim impact statement (s 16A(2)(ea)).

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[50] Commonwealth Director of Public Prosecutions, *Victims of Crime Policy,* para. 4, available at: https://www.cdpp.gov.au/sites/default/files/Victims%20of%20Crime%20Policy_0.pdf.

[51] Commonwealth Director of Public Prosecutions, *Victims and Witnesses* (Web Page), available at: https://www.cdpp.gov.au/victims-and-witnesses.

[52] Commonwealth Director of Public Prosecutions, *Witness Assistance Service Referral Guidelines,* July2021, para. 2, available at: https://www.cdpp.gov.au/sites/default/files/2021%20WAS-Referral-Guidelines.pdf.

[53] Judiciary Act 1903 (Cth), ss 68(1) and 68(2).

[54] *Ibid.* s 68(1).

[55] In *R v Pham* (2015) 256 CLR 550, the majority observed at [22], ''[t]o the extent that Pt IB of the *Crimes Act 1914* (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the Crimes Act is exclusive'' (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground).

Victim impact statements

Section 16AAA and s 16AB of the Crimes Act set out the provisions on the receipt of victim impact statements during sentencing. These sections were inserted into the Crimes Act by the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth). These amendments therefore only apply to offences committed, or alleged to have been committed, on or after 29 June 2013. A victim impact statement can be made by the victim, a member of the victim's family if the court gives leave, or a person appointed by the court.[56] The statement must describe the impact of the offence on the victim, including details of the harm suffered by the victim as a result of the offence.[57] A court sentencing a federal offender for offences committed, or alleged to have been committed prior to 29 June 2013, could receive victim impact statements by relying on a general power at common law to receive information as it thinks fit to enable it to impose a proper sentence.[58] The CDPP has also relied on sections 16A(2)(d) and (e) of the Crimes Act, and on applied State and Territory legislation, to enable a victim impact statement to be tendered.[59]

Reparation orders

If a person is convicted of a federal offence, s 21B of the Crimes Act enables the court to make a reparation order in respect of any loss suffered or expenses incurred "by reason of the offence". A court may order reparation "to any person, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the person by reason of the offence".[60] Before a reparation order can be made there must be "a close or significant connection" between the loss and the offence which caused it. This will not be made out where a "secondary loss occurs by way of a ripple effect".[61] The CDPP has the discretion to decide whether to ask the court to make a

[56] Crimes Act, s 16AAA(a).

[57] Crimes Act, s 16AAA(b).

[58] Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners*, First edition, 2018, para. 161, available at: https://www.cdpp.gov.au/sites/default/files/Sentencing%20of%20Federal%20Offenders%20in%20Australia%20-%20a%20Guide%20for%20Practitioners_300718.pdf.

[59] *Ibid.*

[60] Crimes Act, s 21B(1)(d).

[61] R v. Foster [2009] 1 Qd R 53 [74].

reparation order on behalf of a victim[62] while the court has discretion as to whether to make a reparation order and the amount of the order.

The provision of a victim impact statement and requests for reparations represent the very limited apex of victim participation in criminal prosecutions in Australia. Even where such an opportunity does arise because a conviction has been secured, the impact of participation is limited in that the discretion to request reparations remains ultimately a prosecutorial decision and the victim impact statement is but one of several factors considered by a judge when handing down a sentence.

Prosecution by the DMP under the DFDA

Similar to CDPP Prosecution Policy, the Prosecution Policy of the DMP contains some requirements for the DMP to informally consult with complainants regarding prosecution decisions under the DFDA.[63] For example, in deciding whether charges under the DFDA should be pursued, one of the factors the DMP may consider is the "interests of the complainant" including the effect upon the complainant of proceeding or not proceeding with a charge.[64] Where practicable, the policy states that the views of the complainant will be sought and taken into account in decisions to discontinue a prosecution and whether or not to agree to a plea proposal made by the accused.[65]

Unlike the Criminal Code, there are no express provisions in the DFDA which provide victims an opportunity to participate in prosecutions. However, victim participation may be possible under the following sentencing provisions. Section 70 of the DFDA sets out the sentencing principles to be followed by a tribunal:

> (1) A service tribunal, in determining what action under this Part should be taken in relation to a convicted person, shall have regard to:
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> (a) the principles of sentencing applied by the civil courts, from time to time; and

[62] Commonwealth Director of Public Prosecutions, *Reparation Orders and Victims of Crime Factsheet,* available at: https://victimsandwitnesses.cdpp.gov.au/sites/default/files/2019-02/Reparation%20 orders.pdf.

[63] Office of the Director of Military Prosecutions, *Director of Military Prosecutions Prosecution Policy*, 26 October 2015, available at: https://www.defence.gov.au/mjs/docs/2019-DMP-Annual-Report.pdf.

[64] *Ibid.*, para. 1.5(d).

[65] *Ibid.*, paras. 1.6 and 8.

(b) the need to maintain discipline in the Defence Force.

Given that victim impact statement schemes have been implemented in all other Australian state and federal jurisdictions[66], it may be argued that the consideration of the personal circumstances of victims and their loss resulting from an offence is a well-established sentencing principle in civil courts. Section 70 of the DFDA could therefore provide a basis for the provision of victim impact statements in a prosecution under the DFDA.

Section 84(1) of *DFDA* sets out the power of the tribunal to make reparation orders. It states:

> Where a person is convicted by a service tribunal of a service offence, the tribunal may, instead of, or in addition to, imposing a punishment or making an order under subsection 75(1), order the person to pay such amount as it thinks just by way of reparation to a person who has sustained loss or damage through or by reason of that service offence.

This section would also provide a basis for victims to make a submission to a tribunal regarding their loss and injury, most likely as part of a victim impact statement.

Other avenues for participation

Aside from informal consultation by the prosecution, the provision of victim impact statements and requests for reparations, one other narrow option victims might consider to seek to participate in the potential prosecutions, outside the rubric of the legislative and policy provisions, are applications to become an intervener or an *amicus curiae*.

Amicus curiae

The role of an *amicus curiae* is to assist the court by drawing attention to some aspect of the case which might otherwise be overlooked. The grant of leave is entirely in the

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[66] See Crimes (Sentencing) Act 2005 (ACT), ss 47, 53; Sentencing Act 1995 (NT), ss 106A, 106B; Crimes (Sentencing Procedure) Act 1999 (NSW), ss 28; Victims of Crime Assistance Act 2009 (QLD) s 15(1); Sentencing Act 2017 (SA) ss 13, 14; Sentencing Act 1991 (VIC), Pt 3 Div 1C; Sentencing Act 1995 (WA) s 24.

Court's discretion.[67] In order to succeed in an application, a victim needs to demonstrate that they can "offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted".[68] The court will take the following considerations into account when deciding whether a person will be permitted to act as an amicus: the degree to which relevant issues would otherwise not be adequately canvassed;[69] whether the court considers that it will be significantly assisted by the submissions of the *amicus curiae*;[70] whether it is in the parties' interests that an *amicus curiae* be permitted to make submissions;[71] and whether such costs as are occasioned by consideration of those submissions are not disproportionate to the assistance expected.[72] In relation to questions of fact, the *amicus curiae* may be permitted to tender non-controversial pieces of evidence, but it is doubtful whether this may be done over the objection of a party. Rarely, if ever, would an *amicus curiae* be permitted to tender controversial evidence, and the amicus curiae has no right to lead evidence.[73]

Intervener

In order to succeed in an application to intervene, an intervener needs to show that their rights and interests are affected by the proceeding. Where the impact of a decision is less direct, applications for leave to intervene will not be granted unless the applicant's interests could be substantially affected by a decision.[74] While the role of an *amicus curiae* is to assist the court, the role of an intervener is to represent the intervener's own legal interests in the proceedings. An intervener becomes a party to the proceedings with the benefits and burdens of that status.[75] In appropriate proceedings, an intervener may adduce evidence, call witnesses, cross-examine, and

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[67] Levy v. Victoria (1997) 189 CLR 579, 606 (Levy).

[68] *Ibid.*

[69] Levy, above note 67, 604 (Brennan CJ); Roadshow Films Pty Ltd v. iiNet Ltd (2011) 248 CLR 37, 38-9 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (Roadshow) 39 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[70] National Australia Bank Ltd v. Hokit Pty Ltd (1996) 39 NSWLR 377, 381 (Mahoney P) (NSWCA) (Hokit); Levy , above note 67, 604-5 (Brennan CJ).

[71] See, eg, Hokit, above note 70, 381 (Mahoney P).

[72] *Ibid.*; Levy, above note 67, 604-5 (Brennan CJ).

[73] Bropho v. Tickner (1993) 40 FCR 165, 172-3 (Wilcox J). As to leading evidence, see Corporate Affairs Commission v. Bradley [1974] 1 NSWLR 391, 399 (Hutley JA) (NSWCA).

[74] Levy, above note 67, 601-2 (Brennan CJ); Roadshow, above note 69, 38-9 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); PBU v. Mental Health Tribunal (2018) 56 VR 141 [38] (Bell J).

[75] Trop Nominees Pty Ltd v. Liquor Licensing Cmr (1987) 46 SASR 255.

exercise any right of appeal enjoyed by other parties.[76] Orders for costs can also be made for and against an intervening party.[77]

Case law

Applications to intervene or act as *amicus curiae* are uncommon in criminal law cases and are difficult to succeed in.[78] Such applications are generally brought by interested third parties such as government bodies or nongovernmental organizations. One of the most authoritative and recent decisions regarding the intervention of third parties in criminal proceedings is the High Court case of Strickland (a pseudonym) v. Commonwealth Director of Public Prosecutions.[79] The primary judge in the criminal prosecutions granted the Australian Crime Commission (ACC) leave to intervene to provide submissions on issues affecting the ACC and to object to evidence on grounds of legal professional privilege and public interest immunity. Upon appeal to the High Court, the appellants were obliged by the High Court Rules 2004 (Cth), to join the ACC as a respondent to the appellants' applications for special leave to appeal. During the course of argument, the appellants objected to the ACC making submissions in the appeal, for the reason, among others, that they were not submissions in which the CDPP joined or which the CDPP adopted. In allowing the objection, Kiefel CJ, Bell and Nettle JJ held as follows:

> As the appellants submitted, where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused and it is for the Crown and no one else to represent the community. Here, the Crown appears by the CDPP and so it is for the CDPP and for no one else to represent the community. Occasionally, circumstances arise in which it is appropriate in a civil appeal for this Court to hear an intervener but only if a substantial affection of the intervener's legal interests is demonstrable (as where the intervener is a party to a pending proceeding) or likely. Very occasionally, the Court may hear an intervener on a criminal appeal. Thus far, however, the Court has only ever been disposed to do so in circumstances where the Crown embraces or supports the

[76] *Ibid.*

[77] Rushby v. Roberts [1983] 1 NSWLR 350, 354 (Street CJ).

[78] For examples of unsuccessful applications, see R v. GJ (2005)16 NTLR 230; R v. Thomas (2006) 14 VR 47; R v. Collaery (No 2) [2019] ACTSC 296. For examples of successful applications, see R v. Murphy (1986) 5 NSWLR 18; Karim v. R (2013) 83 NSWLR 268.

[79] (2018) 266 CLR 325.

> intervener's contentions or the intervener's contentions directly support those of the Crown. Where, as here, the Crown and the intervener are not as one in relation to the issues which the intervener seeks to agitate, the intervener should ordinarily not be heard. It would be unfairly prejudicial to the putative offender in that it would require him or her in effect to meet two different cases.[80]

In Palmer v. The State of Western Australia,[81] the National Association of People Living with HIV Australia (Inc) (NAPWHA) sought leave to appear as *amicus curiae* and to adduce evidence in a criminal sentencing appeal. In its submissions, NAPWHA made it clear that it did not wish to support any particular party in the proceedings before the court, and that it only sought to assist the court to understand "important and recent developments in the Australian HIV response". Although NAPWHA did not seek leave to intervene in the case, Mildren J stated as follows (Riley and Southwood JJ concurring):

> [T]o allow intervention in this case would cut across time-honoured principles that criminal proceedings are joined between the State of Western Australia (in Commonwealth cases, the Crown) and the accused. It is the State which represents all of the interests of the community, including the individual interests of the victims of crime, and no one else. At least ordinarily an intervener will not be allowed to raise issues not raised by the State, as to do so would be unfairly prejudicial to require the accused to meet two different cases.[82]

The court also rejected the request of NAPWHA to appear as amicus on the basis that the appellant was represented by experienced senior counsel and the court at first instance already had the benefit of detailed expert evidence.[83]

While an amicus application may be possible, it will likely be difficult for a victim or a victim's group to provide submissions on issues of law or fact that would not already have been covered by the prosecution. Intervention by way of an *amicus* application would also provide a less satisfactory option for victims given the limited scope of the participatory rights provided to *amici curiae*. While participation as an intervener would provide a victim broader participatory rights, there does not appear

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[80] *Ibid.,* 371-2 [109]-[110] (Kiefel CJ, Bell and Nettle JJ).

[81] [2018] WASCA 225.

[82] *Ibid.,* [11].

[83] *Ibid.,* [17].

to be any reported cases in which an application to intervene was made by a victim or a victim's group in a criminal prosecution. For the reasons discussed in Strickland, it is unlikely that such an application would be entertained.

Unlike at the ICC discussed below, the right of Afghan victims to participate in potential criminal proceedings in Australia remains mostly limited to "service" rights i.e., rights which aim to provide better treatment and experience under the criminal justice system. Their status in the proceedings is limited to that of a witness in support of the prosecution's case. While guidelines require that they be informally consulted regarding significant decisions by the prosecution, such guidelines are non-binding. Victims will not be entitled to be legally represented at the bar table. The only "procedural" rights that Afghan victims will have to influence the decision-making process will be the provision of victim impact statements and requests for reparations via the prosecution at sentencing, provided the case proceeds to that stage. Other common law avenues for third party intervention in the proceedings are unlikely to succeed.

Victim participation at the International Criminal Court

The limited opportunities for victim participation in Australia contrast sharply with opportunities available before the ICC. The victim participation model enshrined in the Rome Statute has been heralded as "a new era in victim participation in international criminal law".[84] The practice and procedure of the ICC is drawn from both common and civil law systems. States with civil law inquisitorial criminal justice systems, where victim participation is more common, lobbied strongly for the inclusion of provisions relating to victim participation and redress into the Rome Statute.[85] While victims are not considered a full party to the proceedings,[86] the ICC provides victims with a much greater status by affording them the opportunity to present their views and concerns throughout various stages of the proceedings.[87]

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[84] Bridie McAsey, "Victim Participation at the International Criminal Court and its Impact on Procedural Fairness", *Australian International Law Journal*, Vol. 18, 2011, 106.

[85] Brianne McGonigle, "Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court", *Florida Journal of International Law*, Vol. 21, 2009, p. 114.

[86] International Criminal Court, *Prosecutor v. Katanga and Chui*, Case No ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, [75].

[87] Rome Statute, above note 29, art. 68(3). See also International Criminal Court, *Prosecutor v. Katanga and Chui*, Doc No ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, [3], [40].

Unlike Australia, the Rome Statute provides for the participation of victims at any stage of the proceedings, not merely the sentencing stage. Victims are afforded the opportunity to participate from the "Situation Phase" (once the Prosecutor has opened investigations), through to the "Trial Phase" provided they satisfy the relevant threshold criteria regarding "harm" and "personal interests". Participation also goes way beyond mere informal consultation with victims having the right "to put their views and concerns directly to the judges".[88] However, the ICC Chambers have repeatedly emphasised that such victim participation should only occur "if their intervention would make a relevant contribution to the determination of truth and does not prejudice the principles of fairness and impartiality of the proceedings before the Court".[89] Following a successful application to have their views and concerns heard, victims will either be represented by a legal representative of their own choosing, or the relevant chamber will designate multiple victims a common "Legal Representative of Victims".[90]

During the Situation Phase, a prosecutor must request authorisation from a Pre-Trial Chamber under article 15 in order to proceed with an investigation that he or she has initiated. Article 15(3) permits victims to make "representations" to the Pre-Trial Chamber during authorisation proceedings. In the past, such representations have included requests that an investigation cover a longer period of time than requested by the prosecutor or have requested that an investigation include a broader range of war crimes.[91]

During the Pre-Trial phase, Article 19(3) permits victims to "submit observations to the Court" during proceedings to determine whether a case falls within the ICC's jurisdiction. In Prosecutor v. Katanga and Chui,[92] the Court clarified that victim participation during this phase includes the following: the ability to access all filings, transcripts and decisions contained in the record of the case, excluding ex parte decisions;[93] making submissions on issues relating to the

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[88] International Criminal Court, *Victim's Booklet: A guide for the participation of victims in the proceedings of the ICC* (Web Page) 16, available at: https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf.

[89] Prosecutor v Katanga and Chui, above note 86, [65].

[90] International Criminal Court, *Victims Booklet*, above note 88, 23.

[91] International Criminal Court, *Situation in the Republic of Coîte d'Ivoire*, Case No ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 15 November 2011, [148].

[92] International Criminal Court, *Prosecutor v. Katanga and Chui*, Case No ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 (DRC Decision).

[93] *Ibid.,* [127]-[130].

admissibility of evidence and to examine such evidence;[94] examination of witnesses as part of evidentiary debate following examination by the Prosecution;[95] providing oral motions, responses and submissions;[96] and filing of written motions, responses and replies.[97]

During the Trial Phase, victims can attend and participate in the proceedings through their legal representatives.[98] A key element of participation is the ability for victims to present opening and closing statements following the prosecution's case and prior to the defence's case.[99] Legal representatives of victims can also make applications to question witnesses, experts or the accused, either verbally or in writing[100] and have also been permitted to tender evidence and call witnesses.[101]

Reasoning for greater victim participation

Proponents for stronger victim participation rights argue that it benefits victims by formally and publicly recognizing that victims have suffered wrongdoing.[102] Victims may "find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault."[103] Affording victims the opportunity to participate allows them to contribute to fact-finding and truth-telling which can validate their experience and assist in the process of healing from trauma and degradation.[104] Others have argued that victim participation assists the

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[94] *Ibid.,* [134].

[95] *Ibid.,* [137]-[138].

[96] *Ibid.,* [141].

[97] *Ibid.,* [142].

[98] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) (Rules of Procedure and Evidence), Rule 91.

[99] Prosecutor v. Katanga and Chui*,* above note 86, [68].

[100] *Ibid*., [72].

[101] International Criminal Court, *Prosecutor v. Lubanga*, Case No ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, [96]-[98]; International Criminal Court, *Prosecutor v. Katanga and Chui*, Doc No ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, [82]-[83].

[102] Victims' Rights Working Group, "Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation", 8 July 2013, available at: http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_Parti cipation FINALrevised.pdf.

[103] Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?", *Harvard International Law Journal*, Vol. 46, 2005, p. 330.

[104] Susana SáCouto, "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?", *Michigan Journal of Gender and the Law*, Vol. 18, No. 2, 2012, p. 315.

Court in its fact-finding role because victims are uniquely placed to ensure that the Court is provided with a richer and more nuanced version of events.[105] Post-conviction, some emphasize that the provision of information on the harm suffered by the victim increases proportionality and accuracy in sentencing decisions.[106]

While the ICC model for victim participation is widely regarded as the high-water mark for participatory rights of victims in an international criminal justice process, it has also been the subject of criticism. These include the fact that the large number of applications for victim status places a significant burden on the resources of the Court, with some arguing that the lengthy time taken to consider and respond to applications for victim status undermines the accused's right to an expeditious trial.[107] Of specific relevance to the Australian jurisdiction is the criticism that allowing victims to have a seat at the bar table engenders the presumption that a crime has occurred and undermines the accused's right to the presumption of innocence.[108] The ability of victims to question witnesses, submit evidence and call witnesses also creates the risk that they become "secondary prosecutors" undermining the principle of equality of arms.[109]

From the victim's perspective, a recent Independent Expert Review on the ICC highlighted many criticisms of the victim participation processes at the ICC.[110] Noting that only a fraction of the victim groups from an area of conflict become victim participants[111], the report concludes that, for victims "[…] the Court is not functioning and delivering as envisioned."[112] Delays in the reparations process are described as "profound"[113] leading to "unfulfilled expectations among victims" denting victims' confidence in the credibility of the Court.[114] The Review received

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[105] *Ibid.*, p. 301.

[106] Edna Erez, Pamela Tontodonato, "The Effect of Victim Participation in Sentencing on Sentence Outcome", *Criminology*, Vol. 28, August 1990, p. 3.

[107] International Bar Association, "Enhancing the Efficiency and Effectiveness of ICC Proceedings: a Work in Progress", January 2011, *International Bar Association Human Rights Institute*, 23, available at: https://www.ibanet.org/document?id=January-2011-Enhancing-Efficiency-and-Effectiveness.

[108] Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process, The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process", May 2015, para. 73, available at: http://lawreform.vic. gov.au/sites/default/files/Role_of_Victims_of_Crime_Info_Paper_3_Web.pdf.

[109] *Ibid.*, para 74.

[110] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, pp.270 to 305, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

[111] *Ibid.*, [862].

[112] *Ibid.*, [885].

[113] *Ibid.*, [879].

[114] *Ibid.*, [886].

submissions that the participation procedure is "overly complex, bureaucratic, inconsistent, and far removed from the reality many victims find themselves".[115]

Comparing the ICC and Australian experience and processes

Greater victim participation in Australian criminal trials would require a significant cultural change from the adversarial model and root and branch reform of existing trial structures to accommodate meaningful participation of third parties.[116] While there have been moves to provide victims greater "service" rights in the recent times, the type of radical reform required for an ICC model of victim participation is unlikely to occur in the near future in Australia. If the issues subject of the IGADF Report were investigated and prosecuted by the ICC as opposed to in Australia, some aspects of the experience would likely remain similar for victims. For example, the physical location of the investigators and prosecutors would still be in a venue distant from where the crimes were committed, requiring interpreters, telephone consultations, international travel to the venue of the trials or where possible and/or necessary, the provision of evidence via video link.[117] The isolation and frustrations caused by this physical distance would be similar in both venues but would be ameliorated slightly in the ICC system where victims would at least have the support and guidance of their legal representatives.[118] The range of potential crimes the perpetrators could be prosecuted with would also be similar regardless of whether the matter is prosecuted in the ICC or in an Australian court. The offences contained in Division 268 of the Australian Criminal Code are essentially a "domestication" of the more generally expressed corresponding offences contained in the Rome Statute.[119]

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[115] *Ibid.*, [858].

[116] Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation", *Journal of Law and Society*, Vol. 32, No. 2, 2005, p. 298.

[117] In April 2021, Afghan civilian witnesses were permitted to give evidence via video link from Kabul in an ongoing defamation case in New South Wales regarding war crimes allegations against an ADF soldier. See Christopher Knaus "Ben Roberts-Smith: Afghan civilians to testify via video link in former soldier's defamation case", *The Guardian*, 1 April 2021, available at: https://www.theguardian.com/australia-news/2021/apr/01/ben-roberts-smith-afghan-civilians-to-testify-via-video-link-in-former-soldiers-defamation-case.

[118] Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges", in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 40.

[119] Section 3 of the International Criminal Court Act 2002 (Cth). IGADF Report, above note 2, p. 265.

As described above, victims would undoubtedly have a greater opportunity to participate if the proceedings were prosecuted at the ICC. Unlike in Australia, they would not need to rely on the informal obligations of prosecutors to consult with them regarding significant prosecutorial decisions. Instead, they could be legally represented and, through their counsel, actively participate and have their views considered by the various Chambers.[120] They would not need to wait until after a conviction at the sentencing phase to have an opportunity to be heard directly by the Court and could participate as early as proceedings before the Pre-Trial Chamber to authorise an investigation or hearings regarding jurisdictional issues.[121]

Arguably the procedure for reparations at the ICC is more favourable for the victims than the procedure available in an Australian criminal trial. In Australia, reparation would be limited to financial compensation for losses incurred by individual victims as a result of the crime committed against them.[122] Prosecutors have a discretion to seek a decision on compensation, and victims would have little or no control over the application.[123] While there are also a number of State and Territory administrative victim compensation schemes in Australia, there is no Commonwealth compensation scheme for victims of Commonwealth crime.[124] A recent case before the New South Wales Court of Appeal indicates that it is likely to be difficult for Afghan victims to apply for compensation under State and Territory regimes. The recent NSW case concerned an application for victim support by five women of Yazidi ethnicity who reported that they endured acts of violence in 2014 in Syria and Iraq at the hands of an Australian citizen.[125] In upholding the decision to reject the application under the NSW victims compensation legislation, the Court of Appeal confirmed that, for the NSW scheme to apply, the "act of violence" must have occurred in NSW, and not otherwise.[126] An application for leave to appeal was rejected by the Australian High Court.[127]

At the ICC, victims do not rely on the prosecution to make a request for reparation on their behalf and can apply from the outset directly to the Court to

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[120] International Criminal Court, *Victims Booklet*, above note 88, 17-18

[121] *Ibid*.

[122] Crimes Act, s 21B(1)(d).

[123] Commonwealth Director of Public Prosecutions, Reparation Orders and Victims of Crime Factsheet, above note 62.

[124] Commonwealth Director of Public Prosecutions, *Victims and Witnesses Compensation* (Web Page), available at: https://victimsandwitnesses.cdpp.gov.au/support-and-entitlements/support-and-entitlements/compensation

[125] DRJ & Ors v. Commissioner of Victims Rights & Anor (2020) 103 NSWLR 692.

[126] *Ibid.*, [1], [42], [184].

[127] DRJ & Ors v. Commissioner of Victims Rights & Anor [2021] HCASL 53.

receive reparations or apply during the reparations phase.[128] At the end of the trial, victims can also receive reparation by way of an individual or a collective award.[129] Similar to the Australian criminal law system, the award of reparations is at the discretion of the Court and whether a particular victim can benefit depends on the charges for which the perpetrator is convicted.[130] Individual awards are provided to individual victims or groups of victims for actual quantifiable losses or another form of standardized payment.[131] Collective awards are intended to benefit large numbers of individuals or entire communities of victims and can be made up of symbolic or commemorative awards,[132] including, for example, support for housing, income-generating activities, education programmes and psychological support services. In the present circumstances, given the limited number of Afghan victims, it is likely that the victims could receive individual reparations awards as well as some form of collective award if convictions were secured in the ICC. While this is broader than the Australian criminal law system where no such collective reparations programme exists, the ICC reparations scheme is often subject to criticism and has been described as time-consuming, a huge burden on victims and extremely slow.[133]

At the ICC, Afghan victims would also potentially benefit from support from the ICC's Trust Fund for Victims which is mandated to implement reparations orders emanating from the Court and to provide broader forms of assistance to victims and their families.[134] The latter mandate is intended to provide urgent assistance to victims without having to wait often decades until the conclusion of a case to receive support, and also, to take into account the fact that Court-ordered reparations may not reach all victims in a particular situation.[135] No such mechanisms for urgent assistance, even in the limited form of the Trust Fund's

[128] Rules of Procedure and Evidence, above note 98, Rule 94.

[129] *Ibid.*, Rule 97(1).

[130] International Criminal Court, *Victims Booklet*, above note 88, 17. Crimes Act, s 21B(1)(d).

[131] International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations (amended), 3 March 2015, n38.

[132] Rules of Procedure and Evidence, above note 98, Rules 97–98.

[133] See Luc Walleyn, "The Participation of Victims in the Process of Collective Reparations at the ICC" in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 77, 89.

[134] *Rome Statute*, above note 29, art. 75 and Rules of Procedure and Evidence, above note 98, Rule 98.

[135] However, for criticisms of the implementation of the Trust Fund for Victims' mandate, see Carla Ferstman, "Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness" in Rudina Jasini and Gregory Townsend (eds) *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford, 2020) 57, 66.

assistance mandate, would be available to victims via the Australian criminal or military law system. However, the IGADF Report recommended that where there is credible information that an Afghan national was unlawfully killed, Australia should now compensate the family of that person, without waiting for the establishment of criminal liability. The Department of Defence has promised to determine an approach to compensating victims by the end of 2021.[136]

While the ability of victims to participate in the trial and reparation proceedings at the ICC is greater, there are several notable frustrations with the ICC system for the victims. This includes not least that the progress of cases at the ICC is notoriously slow, sometimes taking decades.[137] These delays are due in no small part to the large number of victims seeking to participate in proceedings and the resulting delay from the Chamber's review of their requests for participation and the participation of victims themselves in the proceedings.[138] That said, Afghan victims have already been waiting an extremely long time for any potential criminal proceedings to commence in Australia. The allegations in the IGADF Report pertain to conduct that allegedly occurred eight to fifteen years ago and investigations to date have already taken six years still with no criminal or military proceedings commenced.

Another drawback of ICC proceedings are the limited resources of the Court and the resulting selectivity of proceedings. These factors lead to a situation where only individuals with the highest responsibility are prosecuted, and only certain crimes specifically addressed, meaning that victims of comparable crimes will often be excluded from the proceedings.[139] This contrasts with the potentially broader scope of national prosecutions because States have the responsibility to investigate all international crimes, and try all those against whom there is sufficient evidence. So far, the investigations by Australian authorities have been wide-ranging. The scope of the IGADF inquiry was largely unlimited, broadly covering "whether there is any substance to persistent rumours of criminal or unlawful conduct by or concerning Special Operations Task Group deployments in Afghanistan during the period [2005]

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[136] Department of Defence, Afghanistan Inquiry Reform Plan, 30 July 2021, available at: https://afghanistaninquiry.defence.gov.au/sites/default/files/2021-07/Afghanistan_Inquiry_Reform_Plan_0.pdf.

[137] Benjamin Gumpert and Yulia Nuzban, "Part I: What can be done about the length of proceedings at the ICC?" *EJIL: Talk*, available at: https://www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/.

[138] Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges" in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 40.

[139] Christoph Safferling (2012) *International Criminal Procedure*, Oxford: Oxford University Press, p. 177.

to 2016"[140] with the IGADF Report finding that in at least twenty-three cases, there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge the individuals involved with war crimes.[141]

Another structural challenge of the ICC is the difficulty that victims have in navigating the various organs and sections that they receive communications from. This includes the outreach staff in a given country, staff members of the Victims Participation and Reparations Section, investigators of the Prosecution or Defence, or counsel for victims. It has been reported that "[t]his multiplicity of actors and interlocutors often creates confusion in the minds of victims".[142] A similar confusion might arise in the context of Australian proceedings with the various actors involved including investigators, prosecutors and limited witness assistance services, but given the lack of a formal infrastructure for victim participation in the Australian proceedings, the complexity for victims is likely to be more limited.

Conclusion

National criminal justice systems remain the most proximate entities to ensure accountability for international crimes and justice for the victims of these crimes. Unlike at the international level, the opportunity for all victims to participate is greater at the national level because States have the responsibility to investigate all international crimes, and try all those against whom there is sufficient evidence.

The efforts that have been made to date to investigate the allegations against ADF personnel and the establishment of the Office of the Special Investigator demonstrate that Australia is taking rigorous steps to ensure that the principle of complementarity is enlivened such that the jurisdiction of the ICC to prosecute is displaced. If prosecutions proceed, they will take place in Australia and will be carried out by the Australian CDPP for offences under the Criminal Code. For victims, this means that their ability to participate in the prosecution process will be very limited. There has been little public discussion regarding the importance and value of victim participation in the investigation and prosecution processes to date. An integral part of the purpose of the criminal law system is to ensure the provision of procedural and substantive justice for victims. In the absence of meaningful victim

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[140] Terms of Reference, IGADF Report, available at: https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf.

[141] IGADF Report, above note 2, pp. 28-29.

[142] Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges" in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 41.

participation infrastructure under the Australian legal system, there is a potential role for appropriate civil society actors in Australia or abroad to provide a support role to Afghan victims and their families. At the very least, assistance could be provided to victims to understand the progress of investigations undertaken in Australia to date; how war crimes are prosecuted in Australia; the legal framework for victims to engage with the investigations and potential prosecutions; and the implication of Australian investigations on any action by the ICC. With such limited formal roles for victims in Australia's criminal legal system, much will depend on the informal efforts made by the investigators and the prosecutors to consult with and include victims in prosecutorial decisions. As the Office of the Special Investigator begins its work, it is hoped that the importance of victim participation will form part of the investigative and prosecutorial approaches of both the special investigator and the prosecutors.