

## CASE NOTES

### VICTIM PARTICIPATION, POLITICS AND THE CONSTRUCTION OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT: REFLECTIONS ON PROCEEDINGS IN *BANDA AND JERBO*

*This case note explores what impact the politics of international criminal law have on victim participation at the International Criminal Court ('ICC'). This is revealed by highlighting aspects of the proceedings in the Banda and Jerbo case at the ICC during which concerns emerged that victim participation was being used to further the political aims of others outside the courtroom. We draw on Sarah Nouwen and Wouter Werner's analysis of the politics of international criminal law to explore what such arguments might mean for the construction of victims at the ICC. Such arguments seem to assume that victim participants are — if not in favour of the ICC — at least not critical subjects of it. As such, they run the risk of failing to recognise victims' political autonomy. This prompts a broader enquiry into how the ICC should respond to the politics of victim participation, as opposed to challenges arising out of its mechanics.*

#### I INTRODUCTION

Whilst it has almost become de rigueur amongst critical international legal scholars to observe the political nature of international criminal hearings,<sup>1</sup> there has been little sustained and specific discussion either of the consequences of the political nature of international criminal hearings for victim participation or of the politics of victim participation itself. Similarly, whilst the institution of victim participation at the International Criminal Court ('ICC') has spawned a

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<sup>1</sup> See Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2007) ch 1; Sarah M H Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941.

large body of literature,<sup>2</sup> this has focused primarily on the mechanics of victim participation, leaving political assumptions that underpin victim participation unarticulated and unchallenged.

This case note asks how the politics of international criminal law impact upon victim participation at the ICC — more specifically, upon the construction of victims. This enquiry is prompted by aspects of the proceedings in *Prosecutor v Banda and Jerbo* ('*Banda and Jerbo*'),<sup>3</sup> where concerns have been raised by various parties that victim participation was being used to further a political agenda, one which is supportive of the Sudanese Government's opposition to the ICC. These proceedings have raised questions about the extent to which parameters and operation of victim participation are, and should be, infused with political determinants beyond the legal tests of eligibility. Such arguments are revealing for what they indicate about the construction of victims at the ICC. We suggest that they rest, at least in part, on an assumption that victim participants are, if not in favour of the ICC, at least not critical subjects. This assumption tests the extent to which the political autonomy of participating victims is recognised. As such it has the potential to undermine one of the purposes of victim participation at the ICC. This is to re-position victims from being mere objects of legal proceedings.<sup>4</sup>

The case note begins in Part II by introducing the case against *Banda and Jerbo* before, in Part III, drawing out contentious aspects of victim participation and representation that have a bearing on our analysis. Part IV explores the ways

<sup>2</sup> See, eg, Susana SáCouto and Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems* 73; War Crimes Research Office, 'Victim Participation before the International Criminal Court' (International Criminal Court Legal Analysis and Education Project Report, Washington College of Law, November 2007); T Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010); Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 *Leiden Journal of International Law* 485; Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 315; Solange Mouthaan, 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?' (2013) 21 *Cardozo Journal of International and Comparative Law* 619; Daniel David Ntanda Nsereko, 'The Role of Victims in Criminal Proceedings — Lessons National Jurisdictions Can Learn from the ICC' (2010) 21 *Criminal Law Forum* 399; Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Journal of International Law* 777; Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court regarding the Victims' Right to Participate' (2010) 23 *Leiden Journal of International Law* 629; Salvatore Zappalà, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137; Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475.

<sup>3</sup> *Prosecutor v Banda and Jerbo* (*Decision on the Confirmation of Charges*) (International Criminal Court, Pre-Trial Chamber, Case No ICC-02/05-03/09, 7 March 2011) ('*Confirmation of Charges Hearing*'). We refer to *Prosecutor v Banda and Jerbo* throughout this case note, even though the ICC terminated proceedings against Jerbo in October 2013: see below n 8.

<sup>4</sup> On the shift of the role of victims at the International Criminal Court ('ICC') from 'passive object' to 'potential subject-matter': see generally Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2.

in which international criminal law generally, and the *Banda and Jerbo* proceedings more specifically, are political, drawing in particular on Sarah Nouwen and Wouter Werner's analysis of the political nature of international criminal law through the role it plays in distinguishing 'between friends and enemies'.<sup>5</sup> Part V turns to examine the political tensions that have emerged around victim participation in various submissions made to the ICC in *Banda and Jerbo*, exploring arguments made about victims' links to outside interests. We argue that they raise troubling questions about the construction of victims at the ICC to the extent that they may rest on an — albeit unarticulated — assumption that victims cannot both be representing their own interests and be allied to interests in opposition to the ICC. Interrogating the place of politics within victim participation is critical to understanding the shape and operation of victim participation. The final Part explores the impact of three possible alternative responses to arguments about the politicisation of victim participation on survivors' political autonomy.

## II THE *BANDA AND JERBO* CASE

*Banda and Jerbo* is one of five cases brought so far in connection with the situation in Sudan, which was subject of the controversial United Nations Security Council ('UNSC') referral under *Resolution 1593*.<sup>6</sup> It arose out of the Prosecutor's investigations of three rebel commanders in Darfur who were thought to be targeting peacekeepers and aid workers.<sup>7</sup> Abdallah Banda, former commander of the Justice and Equality Movement, and Saleh Jerbo,<sup>8</sup> the former leader of the Sudan Liberation Movement Unity Faction, are accused of committing war crimes during an attack against the compound of the African Union ('AU') peacekeeping mission at Haskanita, Sudan, on

<sup>5</sup> Nouwen and Werner, 'Doing Justice to the Political', above n 1, 945. For an exchange of views, see Bas Schotel, 'Doing Justice to the Political. The International Criminal Court in Uganda and Sudan: A Reply to Sarah Nouwen and Wouter Werner' (2011) 22 *European Journal of International Law* 1153; Sarah M H Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel' (2011) 22 *European Journal of International Law* 1161.

<sup>6</sup> SC Res 1593, UN SCOR, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005). The resolution was adopted with 11 votes in favour, none against and 4 abstentions: Algeria, Brazil, China and United States. See also Robert Cryer, 'Sudan, *Resolution 1593*, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 195.

<sup>7</sup> See *Prosecutor v Banda and Jerbo (Public Redacted Version of Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute Filed on 19 October 2010)* (International Criminal Court, Case No ICC-02/05-03/09, 11 November 2010) ('*Document Containing the Charges*').

<sup>8</sup> Against whom Trial Chamber IV terminated proceedings in the light of reports of his death in April 2013, but without prejudice to being able to resume proceedings if information becomes available that he is still alive: *Prosecutor v Banda and Jerbo (Public Redacted Decision Terminating the Proceedings against Mr Jerbo)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 4 October 2013).

29 September 2007,<sup>9</sup> which had been monitoring the implementation of the *Humanitarian Ceasefire Agreement*.<sup>10</sup> As a result of this attack, twelve AU peacekeepers were killed and many injured by about a thousand rebel-led soldiers.<sup>11</sup> The destruction of the mission's facilities and property is said to have affected 'aid and security for millions of people of Darfur who are in need of protection'.<sup>12</sup>

Having voluntarily appeared before Pre-Trial Chamber I in June 2010, Banda and Jerbo waived their rights to appear at the confirmation hearing on 8 December 2010.<sup>13</sup> Ahead of this, the parties made a joint filing to Pre-Trial Chamber I in which the Defence signalled that it did not contest the facts alleged in the charges.<sup>14</sup> Then, in May 2011, with the charges confirmed<sup>15</sup> and in a further act of procedural inter-party cooperation, the Office of the Prosecutor and the Defence agreed to narrow the factual allegations in the charges<sup>16</sup> so as to

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- <sup>9</sup> See *Document Containing the Charges* (International Criminal Court, Case No ICC-02/05-03/09, 11 November 2010). In February 2010, Pre-Trial Chamber I decided that there was insufficient evidence to confirm charges arising from the same Haskanita attack brought against the third suspect, Abu Garda (although the Chamber reserved the Prosecutor's position if new evidence materialised). The specific charges are violence to life, intentionally directing attacks against the peacekeeping mission and pillaging: *Prosecutor v Garda (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010) [1].
- <sup>10</sup> Signed in N'Djamena, Chad, by the Government of Sudan, Sudanese Liberation Army and Justice and Equality Movement on 2 April 2004: see *Humanitarian Ceasefire Agreement on the Conflict in Darfur*, Government of The Republic of Sudan–Sudan Liberation Movement/Army–Sudan Justice and Equality Movement (signed 2 April 2004) <<http://peacemaker.un.org/sudan-darfur-humanitarian2004>>.
- <sup>11</sup> *Document Containing the Charges* (International Criminal Court, Case No ICC-02/05-03/09, 11 November 2010) [84].
- <sup>12</sup> Office of the Prosecutor of the ICC, "'Attacks on Peacekeepers Will Not Be Tolerated'". ICC Prosecutor Presents Evidence in Third Case in Darfur' (Press Release, ICC-OTP-20081120-PR373, 20 November 2008). See also Luis Moreno-Ocampo, 'How Prosecution Can Lead to Prevention' (2011) 29 *Law and Inequality* 477, 489.
- <sup>13</sup> See *Prosecutor v Banda and Jerbo (Defence's Submission of Saleh Mohammed Jerbo Jamus's Request pursuant to Rule 124(1) of the Rules of Procedure and Evidence, Waiving His Right to Be Present at the Hearing on the Confirmation of Charges and Requesting that the Hearing Be Held in his Absence, pursuant to Article 61(2)(a) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 4 November 2010); *Prosecutor v Banda and Jerbo (Decision on Issues relating to the Hearing on the Confirmation of Charges)* (International Criminal Court, Defence, Case No ICC-02/05-03/09, 17 November 2010) [4].
- <sup>14</sup> *Prosecutor v Banda and Jerbo (Joint Submission by the Office of the Prosecutor and the Defence as to the Agreed Facts and Submissions regarding Modalities for the Conduct of the Confirmation Hearing)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 19 October 2010) [5].
- <sup>15</sup> *Prosecutor v Banda and Jerbo (Corrigendum of the 'Decision on the Confirmation of Charges')* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 March 2011) ('*Corrigendum of the Decision*').
- <sup>16</sup> Whilst recognising that the Chamber might exercise its discretion to request the submission of additional evidence or submissions on the issues before it: *Prosecutor v Banda and Jerbo (Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 16 May 2011) [6] ('*Joint Submission regarding Contested Issues*').

identify three issues that would be contested at the trial.<sup>17</sup> Moreover, the defendants agreed that if these three issues were established, then without prejudicing their right to appeal, they would plead guilty to the charges.<sup>18</sup> The trial is scheduled to start in May 2014.<sup>19</sup>

### III CONTENTIOUS ISSUES OF VICTIM PARTICIPATION AND REPRESENTATION

In a departure from previous international criminal tribunals, the ICC allows victims to participate in proceedings in their own right.<sup>20</sup> Participation is permitted at every stage of the proceedings where the victims' 'personal interests' are affected and where participation would be appropriate and not prejudicial to a fair trial. At the pre-trial stage of proceedings, victim participation is permitted by arts 15(3) and 19(3) of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'),<sup>21</sup> but it is provided for more generally by art 68(3). This states that

[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the *Rules of Procedure and Evidence*.<sup>22</sup>

Of the 89 victims recognised as participants for the confirmation hearing in *Banda and Jerbo* held in December 2010,<sup>23</sup> two victims (victims a/1646/10 and a/1647/10), initially represented by Sir Geoffrey Nice QC and Rodney

<sup>17</sup> Namely: the unlawfulness of the attack; the accused persons' awareness of the facts that established that unlawfulness; and the status of the African Mission in Sudan as a UN peacekeeping mission: *Joint Submission regarding Contested Issues* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 16 May 2011) [3].

<sup>18</sup> *Ibid* [5].

<sup>19</sup> *Prosecutor v Banda and Jerbo (Decision Concerning the Trial Commencement Date, the Date for Final Prosecution Disclosure, and Summonses to Appear for Trial and Further Hearings)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 6 March 2013) [25].

<sup>20</sup> Jorda and de Hemptinne, above n 4. See also Matthew Gillett, 'Victim Participation at the International Criminal Court' (2009) 16 *Australian International Law Journal* 29. The role of ICC victims is therefore independent from that of the prosecution. There is a notable contrast here with victim participation as a 'civil party' in criminal proceedings at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), where the explicit purpose is to support the prosecution: see Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Rev 8)* (adopted 12 August 2011) r 23(1). On victim participation at the ECCC, see Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011) 167–223; Kate Yesberg, 'Accessing Justice through Victim Participation at the Khmer Rouge Tribunal' (2009) 40 *Victoria University of Wellington Law Review* 555.

<sup>21</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>22</sup> *Ibid* art 68(3).

<sup>23</sup> *Prosecutor v Banda and Jerbo (Decision on Victims' Participation at the Hearing on the Confirmation of the Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 29 October 2010) ('*Participation at Confirmation*').

Dixon,<sup>24</sup> were local residents and civilian workers employed by the peacekeeping mission and present in the compound when it was attacked. These two Darfuri victims differed from the other participating victims, who were members of the international peacekeeping force (drawn from countries that included Mali and Nigeria), and those connected to them. In accepting their application to participate, Pre-Trial Chamber I recognised the psychological harm the Darfuri victims had suffered as a result of the attack, arising out of the threat to their own lives and having witnessed the killing and injury of AU soldiers.<sup>25</sup>

A number of restrictions on victim participation at the ICC have had an impact on the scope of participation accorded to the Darfuri victims in *Banda and Jerbo*. First, to be eligible to participate in the trial they must establish a link to the specific crimes charged in the indictment.<sup>26</sup> Secondly, *inter partes* procedural agreements, such as those made between the prosecution and the defence in *Banda and Jerbo*, circumscribe the views and concerns that victim participants are legally entitled to bring to the attention of the court.<sup>27</sup> Whilst circumscribing legal issues through the framing of charges and factual agreement is a valuable method of expediting proceedings in the interests of justice, it can lead to a diminution in the space for victims to fully express their views and concerns or, at least, place a greater onus on them to justify that their personal interest sufficiently is engaged to justify their involvement. Accordingly, the burning of the Darfuri victims' homes did not entitle them to participate because it lay beyond the ambit of the crimes with which the defendants had been charged. Similarly, the applications of other citizens who were in the village but not present in the mission were unsuccessful.<sup>28</sup>

<sup>24</sup> They also represented three other applicants in *Banda and Jerbo* (a/6000/11, a/6001/11 and a/6002/11): see, eg, *Prosecutor v Banda and Jerbo (Decision on the Application for Leave to Appeal the 'Decision on Common Legal Representation')* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 13 July 2012) [4] ('*Decision on Leave to Appeal*'). Sir Geoffrey Nice QC and Rodney Dixon are both practising barristers in England and Wales. They each have extensive experience of appearing before a wide range of international and domestic courts and tribunals and have been involved in a number of other ICC cases: see Gresham College, *Professor Sir Geoffrey Nice QC* <<http://www.gresham.ac.uk/professors-and-speakers/professor-sir-geoffrey-nice-qc>>; Temple Garden Chambers, *Rodney Dixon* <<http://www.tgchambers.com/barristers/rodney-dixon.aspx>>.

<sup>25</sup> See *Participation at Confirmation* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 29 October 2010).

<sup>26</sup> International Criminal Court, *Rules of Procedure and Evidence*, ICC Doc ICC-ASP/1/3 (adopted 9 September 2002) r 85 ('*ICC Rules of Procedure and Evidence*').

<sup>27</sup> In sanctioning the parties' agreement, Trial Chamber IV disagreed with the argument advanced on behalf of the two Darfuri victims, that the parties' agreement would in effect curtail the scope for them to represent some of their concerns. This is because in the Chamber's view, the parties' agreement did

not limit the victims' ability to request a more complete presentation of the alleged facts. If the Chamber finds that such evidence is necessary for the determination of the truth, it will request the submission of that evidence, pursuant to Article 69(3) of the [Rome] Statute.

*Prosecutor v Banda and Jerbo (Decision on the Joint Submission Regarding the Contested Issues and the Agreed Facts)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 28 September 2011) [41].

<sup>28</sup> *Participation at Confirmation* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 29 October 2010) [31]–[40].

Increasingly, participation at the ICC is being challenged by the high volume of survivors who wish to participate in its proceedings.<sup>29</sup> The ICC has responded by appointing more and more common legal representatives,<sup>30</sup> a move which was the basis of protracted controversy in *Banda and Jerbo*. Rule 90 of the *Rules of Procedure and Evidence* allows victims to make their own selection of a common legal representative (albeit with the Registry's assistance) and permits the Registry and the Chamber to make such appointments in the event that victims are unable to do so in a timely fashion. In so doing, the ICC is obliged under r 90(4) to take 'all reasonable steps' to ensure that the 'distinct interests' of victims are represented and conflicts of interests are avoided. In the early years of the ICC's practice, it tended to organise victims into the minimum number of groups for purposes of representation and, therefore, appointed a minimum number of legal representatives to appear on the victims' behalf.<sup>31</sup> It has been reluctant to accept claims that victims have direct interests, or that there is, or may be, a conflict of interests, all of which might warrant separate representation. Accordingly, in September 2011, Trial Chamber IV accepted the Registry's nomination of a single common representative for all 89 victims,<sup>32</sup>

<sup>29</sup> Between 2005 and August 2012, the ICC received a total of 12 641 applications to participate (of which 6485 were received after 1 September 2011), with 6237 having been accepted: see Women's Initiatives for Gender Justice, 'Gender Report Card on the International Criminal Court 2012' (Report, November 2012) 267 <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>. For a consideration of the obstacles to victims participating at the ICC (and challenges to their protection), see Gilbert Bitti and Leila Bourguiba, 'Victim's Access to the International Criminal Court: Much Remains to be Done' in Claudio Michelon et al (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate, 2012) 287, 288.

<sup>30</sup> For another initiative designed to facilitate mass participation, see the proposal for the introduction of collective application forms for those seeking to participate as victims: *Prosecutor v Laurent Gbagbo (Second Decision on Issues Related to the Victims' Application Process)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 5 April 2012). See also Carla Ferstman, 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and a Consideration of Options for the Future' (Report, REDRESS, October 2012) 33–8; Inger Agger et al, 'Independent Panel of Experts Report on Victim Participation at the International Criminal Court' (Report, REDRESS and Amnesty International, July 2013) 22–3 [76]–[83] <<http://www.amnesty.org/en/library/info/IOR53/001/2013/en>>. For a proposal that the ICC adopt a class action device to simplify victim certification proceedings and empower victims, see Christodoulos Kaoutzanis, 'Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight against Impunity and Victim Participation' (2010) 17 *University of California Davis Journal of International Law & Policy* 111.

<sup>31</sup> Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 *International Criminal Law Review* 871, 883–9. The ICC's strategies for the appointment of common legal representation continue to evolve: see generally *Prosecutor v Ruto (Decision on Victims' Representation and Participation)* (International Criminal Court, Trial Chamber V, Case No ICC-01/09-01/11, 3 October 2012).

<sup>32</sup> Appointing H el ene Ciss e to be assisted by Associate Counsel Jens Dieckmann: see *Prosecutor v Banda and Jerbo (Notification of Appointment of Common Legal Representatives of Victims)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 14 September 2011). See also, *Prosecutor v Banda and Jerbo (Order Inviting the Registrar to Appoint a Common Legal Representative)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 6 September 2011); *Prosecutor v Banda and Jerbo (Proposal for the Common Legal Representation of Victims)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 25 August 2011).

rejecting claims that the two Darfuri victims had interests sufficiently distinct from the other victims to justify their continued separate representation. However, their former legal representatives, Nice and Dixon, continued to make (ultimately unsuccessful) applications contesting the appointment, even after Trial Chamber IV ruled in May 2012 to uphold the appointment of common legal representation.<sup>33</sup> As we shall show in Part V, their submissions rekindled the concerns that the parties had raised previously when they sought to remove Nice and Dixon and the intermediaries who had assisted the Darfuri victims' participation.

In practice, victim participation has to be limited for the sake of costs, the practicability of proceedings and the need to deliver a fair and efficient trial.<sup>34</sup> Beyond that, there is another question of how far the parameters of victim participation are influenced by the broader politics of international criminal law. This is far less recognised and explored by commentators. Thus the contestation that has surrounded victim participation in *Banda and Jerbo* provides an ideal opportunity to examine political considerations underpinning victim participation and the construction of victims at the ICC.

#### IV *BANDA AND JERBO* AND THE POLITICS OF INTERNATIONAL CRIMINAL LAW

The ICC is a legal rather than a political forum. One of its central aims is to ensure that all trials are fair.<sup>35</sup> Indeed, as many international criminal legal practitioners, particularly court officials, claim, the separation of law and politics is widely seen as lending legitimacy to international criminal hearings.<sup>36</sup> Yet, as a number of scholars have recognised,<sup>37</sup> international criminal hearings are intrinsically political.<sup>38</sup> This is manifested in a variety of ways.

As Nouwen and Werner observe, the establishment of the ICC was a political process — it has jurisdiction over crimes which may be connected with politics and its enforcement is reliant upon 'political will'.<sup>39</sup> Politics affects the operation of the ICC because it relies on states to carry out its wishes,<sup>40</sup> and international

<sup>33</sup> *Prosecutor v Banda and Jerbo (Decision on Common Legal Representation)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 25 May 2012) ('*Common Legal Representation*'); *Decision on Leave to Appeal* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 13 July 2012).

<sup>34</sup> Guénaél Mettraux, 'Foreword' (2010) 8 *Journal of International Criminal Justice* 75.

<sup>35</sup> *Rome Statute* art 64(2).

<sup>36</sup> See Nouwen and Werner, 'Doing Justice to the Political', above n 1, 942.

<sup>37</sup> See, eg, Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1; Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford University Press, 2008); Simpson, *Law, War and Crime*, above n 1; Nouwen and Werner, 'Doing Justice to the Political', above n 1.

<sup>38</sup> Thus Gerry Simpson argues that international criminal hearings 'involve the performance of political contestation within the confines of a somewhat constraining legal procedure', although he observes that ordinary domestic trials are also 'to some extent political' because they involve 'questions of social power, prosecutorial discretion and legislative choice': Simpson, *Law, War and Crime*, above n 1, 14.

<sup>39</sup> Nouwen and Werner, 'Doing Justice to the Political', above n 1, 943.

<sup>40</sup> Kurt Mills, "'Bashir Is Dividing Us": Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly* 404, 407. For the view that, to achieve its mandate, the ICC should concede and embrace the political ramifications of its decisions in Africa, see Angelo Izama, 'Accomplice to Impunity? Rethinking the Political Strategy of the International Criminal Court in Central Africa' (2009) 29(2) *SAIS Review of International Affairs* 51, 53.

criminal hearings are political: they are simultaneously aimed at an audience outside the courtroom and the immediate participants of the trial.<sup>41</sup> Furthermore, at least some of their purposes, such as contributing to peace and reconciliation or establishing an historical record, are political rather than legal.<sup>42</sup> Additionally, international criminal law necessarily operates selectively. The selective application of the law results in, Mahmood Mamdani argues, ‘not a rule of law but a subordination of law to the dictates of power’.<sup>43</sup>

The *Banda and Jerbo* proceedings are taking place within a complex political context, one that is influenced by political reactions generally to the situation in Darfur and Sudan and specifically the ICC’s controversial decision to initiate the case against President Al Bashir. Although the Government of Sudan initially engaged with the ICC for a period, its cooperation came to an end after the ICC issued its first arrest warrants.<sup>44</sup> Sudan’s refusal to hand over Al Bashir, the first sitting Head of State against whom the ICC issued such a warrant,<sup>45</sup> has sparked legal debate about his immunity in international law<sup>46</sup> and further contributed to the political discourse on the state of the ICC’s relationship with Africa. The Sudanese Government’s opposition to the ICC has garnered support from some (but not all) Arab and African leaders, with some states parties declining to arrest

<sup>41</sup> See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking, revised ed, 1964); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction, 2000); Gerry J Simpson, ‘Didactic and Dissident Histories in War Crimes Trials’ (1997) 60 *Albany Law Review* 801, 826–33.

<sup>42</sup> Jenia Iontcheva Turner, ‘Defense Perspectives on Law and Politics in International Criminal Trials’ (2008) 48 *Virginia Journal of International Law* 529, 536–43.

<sup>43</sup> Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Random House, 2009) 284.

<sup>44</sup> Office of the Prosecutor, ‘Fifteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)’ (Report, International Criminal Court, 5 June 2012) [5].

<sup>45</sup> *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009); *Prosecutor v Al Bashir (Second Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010). For discussion of some of the broader ramifications of the Al Bashir warrant, see Charles Chernor Jalloh, ‘Africa and the International Criminal Court: Collision Course or Cooperation?’ (2012) 34 *North Carolina Central Law Review* 203. See also ‘ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan’ (Press Release, ICC-CPI-20090304-PR394, 4 March 2009). The Sudanese Government’s non-cooperation also applies to a refusal to hand over Sudanese Government Minister, Ahmad Harun and Janjaweed militia leader, Ali Kushayb: *Prosecutor v Harun (Decision Informing the United Nations Security Council about the Lack of Cooperation by the Republic of the Sudan)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 25 May 2010).

<sup>46</sup> See Dapo Akande, ‘The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice* 333. Cf Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315. For a debate on the issue, see Alex de Waal and Gregory H Stanton, ‘Should President Omar al-Bashir of Sudan be Charged and Arrested by the International Criminal Court?: An Exchange of Views’ (2009) 4 *Genocide Studies and Prevention* 329. Referring to some of the political consequences in Sudan in the wake of the ICC’s warrant against Al Bashir, Mark Drumbl notes the lack of certainty as to whether indictments actually aid the position of victims: see Mark Drumbl, ‘International Criminal Law: Taking Stock of a Busy Decade’ (2009) 10 *Melbourne Journal of International Law* 38, 41.

Al Bashir when he has visited their countries.<sup>47</sup> Furthermore, the AU has unsuccessfully called upon the UNSC to exercise its deferral powers under art 16 of the *Rome Statute*.<sup>48</sup> There is a clear lack of political consensus, both within the AU and amongst African states, about Al Bashir's indictment.<sup>49</sup> Similarly, although the political view of the ICC within Africa is not universally negative and hostile,<sup>50</sup> there is force in the assessment that the Sudan situation, and the case of *Prosecutor v Al Bashir* ('*Al Bashir*'), are major causes of 'the deteriorating relationship between the ICC and (some) African states'.<sup>51</sup>

Politics is therefore casting a long shadow over the legal proceedings in *Banda and Jerbo*. Whilst the two 'rebel' defendants, who voluntarily appeared at the ICC, recognise the Court's jurisdiction, Sudan has opposed it. Broadly speaking, the political interests of the defendants are at odds with those of Al Bashir and the Sudanese Government.<sup>52</sup> More specifically, the attack on the AU mission on 29 September 2007 was made after the rebels had sustained heavy losses at the hands of Sudanese Government forces earlier that same day and in a context where it was alleged that a previous attack on rebel forces may have been facilitated by intelligence supplied by a government representative at the Haskanita peacekeeping mission.<sup>53</sup>

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<sup>47</sup> See, eg, Chad (July 2010), Kenya (August 2010) and Djibouti (May 2011): *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to the Republic of Chad)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 27 August 2010); *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 27 August 2010); *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to Djibouti)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 May 2011). On each occasion the Pre-Trial Chamber informed the ICC's Assembly of States Parties and the UN Security Council.

<sup>48</sup> The request was noted in: SC Res 1828 (2008), UN SCOR, 5947<sup>th</sup> mtg, UN Doc S/RES/1828(2008) (31 July 2008). See also Dapo Akande, Max du Plessis and Charles Chernor Jalloh, 'An African Expert Study on the African Union Concerns about Article 16 of the *Rome Statute* of the ICC' (Position Paper, Institute for Security Studies, 2010); Lutz Oette, 'Peace and Justice, or Neither? The Repercussions of the *al-Bashir* Case for International Criminal Justice in Africa and Beyond' (2010) 8 *Journal International Criminal Justice* 345.

<sup>49</sup> For a recent, detailed consideration of the position (forming part of a valuable response to criticisms of the ICC's African bias), see Kai Ambos, 'Expanding the Focus of the "African Court"' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 499.

<sup>50</sup> Ibid 510–15.

<sup>51</sup> Ibid 518.

<sup>52</sup> Although there are more recent claims that this relationship is in a state of 'flux', the Prosecutor suggests that Banda is part of a group in a 'pro-government alliance': *Prosecutor v Banda and Jerbo (Decision on the Defence Request for a Temporary Stay of Proceedings)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 26 October 2012) [24].

<sup>53</sup> See *Document Containing the Charges*, Case No ICC-02/05-03/09 [53]–[55]; *Corrigendum of the Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 March 2011) [68]–[70]. In fact, the government representative at the camp had already left before the rebels attacked on 29 September 2007.

Nouwen and Werner explore a further, more specific aspect of the political nature of the ICC that is of particular significance to our arguments about the way politics affects the autonomy, agency and construction of victims at the ICC. This lies in the ICC's capacity to contribute to the construction of the international community's 'friends and enemies'.<sup>54</sup> In a similar vein, Gerry Simpson argues that political trials emerge from the criminalisation of enemies.<sup>55</sup> Nouwen and Werner argue that by cooperating with the ICC, the leaders of the rebel groups in Darfur have sought to portray 'themselves as partners in the fight against *génocidaires*'.<sup>56</sup> In this way, the ICC's interventions have become an additional tool for the warring parties.<sup>57</sup> Nouwen and Werner observe that the rebel movements have presented themselves as allies of the ICC.<sup>58</sup> This is buttressed by the Prosecutor, who has distinguished 'the uncooperative government from the cooperative rebel groups'.<sup>59</sup> Accordingly, the Prosecutor has also presented the rebels as the ICC's friends<sup>60</sup> in contrast to the Government of Sudan, notwithstanding the existence of indictments against Banda and Jerbo, who are rebel leaders.

Nouwen and Werner focus predominantly upon the prosecutorial aspects of the work of the ICC. The *Banda and Jerbo* proceedings prompt us to explore further how the politics of international criminal law impact victim participation. More specifically, in *Banda and Jerbo* it has been contended that victim participation was being used in a politically motivated way to mobilise the confirmation hearing to further interests inimical to the ICC, namely the agenda of the Government of Sudan.<sup>61</sup>

It is important to know how much space victim participation provides for the expression of opposition, whether to the ICC generally or to specific proceedings. If victims enjoy an independent voice in international criminal hearings, it must be recognised that some views and concerns will differ from the

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<sup>54</sup> Nouwen and Werner, 'Doing Justice to the Political', above n 1, 941. Their arguments draw upon but deviate from those of Carl Schmitt: at 945, citing Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, first published 1927, 1996 ed).

<sup>55</sup> Simpson, *Law, War and Crime*, above n 1, 14.

<sup>56</sup> Nouwen and Werner, 'Doing Justice to the Political', above n 1, 956.

<sup>57</sup> Ibid 946. For a representation of the construction of political identity through international criminal law in popular culture, see *The Ghost Writer* (Directed by Roman Polanski, Summit Entertainment, 2010). See also Itamar Mann, 'International Criminal Law and the Ghost of Politics: Film Review' (2010) 5 *Interdisciplinary Journal of Human Rights Law* 107. For a discussion of 'lawfare' — that is, the deployment of law as a 'weapon of war' — see David Luban, 'Carl Schmitt and the Critique of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 457, 457.

<sup>58</sup> Nouwen and Werner, 'Doing Justice to the Political', above n 1, 956–7.

<sup>59</sup> Ibid 962.

<sup>60</sup> Ibid 960. For an indication of how the then Prosecutor persuaded the rebels who supported the Al Bashir prosecution to 'respect' and come to the ICC once they were to be prosecuted, see Moreno-Ocampo, above n 12, 489.

<sup>61</sup> *Prosecutor v Banda and Jerbo (Defence Application to Restrain Legal Representatives for the Victims a/1646/10 & a/1647/10 from Acting in Proceedings and for an Order Excluding the Involvement of Specified Intermediaries)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [1] ('*Defence Application*').

prosecution's strategy<sup>62</sup> or from the framing of proceedings and in some cases the operation of the ICC more generally. It is also important to determine how free from external political affiliation participating victims are expected to be. Given the complex political contexts in which international crimes take place, victims and their concerns may be, or may be seen as, linked with external interests — including, in some cases, those perceived as hostile to the ICC. How the Prosecution, Defence and judges respond to such questions is indicative of the politics of international criminal law and, more specifically, of the ways in which the 'victim' is constructed at the ICC.

## V ATTRIBUTING OUTSIDE INTERESTS TO VICTIM PARTICIPATION

Contentions about the politicisation of victim participation in *Banda and Jerbo* owe much to the volatile relationship between the ICC and Government of Sudan. Moreover, the involvement of actors who assisted the two victims from Darfur constituted a direct cause of concern to the prosecution and defence. They are the Sudanese Workers' Trade Union Federation ('SWTUF')<sup>63</sup> and the Sudanese International Defence Group ('SIDG')<sup>64</sup> and its Secretary-General, Mohamed Ansari. Although the ICC Prosecutor's use of intermediaries is heavily criticised in the *Prosecutor v Lubanga* proceedings and judgment,<sup>65</sup> victim participation remains heavily dependent on intermediaries, including those who are connected to communities where atrocities have taken place. Largely overlooked at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, intermediaries are currently subject to piecemeal and reactive scrutiny by the

<sup>62</sup> ECCC civil parties — unlike victims at the ICC — are meant to support the prosecution, suggesting that their involvement 'must be aligned on the same side as the prosecution': Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls' (2012) 12 *International Criminal Law Review* 375, 388. See also Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18 *Michigan Journal of Gender & Law* 297, 325, 339; Jorda and de Hemptinne, above n 4; Gillett, above n 20; Leyh, above n 20; Yesberg, above n 20.

<sup>63</sup> The Sudanese Workers' Trade Union Federation presented itself to the ICC as a 'union of all trade unions of Sudan with affiliates from 25 state unions and 22 professional federations', with a membership that 'covers the vast majority of the organised working people of Sudan comprising about two million citizens from the government, private and informal sectors': *Prosecutor v Al Bashir (Application under Rule 103 in respect of Prosecution Appeal against 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir')* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09, 20 July 2009) [8].

<sup>64</sup> *Ibid*: the Sudanese International Defence Group describes itself as 'a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have for the peace process in Sudan and for the ordinary people of this country'.

<sup>65</sup> See *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [181].

Chambers<sup>66</sup> and receive differential support, supervision and regulation by other units and organs within the ICC.

SIDG and SWTUF claimed to enjoy the backing of a range of local groups and associations.<sup>67</sup> Yet the parties in *Banda and Jerbo* have in effect attributed their intermediary status to their political affiliation and sympathy with the Government of Sudan.<sup>68</sup> SIDG was established after the arrest warrant was issued against Al Bashir. Then-President of SIDG, Rasheed Mohamed Kheir Abdel Gadir, publicly declared its opposition to the ICC's intervention.<sup>69</sup> Ansari introduced Nice and Dixon to the two Sudanese victims, served as their main point of contact and arranged for their removal from Darfur to ensure their security. Before the common legal representative, Hélène Cissé, took over from Nice and Dixon as counsel for the two Darfuri victims, Ansari was their case manager — an appointment which the Registry confirmed.<sup>70</sup> He regularly updated the Victim Participation and Reparations Section on developments. It was argued that Ansari's Arabic language skills and his presence in Sudan made him an invaluable conduit for facilitating contact between the two victims and their lawyers at The Hague and for conveying their concerns to them.<sup>71</sup>

However, *Banda and Jerbo* are not the only legal proceedings at the ICC in which SIDG and SWTUF have played a part. They have also sought to intervene in the proceedings relating to Al Bashir, on which occasion Nice and Dixon acted as their legal representatives.<sup>72</sup> As part of those proceedings, they presented unsuccessful amicus curiae applications under r 103 of the *Rules of*

<sup>66</sup> Despite the Registry's continuing attempts to develop court-wide guidelines, largely instigated and supported by civil society actors, at the time of writing the work remains unfinished. For further discussion, see Emily Haslam and Rod Edmunds, 'Managing a New "Partnership": "Professionalization", Intermediaries and the International Criminal Court' (2013) 24 *Criminal Law Forum* 49; Christian M De Vos, "'Someone Who Comes between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial' (2011) 12 *Melbourne Journal of International Law* 217; International Bar Association, 'Witnesses before the International Criminal Court' (Programme Report, July 2013) 43–6 <[http://www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/ICC\\_IBA\\_Publications.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx)>.

<sup>67</sup> See, eg, *Situation in Darfur, The Sudan (Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008)* (International Criminal Court, Pre-Trial Chamber, Case No ICC-02/05, 11 January 2009) [2]–[6].

<sup>68</sup> See *Prosecutor v Banda and Jerbo (Prosecution Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [2], [7]–[10], [27] ('*Prosecution Objection*'). See also *Defence Application* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [14]–[19].

<sup>69</sup> See *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [7].

<sup>70</sup> *Prosecutor v Banda and Jerbo (Request of Victims a/1646/10 and a/1647/10 for the Trial Chamber to Review the Registry's 'Notification of Appointment of Common Legal Representatives of Victims' in accordance with Regulation 79(3))* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 30 September 2011) [31] ('*Request for Review*').

<sup>71</sup> *Ibid* [31]–[33], [45]; *Common Legal Representation* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 25 May 2012) [37].

<sup>72</sup> *Prosecutor v Al Bashir (Application under Rule 103 in respect of Prosecution Appeal against 'Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Al Bashir')* (International Criminal Court, Case No ICC-02/05-01/09-27, 20 July 2009).

*Procedure and Evidence* contesting the ICC's jurisdiction.<sup>73</sup> This previous experience led the parties in *Banda and Jerbo* to suggest that the organisations were more concerned with promoting the Government of Sudan's political interests than supporting the involvement of the two Darfuri victims.<sup>74</sup> The parties' concerns reached a critical stage just before the confirmation of charges hearing in December 2010.

Two days before the confirmation hearing, the Prosecutor made an urgent application objecting to the representation of two victim participants by Nice and Dixon,<sup>75</sup> arguing *inter alia* that the ICC should appoint alternative counsel.<sup>76</sup> Independently, but supporting the Prosecutor's objections,<sup>77</sup> the Defence issued an application requesting various forms of relief designed to remove the legal representatives and asked the ICC to prohibit future use of the intermediaries SIDG and SWTUF, who were supporting and funding the legal representatives' involvement in the proceedings.<sup>78</sup>

The Prosecutor argued that the previous lack of success on the part of SIDG and SWTUF when they intervened as *amicus curiae* in the *Al Bashir* case led them to turn to victim participants in *Banda and Jerbo* as 'new proxies'.<sup>79</sup> For the Defence, the SIDG's founding statement demonstrated that it was a 'front' for the Sudanese Government and Al Bashir and that moreover the victims were effectively being used to advance the political agenda of others.<sup>80</sup> The Defence maintained that victim participation provided a platform for SIDG to advance Al Bashir's views and an opportunity to utilise the courtroom to remove enemies that the Government of Sudan had been unable to remove in battle.<sup>81</sup> It questioned SIDG's and SWTUF's suitability as 'honest brokers' and reliable intermediaries in ensuring both the flow of information to the victims about the

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<sup>73</sup> Pre-Trial Chamber I rejected their application to submit an *amicus* under r 103; and their subsequent leave to appeal: see *Situation in Darfur, The Sudan (Decision on Application under Rule 103)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05, 4 February 2009); *Situation in Darfur, The Sudan (Decision on the Application for Leave to Appeal the Decision on Application under Rule 103)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05, 19 February 2009). However, the Appeal Chamber granted the same groups leave to submit observations as *amicus* when the prosecution appealed against a Pre-Trial Chamber ruling declining its request to add charges of genocide to the arrest warrant: *Prosecutor v Al Bashir (Reasons for 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply')* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA, 9 November 2009).

<sup>74</sup> *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [27]–[31].

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* [5].

<sup>77</sup> See *Prosecutor v Banda and Jerbo (Defence Response to the 'Prosecution Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon' of 6 December 2010)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 December 2010) [4].

<sup>78</sup> See *Defence Application* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010).

<sup>79</sup> *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [2].

<sup>80</sup> *Defence Application* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [18].

<sup>81</sup> *Ibid* [16].

proceedings and from the victims to the ICC, describing the role of the intermediaries to be both ‘untenable’ and ‘dangerous’.<sup>82</sup>

The precise ambit of the relief requested differed in their separate applications, but both parties wanted co-counsel for the two Darfuri victims replaced.<sup>83</sup> They claimed that such a drastic step was required to safeguard the integrity of the process and the interests of the two victims. The Prosecution suggested that even if the two victims were not acting as proxies for Al Bashir, a potential conflict of interest arose in violation of art 16 of the *Code of Professional Conduct for Counsel*,<sup>84</sup> because Counsel’s legal fees were being paid by SWTUF.<sup>85</sup> The Defence also claimed that SWTUF funded the same lawyers in the case against Al Bashir.<sup>86</sup> While the Defence placed less emphasis on the language of conflicts and art 16, its concerns were similar to those of the Prosecution.<sup>87</sup>

At the start of the confirmation hearing, the parties’ detailed contentions were summarily dismissed for lacking ‘concrete evidence ... of an abuse of ... process or of a conflict of interest between the interests of the victims and the interests of the two Sudanese organisations’.<sup>88</sup> Although Pre-Trial Chamber I refused to remove Nice and Dixon,<sup>89</sup> he indicated a number of proposed submissions that the victims’ representatives were not permitted to pursue either because they were beyond the scope of the confirmation proceedings or because they did not touch upon their ‘personal interests’, as set out in art 68 of the *Rome Statute*.<sup>90</sup> This would necessarily exclude evidence relating to attacks beyond those with which the defendants were charged, including those that were alleged to have destroyed property in the village of Haskanita. In this way, the ill-defined expression ‘personal interests’ in art 68(3) performs a gatekeeping role by determining the scope of victim participation in the course of judicial proceedings at the ICC.<sup>91</sup>

Even though the parties failed to displace Nice and Dixon (and SIDG and SWTUF) in December 2010, questions remained about the political associations

<sup>82</sup> Ibid [22].

<sup>83</sup> Ibid [42]–[44]; *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [14].

<sup>84</sup> Assembly of States Parties, *Code of Professional Conduct for Counsel*, ICC Doc ICC-ASP/4Res.1 (adopted 2 December 2005).

<sup>85</sup> *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [32].

<sup>86</sup> *Defence Application* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [25].

<sup>87</sup> Ibid [40].

<sup>88</sup> Transcript of Proceedings, *Prosecutor v Banda and Jerbo* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, ICC Doc ICC-02/05-03/09, 8 December 2010) 4 (‘Confirmation of Charges Hearing’).

<sup>89</sup> Ibid 5–7.

<sup>90</sup> Ibid 5. For the Defence, the hearing to confirm the charges was similarly not ‘an opportunity for ulterior motives and political objectives to be pursued’: *Defence Application* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [2].

<sup>91</sup> Matters that were legally perceived as extraneous included: questioning the admissibility of the case and whether it was in the interests of justice; and calling into question the scope of the Prosecutor’s investigation: see *Confirmation of Charges Hearing* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 8 December 2010) 6–7.

of the two Darfuri victims — their intermediaries and lawyers on the one hand and outside political interests and associations on the other. These uncertainties resurfaced over the following 12 or so months as part of a vigorous legal dispute about who should represent the two Darfuri victims for the trial phase of the proceedings. This time the lead was taken by Nice and Dixon, as they attempted to challenge the decision and process by which the Registry had arranged common representation for all 89 victims<sup>92</sup> — an appointment which resulted in their displacement. As part of this dispute, they targeted the fitness and credibility of the duly appointed common legal representative, claiming, amongst other things, that she had misrepresented both their and Ansari's ability to represent the Darfuri victims and SIDG's mission and purpose.<sup>93</sup> Moreover, in writing to the Registry about the effectiveness of their own representation, they: reiterated the absence of evidence of a conflict of interest between SIDG and SWTUF and the two Darfuri victims; rebutted the implication that Ansari was linked to the Sudanese Government; and denied the claim that 'SIDG's work is somehow a "front" for the Government of Sudan'.<sup>94</sup> In seeking a review of the decision to appoint a common legal representative, Nice and Dixon observed that the two Darfuri

victims [were] concerned that the Registry [had] excluded their lawyers on account of false allegations that they represent the Government of Sudan. They ask that if this is the reason behind the Registry's decision, it should be made public so that the victims and the Legal Representatives have a fair opportunity to respond and to show it to be untrue.<sup>95</sup>

Such an assessment may — or may not — be misplaced. Yet it raises a concern that victim participation may be — or may be perceived as — a vehicle which outside interests might use to manipulate participation in an attempt to further their own political aspirations. This concern is problematic to the extent that it rests upon an assumption that victims cannot be legitimately represented (or supported) by those who are linked to individuals and political interests that express some form of opposition to the ICC. Not only does this indicate that the 'friend-enemy' demarcation identified by Nouwen and Werner might run through questions of victim participation, specifically here representation, it has significant implications for the construction of victims at the ICC.

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<sup>92</sup> On the alleged failures in the Registry's procedure (including the lack of direct consultation with the two victims) that culminated in Cissé's selection, see *Request for Review* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 30 September 2011). See also Haslam and Edmunds, 'Common Legal Representation at the International Criminal Court', above n 31.

<sup>93</sup> *Prosecutor v Banda and Jerbo (Corrigendum to Reply to the 'Observations en réponse à la requête aux fins de réexamen de la proposition de désignation d'une représentation légale commune' Filed on 12 October 2011)* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 4 November 2011) [28] ('*Corrigendum to Reply*').

<sup>94</sup> *Request for Review* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 30 September 2011) annex 5.

<sup>95</sup> *Ibid* [44].

## VI THE POLITICS OF VICTIM PARTICIPATION AND THE VICTIM SUBJECT OF INTERNATIONAL CRIMINAL LAW

The actual political views and sympathies of the two Darfuri victims remained clouded throughout the proceedings. Defence and Prosecution submissions repeatedly contended that the intermediaries were sympathetic to the Government of Sudan's political commitments. By contrast, when it came to attributing similar affinities between the two Darfuri victims and the Government of Sudan's agenda, the applications were far more circumspect. Only once did the prosecution go further, conjecturing that the victims' interests and those of the SIDG and SWTUF might be 'legitimately congruent' so that the victims might voluntarily be 'surrogates for the interests of the [Government of Sudan] and Al Bashir'.<sup>96</sup> Yet, for the most part, there is a notable silence in the parties' applications about what the victims' political affiliations were or might have been.

Whatever their actual political views, the highly politicised context of international criminal law means that it should come as no surprise that the political sympathies of participating victims might lie with outside interests apparently critical of the ICC — even if, at a general level, international criminal institutions are at least in part premised on, and draw legitimacy from, pursuing justice for victims. Similarly, victim participants may have concerns about the legitimacy and appropriateness of international criminal justice mechanisms, even if, as seems probable, such issues were far from the minds of the drafters when providing for victim participation in the Rome Statute. It is inevitable that the motivation for individuals and organisations who lend practical and financial support to survivors — enabling them to navigate the application process and logistical challenges associated with participation — may be varied and in some cases undisclosed.<sup>97</sup> However, arguments that focus on the political allegiances of those who facilitate and support victims in their participation may rest on an assumption that victims and their contacts should be politically neutral or, at least, not opposed to the ICC. Such arguments tend to bolster stereotypical constructions of victimhood, laying open the possibility that there exists in the ICC's eyes an 'ideal victim', essential attributes of which are that he or she is in favour of the ICC in general and the specific prosecution in particular. One of the leading proponents of the existence of an 'ideal victim' in the national context, Nils Christie, envisages this archetype to be a 'little old lady' with certain

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<sup>96</sup> *Prosecution Objection* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 6 December 2010) [31].

<sup>97</sup> *Banda and Jerbo* is not the only case currently before the ICC in which claims have been raised about the political affiliations and motivations of intermediaries. Unlike *Banda and Jerbo*, in *Prosecutor v Bemba* it is the Defence that has been highlighting the involvement of a non-governmental organisation — L'Organisation pour la Compassion et le Développement des Familles en Détresse ('OCODEFAD'), based in the Central African Republic — which assisted a number of victim applicants. They point to the fact that OCODEFAD was established by one of the accused's political rivals (Cabinet Minister Bernadette Sayo). In questioning prosecution victims the Defence has made claims that the intermediaries have used dubious methods such as charging fees to help victims complete application forms and coach them in what to say to ICC investigators: see *Prosecutor v Bemba* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 1 December 2011) 4–19. See also Haslam and Edmunds, 'Managing a New "Partnership"', above n 66, 57.

defined attributes. This is the person who ‘most readily’ is given the complete and legitimate status of being a victim’.<sup>98</sup> Critically, one of the six attributes Christie gives to the ‘ideal victim’ is that he or she does not contest prevailing vested interests.<sup>99</sup> Whatever characteristics are to be attributed to the ‘ideal victim’ in international criminal law,<sup>100</sup> it seems unlikely that they would extend to possession by victims of political views and affiliations antipathetic to the ICC.

In contrast, Nice and Dixon argue that the Darfuri victims’ status as independent agents is not compromised by their wish to participate and criticise the ICC or by them receiving support from like-minded groups, with ‘[t]he use of terms such as “proxy” resting upon ‘a simple but unrealistic division between those who are for and those who are against the ICC’.<sup>101</sup> There is a paradox here. The attempt to prevent victim participants from becoming willing or unwilling proxies for other political interests may run the risk of denying victims their political agency. Whether this is the case depends in no small part upon how autonomy and agency are understood in the context of international criminal processes.

## VII BALANCING SURVIVOR AUTONOMY AND OUTSIDE INTERESTS

Challenges to victim participation based on victims’ links to outside interests challenge survivors’ political autonomy. Whilst the classic liberal conception of autonomy emphasises the self-direction of the individual,<sup>102</sup> more recent understandings of autonomy — particularly those developed under the influence of feminist scholarship — have emphasised that autonomy is also politically and socially embedded and constituted.<sup>103</sup> So too, survivors’ personal interests and views and concerns develop within a complex political, social and cultural context largely independent of the ICC and its interests. With this in mind, we now turn to identify three overlapping ways in which the ICC could respond to arguments that victim participation is being politicised by survivors’ links to outside interests which are perceived as inimical to the ICC and will reflect upon

<sup>98</sup> Nils Christie, ‘The Ideal Victim’ in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (MacMillan, 1986) 17, 18. See also Erica Bouris, *Complex Political Victims* (Kumarian Press, 2007). For an exploration of how far this stereotype (with adjusted attributes) is applicable in the context of international crimes, see Joris van Wijk, ‘Who is the “Little Old Lady” of International Crimes? Nils Christie’s Concept of the Ideal Victim Reinterpreted’ (2013) 19 *International Review of Victimology* 159. On the construction of the human rights ‘victim’, see Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002) 29.

<sup>99</sup> Joris Van Wijk, above n 98, 160, citing Christie, above n 98.

<sup>100</sup> Ibid 167.

<sup>101</sup> *Prosecutor v Banda and Jerbo (Submission by Legal Representatives for Victims a/1646/10 and a/1647/10 in light of Urgent Prosecution Objection)* (International Criminal Court, Victims, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 December 2010) [26].

<sup>102</sup> See generally Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988); Joel Feinberg, ‘Autonomy’ in John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press, 1989) 27.

<sup>103</sup> See, eg, Kathryn Abrams, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’ (1999) 40 *William and Mary Law Review* 805; Thomas E Hill Jr, ‘Autonomy and Agency’ (1999) 40 *William and Mary Law Review* 847; Jennifer Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 7.

the possible impact these may have on the recognition of the political autonomy and agency of survivors in international criminal law.

Arguments that point to the politicisation of victim participation through survivors' links to outside interests appear to draw upon a classic liberal conception of autonomy,<sup>104</sup> in so far as they rest upon a challenge to victims' self-direction. Even so, in general, survivor autonomy within the courtroom is necessarily limited by the demands of the legal process, including the need for a fair trial and the practical imperative of legal representation for victims. In *Banda and Jerbo*, the judges avoided directly addressing challenges based on survivors' links to outside interests, partly by relying on formal legal tests such as determining what lies within a victim's personal interest and partly through the implementation of the provisions in the *Rome Statute* for collective representation of participants.<sup>105</sup> By not explicitly challenging arguments (and assumptions) that the two Darfuri victims' participation was constrained by outside influences, the ICC missed an opportunity to affirm victims' political autonomy at the ICC, where autonomy is understood as being to some degree constituted within a broader network of political relations.

Alternatively, the ICC could have been more proactive about the politics and victims it seeks to encourage, either in a particular case or more generally. This would have required a direct response to the sorts of arguments made in the pre-trial proceedings in *Banda and Jerbo*, including a clarification of the type of politics and, therefore, the type of contact with external agents, that is incompatible with victim participation. The concerns noted in the previous Part about the attitudes of the Registry and the common legal representative towards the intermediaries demonstrate the challenges to legitimacy that arise when such matters are not openly resolved in the courtroom. Furthermore, openness about the 'preferred' politics of victim participation would have the additional merit of injecting transparency. However, apart from being extremely unlikely, taking such a step would be controversial. It would lead to an increase in the already time-consuming political controversies within the courtroom and would also open the ICC to widespread criticism about whose interests such politics serve — all of which may further dent the credibility and legitimacy of the ICC.<sup>106</sup> Fundamentally, for our argument, such openness could prove to be counterproductive, restricting access to victim participation for the sake of identifying and sustaining a particular institutional political preference.

Finally, the ICC could affirm that, absent evidence of abuse or conflict of interest, victims' actual or imagined politics (including any links they have to outside associations) would be irrelevant once they have fulfilled the criteria for participation. This would mean that, when faced with applications such as those

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<sup>104</sup> Accordingly, Feinberg emphasises that an autonomous individual is not a 'mouthpiece' for someone else but generates his own authentic opinions: Abrams, above n 103, 809–10, citing Feinberg, above n 102, 32.

<sup>105</sup> See *Confirmation of Charges Hearing* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 8 December 2010) 4; *Common Legal Representation* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 25 May 2010)

<sup>106</sup> There is a conundrum here since the status quo already fuels identical external perceptions. At a general level, the vigorous debates about the practice of the ICC — for example an apparent Africa-bias in the selection of its case load — already raise challenging questions about the ICC's neutrality.

made in *Banda and Jerbo* to remove counsel and intermediaries, the ICC could take the bold initiative of affirming the irrelevance of outside associations to the legitimacy of participation. Such a step could reduce future courtroom disputes of this kind. But, if not, it would at least defuse insinuations of hostility and shift the focus to precise allegations of concern. Beyond this, it promises potentially significant advantages for the ICC in terms of enhancing its credibility and offering tangible evidence of its openness to all victims of international crimes. Before Nice and Dixon were replaced by the common legal representative, they emphasised the importance of the participation of the Darfuri victims and their intermediaries in the proceedings, given the opposition of the Sudanese Government to the ICC.<sup>107</sup> Maximising opportunities for interests that challenge or appear to challenge the ICC and its operation provides a chance to rebut claims that it represents narrow political interests. More than that, it promises to recognise survivors' political autonomy and opens the way for a significant challenge to the ideal type of victim of international criminal law.

#### VIII CONCLUSIONS

Even before the start of the trial, the *Banda and Jerbo* proceedings have been marred by claims that the victim participation process is being exploited to achieve the political goals of others. Such allegations may be directed against 'outsiders' to the ICC, including individuals and organisations acting as intermediaries and governments that oppose the ICC. Given that international criminal hearings are inherently political, it comes as no surprise that victim participation can become a site for the politics of international criminal law. Moreover, it is also possible that through participation, victims and those linked to them might resist the dominant politics of international criminal law and the ways in which such politics come to frame proceedings. We have used *Banda and Jerbo* as a springboard in order to argue that any assumption that the legitimacy of participation depends upon individuals and their supporters being broadly in favour of the ICC and its work is problematic. Undoubtedly, the ICC must be able to prevent victim participation becoming a vehicle for abuse, but it must also balance its commitments to safeguard against abuse of legal process and recognise victims' political autonomy.

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<sup>107</sup> *Corrigendum to Reply* (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 4 November 2011) n 26.

We have argued that the ICC should take steps to acknowledge and promote survivors' autonomy in fashioning its responses to these dilemmas. We have emphasised that autonomous agents are also embedded in broader political contexts and that recognising this can bestow wider benefits on the ICC. Whilst in *Banda and Jerbo* this issue came into sharp relief as a result of allegations concerning victims' links to outside interests, there are far-reaching implications for the future wellbeing of victim participation and the legal construction of victims at the ICC.

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† Department of Law, Queen Mary University of London, UK. We would like to thank the anonymous referees for their insightful and constructive comments. The usual caveats apply.