



CURRENT DEVELOPMENTS ABOUT VICTIMS' PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT

The Rome Statute which established the International Criminal Court (ICC) in 2002 provides unprecedented rights to victims of genocide, war crimes and crimes against humanity. There are two revolutionary aspects to the ICC judicial system of benefit to victims: the participation of victims in trials in which their personal interests are affected and their right to seek reparation.

Values about Victims in the Rome Statute

While the ICC was established to prosecute the perpetrators of the world's most heinous crimes, its creators also wanted the Court to bring justice to victims. They saw that victims need to be able to participate before the Court to ensure their right to justice. Thus, the primary motivation behind the creation of a victim participation scheme within the ICC context was a desire to achieve more than reparative justice. The framers of the ICC believed that a victim who participates in proceedings even if not as a witness will feel a sense of recognition and empowerment by the whole human family. This is a new dimension of victims' participation since victims' rights are not merely understood as rights in terms of compensation for harm and damages suffered although compensation is also important. Accordingly, victims can participate in ICC proceedings whether or not they receive compensation for civil damages and criminal action.

An important concept in the making of the Court was that trials should tell the full story of the circumstances and background of each case. The efficient participation of victims and the information they can provide in all parts of the proceedings is therefore not only essential for the Court's purpose of uncovering the truth in order to determine guilt or innocence, but also for its important role in declaring officially the full truth of what crimes were committed against a person or an entire population. This truth also determines as well the granting of the right to reparations for victims. All these aspects are immensely important for the recovery of the victims and sustainable peace in a conflict region.

Provisions in the Rome Statute

The Rome Statute differentiates between victims, witnesses and victims who act as witnesses. A witness is a person who is called as witness during the proceedings. According to Rule 85, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" and "may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes". During the Court's proceedings a participating victim may provide evidence, for example through a testimony, thus becoming a witness. This is only possible if he or she is called as a witness by the Prosecution, the Defense or the Chamber.

Several provisions allow victims to access the Court in their own right and not just as witnesses called to testify in a case. Victims have the right to participate in the Court process when their personal interests are affected. This helps ensure that their views and concerns are taken into account by the Court. Victims may be able to participate at all stages of the Court proceedings – before and during an investigation, and during charging, trial, sentencing, appeals and reparations process.





Article 68(3) of the Rome Statute establishes a general right of victims whose personal interests are affected to present their views and concerns to the ICC and have them considered by the Court at appropriate stages in the proceedings. The Rome Statute discusses the participation of victims most clearly in Article 68(3), which states: “Where 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 Court’s Rules of Procedure and Evidence (RPE).

Article 15 permits victims to make representations to the Court when the Prosecutor seeks authorization to undertake an investigation on his own initiative. Victims are also entitled to receive notice when an investigation comes to an end. Under Article 19 victims may submit observations to the Court in the context of a motion challenging the ICC’s jurisdiction or the admissibility of a case.

The rules governing victims’ participation are primarily found outside of the Rome Statute, in the RPE. The RPE elaborate on the regime of victims’ participation set forth in the Rome Statute and provide practical guidance for the chambers, ICC staff and for victims and their legal representatives. In order to participate, a victim must send a written application to the Office of the Registrar. The Office of the Registrar then submits the application to the competent Chamber. This Chamber may reject the application if it does not consider the applicant to be a victim within the meaning of the statute, although the applicant may reapply in the future (Rule 89(2)). Rule 89(1) provides that copies of victims’ applications shall be made available to both the Prosecution and defense counsel, who will have opportunity to comment on the applications. Under Rule 89(2), either the Prosecution or Defense may request that the Court deny an application to participate on the ground that the applicant is not a victim under Rule 85, or does not fulfill the criteria of Article 68(3).

Once the relevant Chamber permits his or her participation it determines the arrangements for his or her participation. A victim may be represented by counsel, who must meet the qualifications set forth for defense counsel (Rule 90). The Chamber may ask that a large group of victims choose a shared legal representative (Rule 90(2)). This is particularly useful because the crimes within the jurisdiction of the Court frequently affect the lives of thousands of victims. In addition, if victims are unable to choose a legal representative, the Chamber can ask the Registrar to choose one for them (Rule 90(3)). If victims do not have the means to pay for a shared legal representative, they may request the necessary financial assistance from the Court (Rule 90(5)). The RPE make clear that ICC judges are free to consult the views of any victim in relation to the proceedings of the Court, whether or not the victim has been granted any formal participation rights under the Rome Statute. The Judges decide whether or not victims can be heard, and the most appropriate way for victims to participate.

The Court is required to keep victims informed of the progress of the investigations and prosecutions in which they have expressed an interest. The Court must also make sure that the interests and particular needs of victims of sexual violence, and violence against children, are taken into account at every stage of the proceedings.





Important Precedents and Decisions

The Pre-Trial (PTC) and Trial Chambers (TC) have issued decisions evaluating victims' applications to participate in proceedings under Article 68(3) and setting guidelines for the participation.

DRC Situation

On January 17, 2006 the ICC issued its first decision interpreting and implementing the ground-breaking provisions of the Rome Statute allowing for victims to participate.

PTC I granted six applicants the status of victim for purposes of the situation in the Democratic Republic of the Congo (DRC). PTC I found that Article 68(3) was applicable at the investigation stage of a situation, meaning that victims could participate generally in ICC proceedings before any suspect had been identified or apprehended.

The Office of the Prosecutor (OTP) objected to this decision and stated that participation in the investigation phase of a situation is not envisaged by the Rome Statute and Rules and that allowing a third party to intervene at such an early stage could jeopardize the objective and the integrity of the OTP's work. The Chamber, however, rejected these arguments on the grounds that its decision to permit the victims to participate during the investigation would not adversely impact the proceedings. It noted that "the system of participation can only enhance the impartiality of the Prosecutor's investigation in that it will afford him access to additional evidence" (paragraph 45).

On September 22, 2006 PTC I decided on the modalities of victims' participation during the confirmation of charges hearing. The Chamber concluded that the only measure available to protect victims was anonymity. However, anonymous victims would not be able to add any point of fact, evidence or question the witnesses.

Case against Thomas Lubanga Dyilo

Pre-Trial Chamber I: At least 105 victims have applied to participate in the case against Thomas Lubanga Dyilo. PTC I granted four victims the right to participate. The other applicants were either denied victim status due to the lack of a causal link with charges against Mr. Lubanga or their status is still pending before the Chamber. Since not communicating the victim's identity to Mr. Lubanga and his lawyers is the only way to protect them, their identity will have to stay hidden. PTC I recognized that the danger of anonymous accusations remains. It decided that anonymous parties to the case cannot add any elements of fact to a case. Since the case against Mr. Lubanga concerns the enlisting of child soldiers, victims must have a causal link to these allegations.

The defense team claimed to have difficulties with the alleged victims because the application forms that were given to the Prosecutor in full were provided only in an edited copy to the defense team, which excluded all information that could identify the victims. The defense team stated that there was too little information for a response.

Trial Chamber I: Since the Court decides what measures need to be taken to include and protect victims, the importance of the decision made in January 2008 by Trial Chamber I on the case of The Prosecutor v. Thomas





Lubanga Dyilo needs to be emphasized. TC I defines “a victim of the Court as defined under Rule 85 [to be] a natural or legal person who has suffered harm resulting from the commission of a crimes within the jurisdiction of the Court”.

TC I decided that victims do not need to bring evidence of harm suffered as a result of charges confirmed against Mr. Lubanga. Instead, they have to establish a link to the evidence being brought against Mr. Lubanga. There does not have to be a link to the confirmed charges only. According to paragraph 95 of the decision, there must be either i) an evidential link between the victim and the evidence which the Court will be considering during the trial, leading to the conclusion that the victim’s personal interests are affected, or ii) the victim must be affected by an issue arising during the trial because his or her personal interests are in a real sense engaged by it. The charges brought against Mr. Lubanga only include the recruitment of child soldiers, thus victims of the hostilities in which child soldiers were actively participating and other affected by this practice should be able to participate also.

The Chamber found that “extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused” and repeatedly stated that the implementation of a meaningful victims’ participation scheme cannot result in an unfair trial (paragraph 85). Victims may remain anonymous under certain circumstances and still be able to participate in the proceedings. However, “the greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself” (paragraph 131 of the decision). The Judges clarified that the provisions on the protection of victims in Rule 43 RPE applies to applicants as well, yet due to the burdens on the Victims and Witnesses Unit the extent of such protection will have to be realistic.

TC I rejected the submission by the defense that victims appearing before the Court in person should be treated automatically as witnesses. According to the Court the status of witness depends on whether a person is called as witness during the proceedings (paragraph 132).

The legal representatives of the victims emphasized that anonymity of victims is often essential as far as the public is concerned, but they accepted that this was not necessarily the case as regards the defense to which the identities of the victims participating in the case should be disclosed.

The defense argued that the accused has the right to know the identity of all victims and applicants to participate and therefore the redactions to the evidence ordered to protect victims and witnesses should not be maintained during the trial.

Judge Blattmann, one of the judges of TC I in the Lubanga trial, offered a dissenting opinion. Agreeing with the definition of a victim in the RPE, he rejects the Majority’s application of guidelines which lead to an “imprecise definition of victims” (paragraphs 4, 6). He insists that the Chamber “has the competency to determine whether a person is a victim only when linked to the facts and circumstances found within charges presented by the prosecution and confirmed by the PTC.”

He believes that the rights of the accused person are endangered by an over inclusive and imprecise definition of victims. “With such a definition, it becomes very difficult to know who is actually a victim of the alleged





crimes attributed to the Accused” (paragraph 10). He suggests that in order to determine which victim applicants will have the right to participate in the proceedings before TC I, the Chamber must first assess whether the applicant is a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court related to the confirmation of charges against the accused.

To not require a link between the harm a victim applicant has suffered and the crimes that the accused has been charged with threatens the rights of the accused by leaving the possibility open of granting victim status that goes beyond the framework of the case brought against the accused. It furthermore needs to be determined whether the interests of the victim are affected in the proceedings and whether a victim’s participation in the proceedings is appropriate at a particular time and stage and whether the manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding.

Uganda Situation

Relating to the situation in Northern Uganda, in August 2007 PTC II granted six applicants participant status in the case against Joseph Kony et al. and two applicants were granted standing to participate in the Uganda situation proceedings.

In the context of the situation in Uganda PTC II noted that the majority of the potential participatory rights available to victims would be available even if they did not go through the detailed and lengthy process of applying for participation rights under Article 68(3). Among these rights is Article 15, paragraph 3, which provides that victims may make representations to the PTC when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation and, accordingly, submits to the Pre-Trial Chamber a request for authorization of such an investigation. This led the PTC II to the following conclusions: “victims, as well as any other subject, may contact the Court, prior to and irrespective of whether a situation or a case is pending before it, with a view to triggering the exercise of the Prosecutor's proprio motu powers” (paragraph 92, August 10, 2007).

Furthermore, PTC II stated that “victims having communicated with the Court” even those not having been granted participant status in proceedings, have the right to participate and receive notice. In particular, Rule 59(1)(b), requires the Registrar to provide information regarding any question or challenge having arisen under Article 19 to “the victims who have already communicated with the Court in relation to that case or their legal representatives”. Rule 92(3) provides that the Court’s decision to hold a hearing to confirm the charges pursuant to article 61 shall be notified to “victims or their legal representatives who have already participated in the proceedings or, as far as possible ... those who have communicated with the Court in respect of the case in question”. Rule 93 provides that additionally to seeking the views of participating victims “a Chamber may seek the views of other victims, as appropriate”.

Darfur Situation

So far eleven victims were granted the status of victim in the Darfur situation while eight applications were rejected. On December 3, 2007 Single Judge Kuenyehia affirmed that the participation of victims at the situation stage was appropriate for victims and that victim status was not per se prejudicial to the rights of the Defense. Judge Kuenyehia further stated that applications for participation were neither related to the innocence or guilt of the alleged perpetrator nor to the reparations proceedings and that victims only need to meet the





criteria set forth by the rules prima facie. Furthermore, the exhaustion of domestic remedies was not necessary for participation as victim.

Only natural, live persons can apply for participation and a person could participate as a victim due to the loss of a family member, but not on behalf of a deceased victim. Moreover, proper proof of family ties or legal guardianship is required for applications on behalf on children, as well as the consent of the victim. The credibility of the declarations, however, would not be assessed, but rather overall coherence. Applicants granted victim status shall not have access to documents other than those made public.

Controversial Issues

Serving the interest of victims is not the sole function of the ICC even though it is one of its' prominent features. The Rome Statute and the RPE recognize that victim participation must not undermine the effectiveness of the ICC. The Court's proceedings must be conducted in a manner that is expeditious and fair.

Defendant's rights

The Court must balance the rights of victims to participate with the accused rights to a fair trial. A set of rights applies when an individual is tried as a defendant before the Court. Under Article 66 of the Rome Statute, the defendant is presumed innocent until proven guilty,¹ and the Prosecutor bears the burden to prove the defendant's guilt beyond a reasonable doubt. According to Article 67 the accused in entitled to a public hearing, have adequate time and facilities for the preparation of the defense and to be tried without undue delay, among other due process rights.

Equality of arms

The participation of victims could disturb the equality of arms between the Prosecution and the Defense in two ways.

First, given the potentially large numbers of victims, unregulated victims' participation could substantially drain the resources of the ICC and threaten the right of accused suspects to be tried without undue delay. This could be prevented by grouping victims, similar to a class action system. Furthermore, if large numbers of victims participate, the defense team might not be able to respond accordingly to every victim applicant and victim. It must be ensured that the necessary means are provided to the defense team, so the participation of large numbers of victims does not undermine the principle of equality of arms.

Second, in the case of Mr. Lubanga the defense team has stated that victims should not be able to participate in the proceedings of the entire trial, but rather victims should request individually to participate when appropriate, that is when their interests are affected at any particular stage. If the Chamber grants victims the opportunity to participate extensively and continuously this would essentially afford victims the same rights as the prosecution and the defense and could in consequence create an imbalance in the trial, thereby prejudicing

¹ For information on the presumption of innocence and the right to a fair and public hearing, see Karen Corrie, *Victims' Participation and Defendants' Due Process Rights: Compatible Regimes at the International Criminal Court* (January 10, 2007), available at <http://www.amicc.org/docs/Corrie%20Victims.pdf>.





the rights of the accused. Central to a fair trial is the presumption that an accused is innocent until proven guilty. This calls for a delicate balance of establishing a link between the victims and the accused and at the same time maintaining the presumption of innocence.

However, a victim is not a third party in the trial. Victims' representatives must apply for leave from the Court in order to examine witnesses, experts and the accused, and representatives may be restricted to making written observations only. The Prosecution and Defense are entitled to file replies to victims' submissions. Victims do not have an automatic right to access Prosecution or Defense evidence or to call their own witnesses. Furthermore, victims do not have the right to initiate an investigation, or to compel the Prosecutor to pursue any particular suspect or crime. The Court will manage victims' participation under Article 68 (3) in a manner that would ensure the efficiency and fairness of proceedings as TC I stated in paragraphs 85, 118, 120, 121, 122, 131 of its decision.

A speedy trial also lies in the interest of participating victims. Exceedingly long proceedings may hinder the redressive purpose of the victim participation scheme as well as postpone efforts to address reparations.

Anonymous participation

The ICC has provided, in Rule 87 of the RPE, a series of mechanisms to ensure the protection of victims and witnesses and, at the same time, the rights of the accused. The conditions and modalities by which a victim may participate anonymously are left to the discretion of the Court. Hearings may be conducted in camera in the victims' interest, particularly if they are children or victims of sexual abuse and victims may be questioned via videoconferencing (Rule 87(3)(e)). The name of a victim or any information which could lead to his or her identification can be expunged from public records of the Chamber (Rule 87(3)(a)).

Even though the Rome Statute and the RPE create a detailed victims' participation system, balancing concerns for efficiency and fairness against the redressive purpose underlying the victim participation scheme have largely been left to the discretion of the Court. The Court's series of decisions concerning the participation of victims, described above, demonstrate an emerging body of law which aims to safeguard the fair trial rights of the accused.

Publicity of justice is an essential guarantee for the accused and a fair trial. Visibility of criminal justice may also act as a deterrent to future crimes. However the protection of victims justifies an exemption from the rule. For a victims safety it might be essential to keep his or her identity hidden.

Anonymous participation of victims raises a conflict between two fundamental rights. On the one hand, victims must be granted protection. On the other hand, the accused is entitled to a fair trial, which implies that he or she may be informed of the entire contents of the records and have the opportunity to question, or to arrange to have the victims questioned.

Participating victims, as opposed to witnesses, are granted the right to remain anonymous to the public and the defense. Witnesses may be protected from further trauma by providing the possibility of previously recorded audio or video testimony, according to Rules 67, 87 and 88 RPE. According to Article 87(3)(b) the defense can be prohibited from disclosing the identity of a witness to a third party. However, the identity of the witness cannot be kept from the defense. The identity of participating victims does not have to be disclosed to the





defense in all cases. However, the January TC decision indicates that this will depend on the degree of participation.

A conflict between the safety of a person and the accused right to a fair trial may arise when people with dual status as victims and witnesses participate in the proceedings. Victims who have been identified may be called upon the proceedings as witnesses because they are often able to give direct evidence about alleged offences. Considering the Chambers' decisions on victims' participation and Article 67(1)(e) of the Rome Statute a victim who becomes a witness must disclose his or her identity to the defense.

The Court has the inherent control over its own proceedings and the flexibility to ensure that it can discharge its mandate efficiently, as well as protect the fairness of proceedings. This is reflected in the second part of Article 68(3) which provides that victims' views and concerns will 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 right of the accused and a fair and impartial trial.

The extent and success of the victims' participation scheme will largely depend on future proceedings. So far there are two detainees at the Court of whom one will be going to trial in the spring of 2008.

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