



VICTIMS' PARTICIPATION AT THE ICC: PURPOSE, EARLY DEVELOPMENTS AND LESSONS

The International Criminal Court (ICC) is the first international criminal tribunal to allow victims to participate actively and independently in proceedings. It seeks to balance the rights of the Defense and the need for efficient proceedings with meaningful victims' participation. While loosely defined in the ICC's foundational texts, the victims' participation scheme has been shaped, tested, and refined through the ICC's first cases. The ICC's judges have remained mindful of the balance victims' participation must strike, but the ICC still struggles to process the thousands of applications victims submit seeking to participate. To fulfill its mandate, the ICC is testing new methods of processing applications to participate and new procedures for their participation in the proceedings.

This paper outlines how victims' participation works at the ICC and provides information and advocacy points on issues relevant to it.

Purpose of Victims' Participation

The Rome Statute allows victims to participate actively and independently in ICC proceedings, rather than merely as witnesses called by the Prosecution or Defense. According to experts, victims' participation was included for several reasons:

- It allows those most affected by the crimes before the Court to have a say about "what happened to them, their families, and their communities" and in seeking to hold those who victimized them responsible.¹
- It recognizes victims' suffering, and can thus "constitute a kind of reparation in the form of satisfaction."²
- It allows victims to "experience justice."³
- It can lay the foundation for reconciliation in affected communities.⁴
- It can promote victims' healing and rehabilitation.⁵
- It can help the ICC establish the truth.⁶

¹ Mariana Pena, *Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT'L. & COMP. L. 497, 500 (2010).

² *Id.* at 501.

³ *Id.*

⁴ *Id.*

⁵ War Crimes Research Office, *Victim Participation Before the International Criminal Court*, at 9 (November 2007), at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf (citing Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide*, REDRESS, at 15 (1999); Women's Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters, at 33 (August 4-15 1997); Victims' Rights Working Group, *Victims' Rights in the International Criminal Court*, at 4 (2000).

⁶ Pena, *supra* note 1, at 502-3.

Victims' Participation: Rules and Practice

The Rome Statute, the ICC's governing treaty, is the source of the law that permits victims to participate in proceedings. The ICC's Rules of Procedure and Evidence (RPE), the Regulations of the Court (RoC), and the Regulations of the Registry (RoR) further define how victims' participation occurs. These provisions permit the judges to develop victims' participation in practice.

Who can be a "victim"

The ICC defines "victims" as natural persons who have suffered harm, direct or indirect, as a result of the commission of any crime within the ICC's jurisdiction.⁷ Victims can also be organizations or institutions that have sustained direct harm to any of their property that 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.

Scope and manner of participation

Article 68(3) of the Rome Statute establishes victims' right to participate in ICC proceedings. It states that the ICC shall permit victims to present their "views and concerns" where their "personal interests ... are affected." However, they may only do so "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." In hearings and written decisions, judges often cite this language, indicating that they are mindful of the balance victims' participation must strike.

From this starting point (and other provisions in the Rome Statute, RPE, RoC and RoR), victims' participation has been fleshed out in practice in ICC investigations and cases over the past eight years. As proceedings develop in each situation and case, the judges hearing it (who sit together in Chambers) must decide how specific victims will participate. A fairly consistent practice has emerged. First, victims typically participate through legal representatives (LRs) who present their views and concerns in court proceedings.⁸ Though the RPE say that victims are "free to choose a legal representative" and do not expressly permit the ICC to force legal representation on them, in practice judges typically ensure that victims have legal representation, and victims rarely appear in court themselves. The role of legal representatives is discussed in greater detail below. The activities victims can perform in ICC proceedings, discussed in this section, are typically performed by the legal representative.

Victims can begin participating when the Prosecution is investigating a situation but has not yet brought charges against any specific suspects. During this time, victims can only participate in proceedings before the judges – not in the investigation itself – and only in those proceedings where victims' personal interests are affected. For example, victims have been permitted to participate in proceedings that may undermine their privacy and security. Also, if the Prosecution asks the ICC's Chambers for permission to begin investigating a situation without a referral from an ICC State party or the Security Council – i.e. on her own motion, or *proprio motu* – victims have the right to make representations to the Chambers regarding the Prosecution's request.

Victims can also participate during both the pre-trial and trial stages of cases against named suspects and defendants. At the pre-trial stage of the first cases, victims have been allowed to attend hearings,

⁷ RPE, Rule 85.

⁸ RPE, Rule 91(2).

make opening and closing remarks and other oral submissions during the confirmation of charges hearing (similar to an indictment proceeding in the US), question witnesses at the confirmation hearing, access filings and other documents, and make written submissions on issues of law and fact. Victims have not been allowed to present their own evidence at the confirmation hearing. Pre-Trial Chamber II specified in the *Katanga and Ngudjolo* case that victims could not present their own evidence in large part because allowing them to do so would distort the purpose of the confirmation hearing – which is to test the Prosecution's evidence and determine whether it is sufficient to send the case to trial.

At trial, victims have been allowed to make opening and closing remarks, access evidence and filings, comment on the parties' evidence, question witnesses, present evidence concerning the defendant's guilt or innocence, testify (on their own motion or as witnesses for the Prosecution or Defense), make unsworn statements, suggest additional witnesses that the Chamber can decide to call, and make other written submissions. The judges, who ultimately decide whether the accused has been proved guilty beyond a reasonable doubt, can consider all evidence that the Prosecution, Defense, and witnesses present. They determine what weight to give the evidence before them, taking into account their opinion of the reliability of the information, its source, whether it was given under oath, etc.

As to sentencing, the ICC has only convicted one defendant – Thomas Lubanga Dyilo – and has therefore only issued a sentencing order in relation to this case. Victims were allowed to submit written observations about what his sentence should be, and to make oral submissions at the sentencing.

As to appeals, victims can only appeal judges' orders awarding reparations to victims following a conviction at trial. Victims cannot themselves appeal any other decisions, but, if the Prosecution or Defense appeals a decision, the victims may be able to present their views and concerns on it.

Applying to participate in a situation or case

The RPE, in Rule 89, set out detailed rules for applying to present views and concerns in ICC proceedings. In sum, victims must apply through the Registry, the organ of the ICC that provides judicial and administrative support to the rest of the ICC and has special responsibilities regarding victims' participation. Victims can apply to participate by submitting a standard ICC application form⁹ to the Victims Participation and Reparations Section (VPRS), which is a section within the Registry that is responsible for assisting victims in exercising their rights under the Rome Statute and in obtaining legal assistance and representation.

Once it receives the applications, the VPRS will transmit them to the relevant Chamber. Subject to any concerns about victims' security, the Registry will also provide a copy of the application to the Prosecution and Defense, for their observations. Both parties have an interest in ensuring that only those applicants who qualify as victims are admitted to participate; for example, fake victims could offer false evidence designed to implicate or exonerate the accused, or could seek reparations to which they are not entitled.

While applications to participate are pending, applicants can do very little; for example, they cannot reply to the parties' observations, and may not even be allowed to see them.

⁹ Available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx.

After reviewing all the materials before it, the Chamber will rule on whether the applicants may participate as victims, and will specify the proceedings and manner in which it considers their participation appropriate.¹⁰ The Chamber may reject an application if it considers that the person does not qualify as a "victim." If a Chamber rejects an application, the applicant's only recourse is to submit a new one.¹¹ Applicants cannot appeal decisions on the merits of their applications.¹²

The victim application process is "long and cumbersome for all parties involved."¹³ Some victims have waited over a year for the ICC to determine whether they may participate, and many applications have not been reviewed in time for victims to participate in the desired proceedings. Both the Prosecution and Defense have been overwhelmed when attempting to meaningfully review and give observations on high volumes of applications, which often takes attention and resources away from hearing and trial preparations.

To ensure that all qualified victims are able to participate, and to decrease the burden of application assessment, the ICC is testing new ways to simplify and expedite the application process.¹⁴ In the pre-trial stage of the *Gbagbo* case, Pre-Trial Chamber I permitted victims to apply collectively by giving consent to a third person (who is not a legal representative) to make a single joint application and to serve as the group's contact point with VPRS.¹⁵ In the trial phase of the Kenya cases, Trial Chamber V decided that only victims wishing to present their views and concerns individually by appearing directly before the Chamber (in person or via video-link) have to go through the complex application process that the ICC's RPE requires. Others who consider themselves to be victims and want to be involved in the proceedings through the representation of a LR can instead register with the VPRS through a simpler procedure: their names, contact details, and information about the harm they suffered will be entered into a database that the VPRS will administer and LRs will have access to. Because some victims still might not be able to become involved in this manner (e.g., due to social pressure and intimidation not to participate), the Chamber decided that the views and concerns of victims who do not register shall be accounted for by the common legal representative (CLR).¹⁶ The Chamber did not specify how to do this, but presumably the CLRs in the Kenya cases have enough knowledge about the cases and the scope of victims impacted by the violence to represent those who might feel uncomfortable registering with the VPRS.

Legal representation

As mentioned above, victims have typically participated in ICC proceedings through LRs. LRs are not employees of the ICC, but rather are admitted to the ICC's List of Counsel and selected from it to represent victims. Given the qualifications required for admission to the List of Counsel, LRs sometimes have more experience than some Prosecution trial lawyers working on the same case. The Chamber can

¹⁰ RPE, Rule 89(1).

¹¹ RPE, Rule 89(2).

¹² See Rome Statute, arts. 81, 82; ICC-01/04-418, Pre-Trial Chamber I, December 10, 2007, paras. 16-17; ICC-01/04-437, Pre-Trial Chamber I, January 18, 2008, at 3.

¹³ Pena, *supra* note 1, at 511.

¹⁴ Chambers can do this pursuant to RPE, Rule 89(4), which allows Chambers to devise ways to expedite consideration of the applications "[w]here there are a number of applications."

¹⁵ See ICC-02/11-01/11-86, Pre-Trial Chamber I, April 5, 2012.

¹⁶ See ICC-01/09-01/11-460, Trial Chamber V, October 3, 2012; ICC-01/09-02/11-498, Trial Chamber V, October 3, 2012.

also appoint counsel from the Office of Public Counsel for Victims (OPCV) to serve as LRs,¹⁷ though this has happens less frequently in practice.

The Chambers can also request that victims choose a CLR where there “are a number of victims” and to ensure the “effectiveness of the proceedings.” If victims cannot choose a CLR, the Chambers can ask the ICC’s Registry to choose for them.¹⁸ If victims cannot pay for a CLR, the Registry can help. In such cases, the Registry determines the scope of legal assistance the ICC will pay for. Victims are not guaranteed that support for legal aid will cover the full costs of representation.¹⁹

In practice, ICC has frequently appointed CLRs for victims. In some cases, Chambers have appointed one CLR with a small team to represent all victims in the case (e.g., the Kenya cases). In other cases, several CLRs represent victims grouped by commonalities. For example, at the trial stage in *Katanga and Ngudjolo*, there was a CLR for the main group of victims and a separate CLR for child soldiers, while in *Bemba* the victims were grouped geographically. The Victims’ Rights Working Group (VRWG), a group of NGO experts on victims’ issues, has criticized the Registry for failing to sufficiently consult with victims before choosing their CLRs.²⁰

Until recently, CLRs have been physically present at the ICC for hearings and trials, representing victims directly in all matters. However, in October 2012, Trial Chamber V decided that, in the Kenya cases, the CLR will remain primarily in Kenya to be “the point of contact for the victims whom he/she represents” and will appear in court only “at critical junctures of the trial.” The OPCV will be “the interface between the Common Legal Representative and the Chamber in day-to-day proceedings.” It will attend hearings, intervene in proceedings and question witnesses on behalf of the CLR, and help the CLR prepare written submissions.²¹ The judges asked the Registry and OPCV to define the parameters of this relationship.

The OPCV has never played this role before. While supported by the argument that “greater geographic proximity” to the victims will allow the CLR to provide the most meaningful representation,²² it is likely that this decision was also motivated by budgetary constraints,²³ as it significantly reduces the CLR’s costs, not the least of which is travel expenses between the victims in the field and the seat of the Court.

¹⁷ RoC, Reg. 80(2).

¹⁸ RPE, Rule 90(1)-(3).

¹⁹ RPE, Rule 90(5); RoR, Reg. 113; Gilbert Bitti and Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 465 (Roy S. Lee ed., 2001).

²⁰ Carla Ferstman, Letter on behalf of the Victims’ Rights Working Group to ICC Registrar Silvana Arbia, Re: The Registry’s approach to Common Legal Representation for victims participating in cases before the Court (August 17, 2011), at http://www.vrwg.org/VRWG_DOC/2011_08_17_VRWGLetterssmall.pdf.

²¹ ICC-01/09-01/11-460, Trial Chamber V, October 3, 2012, paras. 42-43; ICC-01/09-02/11-498, Trial Chamber V, October 3, 2012, paras. 41-42.

²² ICC-01/09-01/11-460, Trial Chamber V, October 3, 2012, para. 60; ICC-01/09-02/11-498, Trial Chamber V, October 3, 2012, para. 59.

²³ For example, the Committee on Budget and Finance recently adopted the view that “a system in which victims would be represented only by the Office of Public Counsel for Victims (OPCV) would be more cost efficient.” ICC-ASP/10/15, Annex 3, para. 10, cited in Victims’ Rights Working Group, *Issues and Concerns Presented by the Victims’ Rights Working Group on the occasion of the 10th Session of the Assembly of States Parties*, at 10, fn. 18 (December 12-21, 2011), at http://www.redress.org/downloads/publications/2011_VRWG_ASP10.pdf.

The VRWG cautioned that CLRs should not become a mere “enhanced intermediary” in Trial Chamber V’s scheme.²⁴

Reparations

The Rome Statute sets out broad parameters for the ICC’s system for providing reparations to victims following trial convictions. Reparations can include restitution, compensation, and rehabilitation, and can be distributed individually or collectively. Victims can apply for reparations regardless of whether they applied for or were admitted to participate at the pre-trial or trial stages of the proceedings.

Reparations can be provided by convicted persons or through the Trust Fund for Victims (TFV), a separate entity managed by the ICC’s Assembly of States Parties for the benefit of victims of crimes within the ICC’s jurisdiction, and the families of such victims. The TFV helps administer reparations to victims by collecting funds through fines or forfeitures from convicted persons, and through donors’ voluntary contributions.

The ICC has only issued one reparations decision so far, in the *Lubanga* case in August 2012.²⁵ Trial Chamber I rendered a decision giving general guidelines for reparations in the case, but did not specify what reparations would consist of, exactly to whom to give them, or how. The Chamber gave primary responsibility for the reparations process to the TFV. The Chamber also ordered that reparations should be administered using a collective approach, though some individual reparations may be granted. It also decided that funds could come from the resources of the TFV, given Lubanga’s indigence.

The Defense and victims’ LRs appealed the reparations decision, and the Appeals Chamber gave the appeal suspensive effect – meaning that the reparation decision cannot be implemented until the appeal is resolved. It is unlikely that the Appeals Chamber will render decision before the summer or autumn of 2013.

Balancing Victims’ Participation with Other Key Interests

Defense rights

As Article 68 demonstrates, the drafters of the Rome Statute sought to ensure that victims’ participation would not conflict with the rights of the Defense. Nevertheless, concerns have been raised that victims’ participation unbalances the equality of arms between the Defense and Prosecution because the victims become “second” prosecutors. It is true that participating victims will typically favor the Prosecution’s case, and have done so in practice. To mitigate the impact that their participation may have, the ICC’s foundational texts and the ICC’s judges have limited the extent to which victims can participate. While this does not wholly resolve the problem, it does significantly help.

First, the Rome Statute and RPE give victims reduced participatory rights compared to the Prosecution and Defense. For example, as discussed above, victims cannot appeal trial judgments or sentences, which the Prosecution and Defense are entitled to do. Where Chambers retain discretion over victims’ participation, they have often followed suit. For example, as is discussed above, Chambers have not

²⁴ Victims’ Rights Working Group, *International Criminal Court at 10: the implementation of victims rights – Issues and concerns presented on the occasion of the 11th Session of the Assembly of States Parties*, at 10 (November 14-22, 2012), at http://www.vrwg.org/downloads/2012_VRWG_ASP11-ENGLISH-VERSION.pdf.

²⁵ ICC-01/04-01/06-2904, Trial Chamber I, August 7, 2012.

allowed victims to present evidence at the confirmation of charges hearing, which the Prosecution is obliged to do and the Defense has a right to do.

Second, even after victims are admitted to participate, they must typically seek permission from the Chamber when they want to intervene in proceedings – e.g. to question witnesses, to introduce evidence, to testify – where the Prosecution and Defense automatically have the right to do so. Victims must typically make a detailed written application to the Chamber showing that their personal interests are affected by the matter in which they want to intervene. The Prosecution and Defense are typically entitled to comment on the victims' proposed intervention before the Chamber can grant it.

Chambers have restricted victims' participation so that it will not undermine Defense rights. For example, in *Katanga and Ngudjolo* some victims were allowed to participate anonymously – without the Prosecution or Defense knowing their identities – for their safety. However, victims could only testify at the trial if they were willing to disclose their identities to the Defense. This preserves the rights of the accused to know his accuser, and to examine the witnesses against him. (Knowing a witness' identity is important for the Defense to be able to ask questions related to a witness' basis of knowledge, bias, credibility, reliability, etc.)

Third, even if victims are allowed to intervene, the Chamber can limit the manner in which the participation will occur. Thus, for example, Trial Chambers have limited victims to questioning witnesses on matters impacting reparations and establishment of the truth, or to clarifying and complementing previous evidence. The Chamber can then give directions on the manner and order of questions, and can put the questions to the witness itself on the LR's behalf.²⁶ In the Kenya cases, Trial Chamber V ruled that victims cannot ask questions that formulate new charges against the accused.²⁷ Trial Chambers do not have this much control over Prosecution or Defense participation.

Finally, where Chambers grant victims permission to intervene, they tend to give victims a shorter opportunity to do so than the Prosecution and Defense get. For example, where Chambers have allowed victims to make opening and closing remarks at trial, the time allotted for their remarks is significantly shorter than that given to the Prosecution or Defense. Similarly, victims have been allowed to submit closing briefs following confirmation hearings and trials, but with a shorter page limit than the Prosecution and Defense had for theirs.

Prosecution strategy

Concerns have also been raised about whether victims' participation interferes with Prosecution strategies. For example, this has come up in the context of victims questioning witnesses at trial. In practice, the Court has thanked legal representatives for asking helpful questions, while the Prosecution has found that LR's questions have led witnesses to give answers that go against Prosecution case theory.²⁸ While the Prosecution may view this as problematic, others should be less concerned, because of the fact that Chambers have regularly limited victims' interventions to those which help establish the

²⁶ RPE, Rule 91(3).

²⁷ ICC-01/09-01/11-460, Trial Chamber V, October 3, 2012, para. 75; ICC-01/09-02/11-498, Trial Chamber V, October 3, 2012, para. 74.

²⁸ BRIANNE MCGONIGLE LEYH, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS 318-320 (2011).

truth.²⁹ If establishment of the truth derails Prosecution case theory, the problem may be with the Prosecution's theory and not with the victims' intervention.

Speed of proceedings

Under the Rome Statute, accused persons are entitled to be tried "without undue delay." Concerns have been raised that victims' participation delays proceedings and prevents accused persons from enjoying this right – e.g. that LRs' interventions at hearings and trials will equal the length of the Prosecution or Defense and thus significantly extend proceedings; that LRs' ability to respond to Prosecution and Defense motions and to submit motions of their own adds an extra layer to proceedings that slows them; or that assessment of numerous applications to participate delays the start of proceedings.

These concerns are partly addressed by the ICC's foundational instruments, which stress the importance of Defense rights to speedy proceedings, and which allow Chambers to tailor the manner and scope of victims' participation in proceedings. In practice, it is inevitable that victims' participation will make proceedings longer than if the victims could not participate. However, Chambers have restricted victims' participation so that it does not significantly delay the ICC's cases. For example, as discussed above, LRs typically receive less time than the Prosecution and Defense to make oral submissions such as opening and closing statements. Their ability to question witnesses at trial has been limited to clarifying or complementing previous evidence from the witness' examination-in-chief, and victims cannot duplicate questions that have already been asked. The evidence victims present must be unique. When setting filing schedules – such as for final written submissions following trial – Chambers can order LRs to submit their filings on the same day as the Prosecution or Defense, so victims' filings do not lengthen the schedule.

While the complex procedures for processing victims' applications may not be quick, the cases typically move forward regardless of whether all applications have been properly considered; as such, the proceedings are not delayed, but victims may lose the opportunity to participate. It is hoped that the new applications procedures being tested in *Gbagbo* and the Kenya cases will fix these problems.

Conclusion

With the conclusion of the *Lubanga* trial, the ICC completed a full test of its victims' participation regime, from the initiation of an investigation through trial judgment, although not yet through full appeals following a trial verdict or the award of reparations. At the same time, proceedings in other cases have continued to develop the victims' participation system, testing new methods for application and participation to ensure that victims can present their views and concerns meaningfully and efficiently. The Court, civil society and other interested parties must continue monitoring these procedures, and the Court must be receptive to suggestions for improvement. Only in this way can victims' participation truly "empower and value victims as active participants in the quest for justice."³⁰

²⁹ ICC-01/04-01/06-1119, Trial Chamber I, January 18, 2008, para. 108; ICC-01/04-01/07-1788-tENG, Trial Chamber II, January 22, 2010, paras. 81-84; ICC-01/05-01/08-807-Corr, Trial Chamber III, June 30, 2010, paras. 29-37; see also ICC-01/04-01/07-2288, Appeals Chamber, July 16, 2010, paras. 37-40; ICC-01/09-01/11-460, Trial Chamber V, October 3, 2012, para. 77; ICC-01/09-02/11-498, Trial Chamber V, October 3, 2012, para. 76.

³⁰ Victims' Rights Working Group, *Comments and Recommendations on the "Draft ICC Strategy in Relation to Victims of 18 August 2008,"* at 2 (November 2008), at http://www.vrwg.org/VRWG_DOC/2008_Nov_VRWG_Victims_strategy.pdf.

A shorter companion document is available:
Questions & Answers: Victims' Participation at the ICC
http://www.amicc.org/docs/Victims_Participation_QA.pdf

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Updated March 25, 2013*