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Victim Advocacy before the International Criminal Court

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Editors

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Springer

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...things standing thus unknown, shall live behind me!
If thou didst ever hold me in thy heart
Absent thee from felicity a while,
And in this harsh world draw thy breath in pain
To tell my story.—Hamlet (Act 5, Scene 2) by William Shakespeare

... si les choses restent ainsi inconnues, vivra après moi!
Si jamais tu m'as porté dans ton cœur,
absente-toi quelque temps encore de la félicité céleste,
et exhale ton souffle pénible dans ce monde rigoureux,
pour raconter mon histoire.—Hamlet (Scène 20) de William Shakespeare. Traduction de Victor Hugo¹

My voice is heard in the court because my story will be read,
and will be known, and I will be represented.

Reflections of a Ugandan victim in an interview by Berkeley Law (CA, USA), discussing victim participation at the International Criminal Court²

Ma voix est entendue dans la cour parce que mon histoire sera lue et sera connue, et je serai représentée

Réflexions d'une victime ougandaise dans une interview de Berkeley Law (CA, USA), discutant de la participation des victimes à la Cour pénale internationale

¹Hugo, François-Victor, (1865) *Le Deux Hamlet* (2e éd). Paris: France Pagnerre, p. 369.

²*The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* by Cody, S., Stover, E., Balthazard, M., Koenig, A., & Human Rights Center, University of California, Berkeley, School of Law. (2015:33). https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf. Accessed 10 January 2020.

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Part I

Introduction of Legal Doctrine

Part I covers a number of preliminary matters for lawyers seeking to represent victims at the International Criminal Court (ICC). Solange Mouthaan's chapter: 'The Modalities of Victim Participation' provides an introduction to the ICC scheme for victim participation. While the provisions of the Statute of the ICC and its Rules of Procedure and Evidence provide a broad outline of the scheme, these provisions were drafted with a certain level of imprecision and vagueness, leaving ICC judges with considerable discretion in developing the victim participation scheme. To fully understand the scheme it is thus necessary to also study many ICC victim participation decisions, with the result that there is a level of uncertainty and complexity in the way the scheme has developed. This is not surprising given the reality that a case before the ICC could involve thousands and thousands of victims wishing to participate, with the consequential potential problems of how this might fit in with the need for efficient procedures and the preservation the rights of defendants to a fair trial. Mouthaan's chapter describes some key elements of the scheme—the application process, the criteria and procedure for a Pre-Trial Chamber to declare applicants as victims in the case, and the subsequent role and rights of victim lawyers at the various stages of a case. Overall this chapter makes it clear that despite the challenges, complexities and uncertainties of the scheme, the role of victims has progressed from their former role as mere witnesses in international criminal justice to potentially active participants in ICC cases. However, it is also important for lawyers to understand victims do not reach the status of parties to the case.

The other chapter in this Part by Sam Garkawe provides an outline for those appointed as victims' lawyers of three essential matters that are fundamental to most prosecutions before the ICC—the definitions of the international crimes that may be prosecuted at the ICC; the principles of criminal responsibility that might apply in cases where the defendant has not personally carried out any of the crimes; and defences that may be invoked by the defendant in order to escape criminal liability. The law relating to these three matters are important for victims' lawyers as in order to advise and present their clients 'views and concerns' they must be able to follow

the prosecution and defence cases, especially given that ICC victim participation procedures allow victims certain rights at the various stages of cases. The chapter provides the relevant provisions of the ICC Statute in the three matters, together with further references that will assist victims' lawyers to find the law in the minority of cases where they might have to go beyond the plain meaning of the ICC Statute.

The Modalities of Victim Participation



Solange Mouthaan

1 Introduction

Numerous are the victims resulting from the great number of conflicts that have taken place or are taking place since World War II. These victims have suffered great harms from the commission of international crimes, yet victims' rights and interests have until recently been ignored.

Victims have only recently been given a significant place, in particular with the advent of the International Criminal Court (ICC). Indeed, the ICC is amongst the first international criminal tribunal to adopt a more victim-oriented approach. Victim participation is amongst a set of procedures formally recognising the interests of victims of international crime and to allow direct victim participation in the justice process. Victims have been given an unprecedented role. In particular, the ICC has established the Victims and Witnesses Unit (VWU) to provide protective measures, legal and socio-psychological support, and other supportive measures for victims and witnesses.¹ The Rome Statute allows the Court to award reparations to victims, because it is important for victims to be recognised and compensated for the harm they suffered.² Most importantly, the Rome Statute under article 68(3) provides the normative framework for victim participation and grants victims the right to

¹ Statute of the International Criminal Court (Rome Statute), July 17, 1998, 2187 U.N.T.S. 90 art. 43(6).

² Statute of the International Criminal Court (Rome Statute), July 17, 1998, 2187 U.N.T.S. 90 art. 75.

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participate in the justice process.³ According to Article 68(3) of the Rome Statute, victims may present their views and concerns in proceedings when their personal interests are affected, as long as participation does not unduly prejudice the right of the defendant.⁴

A victim who has been given the right to participate is different to a witness who serves the interest of the Court. A witness is the person called by either the defence or prosecution to testify at a specific time about specific facts or events.⁵ Victim participation refers to the system by which individuals are allowed access the judicial proceedings by becoming ‘participants’ (Van den Wyngaert, 2011, p. 483). Victims’ experiences of the situation under investigation are not necessarily synonymous to the crimes prosecuted. Their stories could provide judges with useful insights into the situation under investigation; may contribute to the truth-finding process and add to the evidence presented by the Prosecutor. As a consequence, judges may grant participating victims appropriate sets of rights to enable them to participate in a meaningful manner at various stages of the proceedings. Compared to previous international criminal law tribunals, the Rome Statute has given participating victims a more prominent voice to ‘tell their story’ either by providing their personal testimony or other means of participation, such as the ability to attend hearings, provide and challenge evidence, and call and question witnesses and experts, as well as the accused (Van den Wyngaert, 2011, p. 476). However, as a consequence, participating victims may expose themselves to public scrutiny and to possible retaliation by the accused or those affiliated to the accused.

Victim participation is an important part of the international criminal justice process. The system of victim participation at the ICC has been hailed as one of the major successes, but as argued by Judge Christine van den Wyngaert, it is also a “controversial aspect of the ICC” (Van den Wyngaert, 2011, p. 476). Indeed, to give victims access to the justice process is one step in the right direction. Victims should be involved with the international criminal justice process in a meaningful manner to them: to be treated with respect, to be kept informed about their case and to be given the possibility for their voice to be heard. However victim participation also presents a number of challenges. Since its inception, the work of the ICC has evolved and its workload is growing due to the steady increase in the number of situations and cases

³ *The Prosecutor v. Lubanga Dyilo*, Case No. 18 January 2008, ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation, para 94.

⁴ Article 68(3): “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 Rules of Procedure and Evidence”.

⁵ Booklet, Victims before the International Criminal Court – A Guide for the Participation of Victims in the Proceedings of the Court, p. 10. <http://www.icc-cpi.int/NR/rdonlyres/C029F900-C529-46DB-9080-60D92B25F9D2/282477/160910VPRSBookletEnglish3.pdf>. Accessed 10 January 2020.

under investigation. The corollary to this growing workload is a surge in the number of victims applying to participate in proceedings.

2 Victims of International Crimes: From Mere Witnesses to Participants

Since the 1940s, human rights law has steadily supported a greater role for victims “to participate in international human rights law mechanisms . . .” and has called upon States to grant a voice to victims and promote the rights and entitlements of victims (Schabas, 2007, p. 325; Trumbull, 2008, p. 777).⁶ However, up until the Rome Statute, international criminal law generally has ignored victims.

In the 1980s, the United Nations’ (UN) *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* called on states to recognise and to adopt basic rights for victims of crime, including victim acknowledgment, the right to access justice and right to fair treatment and the right to restitution.⁷ In particular section 6(b) has inspired article 68(3) in that it invites Member States to allow:

“the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.

The response to this declaration has been wide-ranging at the national level. Whereas many civil law jurisdictions already allowed for some form of victim participation, this was not the case for common law jurisdictions (McGonigle Leyh, 2011a, p. 70; Horovitz, 2013). Currently numerous major jurisdictions provide for victim participation to varying degrees, ranging from offering victims the possibility to make personal statements to presenting civil claims in criminal proceedings in the French criminal system (Stahn et al., 2006, p. 220; Wemmers, 2010, p. 633; McGonigle Leyh, 2011a, p. 65).

In contrast, the International Military tribunals of Nuremberg and Tokyo, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal

⁶ For instance, access to justice is provided for in the International Covenant on Civil and Political Rights on 19 December 1966, the European Convention on Human Rights of 4 November 1950 or the UN Convention against Torture. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

⁷ General Assembly Resolution 40/34, 29 November 1985 available at: <https://www.un.org/ruleoflaw/files/BASICP-4.PDF>. Accessed 25 March 2020.

Tribunal for the former Yugoslavia (ICTY) largely ignored victims. The repression of the crimes that resulted in the victims' harms was the extent of consideration given to victims.

The role of victims in the *ad hoc* international tribunals is minimal, "limited to protection and the restitution of property" (Zappalà, 2010, p. 144) or as witnesses and thus few victims have been able to tell their stories. In fact, as the scholar Brianne McGonigle Leyh points out, the adversarial nature of trials before the *ad hoc* tribunals means that witnesses are not even given the opportunity to tell their experiences, but must instead endure "repetitive questioning" by the parties and ensure their answers do not digress from establishing the guilt or innocence of the accused (McGonigle Leyh, 2011a, p. 140).

The reluctance to grant victims a greater role is related to the potentially great numbers of victims who might have a stake in the judicial proceedings. In the Former Yugoslavia and Rwanda, the sheer numbers of victims of international crimes under the jurisdiction of the *ad hoc* tribunals necessarily would have meant that not all victims could be heard. This would have led to different categories of victims amongst whom only some would be given the opportunity to take part in the judicial proceedings. Instead both *ad hoc* tribunals only heard those victims that were called to testify as witnesses.

Furthermore, the potentially high numbers of victims seeking to participate before the *ad hoc* tribunals would have a negative impact on judicial proceedings (McGonigle Leyh, 2011a, p. 138). Judges of the ICTR stated that to incorporate victims' participation into international criminal proceedings "would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal."⁸ According to scholars Virginia Morris and Michael Scharf, the drafters of the ICTY and ICTR statutes considered the protection of the interests of the victims to be part of the interests of the community for which the prosecutor was responsible (Morris & Scharf, 1995, p. 167). Morris and Scharf argue that to allow counsel for victims to participate "could lead to interference with the case presented by the Prosecutor or divert the attention of the court from the relevant issues in the criminal proceeding thereby prolonging the trial." For both *ad hoc* tribunals, their principal mandate is the prosecution and punishment of the perpetrators, not the victims' interests.

⁸ President of the ICTR, Letter dated Nov. 9, 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, in Letter dated Dec. 14, 2000 from the Secretary-General addressed to the President of the Security Council, Annex, para 4, U.N. Doc. S/2000/1198 (Dec. 15, 2000). Similar views were also expressed by Judges at the ICTY: See President of the Int'l Tribunal for the Former Yugoslavia, Letter dated Oct. 12, 2000 from the President of the International Tribunal for the Former Yugoslavia to the Secretary-General, Annex to a letter dated Nov. 2, 2000 from the Secretary-General to the President of the Security Council, U.N. Doc. A/60/706 (Nov. 2, 2000). See further: Judge Claude Jorda, speaking in Sarajevo on May 12, 2001. Press Release, Int'l Crim. Trib. for the Former Yugoslavia, The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina (May 17, 2001). <http://www.icty.org/sid/7985>. Accessed 10 January 2020.

Nonetheless, the ICC, by acknowledging victims, their interests and potential role, alleviates criticisms that the Court is too far removed from the victims themselves and addresses the lack of emphasis on restorative justice, which was perceived to be a concern in the *ad hoc* international criminal tribunals (Kamatali, 2006, p. 93). Indeed, as argued by Victims' Rights groups argued that there is an injustice in the fact that victims are those directly affected by the commission of international crimes, yet they have little power to participate in proceedings (Garkawe, 2008, p. 347; Morris & Scharf, 1995). As a consequence, the ICC is a more victim-oriented court. As will now be discussed, the Rome Statute includes a pioneering and gradually tested system of victim participation.

3 “Constructive Ambiguity” and Victim Participation⁹

Although victim participation has been widely discussed and addressed to varying degrees by both national and international criminal courts. The ICC defines victim participation in very broad terms. There is very little consistent practice for the ICC to fall back on for support or, as Jackson so eloquently put it, no “ready made garden to work from” (Jackson, 2008, p. 248). Furthermore, those involved in the creation and design of the ICC were influenced by their domestic systems and “[j]udges and other protagonists steeped in their own domestic culture still tend to view processes through adversarial and non-adversarial lenses” (Jackson, 2008, p. 238). The ICC combines features of adversarial and inquisitorial processes. The pre-trial procedure in particular is of an inquisitorial nature personified by the figure of the Prosecutor. The trial procedure is more akin to adversarial processes. Therefore the task given to the judges is not easily achievable, leaving it to them to create a system of victim participation that can be as restrictive or non-restrictive as decided by them. As a consequence, the judges have generally adopted a non-restrictive, victim-oriented approach. It is therefore not surprising that the system of victim participation is not always efficient or consistent.

3.1 *Legal Foundation of Victim Participation*

Article 68(3) of the ICC Statute, the key statutory provision, simply states the basic right of victims to present “their views and concerns when their personal interests are affected”. Apart from a limited number of provisions in the Rules of Procedure and

⁹ The expression “constructive ambiguity” as used by Phillippe Kirsch in Van den Wyngaert (2011), p. 478.

Evidence (RPE),¹⁰ it has largely been left to the judges to prescribe the practical and procedural details of how victim participation will operate in their courtroom in a workable and meaningful manner.¹¹

The wording used in Article 68(3) is sufficiently ambiguous for judges to have considerable leeway to explain and develop the content of victim participation. Article 68(3) leaves many issues to be determined at a later date, such as the various stages of the proceedings during which victim participation will be permitted and when exactly the Court will deem it ‘appropriate’ for the legal representatives of victims to present their views and concerns. Participating victims are given a voice, because they or their legal representatives are granted the right to present their “views and concerns,”¹² which is akin to the role that witnesses fulfil, albeit not at the behest of the parties.

Article 68(3) sits amongst an impressive number of victim-friendly provisions of the Rome Statute. The Court must pay particular attention to the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹³ Victims are also entitled to legal representation and common legal representatives represent victims in all current cases. Within the Registry three units: the VWU, the Victims Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV) are devoted to a variety of needs of victims and witnesses. Finally, the Trust Fund for Victims gives general assistance to victims and their families and is responsible for the process of awarding reparations to victims after a conviction has been reached.

3.2 *Qualifying Victims*

Victims whose interests are affected may apply for participation during the trial stages.¹⁴ The judges determine whether the applicant qualifies for victim

¹⁰ Rules of Procedure and Evidence: Rule 89(1) permits the legal representative of victims to make opening and closing statements. Rule 91(2) enables the participation in hearing and the making of written or oral submissions during a hearing. Rule 91(3) allows the questioning of a witness, expert or the accused following an application to the Chamber. Rule 92(5) provides that the Registry notifies participating victims of hearings, decisions, and submissions or motions. Rule 121(10) and Rule 131(2) address the issue of access by the legal representative of victims to the record of proceedings.

¹¹ Rome Statute, article 68 (3). See *Prosecutor v. Katanga & Ngudjolo Chui*, 13 May 2008, ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, paras 98–100.

¹² Statute of the International Criminal Court (Rome Statute), July 17, 1998, 2187 U.N.T.S. 90, art. 68(3).

¹³ Statute of the International Criminal Court (Rome Statute), July 17, 1998, 2187 U.N.T.S. 90, art. 68(1).

¹⁴ See *Prosecutor v. Lubanga Dyilo*, 19 December 2008, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the

participation. However the procedure to make this determination is very burdensome, in particular for the judges.

Rule 89(1) RPE requires that victims wishing to participate must file an application with the Registrar. Although the Registry has developed a seven-page application form to apply for victim participation and/or reparation, victims are not obliged to use this form, as long as they provide all the necessary information.¹⁵ The Registrar transmits applications to the relevant Trial Chamber, Prosecution, and defense.¹⁶ However, recent decisions saw the pre-trial chamber rationalise the application procedure to address the large numbers of victims seeking to participate.¹⁷ Whilst victims who wish to appear individually before the ICC are still required to follow the procedure set out in Rule 89(1) RPE, victims who do not wish to appear individually can now apply to the Registry for their views and concerns to be represented as a group by their common legal representative. The application procedure is simplified and can be dealt with in a more expeditious manner. It enables the common legal representative to represent the individual views and concerns of a small number of victims whilst also representing the shared views of concerns of a greater group of victims.¹⁸ This approach should also expedite the assessment procedure of application by the trial chambers.

As will be examined below, the application for grouped victims is far less onerous than for victims who want their individual concerns to be represented. The application for representation of shared views and concerns needs to contain the name of the victim, their contact details and information on the harm suffered.¹⁹ The application as set out in Rule 89(1) serves the purpose of determining whether an applicant qualifies as a victim for the purpose of victim participation.²⁰ Consequently, it is essential that it contains the identity of the applicant; the date(s) of the crime(s); the location(s) of the crime(s); a description of the harm suffered by a crime that falls within the competence of the Court; proof of the applicant's identity and the applicant's signature or thumbprint "on the document and at the very least on the last page of the application".²¹

Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, para 57.

¹⁵ Forms are available at <https://www.icc-cpi.int/itemsDocuments/palestine/Application-form-for-individuals-Eng.pdf>, Accessed 25 March 2020.

¹⁶ Rules of Procedure and Evidence, Rule 89(1).

¹⁷ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11- 460; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-02/11-498; *The Prosecutor v. Laurent Gbagbo*.

¹⁸ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11- 460, para 29; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-02/11-498, para 28.

¹⁹ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11- 460, para 49; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-02/11-498, para 48.

²⁰ Rules of Procedure and Evidence, Rule 85(a): "Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".

²¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 26 February 2009, ICC-01/04-01/07-933, para 28.

Where the application is made on behalf of the victim, the victim must give express consent and contain proof of kinship or legal guardianship.²² In addition, Judge Politi clarified in the *Prosecutor v. Kony* case that “both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by one of the listed documents”.²³ The judges are required to determine on a case-by-case basis whether each applicant meets the criteria of Rule 85 of the RPE and whether the applicant’s interests are affected by the proceedings. To do so, judges will examine a number of requirements.

Firstly, the judge must determine whether applicant is a natural or legal person.²⁴ Due to the practical realities and consequences of armed conflict, proof of an applicant’s identity is not always straightforward. Obstacles to communication and travel may make access to civil status records difficult, or these may not be available, too difficult or too expensive to obtain and thus applicants are not able to meet the requirements for proving their identity. It is therefore appropriate to adopt a flexible approach and to determine the acceptability of documents on a case-by-case basis.²⁵

In the *Prosecutor v. Kony* case, Judge Politi agreed that the lack of proper identification documents for people in Northern Uganda necessitates that the requirement ‘be lowered and adapted to the factual circumstances in the region’.²⁶ The Court established that it has the discretion to accept indirect proof as long as a recognised public authority issued the document which has a photograph of the applicant and states clearly the applicant’s name and the date of birth.

Depending on the particular circumstances, the range of documents that in other circumstances would not be sufficient includes, amongst others, national identity cards; passports; short or long birth certificates; death and marriage certificates; family registration booklets; wills; driving licenses; cards from a humanitarian agency; voting cards; certificate of registration issued by the Electoral Commission; identity card issued by a workplace or an educational establishment; graduated tax ticket; letters from a local authority; camp registration cards; documents pertaining to medical treatment; employee identity cards; baptism cards; certificates attesting to loss of official documents; school documents; church membership cards; association and political membership cards; documents issued in rehabilitation centres for children associated with armed groups; certificates of nationality; and pension booklets; resident permit or card issued by a Local Council; letter issued by a leader of an Internally Displaced Persons (IDP) Camp; reunion letter issued by the Resident District Commissioner camp registration card or card issued by humanitarian relief

²² *DRC Situation*, 19 December 2007, ICC-01/04 – 423, para 14.

²³ *The Prosecutor v. Joseph Kony et al.*, 14 March 2008, ICC-02/04 – 125, para 7.

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, 18 January 2008, ICC-01/04-01/06 – 1119, paras 87–89.

²⁵ See for instance Judge Kaul, *The Prosecutor v. Jean Pierre Bemba Gombo*, Pre-Trial Chamber, 12 December 2008, ICC-01/05-01/08-320, para 34; *The Prosecutor v. Omar Hassan Ahmad Al’Bashir*, Pre-Trial Chamber, 10 December 2009, ICC-02/05-01/09-62, para 9.

²⁶ *The Prosecutor v. Joseph Kony et al.*, ICC 02/04 – 125, paras 4–6; ICC-02/04-01/05-371 OA2, para 16.

agencies, such as United Nations High Commissioner for Refugees or the World Food Program; baptism card; letter issued by a Rehabilitation Centre.²⁷

The Court will also allow a statement signed by two witnesses attesting to the identity of the applicant or the relationship between the alleged victim and the person acting on his or her behalf, provided that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of two credible witnesses who are persons of standing in the community.²⁸

Secondly, it is the role of the judge to ‘determine whether the alleged incidents described may be regarded as crimes within the jurisdiction of the Court’.²⁹ As previously discussed it is not sufficient for the applicant to show that they are victims of the three broad categories of crimes under the jurisdiction of the court, such as genocide, crimes against humanity and war crimes. The victims must demonstrate that they have suffered harm resulting from the crimes included in the indictment.

Thirdly, the judge must determine whether the applicant has suffered harm. Harm may be both individual and collective, as long as it is also personal to the individual victim.³⁰ The notion of harm necessarily implies the existence of personal harm suffered by the applicant even though it may have been suffered indirectly.³¹ Harm is understood as a physical or mental injury, emotional suffering, economic loss, or substantial impairment of his or her fundamental rights.³² For instance, in the *Prosecutor v. Lubanga* case, Thomas Lubanga Dyilo was the first person successfully prosecuted by the ICC for the war crimes of recruiting and using child soldiers. He was the leader of the *Union des Patriotes Congolais* (UPC), the rebel force that gained control of the town of Bunia in the Ituri region of the DRC. The UPC massacred civilians in the Bunia region and also recruited child soldiers. The Trial Chamber found that ‘the harm suffered by these indirect victims may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions’.³³

Fourthly, for each category of victims the judge must determine whether a causal link exists between the crimes charged and the harm alleged.³⁴ In the *Prosecutor v. Lubanga* case, the court required that a ‘causal link must exist between the crimes charged and the victim’s harm: the injury, loss, or damage suffered by natural persons must be a result of the crimes confirmed against Thomas Lubanga

²⁷ *DRC Situation*, 19 December 2007, ICC-01/04 – 423, para 15.

²⁸ *DRC Situation*, 19 December 2007, ICC-01/04 – 423, para 15.

²⁹ *The Prosecutor v. Jean Pierre Bemba Gombo*, 12 December 2008, ICC-01/05-01/08-320, para 64; See also *CAR Situation*, Pre-Trial Chamber II, 11 November 2011, ICC-01/05-31, para 3.

³⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 – 1432, para 35.

³¹ *The Prosecutor v. Thomas Lubanga Dyilo*, 11 July 2008, ICC-01/04-01/06 – 1432, paras 32, 38 and 39.

³² *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 – 1119, paras 90–92.

³³ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 50.

³⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 45.

Dyilo'.³⁵ On 29 June 2006, Pre-Trial Chamber 1 rejected a number of applicants, who had been beaten, tortured, raped and submitted to inhuman and degrading treatment and who were not granted the right to participate because their account does not mention the fact that they had been recruited and used as child soldiers.

Finally, as required by Article 68(3), the judge must be satisfied that the 'personal interests' of the applicant are affected.

On the whole, the process to decide whether an applicant should be granted the right to participate is burdensome for a number of reasons. Even if all relevant and necessary information is contained in the seven-page application form, supporting evidence will complement this form. The forms and supporting evidence may need to be translated and redacted of all identifying information. This involves the blackening out of names and any identifying passages in their stories that may lead to their identification. The application form and supporting evidence is then passed on to the Prosecutor and Defence teams for their observations before the judge decides. This is in itself a time-consuming process, in particular since the number of applying victims has noticeably increased. Furthermore, every time a victim applies at a different procedural stage, the victim has to make a written submission to the judge on which the Prosecutor and the Defence teams have the right to comment. Then the judge has to make an assessment whether their personal interest in the particular proceeding are affected.

In light of the growing number of victims applying to participate and the growing number of victims being granted the right to participate, it makes sense to have rationalised the application procedure and to differentiate between victims who want their individual views and concerns to be represented by the common legal representative and victims who want their common shared views and concerns to be represented by the common legal representative. The potential delays in the proceedings are not conducive to a proper and fair trial.

If the application is accepted judges then also determine and organise the extent of each victim's participation.³⁶ Consequently, judges are given a substantial amount of leeway to determine victim participation. Before discussing the variety of modalities of victim participation granted by judges, I would briefly like to clarify the categories of victims and appropriate proceedings for victim participation.

3.3 *Categories of Victims*

The Court has found that there are two categories of victims. Direct victims are 'those whose harm is the result of the commission of a crime within the jurisdiction

³⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 47.

³⁶ Rules of Procedure and Evidence, Rule 89(1).

of the Court' and indirect victims are 'those who suffer harm as a result of the harm suffered by direct victims.'³⁷

To be considered a direct victim, the Chamber must establish the harm suffered by the victim and thus will consider evidence that will demonstrate that the applicant suffered harm 'as a result of the commission of a crime within the jurisdiction of the Court'. In the *Prosecutor v. Lubanga* case the Trial Chamber has rejected an application from a woman whose husband and children were killed in an attack allegedly by the UPC. She was subsequently taken to a UPC camp and continually raped by the UPC militia for months. The application was rejected for lack of sufficient information to conclude that the applicant had suffered personal harm as a result of crimes included in the charges brought against the accused: the recruitment and use of child soldiers.

To be considered an indirect victim, the individual has suffered on the basis of harm suffered by another person who is the direct victim, such as a parent of a child who has been injured or killed as a result of the crimes under the jurisdiction of the Court.³⁸ In other words, it is important to establish the close relationship between the indirect and direct victim.³⁹ In the *Prosecutor v. Kony* case, the ICC is seeking to prosecute Joseph Kony as the alleged commander in chief of the Lords' Resistance Army (LRA) for crimes committed in Northern Uganda, including murdering, raping, maiming, torturing, displacing civilians and recruiting and using child soldiers as crimes against humanity and/or war crimes. The Pre-Trial Chamber has granted victim status to four applicants who suffered emotional harm as a result of the death of their relatives due to crimes under the jurisdiction of the Court.⁴⁰ In the *Prosecutor v. Lubanga* case, the Trial Chamber allowed that, under certain circumstances, the loss, injury or damage suffered by a person intervening to prevent one of the crimes alleged against the accused may also serve as the basis for an application of an indirect victim, provided that the person's harm is sufficiently linked to the direct victim's harm. However, it specifically excludes individuals who suffered crimes committed by children who had been conscripted or enlisted whilst under the age of 15 or used to participate actively in hostilities as 'indirect victims'.⁴¹ Instead, indirect victims 'are restricted to those whose harm is linked to the harm of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise'.⁴² It

³⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 44.

³⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 49.

³⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, 8 April 2009, ICC-01/04-01/06-1813, para 50 citing ICC-01/04-01/06-1432 OA9, para 32.

⁴⁰ *The Prosecutor v. Joseph Kony et al.*, 14 March 2008, ICC-02/04-125 and ICC-02/04-01/05-367, public redacted versions.

⁴¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, 8 April 2009, ICC-01/04-01/06-1501-Conf-Exp, para 4 & ICC-01/04-01/06-1813, para 52.

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, 8 April 2009, ICC-01/04-01/06-1813, para 52.

held that ‘a causal link must exist between the crimes charged and the harm alleged both for direct and indirect victims’.⁴³

3.4 *What Type of Procedures?*

From an early stage, the ICC had to determine whether the wording in article 68 (3) of the ICC Statute permits victims to participate at the investigative phase of a situation or whether this is not a judicial proceeding *per se* and thus participation can only be granted once the charges have been confirmed. Whereas the two Trial Chambers ruled that the investigative stage amounts to “proceedings”, the Appeals Chamber decided that victims do not have a general right to participate at the investigation stage.

The Judges in the *DRC* situation and the *Darfur* situation decided that applicants’ interests could be affected in the investigation stage and therefore victims should have the right to participate in order to express their views and concerns to the Chamber. The Judges reasoned that “the close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute.”

However, the Appeals Chamber disagreed, because the subject matter of the proceedings for each case is defined by the crimes charged. As a consequence only victims of crimes charged will be able to demonstrate that their personal interests are affected by the trial proceedings.⁴⁴

Additionally, the Appeals Chamber argued that article 68(3) quite clearly refers to the ‘judicial proceedings’, which is a “term denoting a judicial cause pending before a Chamber”.⁴⁵ In contrast, the investigation is “an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible”.⁴⁶ As a consequence, the investigative stage should be the sole remit of the Prosecutor.⁴⁷ The Appeals Chamber concluded that article 68(3) of the Rome Statute does not give victims a general right to participate at the investigation stage.

⁴³ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, 8 April 2009, ICC-01/04-01/06-1813, para 45.

⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 – 1432, para 62.

⁴⁵ For the victims’ arguments, see Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, para 32. For the Appeals Chambers’ arguments, see Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, para 45.

⁴⁶ Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177.

⁴⁷ Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, paras 51–52.

Nonetheless, the Appeals Chamber did not dismiss completely the possibility for the Prosecutor to take into account the victims' views and concerns. It acknowledged that in some instances, victims might assist the Prosecutor by presenting information about the scope of his investigations.⁴⁸ In fact, the Appeals Chamber went further by preserving future possibilities for the Pre-Trial Chamber to grant participation to victims in the investigation phase if they can demonstrate that their "personal interests are affected by the issues arising for resolution".⁴⁹ In other words, victims may be allowed to participate in the investigative stage in the context of special judicial proceedings.⁵⁰ Therefore, on the whole victim participation is limited to judicial proceedings taking place after the confirmation of charges.

4 Identifying Modalities for Participation

Participation is a possibility, but it is not a general right. As previously discussed, victims must file written applications describing how their personal interests are affected by each stage of the proceedings, and detailing their proposed intervention. The judges will use their discretionary powers to determine whether participation is granted and the extent of participation that would be appropriate and 'consistent with the rights of the defence to a fair and expeditious trial'.⁵¹ Since 2010, a number of decisions from the Trial and Appeals Chambers enumerate the modalities of victim participation during the trial phase of cases before the ICC. Some modalities had already been established at the pre-trial phase and continued to be permitted during the trial phase of proceedings. Judges have granted the following rights.

4.1 *Notification of Decisions That Affect the Interest of the Victims*

In the first instance, participating victims will be kept informed of decisions that affect their interests in the case, and in particular, they have the right to be informed when the confirmation of charges against the accused will take place.⁵²

⁴⁸ Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, para 54.

⁴⁹ Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, para 56.

⁵⁰ Appeals Chambers decisions in the *DRC* and *Darfur, Sudan* situations: ICC-01/04-556 and ICC-02/05-177, para 57.

⁵¹ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 – 1119, paras 103–104.

⁵² RPE, Rule 92, in particular Rule 92(3).

More generally, legal representatives of victims authorised to participate at the pre-trial stage of the case have the right to be notified of the decisions of the Chamber in the proceedings. On the same basis as the Prosecution and the Defence, they should also be notified of all public requests, submissions, motions, responses and other public procedural documents and public proceedings before the Court, including the date of hearings, any postponements, and the date of delivery of the decision, to have access to the transcripts of hearings contained in the record of the case, whether classified as public or confidential; all proceedings before the Court, including public and closed session hearings, as well as any postponement of those hearings, and the date of delivery of any decisions; to have access to the evidence proposed by the Prosecution and the Defence, and contained in the record of the case; to raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing to attend all public and closed session hearings leading up to the confirmation hearing, as well as all public and closed sessions of the confirmation hearing itself; and, both in the lead up to and at the confirmation hearing, to participate by way of oral motions, responses and submissions, and to file written motions, responses and replies.⁵³

4.2 *Presence, Opening and Closing Statement*

The pre-trial modalities tend to correspond closely to the forms of victim participation contemplated in the RPE. Firstly, on the basis of Rule 89(1) RPE, Pre-Trial Chambers have permitted victims' legal representative to make opening and closing statements and this has been confirmed by the Pre-Trial Chambers.⁵⁴ In the *Katanga* trial, victims have made opening statements and will be allowed to make closing statements after the Prosecution and before the Defence.⁵⁵

Secondly, on the basis of Rule 91(2) RPE, Chambers have permitted legal representatives of victims to attend and participate in public and closed session hearings.⁵⁶

Thirdly, the Trial Chambers in the *Prosecutor v. Lubanga* and *Prosecutor v. Katanga/Ngudjolo* cases approved the presence of victims' legal representative

⁵³ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 13 May 2008, ICC-01/04-01/07 – 474, paras 124–143.

⁵⁴ See for instance *The Prosecutor v. Bahar Idriss Abu Garda*, 19 October 2009, ICC-02/05-02/09-136, para 19; *The Prosecutor v. Jean Pierre Bemba Gombo*, 12 December 2008, ICC-01/05-01/08-320, para 102; *The Prosecutor v. Thomas Lubanga Dyilo*, 22 September 2006, ICC-01/04-01/06-462-tEN, p. 6.

⁵⁵ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 22 January 2010, ICC-01/04-01/07-1788-tENG, para 68.

⁵⁶ See for instance *The Prosecutor v. Bahar Idriss Abu Garda*, 19 October 2009, ICC-02/05-02/09-136, paras 17–18; *The Prosecutor v. Jean Pierre Bemba Gombo*, 12 December 2008, ICC-01/05-01/08-320, para 101.

in the witness familiarisation process, because at a later stage they may have the opportunity to question witnesses.⁵⁷ However, this does not mean that the legal representatives are permitted to speak to witnesses about the evidence. The modalities of their participation are regulated by a protocol established by the VWU.

4.3 Access to Public Documents and Decisions

Some modalities have been made more expansive at the trial phase than at the pre-trial phase. For example, at the pre-trial phase, the victims' legal representatives have been allowed to access the whole public case record at the pre-trial phase, including public filings such as transcripts of hearings, public evidence and public decisions,⁵⁸ whereas the Trial Chambers have all gone beyond and permitted the legal representative of victims to have access to confidential documents and evidence in the case record during the trial phase.⁵⁹ Access has been granted to victims' legal representatives only, but has not been granted to the victims themselves.⁶⁰ With respect to the evidence, the legal representatives are permitted to consult the evidence produced by the parties at least three days prior to the corresponding testimony.⁶¹

4.4 Witnesses

Most significant is that fact that the legal representative of victims can call victims or other witnesses to testify, independently from the Prosecutor or the Defence.⁶² However, the need for a meaningful trial means that only a selection of victims

⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, 25 October 2010, ICC-01/04-01/06-1351, para 39; *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 79–80.

⁵⁸ See for instance *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-136, para 13; *The Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-320, para 103 and ICC-01/05-01/08-807, para 47; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/-06-462-tEN, p. 6 and ICC-01/04-01/06-1119, para 106; *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1788-tENG, paras 122–125 and ICC-01/04-01/07-1665, para 103 and ICC-01/04-01/07-T-86-Red-ENG, pp. 1–2.

⁵⁹ This was decided at a status conference on 1 October 2009, ICC-01/04-01/07-T-71-RED-FRA, pp. 5 and 6.

⁶⁰ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 122–123.

⁶¹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 121–122.

⁶² *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 86–97.

will be able to testify: those that can effectively contribute to the establishment of the truth without duplication or hampering of the proceedings.⁶³

If the judge grants such a right, this will take place at a separate stage in the proceedings. For instance in the *Prosecutor v. Katanga* trial, participating victims were heard after the case of the Prosecution and before the case of the Defence.

Trial Chamber II in the *Prosecutor v. Katanga* case found four female victims had the required personal interest and that their testimony would contribute to the truth seeking function of the Court. The four women were of Hema origin and lived in Bogoro at the time of the attack. Their testimony would clarify the social context, living conditions and atmosphere both before and after the Bogoro attack, the unfolding of the attack itself, the reasons for seeking refuge at the Bogoro Institute, the ethnic nature of the attack and the harm suffered.⁶⁴ The Chamber also found that the proposed testimony would cover the material and emotional consequences of the attack on civilians, detailed information on the unfolding of events at the Bogoro Institute preceding the attack, the action taken by the Red Cross after the attack, and the distinction made between Hemas and non-Hemas by the attackers. The Chamber found the proposed testimony of each witness to be relevant and thus they were authorised to appear as witnesses.⁶⁵

Victims' legal representatives have also been granted the right to question witnesses, experts called by the Prosecutor or the Defence or the accused.⁶⁶ They must demonstrate that the personal interests of one or more victims were affected by the testimony. During the *Lubanga* trial the Trial Chamber clarified the manner in which witnesses could be questioned.⁶⁷ Victims' legal representatives are not parties, but participants in the proceedings and as a consequence the manner in which they question a witness should not necessarily be similar to the cross-examination of witnesses by the prosecution or the defence. Therefore, victims' legal representatives should follow a more neutral form of questioning unless it is necessary to press, challenge or discredit a witness by asking closed, leading or

⁶³ In practice, the Bemba case has shown that not all victims will be able to appear before the judges. See *Prosecutor v. Jean-Pierre Bemba Gombo*, 21 December 2011, ICC-01/05-01/08-2027, second order regarding the application of the legal representatives of victims to present evidence and the views and concerns of victims, para 12.

⁶⁴ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Trial Chamber II, 9 November 2010, ICC-01/04-01/07-2517.

⁶⁵ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Trial Chamber II, 9 November 2010, ICC-01/04-01/07-2602.

⁶⁶ See for instance *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-136, paras 22–23. For the Trial Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* see ICC-01/04-01/06-1119, paras 108, 113, 117; ICC-01/04-01/06-2127, paras 24–30; ICC-01/04-01/06-2340, paras 35–39. For the Trial Chamber in *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui* see ICC-01/04-01/07-1788-tENG, paras 68–78; ICC-01/04-01/07-1665, paras 14–48 and 90–91; For the Trial Chamber in *The Prosecutor v. Jean Pierre Bemba Gombo* see ICC-01/05-01/08-807, paras 38–40.

⁶⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, 16 September 2010, ICC-01/04-01/06-2127.