

# VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
November 2007

## ACKNOWLEDGMENTS

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We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute and the Washington College of Law (WCL), without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including WCL Professor Robert Goldman and the members of the WCRO's ICC Advisory Committee: Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); Daniel Nsereko, University of Botswana Professor of International Law and former Uganda Government Delegate to the Assembly of States Parties to the Statute of the International Criminal Court; Diane Orentlicher, WCL Professor; and Judge Patricia Wald, former Judge of the ICTY.

## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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### COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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## I. EXECUTIVE SUMMARY

Under the 1998 Rome Statute establishing the International Criminal Court (ICC), victims of the world's most serious atrocities were given unprecedented rights to participate in proceedings before the Court. On 17 January 2006, the ICC issued its first decision interpreting and implementing the ground-breaking provisions of the Rome Statute allowing for victims to participate. Since that time, a substantial amount of attention has been focused on the ICC victim participation scheme, both within the Court – through multiple submissions from the parties and victims' representatives, as well as decisions from the bench – and from outside commentators, including victims' rights advocates, academics, and practitioners. Nevertheless, significant questions remain as to how the ICC will be able to effectively achieve the goals of the victim participation scheme without threatening its ability to fairly and efficiently investigate and prosecute “the most serious crimes of concern to the international community as a whole.”<sup>1</sup>

Indeed, the scale of suffering in Darfur, where an estimated 3.6 million people have been affected by the ongoing crisis, as well as in the three other countries currently under investigation by the Court, poses a significant challenge for the success of the ICC's victim participation scheme. As one commentator has aptly summarized:

[T]he ICC must attempt to strike a balance between a number of legitimate objectives. There are the fair trial rights of accused persons, the right of victims to have their say and participate in proceedings where their personal interests are affected, and a workable procedure that will not be overwhelmed by the numbers of victims and survivors wishing to participate.<sup>2</sup>

A review of the ICC's victim participation jurisprudence thus far highlights the extent to which many of the questions surrounding a meaningful yet manageable participation scheme remain unsettled.

Our purpose in writing this report is two-fold. First, we seek to clarify the objectives and concerns underlying the design of the ICC victim participation scheme, which consists of a variety of provisions from the Rome Statute and the ICC Rules of Procedure and Evidence (ICC Rules). In general, we conclude that the framework for victim participation at the ICC is the product of a desire to achieve restorative justice for victims

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<sup>1</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, U.N. Doc. A/CONF.183/9, Preamble (1998) [hereinafter “Rome Statute”].

<sup>2</sup> Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 Int'l Crim. L. Rev. 345, 359-60 (2003).

– meaning that serving the interests of victims would be a goal separate and distinct from punishing wrongdoers – while simultaneously maintaining the efficiency and fairness of the Court’s proceedings. Second, we evaluate the early victim participation jurisprudence of the ICC in light of the goals and concerns identified in the first half of the report, and suggest potential areas of reform that might allow the Court to better achieve the balance between restorative justice on the one hand, and efficiency and fairness on the other.

## RESTORATIVE PURPOSE

The primary motivation behind the creation of a victim participation scheme within the ICC context was a desire to achieve restorative – as opposed to strictly retributive – justice. More specifically, the Rome Statute drafters were heavily influenced by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>3</sup> an instrument designed to support victims’ access to criminal justice mechanisms at both the domestic and international level. Among the key provisions of the UN Victims Declaration are the right of victims to be treated with respect, the right to receive information regarding relevant judicial proceedings, and the right to present their views and concerns to a court. The drafters of the ICC victim participation scheme were also influenced by the widely-perceived failure of the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to connect their work with the very people who had suffered from the crimes being prosecuted by those courts. While many of these criticisms arose from the tribunals’ inadequate outreach and education programs, critics have also pointed to the fact that neither the ICTY nor the ICTR provide any opportunity for victims to interact with the courts other than as witnesses called to serve the evidentiary needs of a given party in a given case.

Thus, driven by the desire to serve a restorative function for victims, in particular by offering a means by which victims could feel connected to the ICC’s operations, the drafters of the Rome Statute and ICC Rules created several provisions through which victims might access the court in their own right, as opposed to as witnesses called to testify in a case. First, 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 of the proceedings.<sup>4</sup>

In addition, the Rome Statute and ICC Rules include a number of more targeted provisions designed to secure victims’ access to the Court in circumstances identified as particularly important to victims’ interests. For example, under Article 15, victims are permitted to make representations to the Court when the Prosecutor seeks authorization to undertake an investigation on his own initiative, as opposed to on the referral of a State Party to the Rome Statute or of the UN Security Council.<sup>5</sup> Victims are also entitled to

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<sup>3</sup> See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34 (1985) [hereinafter “UN Victims Declaration”].

<sup>4</sup> Rome Statute, *supra* n. 1, at Art. 68(3).

<sup>5</sup> *Id.* at Art. 15.



receive notice in the event that such an investigation comes to an end.<sup>6</sup> Furthermore, 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.<sup>7</sup> Finally, the Rules of Procedures and Evidence make clear that ICC judges are free to consult the views of any victim in relation to the proceedings of the Court, regardless of whether the victim has previously been granted formal participation rights under the Rome Statute.<sup>8</sup>

#### EFFICIENCY & FAIRNESS CONCERNS

Of course, serving the interests of victims is not the only function of the International Criminal Court. Hence, in designing the ICC victim participation scheme, the drafters carefully considered the likely impact of the scheme on the fair and expeditious conduct of the Court's investigations and trials. In particular, the drafters were concerned that, given the potentially large numbers of victims resulting from the crimes within the Court's jurisdiction, unregulated victim participation could substantially drain the resources of the ICC and threaten the right of accused suspects to be tried without undue delay.

To address these concerns, the drafters charged the Court with managing victim participation under Article 68(3) in a manner that would ensure the efficiency and fairness of proceedings. Thus, the general victim participation provision not only states that victims shall be able to present their views and concerns to the Court, but also requires that such participation occur "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."<sup>9</sup> Additionally, the drafters placed certain express limitations – over and above the requirements of Article 68(3) – on the timing and scope of victims' role in ICC proceedings. For example, while individuals or groups may voluntarily provide the Prosecutor with information about crimes within the jurisdiction of the Court, the drafting history is clear that victims do not have the power to initiate an investigation against a particular suspect or into a given crime. Furthermore, victims who are authorized to participate in Court proceedings have no automatic right to access the evidentiary record or to question witnesses at trial. On the whole, however, the drafters largely left it to the discretion of the Court to balance the concerns for efficiency and fairness against the restorative purpose underlying the victim participation scheme.

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<sup>6</sup> International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), R. 92(2) [hereinafter "ICC Rules"].

<sup>7</sup> Rome Statute, *supra* n. 1, at Art. 19.

<sup>8</sup> ICC Rules, *supra* n. 6, at R. 93.

<sup>9</sup> Rome Statute, *supra* n. 1, at Art. 68(3).

## EARLY JURISPRUDENCE IN LIGHT OF RESTORATIVE PURPOSE AND NEED TO MAINTAIN EFFICIENCY & FAIRNESS

Given the broad discretion left to the Court under Article 68(3), the early decisions of the ICC are critical to evaluating the likely success of the victim participation scheme. The first decision of the Court responding to requests for participation, issued in January 2006, involved six applicants from the Democratic Republic of Congo (DRC), each of whom sought to participate in proceedings, “be it at the investigation, trial or sentencing stage.”<sup>10</sup> As no trial had yet begun at the time these applications were submitted to the Court, the Pre-Trial Chamber (PTC I) was confronted with the question whether victims could be granted general participation rights under Article 68(3) in the context of an investigation of a “situation,” *i.e.* prior to the identification by the Prosecutor of any suspect or group of suspects.<sup>11</sup> Ultimately, in its January 2006 decision, PTC I determined that Article 68(3) could apply at the investigation stage, and thus granted the six applicants “victim” status for purposes of the DRC “situation.” Notably, however, the Chamber was vague as to the precise form that the participation of these “situation victims” might take under the general Article 68(3) provision.

Since January 2006, some 230 individuals have filed applications to participate before the ICC in proceedings relating to the investigations in the DRC, Uganda, and Darfur, as well as individual “cases” arising out of those investigations. However, to date, only 17 victims have been granted any form of participation under Article 68(3). While approximately 64 of the remaining applicants have been considered and rejected for participation in the “case” against Thomas Lubanga Dyilo, the first suspect charged in the DRC situation, these same individuals are still awaiting a decision on their request to participate in the DRC “situation.” Other applicants have failed to qualify for participation rights under Article 68(3), at any stage, due to their failure to comply with evidentiary requirements that had not been previously communicated to the applicants. The rest of the applicants have yet to receive *any* decision on their requests to participate, even though many filed their applications over one year ago. The limited number of applicants that have received a decision on their request to participate highlights the extreme backlog the Court is already facing with respect to victims’ applications, even though the current number of applications is slight compared to the potential number of applicants who have been victimized by the type of mass crimes the ICC was set up to

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<sup>10</sup> *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 12 (Pre-Trial Chamber I, 17 January 2006) [hereinafter “*Situation in DRC*, PTC I, 17 January 2006”].

<sup>11</sup> In the context of the ICC, the Court’s operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Id.* at ¶ 65. In other words, the “situation” refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

prosecute.

Furthermore, despite the slow process of evaluating victims' applications and the small number of successful applicants to date, the ICC victim participation scheme has consumed a substantial portion of the Court's resources since January 2006. In fact, the Pre-Trial Chambers have issued more than 45 decisions that address, in whole or in part, questions relevant to the victim participation scheme, and over 70 submissions have been filed in connection with those decisions by the Office of the Prosecutor, the Defence, and victims' representatives.<sup>12</sup>

Despite the number of decisions issued on participation-related subjects, the Court has yet to explain how the limited number of victims that have actually obtained the right to participate under Article 68(3) will be able to present their "views and concerns" to the Court under the terms of that provision. For example, although PTC I's January 2006 decision promised the victims of the DRC "situation" a number of theoretical participation rights – including the right to file documents pertaining to the current investigation of the situation in the DRC and the right to request the Pre-Trial Chamber to order specific measures – in reality, these rights remain largely hypothetical. Indeed, the full extent of "participation" by the initial six "situation" victims has been: (i) the submission by the victims' attorney of legal arguments regarding the Prosecutor's right to appeal the Court's January 2006 decision; and (ii) a request that the Pre-Trial Chamber order a hearing on the Prosecutor's decision to temporarily suspend the investigation of Thomas Lubanga Dyilo, which the PTC rejected more than one year after it was filed by the victims. At the same time, the four victims that have been granted participation rights in the "case" against Mr. Lubanga have found that they are continually subject to re-evaluation of their "personal interests" at various stages of proceedings, requiring a considerable expenditure of resources on the part of not only the victims' representatives, but also the Prosecution, the Defence, and the Chambers.

Based on the foregoing – in particular, the small number of victims granted participation rights, the slow and resource-intensive process of evaluating applications, and the lack of clarity as to the implications of obtaining "victim" status under Article 68(3) at both the "situation" and the "case" phases of proceedings – it is questionable whether the Pre-Trial Chambers have struck a reasonably effective balance between the restorative goals of the ICC victim participation scheme and the drafters' concerns about efficiency and fairness. Although achieving this balance will understandably require a fair amount of trial-and-error on the part of the Court, certain aspects of the Chambers' early jurisprudence seem at odds with the drafters' intent in designing the participation scheme.

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<sup>12</sup> Note that these 70-plus submissions each relate, in whole or in large part, to the specific issues of whether and/or how victims may participate before the ICC; we do not include in this figure submissions made by participating victims' representatives in the form of observations on substantive matters, nor the responses of the parties to those substantive submissions.

RECOMMENDATIONS: WAYS TO BETTER ACHIEVE RESTORATIVE PURPOSE WHILE ENSURING EFFICIENCY & FAIRNESS OF PROCEEDINGS

Our recommendations are outlined in detail in the text of this report, but may be briefly summarized as follows:

- Reconsider the application of Article 68(3) to the investigation phase of a situation. While the decision by PTC I to extend Article 68(3) to the investigation stage is not prohibited by the Rome Statute, neither is it required, and the practical effects of the decision have been incompatible with the goals of the victim participation scheme. Importantly, if the Court reverses its decision to apply Article 68(3) during a “situation,” victims will not lose any meaningful rights, as they will still be able to take advantage of Articles 15 and 19 of the Rome Statute – which secure victims’ access to the Court under specific circumstances that have been identified as particularly important to victims’ interests – as well as the notice provisions included in the ICC Rules.

Furthermore, focusing on the victim participation rights expressly provided for in the Statute and Rules – rather than granting victims general participation rights under Article 68(3) – avoids unduly raising victim expectations that they will be able to exercise rights beyond those contemplated by the Rome Statute, rights that even the Court has had trouble articulating. Finally, clarifying the specific timing and scope of victims’ opportunities to intervene at the investigation phase of proceedings will allow the ICC to ensure that the widest possible pool of victims receive the information necessary to take advantage of participation rights under Articles 15 and 19, as well as to meaningfully participate in future cases before the Court.

- Clarify and streamline the process by which victims are determined to have the right to present their views and concerns to the ICC under Article 68(3). Jurisprudence from the Pre-Trial Chambers implementing the victim participation scheme has, to date, left many questions unanswered, leading to frustration among applicants and the risk of inconsistent treatment for similarly-situated victims. Such problems would be significantly reduced if guidelines were issued by the Court on certain fundamental, recurring questions, including the types of documents that will be accepted as proof of identity and the standards by which applicants will be evaluated.

Moreover, the ICC Registrar – which already plays a significant role in the processing and evaluation of victims’ applications – could then use these guidelines to provide the Chambers with a *prima facie* recommendation regarding victims’ ability to participate, leaving for the Chamber’s review only those applications that raise a major unresolved issue. Such a process

would likely reduce frustration among victim-applicants, while also expediting decision-making, which would substantially reduce the lengthy waiting periods victim-applicants currently face. The Registrar could further facilitate the process of determining the scope of victims' right to participate in given proceedings by grouping similarly-situated victims and guaranteeing equivalent rights within each group, which will further reduce the threat that like-victims will receive inconsistent treatment by the Court.

- *Manage concerns of efficiency and fairness through the timing and manner of victim participation, not by limiting their initial ability to obtain "victim" status.* Given the need to balance the drafters' restorative goals with concerns of efficiency and fairness, the Court is faced with two options in implementing the victim participation scheme. First, it could adopt a restrictive interpretation of who qualifies as a "victim" for purposes of Article 68(3), thereby excluding many applicants from even getting a foot in the door of the ICC. Alternatively, the Court could adopt a flexible approach to evaluating victims' applications for participation, and then limit the *timing and modality* of that participation consistently with the Court's obligations under the second half of Article 68(3), which requires that participation take place at "appropriate stages" and in a manner that is consistent with the fair conduct of proceedings.

If the Court favors the former option, it will be difficult for the ICC to fulfill the restorative goals of the victim participation scheme, as few individuals will gain access to the Court. By contrast, providing a wide range of victims limited participation rights, such as the right to receive notice and to submit written observations, would fulfill the core goals of the UN Victims Declaration, namely: treating victims with respect by responding to their request in a timely and even-handed manner; providing them with information relevant to their interests; and giving them the opportunity to communicate their views and concerns to the Court.

- *Ensuring respect for victims' agency.* Regardless of the procedures used by the Court to implement the ICC victim participation scheme, it is essential for the Court to recognize that the overarching purpose behind the scheme is to serve the interests of victims. Specific circumstances in which greater respect for victims' agency should be ensured include where victims clearly express a desire *not* to be evaluated by the Chamber for participation in a particular case, and where victims otherwise qualified to participate in proceedings decide to exercise that right despite a potentially risky security situation.

## II. GENESIS OF ICC VICTIM PARTICIPATION SCHEME

The unprecedented provisions for victim participation in the proceedings of the International Criminal Court are largely a product of a much broader movement in recent decades towards the achievement of restorative – as opposed to strictly retributive – justice.<sup>13</sup> In addition, the drafters of the Rome Statute were heavily influenced by the experiences of the *ad hoc* criminal tribunals in the former Yugoslavia and Rwanda, which are widely-perceived to have failed to connect with the communities that suffered most from the crimes these tribunals were designed to prosecute.<sup>14</sup>

### A. RESTORATIVE JUSTICE MOVEMENT

Generally speaking, proponents of the restorative justice movement maintain that “justice should not only address traditional retributive justice, *i.e.*, punishment of the guilty, but should also provide a measure of restorative justice by, *inter alia*, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries.”<sup>15</sup> While the concept of victim “participation” is not easily defined, it has been broadly described as victims “having a say, being listened to, or being treated with dignity and respect.”<sup>16</sup> Advocates of victim participation in criminal justice mechanisms

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<sup>13</sup> See, e.g., Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES*, 315 (Dominic McGoldrick, *et al.* eds., 2004) (noting that the Rome Statute marked a “major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order,” towards a “more expansive model of international criminal law that encompasses social welfare and restorative justice.”); Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 456, 457 (Roy S. Lee ed., 2001) (“The model for victims’ participation thus developed in the [Rome] Statute... was seen as an important achievement because the Court’s role should not purely be punitive but also restorative.”).

<sup>14</sup> See, e.g., Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 320 (“It was the failure of [the *ad hoc*] Tribunals to take the interests of victims sufficiently into account that motivated many NGOs, individuals, and some governments to argue for a new approach that would safeguard the interests of victims at the ICC.”); David Donat-Cattin, *Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 869, 871 (Otto Triffterer ed., 1999) (“[T]he inclusion of norms on victims’ participation in the Court’s proceedings... was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals.”).

<sup>15</sup> Judges’ Report, *Victims Compensation and Participation*, Int’l Criminal Tribunal for the Former Yugoslavia, CC/P.I.S./528-E, 13 September 2000, at 1, available at [http://www.un.org/icty/pressreal/tolbe\\_e.htm](http://www.un.org/icty/pressreal/tolbe_e.htm). We note that the term “restorative justice” is a broad term used in a variety of contexts, including as a shorthand reference to programs designed to facilitate victim-offender mediation outside the traditional criminal justice realm. However, we restrict our use of the term in this report to the movement *within* the criminal justice context that holds mechanisms created to deliver criminal justice should focus on the interests of victims, as opposed to strictly punishing wrongdoers.

<sup>16</sup> Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 *J. of Law & Society* 294, 295 (2005) (citing I. Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice*

believe that participation has a number of potential restorative benefits, including the promotion of victims' "healing and rehabilitation,"<sup>17</sup> which is encouraged by the "sense of empowerment and closure"<sup>18</sup> believed to accompany victim participation. Relatedly, some supporters of victim participation claim that the participation of victims may assist courts "in making a contribution to the reconciliation of a community or nation more generally."<sup>19</sup> Finally, groups that support a right of victim participation before the ICC have argued that victims' involvement will bring the Court's proceedings "closer to the persons who have suffered atrocities"<sup>20</sup> and increase the likelihood that those most affected by criminal acts will be satisfied that justice has been done.<sup>21</sup>

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Decision-Making, 44 *Brit. J. of Crim.* 967, 973 (2004)). See also Mikaela Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME: A STUDY OF THE STATUS OF VICTIMS BEFORE INTERNATIONAL CRIMINAL TRIBUNALS AND OF FACTORS AFFECTING THIS STATUS, 141-42 (2004) ("For the healing process of victims, it is... important that they have a sense of control over how their case is being dealt with, but also, more generally, that they are treated with dignity and respect."). Notably, in referring to "victim participation," we are discussing a role for victims in criminal proceedings other than as witnesses or as claimants for damages. See *infra* n. 46 *et seq.* and accompanying text.

<sup>17</sup> Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide*, REDRESS, 1999, at 15, available at <http://www.redress.org/documents/inpract.html>. See also Women's Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters, 4-15 August 1997, at 33 ("Participation is significant not only to protecting the rights of the victim at various stages of the proceeding, but also to advancing the process of healing from trauma and degradation. The active involvement, enhanced respect and protection afforded by participation and representation is particularly significant for victims of sexual and gender violence whose perceptions and needs are – in all cultures of the world – frequently ignored, presumed, or misunderstood."); Victims' Rights Working Group, *Victims' Rights in the International Criminal Court*, at 4, 2000, available at <http://www.vrwg.org/Publications/01/VRWG%20flyer2000.pdf> ("The possibility afforded to victims to contribute to fact-finding and truth-telling in the judicial process before the ICC may contribute to their healing after victimization and trauma.").

<sup>18</sup> Fiona McKay, *Universal Jurisdiction in Europe*, 1999, *supra* n. 17, at 15. See also Dr. Yael Danieli, *Victims: Essential Voices at the Court*, VRWG Bulletin, Issue 1, September 2004, p. 6, available at <http://www.vrwg.org/Publications/04/ENG01.pdf> ("On an individual level, acknowledgement at least begins to heal psychic wounds... Further, the ability to participate actively in the proceedings, as is provided for in the Court's procedures, may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood."); Doak, *Victims' Rights in Criminal Trials*, *supra* n. 16, at 312, ("[M]any victims feel that procedures which even allow *passive* participation in the criminal trial carry a certain symbolic importance for many victims which, in turn, can reduce feelings of exclusion and unfairness.") (emphasis in original). Cf. Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, U.N. Doc. E/CN.4/2004/88, ¶ 11 (2004) (explaining that including victims in the design of policies for combating impunity "can help reconstitute the full civic membership of those who were denied the protection of the law in the past," and that victim "participation in public deliberations may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government.").

<sup>19</sup> Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 *J. Int'l Crim. Just.* 219, 221 (2006).

<sup>20</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457.

<sup>21</sup> See, e.g., Women's Caucus for Gender Justice, *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence*, Submitted to the Preparatory Commission for the

A desire to serve the interests of victims was crucial to the founding of the ICC, the world's first permanent international criminal court.<sup>22</sup> In translating that desire into reality, the drafters of the ICC Rome Statute were particularly influenced by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration), unanimously adopted by the UN General Assembly in 1985.<sup>23</sup> The Declaration marks the first formal recognition at the international level that victims are entitled “access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”<sup>24</sup> More specifically, the UN Victims Declaration encourages states to implement measures designed to ensure, *inter alia*, that victims are “treated with compassion and respect for their dignity.”<sup>25</sup> In addition, states are to facilitate the “responsiveness of judicial and administrative processes to the needs of victims” by:

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International Criminal Court, 12-30 June 2000, at 20 (“The right of victims to participate in the proceedings was included in the Rome Statute to ensure that the process is as respectful and transparent as possible so that justice can be seen to be done and to advance the healing of individuals and of society.”); Victims’ Rights Working Group, *Victim Participation at the International Criminal Court: A Summary of Issues & Recommendations*, November 2003, at 2, available at [http://www.vrwg.org/Publications/01/VRWG\\_nov2003.pdf](http://www.vrwg.org/Publications/01/VRWG_nov2003.pdf) (“Taking into account the perspectives of victims will help to ensure that victims have a positive relationship with the Court, and that the processes will neither retraumatise them nor undermine their dignity.”).

<sup>22</sup> See, e.g., Theodore van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, 77 (Herman von Hebel, *et al.* eds., 1999) (“The suffering and the plight of victims undoubtedly contributed to the motivation of all the persons and institutions who advocated the establishment of an effective ICC as a reaction against widespread patterns and practices of impunity for the perpetrators of the most serious international crimes.”).

<sup>23</sup> See generally UN Victims Declaration, *supra* n. 3. See also E.S.C. Res. 1996/14, U.N. ESCOR, 1996 Sess., Supp. No. 1, 45th plenary mtg., at 38, ¶ 6, U.N. Doc. E/1996/96 (1997) (requesting that the Secretary-General “bring to the attention of the Preparatory Committee for the Establishment of an International Criminal Court the potential applicability of the basic principles contained in the Declaration.”); Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 428 (Roy S. Lee ed., 2001) (noting that the UN Declaration was distributed to delegations attending the Preparatory Committee pursuant to the request by the Economic and Social Council). See also Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March-April and August 1996, U.N. GAOR 51st Sess., Supp. No. 22, vol. 1, ¶ 280, U.N. Doc. A/51/22 (1996) (noting that “attention was drawn” to the Victims Declaration as a basis of “further elaborat[ion] and more precisely formulat[ing]” draft Article 43 addressing victims). In 1997, the Preparatory Committee proposed language providing that “[t]he rules of procedure shall include provisions giving effect to the [Victims Declaration].” *Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, Art. 43(7), U.N. Doc. A/AC.249/1997/L.8/Rev.1 (14 August 1997).

<sup>24</sup> ICTY Judges’ Report, *supra* n. 15, at 1. The Judges’ Report goes on to note that, “[w]hile issues relating to what might generally be referred to as ‘victims’ rights’ have been addressed in many domestic law systems for long periods of time, consideration of these issues under international law is of relatively recent vintage. In 1985, the General Assembly adopted a Declaration of Basic Principles for Victims of Crime and Abuse of Power, which has served as the cornerstone for establishing legal rights for victims under international law and has led to a number of developments relating to victims.”). *Id.* See also M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 H.R.L. Rev. 203, 247 (2006) (noting that the UN Victims Declaration was the “first international instrument to articulate victims’ right to access justice and obtain reparation for their injuries.”).

<sup>25</sup> UN Victims Declaration, *supra* n. 3, at ¶ 4.



(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; [and]

(b) Allowing 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.<sup>26</sup>

Thus, among the rights promoted by the Victims Declaration are the right of victims to be treated with respect, the right to receive information regarding relevant judicial proceedings, and the right to present their views and concerns to a court. While some national jurisdictions involve victims to an even greater extent in criminal proceedings, these principles – being treated with respect, receipt of information, and the opportunity to present views and concerns – are seen as fundamental to providing victims “access to justice.”<sup>27</sup>

#### B. EXPERIENCES OF *AD HOC* TRIBUNALS FOR THE FORMER YUGOSLAVIA & RWANDA

Despite the growing recognition of restorative-based justice mechanisms in the 1980s and early 1990s,<sup>28</sup> a number of commentators have claimed that victims’ interests were

<sup>26</sup> *Id.* at ¶ 6.

<sup>27</sup> Heikkilä, *INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME*, *supra* n. 16, at 141-42. The Rome Statute’s drafters also looked to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, another important achievement of the restorative justice movement. *See* 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, Comm’n on H.R., Res. 2005/35, available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-35.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-35.doc) [hereinafter “Basic Principles”]. Although the Basic Principles were not adopted by the Office of the High Commissioner for Human Rights until 2005, draft versions of the Basic Principles date back to 1989, and the continued negotiations on the final version of the document coincided with and influenced the drafting history of the Rome Statute and ICC Rules of Procedure and Evidence. *See, e.g.,* REDRESS, *Rules of Procedure & Evidence for the International Criminal Court: Recommendations to the Preparatory Commission regarding Reparation and Other Issues Relating to Victims*, March 2000, at 1 (explaining that “a footnote to the draft Statute that went to the Rome Conference in June 1998 stated that reference should be made to two UN Documents for key definitions, the [UN Victims Declaration] and the [Draft Basic Principles].”). The Basic Principles, like the UN Victims Declaration, recognize the right of victims to “be treated with humanity and respect for their dignity and human rights,” and requires that States “[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice.” Basic Principles, at ¶¶ 10, 3(c). In addition, the Basic Principles provide that “States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.” *Id.* at ¶ 13.

<sup>28</sup> *See, e.g.,* Doak, *Victims’ Rights in Criminal Trials*, *supra* n. 16, at 294 (explaining that, since the mid-1980s, “the interests of victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems.”); Human Rights Watch, *Commentary to the Second Preparatory Commission Meeting on the International Criminal Court*, July 1999, at 4 (“The principle of greater victim involvement received international recognition through the [1985] Victims’ Declaration, and is increasingly seen in domestic criminal systems in civil and, to a lesser degree, common

“overlooked” by the UN Security Council in the creation of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994, respectively.<sup>29</sup> While the *ad hoc* criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right, nor are victims able to request compensation in proceedings before the tribunals.<sup>30</sup> Furthermore, although the judges of both the ICTY and the ICTR considered the possibility that their statutes might be amended to authorize the award of reparations to victims, each tribunal ultimately rejected such an amendment.<sup>31</sup>

These failures, critics say, have led to a disconnect between the work of the *ad hoc* tribunals and the lives of those who suffered most from the atrocities that these institutions were designed to address. One commentator has summarized the problem in the context of the ICTR as follows:

In the aftermath of the Rwandan genocide, victim participation and legal representation before the [ICTR] have been identified by many observers and defendants of human rights as a necessary instrument to render that Tribunal closer to Rwandan society. Indeed, the fact that Rwandan public opinion does not understand that justice is done, because it is not seen to be done, is probably the major problem for the ICTR, which remains the first jurisdictional body in the history of human-kind to have convicted

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law countries.”).

<sup>29</sup> Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Cassese, *et al.* eds., 2002) (“The Statutes of the Tribunals for the former Yugoslavia and Rwanda overlook victims in two respects: victims cannot take part in a personal capacity in the criminal proceedings and are not entitled to obtain compensation for the harm they suffered.”). *See also* Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 320 (“The *ad hoc* [*sic*] War Crimes Tribunals relied upon the Prosecutor to safeguard victims’ welfare. However, the coupling of victims’ requirements with the demands of successful prosecution had the result that the interests of victims were often overlooked.”).

<sup>30</sup> As then-President of the ICTY, Judge Claude Jorda, summarized in a 2001 speech: “Nor can the International Tribunal hear the tens of thousands of victims. Only those considered useful towards the establishment of the truth are invited to testify.” ICTY Press Release, *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, JL/P.I.S./591-e, The Hague, 17 May 2001. *See also* Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 320 (“During proceedings [before the ICTY and ICTR] a victim could only be heard as a witness for the prosecution or defence. He or she had no independent right to intervene nor was he or she entitled to refuse to give evidence... Although the Tribunals could order restitution of property, they could not compensate victim-witnesses for harm suffered. This was left to national courts or to another competent body.”).

<sup>31</sup> *See* Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, *annexed to* Letter of the United Nations Secretary-General to the Security Council dated 14 December 2000, U.N. Doc. S/2000/1198 (in which the then-President of the ICTR, Judge Navanethem Pillay, informs the UN Secretary-General that any scheme authorizing the ICTR to provide compensation to victims “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.”); ICTY Judges’ Report, *supra* n. 15, at 9 (determining that, although victims of crimes within the ICTY’s jurisdiction have a legal right to seek compensation for their injuries, the judges did not believe that the tribunal was the appropriate forum for handling victim compensation).

perpetrators of the crime of genocide.<sup>32</sup>

Similarly, the former Assistant Secretary-General for Legal Affairs at the UN has written of a “perception by victims and victim societies” in the Balkan countries that the ICTY is “too remote” and argued that there is a lack of “knowledge and appreciation of [the tribunal’s] work at the grass-roots level.”<sup>33</sup>

A related complaint is that “communication [by the tribunals] back to the local communities” in the former Yugoslavia and Rwanda has been “deficient.”<sup>34</sup> Indeed, the Rwandan Representative to the United Nations informed the UN General Assembly in 1999 that communication was so lacking that the general public doubted the commitment of the ICTR to “mete out justice on the Rwandan people’s behalf.”<sup>35</sup> Likewise, the then-President of the ICTY stated in 1999 that the tribunal “must work harder to communicate with the peoples of the former Yugoslavia,” who “often have little idea of what the [ICTY] is doing, except from what they learn via distorted news coverage and State-controlled propaganda.”<sup>36</sup>

Significantly, the criticisms regarding the disconnect between the *ad hocs* and victims “underscore[d]” the overall importance of restorative justice in the drafting of the Rome Statute.<sup>37</sup> Thus, participation of victims was “considered to be an essential tool for

<sup>32</sup> Donat-Cattin, *Article 68*, *supra* n. 14, at 871. *See also* Pam Spees, *et al.*, *Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC*, Women’s Caucus for Gender Justice, 1999, available at <http://www.iccwomen.addr.com/reports/vwicc/index.htm> (noting that a general concern about the ICTR, located in Tanzania, was that “by not having the tribunal in the affected communities there is a danger that those communities will have no faith in the possibility of justice.”).

<sup>33</sup> Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 *J. Intl. Crime. Just.* 541, 544 (2004).

<sup>34</sup> *Developments in the Law – International Criminal Law II: The Promises of International Prosecution*, 114 *Harv. L. Rev.* 1957, 1971-72 (2001).

<sup>35</sup> Statement by the Representative of Rwanda to the United Nations General Assembly, U.N. GAOR, 54th Sess., 48th mtg. at 25, U.N. Doc. A/54/PV.48 (1999) (“The location of the ICTR outside Rwanda has often led the Rwandan public to doubt its existence and its commitment to mete out justice on the Rwandan people’s behalf, as for a long time they knew very little or nothing about its proceedings.”). Though made in the context of highlighting the need for better outreach, this statement is nevertheless illustrative of the fundamental disconnect between the work of the tribunals and the victims on the ground in the former Yugoslavia and Rwanda. *See also* Press Release, Security Council Meets To Discuss International Tribunals for Former Yugoslavia and Rwanda, 21 November 2000, U.N. Doc. SC/6956, available at <http://www.un.org/News/Press/docs/2000/20001121.sc6956.doc.html> (quoting ICTR Prosecutor Carla del Ponte as saying: “We must make our work more relevant to the people of Rwanda.”).

<sup>36</sup> Statement by Ms. Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia to the United Nations General Assembly, U.N. GAOR, 54th Sess., 48th mtg. at 4, U.N. Doc. A/54/PV.48 (1999). As with the preceding quote about the ICTR, this statement was delivered in the context of improving the tribunal’s outreach programs, yet it also illustrates the disconnect between the tribunal and those who suffered the atrocities the ICTY was designed to prosecute.

<sup>37</sup> Women’s Caucus for Gender Justice, *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence*, *supra* n. 21, at 20 (“The codification of victim participation in article 68(3) in the Rome statute reflects the fact that many court systems around the world have successfully allowed victims to participate in criminal trials... This reflects a growing recognition that justice requires more than putting someone in jail. Some of the negative experiences in the *ad hoc*

bringing the Court and its proceedings closer to the persons who have suffered atrocities.”<sup>38</sup>

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[criminal] Tribunals underscores the importance of these provisions for the International Criminal Court.”).

<sup>38</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457. See also Karen Corrie, *Victims’ Participation and Defendants’ Due Process Rights: Compatible Regimes at the International Criminal Court*, American Non-Governmental Organization Coalition for the ICC, 10 January 2007, at 5, available at <http://www.amicc.org/docs/Corrie%20Victims.pdf> (“Within the context of limited participation by victims at the ICTR and the ICTY, the victims’ participation regime established at the ICC shows the positive development of the rights of victims in international criminal law.”).

### III. ACHIEVING RESTORATIVE JUSTICE THROUGH THE ICC VICTIM PARTICIPATION SCHEME

While the focus of this report is the ICC victim participation scheme, the restorative goals underlying that scheme are in fact reflected throughout the Court's governing documents. As the head of the Victims' Rights Working Group – a network of over 200 civil society groups and individual experts created under the auspices of the Coalition for an International Criminal Court<sup>39</sup> – explained in a speech delivered to the Rome Conference in June 1998:

Victims have a wide range of needs which must be met if the process of healing and reconciliation is to take place. They need to have the opportunity to speak the truth about what happened to them, however painful that might be. They also need to hear the truth: to receive answers, and official acknowledgement concerning the violations. They need to be protected from further harm. They need to be involved in the judicial process. And they need compensation, restitution, and rehabilitation.<sup>40</sup>

Notably, the final versions of the Rome Statute and the Rules of Evidence and Procedure together address each of these needs. For example, the Preamble of the Rome Statute declares that the ICC was created, in part, in recognition of the fact that “during this century millions of children, women and men have been the victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>41</sup> Protection of victims from further harm is promoted through Article 43(6) of the Statute, which creates a Victims and Witnesses Unit within the ICC Registry for the purpose of providing “protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”<sup>42</sup> Article 53 requires that the ICC Prosecutor consider the “interests of victims” in determining not to pursue an investigation or a prosecution.<sup>43</sup> Reparation provisions are included at Article 75, which empowers the Court to award “restitution, compensation and rehabilitation” to victims,<sup>44</sup> and Article 79(1), which establishes a Victims Trust Fund “for the benefit of victims of crimes within

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<sup>39</sup> See Victims Rights Working Group, *Obligations to Undertake Outreach to Victims Under the Rome Statute and Rules of Procedure*, November 2006, at 10, available at [http://www.vrwg.org/Publications/01/VRWG\\_Outreach-November2006.pdf](http://www.vrwg.org/Publications/01/VRWG_Outreach-November2006.pdf).

<sup>40</sup> Fiona McKay, *Speech Regarding Redress on Behalf of the Victims' Rights Working Group*, 16 June 1998, available at <http://www.un.org/icc/speeches/616mck.htm>.

<sup>41</sup> Rome Statute, *supra* n. 1, at Preamble.

<sup>42</sup> *Id.* at Art. 43(6).

<sup>43</sup> *Id.* at Art. 53(1) & Art. 53(2).

<sup>44</sup> *Id.* at Art. 75.

the jurisdiction of the Court, and of the families of such victims.”<sup>45</sup> Finally, there are the provisions that make up the victim participation scheme. Thus, although the discussion here focuses on victim participation, that scheme exists within a much broader context of victim-related provisions designed to further victims’ interests.

#### A. VICTIM PARTICIPATION GENERALLY

Before turning to the specifics of the ICC victim participation provisions, it is worth noting that the very existence of the scheme – *i.e.*, the very recognition of victims’ interests in accessing the Court *qua* victims, as opposed to as either witnesses or claimants – reflects the restorative purpose underlying its provisions. For instance, while providing testimony as a witness may serve a restorative function for some,<sup>46</sup> limiting the participation of victims to the role of witnesses renders the achievement of restorative justice generally difficult. Perhaps most obvious is the fact that victim-witnesses will only be heard in the course of proceedings if called upon to testify by either the prosecution or the defence.<sup>47</sup> Moreover, victims’ stories will be limited by the evidentiary needs of the party calling the victim as a witness.<sup>48</sup> Indeed, commentators have noted that the process of providing testimony may actually retard, rather than promote, a victim’s healing process, as “prosecutors generally elicit testimony in a fashion designed to suit the requirements of legal proof, not victims’ psychological health.”<sup>49</sup> As a practical matter, therefore, a limited number of victims will have the opportunity to share their

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<sup>45</sup> *Id.* at Art. 79(1).

<sup>46</sup> *See, e.g.*, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN GAOR, 52d Sess., Agenda Item 49, U.N. Doc. A/52/375, S/1997/729, at ¶ 192 (“[W]itnesses who have come to The Hague have commented afterwards that the opportunity to testify before a duly constituted court has brought them great relief. Justice’s cathartic effects may therefore promise hope for recovery and reconciliation.”).

<sup>47</sup> *See* Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 320.

<sup>48</sup> *Id.* at 320. *See also* Doak, *Victims’ Rights in Criminal Trials*, *supra* n. 16, at 298 (“[Victim-witnesses’] testimony must be shaped to bring out its maximum adversarial effect, and witnesses are thereby confined to answering questions within the parameters set down by the questioner. The victim is denied the opportunity to relay his or her own narrative to the court using his or her own words...”); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings?, Victim-Witnesses at War Crimes Trials*, 15 Eur. J. Int’l L. 151, 154, February 2004 (“In the judicial arena... story-telling can only take the form of giving legal evidence. It is constrained by the judicial endeavour to establish a legally authoritative account of ‘what happened.’”); Sara Kendall & Michelle Staggs, *Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone*, U.C. Berkeley War Crimes Studies Center, 28 June 2005 (describing the decision of the Special Court for Sierra Leone in the case against three members of the Civilian Defence Force to expunge witness testimony regarding sexual violence from the record, and to exclude the planned testimony of additional victims recounting acts of sexual violence, on the grounds that the Prosecutor had failed to allege rape and sexual violence as specific offences under the indictment).

<sup>49</sup> *Developments in the Law – International Criminal Law II: The Promises of International Prosecution*, 114 Harv. L. Rev. 1957, 1972 (2001). *See also* Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 324 (“Victims who testify narrate a story for a particular purpose: to determine the guilt or innocence of the accused, to establish a broader historical record of atrocity, to contribute to peace and reconciliation. However their testimony is used, a tribunal is hardly ever interested in hearing their stories for their own sake. Its ability to provide therapeutic healing is, therefore, limited.”).

stories with the Court, and the stories that are told may be incomplete.

Unlike victim-witnesses, who lack control over the scope and use of their testimony, victims who participate in proceedings in a capacity other than witness are believed to be more likely to feel a sense of recognition and empowerment.<sup>50</sup> Hence, the ability of victims to participate before the ICC independently of providing witness testimony is a key contribution of the Rome Statute in the effort to recognize and respond to victims' interests in the work of the Court.

The desire of the Rome Statute's drafters to serve victims' interests is further evidenced by the severance of provisions allowing for victim participation and those relating to reparations. This is a unique development, as most national jurisdictions that allow for victim participation in criminal proceedings do so for the primary purpose of consolidating the victims' claims for civil damages in a criminal action.<sup>51</sup> Under the Rome Statute, however, victims are not required to participate in pre-trial or trial proceedings before the ICC in order to make a claim for reparations, and victims may participate in proceedings without pursuing compensation before the Court.<sup>52</sup> Thus, the Rome Statute marks "a significant departure from the mere conceptualization of victim's rights in terms of reparation."<sup>53</sup>

This change is important for two reasons. First, it reflects the belief that the opportunity to meaningfully participate in proceedings before the ICC is restorative in its own right, as "the criminal proceedings themselves are a form of reparation for victims."<sup>54</sup> Indeed,

<sup>50</sup> See, e.g., Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 324 ("Victim-witnesses have no control over the purpose of their testimony, nor the strategic use that is made of it. They are usually prevented from dealing with matters that are considered to be irrelevant to those purposes – either because resources are limited or because these parts of their stories do not interest the law."). See also *supra* n. 17 *et seq.* and accompanying text.

<sup>51</sup> See, e.g., ICTY Judges' Report, *supra* n. 15, at 6 ("[M]ost legal systems based on civil law allow for the participation of a victim as a *partie civile*; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused."); Doak, *Victims' Rights in Criminal Trials*, *supra* n. 16, at 310-11 (explaining that, under the *partie civile* systems commonplace in countries such as France and Belgium and the "adhesion" procedure used in Germany, the "ability to pursue civil damages in the criminal trial should, in theory, improve speed, cost, and time involved given that both civil and criminal issues are resolved in the same forum."). In fact, according to Doak, participation by victims within the French system "tends to be limited to the pursuit of the civil claim [for damages]." *Id.* at 311.

<sup>52</sup> See, e.g., Victims' Participation and Reparation Section Booklet, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, Int'l Criminal Court, available at [http://www.icc-cpi.int/library/victims/VPRS\\_Booklet\\_En.pdf](http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf) (describing the different roles of victims before the ICC and distinguishing between participation and seeking an order of reparations from the Court); La Fédération Internationale des Droits de l'Homme, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter 4: Participation, p. 5, April 2007, available at [http://www.fidh.org/article.php3?id\\_article=4208](http://www.fidh.org/article.php3?id_article=4208) ("It is important to note that the procedure for requesting reparations is an independent procedure. Victims do not have to participate in pre-trial or trial proceedings in order to make a claim for reparations.").

<sup>53</sup> Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 219-20.

<sup>54</sup> REDRESS, *Rules of Procedure & Evidence for the International Criminal Court: Recommendations to*

studies have suggested that victims who have pursued civil compensation claims in national courts often report that the *process* of seeking reparation was of equal – if not greater – importance to the victims than the end result.<sup>55</sup> Second, while the operation and reach of the ICC reparations programs remain to be seen, there is concern that monetary payouts made to individual victims, if any, will be limited in number and amount,<sup>56</sup> as well as difficult to enforce.<sup>57</sup> Hence, the restorative goals of the Rome Statute cannot be achieved through a reparations program alone, suggesting that the healing effects of victim participation may be as, if not more, important in meeting these goals.

## B. SPECIFIC PROVISIONS

The ICC victim participation scheme was developed in two stages. First, the basic framework for participation was set forth in the Rome Statute. Second, the drafters of the Rules of Procedure and Evidence elaborated on this framework by providing the definition of victims and outlining the parameters by which victims would access the Court.<sup>58</sup>

### 1. Rome Statute

Article 68(3) of the Statute constitutes the foundational provision for victim participation. It states:

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*the Preparatory Commission regarding Reparation and Other Issues Relating to Victims*, March 2000, at 1.

<sup>55</sup> See, e.g., REDRESS, TORTURE SURVIVORS' PERCEPTIONS OF REPARATION: PRELIMINARY SURVEY, The REDRESS Trust, at 57-58 (2001) (citing several studies in support of the proposition that victims value procedural justice – *i.e.*, the transparency and fairness of the processes by which decisions are made – as much as the ultimate result); Doak, *Victims' Rights in Criminal Trials*, *supra* n. 16, at 308-310, 312 (discussing a number of surveys performed in countries that allow for victim participation in domestic criminal proceedings and concluding that victims who have chosen to exercise their participation rights have expressed greater satisfaction in the criminal justice system than those who chose to forego participation altogether).

<sup>56</sup> See, e.g., Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. Jefferson L. Rev. 189, 191, Spring 2007 (noting that, even if the Victims Trust Fund had “millions of dollars to disburse, the sheer scale of international crimes will likely dwarf monetary resources.”).

<sup>57</sup> See, e.g., REDRESS & Freshfields Bruckhaus Deringer, *Background Paper: Conference on Enforcement of Awards for Victims of Torture and Other International Crimes*, June 2005, available at [http://www.redress.org/conferences/DISCUSSION\\_PAPER\\_ENFORCEMENT.pdf](http://www.redress.org/conferences/DISCUSSION_PAPER_ENFORCEMENT.pdf) (“[T]here are several main areas of concern for the prospects of enforcement of reparations awards. These are: (1) enforcing an order for protective measures; (2) enforcing a final award of reparations including monetary and non-monetary awards; (3) the role of the Trust Fund as a supplementary mechanism for ensuring that awards reach victims; and (4) institutional responsibility within the ICC for monitoring the enforcement of reparations orders. Effective enforcement in all of these areas hinges on a number of factors including (a) the compatibility of domestic legislation and procedures with the Court’s orders; (b) the potential involvement of non-States Parties in this process; and (c) the availability and management of funds, including the possibility of financial default by the person convicted and hence, the search for other possible sources of compensation for victims.”).

<sup>58</sup> See generally ICC Rules, *supra* n. 6.



Where the personal interests of 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.<sup>59</sup>

Notably, the language of Article 68(3) mirrors almost directly Paragraph 6(b) of the UN Victims Declaration,<sup>60</sup> which itself was adopted for the purpose of, *inter alia*, ensuring respect for victims and safeguarding their interests in accessing mechanisms of justice.<sup>61</sup> In fact, the language of the provision is important, even beyond the general principle it represents, because it imposes a duty on the Court to afford qualifying victims at least *some* level of participation. Specifically, under Article 68(3), all “victims” who establish a “personal interest” in proceedings “shall” be permitted to present their views and concerns to the Court, as long as the other conditions in Article 68(3) are met.<sup>62</sup> Thus, while the *timing and modality* of participation may be restricted, victims whose personal interests are affected must be given an opportunity to present their views and concerns.<sup>63</sup>

The language of Article 68(3) is also notable because it allows for a potentially expansive category of victims to qualify for participation rights, requiring only that individuals establish that they are “victims” whose “personal interests” are affected. While the term “victims” is defined in the Rules of Procedure and Evidence – discussed directly below<sup>64</sup> – neither the provisions of the ICC, nor the UN Victims Declaration from which the language of Article 68(3) was taken,<sup>65</sup> define the phrase “personal interests.” Moreover, the term does not appear to have given rise to any significant debate at any point in the drafting process of the Rome Statute.<sup>66</sup> Hence, there is no evidence that the phrase was

<sup>59</sup> Rome Statute, *supra* n. 1, at Art. 68(3).

<sup>60</sup> UN Victims Declaration, *supra* n. 3, ¶ 6(b) (providing that victims should be allowed to have their views presented and considered at “appropriate stages of the proceedings where their personal interests are affected.”). *See also* Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1404 (noting that the wording of Article 68(3) “draws heavily on the terms” of the Victims Declaration).

<sup>61</sup> *See supra* n. 23 *et seq.* and accompanying text.

<sup>62</sup> Rome Statute, *supra* n. 1, at Art. 68(3). In fact, the *travaux préparatoires* of the Rome Statute reveal that the drafters expressly chose to use the words “shall permit,” rather than “may permit,” in Article 68(3), thereby underscoring the fact that the participation of qualifying victims – at some level – is not at the discretion of the Court, but is rather required by the Statute. *See Decisions Taken By the Preparatory Committee At Its Session Held from 4 to 15 August*, Art. 43, A/AC.249/1997/L.8/Rev.1, 14 August 1997. *See also* Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 223 (“The drafters of the Statute rejected an earlier text authorizing the Court to grant participation in favour of the mandatory expression, ‘the Court shall permit’ participation.”).

<sup>63</sup> Donat-Cattin, *Article 68*, *supra* n. 14, at 880 (noting that the drafters specifically rejected the “thesis that it was simply an interest of the victims to participate,” instead providing victims a right to participate, assuming the requirements of Article 68(3) are met).

<sup>64</sup> *See infra* n. 77 and accompanying text.

<sup>65</sup> *See supra* n. 60 and accompanying text.

<sup>66</sup> The language of Article 68(3), including the “personal interests” criterion appears in the ICC Preparatory Committee’s Draft Statute as early as its August 1997 session. *See* 1997 PrepCom Report, *supra* n. 23, at

intended as a meaningful restriction on the categories of victims entitled to participate in ICC proceedings.<sup>67</sup> To the contrary, as explained below, the drafters of the Rome Statute and the ICC Rules envisioned – indeed *expected* – large numbers of victims to participate under Article 68(3).<sup>68</sup>

In addition to the general Article 68(3) framework for victim participation, the Rome Statute includes two provisions granting victims the right to participate in specific proceedings occurring in the investigation phase of the Court’s work.<sup>69</sup> The first of these provisions relates to the Prosecutor’s powers under Article 15 of the Statute to “initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court,”<sup>70</sup> which may include information received from victims.<sup>71</sup> Specifically, Article 15(3) provides:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation [*proprio motu*], he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*<sup>72</sup>

The provision for victim participation in this context is, according to one commentary, a “logical corollary of the role of victims in *proprio motu* investigations,” which are “typically initiated by information submitted by victims,” meaning it is “only natural that

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Art. 43 (providing that “[The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected.]”). Neither this draft nor any subsequent draft of the Statute defines or comments upon the term “personal interests.”

<sup>67</sup> Indeed, as one commentator has observed: “[i]t appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct.” Donat-Cattin, *Article 68*, *supra* n. 14, at 879.

<sup>68</sup> See *infra* n. 104 and accompanying text.

<sup>69</sup> See Rome Statute, *supra* n. 1, at Art. 15(3) & Art. 19(3).

<sup>70</sup> *Id.* at Art. 15(1). See also *id.* at Art. 15(2) (“The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”).

<sup>71</sup> See, e.g., M. Bergsmo & J. Pejic, *On Article 15*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 364-69 (Otto Triffterer ed., 1999) (arguing that, although there is no express right of victims to submit information to the Prosecutor, the drafters “clearly contemplated that the Prosecutor could receive information from victims pursuant to Article 15, paragraphs 1 and 2.”); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 Am. J. Int’l L. 510, 516 (July 2003) (“[T]he Prosecutor may himself trigger the ICC’s jurisdiction by commencing an investigation on the basis of information he has received; the source of the information is irrelevant. It is widely assumed that NGOs and victims’ groups will provide this kind of information to the Prosecutor.”).

<sup>72</sup> Rome Statute, *supra* n. 1, at Art. 15(3) (emphasis added).

they should be allowed to make representations.”<sup>73</sup> Moreover, in the view of Human Rights Watch, the “most essential of all victims’ interests is likely to be the interest in seeing that the Court is seized with the matter and that an investigation proceeds.”<sup>74</sup>

The second occasion on which victims are afforded specific rights of participation as early as the investigation phase is during challenges to the admissibility of a case or the jurisdiction of the Court brought under Article 19,<sup>75</sup> at which point victims are authorized to “submit observations to the Court.”<sup>76</sup>

## 2. Rules of Procedure & Evidence

All provisions in the Rome Statute that provide for victims’ rights to participation, reparations, or protection apply only to those that meet the definition of a victim. This definition was not included in the Rome Statute, but rather is delineated in Rule 85 of the Rules of Procedure and Evidence, which provides:

- (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims 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

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<sup>73</sup> Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 225-26.

<sup>74</sup> Human Rights Watch Commentary, July 1999, *supra* n. 28, at 33.

<sup>75</sup> The first two sub-parts of Article 19 provide as follows:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
  - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
  - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
  - (c) A State from which acceptance of jurisdiction is required under article 12.

*See* Rome Statute, *supra* n. 1, at Art. 19(1) & Art. 19(2).

<sup>76</sup> *Id.* at Art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, *as well as victims*, may also submit observations to the Court.”). Note that Article 15(3) refers to “representations” by victims, while Article 19 refers to “observations.” The Statute does not define either term or distinguish one from the other. However, Rule 50 (providing the procedure for Article 15) and Rule 59 (providing the procedure for Article 19) both speak of a victim’s right to provide “representations” and both require such representations to be submitted in writing. *Compare* ICC Rules, *supra* n. 6, at R. 50(3) with R. 59(3). This may indicate that although these articles use different terminology, they both contemplate only written submissions on behalf of victims at these early stages of the proceedings.

monuments, hospitals and other places and objects for humanitarian purposes.<sup>77</sup>

The primary source of reference in drafting a definition of “victims” for purposes of the ICC was the UN Victims Declaration,<sup>78</sup> which provides that “victims” refers to “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”<sup>79</sup> Notably, “the vast majority of delegations supported in principle a broad definition based on the Victims Declaration” for purposes of the ICC,<sup>80</sup> and according to one participant to the drafting of the Rules, this support lasted long into the negotiating process.<sup>81</sup> Thus, for example, the drafters rejected a proposal made by the Spanish delegation that “a larger group of persons along the lines of the proposed broad definition [in the UN Victims Declaration] would be regarded for purposes of protection and assistance, as well as for claiming reparations,” while a “much reduced group would be regarded as victims for the purposes of participation in the proceedings.”<sup>82</sup>

At the same time, however, there were a variety of “difficulties” among the various delegations with respect to a number of the terms used in the UN Victims Declaration definition.<sup>83</sup> In light of these difficulties, Japan “proposed to have no definition at all, or, alternatively to have a very broad one that would give ample discretion to the Court itself.”<sup>84</sup> Ultimately, the Japanese proposal, which defined “victims” as “any person who suffered harm as a result of a crime under the jurisdiction of the Court,”<sup>85</sup> became the basis for the final definition adopted in Rule 85(a).<sup>86</sup> This potentially broad definition

<sup>77</sup> *Id.* at R. 85.

<sup>78</sup> *See supra* n. 23 and accompanying text.

<sup>79</sup> UN Victims Declaration, *supra* n. 3, at ¶ 1.

<sup>80</sup> Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 430. *See also* Fiona McKay, *Paris Seminar on Victims’ Access to the ICC*, International Criminal Court Monitor, Iss. 12, p. 5, August 1999 (“A consensus emerged [at the Paris Seminar] that the basis and the inspiration for a satisfactory definition should be the 1985 [UN Victims Declaration.]”); *Report on the international seminar on victims’ access to the International Criminal Court*, Annex I, R. X (article 15) n1, U.N. Doc. PCNICC/1999/WGRPE/INF/2 (1999) (providing that the definition followed the Victims Declaration).

<sup>81</sup> *See* Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 430-31 (noting that, through the fifth session of the Preparatory Commission tasked with preparing the Draft Rules, which took place in June 2000, “most delegations favoured... a definition based on the Victims Declaration, which had been on the table of negotiations for years.”).

<sup>82</sup> *Id.* at 431 (explaining that the Spanish delegation’s proposal arose from a concern that the drafters would “jeopardize the ability of the Court to administer justice by prescribing a victims regime that would be too ambitious.”).

<sup>83</sup> *Id.* at 431-32.

<sup>84</sup> *Id.* at 432.

<sup>85</sup> *Id.* at 432.

<sup>86</sup> *See* ICC Rules, *supra* n. 6, at R. 85(a). Observers have noted that the ICC definition of victims is broader than the definition used in the rules of other international criminal courts. *See, e.g.*, Bassiouni, *International Recognition of Victims’ Rights*, *supra* n. 24, at 243 (highlighting the fact that, unlike the rules of the *ad hoc*

arguably serves the interests of victims by allowing the positive effects of the victim participation scheme to reach as many affected persons as possible. Indeed, as noted above, participation of victims was considered by the Rome Statute drafters “to be an essential tool for bringing the Court and its proceedings closer to the persons who have suffered atrocities,”<sup>87</sup> a goal more likely to be accomplished if large numbers of those wishing to participate as victims were able to do so.

The Rules of Procedure and Evidence further reflect an intent to serve victims’ interests through the inclusion of a number of provisions designed to ensure that affected persons who have come in contact with the Court are able to receive information on ICC proceedings relevant to the harm they have suffered. For example, Rule 92(5) guarantees that victims who are granted participation rights under the Rome Statute shall receive information relating to proceedings before the Court, including the date of hearings and any postponements thereof, the date of delivery of those decisions, and any “requests, submissions, motions and other documents relating to such requests, submissions or motions.”<sup>88</sup>

Furthermore, Rule 50(1) gives effect to Article 15(3) by requiring that, when the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation *proprio motu*, the Prosecutor “shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses.”<sup>89</sup> Following notification, victims “may make representations in writing to the Pre-Trial Chamber,” whether or not they have previously submitted communications to the Prosecutor.<sup>90</sup> Similarly, Rule 59 builds on Article 19, providing that notification of a challenge to jurisdiction or admissibility shall be given to “the victims who have already communicated with the Court in relation to the case, or their legal representatives.”<sup>91</sup> Once this category of victims is notified, they may then

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criminal tribunals, Rule 85(a) presumably covers “all persons who have directly or indirectly suffered harm as a result of a commission of any crime within the jurisdiction of the [C]ourt.”); Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 222 (“Rule 85 does not define victims in relation to proceedings against a specified individual in respect of a given conduct. It merely links the term ‘victim’ to the commission of a crime within the jurisdiction of the Court.”).

<sup>87</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457.

<sup>88</sup> ICC Rules, *supra* n. 6, at R. 92(5).

<sup>89</sup> *Id.* at R. 50(1). *See also* Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 227 (“This broad criterion for notification of victims reflects the fact that a large number of victims have potentially been affected by the crimes committed in the situations at hand that are the subject of the investigations, and should therefore have the right to submit representations on the fundamental question of whether investigations should be initiated.”); Women’s Caucus for Gender Justice, *Recommendations and Commentary for Rules of Procedure and Evidence*, Submitted to the Preparatory Commission for the International Criminal Court, 26 July – 13 August 1999, p. 11 (noting that Rule 50 was enacted for the purpose of implementing “the general principle that notice to victims and witnesses is necessary to give effect to the right of victims to participate.”).

<sup>90</sup> ICC Rules, *supra* n. 6, at R. 50(3).

<sup>91</sup> *Id.* at R. 59(1).

“make representations in writing to the competent Chamber within such time limit as it considers appropriate.”<sup>92</sup>

Two additional provisions guarantee that victims who have “communicated with the Court” are able to receive notice of specific proceedings relevant to their interests, even if they have not been granted participant-status under Article 68(3) of the Rome Statute. Specifically, Rule 92(2) provides that the Court “shall notify” victims “who have communicated with the Court in respect of the situation or case in question” concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to Article 53.<sup>93</sup> Similarly, Rule 92(3) requires the Court to notify victims “who have communicated with the Court in respect of the case in question” regarding its decision to hold a hearing to confirm charges pursuant to Article 61.<sup>94</sup>

Notification is critical not only for ensuring effective participation by victims, but also for keeping victims “informed of the developments in their case.”<sup>95</sup> As explained by Human Rights Watch in the context of urging extensive notification requirements in the ICC Rules:

The Court’s proceedings – the investigation, public acknowledgment of atrocities and punishment of those responsible – can themselves constitute a critical form of redress for victims and the societies of which they form part, if they feel able to participate in the process and are kept sufficiently informed of it... Moreover, broadly disseminated information is essential to the transparency of the institution, its credibility and ultimately its effectiveness. The void created where information is lacking provides fertile breeding ground for suspicion and for misinformation to be disseminated by those whose ends it may serve to discredit the Court. If not countered effectively, this could result in the reluctance of individuals, or of national authorities, to cooperate with the Court and could seriously

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<sup>92</sup> *Id.* at R. 59(3).

<sup>93</sup> *Id.* at R. 92(2). Note that, as discussed in the Executive Summary to this Report, the ICC’s operations are divided into two broad categories: “situations” and “cases.” According to ICC Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 65. In other words, the “situation” refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

<sup>94</sup> ICC Rules, *supra* n. 6, at R. 92(3).

<sup>95</sup> *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, United Nations Commission on Crime Prevention and Criminal Justice, II.D.1 at 35 (1999) (“Research indicates that victims who are kept informed by authorities of the developments in their case are more likely to judge the justice procedure as fair and feel that they were treated by authorities with dignity and respect.”).

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impede the Court's ability to function.<sup>96</sup>

Significantly, such information may help avoid the feelings of “disconnect” experienced by victims of the atrocities in the former Yugoslavia and Rwanda towards the *ad hoc* international criminal tribunals established to address those atrocities.<sup>97</sup> Indeed, the “information needs of victims and victimized groups are especially acute in the case of the international criminal tribunals” because as a rule, “trials before these tribunals are conducted far away from the place where the crimes were committed and in a language that is not the mother tongue of the victims.”<sup>98</sup>

Finally, Rule 93 provides that a Chamber “may seek the views” of victims, including those who are not formally participating before the Court under Article 68(3),<sup>99</sup> which may provide an additional method of involving victims in the work of the Court.

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<sup>96</sup> Human Rights Watch Commentary, July 1999, *supra* n. 28, at Section II. Human Rights Watch recommended to the drafters of the ICC Rules that “[k]nowledge about the Court’s existence, objectives and functions should reach as many people as possible, particularly in societies where the crimes under the Court’s jurisdiction occur.” *Id.*

<sup>97</sup> *See supra* n. 29 *et seq.* and accompanying text.

<sup>98</sup> Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME, *supra* n. 16, at 161.

<sup>99</sup> ICC Rules, *supra* n. 6, at R. 93.

#### IV. BALANCING THE GOAL OF RESTORATIVE JUSTICE WITH INTERESTS IN EFFICIENCY AND FAIRNESS

Of course, serving the interests of victims is not the sole function of the ICC, and thus the drafters of the Rome Statute and ICC Rules of Procedure and Evidence recognized the need to achieve victim participation “without undermining the effectiveness of the International Criminal Court, without diverting it from its task of law enforcement.”<sup>100</sup> As a general matter, the Rome Statute and Rules *require* that Court proceedings are conducted in a manner that is expeditious and fair.<sup>101</sup> Thus, while it is true that the “[Rome] Statute reflects the thesis that the right of the victims to participate in the trial is too fundamental to be sacrificed to mere ‘logistical difficulties,’”<sup>102</sup> it was also “considered necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.”<sup>103</sup>

##### A. PRIMARY CONCERNS RELATING TO EFFICIENCY & FAIRNESS

Perhaps the most significant concern of the drafters arising from the integration of victims into criminal proceedings before the Court related to the potential impact on the Court’s ability to conduct proceedings efficiently, as the nature of the crimes within the ICC’s jurisdiction are likely to involve large numbers of victims.<sup>104</sup> One reason the

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<sup>100</sup> Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 323 (citing, Opening Speech by Elisabeth Guigou, French Minister of Justice, at the International Meeting on “Access to Victims to the International Criminal Court,” Paris, 27 April 1999).

<sup>101</sup> For example, Article 64 of the Rome Statute reflects a clear concern for Court efficiency by generally requiring Trial Chambers to ensure that proceedings be conducted in “a manner that is fair and expeditious.” *See* Rome Statute, *supra* n. 1, Arts. 64(2) and 64(3)(a). *See also* ICC Rules, *supra* n. 6, at R. 101 (“In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.”). Article 67 covers the rights of the accused, which include the right to a fair hearing conducted impartially, to be informed of the charges against him or her, to have adequate time and facilities to prepare a defence with counsel of the accused’s choosing, and to be tried without “undue delay.” Rome Statute, *supra* n. 1, at Art. 67(1).

<sup>102</sup> Donat-Cattin, *Article 68*, *supra* n. 14, at 885.

<sup>103</sup> Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 429. *See also* Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 223 (noting that “an extensive interpretation of victims’ rights could conflict with two cardinal principles which are vital to the work and functioning of the Court: the function of the Court as a judicial institution, and the imperative of impartiality.”).

<sup>104</sup> Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 429 (“Due to the nature of the crimes under [the Court’s] jurisdiction, very large numbers of victims might be expected and the Court could be overwhelmed by their full participation and request for reparation.”); Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1389 (“[V]ictims of serious violations of humanitarian law are generally numerous, and their participation in proceedings is apt to be marked by a highly charged emotional atmosphere and by a significant political dimension.”).



efficiency of the proceedings must be safeguarded is that undue delay brought about by victim participation could threaten the right of the accused to a speedy trial.<sup>105</sup> Indeed, among the reasons that the judges of the ICTY rejected a proposal calling for victims' compensation by that tribunal was that such a change "would increase the Chambers' workload and further exacerbate the length of its proceedings, thus undermining its efforts to provide accused with fair and expeditious trials."<sup>106</sup>

Efficient proceedings are equally in the interest of victims. As Human Rights Watch – a forceful advocate for victim participation at the ICC – has recognized, the "overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done."<sup>107</sup> Similarly, the International Federation for Human Rights (FIDH) – which assisted the first victims to participate in proceedings before the ICC with their applications<sup>108</sup> – declared in a 2006 review of the ICC Office of the Prosecutor that "[i]n order for the victims to participate in the trial and to obtain reparations, it is necessary that those responsible for the crimes they have suffered are effectively prosecuted."<sup>109</sup> Thus, exceedingly long proceedings may hinder the restorative purpose of the victim participation scheme as well as postpone efforts to address reparations.

Beyond concerns of efficiency, the drafters of the Rome Statute and Rules also carefully considered the potential effects that the intervention of victims could have on the integrity of the criminal process more broadly. As Judge Claude Jorda, former President of the ICTY and until recently Pre-Trial Judge at the ICC, explained in the context of the *ad hoc* criminal tribunals in the former Yugoslavia and Rwanda:

It is true that to authorize a victim to intervene in the proceedings in his personal capacity, with a view to expressing his concerns and obtaining reparation, is not in itself inconsistent, in formal terms, with the International Covenant on Civil and Political Rights. However, having regard to the nature and scope of the crimes over which the *ad hoc*

<sup>105</sup> See *supra* n. 101 (citing Articles 64 and 67 of the Rome Statute). See also Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. Int'l Crim. Just. 402, 412 (May 2007) ("The number of victims in cases of war crimes and crimes against humanity often runs into the thousands or even tens of thousands. Furthermore, the nature of the damage they have suffered adds to the emotive power of their intervention in proceedings. If not controlled, their participation could therefore interfere with the smooth conduct of trials and the rights of the accused.").

<sup>106</sup> ICTY Judges' Report, *supra* n. 15, at 12.

<sup>107</sup> Human Rights Watch Commentary, July 1999, *supra* n. 28, at 26.

<sup>108</sup> See International Federation for Human Rights, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Press Release, 23 April 2007, available at [http://www.fidh.org/article.php3?id\\_article=4208](http://www.fidh.org/article.php3?id_article=4208).

<sup>109</sup> Statement of Mr. Antoine Bernard, International Federation for Human Rights, Second public hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts, The Hague, 26 September 2006. See also Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 223 (noting that "an extensive interpretation of participatory rights of victims might not only place considerable administrative burdens on the respective organs of the Court, but effectively paralyze the Court's proceedings.").

Tribunals possess jurisdiction, such a prerogative may undermine the rights of the accused if it is not strictly defined and meticulously organized.<sup>110</sup>

In particular, the concern was that the intervention of victims could upset the “equality of arms” between the Prosecution and Defence.<sup>111</sup> As one commentator explains, where a criminal justice system relies on a “delicate balance of power achieved through the clear delineation of roles of the prosecution and defence, the system could be perceived as appearing ‘out of balance’ if another party were involved in the case that could actively work against the interests of the defence.”<sup>112</sup>

## B. SPECIFIC PROVISIONS ADDRESSING CONCERNS OF EFFICIENCY & FAIRNESS

In an effort to achieve a realistic compromise between these concerns and the goal of restorative justice for victims, the drafters sought to create a system that would provide a meaningful yet manageable scheme for victim participation. In the context of general participation throughout the proceedings, two basic options were contemplated: limiting the definition of victim or restricting the scope of their right to participate.<sup>113</sup> As explained above, the drafters of the ICC Rules rejected at least one proposal that would have limited the category of victims qualified to participate in proceedings, instead leaving that category potentially expansive.<sup>114</sup> At the same time, however, the drafters left the Court broad discretion “to determine when and in what manner the victims’ right to participation should be exercised,” suggesting that they chose the latter of the two options for ensuring a workable victim participation scheme.<sup>115</sup>

### 1. Court’s Discretion to Limit Timing & Modality of Victim Participation

As might be expected, the debate during the drafting of the Rome Statute as to the precise role of victims in the context of the ICC was, according to one participant, “filled with many different concerns and conflicting views.”<sup>116</sup> However, according to this same participant, it was “recognized by all” that, due to the nature of the crimes under the ICC’s jurisdiction, “very large numbers of victims might be expected and the Court could

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<sup>110</sup> Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1393.

<sup>111</sup> Doak, *Victims’ Rights in Criminal Trials*, *supra* n. 16, at 298.

<sup>112</sup> *Id.*

<sup>113</sup> See generally Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 429-30.

<sup>114</sup> See *supra* n. 82 *et seq.* and accompanying text.

<sup>115</sup> See, e.g., Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 460. See also Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 429-30 (reporting that as support for a broad definition of “victims” continued to grow, by the March 2000 session of the Preparatory Commission the negotiators of the rules began to focus on limiting the modalities of victim participation as a way to achieve balance between the right of victims to be represented and the need to preserve both the Court’s efficiency and the fairness of the proceedings).

<sup>116</sup> Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 429.

be overwhelmed by their full participation and request for reparation.”<sup>117</sup>

The system devised by the drafters to avoid such a consequence was to provide the Court with “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.<sup>118</sup> This decision 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 rights of the accused and a fair and impartial trial.”<sup>119</sup> In the words of one commentator, Article 68(3) requires that the judges “ensure that victims (or representatives) make a correct use of their right to intervene,” while guaranteeing that the Court use its discretion to “orient the decision towards the appropriate phase in which victims (or representatives) are to intervene, without denying to victims the exercise of their right.”<sup>120</sup>

Importantly, this compromise was supported by victims’ advocate groups involved in the drafting of the Rome Statute and ICC Rules. For example, the Women’s Caucus for Gender Justice stated in the commentary to the draft procedural rules that:

the inclusive general definition [of “victim”] does not mean that all those who fall within the definition are entitled, without condition, to all the rights contained in the Statute and Rules for victims. Rather, the subsequent rules guide the Court’s discretion in applying them in the particular context.<sup>121</sup>

The system enshrined in the Statute for ensuring the Court would not become overwhelmed by large numbers of victims participating in proceedings was maintained in the Rules of Procedure and Evidence, which provide general rules on the modalities of victim participation, but largely leave the Court’s discretion under Article 68(3) unrestrained.<sup>122</sup> As Amnesty International highlighted during the drafting of the Rules,

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<sup>117</sup> *Id.*

<sup>118</sup> Human Rights Watch, *Third Preparatory Commission Meeting on the International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure*, November 1999 at Section II.

<sup>119</sup> Rome Statute, *supra* n. 1, at Art. 68(3). *See also* Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457 (“[M]any delegations were concerned that the potential numbers of victims might make their participation practically impossible and, thus, the modalities for exercising their right to participate in a given case were left in the hands of the Court. Since the practices and experiences regarding victims’ participation are different in different legal traditions, some delegations were also uncertain what impact such an individual role would have on the rights of the accused... In order to overcome such concerns, [Article 68(3)] states that victims’ participation shall take place ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’”).

<sup>120</sup> Donat-Cattin, *Article 68*, *supra* n. 14, at 880.

<sup>121</sup> Women’s Caucus for Gender Justice, *Recommendations and Commentary for Rules of Procedure and Evidence*, Submitted to the Preparatory Commission for the International Criminal Court, 26 July – 13 August 1999, p. 9. *See also* Human Rights Watch Commentary, July 1999, *supra* n. 28, at 28.

<sup>122</sup> *See* Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 460 (“Discussion in the

the Rome Statute “makes clear that the Court – either in its Regulations or in a particular case – must determine the manner in which [victims’] views are to be presented and considered, subject to the fundamental principle that the manner of doing so must not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’”<sup>123</sup> Indeed, this discretion was seen as “an important element for making the scheme workable in case a large number of victims is involved.”<sup>124</sup> Thus, Rule 89, which establishes the basic procedure by which victims apply to participate under Article 68(3), provides that it is the Chamber that shall “specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.”<sup>125</sup>

The Court also maintains discretion to determine the extent of victim participation under Articles 15(3)<sup>126</sup> and 19(3).<sup>127</sup> As adopted, Rule 50(4), which gives effect to Article 15(3) only authorizes victims to make written representations to the Pre-Trial Chamber, and leaves it to the Chamber’s discretion to decide whether to request additional information from them or whether to hold a hearing for that purpose.<sup>128</sup> Similarly, under the Rule 59 procedures for submissions relating to Article 19 proceedings, the Court has no explicit obligation to act on the information provided by victims under Article 19(3),<sup>129</sup> but may, if it so chooses, seek the further views of victims on submissions made to the Court under the provision.<sup>130</sup>

## 2. Rules Expressly Limiting Expansive Participation by Victims

Despite the desire to leave the Court broad discretion to implement the victim

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Paris Seminar [on Access of Victims to the International Criminal Court] and the Preparatory Commission [charged with drafting the RPE] confirmed that the statutory powers of the Court pursuant to [Article 68(3)] to determine when and in what manner the victims’ right to participation should be exercised in a particular case should also be safeguarded in the Rules.”).

<sup>123</sup> Amnesty International, *The International Criminal Court: Ensuring an Effective Role for Victims*, AI Index: IOR 40/10/99, at § 2.A, April 1999.

<sup>124</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 460.

<sup>125</sup> ICC Rules, *supra* n. 6, at R. 89(1).

<sup>126</sup> See Rome Statute, *supra* n. 1, at Art. 15(3) (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation [proprio motu], he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.”).

<sup>127</sup> See Rome Statute, *supra* n. 1, at Art. 19(3) (providing in part that, “[i]n proceedings with respect to jurisdiction or admissibility those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”).

<sup>128</sup> *Id.* at R. 50(4). The only clear obligation of the Pre-Trial Chamber to those victims who have made representations to the Court under Article 15(3) is to notify them of its decision whether or not to authorize the commencement of an investigation by the Prosecutor. *Id.* at R. 50(5).

<sup>129</sup> See *id.* at R. 59(1), (3).

<sup>130</sup> See ICC Rules, *supra* n. 6, at R. 93 (generally authorizing the Chambers to “seek the views of victims... on any issue”).

participation scheme in a manner respectful of victims' interests, the rights of the accused, and the need for fair and expeditious proceedings, the ICC Rules do impose certain express limits on the availability and scope of victim participation. Perhaps most importantly for the purpose of protecting the rights of the accused and ensuring an impartial trial, Rule 89(1) provides that copies of victims' applications shall be made available to both the Prosecution and Defence counsel, who will have the opportunity to comment on the applications.<sup>131</sup> Under Rule 89(2), either the Prosecution or Defence may request that the Court deny an application to participate on the grounds that the applicant is not a "victim" under Rule 85, or otherwise does not fulfill the criteria of Article 68(3).<sup>132</sup>

When victims are granted participation rights by the Court, moreover, the scope of their participation is not infinite, as "a victim does not become a true party to the trial."<sup>133</sup> For example, 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.<sup>134</sup> To the extent victims are permitted to make submissions, the Prosecution and Defence are entitled to file replies.<sup>135</sup> Furthermore, by contrast to certain civil law jurisdictions, victims participating before the ICC do not have an automatic right to access Prosecution or Defence evidence or to call their own witnesses.<sup>136</sup>

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<sup>131</sup> ICC Rules, *supra* n. 6, at R. 89(1) ("Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber."). Applicants may request that the Court redact their name and other information likely to reveal the applicants' identity prior to transmitting an application to the Defence. *See* Rome Statute, *supra* n. 1, at Art. 68(1) ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."). Although beyond the scope of this Report, it is important to note that the ICC Chambers have already faced, and will likely continue to face, significant questions regarding the relationship between protecting the confidentiality of victims and safeguarding the rights of the accused to a fair trial.

<sup>132</sup> ICC Rules, *supra* n. 6, at R. 89(2) ("The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.").

<sup>133</sup> Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1405. *See also* Corrie, *Victims' Participation and Defendants' Due Process Rights*, *supra* n. 38, at 17-18 ("Unlike those domestic judicial systems in which participating victims actually become third parties to the case, victims before the ICC do not gain the status of fully participating third parties at any phase of the investigation or proceedings.").

<sup>134</sup> ICC Rules, *supra* n. 6, at R. 91. *See also* Corrie, *Victims' Participation and Defendants' Due Process Rights*, *supra* n. 38, at 7 (noting that these provisions "help to protect the integrity of the Prosecutor's case and the rights of the accused.").

<sup>135</sup> ICC Rules, *supra* n. 6, at R. 91(2).

<sup>136</sup> *See* Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1406. One commentator

Another difference between victim participation under the Rome Statute and the rights given to victims in some civil law systems is that, in the ICC context, victims do not have the express right to initiate an investigation, or to compel the Prosecutor to pursue any particular suspect or crime.<sup>137</sup> In fact, the drafters of the Rome Statute and ICC Rules intentionally limited the scope of victim participation during specific stages of the investigation phase of the Court's operations,<sup>138</sup> where concerns of efficiency and/or fairness may be heightened.<sup>139</sup> For instance, lengthy debates were held during the drafting of the Rules on the appropriate degree and nature of participation with regard to a request by the Prosecutor to proceed with an investigation under Article 15.<sup>140</sup> While some States argued that victims should be afforded full rights as parties during these proceedings, "including the right to request a hearing, to review communications from all parties, and to appeal a decision not to authorize an investigation,"<sup>141</sup> others claimed a broad role for

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has noted that the limits on victims' access to evidence not only streamlines the proceedings, but is necessary because "it would be difficult to combine comprehensive victim participation with the protection/privacy needs of participating witnesses." See Heikkilä, *INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME*, *supra* n. 16, at 153.

<sup>137</sup> See, e.g., Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457 (noting that, "[c]ontrary to what is the case in, for example, French and Swedish municipal systems, victims do not have the right to initiate criminal proceedings."); Jérôme de Hemptinne & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, *J. Int'l Crim. Just.*, 342, 347-48 (April 2006) ("Indeed, the Statute requires that the investigation be carried out in an independent and objective manner, with equal care given to incriminating and exonerating circumstances... Furthermore, it should be noted that, in conducting the investigations, the Prosecutor, in addition to the interests of victims, has to take into account several other factors (such as the gravity of the crimes, complementarity and other interests, e.g. reconciliation, excessive workload of the Court, etc.)").

<sup>138</sup> See, e.g. Rome Statute, *supra* n. 1, at Art. 15(3) (permitting victims to "make representations to the Pre-Trial Chamber" when the Prosecutor seeks authorization for a *proprio motu* investigation); *id.* at Art. 19(3) (allowing victims to "submit observations to the Court" in the event of a challenge to admissibility or jurisdiction). See also Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 459 ("The Statute contains specific provisions on victims' participation in Part 2 (jurisdiction and admissibility) proceedings. Rules on the modalities of victims' participation in such proceedings would have to be different since the matters may arise at a very early stage when neither the crime nor the 'suspect' is yet clearly identified.").

<sup>139</sup> In the early stages of an investigation into a situation, it is unlikely any particular crime or suspect has been identified; thus, with respect to fairness, the concern is that if victims are allowed broad participation rights at the investigation stage of a situation, the rights of future accused may not be adequately protected. See Michele Marchesiello, *Proceedings Before the Pre-Trial Chambers*, in *II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1231-32 (Cassese, *et al.* eds., 2002) ("[T]here cannot be a really *fair* trial, if this fairness has not been practised and guaranteed appropriately in the phases prior to trial. In brief: there will be no *fair trial* without a *fair pre-trial*." (emphasis in original)). The Regulations of the Court do allow a Chamber to appoint *ad hoc* counsel for the interests of protecting the interests of future accused during the Pre-Trial proceedings. See Regulations of the Court, Adopted by the Judges of the Court on 26 May 2004, Fifth Plenary Session, ICC-BD/01-01-04, Chapter 5, The Hague, 17- 28 May 2004, at Reg. 76(1) [hereinafter "ICC Regulations"]. For further detail on the role of *ad hoc* Defence Counsel in the context of victim participation during an investigation, see *infra* n. 235 *et seq.* and accompanying text.

<sup>140</sup> See John T. Holmes, *Jurisdiction and Admissibility*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, 321, 332 (Roy S. Lee ed., 2001).

<sup>141</sup> *Id.*

victims would undermine the purpose of Article 15, namely, to create an expeditious process for the initiation of an investigation.<sup>142</sup> As drafted, the Rules provide that representations submitted to the Court pursuant to Articles 15(3) and 19(3) shall be made in writing and within a certain time limit.<sup>143</sup> Similarly, although Rule 92(2) requires that victims receive notification of a decision by the Prosecutor not to initiate an investigation or to prosecute pursuant to Article 53(3) of the Rome Statute, victims do not have an express right to participate in any hearings that may arise from such a decision.<sup>144</sup>

Thus, while large numbers of victims will theoretically be permitted to present their views and concerns to the ICC, the “model for victims’ participation... developed in the [Rome] Statute does not go as far as in the case in some national systems.”<sup>145</sup> The scope of ICC participation is nevertheless consistent with Paragraph 6 of the UN Victims Declaration, which “does not require the actual presence of the victim in the courtroom, nor [does it] afford[] the victim an active role in the proceedings, that is [by] granting the victim the possibility of *personally* expressing the views and concerns to the court.”<sup>146</sup> Rather, the Declaration “establishes an expectation that victim participation is encouraged whenever possible and a requirement that due consideration is given to the responsiveness of judicial processes to the needs of victims.”<sup>147</sup>

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<sup>142</sup> *Id.*

<sup>143</sup> ICC Rules, *supra* n. 6, at R. 50(3) and R. 59(3).

<sup>144</sup> Article 53(3) provides as follows:

(a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

Rule 92(2) provides:

In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question.

One way that victims might be able to participate in an Article 53(3) review without applying under the general participation scheme is under Rule 93, which provides that a Chamber “may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of *other* victims, as appropriate.” ICC Rules, *supra* n. 6, at R. 93 (emphasis added). Nevertheless, in such a scenario, any participation by victims would still need to comport with the provisions of the Rome Statute and Rules guaranteeing the efficiency and fairness of the proceedings. *See supra* n. 101 and accompanying text.

<sup>145</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457.

<sup>146</sup> *See* Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME, *supra* n. 16, at 141-42 (emphasis in original).

<sup>147</sup> *Id.* at 141.

### 3. Administrative Tools

In addition to affording the Court broad discretion to limit the timing and modality of victim participation, the Rules of Procedure and Evidence and Regulations of the Court contain a number of administrative tools designed to maintain the efficiency and fairness of ICC proceedings while still allowing for the possibility that large numbers of victims may participate before the Court. Significantly, these measures were not viewed by victims' advocates as potential infringements on participation rights, but rather as a means to guarantee the successful implementation of a meaningful participation scheme. For example, the Women's Caucus for Gender Justice submitted commentary on the Draft Statute in 1997 which included the following observations:

[The] Court must make rules to permit the participation of victims and their representatives consistent with the rights of the accused and the guarantee of a fair, impartial and efficient trial. These are crimes which often involved thousands of victims, particularly when those with command or superior responsibility are accused. The Court must have the power to manage the process, providing in the Rules for collective representative and interventions, for example.<sup>148</sup>

Similarly, Amnesty International pointed out in its 1999 recommendations to the drafters of the ICC Rules of Procedure and Evidence that national courts "have been able to develop effective ways to permit the representatives of victims to present their views and concerns in cases with large numbers of victims," using the American system of class actions – which allows similarly situated plaintiffs to group together for purposes of trial – as a prime example.<sup>149</sup>

Critical to the efficient functioning of the ICC victim participation scheme is the role of the Registry, which is designated by Article 43 of the Rome Statute to be responsible for all non-judicial aspects of the Court's operation.<sup>150</sup> In the Rules of Procedure and Evidence, the Registry "has explicitly been assigned many duties aimed at ensuring effective and meaningful victim participation,"<sup>151</sup> and in fact, the Rules "in most cases do not grant victims the right to address the Chambers directly, but through the Registrar."<sup>152</sup> For example, Rule 89(1) provides that, "[i]n order to present their views and concerns,

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<sup>148</sup> Women's Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters, 4-15 August 1997, at 34.

<sup>149</sup> Amnesty International, *Ensuring an Effective Role for Victims*, April 1999, at 18. As discussed further below, the American system of class actions is not directly applicable to the ICC context because class actions are used strictly in civil, as opposed to criminal, cases. *See infra* n. 366 *et seq.* and accompanying text. Nevertheless, class action procedures provide useful illustrations of the creative ways in which courts have dealt with situations of mass harm efficiently and effectively.

<sup>150</sup> Rome Statute, *supra* n. 1, at Art. 43.

<sup>151</sup> Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME, *supra* n. 16, at 151.

<sup>152</sup> *Id.* at 151-52.



victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber,”<sup>153</sup> along with a report completed by the Registrar.<sup>154</sup> The Registrar may request further information from applicants, States, the Prosecutor, and non-governmental organizations “in order to ensure that such application contains, to the extent possible, the [required] information... before transmission to a Chamber.”<sup>155</sup> In preparing its report to the Chamber, “[t]he Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.”<sup>156</sup> Indeed, the Registrar may submit one report “on a number of applications,” “in order to assist [the] Chamber in issuing only one decision on a number of applications.”<sup>157</sup>

Upon receiving the applications from the Registrar, the Court is authorized under Rule 89(4) to review them “in such a manner as to ensure the effectiveness of the proceedings and [to] issue one decision.”<sup>158</sup> As explained above,<sup>159</sup> the Chamber may reject a victim’s application “on its own initiative,” or upon motion of either the Prosecution or the Defence, on two grounds: if it considers that (1) the person is not a victim; or (2) the criteria set forth in Article 68(3) are not otherwise fulfilled,<sup>160</sup> in particular that their personal interests are not affected.<sup>161</sup> If the conditions for participation are fulfilled, the Chamber shall “specify the proceedings and manner in which participation is considered appropriate,”<sup>162</sup> and this decision shall apply “throughout the proceedings in the same case,” subject to the Chamber’s inherent right to modify its previous rulings when necessary.<sup>163</sup> Furthermore, “[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims... to choose a common legal representative or representatives.”<sup>164</sup> This last provision has been described as critical to the effective

<sup>153</sup> ICC Rules, *supra* n. 6, at R. 89(1). Communications may be submitted in “audio, video, or other electronic form” where an applicant “is unable, due to a disability or illiteracy” to provide one in writing. *Id.* at R. 102. The application is to be made using a standard form or providing equivalent information, including *inter alia* the harm suffered as a result of a crime within the jurisdiction of the Court, why the applicant’s personal interests are affected, and the stage of the proceedings in which the applicant wishes to participate. *See* ICC Regulations, *supra* n. 139, at Regs. 86(1), 86(2)(c),(f),(g).

<sup>154</sup> *Id.* at Reg. 86(5).

<sup>155</sup> *Id.* at Reg. 86(4).

<sup>156</sup> *Id.*

<sup>157</sup> ICC Regulations, *supra* n. 139, at Reg. 86(6).

<sup>158</sup> ICC Rules, *supra* n. 6, at R. 89(4).

<sup>159</sup> *See supra* n. 132 and accompanying text.

<sup>160</sup> ICC Rules, *supra* n. 6, at R. 89(2).

<sup>161</sup> *See* Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 461.

<sup>162</sup> ICC Rules, *supra* n. 6, R. 89(1). Like the Registrar, the Chamber may request additional information from the Prosecutor, States, or victims, before deciding on victims’ applications. ICC Regulations, *supra* n. 139, at Reg. 86(7).

<sup>163</sup> *Id.* at Reg. 86(8) (providing for the continued application of a decision made under Rule 89, subject “to the powers of the relevant Chamber” under Rule 91(1) to modify rules made under Rule 89).

<sup>164</sup> ICC Rules, *supra* n. 6, at R. 90(2).

functioning of the victim participation scheme, as “the crimes within the jurisdiction of the Court frequently affect the lives of thousands of victims.”<sup>165</sup>

Of course, the procedures outlined in Rules 89 through 93 and the accompanying Regulations may always be supplemented by further measures aimed at safeguarding the efficiency and fairness of proceedings. Interestingly, victims’ rights advocates have continued to press the ICC to develop a streamlined and flexible procedure allowing for victim participation before the Court, no doubt recognizing that an ineffective scheme is not in anyone’s interest, least of all the victims. For example, drawing on its members’ experiences in domestic mass-claims litigations, the Victims’ Rights Working Group (VRWG) has argued for application procedures designed to “facilitate the sorting and grouping of applications and thus simplify the decision-making process.”<sup>166</sup> Others have similarly noted the utility of grouping victims for the purpose of participation, suggesting that “collective victim participation” may ultimately prove more workable – and thus more meaningful to victims – than “individual victim participation.”<sup>167</sup>

Another idea forwarded by the VRWG is to make further use of the Registrar’s resources and developing expertise with victims’ issues in order to ease the Chamber’s burden in assessing victims’ status in a given situation or case.<sup>168</sup> For example, the VRWG advocates that, when the time comes for the Court to formally decide if an applicant is a “victim” under Rule 85, either:

The Registrar [could] present groups of applications to the Chambers for determining whether the “basic criteria” are complied with [or] the Chambers may consider providing detailed criteria to the Registrar... on the basis of [which] the Registrar could, for example, classify applications as those that fully fit within the criteria and those that require additional analysis by the judges.<sup>169</sup>

This type of grouping is already being performed by the Registrar for purposes of facilitating the appointment of common legal representation for victims,<sup>170</sup> and nothing in the Rome Statute or Rules prevents making use of such procedures at the application

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<sup>165</sup> Corrie, *Victims’ Participation and Defendants’ Due Process Rights*, *supra* n. 38, at at 6.

<sup>166</sup> Victims Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations* (November 2005), at 8.

<sup>167</sup> Heikkilä, *INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME*, *supra* n. 16, at 143 (“It has thus been suggested that victim participation, which does not significantly delay or obstruct the criminal proceedings, is also possible when it comes to mass atrocities, even though this, at times, requires special arrangements. In particular, it may be necessary to replace individual victim participation with collective victims participation.”).

<sup>168</sup> Victims Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations*, *supra* n. 166, at 9. *See also* ICC Rules, *supra* n. 6, at R. 16(3) & R. 89(1); ICC Regulations, *supra* n. 139, at Reg. 86(6).

<sup>169</sup> Victims Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations*, *supra* n. 166, at 10.

<sup>170</sup> ICC Rules, *supra* n. 6, at R. 90(2).

stage.<sup>171</sup> In fact, this type of expedited process is arguably promoted by the Rules, which permit the Chamber to review victims' applications "in such a manner as to ensure the effectiveness of the proceedings and [to] issue one decision."<sup>172</sup>

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<sup>171</sup> Although the Court has, as will be discussed further in Section V, interpreted Article 68(3) as requiring evaluation of victim-applicants on an individualized basis, *see infra* n. 247 *et seq.* and accompanying text, the plural use of "victims" in Article 68(3) suggests that such an approach is not required. It is true that, unlike the UN Victims Declaration definition of "victims," which refers to "persons who, individually or collectively, have suffered harm," Rule 85(a) defines "victims" simply as "natural persons who have suffered harm." *Compare* UN Victims Declaration, *supra* n. 3, with ICC Rules, *supra* n. 6, at R. 85(a). However, it is not entirely clear from the *travaux préparatoires*, whether "natural persons" includes only individual victims or also victim groups. The definition of "victim" adopted at the 1999 Paris expert seminar recognized both that victims could be either a natural person or a group of natural persons and that they may suffer harm either individually or collectively. *See Report on the international seminar on victims' access to the International Criminal Court*, Annex I, R. X (Art. 15(1)), U.N. Doc. PCNICC/1999/WGRPE/INF/2 (1999) (providing that "'victim' means any person or group of persons who individually or collectively... suffered harm"); *id.* at n. 2 (providing that "[i]n order to eliminate any ambiguity, 'person' means a natural person"). Although the definition adopted at the April 2000 Preparatory Commission meeting provided merely that victims are "persons," omitting the reference to "a group of persons," Preparatory Commission for the International Criminal Court, Rules of Procedure and Evidence, Annex II at 17, R.Q, U.N. Doc. PCNICC/2000/L.1/Rev.1/Add.1, 10 April 2000, the removal of this language does not necessarily indicate an intent to foreclose the possibility of interpreting the term "persons" to include a group of persons. While the simplified text adopted as Rule 85 was designed to eliminate controversial terms originating in the Victims Declaration, it apparently was also intended to leave these kinds of interpretative decisions for the Court. *See* Fernández de Gurmendi, *Definition of Victims and General Principle*, *supra* n. 23, at 432. Notably, reparations may be provided to victims on either an individualized or collective manner. ICC Rules, *supra* n. 6, at R. 97.

<sup>172</sup> ICC Rules, *supra* n. 6, at R. 89(4).

## V. EARLY JURISPRUDENCE AND POTENTIAL REFORMS

Despite the development of a number of procedural rules and regulations designed to govern the victim participation scheme, as of early 2006, the “modalities of victims’ participation [were] still subject to a wide degree of legal and practical uncertainties.”<sup>173</sup> Since January 2006, however, a number of decisions relating to the implementation of the participation scheme have come down from the Pre-Trial Chambers and the Appeals Chamber. Recognizing that jurisprudence about victim participation – and indeed the ICC itself – is still in its early stages, these decisions will nevertheless prove critical in shaping the role of victims before the Court going forward. We therefore use this section to evaluate the current jurisprudence relating to victims in light of the goal of restorative justice, and the concerns of efficiency and fairness, that underlie the design of the ICC victim participation scheme. In addition, we highlight means available to the Court that may allow it to more readily achieve restorative justice for victims without sacrificing the efficiency or fairness of the proceedings.

### A. BRIEF SUMMARY OF VICTIMS’ STATUS BEFORE THE ICC

To date, both Pre-Trial Chamber I (PTC I), presiding over the situation<sup>174</sup> in the Democratic Republic of Congo, and Pre-Trial Chamber II (PTC II), handling the situation in Uganda, have issued decisions evaluating victims’ applications to participate in proceedings under Article 68(3) of the Rome Statute.

PTC I issued the first decision on victim participation before the Court, granting six applicants the status of “victim” for purposes of the situation in the DRC in January 2006.<sup>175</sup> The decision, hailed by one NGO as an “international legal first,”<sup>176</sup> was significant in finding 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.<sup>177</sup> Notably, the decision was made over the objection of the Office of the Prosecutor (OTP), which argued – and continues to maintain<sup>178</sup> – that participation in the investigation phase of a situation is not envisaged

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<sup>173</sup> Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 225. *See also* Human Rights Watch, *A Summary of the Case Law of the International Criminal Court*, March 2007, at 3, available at <http://hrw.org/backgrounders/ij/icc0307/icc0307web.pdf> (“Determining how best to realize the right of victims to participate in the ICC process is one of the major challenges the new court faces.”).

<sup>174</sup> *See supra* n. 93 (discussing the ICC’s distinction between “situations” and “cases”).

<sup>175</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10.

<sup>176</sup> International Federation for Human Rights, *Victims’ Rights Before the International Criminal Court*, *supra* n. 108 (welcoming the decision as “an international legal first” and stating, “[f]or the first time the violation of the fundamental rights of victims, the harm they have suffered and their rights to defend their interest have been recognized by a court.”).

<sup>177</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10.

<sup>178</sup> *See, e.g., Situation in Uganda*, Prosecution’s Reply under Rule 89(1) to the Applications for

by the Rome Statute and Rules, and that allowing a third party to intervene at such an early stage could jeopardize both the objectivity and integrity of the OTP's work and the Court's proceedings more broadly.<sup>179</sup> PTC I rejected these arguments by holding, *inter alia*, that allowing victims to participate under Article 68(3) at the situation phase does not “*per se* jeopardize the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security.”<sup>180</sup> However, it remains to be seen precisely what the scope of victim participation at the situation stage will be beyond the rights separately afforded to victims under Articles 15<sup>181</sup> and 19<sup>182</sup> of the Rome Statute and the notification guaranteed to victims under various procedural rules of the Court.<sup>183</sup>

Although the OTP attempted to appeal the January 2006 decision, both Pre-Trial Chamber I and the Appeals Chamber have held that pre-trial decisions relating to victim participation are not subject to appeal on an interlocutory basis,<sup>184</sup> meaning it may be a number of years before the scheme being put in place by early decisions receives review.

PTC I has also granted a total of four victims the right to participate in the case against Thomas Lubanga Dyilo, the first suspect identified in the DRC situation.<sup>185</sup> None of the six victims originally granted participation status in the DRC situation was deemed to

Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, ICC-02/04-85 (OTP, 28 February 2007).

<sup>179</sup> *Situation in the Democratic Republic of Congo*, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, ICC-01/04 (OTP, 15 August 2005) at ¶¶ 13-17, ¶ 30.

<sup>180</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 57.

<sup>181</sup> As discussed above, Article 15(3) of the Rome Statute provides that victims may make “representations” to a Pre-Trial Chamber in the event that the Prosecutor requests that Chamber to authorize an investigation initiated under the Prosecutor's *proprio motu* powers. *See supra* n. 72 *et seq.* and accompanying text.

<sup>182</sup> Article 19(3) permits victims to “submit observations to the Court” where a challenge has been made to the Court's jurisdiction or the admissibility of a case. *See supra* n. 76 *et seq.* and accompanying text.

<sup>183</sup> *See supra* n. 88 *et seq.* and accompanying text.

<sup>184</sup> *See Situation in the Democratic Republic of Congo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04 (Pre-Trial Chamber I, 31 March 2006); *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04 (Appeals Chamber, 13 July 2006).

<sup>185</sup> *Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0001/06, and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06 (Pre-Trial Chamber I, 28 July 2006) [hereinafter, “*Prosecutor v. Lubanga*, PTC I, 28 July 2006”]; *Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06 (Pre-Trial Chamber I, 20 October 2006) [hereinafter “*Prosecutor v. Lubanga*, PTC I, 20 October 2006”].

have participation rights in the case against Lubanga.<sup>186</sup> Some 64 additional victims have been denied the opportunity to participate in the *Lubanga* case and are still awaiting a decision on their applications to participate in the DRC situation.<sup>187</sup> The remaining victims that have applied to participate in the DRC situation and *Lubanga* case have not received any decision on their applications.<sup>188</sup>

As of November 2006, PTC II had received applications from 49 victims seeking the right to participate in both the situation in Uganda and the case against Joseph Kony, *et al.*<sup>189</sup> In February 2007, a Single Judge of PTC II, Judge Mauro Politi, denied a request from the applicant-victims to be provided with the assistance of a legal representative in connection with the Chamber's evaluation of the victims' applications.<sup>190</sup> Several months later, in August 2007, Judge Politi made the following rulings with respect to the 49

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<sup>186</sup> Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (Pre-Trial Chamber I, 29 June 2006) [hereinafter, "*Prosecutor v. Lubanga*, PTC I, 29 June 2006"]. In determining that the six individuals granted "victim" status in the DRC situation on 17 January 2006 did not qualify for "victim" status in the case against Mr. Lubanga, PTC I explained that, "at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant." *Id.* at 6. In the view of PTC I, this "causal link" was not sufficiently established with respect to the *Lubanga* case by any of the initial six victims of the DRC situation. *Id.* at 7-8.

<sup>187</sup> *Prosecutor v. Lubanga*, PTC I, 20 October 2006, *supra* n. 185. Note that all of the figures cited in this section relating to the number of victim-applications received to date are based on publicly available information, and it is very possible that higher numbers of victims have had some form of contact with the Court in relation to the victims' participation scheme, but perhaps have not been considered by any Chamber due to fundamental deficiencies in their applications.

<sup>188</sup> See *Situation in Darfur, Sudan*, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, Sudan, ICC-02/05, ¶ 14 (OTP, 8 June 2007) (noting that "approximately 150 applications have sought to participate in the DRC situation; a significant number of these... are [still] pending decision."). See also *Situation in the Democratic Republic of Congo*, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, ICC-01/04 (OTP, 25 June 2007).

<sup>189</sup> Situation in Uganda in the Case of *The Prosecutor v. Joseph Kony, et al.*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, at 2-3 (Pre-Trial Chamber II, 10 August 2007) [hereinafter "*Situation in Uganda*, PTC II, 10 August 2007"].

<sup>190</sup> *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, ICC, ICC-02/04-01/05, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations of applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶ 11 (Pre-Trial Chamber II, 1 February 2007) [hereinafter "*Prosecutor v. Kony*, PTC II, 1 February 2007"] ("[A]pplicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber's decision on the merits of the [victims'] application [to participate].").

victims' applications: six victims may participate in the case against Kony, *et al.*;<sup>191</sup> one of those six victims is also entitled to participate in the Uganda situation;<sup>192</sup> and one additional victim (not granted participation in the *Kony* case) may participate in the situation in Uganda.<sup>193</sup> Judge Politi has deferred decision on the 42 remaining applications in the Uganda situation and *Kony* case pending the applicants' submission of satisfactory proof of identification.<sup>194</sup> As with the six victims granted participation rights in the DRC situation, it is not clear how the Chamber envisions permitting the two victims of the Uganda situation to present their "views and concerns" to the Court under Article 68(3) beyond exercising the rights given to victims under Article 15(3)<sup>195</sup> and 19(3)<sup>196</sup> and the various rules relating to victim notification.<sup>197</sup>

At least 21 victims have applied to participate in the situation in Darfur and the cases arising from that situation, yet to date no decision has been issued on the status of those applications.<sup>198</sup> At the time of this writing, no victims have applied to participate in the situation in the Central African Republic.

#### B. APPLICATION OF ARTICLE 68(3) TO INVESTIGATION PHASE OF A SITUATION

Prior to Pre-Trial Chamber I's January 2006 decision, it was unclear whether Article 68(3) was intended to apply to proceedings in the context of a "situation," *i.e.*, before identification by the Prosecutor of a specific suspect or group of suspects.<sup>199</sup> Indeed, in a

<sup>191</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at 61.

<sup>192</sup> *Id.* Note that it is not altogether clear why the other five victims of the *Kony* case would not also be considered victims of the Uganda situation, but it appears that PTC II did not consider their applications for the situation based on the Chamber's view that these other five victims did not claim to "have suffered from events which fall beyond the scope of the Case." *Id.* at ¶ 82.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 62. For further detail, see *infra* n. 253 *et seq.* and accompanying text.

<sup>195</sup> See *supra* n. 72 *et seq.* and accompanying text (discussing Article 15(3) of the Rome Statute, which provides victims an opportunity to make representations to the Pre-Trial Chamber in the event that the Prosecutor seeks authorization to pursue a *proprio motu* investigation).

<sup>196</sup> See *supra* n. 76 *et seq.* and accompanying text (discussing Article 19(3) of the Rome Statute, which permits victims to submit observations to the Court in the context of a challenge to the ICC's jurisdiction or to the admissibility of a case).

<sup>197</sup> See *supra* n. 88 *et seq.* and accompanying text.

<sup>198</sup> *Situation in Darfur, Sudan*, Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, ICC-02/05-74 (Pre-Trial Chamber I, 23 April 2007); *Situation in Darfur, Sudan*, Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings, ICC-02/05-85 (Pre-Trial Chamber I, 23 July 2007). Five of these applications were first filed in June 2006, and approximately 16 others were submitted to the Court shortly thereafter. See Victims' Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf>.

<sup>199</sup> See, e.g., Stahn, *et al.*, *Participation of Victims in Pre-Trial Proceedings of the ICC*, *supra* n. 19, at 221 ("Despite the widespread recognition of the fundamental role victims have been afforded in ICC proceedings, little attention has been paid to the fact that the Statute and Rules fail to specify clearly if and where participatory rights are linked to 'victims of a situation' (e.g. all natural persons, organizations and

2002 article evaluating the ICC victim participation scheme, Judge Claude Jorda, who authored the January 2006 decision, appeared to suggest that Article 68(3) would not apply prior to the case phase of proceedings. Specifically, the article states:

[I]n contrast to the procedure followed by the *ad hoc* Tribunals, the victim enjoys a limited right to be informed of progress in the criminal proceedings: the ICC Statute confers on him the right to “make representations to the Pre-Trial Chamber” upon examination by that Chamber of the Prosecutor’s request for authorization to proceed with an investigation [citing Article 15(3)], and the right to be informed of the closure of that investigation [citing Article 53]. *During the course of the trial proper, two provisions of the ICC Statute govern the participation of the victim: Articles 19(3) and 68(3).*<sup>200</sup>

Thus, it seems Judge Jorda believed that Article 68(3) was intended to govern victim participation at trial, but not before. This interpretation seems consistent with the drafting history described above, given that the drafters declined to provide victims any right to initiate investigations or particular prosecutions.<sup>201</sup> Thus, while Judge Jorda adopted a different interpretation of the victim participation scheme in his January 2006 decision, the application of Article 68(3) to the investigation stage of a situation is not necessarily mandated by the Rome Statute or Rules.

Moreover, while the January 2006 decision may appear to serve a restorative goal – and, indeed, was lauded by victims’ advocates as a landmark decision recognizing victims’ interests<sup>202</sup> – it remains to be seen what practical significance the decision to extend Article 68(3) to the investigation stage of a situation has for victims. As PTC I recognized in its January 2006 decision, Article 68(3) imposes a “dual obligation” on the Court with respect to victims whose personal interests are affected: (i) the Chamber must permit victims to present their views and concerns; and (ii) the Chamber must examine those views and concerns.<sup>203</sup> Yet, both PTC I and PTC II have been vague as to how victims who have been granted the right to participate at the situation stage will be able to exercise the rights afforded by Article 68(3). For its part, PTC I was very broad, saying that:

In the light of the core content of the right to be heard set out in [A]rticle 68 (3) of the Statute, persons accorded the status of victims will be

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institutions that have suffered harm as a result of the commission of crimes within the jurisdiction of the Court in a specific territory) or confined to ‘victims of a case’ (e.g. natural persons, organizations and institutions that have suffered harm as a result of the conduct of one or several identified accused or suspects.”)).

<sup>200</sup> Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1404 (emphasis added).

<sup>201</sup> *See supra* n. 137 *et seq.* and accompanying text.

<sup>202</sup> *See, e.g.*, Statement of Mr. Antoine Bernard, International Federation for Human Rights, *supra* n. 109 and accompanying text.

<sup>203</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 71.



authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.<sup>204</sup>

In addition, the Chamber concluded that the six victims with status to participate in the DRC situation would be able to request “the Pre-Trial Chamber to order specific measures.”<sup>205</sup>

In a more recent decision in the context of the Uganda situation, PTC II set out to more precisely identify “the nature and scope of the proceedings in which victims may participate in the context of a situation.”<sup>206</sup> Yet the majority of the potential participatory rights described in the Chamber’s decision as being available to victims of the Uganda situation would seemingly be available to victims *even if* they did not go through the detailed and lengthy process of applying for participation rights under Article 68(3). In fact, in identifying the instances at which victims of a situation could theoretically participate before the ICC, PTC II focused “attention on a number of provisions in the Rules which refer to the concept of ‘victims having communicated with the Court’: namely, victims that, *whilst not having (as yet) been allowed to participate in proceedings*, have nevertheless been in contact with the Court.”<sup>207</sup>

Among these provisions, PTC II noted, are the right to make “representations to the Pre-Trial Chamber” regarding a request from the Prosecution to authorize an investigation under Article 15(3);<sup>208</sup> the right of victims to receive notice of proceedings pursuant to Article 15(3);<sup>209</sup> the right to notice of a decision by the Prosecutor not to prosecute pursuant to Article 53(3);<sup>210</sup> and the right to notice of a Court’s decision to hold a hearing to confirm the charges pursuant to Article 61.<sup>211</sup> PTC II also noted that the Court may “seek the views” of *any* victims – regardless of whether they have obtained participation rights under Article 68(3) – on *any* issue.<sup>212</sup> Oddly, however, even after recognizing that

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at ¶ 75.

<sup>206</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 88. Judge Politi notes that “the list of proceedings” he provides “does not intend to be necessarily exhaustive,” as all possible scenarios cannot be foreseen at this stage.” *Id.*

<sup>207</sup> *Id.* at ¶ 93 (emphasis added).

<sup>208</sup> *Id.* at ¶ 90. *See also* Rome Statute, *supra* n. 1, at Art. 15.

<sup>209</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 91. *See also* ICC Rules, *supra* n. 6, at R. 50(3).

<sup>210</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 93. *See also* ICC Rules, *supra* n. 6, at R. 92(2).

<sup>211</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 93. *See also* ICC Rules, *supra* n. 6, at R. 53(3).

<sup>212</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 93. *See also* ICC Rules, *supra* n. 6, at R. 93.

victims would be entitled to these same rights without obtaining participant-status under Article 68(3), PTC II held that, if victims do wish to apply under Article 68(3), the participation of “each of the victims involved” at the investigation phase of the situation will “depend not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question.”<sup>213</sup>

1. Creating Unrealistic Expectations of Victims’ Role at Investigation Phase of Situation is Inconsistent with Restorative Justice Goal

The primary problem with the application of Article 68(3) to the investigation stage is that it may in fact *undermine* the restorative aims behind the victim participation scheme by creating false hope among victims in regard to their role at that stage. Surely it would be reasonable to assume that, if victims are to go through the process of filling out the lengthy application form<sup>214</sup> required to participate under Article 68(3) and wait, in many cases, for over one year to receive an evaluation of their applications, the award of general “victim” status at the investigation stage would involve meaningful rights.<sup>215</sup> In reality, however, the “victims of a situation” have not, to date, actually had a significant opportunity to present their “views and concerns” to the Chamber as contemplated by Article 68(3). Indeed, since being granted “victim” status for purposes of the DRC investigation in January 2006, the extent of the initial six victims’ “participation” has

<sup>213</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 89. Note that PTC II identified two additional instances, both under Article 57(3)(c), at which victims’ “personal interests” may be affected at the situation stage, namely: in proceedings initiated by the Pre-Trial Chamber relating to the protection and privacy of victims and witnesses and those relating to the preservation of evidence. *Id.* at ¶ 97. However, as the Chamber also notes, the Court is free to “seek the views” of any victim on any issue, and therefore extending Article 68(3) to the investigation phase of a situation is not necessary to protect victims’ potential rights to access the Court at these stages. Moreover, the Chamber also recognizes that victims applying for participation (which includes participation in a case) may submit their views and concerns “on protective measures to be taken by the Chamber even prior to the consideration of the merits of their application.” *Id.* at ¶ 99.

<sup>214</sup> At present, the “standard” form by which victims are to apply to participate under Article 68(3) of the Rome Statute is 17 pages in length and requires victims to recount the details of the harm they have suffered, which is presumably a painful experience for most, if not all, applicants. *See Int’l Criminal Court, Standard Application Form to Participate in Proceedings before the ICC for Individual Victims and Persons Acting On Their Behalf*, available at <http://www.icc-cpi.int/victimissues/victimsparticipation/victimsparticipationForm.html>.

<sup>215</sup> Unfortunately, dashed expectations on the part of victims is a broader issue for the ICC in terms of the Court’s limited mandate – the ICC has the responsibility to investigate and prosecute only “the most serious crimes of concern to the international community as a whole” – and the relatively small number of prosecutions it is likely to undertake in any given situation. *See Rome Statute, supra* n. 1, at Preamble, ¶¶ 4, 9, Art. 5(1). As one human rights lawyer from Sudan has remarked, “many of those affected by the conflict harbour unrealistic expectations of the court,” as “their initial understanding was that the court was coming to solve the whole problems [*sic*] and to prosecute all the perpetrators, and to bring things to where they should be.” Institute for War & Peace Reporting, *Sudan: Few Victims Likely to Participate in International Court Trial*, 27 July 2007, available at <http://allafrica.com/stories/200707301151.html>. While effective participation by victims will not necessarily resolve this greater issue, it is critical that as many victims as possible receive accurate information about the ICC and their role in it, which will be encouraged by the simplification of the application procedure and the provision of clear guidelines for participation. *See infra* n. 333 *et seq.* and accompanying text.

been limited to the following: (i) the submission of legal arguments by the victims' lawyer challenging the Prosecutor's application to appeal the January 2006 decision of PTC I,<sup>216</sup> and (ii) a request that the Chamber order the Prosecutor to provide it with information and documents regarding the OTP's decision to temporarily suspend its investigation in relation to other potential charges against Mr. Lubanga pending the close of the present proceedings against the accused.<sup>217</sup> Notably, this request for information about the investigation of Mr. Lubanga was filed by the victims' representative in August 2006, and it was not until over one year later, on 26 September 2007, that the PTC issued a decision denying the victims' request.<sup>218</sup>

Moreover, it is unlikely that any "situation" victims will have an opportunity to meaningfully present their views and concerns to the Court in the future, unless it is in the context of exercising the rights afforded to victims at the investigation stage outside of Article 68(3). For example, pursuant to Article 15(3)<sup>219</sup> and Article 19(3),<sup>220</sup> those individuals that have been granted participation rights in the DRC situation will have an opportunity to submit written observations to the Court in the event that a hearing is held involving a request by the OTP for approval to continue a *proprio motu* investigation or a challenge to jurisdiction or admissibility. However, the situation-victims would have those rights even without having been afforded participant status under Article 68(3). In fact, as a practical matter, the only immediately obvious manner in which victims could participate *under Article 68(3)* at the investigation stage – in other words, in which they would have an opportunity to meaningfully present their views and concerns to the Court beyond exercising rights given to victims in other parts of the Rome Statute and ICC Rules – would be if the Court were to hear evidence from victims regarding particular suspects or crimes. Yet such participation would arguably run counter to the intent of the drafters, who made clear that victims would not have the right to initiate investigations.<sup>221</sup>

Notably, PTC I itself appears to recognize, at least at a certain level, that Article 68(3) cannot be meaningfully applied at the investigation stage of the situation. Specifically, the Chamber held in its January 2006 decision that Article 68(3) requires not only that applicants meet the definition of "victims" under Rule 85, but also that they demonstrate that their "personal interests" are affected by the proceedings in which they wish to participate.<sup>222</sup> However, the Chamber then went on to explain that "the personal interests

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<sup>216</sup> *Situation in DRC*, Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6 (Victims' Representative, 27 January 2006).

<sup>217</sup> *See Situation in DRC*, Decision on the requests of the Legal Representative for victims VPRS1 to VPRS 6 regarding "Prosecutor's information on further investigation," ICC-01/04-399, at 2-3 (Pre-Trial Chamber I, 26 September 2007).

<sup>218</sup> *Id.*

<sup>219</sup> *See supra* n. 72 and accompanying text.

<sup>220</sup> *See supra* n. 76 and accompanying text.

<sup>221</sup> *See supra* n. 137 *et seq.* and accompanying text.

<sup>222</sup> *See Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 62 (holding that "personal interests" in Article 68(3) "constitutes an additional criterion to be met by victims, over and above the victim status

of victims are *affected in general* at the investigation stage,<sup>223</sup> rendering the “additional criterion” essentially meaningless at the situation stage.<sup>224</sup> Moreover, the reason that PTC I determined that victims’ interests are “affected in general” during an investigation was because “the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”<sup>225</sup> Yet, as discussed above, the provisions of the ICC victim participation scheme are intended to allow victims to participate in a manner *distinct* from witnesses and from claimants.<sup>226</sup> Thus, it seems that the Pre-Trial Chamber itself did not see the extension of Article 68(3) to the investigation phase of a situation as serving a restorative function for victims. It is therefore unsurprising that the Chamber, in a decision written shortly after its seminal January 2006 holding on victim participation at the investigation stage, described the system of participation provided for in that decision as “very limited.”<sup>227</sup>

## 2. Applying Article 68(3) to Investigation Phase of Situation is Inconsistent with the Court’s Obligations to Ensure Efficient & Fair Proceedings

Another problem with the Court’s application of Article 68(3) to the situation stage is that it is not efficiently responding to victims’ requests to participate. At the time of this writing, upwards of 90 victim-applicants are awaiting an initial decision from PTC I as to whether they qualify as victims in the DRC situation alone.<sup>228</sup> At least 65 of these victims filed their applications on or before 25 September 2006.<sup>229</sup> Oddly, PTC I did accept submissions from the parties and the victims’ representatives on the ability of these same 65 victims to participate in the *case* against Lubanga and conducted a review of each applicant for that purpose, but for reasons not explained in the decision, the Chamber declined to conduct a simultaneous review of the same 65 applicants’ request to participate in the DRC *situation*.<sup>230</sup> Rather, after concluding that only one of the 65 victims qualified for participation in the *case*, the Chamber held that it would “consider their application for participation in the investigation stage” of the DRC *situation* in “due

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accorded to them.”).

<sup>223</sup> *Id.* at ¶ 63 (emphasis in original). Indeed, in its decision, Pre-Trial Chamber I also stressed that Article 15, one provision that explicitly provides victims the right to participate before a “case” has been initiated, does not explicitly require a “personal interests” analysis, but instead appears to “accord a specific right of participation” to victims who meet only the criteria found in Rule 85. *Id.* at ¶ 62.

<sup>224</sup> *Id.* at ¶ 64.

<sup>225</sup> *Id.*

<sup>226</sup> See *supra* n. 46 *et seq.* and accompanying text.

<sup>227</sup> *Situation in the Democratic Republic of Congo, Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04-135, ¶ 47 (Pre-Trial Chamber I, 31 March 2006).*

<sup>228</sup> *Prosecutor v. Lubanga, PTC I, 20 October 2006, supra* n. 185, at 10.

<sup>229</sup> *Id.* at 2-3 (noting that the applications under consideration in the decision were filed between 31 July 2006 and 25 September 2006).

<sup>230</sup> *Id.*

course.”<sup>231</sup> Similarly lengthy waiting-periods have been seen with respect to applications to participate under Article 68(3) in the Uganda and Darfur situations.<sup>232</sup>

The Pre-Trial Chambers’ application of Article 68(3) to the investigation stage of a situation also presents concerns about the fair treatment of victims by the Court. On the one hand, if particular victims – for example, the two victims granted participation rights under Article 68(3) in the Uganda situation<sup>233</sup> – were permitted to provide evidence to the PTC in the context of an investigation, the result could be harmful to many other groups of victims, as the crimes suffered by those non-participating victims may receive less attention by the Court, given its limited resources. At the same time, if all interested victims were permitted extensive participation rights in the context of an ongoing investigation, it would be virtually impossible for the ICC to realistically ensure equal access for each individual to exercise such rights.

A final concern relates to the Court’s ability to safeguard the rights of future suspects at the investigation stage of a situation. In its January 2006 decision, PTC I recognized its duty to ensure that victim participation “is not prejudicial to or inconsistent with the rights of the Defence,”<sup>234</sup> and went on to conclude that such concerns had been addressed because “the Chamber decided to appoint an *ad hoc* counsel to represent the interests of the Defence.”<sup>235</sup> PTC I has also appointed *ad hoc* counsel in the context of the Darfur situation,<sup>236</sup> and PTC II has used the tool in the Uganda situation.<sup>237</sup> Notably, however, the Court has appeared to take a highly restrictive view of the ability of *ad hoc* counsel to act on behalf of prospective suspects. For example, in the Darfur investigation, PTC I refused to consider a motion filed by *ad hoc* counsel in October 2006 that challenged the very jurisdiction of the Court in Darfur, finding that the lawyer was not authorized to bring such a challenge.<sup>238</sup> While the appropriate role of *ad hoc* counsel at the

<sup>231</sup> *Id.* at 10.

<sup>232</sup> *See supra* n. 189 and accompanying text (discussing the waiting times of applicants wishing to participate in the Uganda situation) and n. 198 (discussing the waiting times of applicants wishing to participate in the Darfur situation).

<sup>233</sup> *See supra* n. 192 *et seq.* and accompanying text.

<sup>234</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 70.

<sup>235</sup> *Id.*

<sup>236</sup> *See Situation in Darfur, Sudan*, Decision on the Request for an Extension of Time, ICC-02/05-18, at 2 (Pre-Trial Chamber I, 25 August 2006).

<sup>237</sup> *See Prosecutor v. Kony*, PTC II, 1 February 2007, *supra* n. 190.

<sup>238</sup> *Situation in Darfur, Sudan*, Décision relative aux conclusions aux fins d'exception d'incompétence et d'irrecevabilité, ICC-02/05-34, 22 November 2006. The submissions of *ad hoc* Defence Counsel and decisions of the Court in this context are only available in French. *See also* Victims’ Rights Working Group, *ICC Victim’s Rights Legal Update*, 2 February 2007, at 1, available at <http://www.vrwg.org/Publications/01/2007%20Feb%20Legal%20Update.pdf> (“On 22 November, the Court rejected Maitre Shalluf’s [*ad hoc* Defence Counsel] request that it declare itself incompetent in the Darfur Situation indicating that that none of the articles stated by the defence counsel allowed him to contest the admissibility of the case or the competency of Court, especially considering the fact that no indictment had been made yet. Maitre Shalluf sought to appeal this decision on 27 November but leave for appeal was denied on 12 December on the ground that the Defence Counsel’s request had no legal basis.”).

investigation stage of proceedings is beyond the scope of this report, it must nevertheless be noted that barring *ad hoc* counsel from making such fundamental challenges at this stage could affect the rights of future accused, and therefore raises questions about the Court's ability to protect those rights, as required not only under Article 68(3), but also under the Rome Statute generally.<sup>239</sup>

### 3. Recommendations to Better Achieve Restorative Goals While Ensuring Efficiency & Fairness of Proceedings

Given the potential concerns raised by the extension of Article 68(3) to the investigation stage of a situation, particularly in light of the restorative purpose behind the victim participation scheme and considerations of efficiency and fairness, a review of PTC I's January 2006 decision may be in order. As explained above, application of Article 68(3) to the investigation stage of a situation is not expressly mandated by the Rome Statute or Rules. While an argument may certainly be made in favor of such application – as seen in PTC I's January 2006 decision – the above analysis suggests that this holding may be at odds with the broader goals and concerns underlying the victim participation scheme.

Importantly, victims are not likely to lose any meaningful participation rights if the Court does not apply Article 68(3) to the investigation phase, as victims could still benefit from the majority of access and notice rights at the situation stage described by PTC II in its August 2007 decision.<sup>240</sup> At the same time, the Court may be able to *increase* the number of victims able to take advantage of such rights by focusing its resources on broadly disseminating information about the Court and potential opportunities available to victims to interact with it. For example, all victims who “communicate with the Court” are entitled to notice regarding the Prosecutor's decisions not to proceed with an investigation or a particular prosecution.<sup>241</sup> Communicating with the Court may require nothing more than expressing an intent to participate at some stage of the proceedings, as the Registrar is authorized to keep a database of individuals who have expressed such a desire.<sup>242</sup> Potential victim-participants will then be on record with the Court, and in the event the Pre-Trial Chamber calls a hearing under Articles 15(3) or 19(3), the Court need only assess whether those wishing to submit “observations” meet the definition of “victims” under Rule 85. Furthermore, encouraging victims to communicate with the

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<sup>239</sup> See, e.g., Rome Statute, *supra* n. 1, at Art. 67 (guaranteeing rights of the accused, including the right to a fair hearing conducted impartially, to be informed of the charges against him or her, to have adequate time and facilities to prepare a defence with counsel of the accused's choosing, and to be tried without “undue delay”).

<sup>240</sup> See *supra* n. 207 *et seq.* and accompanying text.

<sup>241</sup> See *supra* n. 93 and accompanying text (citing ICC Rule 92(2)).

<sup>242</sup> ICC Rules, *supra* n. 6, at R. 16(3) (“For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.”). Note that, although Rule 16(3) refers to victims who have expressed an intention to participate “in a specific case,” the Rules were adopted well-before PTC I's January 2006 decision distinguishing between “situation” and “case,” and therefore the use of the word “case” should not necessarily be interpreted as excluding victims who have expressed an intent to the Registrar to participate at an appropriate phase of an investigation, for example, under Article 15(3).

Court during the investigation phase will increase the pool of victims upon which the Pre-Trial Chamber may draw if it chooses to seek the views of victims pursuant to Rule 93.<sup>243</sup> Finally, victims will of course retain the ability to apply under Article 68(3) for any relevant cases that arise out of a situation.<sup>244</sup>

While not taking away any meaningful rights for victims, there are several advantages to de-linking Article 68(3) from participation at the investigation phase of a situation. First, victims would have a better understanding of their rights during an investigation, as well as the potential to increase those rights over time as additional suspects are arrested in a given situation, thereby decreasing the risk of frustration inherent in the Court's current approach to victim participation at the situation stage. In addition, making clear that victims need only "communicate with the Court" to enjoy many of the same rights they are likely to enjoy if determined to have participation rights under Article 68(3) will have the benefit of significantly easing the burden of the current victim participation scheme on the Chambers and the parties. Although the Court would likely need to evaluate the "victim" status of those who "communicate with the Court" under Rule 85 prior to receiving observations from those individuals under Articles 15(3) or 19(3), or communicating with any of them pursuant to Rule 93, such an evaluation would only need to occur if and when one of these circumstances were to arise. Moreover, the nature of the evaluation itself would be easier for both the Court and victims to understand, as individuals would only need to show that they meet the definition of victim under Rule 85, and thus the Court could abandon the seemingly meaningless and opaque application of the "personal interests" requirement to victims at the investigation phase of proceedings. Finally, defining the participation rights of victims at the investigation stage under Articles 15(3) and 19(3), as well as the various rules ensuring notice to victims concerning a range of issues, is more likely to safeguard the fairness and integrity of the overall proceedings.

### C. DETERMINING VICTIMS' RIGHT TO PARTICIPATE UNDER ARTICLE 68(3)

As explained above, the drafters of the Rome Statute and Rules declined to place express restrictions on the category of persons potentially able to qualify as "victims" for purposes of participation in proceedings before the ICC.<sup>245</sup> Nevertheless, as suggested by the small numbers of victims that have qualified to participate before the Court at any stage,<sup>246</sup> the early decisions of the PTC I and PTC II have set forth a complicated and

<sup>243</sup> See *supra* n. 99 and accompanying text (discussing Rule 93 of the ICC Rules of Procedure and Evidence, which permits the Court to seek the views of any victim on a particular subject, whether or not the victim has been granted formal status as a participant in proceedings before the Court).

<sup>244</sup> Notably, one recent report has suggested that victims are primarily interested in participating at the *case* phase of proceedings, rather than the situation. See, Victims' Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf> ("Now there are some decisions which outline the difference between participation in the situation and participation in a case... Victims want to participate in cases.").

<sup>245</sup> See *supra* n. 80 *et seq.* and accompanying text.

<sup>246</sup> See *supra* n. 176 and accompanying text (discussing the six victims granted participant status in the DRC situation), n. 185 and accompanying text (discussing the four victims granted participant status in the

time-consuming process for applying to participate under Article 68(3).

Both PTC I and PTC II have held that, in order to participate under Article 68(3), applicants must first qualify as “victims” under Rule 85(a),<sup>247</sup> and that Rule 85(a), in turn, has four sub-requirements. Those requirements are: (1) that victims be “natural persons”; (2) that they have suffered “harm”; (3) that the crime(s) alleged fall within the ICC’s jurisdiction; and (4) that a causal nexus exist between the crime and the harm suffered.<sup>248</sup> Yet, although the Pre-Trial Chambers agree on the test that should be applied under Rule 85(a), it remains far from clear what information or evidentiary proof victims must supply to meet each of these sub-requirements.<sup>249</sup> This is true even with respect to the seemingly uncontroversial requirement that victims be “natural persons.”<sup>250</sup> In January 2006, PTC I held that a “natural person” is “any person who is not a legal person,”<sup>251</sup> and therefore that victims will satisfy the “natural persons” requirement simply by virtue of being “human beings.”<sup>252</sup> Over a year and a half later, however, PTC II held that the term “natural persons” requires that the “*identity of the applicant*” be “duly established.”<sup>253</sup> Moreover, such identity may only be established, according to PTC II’s August 2007 decision, by a document “(i) issued by a recognized public authority; (ii) stating the name and the date of birth of the holder; and (iii) showing a photograph of the holder.”<sup>254</sup> The Chamber’s identity requirements, unsurprisingly, meant that only 7 of the 49 applicants

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*Lubanga* case), and n. 191-93 and accompanying text (discussing the seven victims granted participant status in the Uganda situation and/or the case against *Kony, et al.*).

<sup>247</sup> Based on information available through the ICC’s website, the Court has yet to receive any applications from victims under Rule 85(b).

<sup>248</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 79; *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 12.

<sup>249</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 81. For example, PTC I has declined to rule on what constitutes “harm” under Rule 85, holding that “the Chamber must interpret the term on a case-by-case basis.” *Id.* at ¶ 94 (denying 49 applications because the victims lacked “sufficient evidence to show that there are reasonable grounds to believe that the harm suffered is directly linked to the crimes set forth in the warrant of arrest against [Lubanga].”). *See also* Int’l Bar Ass’n, *Monitoring Report: International Criminal Court*, An International Bar Association Human Rights Institute Report, September 2006, at 13 (“[T]he precise legal interpretation of the extent of the causal link between the injury sustained and the crime or crimes charged remains to be developed.”). Similarly, PTC I has given no indication as to what is needed to establish a “causal nexus” under Rule 85, even though the Chamber has denied the applications of over 50 victims seeking to participate in the *Lubanga* case on the grounds that the victims failed to meet that requirement. *See Prosecutor v. Lubanga*, PTC I, 20 October 2006, *supra* n. 185. PTC II, meanwhile, has expressly recognized that “there is no reference to causality as such in Rule 85 of the Rules, which simply refers to the harm having been suffered ‘as a result of’ the alleged crime,” yet it continues to apply the requirement. *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 14.

<sup>250</sup> ICC Rules, *supra* n. 6, at R. 85(a).

<sup>251</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 80 (“The ordinary meaning of the term ‘natural person,’ as it appears in rule 85(a), is... in English, ‘a human being.’ A natural person is thus any person who is not a legal person.”).

<sup>252</sup> *Id.* at ¶ 80.

<sup>253</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 12 (emphasis added).

<sup>254</sup> *Id.* at ¶ 16.



received *any* evaluation beyond their proof of identity, and that the remaining applications were postponed pending adequate proof that those persons were “natural persons.”<sup>255</sup> Finally, one week after PTC II set forth its strict identity requirements, PTC I issued a decision in the DRC situation regarding what is required for a victim’s application to be considered “complete” and held that a wide range of documents may be considered adequate proof of identification.<sup>256</sup>

Notably, PTC II recognized in its August 2007 decision that “in a country such as Uganda, where many areas have been (and to some extent, still are) ravaged by an ongoing conflict and communication and traveling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties.”<sup>257</sup> Nevertheless, the Chamber reasoned that, “given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted.”<sup>258</sup> In so holding, PTC II appears to have overlooked the fact that both the text and the drafting history of Article 68(3) give the Court discretion to address fairness concerns by controlling the *timing and modality* of victim participation,<sup>259</sup> while neither the Statute nor the drafting history suggest that fairness concerns should be addressed by placing restrictions on applicants’ *ability* to qualify as victims.<sup>260</sup> Indeed, Pre-Trial Chamber II recognized this very fact elsewhere in its 10 August decision, noting that “*whilst victims’ right to intervene cannot be denied*, the judges’ control over the determination of the appropriate procedural phase in which their intervention will take place will ensure that victims make proper use of such right.”<sup>261</sup>

Adding to the confusion surrounding the interpretation of Rule 85(a) is the fact that PTC I has applied different standards of review at different stages of proceedings, saying that the Court must have “grounds to believe” an applicant is a “victim” at the situation stage,<sup>262</sup> but requiring “reasonable grounds to believe” that Rule 85(a) is met at the case

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<sup>255</sup> *See generally id.*

<sup>256</sup> *See Situation in Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation, ICC-01/04-374, at ¶¶ 13-15 (Pre-Trial Chamber I, 17 August 2007).

<sup>257</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 16.

<sup>258</sup> *Id.*

<sup>259</sup> *See Rome Statute*, *supra* n. 1, at Art. 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.*”) (emphasis added).

<sup>260</sup> *See supra* n. 132 *et seq.* and accompanying text (discussing various rules expressly limiting the timing and/or modality of victims’ participation).

<sup>261</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 8 (emphasis added).

<sup>262</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 99.

stage.<sup>263</sup> Yet, the Chamber has not clarified the substantive difference between the two standards. As the International Bar Association has observed, it “remains difficult to predict which types of factual scenarios will satisfy the higher standard required for victim participation in cases.”<sup>264</sup> Meanwhile, PTC II has suggested that a third standard of review – different from either of the two used by PTC I – will be used at both the situation and the case stage of proceedings, saying only that “all the factors identified as relevant for the definition of victim provided by Rule 85 of the Rules are to be proved to a level which might be considered satisfactory for the limited purposes of that rule.”<sup>265</sup>

Confusion has also arisen in relation to the meaning of “personal interests” under Article 68(3). As explained above, the phrase “where their personal interests are affected” was taken directly from Paragraph 6(b) of the UN Victims Declaration,<sup>266</sup> and does not appear to have been the subject of any significant discussion amongst the drafters either before or after its incorporation into the Rome Statute.<sup>267</sup> Yet, like the term “natural persons,” the phrase “personal interests” has taken on unanticipated significance for victims’ prospects of participating before the ICC. Indeed, although Judge Politi has stated that “the ‘*personal interests*’ of the applicant victims” constitute the “paramount criterion” for participation,<sup>268</sup> neither he nor any other Chamber of the Court has explicitly defined or explained what “personal interests” requires under Article 68(3). Pre-Trial Chamber I, for example, has stated only that “personal interests” are generally affected at the situation stage,<sup>269</sup> and has not conducted any meaningful analysis of the term at the case stage. Rather, in its July 2006 decision evaluating three applications to participate in the *Lubanga* case, PTC I merely noted in passing that two of the three victims had established that their “personal interests are directly linked to the proceedings against Thomas Lubanga Dyilo” before ultimately holding that all three applicants were entitled to participate in the case.<sup>270</sup>

PTC II, meanwhile, has suggested that “personal interests” at the case stage requires as little analysis as it does at the situation stage, stating that the requirement is met whenever a victim “applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear for one or more individuals,” assuming the requirements of Rule 85, including the causal nexus requirement, are met.<sup>271</sup> Thus:

Subject to the need for the [C]hamber to determine whether the constituent

<sup>263</sup> See *Prosecutor v. Lubanga*, PTC I, 28 July 2006, *supra* n. 185, at 9-13.

<sup>264</sup> IBA Monitoring Report, *supra* n. 249, at 14.

<sup>265</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 15.

<sup>266</sup> UN Victims Declaration, *supra* n. 3, at ¶ 6(b).

<sup>267</sup> See *supra* n. 66 *et seq.* and accompanying text.

<sup>268</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 9 (emphasis in original).

<sup>269</sup> See *supra* n. 223 *et seq.* and accompanying text.

<sup>270</sup> *Prosecutor v. Lubanga*, PTC I, 28 July 2006, *supra* n. 185, at 9-13.

<sup>271</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 9.

elements of the definition of victim under Rule 85 of the Rules are present, the fact that such a victim's personal interests are "affected" by criminal proceedings relating to the event or events in question seems incontrovertible. Indeed, commentators regard the fact "*that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct*" as a self-evident assumption; accordingly, they consider that reference to "*personal interests*" as a condition for being allowed to present views in Court under these circumstances does nothing but mirror such assumption.<sup>272</sup>

In sum, although the Court has suggested that "personal interests" is an independent – indeed "paramount" – criterion to be satisfied by applicants under Article 68(3), the Court has yet to elaborate on what "personal interests" requires. Thus, as two attorneys representing victim-applicants in the situation in Darfur recently remarked, it is still "not clear what constitutes 'personal interest' under Article 68(3)" of the Statute.<sup>273</sup> It also seems reasonable to assume that those victims not able to secure legal representation to assist them with their applications under Article 68(3) will have a difficult time ascertaining what exactly the Court wants to know.

Finally, both Pre-Trial Chambers and the Appeals Chamber have held that applicants' personal interests in participation must not only be established during the initial determination of whether the applicant should be granted "victim" status, but must also be *re-evaluated* at each point in the proceedings at which a victim wishes to actually exercise his or her participation rights. Thus, for example, despite holding in its January 2006 decision that the "personal interests" of victims are affected "in general" at the investigation phase of a situation,<sup>274</sup> PTC I concluded in the same decision that, with "regard to specific proceedings relating to the investigation of the DRC situation," the Chamber would evaluate "whether persons *having the status of victims* may participate" by looking to "the impact that such specific proceedings could have on their personal interests."<sup>275</sup> In other words, the six victims initially granted status to participate in the DRC situation cannot, according to PTC I, present their "views and concerns" under Article 68(3), even during the investigation of that situation, without first proving to the Chamber that their "personal interests" are affected by the specific proceedings being considered by the Court at that time. Similarly, PTC II has held that, even if victims are determined to have participant-status under Article 68(3) for purposes of the situation, "[i]n order to allow participation, the Chamber will have to assess... whether the *personal interests of the victims are actually affected* in relation to the proceeding

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<sup>272</sup> *Id.* (emphasis in original).

<sup>273</sup> Victims' Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf>.

<sup>274</sup> See *supra* n. 223 *et seq.* and accompanying text.

<sup>275</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 73 (emphasis added).

concerned.”<sup>276</sup>

The same approach has been adopted with respect to evaluating each victim’s ability to exercise his or her rights under Article 68(3) at the case stage.<sup>277</sup> For example, in a February 2007 decision, the majority of the ICC Appeals Chamber applied the “personal interests” criterion to determine that victims who had already been granted the right to participate in specific proceedings at the Pre-Trial level had no automatic right to participate in an interlocutory appeal arising out of those proceedings, but rather had to re-establish that their personal interests were affected by the appellate proceedings, as well.<sup>278</sup> Specifically, the Appeals Chamber held that, in order to participate in an interlocutory appeal, victims who have already been granted the right to participate in a case must nevertheless seek leave of the Appeals Chamber *via* an application that includes “a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal.”<sup>279</sup>

Importantly, the application of the “personal interests” criterion to determine the timing and/or manner of victim participation is in no way mandated by the Rome Statute or the ICC Rules. Moreover, it has not proved to be helpful in practice, as the meaning of “personal interests” at progressive stages of proceedings is no clearer than the meaning of “personal interests” at the initial application stage. Indeed, as Appeals Chamber Judge Sang-Hyun Song argued in an opinion dissenting from the February 2007 decision mentioned above, if victims are able to establish their “personal interests” in a given situation or case at the application stage, it would be reasonable to assume that their “personal interests” are affected in all proceedings arising from that situation or case.<sup>280</sup> For example, Judge Song pointed out that, with respect to victims’ right to participate in interlocutory appeal proceedings, the “personal interests of the victims are *necessarily* affected if they have participated in the proceedings before the Pre-Trial Chamber” in relation to the issue being appealed.<sup>281</sup>

While it is unclear why the judges of the ICC have chosen to use “personal interests” in this manner, one explanation may be that they are struggling to give meaning to the term, which might otherwise appear redundant with the “causal nexus” requirement under Rule

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<sup>276</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 103 (emphasis added).

<sup>277</sup> See *supra* n. 93 (discussing difference between a “situation” and a “case”).

<sup>278</sup> *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo,” No. 01/04-01/06, at ¶ 44 (Appeals Chamber, 13 February 2007) [hereinafter “*Prosecutor v. Lubanga*, Appeals Chamber, 13 February 2007”].

<sup>279</sup> *Id.*

<sup>280</sup> *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, 01/04-01/06 (Judge Song, 13 February 2007) [hereinafter “*Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, 13 February 2007”].

<sup>281</sup> *Id.* at ¶ 8 (emphasis added).

85(a).<sup>282</sup> This would be understandable, as general rules of treaty interpretation require that, to the extent possible, all terms of a treaty be given independent meaning and effect.<sup>283</sup> However, in practice, the Chambers' attempt to give independent meaning to "personal interests" – which was imported into Article 68(3) as part of a paragraph lifted practically wholesale from the UN Victims Declaration, apparently without any discussion<sup>284</sup> – has been problematic, as the Chambers have been unable to apply the term meaningfully and consistently.

Furthermore, as discussed in detail below,<sup>285</sup> applying "personal interests" as a means of determining the timing and manner of victim participation also renders the term redundant, as Article 68(3) already requires that the Court regulate such participation by ensuring that it occurs at "stages of 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."<sup>286</sup> Thus, there appears to be little reason for the Court to re-examine at every stage of the proceedings the "personal interests" of victims that have already been deemed to have participant-status under Article 68(3) in order to determine the appropriate timing and manner of their participation.

## 1. Current Process is at Odds with Restorative Justice Goals of Victim Participation Scheme

### *a) Lack of Clarity*

The complexity and consequent confusion engendered by the Court's early jurisprudence on victim participation run contrary to the restorative purpose of the victim participation scheme in several ways. First, the lack of clarity is likely to render the very *process of applying* to participate before the ICC frustrating, as victims may not understand what information they are required to provide to the Court. This is significant because the submission of an application is, practically speaking, the first opportunity victims have to access the ICC. If victims feel constrained by the need to fulfill a detailed set of strict, yet unclear, requirements, their first experience communicating with the Court is unlikely to be a positive one.<sup>287</sup>

<sup>282</sup> As discussed above, both PTC I and PTC II have held that, to qualify as a "victim" under Rule 85(a), an applicant must establish a "causal nexus" between the crime and the harm suffered. *See supra* n. 248 and accompanying text.

<sup>283</sup> *See, e.g.,* International Court of Justice, *The Corfu Channel Case (Merits)*, 1949 I.C.J. 4, \* 23-24 (holding that, as a general rule of treaty interpretation, a term should not be read in a manner that would render it devoid of independent effect and meaning).

<sup>284</sup> *See supra* n. 65 *et seq.* and accompanying text.

<sup>285</sup> *See infra* n. 317 *et seq.* and accompanying text.

<sup>286</sup> Rome Statute, *supra* n. 1, at Art. 68(3).

<sup>287</sup> Notably, the 17-page standard application form has apparently proved daunting even to some of the lawyers seeking to assist victims with the application process. *See, e.g.,* Victims' Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf> (in which two

Moreover, the onerous application process and lack of clarity surrounding the victim participation scheme are likely to discourage victims from applying to the Court. As the Victims' Rights Working Group observed in 2003: "a very detailed [application] form would discourage victims from using it, and would also increase the likelihood of mistakes and other inaccuracies."<sup>288</sup> Indeed, the confusion surrounding the application and review process may be one reason that the ICC has seen a far smaller-than-anticipated number of applicants overall.<sup>289</sup> Relatedly, the failure to produce clear guidelines as to what is required from victims discourages outreach by the Court and the non-profit organizations upon which the ICC relies to inform victims of the participation scheme.<sup>290</sup> As recognized by Fiona McKay, Head of the Victims Participation and Reparation Section of the ICC, without guidance from the Court, it is "difficult to answer questions we are frequently asked, such as which victims might be accepted to participate at different phases of ICC proceedings."<sup>291</sup> Similarly, Human Rights Watch has observed:

There are numerous challenges to ensuring that affected communities have an adequate understanding of [victims'] rights, challenges that are magnified by the absence of precedents to rely on and learn from. Experience has shown that the workings of a complex criminal proceeding, particularly at an international justice mechanism, may be confusing or even daunting to many victims. Lack of information may discourage them from applying to participate or to receive reparations, or from actively participating. For example, we understand from partners in the [DRC] that many victims and organizations working with victims are

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lawyers representing Sudanese victims describe the process of applying to the Court as challenging, noting the difficulty in translating a complex form into the native languages of victims and the need for supporting documentation).

<sup>288</sup> Victims' Rights Working Group, *Victim Participation at the International Criminal Court*, *supra* n. 21, at 8.

<sup>289</sup> Indeed, contrary to the warning made by the Office of the Prosecutor that PTC I's January 2006 decision allowing participation at the investigation stage "could result in tens of thousands, or hundreds of thousands of individuals, having the right to participate," just over 150 victims have applied to participate in the DRC situation. *See Situation in DRC*, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 5 (OTP, 23 January 2006).

<sup>290</sup> *See* Carla Ferstman, *NGOs and the Role of Victims*, Speech delivered at an International Seminar Organised by the Forum for International Criminal Justice and Conflict at the Initiative of the Norwegian Helsinki Committee and PRIO, 2 October 2006, at 7 ("The main NGOs working closely with the Court work with partners based in situation countries. Often, the partners are human rights monitoring NGOs – not always working at the most grassroots level and not usually in the habit of representing victims before courts. At the local level, NGOs also play an important role as intermediaries for the Court in engaging with victims. The Court should do more to support the work of intermediaries and to recognize the needs of such partners to protection.").

<sup>291</sup> Victims' Rights Working Group, *Interview with Fiona Mc Kay, Head of the Victims Participation and Reparation Section of the International Criminal Court*, VRWG Bulletin, Issue 5, February 2006, at 4, available at <http://www.vrwg.org/Publications/04/ENG05.pdf>. Although Ms. McKay was speaking at a time when only one decision on victims' participation had come out, the point remains valid if the increasing number of decisions do not help provide guidance to the Registrar and others hoping to encourage greater victim participation before the Court.

awaiting more information on reparations before deciding whether to apply to participate or apply to receive reparations.<sup>292</sup>

As the director of REDRESS remarked in October 2006, while non-governmental organizations have been successful in assisting with the “first ‘token’ participation of victims,” they and the Court have been “less effective at ensuring the involvement of mass numbers of victims.”<sup>293</sup> If this remains the case, the potentially restorative effects of participation are likely to reach only a fraction of victims who might otherwise have come before the Court.

Finally, the confusion and complexity of the application process detracts from the restorative purpose behind the victim participation scheme because less applicants are likely to be successful, which undermines the restorative goal of permitting as many victims as possible to be recognized by, and have access to, the Court.<sup>294</sup> PTC II’s interpretation of “natural persons” as imposing a strict identity requirement – which had not been previously communicated to victims – evidences how deep of an impact the confusion can have on victim applicants: only 7 of 49 applicants reviewed by the Chamber were able to meet the requirement.<sup>295</sup> Notably, two lawyers representing a number of victims with applications pending before PTC I in the Darfur situation recently remarked that, in their opinion, the Court has erected “serious barriers” to victims’ ability to participate because the “Court is generally fearful of large numbers of victims.”<sup>296</sup>

#### b) *Inconsistent Treatment*

The lack of concrete standards guiding the determination of “victim” status or the factors governing the timing and scope of participation also increases the risk that similarly-situated victims will be treated differently, which in turn decreases the potential healing benefits and sense of empowerment believed by victims’ advocates to accompany participation.<sup>297</sup> As one commentator has pointed out, uncertainty in the provisions governing the participation scheme “endangers the consistency that formalized participation should achieve.”<sup>298</sup> Indeed, inconsistent treatment has already been seen in the application of different standards by PTC I and PTC II regarding the requirements of

<sup>292</sup> Human Rights Watch, *The Strategic Plan Of The International Criminal Court*, A Human Rights Watch Memorandum, July 2006, at 6, available at <http://hrw.org/backgrounder/ij/memo0706/index.htm>.

<sup>293</sup> Ferstman, *NGOs and the Role of Victims*, *supra* n. 290, at 7.

<sup>294</sup> See Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 457 (noting that permitting the participation of victims was considered by the Rome Statute drafters “to be an essential tool for bringing the Court and its proceedings closer to the persons who have suffered atrocities,” a goal more likely to be accomplished if large numbers of those wishing to participate as victims are able to do so).

<sup>295</sup> See *supra* n. 253 *et seq.* and accompanying text.

<sup>296</sup> Victims’ Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf>.

<sup>297</sup> See *supra* n. 17 *et seq.* and accompanying text.

<sup>298</sup> Haslam, *Victim Participation at the International Criminal Court*, *supra* n. 13, at 323.

the “natural persons” language of Rule 85(a).<sup>299</sup> Moreover, the likelihood of inconsistent treatment among similarly-situated victims increases under the holding by Judge Politi of PTC II that victims are not entitled to legal representation at the application stage.<sup>300</sup>

c) *Ignoring Victims’ Express Interests*

A final concern in relation to the Court’s process of determining whether victims are qualified to participate in proceedings relates to the Chamber’s treatment of victims themselves. As discussed above, the 1985 UN Victims Declaration makes clear that respectful treatment of victims is a key aspect of ensuring victims’ interests are represented in the criminal justice process.<sup>301</sup> Furthermore, the ICC victim participation scheme itself serves a restorative purpose by recognizing victims’ right to participate *qua* victims, as opposed to as witnesses, which is important in that it provides victims an independent voice to tell their own stories of their own volition.<sup>302</sup> Nevertheless, PTC I has on two occasions ignored the express wishes of victims and made decisions contrary to their interests without any apparent justification.

First, following the issuance of a warrant of arrest against Thomas Lubanga Dyilo in February 2006, PTC I announced that it would automatically review the initial applications for participation submitted by the six victims – known as VPRS 1 through VPRS 6 – who had been granted participation rights in the DRC situation in January 2006. Notably, however, the six victims’ legal representative filed a submission to the Chamber requesting that, given the non-definitive and non-exhaustive character of the charges against Lubanga at that time, the Court defer the examination of the status of VPRS 1 – VPRS 6 until after the charges against the accused had been confirmed.<sup>303</sup> In other words, the victims expressly informed the Court that they did not wish to be considered for participation in the case against Lubanga under the current set of charges alleged against the suspect. Nevertheless, PTC I, without explanation, rejected the victims’ request, and then went on to hold that the six victims had not established a sufficient “causal nexus” between the harm suffered and the crimes contained in the arrest warrant issued against Lubanga.<sup>304</sup>

The second occasion upon which Pre-Trial Chamber I appears to have disregarded the express wishes of victims is found in the Chamber’s October 2006 decision regarding the applications of some 65 individuals seeking to participate in the *Lubanga* case.<sup>305</sup> After having received submissions on the victims’ applications from the Prosecution and Defence, PTC I determined that, of the 65 applicants, a total of seven had “provided

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<sup>299</sup> See *supra* n. 248 *et seq.* and accompanying text.

<sup>300</sup> *Prosecutor v. Kony*, PTC II, 1 February 2007, *supra* n. 190, at ¶ 11.

<sup>301</sup> See *supra* n. 25 *et seq.* and accompanying text.

<sup>302</sup> See generally *supra* n. 46 *et seq.* and accompanying text.

<sup>303</sup> *Prosecutor v. Lubanga*, PTC I, 29 June 2006, *supra* n. 186, at 4-5.

<sup>304</sup> *Id.* at 7-9.

<sup>305</sup> See generally *Prosecutor v. Lubanga*, PTC I, 20 October 2006, *supra* n. 185.



sufficient evidence to satisfy the Chamber that there are reasonable grounds to believe that [they have] suffered harm as a result of the crimes set forth in the warrant of arrest issued against Thomas Lubanga Dyilo.”<sup>306</sup> Nevertheless, citing “the recent deterioration in security in some regions of the DRC” and the Chamber’s own “opinion that the effective exercise of procedural rights arising from the granting of the status of victims with standing to participate... would have the effect of significantly increasing the risks to which the applicants are exposed,” PTC I determined that it would be “inappropriate” to award six of the seven qualified applicants the right to participate “at this particular stage in the proceedings.”<sup>307</sup> Notably, the Chamber recognized that the six victims it barred from participation rights had already been granted protective measures under Article 68(1), which is a separate and distinct provision from Article 68(3).<sup>308</sup> Thus, it is unclear why PTC I did not grant the victims’ applications in line with the Court’s duty under Article 68(3) – which provides the Court *shall* permit victims to participate where their personal interests are affected<sup>309</sup> – and allow the victims, perhaps in consultation with their legal representatives and/or the ICC Victims and Witnesses Unit, to determine for themselves whether they wished to forgo participation in light of the increased security risks.

## 2. Current Process Threatens to Undermine Efficiency & Fairness of Proceedings

### *a) Process of Evaluation is Time-Consuming & Resource-Intensive*

In addition to the seemingly negative effects on the restorative goals underlying the ICC victim participation scheme, the Court’s current approach to determining applicants’ right to participate constitutes a serious threat to the efficiency of proceedings, as evidenced by the fact that the majority of applicants have been waiting from several months to more than a year for a decision on their initial applications to the Court.<sup>310</sup> This result is not only harmful to victims, many of whom are left without any recognition by the Court or the ability to receive information regarding the ICC’s operations, but also calls into question the Court’s ability to guarantee the speedy trial rights of current and future

<sup>306</sup> *Id.* at 10, 12. Notably, PTC I makes no mention of the “personal interests” of either the six victims considered to have qualified for participation under Article 68(3), nor those rejected by the Court for participation in the *Lubanga* case. *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* See also Rome Statute, *supra* n. 1, at Art. 68(1).

<sup>309</sup> See Rome Statute, *supra* n. 1, at Art. 68(3).

<sup>310</sup> See Victims’ Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7, available at <http://www.vrwg.org/Publications/04/ENG09.pdf> (in which lawyers representing victims in the Sudan case explain that several have been waiting for more than one year to receive a decision on their application to participate at the investigation stage of a situation); *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 2 (noting that a number of victims’ applications were filed in June 2006); *Prosecutor v. Lubanga*, PTC I, 20 October 2006, *supra* n. 185, at 12-14 (in which PTC I indefinitely postponed review of any additional victims’ applications due to the imminent confirmation hearing for Lubanga).

accused in custody.<sup>311</sup>

Moreover, the detailed, individualized procedure developed by the Court to review victims is a drain on the resources of the Prosecutor and Defence, which have been submitting observations on each victims' application received by the Court to date.<sup>312</sup> Indeed, in the DRC proceedings alone, there have been nearly 60 submissions by the Prosecutor's Office, Defence Counsel, and Victims' Representatives on victim participation issues, and approximately 30 decisions by Pre-Trial Chamber I and the Appeals Chamber. The arrest warrants issued for Joseph Kony and other named suspects in Uganda raise similar concerns, as the Prosecution and Defence have made multiple submissions individually assessing whether the nearly 50 victims who have applied thus far to participate in the case meet the criteria for participation. Unsurprisingly, a September 2006 report on the status of the pre-trial proceedings in the *Lubanga* case stated that, after PTC I requested submissions from the Prosecution and Defence on applications filed by an additional 43 victims, the Defence expressed "concerns about its capacity to respond to these numerous victim applications with the confirmation hearing listed imminently."<sup>313</sup>

Significantly, this situation promises to worsen in the future, particularly because the Chambers have indicated that they will automatically re-evaluate every applicant's request for participation each time a new case emerges in a given situation, presumably re-applying the detailed, individualized procedure to each applicant with each review.<sup>314</sup> While it is reasonable to assume that the Court would be required to assess whether a "situation" victim has a particular connection with a new case or charge emerging out of that situation, a detailed, individualized evaluation of each victims' circumstances by the Court would likely be untenable, particularly if hundreds or thousands of victims apply. Rather, as discussed below, the efficient functioning of the ICC victim participation system will likely require some sort of *prima facie* review of applications to determine whether a particular victim is at least facially connected to any new case arising from the relevant situation.

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<sup>311</sup> See *supra* n. 101 and accompanying text.

<sup>312</sup> The potential drain on resources was recognized almost immediately after PTC I's January 2006 decision on victims' participation. See, e.g., De Hemptinne & Rindi, *supra* n. 137, at 348 ("The participation of victims might impinge on the efficiency and expeditiousness of the proceedings. Given the massive scale of alleged crimes committed in the DRC, which could result in a potentially large number of individuals claiming the right to participate, the Pre-Trial Chamber and the Prosecution might have to bear a heavy burden, for which they may not be equipped. For instance, while the Pre-Chamber might be required to deal with petitions coming from hundreds or thousands of victims of a situation, the Prosecutor might have to consider and respond to the views put forward by all the numerous victim participants.").

<sup>313</sup> IBA Monitoring Report, *supra* n. 249, at 8.

<sup>314</sup> See *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 67 ("[W]here any natural or legal person applying for the status of victim in respect of a situation also requests to be accorded the status of victim in any case ensuing from the investigation of such a situation, the Chamber automatically takes this second request into account as soon as such a case exists, so that it is unnecessary to file a second application.").

*b) Re-evaluation of “Personal Interests” at Each Stage of Proceedings within Each Situation or Case is Inefficient & Unnecessary*

As explained above, the individualized analysis of each person seeking to participate before the Court under Article 68(3) does not end when that person is granted “victim” status, as each victim must apparently re-establish his or her “personal interests” at each specific stage of proceedings within the situation or case in which he or she wishes to participate. As the backlog the Court is already facing indicates, this system promises to substantially hinder the efficiency of proceedings. Perhaps in recognition of this problem, the Regulations of the Court provide that “[a] decision taken under Rule 89 [regarding victim participation] shall apply throughout the proceedings.”<sup>315</sup> Indeed, the practice of re-evaluating victims’ personal interests at every stage of proceedings is arguably contrary to these Regulations. As Judge Song argued in dissenting from the Appeals Chamber’s February 2007 decision requiring victims wishing to participate in appellate proceedings to show how their personal interests were affected, such a requirement is “not warranted by the relevant provisions” of the Statute, Rules, and Regulations of the Court, and “leads to unnecessary procedural steps that are bound to slow down the appellate process.”<sup>316</sup>

Moreover, continually subjecting individuals already granted “victim” status to a re-evaluation of their “personal interests” within each case or situation is arguably unnecessary. As PTC II recognized in the context of reviewing victims’ applications to participate in the Uganda situation and related cases:

Article 68, paragraph 3, of the Statute vests the Court (*i.e.*, its Chambers) with broad discretion to determine *at what stage and in which manner* victims should be allowed to participate in the proceedings. Commentators have highlighted that whilst victims’ right to intervene cannot be denied, the judges’ control over the determination of the appropriate procedural phase in which their intervention will take place will ensure that victims make proper use of such right.<sup>317</sup>

As this passage suggests, while victims that meet the standard for participation under Article 68(3) cannot be deprived of that right, the Court may manage victims’ “use” of their participation status by limiting “at what stage and in what manner” victims may exercise their right to participate. Thus, in the words of Judge Song’s February 2007 dissent: “if the Appeals Chamber considers that in specific appeals, the participation of victims would be inappropriate, it could issue an order to that affect,”<sup>318</sup> without ever having to consider “personal interests.” Indeed, it could manage the “use” of victims’

<sup>315</sup> See ICC Regulations, *supra* n. 139, at Reg. 86(8) (providing that “[a] decision taken by a Chamber under [R]ule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber [to modify previous rulings under this article]”).

<sup>316</sup> *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, 13 February 2007, *supra* n. 280, at ¶ 2.

<sup>317</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 8 (emphasis added).

<sup>318</sup> *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, 13 February 2007, *supra* n. 280, at ¶ 6.

right to participate by limiting the timing and modality of victims' interventions in light of efficiency and fairness concerns underlying the victim participation scheme. The same rationale would seemingly apply in the Court's evaluation of any request from victims who have already been granted participation rights under Article 68(3) to participate in specific proceedings arising in the situation or case for which they have been granted those rights.

### 3. Recommendations to Better Achieve Restorative Goals While Ensuring Efficiency & Fairness of Proceedings

As already noted, the confusing, inconsistent, time consuming, and resource-intensive process developed by the Pre-Trial Chambers for evaluating victims' applications to participate before the ICC is in no way mandated by the Rome Statute or Rules.<sup>319</sup> Interestingly, many of the aspects of this process were put in place by Pre-Trial Chamber I in its January 2006 decision determining the status of just six applications for participation in the DRC situation.<sup>320</sup> These six applications were the *only* applications that had been submitted to the ICC at that time,<sup>321</sup> meaning it was reasonably within the capacity of the Court, as well as the Prosecution, *ad hoc* Defence Counsel, and the victims' representative to undertake a separate and detailed analysis of each application. Since January 2006, some 230 additional victims have applied to participate in the Court's proceedings.<sup>322</sup> While this number is slight in comparison to the projections of some,<sup>323</sup> the Court is already backlogged in its processing of victims' applications.<sup>324</sup>

Moreover, as PTC I has recognized, the purpose of reviewing victims' applications under Article 68(3) is *not* "to make a definitive determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case."<sup>325</sup> Thus, the detailed, individualized review process

<sup>319</sup> To the contrary, the drafters of the ICC Rules expressly rejected a necessarily restrictive definition of "victims" for purposes of participation, opting for a potentially broad and encompassing definition. *See supra* n. 82 and accompanying text. At the same time, there is no evidence that the "personal interests" criterion was intended as a substantial hurdle to victims' ability to participate before the ICC. *See supra* n. 66 and accompanying text.

<sup>320</sup> *See generally Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10.

<sup>321</sup> *See* International Federation for Human Rights, *Report of the FIDH Legal Action Group: Supporting the participation of victims from DRC before the International Criminal Court*, November 2006, at 17.

<sup>322</sup> *See supra* n. 176 *et seq.* and accompanying text (noting that, to date, only 17 victims have been granted participation rights of any kind; less than 70 victims have received some decision on their applications, and many of those continue to await further determination from the Court).

<sup>323</sup> *See, e.g., Situation in DRC*, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 5 (OTP, 23 January 2006) (warning that PTC I's January 2006 decision allowing participation at the investigation stage "could result in tens of thousands, or hundreds of thousands of individuals, having the right to participate."); Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1409 ("[T]here is every reason to believe that a large number of victims would like to be able to bring their case before the Court and present their views.").

<sup>324</sup> *See supra* n. 310 and accompanying text.

<sup>325</sup> *Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 82.

being implemented by the PTCs is difficult to justify in practice.<sup>326</sup>

Finally, refraining from an adjudication of harm during the evaluation of victims' applications to participate is important because, as a practical matter, victims' applications are being filed long before any evidence has been "properly presented and evaluated at trial."<sup>327</sup> According to one commentator, the difficulties in evaluating victims' applications prior to the introduction of evidence should be resolved by providing Pre-Trial Judges with investigative powers similar to those of an investigating judge in a civil law system, allowing the PTC judges to not only effectively evaluate the interests of applicant victims prior to the formal introduction of any evidence, but also to protect the rights of the accused.<sup>328</sup> However, there is no support for this recommendation in either the Rome Statute or the Rules, nor is there any evidence that the drafters intended the Pre-Trial Chamber to play such a role. As Judge Claude Jorda recognized prior to his appointment as a Pre-Trial Chamber Judge at the ICC, "judges of the Pre-Trial Chambers... are not in principle supposed, save in very exceptional cases, to involve themselves in the gathering of evidence."<sup>329</sup> Even the commentator cited above who recommended that the ICC provide investigative powers to Pre-Trial Chamber judges recognizes that, as drafted, the Rome Statute "does not provide, as do the Romano-Germanic systems, for the appointment of an investigating judge with the responsibility for collecting all items of evidence."<sup>330</sup> Indeed, the drafters of the Statute expressed hesitancy over the very creation of a Pre-Trial Chamber within the Court,

<sup>326</sup> The UN Victims Declaration makes clear that "victims" may be identified before any perpetrator is "identified, apprehended, prosecuted or convicted." See UN Victims Declaration, *supra* n. 3, at A.2. Notably, during the drafting of both the Rome Statute and the ICC Rules, some participants argued that all references to "victims" be changed to "alleged victims" in order to avoid violating the principle that the accused is presumed innocent until proven guilty. See John R. W.D. Jones, *Protection of Victims and Witnesses*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1357 (Cassese, *et al.* eds., 2002). Other commentators disagreed, saying that presuming the accused is innocent should not necessarily lead to the assumption that the victim was not victimized for two reasons: first, the fact that in most cases, the victimization may be medically or historically proven regardless of whether or not the perpetrator is caught, tried, or convicted; and second, the fact that in national systems, victims are entitled to certain rights or benefits, including reparation or civil compensation, regardless of whether or not the perpetrator has been caught, tried or convicted. See Donat-Cattin, *Article 68*, *supra* n. 14, at 876, n. 24.

<sup>327</sup> Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 13, at 461 (noting that "the assessment of the applicant's status as 'victim' may have to be of a summary and preliminary nature.").

<sup>328</sup> Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, J. Int'l Crim. Just. 402, 413, May 2007 ("[T]he ICC's RPE... allows judges to reject any application to participate or to question a witness that they deem unfounded. But it is hard to see how judges could properly exercise such control without having a comprehensive understanding of the case, and, in this, they would be greatly assisted if they were able to review an investigation case file compiled by a neutral third party, namely an independent judge. The need for judges to participate in investigations is even greater [at the investigation stage], before the prosecutor has issued an arrest warrant. Indeed, at this point the judges must determine whether individuals are truly victims of alleged crimes within the ICC's jurisdiction. How can they properly do so without undertaking investigations themselves?").

<sup>329</sup> Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 29, at 1412.

<sup>330</sup> *Id.*

ultimately agreeing it was necessary, but expressing concern that “undue judicial control over the investigation would interfere with the separation of the judicial and prosecutorial functions.”<sup>331</sup>

Solutions that are more consistent with the Rome Statute and its drafting history include simplifying the application process and making greater use of the role already assigned to the ICC Registrar to receive, review, group, and prepare reports on all victims’ applications to participate before the Court.<sup>332</sup> Adopting procedures in support of such changes, along with ensuring respect for victims’ agency, will enable the Court to better fulfill the restorative purpose underlying the victim participation scheme, while maintaining the efficiency and fairness of the proceedings.

a) *More Guidance, Streamlined Process*

The first way in which the ICC Registrar could be used to improve the Court’s process of evaluating victims’ applications would be for the judges of the Court to provide the Registrar additional guidance as to what is required under Rule 85(a) – for instance, whether “natural persons” requires that a person be a human being or have a government-issued photo-identification card – so that the Registrar may render *prima facie* recommendations regarding whether applicants qualify as “victims” under Rule 85.<sup>333</sup>

<sup>331</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March-April and August 1996*, U.N. GAOR 51st Sess., Supp. No. 22, Vol. 1, U.N. Doc. A/51/22, ¶ 288 (1996).

<sup>332</sup> See ICC Rules, *supra* n. 6, at R. 89(1); ICC Regulations, *supra* n. 139, at Reg. 86(4) – Reg. 86(6). The ICC Registry includes two sub-units dedicated to issues of victim participation: the Victims’ Participation and Reparation Section (VPRS) and the Office of Public Counsel for Victims (OPCV). VPRS is “a specialised section within the Registry with responsibility for assisting victims and groups of victims in fully exercising their rights under the Rome Statute and in obtaining legal assistance and representation, including, where appropriate, from the OPCV.” See ICC Website, Frequently Asked Questions, available at [http://www.icccpi.int/victimissues/victimscounsel/OPCV/OPCV\\_faqs.html](http://www.icccpi.int/victimissues/victimscounsel/OPCV/OPCV_faqs.html). It “can be seen as victims’ first point of contact with the Court, since the section is in charge of disseminating the application forms for participation and reparations and assisting victims fill them in, as well as providing them with all the information necessary for them to exercise their rights under the Rome Statute.” *Id.* OPCV, on the other hand, “shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate, legal research and advice.” ICC Regulations, *supra* n. 139, at Reg. 81(4). In addition, the OPCV has been directed by both PTC I and PTC II to assist unrepresented victims with the process of applying to participate before the Court, given that victims are not entitled to court-appointed representation at the application stage. See *Prosecutor v. Kony*, PTC II, 1 February 2007, *supra* n. 190, at ¶ 13; *Situation in Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, ICC-01/04-374, at 24 (Pre-Trial Chamber I, 17 August 2007).

<sup>333</sup> Importantly, the Court has already afforded the Registrar significant responsibility in relation to the victims’ participation scheme and in other contexts. As described above, the Registrar already conducts a detailed review of all victims’ applications and prepares a report thereon prior to transmitting the applications to the relevant Chamber. See *supra* n. 154 *et seq.* and accompanying text. Furthermore, PTC II has held that, where publicly-available reports from the UN or other non-governmental organizations are unavailable for purposes of corroborating the facts set forth in a victim’s application to participate at the situation stage, the Victims Participation and Reparations Section of the Registry shall prepare “an additional report containing any other elements that could corroborate the statement of the victim concerned.” See *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 106. Beyond the context

Relying on the Registrar's *prima facie* analysis of victims' applications not only makes sense as a matter of efficiency, but also from a practical perspective, as the Registrar – and not the Chambers – is the unit of the Court with which the vast majority of victims will have contact. Indeed, the Rules of Procedure and Evidence assign a variety of critical responsibilities relating to victim participation to the Registrar. As one author has summarized, the Registrar is responsible for:

- (1) providing notice or notification to victims or their legal representatives; (2) assisting the victims in obtaining legal advice and organizing their legal representation, and providing the victims' legal representatives with adequate support, assistance, and information; (3) assisting the victims in participating in the different phases of the proceedings; (4) taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings; (5) informing victims of their rights under the Statute and the Rules...; and (6) ensuring that victims are aware, in a timely manner, of the relevant decision of the court that may have an impact on their interests, subject to provisions on confidentiality.<sup>334</sup>

In addition, Rule 16 specifies that the Registrar may keep a special register for victims who have expressed their intention to participate in proceedings of the Court.<sup>335</sup>

Moreover, the Regulations of the Court task the Registrar with not only receiving victims' applications to participate, but also reviewing the content for completeness.<sup>336</sup> In this connection, the Registrar is entitled to "request further information from victims," as well as "seek additional information from States, the Prosecutor and intergovernmental or non-governmental organizations."<sup>337</sup> After conducting a review of each application, the Registrar is to "present all applications... to the Chamber together with a report thereon."<sup>338</sup> The Regulations do not specify the content or import of this report, but given the extent of the review already conducted by the Registrar, along with its broader mandate in relation to victim participation issues, it would be more than reasonable for the Court to rely on at least an initial recommendation by the Registrar as to applicants' status as "victims" under Rule 85 and broader qualifications to participate in particular proceedings before the ICC.<sup>339</sup> Of course, a Chamber could ultimately reject the

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of the victims' participation scheme, the Registry has been assigned other "unique functions as provider of full faith and credit of the proceedings before the Court and record keeper," including a role in the process of disclosure between the Prosecution and Defence. *See* Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06, ¶ 69 (Pre-Trial Chamber I, 15 May 2006).

<sup>334</sup> Heikkilä, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME, *supra* n. 16, at 152.

<sup>335</sup> ICC Rules, *supra* n. 6, at R. 16(3).

<sup>336</sup> ICC Regulations, *supra* n. 139, at Reg. 86(4).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at Reg. 86(6).

<sup>339</sup> Although one Trial Chamber recently issued a decision holding that the reports prepared by the

Registrar's initial findings in any given case.

Relying on an administrative evaluation of victims' applications to make a *prima facie* recommendation of their status is consistent with the practice of a number of other international tribunals and related fora. In fact, administrative procedures are widely-used for the purpose of identifying applicants as victims at a stage when judicial review of the merits of each case is not yet warranted.<sup>340</sup> For example, in the context of the United Nations Claims Commission, the body's Secretariat "assumed and exercised extensive claims review functions, particularly in individual claims functions," such that the "Secretariat became the ['workhorse'] of the Commission."<sup>341</sup> Similarly, the Iran-U.S. Claims Tribunal Registrar was afforded discretion to accept or deny the initial Statement of Claim by which an individual could start a case before the Tribunal.<sup>342</sup> As one commentator has noted, such procedures afford the relevant decision-making body "greater flexibility," meaning it is "therefore able to deal with more claims faster, which is an important consideration when individual claimants are involved."<sup>343</sup>

Nor are international claims tribunals the only fora where an essentially administrative procedure can identify an individual as a victim, at least in the early stages of the process. Under the Rules of Procedure and case law of the Inter-American Commission, identification of victims can occur as early as the initial processing of an application,

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Registrar should not "contain any comment or expression of views on the overall merits of the application to participate," the Chamber also stated that the decision was "not to prevent [the Registrar], for instance, from directing the attention of the Trial Chamber in a neutral way to particular issues or facts that it is [*sic*] considered are likely to be relevant to the Chamber's decision." See *Situation in the Democratic Republic of Congo, Prosecutor v. Thomas Lubanga Dyilo*, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06, ¶ 20 (Trial Chamber I, 9 November 2007). Moreover, this is the only decision thus far addressing the extent to which the Registrar should comment on victims' applications in its report to the Chamber, meaning another Trial Chamber may adopt a different approach that would allow the Registrar not only to draw the Chamber's attention to relevant issues and facts, but also to render an initial opinion on the applications. Such an approach would not change the fact that the Chamber is responsible for rendering the ultimate decision on any given application.

<sup>340</sup> Of course, the mechanisms referenced in this discussion may be distinguished in many significant ways from an international criminal tribunal, such as the ICC. Thus, we do not cite these examples as specific models the ICC should adopt, but rather to illustrate a number of creative procedures other international fora have developed to best accomplish their mandates where large numbers of victims or other claimants are involved. These various procedures may be used as guidance for the ICC judges, who have broad discretion in their implementation of the victims' participation scheme, in considering possible alternative processes by which the determination of victims' status could be accomplished.

<sup>341</sup> Veijo Heiskanen, *Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology*, in *REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES*, 33-34, n. 29 (Int'l Bur. Perm. Ct. Arb'n, eds., 2006).

<sup>342</sup> See, e.g., *In Re Refusal to file Claim of Hawaiian Agronomics Company*, Refusal Case No. 10, 1 Iran-U.S. C.T.R.134.

<sup>343</sup> See Vandana Patel, *A Comparative Analysis of Mass Claims Mechanisms*, Paper Presented at the Stocktaking Conference on Palestinian Refugee Research in Ottawa, Canada, at 5 (17-20 June 2003), available at [http://www.idrc.ca/uploads/user-S/10578565170Session\\_8\\_Vandana\\_Patel\\_new.doc](http://www.idrc.ca/uploads/user-S/10578565170Session_8_Vandana_Patel_new.doc).



which is conducted by the Executive Secretariat of the Commission.<sup>344</sup> Similar to the Registrar in the context of the ICC, the Executive Secretariat initially studies and processes the petition, considers whether a petition is complete and may request further information from the petitioner as necessary.<sup>345</sup> Where there is doubt as to whether a petition is complete, the Secretariat may consult with the Commission proper.<sup>346</sup> Another regional human rights court that makes use of initial screening procedures in the evaluation of victims is the European Court on Human Rights. In that system, the Registrar treats each application as “preliminary” or “provisional,” corresponding with the applicant about potential problems with his application, while leaving the final determination of admissibility to the Court.<sup>347</sup> The African Commission on Human and Peoples’ Rights also has an initial administrative handling of communications from individuals.<sup>348</sup>

Related to the administrative nature of international claims tribunals procedure is a relaxed standard of proof employed for some claims. While both the Iran-U.S. Claims Tribunal and the United Nations Compensation Commission (UNCC) maintained a traditional “preponderance of evidence” or “balance of probabilities” approach,<sup>349</sup> the

<sup>344</sup> Rules of Procedure of the Inter-American Commission of Human Rights, *approved* Dec. 2000, *as amended* Oct. 2006, available at <http://www.cidh.oas.org/Basicos/basic16.htm>, Art. 26 (setting role of Executive Secretariat), Art. 28 (listing what petitions should contain), Art. 30(1) (“The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.”). As with the international claims tribunals discussed immediately above, the practice of regional human rights bodies, which monitor compliance by States with human rights norms, is not directly applicable to international criminal courts, which seek to hold individuals criminally accountable for serious violations of human rights and international humanitarian law. We therefore reiterate that these examples are used merely to highlight some of the procedures adopted by other bodies dealing with cases involving large numbers of victims, in an effort to provide potential guidance to the ICC in the implementation of its victims’ participation scheme.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at Arts. 28(2) & 28(3).

<sup>347</sup> See European Court of Human Rights, Final Report of the Working Party on Working Methods of the European Court of Human Rights: Three Years’ Work for the Future, at ¶ 32 [reprinted in 24 Human Rights L.J. 220, 222 (2003)].

<sup>348</sup> See Rules of Procedure of the African Commission on Human and Peoples’ Rights, *adopted* on 6 October 1995, at R. 88(1), available at <http://www1.umn.edu/humanrts/instreet/africancomrules.html>. See also African [Banjul] Charter on Human and Peoples’ Rights, *adopted* on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986, at Art. 55. The Commission’s Rules of Procedure provide that “[t]he Secretary of the Commission shall prepare lists of communications submitted to the Commission... to which he/she shall attach a brief summary to their contents and regularly cause the lists to be distributed to members of the Commission.” Rules of Procedure of the African Commission on Human and Peoples’ Rights, *supra*, at R. 103(1). In addition, “the Secretary shall keep a permanent register of all these communications which shall be made public[.]” *Id.* The rules also provide that the Commission, through the Secretary, can ask complainants to clarify their communications, such as by providing more information about “the purpose of the communication” and “the facts of the claim.” *Id.* at R. 104.

<sup>349</sup> J. van Haersolte-van Hof: *Innovations to Speed Mass Claims: New Standards of Proof*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES, 13, 14 (Int’l Bur. Perm. Ct. Arb’n, eds., 2006); Rajesh Singh, *Raising the Stakes: Evidentiary Issues in Individual Claims Before the United Nations Compensation Commission*, in REDRESSING INJUSTICES THROUGH MASS

UNCC applied:

considerations... that alleviated many claimants' burdens in relation to the provision of evidence. This was achieved partly by creating a body that was more administrative than judicial in nature and which was not primarily concerned with legal formalities and rules... The UNCC chose a novel approach to the question of evidence, requiring "simple documentation" or a "reasonable minimum" from a claimant by way of proof. This did not change the evidentiary standard of "balance of probabilities" but rather assisted a claimant in getting to that standard.<sup>350</sup>

For instance, for the smaller property and injury claims, a "reasonable minimum" sometimes amounted to personal or witness statements asserting ownership and loss, together with presumptions based on reports by governments, organizations, and experts.<sup>351</sup>

The approaches described above, tailored to the particular needs of the ICC victim participation scheme, could improve upon the implementation of the scheme in several ways. First, if the judges of the Court were to provide better and more detailed guidance on what is required of victims and the standards by which applications will be evaluated, the Registrar would be better able to evaluate victims' applications, leaving for the Chamber's review only those applications that raised a significant unresolved issue. An additional benefit would be that the Registrar could then communicate these guidelines directly both to victims and to non-governmental organizations involved in assisting the Court's outreach to victims.

The communication of such guidelines would not only render the application process less frustrating for victims, but could also help ensure consistent treatment of similarly-situated victims. At the same time, victims would benefit from an expedited decision-making process, eliminating or significantly reducing the lengthy waiting periods victim-applicants currently face.<sup>352</sup> Furthermore, a better understanding of the Court's process of evaluating victims' applications, and a robust role for the Registrar in ensuring the completeness and accuracy of applications, would increase the efficiency of proceedings overall. Finally, increasing the efficiency of proceedings would also help ensure the overall fairness of proceedings. Indeed, increasing the efficiency with which the Court

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CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES, 61, 62 (Int'l Bur. Perm. Ct. Arb'n, eds., 2006).

<sup>350</sup> Singh, *Raising the Stakes*, *supra* n. 349, at 62.

<sup>351</sup> UNITED NATIONS COMP'N COMM'N RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING INDIVIDUAL CLAIMS FOR SERIOUS PERSONAL INJURY OR DEATH (CATEGORY "B" CLAIMS), 35 U.N. Doc. S/AC.26/1994/1, 35-38 (26 May 1994), *available at* <http://www2.unog.ch/uncc/reports/r94-01.pdf>; UNITED NATIONS COMP'N COMM'N GOVERNING COUNCIL, REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE FIRST INSTALLMENT OF INDIVIDUAL CLAIMS (CATEGORY "C" CLAIMS), 27-26 U.N. Doc. S/AC.26/1994/13, 25-29 (21 December 1993), *available at* <http://www2.unog.ch/uncc/reports/r94-03.pdf>.

<sup>352</sup> *See supra* n. 310 and accompanying text.

manages the victim participation scheme would significantly advance the Court's ability to ensure a speedy trial, as well as lessen the current burden on Defence Counsel of having to respond on an individual basis to each victim-applicant under opaque requirements and shifting standards.

*b) Making Early Use of Registrar's Authority to Group Victims*

Another procedural tool available to the Court that does not seem to have received sufficient consideration to date is the possibility of grouping similarly-situated victims for purposes of determining the right to participate in a case and the appropriate stages of that participation. While neither the Rome Statute nor the Rules expressly authorize the use of grouping methods at the participation stage, it is certainly within the Court's discretion to mandate such a process.<sup>353</sup> Indeed, the Court is authorized under the Rules of Procedure and Evidence to review victims' applications "in such a manner as to ensure the effectiveness of the proceedings and [to] issue one decision."<sup>354</sup> Further, collective treatment by victims is in fact supported by several of the ICC's provisions and rules. For example, Article 68(3) refers to "victims" in the plural, and that term is in turn defined in Rule 85(a) as "persons who have suffered harm," again using the plural.<sup>355</sup> Moreover, to assist the Pre-Trial Chamber in managing the victim participation scheme, the Regulations of the Court allow the Registrar to present all applications for participation together with one report.<sup>356</sup> They also allow the Registrar to present one application where there is a group of victims, "taking into consideration the distinct interests of the victims."<sup>357</sup>

Other Rules of Procedure are also supportive of the view that "persons" may sometimes include a group. For instance, "[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims... to choose a common legal representative or representatives."<sup>358</sup> Similarly, reparations may be provided to victims in either an

<sup>353</sup> Furthermore, as discussed in n. 177 above, the *travaux préparatoires* suggests that the drafters left discretion to the Court to treat victims as groups, as opposed to on an individual basis.

<sup>354</sup> ICC Rules, *supra* n. 6, at R. 89(4).

<sup>355</sup> While Article 68(3) also refers to "personal interests," which could arguably be interpreted as requiring an individual analysis, both PTC I and PTC II have held that, at least at the situation stage of proceedings, the personal interests of all victims are affected in general. *See supra* n. 268 *et seq.* and accompanying text. Moreover, both PTC I and the Appeals Chamber have applied the "personal interests" criterion to victim-participants as a group in determining whether victims should be allowed to participate at a given stage of proceedings. *See, e.g., Situation in DRC*, PTC I, 17 January 2006, *supra* n. 10, at ¶ 75 (holding that victims of a situation may request the Pre-Trial Chamber to order specific proceedings, which the Chamber would grant or deny based on whether or not the victims' "personal interests" were affected); *Prosecutor v. Lubanga*, Appeals Chamber, 13 February 2007, *supra* n. 278, at ¶¶ 50-55 (determining that all four of the victims who had been granted standing to participate in the *Lubanga* case had personal interests that were affected by particular appellate proceedings, without conducting an individualized assessment of each victim's interests).

<sup>356</sup> ICC Regulations, *supra* n. 139, at Reg. 86(6).

<sup>357</sup> *Id.* at Reg. 86(5).

<sup>358</sup> ICC Rules, *supra* n. 6, at R. 90(2).

individualized or collective manner.<sup>359</sup> As at least one commentator has noted in the context of reparations, “[i]n certain situations, individual claims could be grouped together – such as by village or district – for the purposes of preparation, to ensure consistency and efficiency.”<sup>360</sup>

Thus, grouping could arguably be used not only for purposes of representation or reparations, but also earlier in the process, in the context of evaluating applications for the right to participate. For example, upon receiving victims’ applications to participate, the Registrar could group victims of a situation together according to a variety of criteria – including ethnicity, religion, mother tongue, location, harm suffered, *etc.* The Registrar could then apply the same *prima facie* recommendation regarding applicants’ eligibility described above<sup>361</sup> to groups of similarly-situated applicants, further facilitating the Chamber’s ultimate decision regarding whether to grant victims the right to participate in a given case.

Grouping might also facilitate the determination of “personal interests” at the case stage. Specifically, the Chamber could individually analyze the “personal interests” of some fraction of a group’s members in relation to a case, and then apply the finding to all similarly situated members of the group.<sup>362</sup> Such a practice would not only promote efficiency, but would also ensure consistency among victims of the same ethnic or religious group, language, location, harm suffered, or other relevant criteria.

Notably, victims’ rights advocates do not appear to be averse to such grouping mechanisms. As explained above, the Victims’ Rights Working Group has recommended the Court adopt procedures designed to “facilitate the sorting and grouping of applications and thus simplify the decision-making process.”<sup>363</sup> More recently, REDRESS, an active member of the Victims’ Rights Working Group that has extensive experience in obtaining justice for victims, explained:

Victims’ interests will be multiple and diverse, despite their shared association to a particular situation or case before the Court. However, it will be impossible for all or even most victims to participate in Court proceedings individually. Therefore, the organisation of victims into groups that adequately reflect their interests is a necessary precondition to their effective participation.<sup>364</sup>

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<sup>359</sup> *Id.* at R. 97.

<sup>360</sup> Marc Henzelin, Veijo Heiskanen & Guenael Mettraux, *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claim Processes*, 317 *Crim. L. Forum* 328 (2006).

<sup>361</sup> *See supra* n. 339 *et seq.* and accompanying text.

<sup>362</sup> This practice is often used in domestic jurisdictions that make use of “class action” procedures in large-scale, civil litigation. *See infra* n. 366 *et seq.* and accompanying text.

<sup>363</sup> Victims’ Rights Working Group, *Victim Participation at the International Criminal Court*, *supra* n. 21, at 9.

<sup>364</sup> REDRESS, *Ensuring the Effective Participation of Victims Before the International Criminal Court: Comments and Recommendations Regarding Legal Representation For Victims*, at 6, May 2005, available at [http://www.iccnw.org/documents/REDRESS\\_%20LegalRepsVictims\\_23May05.pdf](http://www.iccnw.org/documents/REDRESS_%20LegalRepsVictims_23May05.pdf).

REDRESS recommends that “local grassroots organizations” have a “key role in facilitating” this grouping process, and there is no reason that the Registrar should not work with such intermediaries in facilitating the grouping of victims, particularly in light of the many duties held by the Registrar in relation to victims’ applications discussed above.<sup>365</sup>

In one form or another, several domestic jurisdictions have procedures for finding facts that apply to particular individuals, then applying those findings to a multiple number of victims. For example, some jurisdictions make use of what is commonly called a class or group action,<sup>366</sup> most often in the context of a civil lawsuit. Class actions are especially suited where a relatively large number of individuals suffer similar sorts of harm, such as mass-scale human rights violations.<sup>367</sup> As one commentator has noted, “the class action device is a potent weapon for aggregating the interests of the victims, and bringing the consequences of the wrong to bear forcefully on the wrongdoer.”<sup>368</sup> The process of aggregating such interests is particularly useful as it permits a large number of individuals, as victims, to be recognized in a situation of mass harm. In Brazil’s version of a class action, for example, it is first established that a defendant is liable for a particular sort of harm;<sup>369</sup> thereafter, individual claimants bring their own suit to prove that they are a member of the group harmed and to prove damages.<sup>370</sup> While the Brazilian class action is civil in nature, and usually involves domestic contract or tort claims,<sup>371</sup> it may also be linked to a criminal case.<sup>372</sup>

In varying ways, the Iran-U.S. Claims Tribunal, the United Nations Compensation Commission, the Kosovo Housing and Claims Commission, and the European Court on Human Rights all lean towards a two-part procedure that echoes the concept of the class action. A question is decided once for a small number of individuals, and decided with some rigor, and then applied with less rigor to the rest of a group of claims involving

<sup>365</sup> See *supra* n. 150 *et seq.* and accompanying text.

<sup>366</sup> A prominent U.S. environmental defence attorney explains the distinction this way: “[In a] ‘class action’ ... a representative plaintiff seeks to obtain relief on behalf of a group of similarly situated persons, and... the action is binding on those persons, irrespective of whether they are actually joined as parties to the case. Generally, a ‘group action’ does not bind persons, but instead permits groups of plaintiffs to consolidate their claims in a single proceeding.” Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 2 CLASS ACTION LITIGATION REP. 3, n. 2 (2001); available at: [http://www.gardere.com/Content/hubbard/tbl\\_s31Publications/FileUpload137/708/BNA-ClassAct-Armageddon.pdf](http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/708/BNA-ClassAct-Armageddon.pdf).

<sup>367</sup> Beth van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 279, 279-280 U. Chi. Legal F. (2003).

<sup>368</sup> M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 Va. J. Int’l. L. 1069, 1105 (1999).

<sup>369</sup> Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 333 (2003).

<sup>370</sup> *Id.* at 333, 359.

<sup>371</sup> *Id.* at 279, 283.

<sup>372</sup> *Id.* at 408 (quoting Art. 103(III)(4), Brazilian Consumer Code).

similar issues. For example, the Iran-U.S. Claims Tribunal used this approach for cases involving forum selection clauses, implementing a process by which “the Tribunal first identified a representative group of claims, which it then resolved, setting a precedent for the remaining claims.”<sup>373</sup> Similarly, the United Nations Claims Commission evaluated 3,000 of a group of 430,000 property and personal injury or death claims to develop and implement “the criteria for evaluating and verifying the [remaining]... claims and for reaching compensation determinations.”<sup>374</sup> This process was made explicit in the rules of the Kosovo Housing and Property Claims Commission, which stated that “[o]nce a precedent setting decision has been taken, the Commission’s rules of procedure expressly authorize the delegation of certain claims review functions to the Commission’s Registrar” and its “administrative and secretariat and investigative arm.”<sup>375</sup> Two policy interests are served by this two-step approach: “[r]esolving claims on a [‘]wholesale[’] basis, rather than a on a [‘]retail[’] case-by-case basis... (i) enhances efficiency [and] (ii) promotes the consistency of jurisprudence.”<sup>376</sup>

As with the recommendations relating to streamlining the application procedure described above, allowing the Registrar to make early use of its authority to group victims helps serve a restorative purpose because it ensures victims receive decisions on their applications in a timely manner. This in turn allows victims to benefit from recognition by the Court at an early stage, and to begin receiving information regarding the ICC’s operations relevant to the harm they have suffered, thereby fulfilling two of the basic rights set forth in the UN Victims Declaration, namely: respectful treatment and the receipt of information.<sup>377</sup> Grouping of victims could also be used to avoid the time-consuming individualized review by the Court of each application every time a new suspect is identified or a new charge is brought, increasing the efficiency of the proceedings. Specifically, the Court could implement the type of two-part process used by claims tribunals and others to evaluate the applications of similarly-situated victims seeking to participate in a given case, meaning that the Chamber would conduct a rigorous review of a few applications in each group to determine that whole group’s eligibility to participate. Not only would such changes increase efficiency, and thus fairness, but facilitating the operations of the Court would also better ensure that victims are able to exercise a third basic right embodied in the UN Victims Declaration, as well as the Rome Statute: the right to have their views and concerns actually heard and

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<sup>373</sup> Veijo Heiskanen, *Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES, 27, 33 (Int’l Bur. Perm. Ct. Arb’n, eds., 2006) (citing Charles N. Brower & Jason D. Brueschke, THE IRAN-U.S. CLAIMS TRIBUNAL 61 (1998)).

<sup>374</sup> Christopher S. Gibson, *Mass Claims Processing: Techniques for Processing over 400,000 Claims for Individual Loss at the United Nations Compensation Commission*, in THE UNITED NATIONS CLAIMS COMMISSION: THIRTEENTH SOKOL COLLOQUIUM, 155, 171 (Richard B. Lillich ed., 1995).

<sup>375</sup> Heiskanen, *Virtue Out of Necessity*, *supra* n. 373, at 33-34.

<sup>376</sup> *Id.* at 33.

<sup>377</sup> *See supra* n. 25 *et seq.* and accompanying text.

considered by the Court.<sup>378</sup>

*c) Addressing Concerns of Efficiency & Fairness By Managing the Timing & Manner of Participation*

As discussed in the first half of this report, the drafters of the Rome Statute and Rules designed a scheme under which large numbers of victims could participate before the Court without sacrificing the efficiency and fairness of proceedings, namely by giving the judges broad discretion to determine the timing and manner of victim participation. Indeed, the plain language of Article 68(3) and the drafting history of the Rome Statute and Rules demonstrate that, rather than imposing strict requirements on applicants' ability to qualify as "victims," the Court may address fairness concerns by adjusting the timing and manner of the participation.<sup>379</sup> Nevertheless, on various occasions, the Chambers appear to have chosen to deal with concerns of efficiency and fairness by limiting victims' ability to participate altogether, as opposed to managing the timing and manner of that participation. For example, PTC II justified its decision to impose strict identification requirements on victims under Rule 85(a) by determining that, "given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be... inappropriate not to require that some kind of proof meeting a few basic requirements be submitted."<sup>380</sup>

Importantly, Pre-Trial Chamber II's approach to identification requirements under Article 68(3) highlights a significant tradeoff that will continually arise in the context of the ICC victim participation scheme. Specifically, where a large number of victim-applicants potentially qualify for participation rights, the Court could respond in one of two ways. First, it could adopt a highly restrictive interpretation of who qualifies as a "victim" for purposes of Article 68(3), thereby potentially excluding many applicants from obtaining any participation rights. Alternatively, the Court could adopt a flexible approach to evaluating victims' applications for participation – for example, by broadening the category of documents that may serve as a victim's proof of identification – and then limit the *timing and modality* of victim participation consistently with the Court's obligations under the second half of Article 68(3). Notably, even if the scope of participation were limited to the right to receive notice of the proceedings and the right to submit written observations to the Chambers, such rights would fulfill the core goals of the UN Victims Declaration, namely: demonstrating respect for victims that have applied to the ICC by responding to their requests in a timely and even-handed manner; providing information to victims relevant to their interests; and creating the opportunity for victims

<sup>378</sup> See *supra* n. 27 and accompanying text.

<sup>379</sup> See *supra* n. 118 *et seq.* and accompanying text.

<sup>380</sup> *Situation in Uganda*, PTC II, 10 August 2007, *supra* n. 189, at ¶ 16. This decision had the effect of further delaying the Court's review of 42 victims' applications to participate, and has potentially precluded those victims from participating altogether given the rigorous proof of identification now required by PTC II. As explained above, PTC II determined that the only means by which victims may satisfy the "natural persons" requirement in Rule 85(a) is by submitting to the Court by a document "(i) issued by a recognized public authority; (ii) stating the name and the date of birth of the holder; and (iii) showing a photograph of the holder." *Id.*

to communicate their views and concerns to the Court. While participation may be more extensive where fewer victims are granted participant status, such as seen in the *Lubanga* case, where the four victims were permitted to, *inter alia*, make opening statements through their representatives at the hearing on the confirmation of charges against Mr. Lubanga, nothing in the Rome Statute or ICC Rules necessarily requires that the scope of participation be as extensive in each case.

Significantly, the Court has on at least one occasion adopted an approach by which it regulated the manner of victim participation rather than simply excluding it altogether. Specifically, in response to requests from the four victims in the *Lubanga* case to participate in the hearing on the confirmation of charges, PTC I determined that the victims could participate at some level.<sup>381</sup> However, noting the victims' request to remain anonymous, the Chamber limited the scope of their participation accordingly, holding that victim participation at that stage would be limited to accessing public documents and presence at the public hearings, which included the delivery of opening and closing statements by the victims' representatives.<sup>382</sup> The Court also noted that, should the victims agree to disclose their identities to the Defence at a later stage, the Chamber would re-examine whether "they could be granted leave to participate in another manner."<sup>383</sup>

Another context in which the balance between the right to participate and the manner of that participation could be struck differently is with regard to the Chambers' practice of continually re-evaluating victims' "personal interests" in participating at each stage of proceedings. As explained above, both Pre-Trial Chambers and the Appeals Chamber have taken this approach to one extent or another.<sup>384</sup> However, the approach advocated by Appeals Chamber Judge Sang-Hyun Song is both more logical *and* more consistent with the text and drafting history of the Rome Statute and Rules of Procedure. Specifically, Judge Song reasoned that, once victims have been granted the right to participate in a given case – for example, the four victims granted participation rights in the *Lubanga* case – it is logical to assume that their personal interests are affected at every stage of that case.<sup>385</sup> At the same time, Judge Song points out that if at any given stage of proceedings, the Chamber believes that victim participation would be "inappropriate," *i.e.*, contrary to the concerns of efficiency and fairness, the Chamber could issue an order limiting or postponing the presentation of victims' views and concerns or altering the manner in which victim participation will take place.<sup>386</sup>

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<sup>381</sup> See Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision authorising the filing of observations on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 ICC-01/04-01/06-463 (Pre-Trial Chamber I, 22 September 2006).

<sup>382</sup> *Id.* at 6.

<sup>383</sup> *Id.* at 8.

<sup>384</sup> See *supra* n. 275 *et seq.* and accompanying text.

<sup>385</sup> See *supra* n. 280 *et seq.* and accompanying text.

<sup>386</sup> *Id.*



Thus, once a victim is granted participation status, decisions as to the timing and manner of that participation should be made strictly according to the considerations that underlie the design of the victim participation scheme: efficiency and fairness. It neither serves the restorative goals of the drafters, nor safeguards concerns of efficiency and fairness, for the Court to demand that victims meet strict evidentiary hurdles to qualify for victim status or to continually review what it believes to be in the victims' interests, particularly when the standard by which the Court evaluates those interests remains unclear.

*d) Ensuring Respect for Victims' Agency*

Regardless of the procedural tools the Court may adopt to further the restorative purpose behind the victim participation scheme, it is critical that the independent role afforded to victims to present their views and concerns to the ICC be respected. As described above, the participation provisions included in the Rome Statute and Rules are significant in that they recognize a right for victims to contribute to the work of the ICC without acting as evidentiary witnesses, and regardless of their desire to obtain reparations for their harm.<sup>387</sup> This recognition is not served by decisions of the Court that may be seen as ignoring victims' wishes or as adopting a paternalistic view of victims. Thus, it is essential that the Court respect victims' wishes, even if those wishes seem, in the Court's opinion, to threaten the victims' interests or security.

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<sup>387</sup> See *supra* n. 46 *et seq.* and accompanying text.

## VI. CONCLUSION

As this report has highlighted, the ICC victim participation scheme was born from a desire on the part of the drafters to render the ICC accessible and receptive to the victims on whose behalf the Court was established. This intent is demonstrated not only by the potentially broad definition of “victims,” the guarantee of notice to victims who have communicated with the Court, and specific opportunities to allow victims to participate before the Court, but also by the general motivation of the drafters to avoid the mistakes of the *ad hoc* international criminal tribunals in failing to connect the work of the court to the lives of victims.<sup>388</sup> Indeed, the *travaux préparatoires* show that the drafters specifically contemplated the fact that very large numbers of victims would be eligible to participate before the Court.<sup>389</sup> While certain limitations were placed on the timing and manner of victim participation, and ultimately the Court was given broad discretion to protect the efficiency and fairness of the proceedings, victims who meet the statutory requirements of Article 68(3) have to be permitted to present their views and concerns to the Court. Furthermore, those who do not formally qualify to participate under Article 68(3) may nevertheless communicate with the ICC and receive information regarding relevant proceedings.

However, as the small number of applicants granted “victim” status to date indicates, the ICC’s early cases on victim participation suggest that the Court has been slow to allow broad access by victims. At the same time, certain aspects of the Pre-Trial Chambers’ decisions to extend Article 68(3) to the investigation stage may conflict with the rights of the accused and fair and impartial proceedings. Finally, the victims-related jurisprudence to date lacks clarity and consistency, and has involved unwarranted restrictions on and re-evaluations of victims’ rights to participate, which further frustrates the restorative intent behind the victim participation scheme, as well as causing significant delays in the processing of victims’ applications and more generally in the Court’s proceedings.

Thus, as the Court continues to implement and refine the victim participation scheme, we recommend that it amend certain aspects of its earlier jurisprudence – in particular, the application of Article 68(3) to the investigation stage of a situation, and the practice of continually re-evaluating victims’ “personal interests” in determining the timing and manner of their participation – as well as adopt procedures designed to clarify and streamline the workings of the overall scheme. We believe that the adoption of the recommendations set forth in this report will allow the Court to better achieve an appropriate balance between the restorative purpose underlying the victim participation scheme and the concerns of the drafters regarding the scheme’s potential effects on efficiency and fairness.

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<sup>388</sup> See *supra* n. 29 *et seq.* and accompanying text.

<sup>389</sup> See *supra* n. 104 *et seq.* and accompanying text.

## ORDERING INFORMATION

Inquiries about obtaining print copies of reports may be sent to:

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## Victim Participation Before the International Criminal Court

In 2007 the War Crimes Research Office launched a new initiative, the International Criminal Court (ICC) Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. This is the first in a series of reports that will examine these issues.

This report highlights that the ICC victim participation scheme was born from a desire on the part of the drafters to render the ICC accessible and receptive to the victims on whose behalf the Court was established. This intent is demonstrated not only by the potentially broad definition of "victims," the guarantee of notice to victims who have communicated with the Court, and specific opportunities to allow victims to participate before the Court, but also by the general motivation of the drafters to avoid the mistakes of the *ad hoc* international criminal tribunals in failing to connect the work of the court to the lives of victims. Indeed, the *travaux préparatoires* show that the drafters specifically contemplated the fact that very large numbers of victims would be eligible to participate before the Court. While certain limitations were placed on the timing and manner of victim participation, and ultimately the Court was given broad discretion to protect the efficiency and fairness of the proceedings, victims who meet the statutory requirements of Article 68(3) have to be permitted to present their views and concerns to the Court. Furthermore, those who do not formally qualify to participate under Article 68(3) may nevertheless communicate with the ICC and receive information regarding relevant proceedings.

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