VICTIM PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT: ACHIEVEMENTS MADE AND CHALLENGES LYING AHEAD

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"I fear that failure by the international community to address the needs of victims of the conflicts that occurred in the former Yugoslavia will undermine the Tribunal’s efforts to contribute to long term peace and stability in the region."
Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia

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I. INTRODUCTION

The participation of victims in proceedings before the International Criminal Court (ICC or Court) is one of the most innovative aspects of its Statute (ICC Statute or Rome Statute). It is fair to acknowledge, however, that its inclusion in the Court's founding document was the result of a compromise among different legal traditions. This explains the vagueness of the provision included in Article 68(3). As with many other provisions of the Statute, much was left for interpretation and determination by the Court.

The ICC has been operational for over seven years now. Since the opening of judicial proceedings, victim participation has gradually gone from a written provision to a judicial practice. The ICC has made significant developments throughout this process, but it has also encountered numerous challenges. This article looks back at the rationale for victim participation in ICC proceedings and reviews some of the most significant achievements made in this area since the entry into force of the Rome Statute. It also looks at some of the common challenges encountered, and makes proposals to overcome those in order to render victim participation as effective as possible.

This article is not an exhaustive study of the Court's jurisprudence on the matter. Nor does it intend to address the wealth of issues which have arisen and the variety of opinions expressed on the issue of victim participation over the last few years. It has been written following the International Law Weekend held in New York from October 22–24, 2009. As such, it is a collection of ideas selected for that occasion.

The Rome Statute recognized several rights to victims: the right to be informed about crimes and proceedings concerning them, the right to participate in proceedings, the right to legal representation, and the right to


2. Rome Statute of the International Criminal Court, art. 68(3), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute] “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

3. Although the Rome Statute mentions victims' legal representatives in some provisions, see Rome Statute, supra note 2, arts. 68(3), 84(2); the general right to legal representation is enshrined in Rules of Procedure and Evidence of the ICC, 2002 ICC-ASP/1/3 Rule 90(1): “[a] victim shall be free to choose their legal representative.”
benefit from protection and support,\(^4\) and the right to obtain reparations.\(^5\) The exercise of some of these rights cannot be separated from one another in practice. This article, however, will concentrate solely on the issue of victim\(^6\) participation, and also include some comments on the right to legal representation which is most intrinsically linked to the right to participate in proceedings.

II. BACKGROUND AND RATIONALE FOR VICTIM PARTICIPATION

The ICC system is a hybrid one, bringing together elements from various legal systems around the world and, in particular, the common law and civil law systems. The regime of victim participation is a very good example of such hybrid nature. The notion of victim participation in criminal proceedings is unknown in most common law systems. On the other hand, civil law systems give generous and extensive rights to victims in criminal proceedings (e.g. \textit{partie civile} regimes). Victim participation at the ICC is a compromise between these two legal traditions.

From a historical perspective, the operations of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (created in 1993 and 1994 respectively) influenced the negotiation of the Rome Statute. Both tribunals have been criticized for failing to properly take into account and engage those most concerned by trials for crimes which changed their lives forever. The increasing role acknowledged to individuals in public international law, as well as the considerable international agreement on the

\begin{itemize}
  \item \textit{Rome Statute, supra note 2, art. 68(1).}
  \item \textit{Rome Statute, supra note 2, art. 75.}
  \item For the purposes of the ICC Statute and Rules of Procedure and Evidence, victims are defined as follows:
    \begin{itemize}
      \item natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
      \item 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 monuments, hospitals and other places and objects for humanitarian purposes.
    \end{itemize}
\end{itemize}
fact that victims had a role to play in judicial processes, also determined the inclusion of provisions on victims’ rights in the ICC Statute.

A. Why does Victim Participation Matter?

There is a perception among those unfamiliar with the notion of victim participation that this mechanism solely serves victims’ interests to obtain reparations. If that were the case, however, the drafters of the Rome Statute would not have included two separate provisions and created two different regimes, one for participation and another for reparations. Victims have their personal reasons for participating in judicial proceedings and the explanations might not always be the same for victims of the same crimes, let alone for victims of different crimes, coming from different countries, and with different social backgrounds.

However, it is possible to affirm that what moved the drafters of the ICC Statute to include victim participation among its provisions was something greater than the idea that victims should obtain reparations for the harm they suffered. Victim participation has to do with having those most affected by the crimes have a say, an independent voice on the trials unveiling what happened to them, their families, and their communities.

Victim participation is also justified by victims’ central interest for justice to be done. It is only fair that victims are fully involved and that their voice be heard with respect to the prosecution, trial, and conviction of those who victimized them.


9. Rome Statute, supra note 2, art. 68(3).

10. Rome Statute, supra note 2, art. 75.


12. Katanga Decision on Modalities at Pre-Trial Stage, ICC-01/04-01/07-474 ¶¶ 37–44; Bemba Fourth Decision, ICC-01/05-01/08-320 ¶ 90. See also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-925, Separate Opinion by Judge Sang-Hyu Song in the Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06, a/0002/06 and a/0003/06 concerning the
Allowing victims to participate in a specific case is also a way of recognizing their suffering, and can thus constitute a kind of reparation in the form of satisfaction. Recognition of the harm suffered and reassurance that the victim is not to blame for the atrocities he/she has endured can have the effect of empowering victim communities.

Finally, having victims involved in the judicial process allows them to experience justice and can lay the foundation for reconciliation in the communities. This is an essential part of the legacy that international tribunals will hopefully leave in the countries torn by conflict where the ICC operates.

This comprehensive understanding of victim participation is shared by the ICC judges, who have discussed the purpose of victim participation in different decisions.

**B. What has Victim Participation brought in Practice to ICC Proceedings?**

Opponents of the idea of victim participation frequently believe that victims’ interest can and should be represented by the Prosecution. However, the early experience of the ICC shows that victims’ interests are not exactly the same as those of the Prosecutor in numerous occasions. The Prosecutor is concerned with proving his case and might make political choices or decisions related to the quality of the evidence the Prosecutor has collected. For example, when the ICC Prosecutor initially presented his

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“Directions and Decision of the Appeals Chamber,” ¶¶ 13–14 (June 13, 2007) [hereinafter Decision on Victims’ Participation in Appeals].

13. “‘Satisfaction’ covers a wide and varied range of non-monetary measures that may contribute to the broader and longer-term restorative aims of reparation. . . . [a] central component is the role of public acknowledgment of the violation. One of the worst aspects for a victim is that he/she is not believed or that what really happened, be it torture or some other grave abuse, has been covered up or shrouded in secrecy. Bringing events officially into the open, provided this does not cause further harm to or danger for the victim and their families, can go quite a distance towards restoring the individual’s sense of identity and dignity, and can also act as a deterrent.”


14. Situation in the Democratic Republic of Congo, ICC-01/04-101-tEN-Corr, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 51 (Jan. 17, 2006) [hereinafter DRC 17 Jan. 2006 Decision]; Katanga Decision on Modalities at the Pre-Trial Stage, ICC-01/04-01/07-474 ¶ 157; Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-136, Decision on Victims’ Modalities of Participation at the Pre-Trial Stage of the Case, ¶ 7 (Oct. 6, 2009) [hereinafter Abu Garda Decision on Modalities at the Pre-Trial Stage].
case against Thomas Lubanga Dyilo from the Democratic Republic of Congo, he argued that the crimes he intended to prosecute Lubanga for had been committed during an armed conflict of a non-international character. The victims, however, argued that the conflict was of an international character and referred to the notorious and well-documented intervention of Uganda and Rwanda in the Ituri conflict during which the crimes were committed. The judges found that the victims' argument was sound and modified the charges under which Thomas Lubanga was to be prosecuted. This example illustrates that victims' views are complementary to, and could sometimes be in opposition with, those of the Prosecution. There could even be situations where victims agree with the Defense.

Victims also bring views from the places where the crimes were committed. A very good example of this comes from a hearing in the case The Prosecutor v. Jean-Pierre Bemba Gombo, where a discussion on local languages spoken in the Central African Republic became relevant as the language spoken by the attackers had been one of the factors which helped victims identify them. The Defense made challenges to the Prosecutor's arguments, bringing confusion as to the local languages spoken in the Central African Republic. The victims' legal representatives were the only ones in the courtroom who were to shed light on the situation and give an explanation on the local languages spoken in the country.

Another good example of positive input provided by victims is the matter of names in the Democratic Republic of Congo. During the presentation of the case The Prosecutor v. Thomas Lubanga Dyilo in trial, the Defense questioned the credibility of witnesses because of the numerous and frequent inconsistencies in the names of persons referred to in the

16. Katanga Decision on Modalities at Pre-Trial Stage, ICC-01/04-01/07-474 ¶ 36.
18. "Contrary to what has been affirmed here, Lingala is not spoken in Central African Republic. Indeed, although some Central Africans can speak Lingala, this does not mean that we can draw the conclusion that Lingala is spoken in the Central African Republic. It would be like concluding that English is the language of the Central African Republic because some people can speak it there. Sango is the national language, and French is also spoken in the Central African Republic as official language. Lingala has never been a lingua franca in the Central African Republic."

Id. at 97-98.
witnesses’ statement.\textsuperscript{19} Victims’ representatives brought to the attention of the Chamber the ways in which names are given in the Democratic Republic of Congo, thereby explaining apparent inconsistencies.\textsuperscript{20} This led to the Chamber’s appointment to an expert on names and other social conventions in the Democratic Republic of Congo.\textsuperscript{21}

Overall, victims have contributed to a more comprehensive presentation of the cases, and have also assisted judges to have a better understanding of the context of the relevant case.

Victim participation brings another dimension to the proceedings, the one of suffering. Witnesses would be unable to present that perspective, since they are “elements” of the Prosecution and as such, they serve the Prosecution’s interest. The notion of victim participation implies providing individuals a channel to express their independent voice.\textsuperscript{22}

\textbf{III. ACHIEVEMENTS MADE IN THE AREA OF VICTIM PARTICIPATION AT THE ICC}

The regime of victim participation established in the ICC Statute is a unique one. Moreover, given that the Rome Statute and complementary texts leave many questions open to judicial interpretation, the system for victim participation is being developed and shaped through the Court’s jurisprudence.

According to the central provision on victim participation, “where the personal interests of victims are affected the Court shall permit their views and concerns to be presented.”\textsuperscript{23} However, the Statute and the Rules of Procedure and Evidence say very little\textsuperscript{24} as to how that participation should operate in practice. The ICC Statute actually indicates that the judges are to determine how those views and concerns are to be presented, \textit{i.e.}, the modalities for participation.\textsuperscript{25}

\begin{itemize}
  \item[19.] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1793, Analyse relative à l'attribution et aux composants du nom en République démocratique du Congo, ¶ 1–2 (Mar. 20, 2009).
  \item[20.] \textit{See, e.g., id.}
  \item[21.] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1934, Instructions to the Court’s Expert on Names and Other Social Conventions in the Democratic Republic of Congo, ¶ 4 (June 5, 2009).
  \item[22.] DRC 17 Jan. 2006 Decision, ICC-01/04-101-t\textit{EN-Corr} ¶ 51.
  \item[23.] \textit{Rome Statute, supra} note 2, art. 68(3).
  \item[25.] In determining the modalities for victim participation, the judges must see to that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. \textit{Rome Statute, supra} note 2, art. 68(3).
\end{itemize}
Victims' legal representatives have struggled through filings and submissions to ensure that the right to participation can be exercised in a meaningful way.26

Different chambers have taken different approaches with respect to certain issues. The description below is drawn from a global analysis of approaches adopted by different chambers at different stages of the proceedings,27 and reflects the current state of jurisprudence.

A. Right to Access the Record of the Case

The access to the public record of the case, including public evidence filed by the Prosecution and the Defense, never posed substantial problems. The most contentious discussion has concerned the access to confidential pieces of the Prosecution's record.

As a general rule, victims have access to the public record of the case, including public evidence filed by the Prosecution and the Defense. This is because confidential filings normally have sensitive information on protection of witnesses and victims, or sensitive information pertaining to national security. However, in order for participation to be truly meaningful, it is often necessary that victims' legal representatives have access to confidential material. The ICC Chambers have acknowledged that the parties can decide to notify confidential documents to the victims' legal representatives should they feel that those contain information which affects the relevant victims' personal interest. In addition, the relevant Chamber can decide by itself to allow legal representatives to access other confidential materials which affect the victims' personal interest. Finally, the legal representatives have access to the entire index of the case and can thereby identify confidential materials which could potentially affect the

26. For a discussion on the need to ensure meaningful participation. See Katanga Decision on Modalities at the Pre-Trial Stage, ICC-01/04-01/07-474 ¶¶ 153–63. See also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 97 (July 11, 2008) [hereinafter Judgment Against Trial Chamber I's Decision].

27. The stages of ICC proceedings are: pre-trial, trial, and appeals.
victims' personal interest,\textsuperscript{28} and request the Chamber to authorize them to have access to them.\textsuperscript{29}

\textbf{B. Right to Question Witnesses}

The right to question witnesses is recognized in Rule 91(3) of the Rules of Procedure and Evidence. Jurisprudence has clarified the conditions under which this right can be exercised.

Because of security reasons, victims can be given an option to remain anonymous to the Defense team.\textsuperscript{30} Anonymous victims are barred from exercising the right to question witnesses, as this would be contrary to the rights of the accused.\textsuperscript{31}

On the contrary, victims who have disclosed their identities have a right to question witnesses. In order for legal representatives to exercise this right, they must request the relevant Chamber leave to do so, and must show in their submission that the relevant witnesses' statement affects the victims' personal interest. Legal representatives are also often required to file a list of questions they intend to pose to the relevant witness or expert witness prior to the questioning.\textsuperscript{32} This is why timely access to the record of the case, including relevant confidential material, is of the essence. In order to request leave to intervene, victims' lawyers must have identified and anticipated the portions of the proceedings which are due to affect their clients' interests.\textsuperscript{33}

\textsuperscript{28} The notion of "personal interest" is central to the idea of victim participation. \textit{See Rome Statute, supra note 2, art. 68(3).} This explains why exercise of certain rights is conditional upon demonstrating that the victims' personal interest is affected by the specific proceeding at hand. For a discussion on "personal interest," see Decision on Victims' Participation in Appeals, ICC-01/04-01/06-925 ¶ 28.

\textsuperscript{29} Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1119, Decision on Victims' Participation, ¶¶ 105–107 (Jan. 18, 2008) \textit{[hereinafter Lubanga Decision on Victim Participation]; Abu Garda Decision on Modalities at the Pre-Trial Stage, ICC-02/05-02/09-136 ¶¶ 11–15.}

\textsuperscript{30} A large number of victims applying for participation have requested to remain anonymous vis-à-vis the Defense, given the security conditions in the countries where the Court operates and the dangers that disclosing their identities to the Defense could entail.

\textsuperscript{31} Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-462-\textsc{tEN}, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 7 (Sept. 22, 2006).

\textsuperscript{32} Katanga Decision on Modalities at the Pre-Trial Stage, ICC-01/04-01/07-474 ¶¶ 135–139; Abu Garda Decision on Modalities at the Pre-Trial Stage, ICC-02/05-02/09-136 ¶ 22.

\textsuperscript{33} Lubanga Decision on Victim Participation, ICC-01/04-01/06-1119 ¶ 107.
C. Right to Challenge and to Tender Evidence, including through Provision of a Personal Statement before the Court

Victims have also been granted the right to challenge the admissibility and the relevance of evidence presented by the Prosecution and the Defense. Judges have gone further than that and have acknowledged that victims can also submit their own evidence pertaining to the guilt or innocence of the accused. This has raised questions and encountered opposition from both the Defense and the Prosecution. But the right to challenge and tender evidence has been confirmed by the Appeals Chamber. Such a right implies obligations related to the parties’ right to disclosure and inspection. It remains to be seen how many of these questions will be solved in practice since, so far, victims have made few attempts to introduce evidence.

A prominent example, however, is the request made by three victims in the case of The Prosecutor v. Thomas Lubanga Dyilo to address the Court in person in order to present their views and concerns, and to give evidence under oath. The relevant Chamber has deferred a decision on whether the victims will be allowed to present views and concerns in person. But it has ruled positively on the victims’ request to give evidence under oath. In response to the Prosecution’s concern that evidence to be presented by those victims could potentially duplicate other evidence presented in trial, the Trial Chamber has stated: “[t]he account of each [victim] is unique—none of their personal histories are the same. . . .”

While the issues described above are nearly settled (although modalities for the exercise of these rights will probably become clearer as the Court makes further findings on those issues), other matters are far from

34. Lubanga Decision on Victim Participation, ICC-01/04-01/06-1119 ¶ 108–111. For an opinion a contrario, see Katanga Decision on Modalities at the Pre-Trial Stage, ICC-01/04-01/07-474 ¶ 90–114.
37. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2032-Anx, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/06 to Express their Views and Concerns in Person and to Present Evidence during Trial, ¶¶ 25–40 (June 26, 2009).
38. Id. ¶ 37.
being decided. A good example of such matters is the right of victims to put into question the charges brought against the accused.

D. *The Right of Victims to Challenge the Prosecutor’s Decision on which Charges to bring Against the Accused*

The issue has arisen in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, where the accused has been charged with conscription, enlistment, and use of child soldiers in hostilities.³⁹ Victims’ groups expressed disappointment about the narrowness of the charges from the outset, believing that Mr. Lubanga should have been charged for other crimes committed by the militia he led.⁴⁰

Victims participating in the case introduced a motion requesting the Trial Chamber to change the “legal characterization of the facts”¹⁰ so that new charges could be added. The motion was based upon testimonies provided by witnesses during trial. When discussing their experiences in the recruitment camps, witnesses described situations which, in the view of the victims’ legal representatives, should be qualified as cruel and inhuman treatment, and sexual slavery. In their motion, victims’ lawyers contended that the accused should also be prosecuted for those charges. The Trial Chamber has ruled positively on this request by giving notice to the parties that the legal characterization of the facts on which the trial is based may be subject to change.⁴² The Defense and the Prosecution have appealed the decision. The Appeals Chamber had not issued its decision at the time of writing.

This situation in the case of *The Prosecutor v. Thomas Lubanga Dyilo* is sensitive and delicate because the challenge has been brought up a little late in the presentation of the case.⁴³ Because of the division of labor

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⁴¹. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2049, Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Charges may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ¶ 35 (July 14, 2009).

⁴². See generally id.

⁴³. This was not a deliberate strategy, as victims’ legal representatives obtained access to the record of the case quite late. They also based their arguments upon the testimonies which were heard in trial. Therefore, in the case at hand, they would not have been able to raise the matter earlier.
between the different chambers at the ICC (in particular, the Pre-Trial and the Trial Chambers), the motion might be unsuccessful. Also, the Appeals Chamber is likely to rule that bringing up this issue at this late stage of the proceedings could potentially affect the right of the accused to a fair trial.\textsuperscript{44}

Regardless of the final outcome in this particular case, the larger question of whether victims can have a say about the charges brought against the accused remains. Similar attempts were made by victims and victims' groups at earlier stages of the proceedings, when it would have probably been more appropriate for the judges to entertain such a motion. However, without fully considering the matter, the relevant Chamber refused to act on the submissions.\textsuperscript{45} Therefore, the question is far from having been settled, and could come up again in future proceedings.

It is fair to recall that the issue of the charges brought against the accused is a key matter that goes to the heart of victims' interest for justice to be done. The current ICC Prosecutor has adopted a policy of focused investigations and prosecutions, which implies bringing cases for only a limited number of charges and incidents. Those selected charges and incidents should, in principle, reflect the full range of crimes committed by a perpetrator in a given situation.\textsuperscript{46} While the Prosecutor is independent and free to choose his policies, it must be recalled that the Pre-Trial Chamber is mandated with overseeing the Prosecution's investigations\textsuperscript{47} and making sure that the Prosecutor fulfills his duty in full compliance with the rights of victims.

\textsuperscript{44} According to the Rome Statute, victim participation must be exercised "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." \textit{Rome Statute, supra} note 2, art. 68(3). For an analysis \textit{a contrario} on the possibility to change the legal characterization of the facts at the stage of the proceedings at hand, see \textit{generally} Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2054, Minority opinion on the "Decision giving Notice to the Parties and Participants that the Legal Characterization of the Charges may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court" (July 17, 2009).

\textsuperscript{45} Situation in the Democratic Republic of Congo, ICC-01/04-373, Decision on the Request Submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence (Aug. 17, 2007); Situation in the Democratic Republic of Congo, ICC-01/04-399, Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on Further Investigation" (Sept. 26, 2007).


\textsuperscript{47} \textit{Rome Statute, supra} note 2, arts. 53, 56 & 57. \textit{See also} Regulations of the Court, adopted by the Judges of the International Criminal Court on, ICC-BD/01-01-04, Reg. 48 (May 26, 2004).
IV. CHALLENGES TO THE IMPLEMENTATION OF VICTIM PARTICIPATION IN ICC PROCEEDINGS

The achievements described in the section above are relevant. More positive developments are expected in years to come as the Court completes a full cycle of proceedings, and opens new trials affecting victims' interests in new and various ways. However, the challenges of a unique system in the making cannot be underestimated. This section looks at some of the most common challenges and makes suggestions to overcome them.

A. Resistance to the Notion of Victim Participation

Since the principle of victim participation was adopted and throughout its implementation, there has been much resistance to the notion of victim participation, and especially much fear that large numbers of victims applying to participate could destabilize the proceedings and the Court as a whole. However, it must be recalled that the ICC has jurisdiction for massive crimes, which, by definition, imply that a large number of victims be involved. Therefore, a big quantity of victims should not be seen as a “problem” but rather as a departing point for the development of mechanisms to adequately implement the Rome Statutes' provisions on victims’ rights. This calls for effective administrative mechanisms to handle large numbers of applications, and the organization of an effective system of common legal representation.

The parties to the proceedings, Prosecution and Defense, have also been reluctant to accept the idea that victims have a major role in ICC proceedings. Initially, the Prosecution feared that victims' observations and requests could affect the independence or the integrity of the investigation. These fears have, for the most part, disappeared since the practice of


49. Carla Ferstman, Time to Address Victims’ Participation at the ICC, ACCESS: VICTIMS RIGHTS BEFORE THE INTERNATIONAL CRIMINAL COURT (Victims’ Rights Working Group), (Issue 10), at 8 (Winter 2007/8).

50. Situation in the Democratic Republic of Congo, ICC-01/04-84, Prosecution’s Reply on the Applications for Participation 01/04/1-dp to 01/04/6-dp (Aug. 15, 2005); Situation in the Democratic Republic of Congo, ICC-01/04-103, 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 (Jan. 23, 2006); Situation in the Democratic Republic of Congo, ICC-01/04-143, Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal (Apr. 24, 2006).

51. See, e.g.:
victim participation has demonstrated that victims are not there to compete with the Prosecution nor to alter investigations, but to enrich proceedings with the perspective of those who suffered from the crimes.

The Defense has been similarly reluctant to accept victims' participation. Some Defense teams have reviewed victim applications for participation as they would scrutinize witnesses' statements and have consequently complained about anonymity. Others have contended that victim participation was contrary to the presumption of innocence, disregarding the fundamental principle that a victim is a victim "regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted." Also, Defense Teams have used the reference made in Article 68(3) to the right to a fair trial to argue that victims should not participate at certain stages because that would affect the right of the accused. This argument is flawed because the reference made in article 63(3) to the rights of the accused points to the modalities and not the principle of participation. In other words, the judges shall accept victim participation if they think that it is appropriate because the stage or proceeding at hand affects their personal interest. It is in determining the ways in which victims participate that they must take into consideration the right of the accused to a fair trial.

"Regarding victims participation, the challenge for the Court was to address all issues in a consistent manner. Victim participation is a right accorded to victims by the Statute. As Prosecutors, we believe that as many victims as possible may participate to express their views and concerns, presenting a different social dimension of the crimes and obtaining respect and reparations."


53. See also arguments in relation to the use of the term "victim" in Situation in the Democratic Republic of Congo, ICC-01/04-419, Request for Leave to Appeal the “Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” ¶ 34 (Dec. 13, 2007).

B. Making Victim Participation Meaningful

The time has come for all parties involved to come to grips with the idea of victim participation. The notion has been included in the Rome Statute and it is, therefore, time to overcome the debate as to whether it must be accepted or not. The efforts of all actors involved must focus now on how to make participation meaningful for all: the Prosecution, the Defense, the Court, and the victims themselves. This subsection makes proposals to make the system of victim participation work more effectively.

1. The Application Process

In order for victims to participate in the proceedings, they must file an application. The experience at the ICC so far shows that the application process has been long and cumbersome for all parties involved, including victims. It has also been very contentious and has brought about a high amount of litigation during a phase which should be purely administrative or, at the least, much more simple. Nevertheless, litigation at this early stage of the ICC has proved helpful to a certain extent to clarify some fundamental issues. For example, there have been questions as to whether deceased persons could participate in proceedings, or as to the nature of the harm that the person must have suffered to qualify as a victim, what a direct and an indirect victim is, and whether the latter may participate in ICC proceedings at all. The Rules of Procedure and Evidence do require that the applications be submitted to the Prosecution and the Defense before judges make a decision. It is also acknowledged that careful scrutiny of applications is important to avoid fraud claims. However, it is submitted


56. Prosecutor v. Katanga & Ngudjolo Chui, ICC-01/04-01/07-1491-Red, Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure, ¶ 50–56 (Sept. 23, 2009), [hereinafter Katanga Decision on Victims’ Applications at Trial Stage]; Situation in the Democratic Republic of Congo, ICC-01/04-423-Corr, Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0118/06, a/0128/06 à a/0162/06, a/0199/06, a/203/06, a/209/06, a/214/06, a/220/06 à a/0222/06, a/0224/06, a/0230/06 à a/0236/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06, ¶ 23–25 (Dec. 24, 2007); Bemba Fourth Decision, ICC-01/05-01/08-320 ¶¶ 44, 47.

57. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶¶ 1, 32, 38 (July 17, 2008).

58. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1813, Public Redacted Version of "Decision on indirect victims" (Apr. 8, 2009).

that it is possible to speed up and simplify the process. The Registry should take a more proactive role in processing applications, seeking the judges’ instructions on key matters, and centralizing responses to applications. It is hoped that once the most fundamental issues have been clarified, the judges will also delegate more authority upon the Registry, so as to avoid extensive and unnecessary litigation with a view to ensure faster and smoother proceedings for all the parties involved.

The Defense has complained extensively for delays and workload caused by the need to respond to victims’ applications.60 But it must not be forgotten that delays in these proceedings affect, first and foremost, the victims themselves, some of whom have waited over two years to have the court rule upon their applications. This has arisen because of delays inherent to the proceedings and, in some cases, the disregarding of deadlines in the transmission of the applications by the Registry to the Chambers. The filing of incomplete applications, partially due to the lengthiness and complexity of application forms, is also to blame for undue delays. Civil society groups have advocated for simplification of the forms as well as for more intense outreach and education in the field as to how the forms must be filled out61 in order to avoid delays at a later stage. While some efforts have been undertaken in this respect, the Court needs to take further initiatives in order to improve the application process.

2. Breaching the Gap Between the Court and Victims’ Reality

Victims come from regions devastated by conflict. Moreover, their cultural background, habits, and legal customs differ greatly from practices in other parts of the world. Judicial proceedings are governed by strict rules and tend to be formalistic. However, judicial and quasi-judicial bodies which have dealt with massive claims related to conflict situations have traditionally been flexible with respect to evidentiary requirements.62 Such

60. See, e.g., Lubanga Defense Observations on Victim Participation, ICC-01/04-01/06-386 ¶ 48.


flexibility is necessary in view of the reality of victims. High requirements in terms of the standard of evidence or strict norms would, in practice, preclude victims from participating in the proceedings.

The ICC judges are mindful of this need for flexibility. For example, in order for a victim to participate in the proceedings, they must be able to show that they qualify as victims prima facie. However, the judges have demanded the submission of an increasing number of documents, for example identification cards, proof of relationship with other victims when the victim argues to have suffered moral harm, documents to prove capacity to act on behalf of an organization, among others. While this is partially understandable because judges must guarantee that no fraud

Registrar’s Decision of 28 March 2008 on the Application for Legal Assistance Paid by the Court Filed by Mr Keta on behalf of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 under Regulation 85(3) of the Regulations of the Court, ¶ 18–24, (Apr. 14, 2008) [hereinafter Request for Review of Decision on Legal Aid for Victims].

Situation in Uganda, ICC-02/04-101, 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, ¶ 16 (Aug. 10, 2007) [hereinafter Uganda Aug. 10, 2007 Decision]; See also Lubanga Decision on Victim Participation, ICC-01/04-01/06-1119 ¶ 87; and Katanga Decision on Victims’ Applications at Trial Stage, ICC-01/04-01/07-1491-Red ¶¶ 38–39.

Situation in Darfur, ICC-02/05-110, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ¶ 8 (Dec. 3, 2007).

Situation in Uganda, ICC-02/04-179, Judgment on the appeals of the Defense against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, ¶ 36 (Feb. 23, 2009).

Situation in Uganda, ICC-02/04-179, Judgment on the appeals of the Defense against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, ¶ 36 (Feb. 23, 2009).

Lubanga Decision on Victim Participation, supra note 26, ¶ 89.
applications are accepted, further efforts must be made to reconcile evidentiary requirements. For example, an initial decision on proof of identity required that the applicant produce an identity 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.” A subsequent study revealed that documents meeting those requirements were not widely available in the country concerned. As a consequence, these requirements were later amended. Further endeavors in this regard must be undertaken.

Similarly, more needs to be done to fully acknowledge the reality of victims: for example, many live in villages where there is simply no photocopier, and must travel to the next village to be able to copy an I.D. or the application form. Also, some people in Africa, especially those living in conflict areas, might not know their date of birth and nor have proof thereof.

3. Organizing an Adequate System of Legal Representation Paid by the Court

According to Rule 90(1) of the Rules of Procedure and Evidence, victims can choose a legal representative. Rule 90(5) states that victims “who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry including, as appropriate, financial assistance.” In compliance with this provision, the ICC Registry has put in place a legal aid system for indigent victims. Participation in ICC proceedings requires technical advice and, although the Statute does not demand that victims to act through a lawyer, that is unavoidable in practice. Most victims do not possess the legal knowledge required to plead in complex international law proceedings. In addition, one lawyer normally represents a group of participating victims. This

72. The Rules of Procedure and Evidence provide for the possibility to appoint common legal representatives for groups of victims “for the purposes of ensuring the effectiveness of proceedings.” Rules of Procedure and Evidence of the ICC, 2002 ICC-ASP/1/3, at Rule 90(2). In doing so, the judges and the Registry must ensure that “the distinct victims of victims . . . are represented and that any conflict of interests is avoided.” Rules of Procedure and Evidence of the ICC, 2002 ICC-ASP/1/3, at Rule 90(4). In addition, the relevant Chamber must take into consideration the characteristics of the group of victims: number of victims, homogeneity in the type of crimes, harm suffered and location of
allows the system to work more efficiently as it would be impractical to have each and every victim appear physically before the Court.

Given the overwhelming indigence among victims of the crimes under the jurisdiction of the Court, financing legal aid is essential for victims to exercise their rights. Initially, the Registry had little experience as to what resources should be allocated to represent victims, as the extent of their participation remained unclear. For this reason, when the scheme for legal aid for victims was established, it was copied upon the one for the Defense. As a result, the system was necessarily inadequate since Defense attorneys have very different needs from those of victims’ lawyers. These differences result from the very nature and modalities of victim participation, the distance between the seat of the Court and the victims’ location, and the fact that one lawyer usually represents numerous victims.

The system has evolved over time and has incorporated a certain level of flexibility to accommodate the needs of victims’ legal representation teams. However, the scheme still fails to appropriately take into consideration and adequately fund some of the most important aspects of victims’ legal representation. For example, a fundamental part of the responsibilities of a legal representative is to maintain contact and seek instructions from their clients. This, in turn, requires a travel budget for that specific purpose, and the organization of a support structure in the field.

V. CONCLUSION

The inclusion of a regime of victim participation in ICC proceedings is a major achievement of the international criminal justice system, and corresponds to the evolution of the role of victims in judicial processes. The interpretation and implementation of such a novel provision calls for a

the victims facilitates the appointment of common legal representatives. See Prosecutor v. Katanga & Mathieu Ngudjolo, ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation, ¶ 12 (July 29, 2009) [hereinafter Order on Common Legal Representation].

73. Request for Review of Decision on Legal Aid for Victims, ICC-01/04-494-tENG ¶ 26–32.


76. Order on Common Legal Representation, ICC-01/04-01/07-1328 ¶ 17.
sense of balance as well as for creativity. While important landmarks have been established in the interpretation of victims’ rights, a number of challenges lie ahead. All parties involved, including the parties to the proceedings, judicial actors as well as victims’ legal representatives must work together in order to make victim participation truly meaningful and to overcome common hurdles.