

VICTIM PARTICIPATION IN CRIMINAL LAW PROCEEDINGS

Survey of Domestic Practice
for Application to International
Crimes Prosecutions





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INTRODUCTION

The past thirty years has seen significant strides made to strengthen systems to investigate, prosecute and punish those accused of crimes under international law including genocide, crimes against humanity, war crimes, torture and enforced disappearance. Efforts at the international level – including through the International Criminal Court – are increasingly being matched by investigations and prosecutions at the domestic level. Progressively, more trials concerning crimes under international law are taking place through national criminal processes. These include trials following periods of transition and through specially constituted chambers or tribunals following periods of mass atrocity.

Victims of international crimes are at the very core of the fight against impunity for those crimes. States and criminal justice actors need to be aware of what victims' rights are, and how they can be meaningfully and effectively respected. This includes victims' rights to be treated with compassion, dignity and respect, to have access to justice and to obtain reparation.¹ Victims have a right to be protected from reprisals, to receive information about the progress of cases that concern them and to engage with the legal process.

This report seeks to address one particular aspect of victims' rights: victim participation. The report analyses victims' right to engage in proceedings that concern them and in particular the extent to which a range of domestic jurisdictions provide victims with rights to play an active role in criminal proceedings.² Such active rights may include, for example, the right to launch proceedings, to challenge decisions not to prosecute, or to make statements in court.

The objective of this report is to help states to develop and put in place a framework for victim participation in the context of investigating and prosecuting international crimes at the domestic level.

This is an area where practice diverges significantly across legal traditions. It has provoked intense debate in respect of international criminal proceedings. REDRESS and ISS consider this area to be crucial. Involving victims of international crimes in processes that concern them is not only appropriate in moral terms, it results in more effective criminal processes and is consistent with emerging principles of, and rights under international law.

Part One provides a brief introduction to international standards on victims' rights and the specific characteristics of international crimes relevant to issues of victims' active participation in criminal proceedings.

Parts Two and Three examine the notion of victims' active rights, broken down into a number of stages of proceedings. Each chapter begins with an examination of relevant international standards, followed by an illustrative survey of practice from 22 countries. Each section considers how such rights may be applicable in trials concerning

¹ See, e.g., UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res A/RES/40/34, 29 November 1985 ('UN Victims' Declaration') and UN 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, UNGA Res 60/147, 16 December 2005 ('UN Basic Principles on Remedy and Reparation').

² See further, Lorraine Wolhuter et al (2008), *Victimisation and Victims' Rights*, Routledge, p. 175.

international crimes, and provides examples of how challenges specific to the prosecution of international crimes have been dealt with in domestic and international settings. Finally, each section makes recommendations as to how active rights can be respected in trials for international crimes. Annex One provides a summary of these recommendations, and strategies to achieve them, across the different stages of the criminal process in relation to crimes under international law.

The active, participatory, rights examined in this report can be contrasted with other rights, such as rights to information, to protection, and to assistance, that the state is required to provide to victims under domestic and international law.³ In many crucial ways such rights are necessary to enable victims to engage in the proceedings, and to exercise any active participation rights that they have. These other rights are not dealt with in detail in the report, but are considered briefly in Part Four, along with victims' right to reparation.

It is hoped that this report will provide a useful reference for actors in domestic systems engaged in wider discussions on victims' rights.

Methodology & acknowledgments

At the outset, 22 countries were chosen for detailed study, representing a range of legal traditions and geographical locations. A number of these countries were specifically included as they have experience of holding trials for international crimes. The countries included for study were: Argentina, Australia, Bangladesh, Brazil, Cambodia, Central African Republic ("CAR"), Chile, Colombia, Democratic Republic of the Congo ("DRC"), England and Wales, Denmark, France, Germany, Guatemala, India, Ireland, Italy, Kenya, Norway, Senegal, Uganda and the United States of America ("USA").

The research for this report was carried out in two stages. The first stage consisted of desk-based research of relevant national legal provisions and practice based on a series of questions relating to victims' rights in domestic proceedings. This research was carried out with the assistance of faculty and students of the Oxford Pro Bono Publico project (responsible for research on Australia, Brazil, England and Wales, Denmark, India, Ireland, Italy, Norway, and the USA⁴) and Bristol University Law School (responsible for research on Bangladesh, France, and the USA). Research on additional countries was carried out by Allan Ngari at ISS (Central African Republic, Democratic Republic of the Congo, Kenya and Uganda) and Beini Ye, Gaelle Carayon and Cristina Sánchez de la Cruz at REDRESS (Argentina, Cambodia, Colombia, Chile, Germany, Guatemala and Senegal).

The second stage involved detailed interviews with practitioners, including lawyers and prosecutors, and academics from a number of the countries studied to verify the information gathered through the desk-based research and to discuss difficulties and successes with implementation in practice, and how, if at all, such procedures had been used or adapted for trials of international crimes. Interviews were carried out by Cristina Sánchez de la Cruz at REDRESS.

³ *Ibid.*

⁴ The full results of this research are available online: Oxford Pro Bono Publico (2015), 'Victim Participation in Criminal Procedures: A report to assist REDRESS', April 2015 ("OPBP Report"), and related country reports (hereinafter referred to as "OPBP country report"), <http://ohrh.law.ox.ac.uk/opbp-makes-submissions-to-redress-on-victim-participation-in-criminal-procedures/>.

Special thanks must go to those who generously gave their time to be interviewed or otherwise provided further information including Mr. Gabriel Bicinskas, Coordinator of the Human Rights Observatory in the Municipality of Quilmes (Argentina); Mr. Juan Pablo Delgado Díaz, Lawyer, Masters in Criminal Law and Criminal Procedure, and member of the Legal Team of the *Agrupación de Familiares de Ejecutados Políticos* (AFEP) (Association of Relatives of Victims of Extrajudicial Killings) (Chile); Ms. Karinna Fernández Neira, Lawyer, LLM Candidate at the University of Essex, Associate Researcher in the Institute of the Americas, University College London (Chile); Mr. Rodrigo Fernández Moraga, Legal Advisor in the Special Unit on Criminal Responsibility of Adolescents and Violent Crimes of the Public Prosecutor's Office of Chile (Chile); Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute at Lewis & Clark Law School (USA); Mr. Alan Iud, Legal Team, *Abuelas de Plaza de Mayo* (Argentina), Ms. Sarah Kasande Kihika, Program Associate, International Centre for Transitional Justice (Uganda); Ms. Carmen López de Cáceres, Lawyer, Women's Rights Advocate and Founder of *Convergencia Cívico Política de Mujeres* (Women's Civil and Political Convergence) (Guatemala); Mr. Sylvain Makangu, Judicial Affairs Officer, Justice and Corrections Services, United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) (CAR and DRC); Ms. Maria McDonald, Barrister-at-Law and Founding Member of the Victims Rights Alliance (Ireland); Mr. Matthieu Mugisho, victims lawyer, CREDDHO (DRC); Ms. Vahida Nainar, Independent Researcher/Consultant, Human Rights & Women's Rights Advocate (India); Ms. Christel Nij Bijvank, Advisor to the Public Prosecutor for International Crimes Netherlands National Prosecutor's Office / Landelijk Parket Rotterdam (The Netherlands); Ms. Anita Nyanjong, Programme Manager, Access to Justice, Kenya Section of the International Commission of Jurists (Kenya); Ms. Libby Penman, Lawyer (Australia), Ms. Nívia Mônica da Silva, public prosecutor, Centre for Support of Human Rights, Minas Geiras (Brazil); Dr. Gregor Urbas, Associate Professor of Law, University of Canberra (Australia); and Mr. Luis Felipe Viveros Montoya, Senior Lawyer at *Centro Jurídico de Derechos Humanos de Antioquia* (Human Rights Legal Centre of Antioquia) (Colombia). Though experts were consulted on particular issues, the responsibility for the final information contained in the report remains with REDRESS and ISS.

This report, based on the research conducted, was written by Sarah Fulton, with the invaluable assistance of Cristina Sánchez de la Cruz and input from Beini Ye and Gaele Carayon of REDRESS. It was edited by Carla Ferstman and Lutz Oette of REDRESS. It draws on both the research conducted specifically for the project, on secondary sources including monographs and journal articles, and on previous reports produced by REDRESS.⁵

The research, limited to 22 countries, cannot be representative of the law and practice in all countries. Information from practice of international criminal trials conducted in a number of other jurisdictions has been included where particularly relevant, but overall the report provides only a snapshot of different approaches adopted across the particular countries studied in detail. In addition, although efforts have been taken to verify the desk-based research for a number of jurisdictions, it is possible that the law as written is applied differently in practice.

⁵ Including in particular REDRESS, TRIAL, FIDH, ECCHR (2014), 'Driving Forward Justice: Victims of Serious International Crimes in the EU', October 2014, and REDRESS (2012), 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future', October 2012, both available at: <http://www.redress.org/reports/reports>.

A number of other caveats apply. First, a number of jurisdictions considered in this report are federal jurisdictions, with both federal and state laws applicable to crimes depending on the jurisdiction the crime falls within in. Of the countries studied in detail, this is the case in Australia, Argentina, and the USA. Throughout the report, references to the laws of those countries are to the rules of federal criminal procedure, unless stated otherwise. Rights may be either more extensive, or less extensive, in particular states within those federal jurisdictions.⁶ In addition, unless otherwise stated, references to Argentina's laws are to the new National Criminal Procedure Code, which will be implemented in stages from March 2016.⁷

Second, in a number of common law jurisdictions, victims' rights have been introduced by Charters and Codes of Practice, which – while generally respected in practice – are not legally enforceable by the victims. Of the jurisdictions studied, this is the case in Australia, England and Wales, and Ireland.⁸ Throughout the report, the guarantees provided to victims by these charters and codes of practice will be referred to as “rights”, however their particular legal status should be borne in mind.

Third, it is likely that changes to the law and practice will take place in a number of European jurisdictions as a result of an important new European Union (EU) Victims' Directive, which has the force of law and must be implemented by member states by 16 November 2015.⁹ Of the countries studied, Ireland and Italy are notable for the provisions of their law requiring substantial amendment to bring them into line with the EU Victims' Directive.¹⁰ Given this, significant changes are likely to take place in the domestic law of these and other European countries in the near future. In Ireland, for example, as this report went to press the Criminal Justice (Victims of Crime) Bill was being examined in the Justice Committee, with a deadline for adoption by the parliament of November 2015.¹¹

Finally, a note on terminology. The term “victim” will be used throughout, regardless of whether the crime is proved (whether in criminal, civil or administrative proceedings). This follows the practice of domestic jurisdictions, which grant certain rights to individuals who allege they are victims of crime from the time they make a complaint and throughout criminal proceedings, on the basis that the “presumption of victimhood” is crucial for the recognition of victims' rights in the same way as the presumption of innocence is key to the protection of the rights of the accused”.¹² This is

⁶ For example, in the USA, different states have regulated the rights of victims to varying degrees, with California an example of a state affording them constitutional status.

⁷ See Law n. 27150, Ley de implementación de Código Procesal Penal de la Nación, 2015.

⁸ See, e.g., Australia: *Victims of Crime Act 1994* (ACT); *Victims Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act* (NT); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims' Charter Act 2006* (Vic); *Victims of Crime Act 1994* (WA); England and Wales: Ministry of Justice (2013), 'Code of Practice for Victims of Crime in England and Wales' ("England and Wales Code of Practice for Victims"), October 2013, <https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime>; Ireland: Victims of Crime Office (2010), 'Victims of Crime Charter and guide to the criminal justice system', <http://www.victimsofcrimeoffice.ie/en/vco/Entire%20Charter.pdf/Files/Entire%20Charter.pdf> ("Ireland Victims of Crime Charter").

⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, ("EU Victims' Directive"), Art. 11(1).

¹⁰ OPBP Report, para. 8. See further Maria McDonald et al (2014), 'The implementation and enforcement of the Victims' Rights Directive in Ireland: Ensuring the consistency of victims' rights for all victims of crime', Victims' Rights Alliance, <https://victimrightsalliance.com.files.wordpress.com/2014/10/vra-report.pdf>.

¹¹ Further information available at: http://www.justice.ie/en/JELR/Pages/Criminal_Justice_%28Victims_of_Crime%29_Bill.

¹² Anne-Marie De Brouwer and Mikaela Heikkilä (2013), 'Victim Issues: Participation, Protection, Reparation, and Assistance' in G Sluiter et al (eds), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, p. 1346, citing MS Groenhuijsen (1999), 'Victims' Rights in the Criminal Justice System: A Call for a More Comprehensive Implementation Theory', in JIM van Dijk et al (eds), *Caring for Crime Victims: Selected Proceedings of the 9th International Symposium on Victimology*, Monsey, NY: Criminal Justice Press.

also the approach taken by a number of international declarative and treaty texts which are discussed throughout this report. Post-conviction rights, including the right to reparation through criminal proceedings, rights to provide input on separate sentencing proceedings, and information on release, will only apply to individuals where the accused is found guilty of the crime alleged. In addition, a conscious decision has been taken to use the word “victim” rather than “survivor”. The term “survivor” is in many contexts more empowering for individuals. However, not all victims of crime survive, and “[m]any who survive in a literal sense continue to be victimized physically, psychologically, financially and socially”.¹³ While recognizing that “many victims are not the passive subjects of crime”, the term “victim” has a technical legal meaning in international law and in many domestic systems, and is therefore used throughout this report.¹⁴

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¹³ Saumya Uma (2013), ‘Integrating Victims’ Rights in the Indian Legal Framework’, in V Nainar and S Uma (eds), *Pursuing Elusive Justice: Mass crimes in India and the relevance of international standards*, Oxford: Oxford University Press, 245-286 at 248.

¹⁴ *Ibid.* See further Committee Against Torture, ‘General Comment No. 3: Implementation of Article 14 by States Parties’, UN Doc. CCPR/C/GC/3 (2012) (“CAT General Comment No. 3”), para. 3.

PART ONE: BACKGROUND

1. International crimes and victims' rights

There is international consensus that certain crimes – including genocide, crimes against humanity, war crimes, enforced disappearance and torture – constitute crimes under international law (hereinafter “international crimes”), and that perpetrators of these crimes must be held accountable, wherever they are committed.¹⁵ The past thirty years has seen increasing attention paid to prosecuting those bearing the greatest responsibility for these crimes, as required by both customary international law and treaties to which most states are party. High profile prosecutions have taken place at the international level – through special international tribunals established by the United Nations (UN), and through the first trials conducted by the International Criminal Court (ICC).

However, criminal accountability is also increasingly the focus of efforts at the national level. This has been accomplished through the creation of hybrid tribunals and special chambers established with international support in countries where mass violations have taken place,¹⁶ through the normal criminal justice system following periods of transition,¹⁷ and through the use of universal jurisdiction provisions to prosecute crimes committed in other countries.¹⁸ In Africa, special courts and chambers have been established recently in Senegal (to try former dictator Hissène Habré),¹⁹ the Central African Republic (CAR) (with jurisdiction to try international crimes of genocide, crimes against humanity and war crimes committed in the CAR or by a nation of the CAR)²⁰ and Uganda (with jurisdiction over international crimes (war crimes, crimes against humanity and genocide, as well as piracy, terrorism and trafficking)).²¹

National level prosecutions align with one of the foundational principles of the ICC – complementarity. This principle recognises that states bear the primary responsibility to investigate and prosecute international crimes, and that the ICC is a court of ‘last resort’ which can step in where national jurisdictions have failed to do so.²² While supporting

¹⁵ See further, REDRESS and FIDH (2010), ‘Extraterritorial Jurisdiction in the European Union: A study of the laws and practice in the 27 member states of the European Union’, December 2010, www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf, pp. 5-11.

¹⁶ Such as the Special Court for Sierra Leone (“SCSL”); the Special Panels for Serious Crimes in Timor Leste (“SPSC”); “Regulation 64” Panels in the Courts of Kosovo; the War Crimes Chamber in the State Court of Bosnia and Herzegovina and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). See further, Sarah Williams (2014), ‘Hybrid International Criminal Tribunals’, Oxford Bibliographies, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>.

¹⁷ Such as trials taking place in a number of Latin American countries following periods of dictatorship. See further, Francesca Lessa et al. (2014) ‘Overcoming Impunity: Pathways to Accountability in Latin America’, 8(1) IJTJ (2014) 75-98.

¹⁸ See further, REDRESS and FIDH (2010), Extraterritorial Jurisdiction in the European Union’.

¹⁹ See further, HRW (2015), ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’, 9 July 2015, <https://www.hrw.org/news/2015/07/09/qa-case-hissene-habre-extraordinary-african-chambers-senegal>; “The chambers were inaugurated by Senegal and the African Union in February 2013 to prosecute the “person or persons” most responsible for international crimes committed in Chad between 1982 and 1990, the period when Habré ruled Chad”, and the official website (in French), www.chambresafriaines.org/ <http://www.chambresafriaines.org>.

²⁰ *La Loi organique portant création, organisation et fonctionnement de la cour pénale spéciale* (Special Criminal Court law), was adopted by the transitional parliament of the CAR on 22 May 2015. Copy available at: <https://rongdhrca.wordpress.com/2015/07/22/loi-organique-n15-003-portant-creation-organisation-et-fonctionnement-de-la-cour-penale-speciale/>.

²¹ See further, Judiciary, Republic of Uganda, ‘International Crimes Division’, http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html.

²² See, e.g., Statute of the International Criminal Court, 2187 UNTS 90, *entered into force* 1 July 2002 (“Rome Statute”), Art. 17.

international mechanisms such as the ICC remains vital to ensuring that the most responsible individuals in any given situation under consideration are held accountable, national criminal justice systems remain the most proximate entities to ensure accountability for international crimes and justice for the victims of these crimes. National criminal justice systems have the potential to address criminality of the full range of actors from the planners and organisers of international crimes to the other perpetrators who carry them out. In this respect, national criminal justice systems can provide justice and reparation, at least as a matter of principle, to a larger number of victims than international mechanisms can.

International standards on victims' rights

Trials of international crimes wherever they take place demonstrate the close linkages between international criminal law, international humanitarian law, and international human rights law. Acts that are recognised as criminal in international law frequently also amount to serious human rights violations under treaties to which most states are party, including the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention for the Protection of All Persons from Enforced Disappearance (CED) and regional human rights treaties.²³

Under those human rights treaties, states have obligations to investigate, prosecute and punish perpetrators of serious human rights violations (which will typically amount to international crimes), and victims have the right to an effective judicial remedy, including reparation for the violations they have suffered.²⁴ For violations of the gravity of international crimes, reparation is generally understood to require restitution, compensation, rehabilitation, measures of satisfaction (acknowledging and apologising for what happened), and guarantees of non-repetition to prevent them from happening again.²⁵ Connected to these rights, victims and their families also have the right to know the truth about the abuses they have suffered, including the identity of perpetrators and the causes that gave rise to the violations.²⁶ At the same time, persons alleged to have committed such crimes hold fundamental rights to a fair and expeditious trial.²⁷

International standards have developed to give greater guidance as to what an effective remedy entails for victims, with recognition of the importance of the *process*, as well as the outcome of that process. In this, four key areas have been recognised as particularly important: i) being treated with dignity and respect; ii) having information about legal processes concerning them; iii) measures to ensure equal access to those processes; and iv) protection from reprisals. It is recognised that criminal justice processes should be empowering to victims; their voices should be heard in such processes – not only as

²³ Including the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. See further Human Rights Committee (UN HRC), 'General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18; Robert Cryer et al. (2013), *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge: Cambridge University Press, pp. 13-15.

²⁴ See, eg. ICCPR, Art. 2(3); CAT, Art. 14; CED, Art. 24. See also UN Basic Principles on the Right to Remedy and Reparation, paras. 12, 18-23; UN HRC, General Comment No. 31, para. 15; CAT General Comment No. 3, paras. 2, 6-18.

²⁵ *Ibid.*

²⁶ See, e.g., UN Human Rights Commission, Human Rights Resolution 9/11, 'Right to the truth', 24 September 2008, UN Doc. A/HRC/RES/9/11; IACtHR, *Velásquez Rodríguez v Honduras*, Judgment, Ser. C, No. 4, 29 July 1988; ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/2011, 24 July 2014, paras. 494-95.

²⁷ See further, Lorenzo Gradoni (2013) 'The Human Rights Dimension of International Criminal Procedure', in *International Criminal Procedure: Principles and Rules*, G Sluiter et al (eds), Oxford: Oxford University Press, pp. 74-80.

witnesses for the prosecution, but as rights holders with valid interests in the proceedings and their outcome.

In relation to active participation in criminal proceedings, international and regional human rights bodies have recognised that victims have certain rights to information and involvement throughout proceedings that concern them, and are therefore “start[ing] to find that the complete exclusion of victims from criminal proceedings [is] unacceptable”.²⁸

These standards have been reflected and developed in several instruments adopted by the UN General Assembly, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (“UN Victims’ Declaration”), and the UN 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 (“UN Basic Principles on Remedy and Reparation”).²⁹

The UN Victims’ Declaration, adopted in 1985, recognises, among other things, that victims should be heard in criminal proceedings, should have their privacy protected, should have access to proceedings for redress, and should be provided with financial, medical and other assistance.³⁰ The UN Basic Principles on Remedy and Reparation, adopted in 2005, recognise that victims of gross human rights violations and serious violations of international humanitarian law have certain basic rights, including that they “should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety”, and that they should have “equal access to an effective judicial remedy”, “adequate, effective and prompt reparation for harm suffered” and “access to relevant information concerning violations and reparation mechanisms”.³¹ Although not technically binding on states, both of these documents have been held to carry significant weight.³²

In line with these developments, states are progressively expanding victims’ rights to protection, assistance, information and participation across domestic legal systems from different legal traditions. At the European level, a significant step forward in this regard has been taken with the adoption of a new Directive on Victims’ Rights by the EU which (as discussed further throughout this report) provides concrete rights to victims in EU states to information, assistance and protection, and to review decisions not to prosecute crimes concerning them.³³

Active participation in criminal proceedings for international crimes

As will be explored further throughout this report, active participation of victims in criminal proceedings is commonplace in many domestic jurisdictions. However, until recently, international criminal courts and tribunals gave only sparse consideration to victims’ views and concerns and limited space for their active engagement with such

²⁸ De Brouwer and Heikkilä (2013), 'Victim Issues', p. 1339. In relation to specific rights see further the relevant sections on international standards in each chapter of Parts Two and Three of this report.

²⁹ See above n.1.

³⁰ UN Victims’ Declaration, Principles 4 and 6.

³¹ UN Basic Principles on Right to Remedy and Reparation, paras. 10 and 11.

³² See, e.g., ICC, *Thomas Lubanga Dyilo*, TC, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, para. 185; ECCC, Case No. 002/19-09-2007-ECCC/OIJ, Pre-Trial Chamber, Doc. No. D404/2/4, 24 June 2011, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, para. 32.

³³ EU Victims’ Directive, above n.9.

institutions beyond the role of prosecution witness. These judicial bodies were generally physically and conceptually removed from the communities most affected by the crimes, causing alienation and disillusionment and marginalising their relevance to the societies concerned.

In order to address these shortcomings, the ICC Statute and for instance, newer specialised criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL), have gone some distance to incorporate processes that positively engage with victims and to a certain extent, their communities.³⁴ For example, the ability of victims to participate in legal proceedings is a key feature of the Rome Statute. Article 68(3) of the Rome Statute allows victims to participate “at stages of the proceedings determined to be appropriate” when their “personal interests [...] are affected” in “a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

Specific characteristics of international crimes

International crimes are crimes recognised to be of extreme gravity. They are also often characterised by extreme levels of victimisation – crimes against humanity and genocide are always collective in nature and involve large numbers of victims, but war crimes, torture and enforced disappearances are also often committed on a wide scale against specific groups, and have direct impacts on the wider community.

International crimes therefore have grave consequences for victims. They tend to directly attack the personality and individuality of victims, disrespecting their very “human existence”.³⁵ The ordinary structures of society prove incapable of preventing the victimisation, which can lead to a dramatic loss of trust in institutions and the government.³⁶ As a result, “[t]he sentiment of shame arising out of the victimisation is higher compared to ordinary crimes as the disgrace and disrespect for the victim pertains to the entire environment of the victim”.³⁷ The intensity of trauma is often greater than that experienced in ordinary domestic crimes, and persistent trauma in the face of impunity “will inevitably lead to the internalization of the social stigma”.³⁸ These experiences can lead to long-term psychological consequences.³⁹

Studies of victimisation have shown that this impact on victims leads to a number of specific emotional, information and practical needs:

For international crimes, these needs can be more acute owing to the scale and gravity of the crimes committed. Emotional needs of victims may require medical rehabilitation to cope with their trauma, public acknowledgement of their suffering to counter impunity, as well as supportive treatment and protection measures in judicial proceedings to ensure they are not revictimised. Victims’ informational needs may include wanting to know why they were targeted, who is responsible, the wider context of violations, and how they can access redress. In terms of practical needs, victims may want to see those responsible to be identified, prosecuted and punished; they may need financial support, protection from further violence, as well as basic provision of necessities, given the scale of destruction cause by international crimes. Victims are not homogenous, nor do they speak with one voice. Their needs can

³⁴ For a survey of relevant practice see further, De Brouwer and Heikkilä (2013), ‘Victim Issues’, pp. 1299-1353. See further, Robert Cryer et al (2014), *Introduction to International Criminal Law and Procedure*, p. 484.

³⁵ Christoph Safferling (2012) *International Criminal Procedure*, Oxford: Oxford University Press, p. 166.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* See also, Yael Danieli, ‘Massive Trauma and the healing Role of Reparative Justice’ (2009) 22(5) *Journal of Traumatic Stress* 351.

change over time and can conflict with others, such as some preferring peace over accountability, or compensation instead of goods in kind. Crimes and violations impact individuals and groups differently, given their diverse social and cultural background and personal characteristics. Instead of being prescriptive to respond to these general needs, which would be challenging given their broad and at times conflicting nature, justice should be responsive, as far as possible, to victims, enabling them to access redress and present their interests in proceedings which determine outcomes that affect them.⁴⁰

Purposes of victim participation in criminal proceedings for international crimes

In light of the specific characteristics of international crimes, and of victims' recognised rights and needs under international law, active participation of victims in criminal proceedings for international crimes can be seen to serve a number of purposes.

Victims will certainly have much to contribute to the establishment of the truth, given their experience of the crimes.⁴¹ This can be seen to serve both utilitarian purposes for society as a whole, and to serve the victims' own right to the truth and to justice. This latter aspect has been recognised, for example, by the Colombian Supreme Court, which has repeatedly ruled that victims do not merely hold a right to pecuniary reparation, but an additional right of access to the truth and justice. Their intervention in criminal proceedings is necessary primarily so that the truth can be established and that justice can be delivered.⁴²

Handled appropriately, victims' participation in criminal trials may contribute to their sense of justice about the proceedings. A range of studies by psychologists and others has showed that "the manner in which a trial is conducted and the extent to which participants have a 'voice' in the proceedings are major influences – though not the only ones – on satisfaction that justice was done".⁴³

Victims' engagement in the criminal justice process may also be a way in which to formally recognise their suffering and to foster their agency and empowerment. Given the long-lasting psychosocial impacts on victims, this can be particularly important in relation to trials concerning international crimes, as is underscored in the ICC's revised strategy in relation to victims:

Victims' participation empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred. Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process. Moreover their participation

⁴⁰ Luke Moffett (2014), 'Realising Justice for Victims before the International Criminal Court', 6 *ICD Brief* 1, September 2015, p. 2.

⁴¹ Claude Jorda & Jérôme de Hemptinne (2002), 'The Status and Role of the Victim', in A Cassese, P Gaeta, and J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, p. 1388. See also, ICC, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *Lubanga* (ICC-01/04-01/06-462), 22 Sept. 2006, p. 5, and Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG), 22 Jan. 2010, paras. 60-61.

⁴² See, e.g., judgments C-228/2002, C-805/2002 and C-875-2002. See further, Eduardo Matyas Camargo (2012), 'Derechos de las Víctimas en el Proceso Penal Colombiano' (2012) 12 *Revista Republicana* 17, pp. 17, 18, 20; O Huertas Díaz et al (2011), 'Los Derechos de la Víctima del Delito en la Ley 906 de 2004: Análisis de su Reconocimiento y Evolución Jurisprudencial', *Verba Juris*, 165-183; Mateo Mejía Gallego (2014), 'La participación de las víctimas en el sistema penal acusatorio colombiano, una perspectiva desde la jurisprudencia de la corte constitucional', <http://bit.ly/1M3MKmF>.

⁴³ Eric Stover et al. (2011), 'Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia', 93 (882) *International Review of the Red Cross* 503, p. 531; Yael Danieli, 'Massive Trauma and the healing Role of Reparative Justice' (2009) 22(5) *Journal of Traumatic Stress* 351.

in the justice process contributes to closing the impunity gap and is one step in the process of healing for individuals and societies.⁴⁴

As well as serving these rehabilitative ends for the victims themselves, participatory rights may “reflect the more principled idea that those victimized should not be excluded from the legal process in which their victimization is addressed”.⁴⁵

Challenges of participation

However, victims’ experiences of processes designed to be participatory in international criminal proceedings have been mixed,⁴⁶ and the views of lawyers, academics and staff of international criminal courts and tribunals about the merits of such processes have been variable. Some hold steadfast to the view that strengthening victims’ role in criminal proceedings taints the rights of the defence (explored further in Part Two), whereas others point to the procedural difficulties of such involvement, referring mainly to the potential for delays, escalation of costs and other inefficiencies.⁴⁷ To date, however, “the participatory rights of victims have not been found per se to violate the fair trial rights of the accused”.⁴⁸

Where there are large numbers of victims this can provide significant practical challenges, particularly in registering and vetting victim applications, providing victims with updates about the procedure, and meaningfully taking account of victims’ views, whether directly or through systems of common legal representation.⁴⁹ In addition, “[t]he interests and needs of different victims and within victim groups may also differ and even be in conflict with each other”.⁵⁰ Where workable procedures are not in place, victims’ participation may not be meaningful, leading to secondary victimisation rather than empowerment when their expectations cannot be met.⁵¹

On the other hand, issues around the number of participants and consequent inefficiencies that arise at the international level, while certainly very important, should not be overstated at the domestic level. Although many international crimes do involve large numbers of victims, trials at the domestic level often involve lower level perpetrators where the numbers of victims may be more easily managed. In addition, as discussed further in the report, where there are large numbers of victims, victims often organically group themselves with common legal representation in criminal trials in which they are involved, and where this does not happen systems of collective action or common legal representation can be used or introduced to facilitate proceedings.

⁴⁴ ICC Revised Strategy in Relation to Victims, 28 May 2012, on file with REDRESS.

⁴⁵ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1343.

⁴⁶ See, Jonathan Doak (2011), ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’, 11 *International Criminal Law Review* 263–298; Madhev Mohan (2009), ‘The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal’, 9 *International Criminal Law Review* 733-775; Stover et al. (2011), ‘Confronting Duch’, pp. 540-546.

⁴⁷ Yet note the comments of Judge Fulford, the Presiding Judge in the ICC *Lubanga* trial proceedings, who has indicated that ‘the experience of Trial Chamber 1 has been that the involvement of victims has not greatly added to the length of the case. Their submissions and questioning have been focused, succinct and seemingly relevant to the issues in the case. Whether it is said their role has undermined the fairness of the trial will be revealed in closing submissions, but purely from the point of view of time, they have not significantly extended the proceedings.’ Judge Sir Adrian Fulford, ‘The Reflections of a Trial Judge’, (2011) *Criminal Law Forum* 22:215–223, p. 222.

⁴⁸ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1340.

⁴⁹ See further De Brouwer and Heikkilä (2013), ‘Victim Issues’, pp. 1346-1347.

⁵⁰ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1347.

⁵¹ Stover et al. (2011), ‘Confronting Duch’, p. 542; De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1347.

At the international level, another perceived challenge of participation is the selectivity of proceedings: where only those with the highest responsibility are prosecuted, and only certain crimes are specifically addressed, many victims of comparable crimes will be excluded from the proceedings.⁵² This is not such an issue at the domestic level, where states have the responsibility to investigate all international crimes, and try all those against whom there is sufficient evidence.

As will become clear throughout this report, victim participation in criminal proceedings is traditionally central to many domestic legal systems, and is increasing even in those jurisdictions where it was previously not common. On the other hand, trials of international crimes provide specific challenges for victim participation. This report hopes to ensure that developments in international human rights law and international criminal law in this regard are fed back to domestic criminal trials for international crimes, and that informed decisions can be made – based on successful examples of both international and domestic practice – to enable the greatest degree of victim participation possible in such proceedings.

2. A note on systems of criminal procedure

This report considers jurisdictions from both the common law and civil law traditions. There are important differences in the way common law and civil law systems are structured, though these are not uncontested, and both systems are constantly evolving to incorporate attributes that might not be traditionally associated with them.⁵³

Specifically, in relation to criminal justice, common law systems have traditionally adopted an **adversarial system**: characterised as a two-sided contest between the state and the defendant, with the judge (and usually jury, at least for serious crimes) playing the role of neutral “referee”.⁵⁴ Police tend to carry out the investigation, and while prosecutors may suggest lines of inquiry, they do not usually have their own investigative powers (though this is not the case in all jurisdictions).⁵⁵ The judge does not take part in the investigation except where coercive measures are needed in the course of the investigation, and does not exercise quality control over the evidence gathered.⁵⁶ The focus of the trial is whether the state can prove the defendant’s guilt beyond a reasonable doubt, on the basis of evidence collected and presented by the parties and issues defined by them.⁵⁷ That evidence is presented and tested at trial through oral testimony subject to cross-examination. Sentencing is normally separated from the inquiry into whether a person is guilty of the crime alleged, and sentencing procedures only take place once a guilty verdict has been handed down. Traditional conceptions of adversarial criminal justice left little room for victim participation except as a witness for the prosecution’s case. As this report will show, however, that is now changing.

⁵² See, e.g., Safferling (2012), *International Criminal Procedure*, p. 177.

⁵³ John D Jackson and Sarah J Summers (2012), *The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions*, Cambridge: Cambridge University Press, p. 9; David Baragwanath (2014), ‘The Interpretative Challenges of International Adjudication across the Common Law/Civil Law Divide’, 3 *Cambridge Journal of International and Comparative Law* 450, 465-466.

⁵⁴ William T Pizzi and Walter Perron (1996), ‘Crime Victims in German Courtrooms’, 32 *Stan J Int’l Law* 31 at 51.

⁵⁵ Karel de Meester et al. (2013), ‘Investigation, Coercive Measures, Arrest, and Surrender’, in G Sluiter et al (eds), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, pp. 207-208.

⁵⁶ *Ibid.*, p. 207.

⁵⁷ Pizzi and Perron (1996), ‘Crime Victims in German Courtrooms’, p. 51.

On the other hand, civil law countries traditionally adopted an **inquisitorial system** of criminal procedure, which is generally seen to be “characterized by an active role for the fact-finder, by decisions based on full judicial inquiry and by truth-seeking rather than proof-making”.⁵⁸ An inquisitorial procedure will usually involve an extensive pre-trial investigation, carried out by (the police under the guidance of) a prosecutor (with guarantees of judicial independence) or investigative judge.⁵⁹ Prosecutors and investigative judges are therefore actively engaged in gathering both exculpatory and incriminatory evidence, while the role of the defence during an investigation is limited to protecting the accused person’s interests (including by suggesting certain actions are taken) and ensuring that the investigation is carried out in accordance with the rules.⁶⁰ Given the more central role of professional judges, rules of evidence are much less restrictive than those in common law systems, as the system assumes that “factfinders will be able to separate the more probative from the irrelevant evidence”.⁶¹ Judges are likely to play a much more active role in the trial, including by questioning witnesses, and must give reasoned decisions for their verdict.⁶² Inquisitorial systems have tended to provide the victim with the opportunity to take a more prominent role in both the investigation and trial, through specific procedures by which the victim may seek statuses such as “civil party” (CAR, DRC, France) or “*Nebenkläger*” (Germany) and play an active part in the proceedings.

A number of civil law countries have a more **hybrid system**, however. This is the case, for example, in the Nordic countries – including (for the purposes of this report) Denmark and Norway – where “investigations are primarily inquisitorial, but are aimed towards a trial that is adversarial in nature”.⁶³ Reforms were also introduced to provide for aspects of an adversarial criminal procedure in Italy, incorporating “adversarial procedures into an inquisitorial foundation”.⁶⁴ Reforms to introduce adversarial criminal procedures have also recently been undertaken in a number of Latin American countries that experienced periods of autocratic rule, characterised by politically controlled judiciaries. Of the countries surveyed, these include Guatemala (1992), Chile (2000), Colombia (2004), and Argentina (2014).⁶⁵ Many of these jurisdictions, informed by their existing legal culture and previous procedures, have to a large extent preserved a greater role for victims in the investigation and trial within the adversarial procedure both in legislation (with the retention of victim party statuses such as civil party, “*querellante*” (Argentina, Chile, Colombia, Guatemala, Italy), prosecution assistant (“*assistente de acusação*”) (Brazil)) and through subsequent judicial interpretation.

The countries surveyed may be broken down into the three broad categories as follows:

⁵⁸ Arie Freiberg (2011), ‘Post-Adversarial and Post Inquisitorial Justice: Transcending Traditional Penological Paradigms’, 8 *European Journal of Criminology* 82-101.

⁵⁹ De Meester et al (2012), ‘Investigation’, p. 206.

⁶⁰ *Ibid.*

⁶¹ Pizzi and Perron (1996), ‘Crime Victims in German Courtrooms’, p. 43.

⁶² John Jackson and Sarah Summers (2013), ‘Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence’, 2 *Criminal Law Review* 114 at 125.

⁶³ De Meester et al (2012), ‘Investigation’, 207.

⁶⁴ Julia Grace Mirabella (2012), ‘Scales of Justice: Assessing Italian Criminal Procedure through the Amanda Knox Trial’, 30 *Boston University International Law Journal* 29 at 232. See also Giulio Illuminati (2005), ‘The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)’, 4 *Washington University Global Studies Law Review* 367-81.

⁶⁵ See eg. Andrés Torres (2007), ‘From Inquisitorial to Accusatory: Colombia and Guatemala’s Legal Transition’, Law and Justice in the Americas Working Paper Series. Paper 4, <http://lawdigitalcommons.bc.edu/liawps/4>; Daniel Pulecio-Boek (2014), ‘The Genealogy of Prosecutorial Discretion in Latin America: A comparative and historical analysis of the adversarial reforms in the region’, 13 *Richmond Journal of Global Law and Business* 67.

Adversarial	Inquisitorial	Hybrid
Australia Bangladesh England & Wales India Ireland Kenya Uganda USA	Cambodia CAR DRC France Germany Senegal	Argentina Brazil Chile Colombia Denmark Guatemala Italy Norway

While general patterns may be observed, within these categories jurisdictions are by no means identical. India stands out as a common law jurisdiction that has abolished juries, while in other countries juries may be required only for the most serious offences. In France and the DRC victims may initiate proceedings before an investigative judge (though in some countries this right depends on the jurisdictional basis for prosecution), whereas in Germany victims of many serious crimes may only join proceedings brought by a public prosecutor. In Argentina the victim may join a public prosecution as a subsidiary prosecutor with extensive rights, whereas in Denmark the victim has much more limited rights at trial. However, there remain sufficient bases for a parallel analysis of jurisdictions from these three different broad categories under a number of the headings that follow, to show that in many cases the rights and interests of victims have been and can be accommodated across a range of legal traditions.

PART TWO: THE “VICTIM” IN CRIMINAL PROCEEDINGS

1. Key issues and relevant international standards

Any discussion of victims’ rights must be informed by a clear understanding of who is entitled to those rights – that is, who is considered a victim? It is clear that a person directly injured by a crime would ordinarily be considered a victim, but does this extend to other people harmed as a result of the crime (such as witnesses or family members)? Can a legal entity, such as a company, be recognised as a victim? Can a collective suffering a collective violation play the role of a victim, entitled to specific rights? Where there are large numbers of victims who is entitled to represent their views?

International standards providing guidance as to minimum rights for victims of crime define victims by reference to harm caused by the crime, but do not necessarily provide clear answers to all of these questions. The UN Victims’ Declaration defines victims as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws ...”.⁶⁶

This definition was adopted and expanded on in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (“ACmHPR Fair Trial Principles”), adopted by the African Commission in 2001:

[P]ersons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws or that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress.⁶⁷

The same principles were then reflected, in the context of gross violations of human rights and serious violations of international humanitarian law, in the UN Basic Principles on Remedy and Reparation. This provides the following definition:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁶⁸

At the international level, therefore, harm is a guiding principle, and there is recognition that harm may be suffered collectively, and may be suffered by the family members of the person initially victimised. This is consistent with jurisprudence of international and regional human rights bodies.⁶⁹

⁶⁶ UN Victims’ Declaration, para. 1.

⁶⁷ ACmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, Doc. OC/OS(XXX)247 (2001), Section S(n) (“ACmHPR Fair Trial Principles”).

⁶⁸ UN Basic Principles on Remedy and Reparation, par. 1.

⁶⁹ See, e.g., CAT General Comment No. 3, para. 3. On the approach of the Inter-American Court of Human Rights on this issue see Clara Sandoval-Villalba (2009), ‘The Concepts of ‘Injured Party’ and ‘Victim’ of Gross Human Rights Violations in the

Trials for international crimes will often involve large numbers of victims, and the dividing line between who is a victim with rights in the procedure, with rights to support, and with rights to reparation, will not necessarily be self-evident. Where there is the opportunity to craft specific procedures for domestic trials involving international crimes, it is important that specific consideration is given to who will be held to have rights, and to what extent. In this, the UN Basic Principles on Remedy and Reparation sets out the overall framework of rights, and international and comparative practice can play a useful guide as to how those rights are fulfilled in practice.

As discussed in the previous section, international human rights law increasingly recognises broad principles that apply to “victims” generally, including the right to protection, to be treated with dignity, to information about processes that concern them, and to reparation. However, within those overarching principles, the way in which specific rights apply in domestic criminal proceedings may depend on the person’s proximity to the crime, so that those directly harmed are given one set of rights, and family members or witnesses another. In addition, victims may be given the option to take up a particular status in criminal proceedings, which grants them specific participatory rights in the proceedings that they would otherwise not have had. The overarching term “victim” may therefore be a general category, with specific rights granted to subsets of victims within that category.

2. General understanding of victim: correlation with harm or interest protected

(i) Domestic practice

In different jurisdictions, this notion of a “victim” as understood in international human rights law may be captured in a range of technical terms, but the starting point is usually “victim” and/or “injured party”. Falling within the category of “victim” and/or “injured party” may then give rise to certain rights, and the ability to be accorded certain technical statuses within proceedings, including that of a “civil party”, or an “auxiliary prosecutor”, which may in turn lead to certain additional rights (as briefly discussed further below).

Most of the countries surveyed included a definition of “victim” or “injured party” in their statutes relating to criminal procedure and the administration of justice, though in a small number of countries the terms are either not defined,⁷⁰ are defined only for certain limited purposes,⁷¹ or have multiple different definitions across states within federal countries and for different purposes.⁷² Whether defined or developed through

Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations’, in C Ferstman et al (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Leiden: Martinus Nijhoff, 243-282.

⁷⁰ E.g., Danish legislation does not contain a definition of the word victim (using word *forurettede*, roughly translated as “injured”), although the Administration of Justice Act refers to “the victim” in several articles. In practice it has been interpreted narrowly: see further Commission Report 1485/2006 (Betænkning om forurettedes processuelle retsstilling i straffesager, betænkning 1485/2006), p. 17 (cited in OPBP Country Report: Denmark, para. 8). See also Norway (OPBP Country Report: Norway, para. 6).

⁷¹ For example, in Australia, no state criminal code contains an all-encompassing general definition, though some criminal codes have limited definitions for specific crimes, and definitions exist for the purposes of statutes providing victims the right to provide a victim impact statement for sentencing (see, e.g., *Sentencing Act 1991* (Vic), s 3 (definition: victim)).

⁷² For example Australia: Standing Committee on Law and Justice, *National Framework of Rights and Services for Victims of Crime – 2013-2016* (2013), pp. 2-3.

interpretation, there are similarities in the approaches adopted across a range of countries for both “victims” and – where applicable – “injured parties”.

In all of the countries surveyed a person who suffered harm, loss or injury is granted certain rights – whether as a “victim” or an “injured party”.

In many of the jurisdictions surveyed, “victim” is defined or interpreted by reference to some form of harm, loss or injury caused by the crime. Examples include:

- **England and Wales:** “a “victim” is ... a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct ...”⁷³
- **Guatemala:** “the person affected by the commission of the crime”⁷⁴
- **India:** “a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged...”⁷⁵
- **Kenya:** “‘victim’ means any natural person who suffers injury, loss or damage as a result of an offence”.⁷⁶

This is also the approach followed by the **EU Victims’ Directive**, which must be implemented in all member states by November 2015, and which defines a victim as a “natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by actions or omissions that are in violation of the criminal law of a Member State”.⁷⁷

In other cases, although the word “victim” is not used, rights are granted to those who have suffered loss as “civil parties” to participate in criminal proceedings. In Senegal, for example, a civil party is a person who has personally suffered harm as a direct result of an offence.⁷⁸ The harm may be physical, mental, moral or material.⁷⁹

In some countries the notion of “victim” is specifically distinguished from that of an injured party or civil party, although both hold rights. In such jurisdictions, the “victim” refers to individual/s whose interests are protected by the prohibition of the conduct (such as a property owner whose rights are protected by the prohibition of trespass).⁸⁰ In **Italy**, for example, the “victim” is defined as the holder of the interest that is sought to be protected by the law, and is distinguished from an “injured party” who suffers harm as a result of the commission of the crime.⁸¹ Although the two categories will often overlap and both refer to “victims” with rights in the wider sense considered in this report, the distinction is important as the different notions lead to different rights – only an “injured party” may bring a civil claim against the accused within the criminal proceedings,⁸² while the “victim” enjoys certain active and other rights.⁸³

⁷³ England and Wales Code of Practice for Victims, above n.8, Introduction, s. 4.

⁷⁴ Guatemala CCP, Art. 117.

⁷⁵ India CCP, s. 2(wa).

⁷⁶ Kenya Victim Protection Act 2014, s 2.

⁷⁷ EU Victims’ Directive, Art. 2(a)(1).

⁷⁸ Senegal CCP, Art. 2: “L’action civile en réparation de dommage causé par toute infraction appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction”.

⁷⁹ Senegal CCP, Art. 3; Chambre criminelle, 7 septembre 1999 (Bull. n° 179),

https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_1999_91/jurisprudence_cour_95/droit_penal_p_ rocedure_penale_5811.html.

⁸⁰ This is the case, e.g., in Germany, although this view is contested among scholars, see Löwe et al., *Die Strafprozessordnung und das Gerichtsverfassungsgesetz*, 25th edition, 2001, §406d, par. 6.

⁸¹ Cass. Sez. Un. 21.4.1979, Pelosi; Cass. Sez. Un. 25.10.2007, Pasquini; Gaito, 477; OPBP Country Report: Italy, para. 2.

⁸² Italy CCP, Art. 76.

⁸³ OPBP Country Report: Italy, para. 2. See further Italy CCP, Art. 90.

Does harm need to be caused directly?

A number of jurisdictions expressly limit the relevant harm for the purpose of being determined a “victim” to that caused “directly” by a crime. The **EU Victims’ Directive**, for example, defines victims by reference to harm or loss “directly caused by actions or omissions”.⁸⁴ The law in **England and Wales** also expressly limits the definition of victims to those whose harm was “directly caused by criminal conduct”,⁸⁵ as do a number of the state laws in **Australia**,⁸⁶ and the law in **Senegal**.⁸⁷ **USA** law requires that the harm be both “direct” and “proximate” before a person is recognised as a victim.⁸⁸

Other jurisdictions grant certain rights to individuals who were indirectly affected. In **Uganda**, for example, a victim may provide a victim impact statement for sentencing proceedings – in this context, a victim is defined as a “person directly or indirectly affected by the commission of the offence or omission of a lawful duty”.⁸⁹ In the **DRC**, both direct and indirect victims are considered eligible to participate in proceedings and to receive support.⁹⁰

The distinctions between direct and indirect causation are fine and often confusing both within and between jurisdictions.⁹¹ In **USA** law, for example, “[d]irect causation embodies the concept of “but for” cause; it asks whether but for this conduct, would the harm have occurred?”.⁹² Under the CRVA, “a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission”.⁹³

In **England and Wales**, however, the test for whether an individual comes within the definition of victim is whether they have “directly experienced” criminal conduct. As the Code of Practice for Victims provides:

You are **entitled** to receive services under this Code if you have made an allegation that you have **directly** experienced criminal conduct to the police in England and Wales, or had an allegation made on your behalf. This will include, for example, where a person has been subjected to hate crime (see glossary). If you have witnessed criminal conduct, but are not a victim, you can access services under the Witness Charter, rather than under this Code.⁹⁴

⁸⁴ EU Victims’ Directive, Art. 2(1)(a) (emphasis added).

⁸⁵ England and Wales Code of Practice for Victims, Introduction, s 4.

⁸⁶ Victims Rights and Support Act 2013 (NSW), s. 5; Victims of Crime Assistance Act 2009 (Qld), s. 5 ; Victims’ Charter Act 2006 (Vic), s. 3(1) ; Victims of Crime Act 1994 (WA), s. 2.

⁸⁷ Senegal CCP, Art. 2: “L’action civile en réparation de dommage causé par toute infraction appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction”.

⁸⁸ US CRVA. Here “proximately” narrows the definition of “directly”: Charles Doyle (2012), ‘Crime Victims’ Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771’, 24 April 2012, CRS, 7.

⁸⁹ Practice Directions, s. 4.

⁹⁰ Information from DRC lawyer, 7 August 2015.

⁹¹ See, e.g., Victor Knapp (1972), ‘Causation and Remoteness of Damage’ in *International Encyclopedia of Comparative Law*, Leiden : Martinus Nijhoff, pp. 40-45. According to William Lloyd Prosser (in relation to Anglo-American law), there “is perhaps nothing in the entire field of the law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion” than legal causation issues, “despite the manifold attempts which have been made to clarify the subject”: William Lloyd Prosser et al. (eds), (1984), *Prosser and Keeton on Torts*, 5th ed., West, p. 263.

⁹² National Crime Victim Institute (NCVI), ‘Fundamentals Of Victims’ Rights: An Overview of the Legal Definition of Crime “Victim” in the United States’, November 2011, <https://law.lclark.edu/live/files/11824-fundamentals-of-victims-rights-an-overview-of-the>, p. 2, citing *In re Fisher*, 640 F.3d 645, 648, reconsideration denied, 649 F.3d 401 (5th Cir. 2011). Contrast, eg. the interpretation of the International Committee of the Red Cross (ICRC), in relation to the phrase “direct participation in hostilities”. In that context, direct causation is understood as “meaning that the harm in question must be brought about in one causal step”: Nils Melzer (2009), ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, ICRC, <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, p. 53.

⁹³ *In re Fisher*, 640 F.3d 645, 648.

⁹⁴ England and Wales Code of Practice for Victims, Introduction, s 13.

The Delhi High Court has recently considered the definition of “victim” in **India’s** Criminal Procedure Code giving rise to active participation rights, and has concluded that it must be interpreted broadly.⁹⁵ According to the Court the harm required to be suffered by a “victim” under the Indian statute is not limited to “direct” injury, although “there has to be a relationship between the injury and the person who suffered it, i.e. the ‘victim’”, in other words “proximity”, assessed on “a case to case basis”.⁹⁶ In the context of a case where the immediate victim was deceased, the Court held that close family members of the immediate victim who suffered psychological harm fall within the definition of “victim”: “[i]f ‘injury’ denotes harm caused to one’s mind, then a ‘victim’ by this definition, must encompass not only the ‘victim’ in the natural and ordinary sense of the term, but also those near and dear to him or her, because they experience ‘harm to the mind’ or mental anguish by virtue of the harm to ‘body, mind, reputation or property’ suffered by a loved one”.⁹⁷

In a number of civil law countries, the issue may be decided by the distinction drawn (discussed above) between the person whose rights are sought to be protected by the criminal prohibition (the primary “victim”) and injured parties who suffer loss. In **Germany**, for example, individuals who are potentially entitled to claim pecuniary and/or non-pecuniary damages, including from indirect harm, are considered to be injured parties, while “victims” in the general sense (with other overlapping rights) are those whose rights are protected by the prohibition of the alleged criminal conduct.⁹⁸

In essence, there are some limits drawn to how closely affected the individual needs to have been by the crime as to whether individuals are afforded different types of status of “victim” in proceedings. Those limits are often closely informed by domestic jurisprudence and legal traditions, and different degrees of proximity to the crime may give rise to different rights.

Extension to immediate family members of a victim killed as a result of a crime

Most jurisdictions surveyed extend the rights, or some of the rights, available to victims to immediate family members (and in some cases successors), where a person has died as a result of the crime. This is the case, for example, in **Argentina**;⁹⁹ **Australia** (NSW, Queensland, South Australia¹⁰⁰); **Chile**;¹⁰¹ **DRC**;¹⁰² **England and Wales**;¹⁰³ **Germany**;¹⁰⁴ **India**;¹⁰⁵ **Ireland**;¹⁰⁶ **Italy**;¹⁰⁷ and the **USA**.¹⁰⁸ It is also the position under the **EU Victims’ Directive**.¹⁰⁹

⁹⁵ *Ram Phal & Ors. v State*, Delhi High Court, CRL.A 1415/2012, 28 May 2015 (available at:

<http://indiankanoon.org/doc/121117145/>).

⁹⁶ *Ibid.*, para. 29.

⁹⁷ *Ibid.*, para. 31.

⁹⁸ Although this view is contested among scholars, see Lowe et al. (2001), *Die Strafprozessordnung und das Gerichtsverfassungsgesetz*, 25th ed., par. 6.

⁹⁹ Argentina CCP, Art. 78.a, 78.b.

¹⁰⁰ Victims Rights and Support Act 2013 (NSW), s 21; Victims of Crime Assistance Act 2009 (Qld), s 26(5); Victims of Crime Act 2001 (SA), s 4;

¹⁰¹ Chile CCP, Art. 108.

¹⁰² Information from DRC lawyer, 7 August 2015.

¹⁰³ England and Wales Code of Practice for Victims, Introduction, s 4.

¹⁰⁴ Germany CCP No. 1, art. 395(2).

¹⁰⁵ India CCP 1973, s 2(wa).

¹⁰⁶ Interview with Irish lawyer, 5 August 2015.

¹⁰⁷ Italy CCP, Art. 90(3).

¹⁰⁸ Interview with US lawyer, 2 July 2015.

¹⁰⁹ EU Victims’ Directive, Arts. 2(1)(a), 2(1)(b).

Determining who represents those interests depends on national law. The types of family members that the rights extend to varies across jurisdictions, ranging from parents, legal guardians, step-parents, spouses, cohabiting partners, children, siblings, and grandparents.¹¹⁰ In the Australian state of **New South Wales**, for example, the legislation provides that where there is more than one member of the person's immediate family, "members of the immediate family may nominate a representative for the purposes of the Charter of Victims Rights".¹¹¹ In other jurisdictions, including **Chile**, a list of immediate family members is set out in order of priority.¹¹² In **DRC**, if there is any disagreement between family members, the dispute is resolved by an administrative body (the family council), which appoints a "liquidator" who represents the deceased in all legal affairs.¹¹³

Extension of rights to other family members

In some jurisdictions rights or assistance such as financial assistance or counselling accorded to victims are also explicitly stated to extend to their family members.

- Assistance extends to family members regardless of any harm suffered: e.g. **Australia** (Northern Territory).¹¹⁴
- Rights or assistance extend to certain family members if they suffer harm as a result of the crime: e.g. **Australia** (New South Wales, Queensland, South Australia, Northern Territory - psychological harm caused to parents by becoming aware of a crime against a child under 18);¹¹⁵ **Colombia**;¹¹⁶ and **Guatemala**.¹¹⁷

¹¹⁰ Argentina CCP, Arts. 78.1, 78.b (spouse, partner, heirs, legal guardians); Guatemala CCP, arts 78.a, 78.b (spouse, partner, heirs, legal guardians); Colombia CCP, Art. 132 read with Judgment C-516/07; Guatemala CCP, Art. 117.2 (spouse, parents, children, person that lives together with the victim at the time of the commission of the crime); Chile CCP, Art. 108 (spouse, children, ascendants, siblings, adopted children, adoptive parents); England and Wales Code of Practice for Victims, Introduction, s. 4 (spouse, partner, relatives in direct line, siblings and dependants of the victim); Germany CCP (No. 1), art. 395(2) (children, parents, siblings, spouse or civil partner); Italy CCP, Art. 90(3) (close relatives); Interview with US lawyer, 2 July 2015 in relation to US national criminal proceedings; EU Victims' Directive, Arts. 2(1)(a), 2(1)(b) (spouse, person living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, relatives in direct line, siblings and dependants of the victim); Australia: Victims of Crime Assistance Act (NT), ss. 13, 15 (spouse, de facto partner, parent, step-parent, guardian, child, stepchild, dependent person); Victims' Rights and Support Act 2013 (NSW), s 22 (spouse, de facto partner, parent, guardian, step-parent, child, step-child, sibling, step-sibling); Victim of Crime Assistance Act 2009 (Qld), s 26 (close family member, or dependant); Victims of Crime Act 2001 (SA), s 4 (spouse or domestic partner, parent, grandparent, child, grandchild, sibling).

¹¹¹ Victims Rights and Support Act 2013 (NSW), s 5.

¹¹² Chile CCP, Art. 108.

¹¹³ Information from DRC lawyer, 7 August 2015.

¹¹⁴ Victims of Crime Assistance Act (NT), ss. 13, 15.

¹¹⁵ Victims Rights and Support Act 2013 (NSW), s 22; Victims of Crime Assistance Act 2009 (Qld), s 26; Victims of Crime Act 2001 (SA), s 4; Victims of Crime Assistance Act (NT), s 13; (injury to parent/guardian of a child victim by becoming aware of the harm). Note that in Queensland these are stated to be "Principles" rather than enforceable rights: s 7.

¹¹⁶ Colombia CCP, Art. 132, read with Judgment C-516/07.

¹¹⁷ Guatemala CCP, Art. 117.2.

In the **Australian State of New South Wales**, the Victims' Rights and Support Act 2013 provides certain rights to victims through a "Charter of Rights of Victims of Crime", and financial assistance to that person and others harmed.

For the purposes of the rights set out in the "Victims Charter", "**victim of crime**" is defined as a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence. However, if a person dies as a result of the act concerned, a member of the person's immediate family is also considered a "victim of crime" for the purposes of the Charter. If there is more than one member of the person's immediate family, members of the immediate family may nominate a representative for the purposes of the Charter (Section 5). Under the Victims' Charter, the victim of crime has among other things the right to receive certain information and support, to protection, to make certain submissions, and to financial assistance (Section 6).

The Act also provides for support to victims. In relation to this support, it provides for assistance to the following categories of individual:

Primary Victim – a person who is injured or dies as a direct result of an act of violence committed against him or her, and any person who is injured or dies as a direct result of trying to intervene to arrest the alleged perpetrator, prevent the act of violence or aid the victim (Section 20).

Secondary victim – a person who is present at the scene of an act of violence and who is injured as a direct result of witnessing that act or a parent or guardian of a primary victim who was under 18 years old, where the parent or guardian is injured as a direct result of subsequently becoming aware of an act of violence (Section 21).

Family victim – a person who was a member of the immediate family of a primary victim who died as a direct result of the act. Member of the immediate family is defined to include the victim's spouse, de facto partner who has cohabited with the victim for at least two years, parent, guardian or step-parent of the victim, child or stepchild of the victim, or another child of whom the victim is the guardian, or a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim (Section 22).

Each category of victim is provided support under different schemes set out in the Act. Primary victims and family victims are entitled to counselling and financial assistance, while secondary victims are entitled to counselling. Similar schemes exist in other States of Australia.

Individuals who suffer harm by intervening or witnessing the crime

In a number of **Australian states**, the definition of "victim" is also specifically worded to include those who suffer harm in intervening to prevent the crime or assist the victim,¹¹⁸ or by witnessing the crime.¹¹⁹ In other countries, such as **England and Wales**, witnesses are not covered by victims' provisions, but rather by a separate Witness' Charter.¹²⁰

¹¹⁸ eg. Victims Rights and Support Act 2013 (NSW), s 20; Victims of Crime Assistance Act (NT), s 9.

¹¹⁹ Eg. Victims Rights and Support Act 2013 (NSW), s 22; Victims of Crime Assistance Act 2009 (Qld), s 26; Victims of Crime Act 2001 (SA), s 4; Victims of Crime Assistance Act (NT), s 13.

¹²⁰ England and Wales Code of Practice for Victims, Introduction, s. 13.

(ii) Application to trials for international crimes

Connection with harm

At the very general level, therefore, domestic definitions of “victim” or “injured party” are consistent with the understanding in international human rights law expressed in the UN Basic Principles on Remedy and Reparation. Although there are differences in the technical terms used and the exact rights that those statuses provide, in all countries studied, a person who has suffered harm as the result of a crime is entitled to a certain status with certain rights.

States should ensure that their domestic understanding of victim or injured party is fully in compliance with the general definition of victim set out in the UN Basic Principles on Remedy and Reparation. In particular, for cases concerning international crimes, they should review the domestic understandings of “victim” or “injured party” to ensure that all of the types of harm envisaged in the UN Basic Principles on Remedy and Reparation (physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights) are considered in determining whether someone holds rights as a victim or injured party in relation to the criminal proceedings.

Successors of deceased victims

There is also significant domestic practice recognising the rights of immediate family or successors of a victim who has died as a result of a crime to take over their rights in criminal proceedings, and to be entitled to receive reparation for the deceased person’s injuries. This is consistent, too with the practice of international human rights bodies and courts,¹²¹ and specific provisions in the Convention Against Torture.¹²²

In trials for international crimes with large numbers of victims, recognising successors may raise certain challenges – from issues of proof of relationship in post-conflict settings where official documents may not be available,¹²³ to (occasionally) determining disputes between different family members about who represents the deceased victim’s interests. However, these challenges can be overcome by adopting context-appropriate standards of proof (see further next section), and – in relation to disputes about representation – by including rules of procedure on this issue or by reference to existing principles of domestic law (see above).

¹²¹ For example, before regional courts such as the ECtHR, IACtHR, ACHPR, and UN treaty bodies including the HRC and CAT, relatives of deceased victims have standing to bring complaints on their behalf. In relation to the HRC, for example, see further Alexandra R Harrington (2012), ‘Don’t Mind the Gap: The rise of individual complaint mechanism within international human rights treaties’, 22 *Duke Journal of International & Comparative Law* 153 at 160-161.

¹²² Convention Against Torture, Art. 14(1).

¹²³ This happened, for example in Cambodia before the ECCC: see further Stover et al. (2011), ‘Confronting Duch’, p. 451, and in the *Ntuyahaga* case prosecuted in Belgium (see further p. 93).

At the ECCC, immediate family members of deceased individuals who could otherwise have exercised civil party status were allowed to appropriate their status. The nominated family member needed to present proof of death (which was difficult in some cases as the authorities would ask for bribes to issue them), ID-card of the family member or other proof of identity and a letter saying they wanted to take on the status. Only one person was able to succeed the deceased, and any disagreements between family members had to be resolved by the family internally.¹²⁴

States should ensure that, where a victim has died as a result of the crime, the rights that would have accorded to them to participate in proceedings and to claim reparation pass to their immediate family members or successor. If new procedures are being introduced to allow this in general law or before a special court or tribunal, consideration should be given to how any disputes about representation between family members should be determined.

Proximity of victim to the crime

As set out above, there are clear differences between states as to the extent to which a person needs to be “directly” affected by the crime as to whether they are afforded the status of “victim” in proceedings. Within jurisdictions, different approaches may be taken to what amounts to “direct” and “indirect” harm. Some states clearly recognise participatory rights of those who have suffered indirect harm, while others limit rights and support to victims who were the direct object of the crime. In a number of cases further support and financial assistance may also be provided to family members, though not necessarily participatory rights.

International crimes have a number of key features that are of relevance when determining how far rights to participate and to support in criminal proceedings should extend. As discussed in Part One, by their very nature many of these crimes are directed against large numbers of people, as well as against collectivities. Enforced disappearance, for example, targets not just the individual who is disappeared, but also directly targets the family members of the disappeared person who are subjected to the torture of not knowing where their loved one is or whether they are dead or alive,¹²⁵ and targets communities to instil terror and suspicion.¹²⁶ Crimes against humanity are by definition committed against a civilian population in a widespread or systematic manner, and genocide is by definition committed against a national, ethnic, racial or religious group.¹²⁷

Even where an international crime is specifically directed at one person, the harm caused to others around them – including immediate family members who may suffer severe emotional distress and/or lose their only means of support and livelihood through death or permanent incapacity, witnesses to atrocities and those harmed in

¹²⁴ Information from Cambodian civil party lawyer, 6 August 2015.

¹²⁵ See, eg. HRC, *Quinteros v Uruguay* (1983), Comm. No. 107/1981, UN Doc CCPR/C/OP/2 at 138, 21 July 1983, para. 14; IACtHR, *Blake v Guatemala*, 24 January 1998, paras. 60, 114-116 (where the parents were found to have suffered violations of the right to humane treatment); *Goiburú and Others v Paraguay*, 22 September 2006, paras. 95 *et seq.*; ECtHR, *Bazorkina v Russia* (2006), App. No. 69481/01, 27 July 2006, paras. 139-142.

¹²⁶ T Scovazzi and G Citroni (2007), *The Struggle against Enforced Disappearances and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff, pp. 7-13; UN Human Rights Council (2013), ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Without a trace: enforced disappearances in Syria’, 19 December 2013, <http://www.refworld.org/docid/52b44c234.html>, para. 17.

¹²⁷ See, eg. Rome Statute, Arts. 6 and 7.

intervening to prevent crimes – will often be severe and long-lasting. The Inter-American Court and Commission of Human Rights have held, for example, that a mother who witnessed the rape of her children, and children who witnessed the rape of their mother by soldiers had, as a consequence, suffered a violation of their right to personal integrity.¹²⁸ For international crimes, therefore, there are reasons why the scope of victimisation may justifiably go beyond the individual directly attacked.

This is reflected in the practice of the ICC. Under its rules, victims are defined as:

natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; and

organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.¹²⁹

This drafting deliberately leaves open the question of whether “indirect victims” who are natural persons are to be covered by the definition.¹³⁰ In its jurisprudence, the ICC has found that indirect harm may entitle a person to be recognised as a victim with rights before the court. In the court’s jurisprudence, “harm” does not need to be direct, though it must be personal to the victim, including where the harm is an effect of the injury suffered by another person, e.g., the harm suffered by a parent through a child’s suffering as a child soldier,¹³¹ or emotional suffering related to the loss of family members.¹³² Some forms of harm have been held to be too remote from the crime alleged, however – so that victims of the abuses perpetrated by child soldiers were not held to have rights to participate in the trial of an individual charged with conscripting, enlisting or using those children as a war crime.¹³³

The approach adopted by the ECCC to who amounted to a victim was also broad. Its internal rules were amended to provide that civil party applicants must be able to demonstrate that their injuries (physical, material or psychological) were suffered “as a direct consequence of” at least one of the crimes alleged against the accused.¹³⁴ However the Pre-Trial Chamber ruled that family members of the immediate victim (deceased or not) could claim psychological injury and thus civil party status. In addition, even non-family members belonging to the same persecuted community or group of the immediate victim (deceased or not) could claim psychological injury and thus civil party status.¹³⁵ Once admitted as civil party, they had the right to a common legal representation, and to receive counselling services when they appeared in court to testify with one follow-up afterwards.

¹²⁸ IACmHR, *Ana, Beatriz y Celia González Pérez v Mexico* (2001) Case No. 11/ 565, Decision of 4 April 2001, Report No. 53/01, para. 53; IACtHR, *Fernández Ortega et al. v Mexico* (2010) 30 August 2010, para. 145.

¹²⁹ ICC, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000) (“ICC RPE”), Rule 85.

¹³⁰ Safferling (2012), *International Criminal Procedure*, p. 170.

¹³¹ ICC, *Lubanga*, Appeals Chamber, ICC-01/04-01/06-1432, 11 July 2008, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, paras. 32-38.

¹³² ICC, *Situation in the DRC*, PTCl, ICC-01/04-101-tEN-Corr, 17 January 2006, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, paras. 117, 132; *Katanga & Ngudjolo*, PTCl, ICC-01/04-01/07-579, 10 June 2008, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, paras. 69-70.

¹³³ ICC, *Lubanga*, TCl, ICC-01/04-01/06-1813, 8 April 2009, Decision on ‘Indirect Victims’.

¹³⁴ ECCC, Internal Rules (revision 5), Rule 23 bis (1).

¹³⁵ See ECCC, Case No. 002/19-09-2007-ECCC/OClJ, Pre-Trial Chamber, Doc. No. D404/2/4, 24 June 2011, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, paras. 83-88.

On the other hand, given the often large number of potential victims in trials concerning international crimes, there may be practical arguments for limiting rights to *participate* in proceedings to victims who have been the direct object of the crime (and where they are deceased, their family members), and this is the approach adopted in most (though not all) domestic jurisdictions surveyed. Either way, the specific nature of the crime must be considered carefully; for example in enforced disappearance cases close family members are considered “direct” victims in international human rights law.

Even if proximity to the crime is narrower for participation than that adopted by the ICC or the ECCC, the UN Basic Principles on Remedy and Reparation also give support to the argument that indirect victims, such as witnesses and family members, should be considered for at least assistance and for the provision of reparation. This approach is supported, for example, by the practice in Australia outlined above.

States’ domestic legal principles will likely determine the extent to which a person must suffer direct harm as a result of the crime to be granted participatory rights in proceedings. However, states should provide support, assistance and access to reparation to individuals who have suffered indirect harm as a result of the act, including family members and those intervening to prevent the crime or assist the victim, in line with international standards.

The precise line between harm that is “as a result of” a criminal act, and harm that is seen to be too remote from it may be a matter of domestic jurisprudence and interpretation. However, in that interpretation it is important to take into account the specific nature of the international crimes alleged, and it may be helpful for domestic bodies to consider the jurisprudence of the ICC and the ECCC in this regard, and to revise domestic law where it is deficient.

3. Inclusion of legal persons, as well as natural persons

(i) Domestic practice

A number of jurisdictions limit victims’ rights to natural persons (e.g. **Australia**;¹³⁶ **Ireland**¹³⁷ and **Chile**¹³⁸). Other jurisdictions allow legal persons, including companies and non-governmental organisations, to hold the rights afforded to victims. Jurisdictions where legal persons may enjoy the status of victim or exercise certain rights associated with it include **Brazil**,¹³⁹ **Colombia**,¹⁴⁰ **England and Wales**,¹⁴¹ **Guatemala**,¹⁴² **Senegal**¹⁴³ and the **USA**.¹⁴⁴

¹³⁶ OPBP Country Report: Australia, para. 5.

¹³⁷ Ireland Victims of Crime Charter, p. 8.

¹³⁸ Although this is currently under litigation: information from interview with Ms. Karinna Fernández Neira, 2 July 2015.

¹³⁹ Guilherme de Souza Nucci (2008), *Leis Penais e Processuais Penais Comentadas*, GEN: Sao Paulo, p. 1017.

¹⁴⁰ Colombia CCP, Art. 132.

¹⁴¹ England and Wales Code of Practice for Victims, para. 19 (includes businesses and charities, but not public sector bodies).

¹⁴² Guatemala CCP, Art. 117.3.

¹⁴³ Senegal CCP, Art. 3 : “L’action civile peut être exercée en même temps que l’action publique et devant la même juridiction.

Elle est recevable pour tous chefs de dommages aussi bien matériels que corporels ou moraux, qui découlent des faits, objets de la poursuite. La partie lésée peut poursuivre devant la juridiction répressive, outre la réparation du dommage découlant du fait poursuivi, celle de tous autres dommages résultant directement de la faute de l’auteur de l’infraction”.

¹⁴⁴ Charles Doyle (2012), ‘Crime Victims’ Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771’, 24 April 2012, CRS, 6-7.

In addition, some jurisdictions specifically allow organisations to represent collective interests as a victim in their own right. For example, in **Argentina**, Article 78 of the Criminal Procedure Code extends the definition of “victim” to associations or foundations in cases of crimes against humanity or grave breaches of human rights, provided that their statutory objective is directly linked to the protection of rights which have been affected.

Similarly, indigenous groups may be considered victims of crimes involving discrimination against some of its members or which directly affect their collective interests, as well as in crimes of genocide conducted against members of the group.¹⁴⁵ These are known as “collective victims” and are seen as legitimately able to join the proceedings because of the collective interests they want to protect. This collective action is not meant to protect personal interests but to defend common interests, which they ensure through representation.

The provision allowing for collective victims was inserted in the **Argentinean Criminal Procedure Code** with the support of non-government organizations. The provision does not require the organization to obtain the consent of individual victims, because it is not seen to represent (in legal terms) an individual victim or victims, but to safeguard collective interests.¹⁴⁶

The objective of collective representation is not to displace the individual victim/s however: all of the individual victims also have the possibility of intervening in the case as *querellantes*, autonomously. If there are a large number of *querellantes*, the court will order unification of the individual *querellas* (depending on the magnitude of the case, this may result in a sole unified *querella* or several groups of *querellas*) (see further in this chapter). Where a collective victim is involved, the victim *querellas* and the association representing collective interests may join as one party if they wish, or may continue to be represented separately.¹⁴⁷ In practice therefore, if an association’s intervention is not compatible with the views of individual victims this will be made apparent, and it will not be given significant weight.¹⁴⁸

An Argentinean lawyer working for *Abuelas de Plaza del Mayo* – an organization that has played a key role in fighting impunity for international crimes including enforced disappearance in Argentina – highlighted two major benefits of allowing collective victims to play a role in criminal procedures. First, the collective victim intervenes as a *querellante* from the investigative stage when the facts and identity of the individual victim may not be clear. In an enforced disappearance case, for example, it may not be known whether a particular woman or man is the child of a person who has been disappeared. This provides significant practical advantages because wider investigative measures can be requested and there is no need to focus on one particular case. Second, in those cases where the restitution of identity has occurred, numerous families do not want to have an active role in the criminal proceeding, because of the complications this may provide for family reconnection. Nevertheless, these families do want truth and justice, and the association therefore intervenes by filing a *querella*.

Many of the major cases related to crimes against humanity in Argentina have had both individual victims and associations as *querellantes*.¹⁴⁹

¹⁴⁵ Argentina CCP, Art. 78.e.

¹⁴⁶ Information from Argentinean lawyers 11 August and 17 August 2015.

¹⁴⁷ *Ibid.*

¹⁴⁸ Information from Argentinean lawyer, 11 August 2015.

¹⁴⁹ *Ibid.* Such cases include the Major Case *Megacausa* ESMA II (Case n. 1270 and accumulated cases nos. 1271, 1275, 1276, 1277, 1278, 1298, and 1299), concerning crimes committed in the clandestine detention, torture and execution centre based in the *Escuela Mecánica de la Armada* (E.S.M.A. –Mechanical School of the Army-) where around 5,000 people were illegally detained between 24 March 1976 and 10 December 1983 (<<http://bit.ly/1WC4NoF>> and <<http://bit.ly/1TR8T8i>>); the *Campo*

Note that Argentina has also recently introduced provisions allowing victims to delegate associations to also represent their *individual* interests in proceedings: this is discussed further under legal representation.

Associations meeting certain requirements may also act as civil parties in proceedings in **France**.¹⁵⁰ Article 2-1 to 2-23 of the French Code of Criminal Procedure specifically list the types of associations permitted to constitute themselves as a civil party and join the proceedings to protect the victim's rights. The association must have been lawfully registered for at least 5 years on the date of the offence and its statutory purpose must be to defend particular interest or rights listed from Article 2-1 to 2-23, such as associations fighting discrimination, sexual violence, crimes against humanity and war crimes, those protecting individual and collective freedoms.¹⁵¹ While consent from the individual victim must be obtained to act as a collective victim in relation to certain crimes, consent requirements do not apply to associations protecting rights of victims of war crimes, crimes against humanity or acts of terrorism.¹⁵²

Representation through associations was how a criminal complaint was brought in France against Mauritanian intelligence officer **Ely Ould Dah**. At the request of two victims, political refugees in France, human rights associations FIDH, LDH and the Human Rights Association for Mauritanian Victims lodged a complaint against Ould Dah for acts of torture. The Associations represented the interests of the two victims throughout the trial, which resulted in an eventual conviction *in absentia*.¹⁵³

Although such rights do not exist in any of the common law jurisdictions surveyed, victims' advocates in **Ireland** are currently calling for similar provisions to be included in the new victims' rights legislation being introduced to implement the EU Victims' Directive. The provision called for (inspired by the Canadian Bill of Rights Act¹⁵⁴), would mean that in cases where a crime has been committed against the community rather than an individual victim, a group or a human rights organisation could make a victim impact statement on the impact that the commission of the crime has had on them.¹⁵⁵

(ii) Application to trials for international crimes

Should rights be limited to natural persons?

In the jurisdictions studied there are different approaches to whether legal persons who suffer harm can in principle be recognised as victims with rights in the proceedings:

de Mayo Major case, nos. 2005 and 2044 (<http://bit.ly/1JfqEMN>); case nos 2023, 2034, 2043, and 2031 (<http://bit.ly/1Jonh8k>); case nos. 2046 and 2208 (<http://bit.ly/1EOJ8kc>); case no. 2203 (<http://bit.ly/1TRpEp5>); case no. 2376 (<http://bit.ly/1K3K9c6>); and case no. 2441 (<http://bit.ly/1hIE1AM>), related to crimes committed in the clandestine centre of Campo de Mayo during the military dictatorship, in which it is estimated that between 3,500 and 5,000 persons were illegally detained <<http://www.memoriaabierta.org.ar/campodemayo/>>; and the *Plan Sistemático de Apropiación de Niños* –Systematic Plan for the Appropriation of Children- case (Case no. 1351 “FRANCO, Rubén O. and others s/ abduction of children below 10 years of age (<<http://bit.ly/1J0zexG>>).

¹⁵⁰ France CCP, Arts. 2-1 to 2-23.

¹⁵¹ France CCP, Arts. 2-2, 2-4 and 2-17.

¹⁵² France CCP, Arts. 2-4 and 2-7.

¹⁵³ See further FIDH, ‘Ely Ould Dah case’, <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/mauritania/Ely-Ould-Dah-Case/>.

¹⁵⁴ S.C. 2015, c. 13, Summary (m) and section 26, http://laws-lois.justice.gc.ca/eng/annualstatutes/2015_13/.

¹⁵⁵ Information from Irish lawyer, 5 August 2015.

some restrict these rights to natural persons while a large number of countries across different legal traditions do not.

In relation to international crimes, there may be good reasons to allow legal persons to have certain rights in the proceedings, and rights to reparation, where they have directly suffered harm. Certain war crimes, for example, may, by definition, target institutions, such as hospitals, schools and cultural heritage, as well as the individuals in them.¹⁵⁶ For this reason, as outlined above, the ICC Rules of Procedure and Evidence recognises as victims “organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.¹⁵⁷ There are certainly precedents for corporations being provided with rights concerning international crimes: for example, the UN Compensation Commission was an administrative mechanism that provided reparation to both individuals and corporations for harm sustained during the Iraq war with Kuwait.¹⁵⁸

Whether legal persons who suffer harm as the result of an international crime may participate in criminal proceedings and have access to information and support is a matter that can be determined under domestic law. When a special court or tribunal is being established to try international crimes, careful consideration should be given to this question in the context of the specific crimes that are likely to be investigated and prosecuted.

Should associations be able to represent victims’ interests as victims themselves?

Although only seen in a small number of the jurisdictions studied, the possibility for associations to bring complaints and participate in proceedings as a victim themselves, representing collective interests, has proved an important avenue for justice in some domestic contexts. As will be explored later in the report, the two jurisdictions referred to in which this possibility is available are jurisdictions where victims may themselves initiate criminal procedures before an investigative judge.¹⁵⁹ In both of these jurisdictions, the associations concerned must meet certain criteria.

This type of victim participation can be seen to have significant advantages in its own right: allowing for the representation of collective interests, ensuring investigations are sufficiently broad from the outset when facts are still being determined, and allowing victims to choose the extent to which they wish to participate directly or have their interests otherwise represented. It also has the potential to address some of the challenges domestic courts and special tribunals are faced with when dealing with crimes with a large number of victims: how complaints are initiated and taken forward when there are a huge range of potential victims, issues of efficiency in providing victim input into investigations and prosecutions, and how information is fed back to a large number of victims. It may also address some of the issues around the exclusion of large

¹⁵⁶ Eg. Art. 8(2)(b)(ix) of the Rome Statute prohibits attacks on buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.

¹⁵⁷ ICC RPE, Rule 85.

¹⁵⁸ On the UN Compensation Commission see further, Linda A Taylor, ‘The United Nations Compensation Commission’, in C Ferstman et al (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Leiden: Martinus Nijhoff, 197-216.

¹⁵⁹ Although note that in France this right has been restricted in relation to international crimes. See further p.49.

numbers of victims when only certain individual perpetrators, or individual crimes, are selected for prosecution (see above, p. 12).

However, the rights to an effective remedy recognised under international law – including the support, information, protection and reparation that are part of it and that are provided for under many domestic legal systems – also accrue to the individual victims of the crimes.

The key issue in such an approach is therefore to ensure that individual victims also have the opportunity to make their individual views known. Where there are multiple viewpoints it may be impossible for a single “collective” victim to put these across, or at the very least difficult for a court to control that process. The approach adopted in Argentina, where a collective victim may participate alongside individual victims (and representation of individual victims is grouped for efficiency), appears to be an appropriate solution.

Providing for “collective” victims can serve useful purposes in domestic legal systems to enable criminal complaints to be initiated and ensure that investigations are undertaken. While organisations filling such a role may be required to meet certain criteria these should not be so restrictive so as to present a barrier to participation. In addition, states should take proactive measures to reach out to individual victims of the crime and provide support and information they are entitled to under domestic law, and should ensure that victims have the option to play a role in proceedings in their own right (alongside any collective victim) in accordance with domestic law.

Where a special chamber of tribunal has been established specifically to try international crimes there are stronger arguments that issues of efficiency can be dealt with through common legal representation (discussed further in this section). However, consideration should also be given to providing a place for “collective” victims to represent broader interests in the investigation and any subsequent prosecution, alongside those of individual victims.

4. Different statuses of victims in domestic criminal procedures

(i) Domestic practice

Across the jurisdictions surveyed, victims of crime can play a wide range of roles and are accorded a number of different statuses in proceedings. Therefore, the “legal status of the victim definition is dependent on the legal rights attached to the status”.¹⁶⁰ At a broad brush, this range of categories may include (though is not necessarily described as):

- **Victim as witness** – who may inform the authorities of the crime and provide witness evidence in the investigation and trial. All jurisdictions tend to use victims as witnesses in trials, although in some jurisdictions this may impact on the victim’s ability to participate in the trial in other ways.

¹⁶⁰ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1307.

- **Victim as “victim”** – who is entitled to certain rights such as information and support, and may be entitled to the right to be heard (for example on sentencing) and to appeal certain aspects of the procedure. Again, these rights are available in nearly all of the jurisdictions surveyed. The participation of victims is limited to these aspects in a number of common law countries including Australia, England and Wales, Ireland and Uganda.
- **Victim as “intervener”** – who has certain rights to be heard in the investigation and/or trial, sometimes subject to considerations of fairness to the defence. These types of rights are available to victims in jurisdictions with adversarial and hybrid systems including Denmark, Kenya, Norway and the USA. Some limited rights of participation are also given to victims in India and Bangladesh.
- **Victim as “civil party”** in the criminal trial – who can attach a civil claim for damages to the trial and can exercise significant rights in the criminal investigation and trial, in relation to matters related to the civil claim. This status is available in a number of civil law countries including Argentina, Cambodia, CAR, Chile, DRC, France, Germany, Guatemala, Italy, and Senegal.
- **Victim as auxiliary or subsidiary prosecutor** – who is allowed, through their legal counsel, “to work alongside public prosecutors. Although the public prosecutor retains the responsibility of presenting the case, the victim, acting as a subsidiary/auxiliary prosecutor, and represented by legal counsel, has the right to be present at all proceedings, to question the witnesses, to submit evidence, to make statements of law and fact, and to claim reparations”.¹⁶¹ They may therefore play an even greater role than a civil party because their participation concerns the whole proceedings, not just the civil aspect. Such participation may be open to all victims (e.g. Colombia),¹⁶² or may be made possible through the filing of a specific form of complaint called a “*querella*” (in eg. Argentina, Chile, Guatemala), or through other specific procedures such as the “*Nebenkläger*” procedure in Germany¹⁶³ or prosecution assistant in Brazil.¹⁶⁴ Some jurisdictions limit this type of participation to certain crimes,¹⁶⁵ while in other jurisdictions it can be lodged for any crime.¹⁶⁶
- **Victim as private prosecutor** – who has full conduct of the investigation and/or prosecution. The ability to take such prosecutions may be subject to procedural restrictions (such as a requirement of permission) or limited to certain crimes. Private prosecutors are generally required to cover the costs of proceedings that result in an acquittal.

Not all of these categories are applicable in each jurisdiction, and some overlap within jurisdictions. Nearly all jurisdictions will see victims as witnesses and accord victims’ rights to information and support, and certain rights to be heard in some circumstances. Some countries will allow injured parties to join their own civil case to the criminal prosecution as a civil party, and/or may (separately) give them the opportunity to join

¹⁶¹ Brianne McGonigle Leyh (2011), *Procedural Justice? Victim Participation in International Criminal Proceedings*, Cambridge: Intersentia, p. 82.

¹⁶² Eg. Colombia: See further Huertas Díaz et al (2011), ‘Los Derechos de la Víctima del Delito’; Judgment C-454/2006; C-209/2007.

¹⁶³ See further Pizzi and Perron (1996), ‘Crime Victims in German Courtrooms’.

¹⁶⁴ Brazil CCP, Art. 268.

¹⁶⁵ For example, it is also possible to file a *querella* in Colombia, but only for minor crimes. Crimes under international law could not be prosecuted by *querella*: interview with Colombian lawyer, 24 June 2015.

¹⁶⁶ E.g., Chile: Information from interview with Mr. Juan Pablo Delgado Díaz, 3 July 2015, and interview with Ms. Karinna Fernández Neira, 2 July 2015.

the criminal prosecution as an intervener or an auxiliary/subsidiary prosecutor. In some countries, such as Norway, victims are given different status and rights depending on whether they are represented by counsel or not.

Guatemala provides an example of different statuses that a “victim” may hold in criminal proceedings in that country depending on the procedures they follow.

Victims who do not opt to be recognised as a party to the proceedings have a more limited role throughout the criminal proceedings but do hold the rights (*inter alia*) to testify as a witness; give consent for certain procedures to close the investigation; to be informed of the rights which they are entitled; to get medical and psychosocial assistance; to have their opinion heard by the Public Prosecutor; to be informed of decisions adopted by the Prosecutor and judge; to receive protection;¹⁶⁷ and to receive immediate information and comprehensive, urgent and necessary assistance from the office for victim care.¹⁶⁸

Victims who have suffered harm (or their successors) and seek to obtain reparation through the criminal proceedings may request to be recognised as a civil actor in the case. The intervention of the civil actor during the proceedings is limited to her/his civil interest, that is, to the accreditation of the facts, the imputation of those who the victim considers responsible, the indication of the existing link between them and the third party who is civilly responsible and the establishment of the existence and extension of the damages.¹⁶⁹

For certain crimes, the victim may be recognised as the exclusive prosecutor (as “querellante exclusivo”, or exclusive complainant) for criminal proceedings. In such cases, the intervention of the Public Prosecutor is limited to preliminary investigations when requested by the *querellante*, when it has not been possible to identify or individualise the defendants, to determine her/his place of residence, or when it is necessary to establish the crime in a clear and precise manner.¹⁷⁰

Alternatively, for crimes which cannot be prosecuted privately, **a victim may opt to take part in the proceedings brought by the Public Prosecutor as an auxiliary querellante (adhesive complainant).** In such cases, the Public Prosecutor assumes the representation of the public interests as well as of those of the victim, but the victim is also recognised as party to the proceedings.¹⁷¹ Despite adhering to the prosecution carried out by the Public Prosecutor’s Office, the *querellante* holds a considerably independent and autonomous role and may (among other things) request that certain steps are taken in the investigation, oppose requests to dismiss the proceedings, offer their own indictment, introduce evidence in the trial, cross-examine witnesses, and make closing statements.¹⁷²

(ii) Application to international criminal proceedings

A number of jurisdictions that provide strong participatory rights to victims in criminal proceedings allow victims to choose from the outset the extent to which they would like to exercise those rights. Certain rights, including rights to support and information, are given to all victims, while participatory rights and the right to claim reparation may be

¹⁶⁷ Decree 18/2010, Amendments to the Criminal Procedure Code, article 7, in modification of article 117 of the Guatemala CCP.

¹⁶⁸ JN Cahuex Lemus de Maldonado (2014), ‘Derecho a la Atención Integral a la Víctima dentro del Proceso Penal Guatemalteco’, July 2014, Universidad Rafael Landívar, <http://bit.ly/10qiWil>, pp. 94, 95.

¹⁶⁹ Guatemala CCP, Art. 134.

¹⁷⁰ Guatemala CCP, Arts 122, 474 and 476.

¹⁷¹ Cahuex Lemus de Maldonado (2014) ‘Derecho a la Atención Integral a la Víctima’, pp. 20, 59; AA Morales Alvarez (2006),

‘Importancia de tener como Agraviados a los Hermanos de la Víctima y Puedan Ejercer los Derechos del Querellante Adhesivo’.

¹⁷² Guatemala CCP, Arts. 315, 317, 345 Bis, 345 Ter, 337, 347, 376, 378, 382.

accessed through an application for specific status, such as an “auxiliary prosecutor” or “civil party”.

International crimes trials will often have very large numbers of potential victims. However, experience has shown that not all victims wish to pursue active participation in the investigation and trial. Some may be satisfied with information and support, and the right to reparation. Others may wish to take a much more active role in proceedings.

One strategy that may be adopted at the domestic level – both in the normal criminal justice system and in any special chamber or tribunal – is to introduce different modes of participation, and levels of specificity for registration depending on the nature of the victims’ preferred mode of participation. This is discussed further in the next chapter. In doing so, however, care must be taken to ensure that victims are given a real choice as to whether to exercise participatory rights available to them (i.e. the modes of participation must be accessible and non-discriminatory), and the option to change their mind as the proceedings progress.

5. Who represents victims of mass crimes?

(i) Domestic practice

Not all criminal proceedings for international crimes – especially at the domestic level – concern large numbers of victims.¹⁷³ However, where there are a large number of victims associated with a single proceeding, a significant issue in both domestic and international practice is how legal representation is organised for the victims.

As set out above, in some jurisdictions one way in which victims’ interests are represented in such cases is by an association to bring the complaint on a collective basis (such as in **Argentina, Colombia** and **France**).

In other cases, the issue may also be dealt with through arrangements for common legal representation, and modified procedures. In **Colombia**, for example, there are no express provisions for the regulation of group complaints. However, it is established that during the hearing on the indictment the Judge can determine – for the purposes of intervening in the trial – a number of victim’s representatives equal to the number of defendants.¹⁷⁴

In the **USA**, the Crime Victims’ Rights Act provides that:

In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a),

¹⁷³ For example, in criminal cases brought in certain European countries using universal jurisdiction provisions, the numbers of victims participating as civil parties has varied significantly. In France, a total of 24 individuals have participated in three of the four serious international crimes cases which have taken place to date. In Germany, four victims participated in one of the two cases which have taken place since 2002. Nineteen victims have taken part in three of the nine international crimes cases prosecuted in The Netherlands. In Belgium, much larger numbers of victims have participated in the four international crimes cases prosecuted to date. The ‘Butare’ case in 2001 involved 108 civil parties; 63 took part in the Kibungo case in 2005 and 66 in the prosecution of Ephrem Nkezabera in 2009. 163 individuals as well as the states of Belgium and Rwanda were admitted as civil parties in the trial of Bernard Ntuyahaga in 2007. See further, REDRESS et al. (2014), ‘Driving Forward Justice’, p. 39.

¹⁷⁴ Colombia CCP, Art. 340.

the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.¹⁷⁵

Fashioning a reasonable procedure does not allow, however, dispensing with victims' rights altogether.¹⁷⁶ Where victims' interests align they may have one joint legal representative, although this is discouraged as if conflicts later arise between the victims the lawyer will need to recuse him or herself. However, joint representation has happened, for example, following the Oklahoma city bombing case, where the large number of victims that emerged were represented by a single lawyer, because they were seeking to be able to give victim impact statements in relation to sentencing, an issue in which all agreed on.¹⁷⁷

On the other hand, in **Argentina**, the Criminal Procedure law specifically provides that where there is more than one *querellante*, and there is a commonality of interests, they should act under the same legal representation.¹⁷⁸ Once a decision to proceed to trial is adopted, the judge will normally include a decision on the unification of victims' interventions during the proceedings, if appropriate.

As discussed above at page 26, individual victims and associations can participate side by side in the proceedings, and while the individual victims' interventions will be grouped, they will only be grouped with the "collective" victim by agreement.¹⁷⁹ For example, in relation to a criminal process concerning the substitution of the identity of the daughter of a forcibly disappeared couple, the Human Rights Secretariat of the Nation, the organisation *Abuelas de la Plaza de Mayo*, and the direct victim all intervened as *querellantes*. Each *querellante* had its own legal representation and its own intervention rights, and could present different and separate legal arguments.¹⁸⁰

In addition, a new provision has also been introduced into Argentina's new Criminal Procedure Code (entering into force in March 2016) that will allow a victim to appoint an association to represent his or her individual interests in proceedings.¹⁸¹ The association must be registered in accordance with the law, focused on the protection and assistance to victims, on the defence of diffuse or collective interests, and/or on the defence of human rights, or must specialise in public interest actions. Once this representation is formalised, the association will exercise all the rights of the victim/s, who they should keep informed.

(ii) Application to international crimes

The review of domestic practice shows that some jurisdictions provide limits on the number of lawyers who may represent victims' views in criminal proceedings on the grounds of efficiency of the process. In interviews the view was expressed that in practice – even where there are no limits set on the number of legal representatives who may appear in a trial – where there are crimes generating multiple victims the victims will usually organise themselves into a group with a common legal representative or at least grouped with legal representatives.¹⁸²

¹⁷⁵ CRVA 18 U.S.C. § 3771, (d)(2).

¹⁷⁶ *In re Dean*, 527 F.3d 391 (5th Cir May 7, 2008).

¹⁷⁷ Interview with US lawyer, 2 July 2015.

¹⁷⁸ Argentina CCP, Art. 83.

¹⁷⁹ Information from Argentinean lawyer, 11 August 2015.

¹⁸⁰ Interview with Argentinean lawyer, 2 July 2015.

¹⁸¹ Argentina CCP, Art. 81.

¹⁸² Interview with Colombian lawyer, 24 June 2015.

Common legal representation tends to occur organically in the **DRC**, where large numbers of victims are involved in one trial. According to a DRC lawyer, the majority of victims of international crimes are indigent and access free legal representation through the Bar Association, or through NGOs (although if a person can afford to pay for their own representation they can appoint their own lawyer). Usually, one lawyer is assigned to all victims for one trial. The common lawyer will meet with victims individually and then summarise their demands before the court. In some cases involving very large numbers of victims – such as the *Minova* case, concerning 39 soldiers accused of mass rape of 135 women and girls – more than one set of lawyers has represented victims.¹⁸³ In those situations, the different teams meet in advance and try to harmonise their actions and split the work.¹⁸⁴

Given the complexity of proceedings concerning international crimes, the large number of victims involved and the distance that often separates victims from the court or tribunal, effective legal representation of victims is crucial to enable meaningful participation. However some trials for international crimes have involved large numbers of victim representatives, each making submissions, and criticism has been made of the impact on the trial process.¹⁸⁵ For example in the trial of Paul Touvier in **France** in 1994 for crimes against humanity committed during the Holocaust, 34 civil party lawyers, representing between fifty and eighty victims and victim groups, participated in proceedings. This level of participation was sharply criticised, the trial being described by some as descending into “an extraordinary spectacle”.¹⁸⁶

Where there are large numbers of victims there may be significant advantages to systems of common legal representation.¹⁸⁷ Legal representatives can act as interlocutors between the court and a large number of victims, providing information on the proceedings (including notification of decisions and procedural steps) and seeking their views to present to the court. Limiting the number of submissions and interventions where possible through joint positions saves both time and resources of the prosecutor and court, and reduces the burden on the defence from responding to multiple submissions.¹⁸⁸ It may also allow for better-organised participation by victims,¹⁸⁹ and participation in more aspects of the procedure.

¹⁸³ For further information on the *Minova* case see, HRW (2014), ‘Democratic Republic of Congo: Ending Impunity for Sexual Violence’, 10 June 2014, <https://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence>.

¹⁸⁴ Information from DRC lawyer, 7 August 2015.

¹⁸⁵ See further Stover et al. (2011), ‘Confronting Duch’, pp. 509-10.

¹⁸⁶ Michael E Tigar, Susan C Casey, Isabelle Giordani, and Sivakumaren Mardemootoo (1995), ‘Paul Touvier and the crime against humanity’, in 30 *Texas International Law Journal* 295.

¹⁸⁷ See further De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1346-47.

¹⁸⁸ See eg. ICC, *Katanga and Ngudjolo*, TC, 22 July 2009, Order on the organisation of common legal representation of victims, paras. 10-12.

¹⁸⁹ See De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1347: “...victims may be frustrated if their participation is not organized well, which would result in secondary victimization, and not in the expected empowerment”.

After the first trial conducted at the ECCC, the Chamber revised its rules to limit the number of civil party lawyers in the courtroom, deciding that all of the civil parties would be represented by two lead co-lawyers (one international and one Cambodian) during the actual proceedings. The lead co-lawyers are hired and paid for by the ECCC, and assisted by specialised civil party lawyers (not paid by the ECCC) who continue to represent various sub-groups and interests and serve as the link between their clients and the lead co-lawyers.¹⁹⁰ The Rules oblige the lead co-lawyers to consult with civil party lawyers and find a consensus where possible on any procedural actions taken. In practice, the civil party lawyers have the direct contact with the clients and the lead co-lawyers try to get their views before taking action.¹⁹¹

This set-up ensures that counsel who had previously been assisting parties, and who had often built both trust with victims and significant knowledge of the case, can continue to play an active role.¹⁹² It also encouraged collaborations with pro bono counsel and civil society groups that occasionally managed to afford significant support, expertise and resources to victim legal representation which would have otherwise not been available to the lead co-lawyers.¹⁹³ Individual representation continues to apply during the investigation stage.

The ICC Rules also include a system of common legal representation, with inbuilt safeguards for victims' rights. Rule 90 provides that victims shall be free to choose their legal representative, but provides that where 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, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.¹⁹⁴

If victims cannot agree a common legal representative within a specified time frame, the Chamber may request the Registrar to choose one. In doing so, the:

Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.¹⁹⁵

Experience at the ICC and the ECCC have, however, demonstrated a number of challenges in the delivery of quality representation of victims. Some of these challenges are peculiar to the legal representation of victims, for instance the complexity of representing a large number of clients with different interests or the need to cope with trauma and familiarise with victims' cultural and social backgrounds. Other challenges pertain to the nature of proceedings before the body and how the system of legal representation has been given effect in practice. These include the complexity and length of proceedings, sometimes insufficient financial and personnel resources to conduct proper consultation with clients in the field, and in the case of the ECCC - communication difficulties between lead co-lawyers and lawyers directly in contact with

¹⁹⁰ ECCC Internal Rules (Revision 5), Rule 12 ter, Rule 23 bis (2), Rule 23 bis (3). See further Stover et al. (2011), 'Confronting Duch', p. 542.

¹⁹¹ Information from Cambodian civil party lawyer, 6 August 2015.

¹⁹² REDRESS (2012), 'The Participation of Victims in International Criminal Court Proceedings', p. 6.

¹⁹³ *Ibid.*

¹⁹⁴ ICC RPE, Rule 90(2).

¹⁹⁵ ICC RPE, Rule 90(4).

victims. Other difficulties may relate to shortcomings in counsels' performance in the areas of contact and information provided to victims, client care and in-court work.¹⁹⁶

Common legal representation may be necessary in criminal proceedings concerning international crimes with large numbers of victims (in particular at the trial stage), but given the importance of the role of the legal representative to victims accessing an effective remedy it is crucial to ensure that where it is used safeguards are in place. Procedures must ensure that victims have the chance to provide input into the choice of legal counsel and that victims' distinct interests are represented, and a transparent framework should be established to assess the conduct of joint legal representatives and to support them to better serve the needs and rights of their clients. Consideration should be given to retaining a role, under any common legal representative, for previously engaged victim counsel.

¹⁹⁶ See REDRESS (2015), 'Representing Victims Before the ICC: Recommendations on the Legal Representation System', April 2015, <http://www.redress.org/downloads/publications/1504ReprentingVictims.pdf>.

PART THREE: ACTIVE PARTICIPATION RIGHTS

I. Initiation of proceedings

1. Key issues and international standards

The greatest hurdle for victims of international crimes can be to have the crimes investigated in the first place. Many cases concerning international crimes and human rights violations are never made the subject of a formal complaint. This may be because victims cannot physically access authorities, do not have knowledge of procedures, are scared of further victimisation or do not think the authorities will act.

International human rights law clarifies that the fundamental principle of non-discrimination means that special measures may need to be taken to enable victims from marginalised or vulnerable groups to access judicial mechanisms, including through making criminal complaints. For example, the ACmHPR Fair Trial Principles and Guidelines provide that:

In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

...

States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.

...

Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.¹⁹⁷

Where complaints of international crimes are made, the vast majority never proceed to an investigation – whether because the issues involved are seen as too political, the authorities involved lack the expertise to investigate them or fear being overwhelmed, or the authorities responsible for investigating them are themselves involved in the crime or protective of the persons involved. No matter what system is followed, and by what method a criminal procedure is initiated, it is crucial that victims can both complain about crimes they have been subjected to and have some way of ensuring that an investigation proceeds where there is credible information that a serious crime has been committed.

International human rights courts and bodies have found that a failure to carry out a prompt, thorough, effective, impartial and independent investigation into allegations of

¹⁹⁷ Section G(c)-(d), N(e).

serious human rights violations will violate some or all of procedural aspects of the rights concerned (such as the right to life), victims' right to an effective remedy, victims' right to a fair trial and victims' right to the truth.¹⁹⁸ International treaty bodies and regional human rights courts have therefore found on numerous occasions that victims' rights have been violated where such an investigation has not proceeded following a complaint.

As will be examined below, national legal systems provide safeguards to enable victims to ensure that investigations are pursued. These range from victims being able to institute proceedings directly, to victims being able to appeal or seek review of decisions not to investigate, and criminal complaints against negligent officials. A set of principles drafted to combat impunity at the UN level considered victims' ability to initiate criminal proceedings as the most effective safeguard to ensure effective investigations into international crimes are pursued. According to the principles:

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures.¹⁹⁹

2. Filing a complaint

(i) Domestic practice

In most of the jurisdictions surveyed, it is possible for any person with notice of a crime, including the victim, to report it to the authorities. Complaints may be made in a number of ways including to the police²⁰⁰ (including personally at a police station,²⁰¹ by telephone hotlines to police authorities,²⁰² over the internet²⁰³), to the military,²⁰⁴ to a prosecutor,²⁰⁵ or directly to a Magistrate or Judge.²⁰⁶ No jurisdiction surveyed (officially) requires the payment of any fee to lodge a criminal complaint though corruption and bribery can in practice be used to hinder complaints.

¹⁹⁸ See eg. ECtHR: *McCann & Ors v United Kingdom* (1995), App No. 18984/91, 5 September 1995, para. 161 (relating to Art. 2), *Assenov & Ors v Bulgaria* (1998), App. No. 24760/94, 28 October 1998, par. 109 (relating to Art. 3); IACTHR, *Velásquez Rodríguez v Honduras*, Judgment, 29 July 1988, para. 188 (right to an effective remedy and right to the truth); IACTHR, *Blake v Guatemala*, Judgment, 24 January 1998, para. 96-97 ("the right to a fair trial includes victims' relatives right to judicial guarantees, and specifically to a criminal investigation for the purpose of identifying and, when appropriate, prosecuting and punishing those responsible").

¹⁹⁹ "Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity", UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 ("Updated Impunity Principles"), Principle 19.

²⁰⁰ Eg. Denmark, Administration of Justice Act, s. 742(1).

²⁰¹ Eg. OPBP Country Report: Australia, para. 11.

²⁰² See eg. OPBP Country Report: Australia, para. 11; OPBP Country Report: England and Wales, para. 4.

²⁰³ See eg. OPBP Country Report: Australia, para. 11.

²⁰⁴ E.g., in Argentina complaints must be filed in a written or oral manner, personally or by a representative before the police or other State Security Force, the Judge, or the representative of the Public Prosecutor's Office. See, Argentina CCP, Art. 203.

²⁰⁵ Eg. Argentina CPP, Art. 203; Cambodia CCP, Art. 50; Chile CCP, Art. 173; Guatemala CCP, Art. 297; Italy CCP, Art. 330.

²⁰⁶ Bangladesh CCP, s. 190; India CCP, s. 200; Cambodia CCP, Art. 124; Guatemala CCP, Art. 297; USA, 2011 Amendment, Federal Rules of Criminal Procedure T 2. R. 3.

In **Colombia**, procedures have been introduced to allow for a complaint to be filed before a wider range of public servants, who then have the duty to forward it to the competent authorities.²⁰⁷ This measure was introduced because in some small municipalities victims either do not have access to the authorities to which complaints were to be made to (such as police or prosecutors), or were previously forced to bring complaints before those alleged to be responsible for the crimes (such as the military). Steps are now also being taken to allow complaints to be filed electronically.²⁰⁸

The formality with which crimes need to be reported differs from country to country. In some jurisdictions, an anonymous complaint to a police telephone hotline will be sufficient to initiate an investigation by police.²⁰⁹ In other jurisdictions the complaint must be recorded by police in a certain format (such as a “First Information Report” in **India** or **Bangladesh**),²¹⁰ or must be recorded under oath (such as in the **USA**),²¹¹ or a witness statement is taken and signed by the complainant.²¹²

In some jurisdictions for certain crimes, action against the accused can *only* proceed if the victim lodges the complaint. This is the case, for example, in **Italy**,²¹³ **Colombia**,²¹⁴ and **Brazil**²¹⁵ - usually for crimes seen as affecting the privacy of a victim, such as defamation and rape. If there is more than one victim it is sufficient that one victim files the complaint.²¹⁶

For ordinary crimes in many jurisdictions time limits – often quite short – apply to the filing of criminal complaints, after which time the complaint is barred. However, given their gravity, such statutes of limitation should not be applied in cases of alleged international crimes.²¹⁷

(ii) Application to international crimes

Domestic practice is relatively consistent – victims of crime can report the crime to relevant specified authorities, who are then obliged to investigate. Where it may be difficult for certain people to access those authorities, some states have taken measures to make this easier, for example by allowing complaints to be filed online, or with any public servant.

Filing a complaint or registering for victim status

Complaints about international crimes will often proceed in the same way, although problems concerning access to the relevant authorities may be heightened concerning

²⁰⁷ Interview with Colombian lawyer, 24 June 2015. See further <http://www.fiscalia.gov.co/colombia/servicios-de-informacion-al-ciudadano/preguntas-frecuentes/>.

²⁰⁸ Interview with Colombian lawyer, 24 June 2015.

²⁰⁹ E.g., Australia, see OPBP Country Report: Australia, para. 11.

²¹⁰ India CCP, s. 154(1); Bangladesh CCP, s. 154. See also eg. the requirements for a complaint made in Italy CCP, Art. 332.

²¹¹ USA, 2011 Amendment, Federal Rules of Criminal Procedure T 2. R. 3.

²¹² Eg. England and Wales: Criminal Justice Act 1967, s. 9 (witness statement is signed). Anonymous complaints may also be made through the Crimestoppers telephone hotline.

²¹³ Italy CCP, Art. 336.

²¹⁴ Colombia CCP, Art. 74.

²¹⁵ Brazil CCP, Arts. 5(4)-(5).

²¹⁶ Italy CCP, Art. 337.

²¹⁷ See, eg. UN Basic Principles on Remedy and Reparation, para. 6.

these crimes and different procedures may be in place where specialised tribunals or chambers are established. Many victims – who may be poor, geographically isolated, illiterate, or otherwise vulnerable – may have difficulties accessing any procedure to make a complaint or to advise the appropriate body of their alleged victim status. This may be addressed in the normal criminal justice system by widening the authorities to which complaints can be made and outreach by investigators and prosecutors involved in ongoing investigations. Where specialised chambers or tribunals are established, mapping of victim populations, early outreach to victims and straightforward and accessible complaints procedures should be a key priority.

In the first case carried out before the **ECCC**, “it was not the ECCC’s under-resourced Victims Unit, established to assist victims file complaints and civil party applications, but Cambodian human rights organisations and civil party lawyers who led the effort to inform the Cambodian public about civil party participation at the ECCC, find legal representatives for the civil parties, and develop a system for managing the applications. Human rights groups undertook these projects with very limited guidance or assistance from the ECCC. In the end, these organisations became involved in nearly every aspect of the civil party process: informing victims of their rights; holding group meetings to answer questions; helping applicants fill in the requisite forms (a process that could often take hours and, in some cases, days); compiling and entering information from the forms into a database; sending the forms to the ECCC; and following up with the civil party applicants”.²¹⁸

Second, actors in the domestic criminal justice system with whom complaints are filed or forwarded as a matter of course may not have the necessary knowledge of international criminal law, or sufficient expertise or resources to conduct a complicated and large-scale investigation. Where the complaint relates to powerful state or non-state actors, they may also be obstructed in their task. For this reason, it is advisable that independent, specialised units are established within the criminal justice system, with the requisite expertise and resources, and that complaints are filed or forwarded to them.

In **Colombia**, the National Human Rights and International Humanitarian Law Directorate has competence at the national level to investigate international crimes. Its public prosecutors have access to a higher number of investigators, and to a greater institutional backup. The Directorate does not have the obligation to accept cases, and the representatives of the victims have the burden of justifying why it should assume the investigation of a particular case. Recently, an Analysis and Context Unit was created, to analyse patterns and investigations carried out by the Public Prosecutor’s Office in order to determine the nature of crimes and prioritisation of cases.²¹⁹

Third, challenges may occur in coordination where a crime involves a large number of victims, as will often be the case in relation to international crimes. Where the normal criminal justice system is being used to investigate and prosecute crimes, establishment of specialised units responsible for investigating such crimes, and compilation of

²¹⁸ Stover et al. (2011) ‘Confronting Duch’, pp. 515-16.

²¹⁹ Interview with Colombian lawyer, 24 June 2015.

registers of victims of mass crimes, have been used to overcome some of these challenges.

Kenya has introduced procedures to ensure that details of victims of mass crimes are contained together in one place. Section 7 of the Victim Protection Act of 2014 provides that: “Where there are several victims as a consequence of an act of terrorism, internal civil unrest, war or any other activity that is likely to cause mass victimisation, the officers shall immediately open a special register that shall contain the details of victims ...”.

The large number of potential victims can also provide challenges – particularly for specialised chambers and tribunals – in registering victims and vetting their applications to ensure that they fulfil the relevant criteria for the status that they are seeking in the particular proceedings. This is an issue that the ICC has struggled with over the course of its operations, and reforms have been suggested to streamline the process.

Proposals to address this have tended to focus on ‘collective’ application or participation processes.²²⁰ This generally means that rather than each individual filling out a separate application form, victims apply together to participate in proceedings. However, such processes can have their own limitations, particularly when it is not possible for victims to speak with one voice (because of the nature of their victimisation, their current locations or because of the lack of suitable victim interlocutors).

This approach was adopted in the *ICC’s Gbagbo* case, where the judge considering victim applications issued a decision in which she indicated, *inter alia*, that a collective approach to victims’ applications should be encouraged, and ordered the Registry to carry out a “mapping” of the victim population in Cote d’Ivoire to identify the main victim communities and groups, and to identify persons who could act in the name of individual applicants and to encourage individuals to group themselves in order to make a single collective application to participate in proceedings.²²¹ The procedure ultimately adopted by the Single Judge in the *Gbagbo* case was a mixed one, whereby a collective form was designed by the Registry which allowed groups of victims to file a single application, to which individual statements from victims constituting the group were appended.²²²

A different approach was adopted in the *Kenyatta* case, where the Trial Chamber indicated that only victims who wish to present their views and concerns individually by appearing directly before the Chamber, in person or via video-link, should be required to complete an individualised application form. Other victims, who wish to participate in proceedings without appearing before the Chamber, should be able to present their views and concerns through a common legal representative. To do so, this latter category may optionally register with the Court as “victim participants”,²²³ in order to facilitate communication with the Court and their contact with the common legal representative.

²²⁰ ICC (2012), ‘Report on the Court’s Review of the Victim Application System’, 24 September 2012.

²²¹ See ICC, *Gbagbo*, PTC III, ICC-02/11-01/11-33, Pre-Trial Chamber III, 6 February 2012, Decision on issues related to the victims’ application process.

²²² ICC, *Gbagbo*, PTC I, ICC-02/11-01/11-86, 5 April 2012, Second decision on issues related to the victims’ application process.

²²³ ICC, *Muthaura & Kenyatta*, TC V, ICC-01/09-02/11-498, 3 October 2012, Decision on victims’ representation and participation, para. 24; ICC, *Ruto & Sang*, TC V, ICC-01/09-02/11-460, 3 October 2012, Decision on victims’ representation and participation, para. 25.

Another practical difficulty when seeking victim status for many victims of international crimes – who may have been traumatised and displaced, and who may be otherwise marginalised – is proving their victim status. In situations of mass atrocity, victims often lose access to official documents that may help them prove both their identity and their claims.²²⁴ Accordingly, the ICC has adopted a pragmatic approach to proof of identity, accepting documents such as student cards, and emphasising that “what evidence is considered sufficient must be established on ‘a case by case basis taking into account all relevant circumstances’”.²²⁵

Where crimes are being dealt with through the normal criminal justice system, victims of international crimes should be able to complain to the police or other authorities in the normal way. If their complaint relates to a crime involving mass victimisation, it should be forwarded to an appropriate central investigative body with responsibility for investigating international crimes, or such a team should be established. States may consider introducing provisions to allow victims of international crimes to file a complaint before a wider range of public servants, who then have the duty to forward it to the competent authorities.

Any chamber or tribunal specifically dealing with international crimes should establish a procedure by which victims can complain of their alleged victimisation. At the outset, mapping of victim populations and significant outreach should be undertaken to ensure that victims know of the procedure and are able to use it. Chambers and tribunals should take a pragmatic approach to proof of victim status, appropriate to the context.

3. Victims’ opportunity to ensure that valid complaints are pursued

(i) Domestic practice

The filing of a complaint to police or other authorities will usually give rise to duties incumbent on police or prosecutors to investigate complaints and initiate a prosecution where sufficient evidence exists.²²⁶ However, it does not necessarily lead to the formal opening of a “procedure” under the criminal procedure law or necessarily lead to the supervision of a judge to ensure that decisions as to whether or not to investigate are taken appropriately. National jurisdictions have different ways of providing victims with a degree of input into this process, or to review police’s and prosecutors’ actions.

Four major models can be identified. In some countries, victims may seize a court directly with a case, or otherwise automatically initiate a criminal process. In this type of situation judicial oversight is available from the beginning of the process and will often allow for appeals from decisions within it. In other jurisdictions, provision is built in for either judicial or administrative appeal against decisions not to begin an investigation. Third, in some jurisdictions, police may themselves be made the subject of a criminal complaint if they do not investigate cases where prima facie such an investigation

²²⁴ For example in the first trial before the ECCC, 24 individuals who had participated as civil parties were rejected as such in the verdict, due to insufficient proof of victim status as documents had been destroyed by the Khmer Rouge regime: see further Stover et al. (2011), ‘Confronting Duch’, p. 541.

²²⁵ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1301, citing ICC, *Kony et al*, AC, 23 February 2009, para. 1.

²²⁶ See, eg. OPBP Country Report: India, pp. 4-5.

should have taken place. Finally, some jurisdictions provide the possibility of pursuing a prosecution privately, where state authorities do not do so.

a. Right to initiate criminal proceedings and/or seize a court directly

Some forms of victim participation allow victims (and usually their heirs or successors) to formally launch a criminal proceeding. In a number of jurisdictions providing for “auxiliary/subsidiary prosecutors”, or civil party participation (see above page 29), victims may follow specific procedures to file complaints directly to a judge. The judge will then send the case to the prosecutor to investigate, but will retain oversight of the investigation and any decision not to pursue an investigation.

For example, in **Cambodia**, if no criminal proceedings are underway, victims can file a criminal complaint together with a civil party application and thereby initiate the criminal procedure before the investigating judge.²²⁷ The investigating judge must then forward the complaint and application to the prosecution and wait for the prosecution to issue an introductory submission before beginning the judicial investigations.²²⁸ In **DRC**, victims (“injured parties”) have the option of seizing the court directly with a case, which is then taken forward by the prosecution. They may join the proceedings as a civil party, or decide to take no further role in the proceedings.²²⁹ Similarly in **Guatemala**, a victim has the opportunity of filing a complaint to an investigative judge as a *querrela*, which is then sent to the Prosecutor for investigation.²³⁰

In these jurisdictions, and others, injured parties may also make an application to join ongoing prosecutions as “civil parties” at a later stage of proceedings.

Some common law jurisdictions also provide victims with the opportunity to file a complaint directly to a magistrate or judge. While not technically leading to the opening of a criminal procedure without further intervention of the judge or magistrate, it does mean judicial (or quasi-judicial in the case of some magistrates) oversight from an early stage.

Providing the option of filing a complaint directly to a magistrate is seen as important in some countries where police normally hold the responsibility to accept complaints and to investigate them. In **Bangladesh**, for example: “lodging complaints with police stations is oftentimes difficult for the poor and politically weak, especially if the complaints relate to wealthy and politically connected persons. The offenders or persons in league with them will invariably make arrangements with the police, even before a complaint is made, to block the victim. In such cases, the other option is to lodge a complaint directly to a magistrate’s court. The court can then order the officer-in-charge of the relevant police station to ‘take necessary steps’ or ‘take legal steps followed by inquiry’ or ‘register as a complaint following inquiry’”.²³¹

²²⁷ Cambodia CCP, Art. 5.

²²⁸ Cambodia CCP, Art. 139.

²²⁹ DRC CCP, Arts. 54 and 69.

²³⁰ Guatemala CCP, Art. 3030.

²³¹ Md. Ashrafuzzaman, ‘The disposable prosecutors of Bangladesh’, AHRC, <http://www.article2.org/mainfile.php/0701/309/>.

b. Right to challenge decisions not to open an investigation

In the jurisdictions surveyed where police are responsible for investigating serious criminal complaints, police generally (although not always²³²) have the obligation to follow all reasonable lines of inquiry to determine whether an investigation should be opened.²³³ Similarly where prosecutors are tasked with investigating complaints, they are generally required to investigate as soon as they are informed of the alleged commission of a crime.²³⁴

Sometimes police or prosecutors may decide not to open an investigation. Such decisions can be challenged in a number of different ways:

- **By way of supervision by a judge:** where victims can seize courts directly with a criminal complaint (as set out above), the court retains supervision of the police or prosecutor's decision as to whether to investigate the complaint. For example in **Bangladesh** or **India** where a complaint is filed with a magistrate; in **Chile** where a *querrela* is filed; or in **France** where a civil party files a criminal complaint to an investigative judge, the oversight of the supervisory judge or magistrate is engaged immediately. If the judge or magistrate admits the *querrela* or complaint submitted by the victim, the police or public prosecutor is obliged to carry on with the investigation.²³⁵

In **France**, victims and other affected parties, such as associations, can constitute a *partie civile* and file a criminal complaint directly with investigative judges.²³⁶ Once this is done, the investigating judge orders the complaint to be sent to the district prosecutor for consideration. Where the prosecutor considers that the complaint is insufficiently grounded or justified, the district prosecutor may, before making his submissions and if this has not been done by the investigating judge on his own motion, request this judge to hear the civil party and invite them to disclose any element liable to support his complaint. The district prosecutor may only send the investigating judge submissions not to investigate where the facts of the case cannot lead to a lawful prosecution, or where, if the facts were shown to exist, they would not amount to any criminal offence. Where the investigating judge decides otherwise, s/he must make a reasoned order.²³⁷ A civil party has the right to appeal such an order.²³⁸

- **By direct appeal to a judge:** In other jurisdictions, the victim may have the right to appeal directly to a judge on a decision not to investigate. This right is afforded, for example, to victims in **Guatemala**. If the Public Prosecutor finds that the facts prompting the complaint or *querrela* do not amount to a crime or it is not possible to continue, s/he can decide to dismiss the proceedings. The victim and the

²³² See, eg. Australia, *Taha v Shaq Industries Pty Ltd & Ors* [2012] VSC 30, [10]; in Ireland, the *Garda Síochána* (police) have a large measure of discretion in deciding whether to conduct an investigation: *Fowley v Conroy* [2005] 3 IR 480 (note however that in the Ireland Victims of Crime Charter, the *Garda Síochána* give an undertaking to investigate the complaint of an alleged victim (s. 2)).

²³³ Eg. England and Wales: Criminal Procedure and Investigations Act 1996, s. 23(1) - Criminal Procedure and Investigations Code of Practice, s 3(5), *NVB v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB); Denmark, Administration of Justice Act, s 742(2); Norway, Circular Letter on Prosecution, s 7(4).

²³⁴ See, eg. Guatemala CCP, Art. 289.

²³⁵ Eg. Chile CCP, Art. 169.

²³⁶ France CPP, Art. 85. Although note, as set out at p.49, this is not possible with respect to genocide, war crimes and crimes against humanity.

²³⁷ France CCP, Art. 177.

²³⁸ France CCP, Art. 186. See further Art. 502.

complainant have the right to be informed. Within 10 days, the victim has the right to object to the dismissal of the investigation before the competent Judge, in an oral hearing and in the presence of the Prosecutor.²³⁹

- **By separate proceedings before a court:** In **England and Wales**, a decision not to investigate a case concerning serious human rights violations can be challenged before the Courts. This is not, however, by way of an appeal as of right, but by bringing separate proceedings, for example for judicial review.²⁴⁰ Such actions are not limited to common law countries. In **Brazil**, for example, any person with an interest in the case (such as a victim, even if they are not the complainant) may file a general administrative law claim against the actions of the police, if they are considered to be arbitrary or in violation of any law.²⁴¹

In **Kenya**, systematic police failures to investigate allegations of sexual assault were challenged by a joint constitutional petition brought by a group of victims.²⁴² The constitutional challenge was brought by eleven girls whose cases had not been investigated, and a non-government organisation as public interest litigator, coordinated through a network of local and international non-governmental organisations. In its judgment, the Court held that failure to investigate sexual abuse was a breach of constitutional rights and rights guaranteed under international human rights treaties, and ordered investigations to be opened.²⁴³

- **By appeal to a higher officer:** Another common way by which decisions not to investigate can be challenged is by appeal to a higher officer. In **Cambodia**, for example, where a prosecutor does not respond to a complaint or decides to close it after conducting preliminary investigations, the victim can appeal to the General Prosecutor, who will review the file and may instruct the prosecutor to proceed, or confirm the closure of the case.²⁴⁴ Similarly, in **India**, where an officer refuses to register a complaint (i.e. open an investigation) into an alleged “cognizable” offence, the complainant can send the substance of the complaint to the Superintendent of Police, who, on being satisfied that the information discloses the commission of a cognizable offence, can either conduct the investigation themselves, or direct that it be conducted by someone else.²⁴⁵ Similar provisions exist in **Brazil**²⁴⁶ and in **Norway**.²⁴⁷ In **Denmark**, a decision by the police not to investigate a complaint is appealed not to a higher police officer, but to the public prosecutor.²⁴⁸
- **By other administrative complaint:** In a number of jurisdictions decisions not to open an investigation are dealt with through administrative complaints procedures. This is the case, for example, in different **Australian states**, where victims can

²³⁹ Guatemala CCP, Art. 310, modified by Decree 7/2011.

²⁴⁰ See, eg. *NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB).

²⁴¹ Federal Law No. 9.784, Arts. 3, 5 and 6.

²⁴² *CK (a child) and 11 others v Commissioner of Police & Ors* [2013] Petition No. 8 of 2012, High Court of Meru, 27 May 2013.

²⁴³ See further Winifred Kamau and Kieya Kamau (2013), ‘Case Comment – Victory for 160 Girls in Defilement Constitutional Challenge; Petition No. 8 of 2012, High Court of Meru, C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector-General of the National Police Service & 2 Others [2012] eKLR’, <http://kenyalaw.org/kl/index.php?id=4504>. A copy of the judgment is available at <http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf>.

²⁴⁴ Cambodia CCP, Arts. 6 and 41.

²⁴⁵ India CPC, s 154(3).

²⁴⁶ Brazil CCP, art. 5(2).

²⁴⁷ Norway Circular Letter on Prosecution, s 17(2).

²⁴⁸ Administration of Justice Act, s. 749(3).

complain to internal complaint mechanisms or external victim services coordinators,²⁴⁹ in **Ireland**, where a complaint may be made to the *Garda Síochána* Ombudsman Commission,²⁵⁰ and in the **USA**, where the victim must make a complaint directly to the Department of Justice (which is the only entity entitled to bring proceedings under police misconduct provisions).²⁵¹ Such procedures, while arguably easier to engage than judicial review, do not necessarily provide victims with enforceable legal rights, and in many cases they may involve only a review of police conduct, rather than review of the case itself. In some cases, concerns have been raised about the effectiveness of such internal procedures of oversight.²⁵²

c. Criminal complaints against officers who do not pursue investigations

A more extreme way in which failures to investigate may be addressed is by criminal complaint against individual police officers concerned. This is a possibility in **India**, for example, where a police officer may be convicted by a magistrate and sentenced to a penalty of three month's pay and/or imprisonment for three months.²⁵³ Even stronger provisions were introduced for certain sexual offences in 2013. Under those provisions, a public servant who does not record a complaint about a number of specified offences (including acid attacks, rape, and words, gestures or acts intended to insult the modesty of a woman), can be sentenced to imprisonment for six months to three years.²⁵⁴

Despite the technical possibility of such actions, past criminal complaints against police officers have not typically resulted in convictions. For example, of the nearly 7,000 complaints made against police officers in Maharashtra in 2012, only 185 were sent to trial, with only 25 completed trials and five resulting convictions (approximately 0.07% of the complaints submitted).²⁵⁵

d. Private prosecutions

In some countries, a safeguard against official inaction is the ability to bring a prosecution privately. When this route is pursued, the victim/s are responsible to investigate the crime, present an indictment to court, and conduct the prosecution before the court. A number of models can be identified.

- **Allowed for any crime, with restrictions:** At common law, where the responsibility to investigate and prosecute crimes rests with the police and prosecution rather than judges, and it is generally not an enforceable duty, the right of a private individual to institute a prosecution for a breach of the law has been seen as "a

²⁴⁹ OPBP Country Report, Australia, para. 18.

²⁵⁰ Garda Síochána Act 2005, part III.

²⁵¹ Violent Crime Control and Law Enforcement Act 1994, 42 USC 14141.

²⁵² For example in Ireland, the Guerin Report highlighted major discrepancies with the Garda Síochána (Available at <http://www.merriestreet.ie/en/wp-content/uploads/2014/05/Final-Redacted-Guerin-Report.pdf>) and the Garda Inspectorate Report similarly highlighted major issues. Very recently, the Garda Síochána Act of 2005 has been amended. This amendment has introduced a judge over the GSOC (Garda Síochána Ombudsman Commission), and additional powers have been granted to the Ombudsman. The GSOC has the right to compel the Gardaí to provide information (information from Irish lawyer, 5 August 2015).

²⁵³ Police Act, s. 29.

²⁵⁴ Criminal Law Amendment Act no 13 2013, s. 3.

²⁵⁵ OPB Country Report: India, para. 12, citing Maja Daruwala, 'Perpetuating Immunity', *Indian Express*, 24 February 2014, <http://indianexpress.com/article/opinion/columns/perpetuating-impunity/>.

valuable constitutional safeguard against inertia or partiality on the part of authority".²⁵⁶

Several common law countries allow private prosecutions for any crime, although often with certain restrictions. In **Kenya**, private prosecutions are seen as an important constitutional safeguard “against a capricious, corrupt or biased failure or refusal of police forces and the Attorney General to prosecute offenders against the criminal law”, but may be instituted only with permission of a magistrate.²⁵⁷ In **England and Wales** although private prosecution is allowed for any crime it may in certain circumstances be taken over or terminated by government prosecutors. Furthermore, following a controversial amendment introduced in 2011, an arrest warrant related to a private prosecution for certain international crimes committed outside the United Kingdom can only be issued with the consent of the Director of Public Prosecutions.²⁵⁸ Similarly, while private prosecutions are possible in **Australia** (for Commonwealth crimes) and **Uganda**, in both cases the public prosecutor may take over the proceedings, including by terminating them, at any time.²⁵⁹

- **Allowed where the prosecutor declines to prosecute:** In other countries, victims can bring a private prosecution where the prosecutor declines to do so. For example, in **Argentina**, a public prosecution can be “converted” to a private prosecution in certain circumstances, including where the prosecutor has used their discretion not to proceed with the prosecution.²⁶⁰
- **Allowed only for certain “private” or “minor” crimes:** In other legal traditions private prosecutions are seen to be appropriate for certain crimes only. **Germany** is an example of such a country. It allows private prosecution for certain crimes listed in Article 374(1) of the CCP, mainly consisting of crimes that infringe personal rights such as insult, trespassing, damaging property and assault. Such crimes can only be prosecuted by the state where there is a public interest, and private prosecution may therefore be pursued where the prosecution decides not to prosecute for lack of public interest. Only persons directly affected by one of the listed crimes may pursue a private prosecution, and a deposit must be paid for the estimated expenses of proceedings. Other countries with similar provisions include **Denmark** (limited to certain crimes such as defamation),²⁶¹ **Ireland** (only for summary offences),²⁶² and **Italy** (only for minor offences before the Justice of the Peace).²⁶³

(ii) Application to international crimes

As set out above, in cases concerning serious violations of human rights including international crimes, victims’ right to an effective remedy requires the carrying out of an investigation.

²⁵⁶ *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477, per Lord Wilberforce.

²⁵⁷ *Richard v Republic* [2006] eKL, High Court, 17 November 2006, <http://kenyalaw.org/caselaw/cases/view/35061/>; Kenya CCP, s 88.

²⁵⁸ Police Reform and Social Responsibility Act 2011, s. 153.

²⁵⁹ Australia: Crimes Act 1914, s. 13; Commonwealth Director of Public Prosecutions Act 1983, s. 9(5); Uganda: Constitution of Uganda, s. 120(3)(c).

²⁶⁰ Argentina CPP, art. 33.

²⁶¹ Denmark Criminal Code, ss. 152-152 d, 263-265, 274 and 294.

²⁶² Ireland, Criminal Justice (Administration) Act 1924, s 9(1); *State (Collins) v Ruane* [1984] IR 105.

²⁶³ Decreto Legislativo 28 agosto 2000, n. 274 (d.lgs. 274/2000).

Where state or otherwise powerful actors are involved in the crimes – as they often are with international crimes – structures of impunity within the regular criminal justice system may stymie investigations. It is therefore particularly important that victims of international crimes have some way to require judicial oversight or review of decisions taken as to whether and which crimes should be investigated. This will help ensure that decisions on investigations are not taken in an illegal or arbitrary way.

Furthermore, international crimes often involve a very large number of potential victims and crimes of an inter-connected nature. One potential investigation may cover a multitude of crimes affecting a multitude of victims. As such, investigations may need to be coordinated on a wide scale both within and sometimes between countries. Comprehensive mapping of crimes should therefore be carried out, and priorities for investigation and prosecution should be identified and communicated to victims and the wider public. Without such a strategy “there is no objective basis to enable effective communication to victims or the public about the prioritization of judicial investigations or trials, or to explain how cases are selected and justice is effected”.²⁶⁴ This is not only important for victims, but is crucial for “rebuilding public confidence in the formal justice system.”²⁶⁵

Ensuring both that specialised units deal with international crimes, and that they seek victims’ input at the outset of framing the overall investigative and prosecutorial strategy can increase the effectiveness of the investigation and subsequent prosecution.

Where victims are relying on the ordinary criminal justice system

These challenges will raise different practical issues depending on whether victims are relying on the normal criminal justice system or have access to a specially constituted chamber or tribunal. In the first case, victims can bring individual or group complaints to criminal justice actors in the usual way, and normal processes of review and appeal can be used (or if unavailable, introduced), to ensure that complaints are dealt with properly. The strongest rights for victims in this regard exist where victims can initiate proceedings directly.

²⁶⁴ ICTJ (2015), ‘The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)’, July 2015, <https://www.ictj.org/publication/accountability-landscape-eastern-drc-analysis-national-legislative-and-judicial-respon-0>, p. 35.

²⁶⁵ *Ibid.*

The ability to initiate proceedings directly has provided an important opening for victims to have criminal complaints investigated using universal jurisdiction provisions in countries including France, Belgium and Spain.²⁶⁶ Several cases were filed in this way, such as **Ely Ould Dah**²⁶⁷ and **Khaled Ben Saïd**,²⁶⁸ both for torture, trial of **Chilean officials** from the Pinochet dictatorship for enforced disappearance, in France,²⁶⁹ the proceedings against **Augusto Pinochet**, resulting in an extradition order in the UK, brought in Spain, and the case against **Hissène Habré**, brought in Belgium.²⁷⁰

However, some states have begun to restrict this right in relation to international crimes. In 2010, **France** removed victims' rights to file civil party complaints in cases of genocide, crimes against humanity, and war crimes and instead vested sole authority to initiate criminal proceedings with prosecutors.²⁷¹ According to Human Rights Watch, French lawmakers and officials were concerned that "allowing civil party complaints in grave international crimes cases might result in the filing of frivolous, abusive, or ill-founded complaints and could create diplomatic tensions in sensitive cases."²⁷² Complaints may still be filed directly with investigative judges for torture, enforced disappearance, and crimes related to the former Yugoslavia and Rwanda due to the *aut dedere, aut judicare* principle and special legislation relating to those tribunals.²⁷³ Similar restrictions have been introduced in Germany,²⁷⁴ Belgium²⁷⁵ and Spain.²⁷⁶

When there are a large number of complaints, prosecutorial strategies have prioritised certain cases over others, leading to delays with other cases. It is therefore crucial that victims have rights to information about prosecutorial strategies, the status of their complaint, and the ability to challenge any decision not to open an investigation into it.

Best practice is that victims are able to initiate criminal proceedings directly, but "because most victims have neither the skill nor the resources to conduct an adequate private investigation, some meaningful procedure should exist to ensure an adequate official investigation where the authorities fail or refuse to conduct one".²⁷⁷

²⁶⁶ See further HRW (2006), 'Universal Jurisdiction in Europe: The state of the art', June 2006, www.hrw.org/sites/default/files/reports/ij0606web.pdf, pp. 7-8.

²⁶⁷ See further *Ould Dah v France* (2013) 56 E.H.R.R. SE17, para. 6.

²⁶⁸ See further <https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/tunisia/Ben-Said-Case/Appeal-trial-of-Khaled-Ben-Said-a>.

²⁶⁹ See FIDH, 'The Trial of the Pinochet Dictatorship', p. 2, www.fidh.org/IMG/pdf/CHILI_DosPress_UK-CS3-02-2-2.pdf.

²⁷⁰ HRW (2006), 'Universal Jurisdiction in Europe', p. 7.

²⁷¹ France CCP, Art. 689-11 (2010 amendment).

²⁷² HRW (2014), 'The Legal Framework for Universal Jurisdiction in France', www.hrw.org/sites/default/files/related_material/IJ0914France.pdf, p. 5, citing Assemblée Nationale, "Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la république, sur le projet de loi, adopté par le sénat (N° 951), portant adaption du droit pénal à l'institution de la Cour pénale internationale", 19 May 2010, <http://www.assembleenationale.fr/13/rapports/r2517.asp>.

²⁷³ HRW (2014), 'The Legal Framework for Universal Jurisdiction in France', citing France CCP Articles 689-2 and 689-13.

²⁷⁴ Germany CCP, s. 153f (federal public prosecution office has a discretion to dispense with prosecuting alleged international crimes, which does not apply in respect of 'ordinary' domestic offences).

²⁷⁵ Belgium CCP, Article 6(1^{bis}), 10(1^{bis}) and 12^{bis} (although this does not apply where the accused is Belgian or a resident of Belgium), as amended by Loi 32, 5 August 2003, Article 14.

²⁷⁶ Articles 23.2 and 23.4, *Ley Orgánica del Poder Judicial* ('Organic Law of the Judicial Power'); on legislative amendments made in March 2014 see civil society letter, 'Spanish Lawmakers Should Reject Proposal Aimed at Closing the Door on Justice for the Most Serious Crimes', 10 February 2014, <http://www.redress.org/downloads/publications/Spain%20-%20Universal%20jurisdiction%20civil%20society%20letter%20ENGLISH.pdf>.

²⁷⁷ Douglas E Beloof (1999), 'The Third Model of Criminal Process: The Victim Participation Model' [1999] *Utah Law Review* 289 at 309.

To ensure that investigations of international crimes proceed in line with victims' right to an effective judicial remedy, victims should either be able to initiate proceedings directly before a judge, or there should be the opportunity for judicial review of a decision not to investigate a decision as an ordinary part of the procedure. Where appeal to a judge is not available, the victim must have the option to pursue a private prosecution.

Where a special chamber or tribunal is established

Where a special chamber or tribunal has been established, victims may not be aware of the scope of the potential investigation and whether their complaint fits within it. Given the interconnected nature of the crimes, and the rights victims have to an effective remedy, it is important that investigators have as much input as possible from victims at an early stage. Opportunities for victim input and judicial oversight of decisions on investigations should be built-in to procedures.

The ICC Statute provides an opportunity for victims to provide information and views before an investigation is opened, even though it does not provide victims with the right to make a "formal report of a crime....which automatically triggers an investigation".²⁷⁸ Under Article 15(3) of the Rome Statute, the Pre-Trial Chamber must authorise the commencement of any investigation, and victims have the opportunity to "make representations" at this stage of the proceedings.²⁷⁹ At this early stage the parameters of the investigation will not have been finally settled, and accused persons may not have been identified, so the category of victims who can opt to provide submissions is a broad one – including any person who is a victim of the "situation" under consideration.²⁸⁰

This Article 15(3) opportunity for victim participation has proved to be a relatively important opening for victims to express views and concerns at the earliest possible stage. In the **Côte d'Ivoire** situation, the Office of the Prosecutor sought to open an investigation limited to post-election violence, however the Chamber – following submissions from victims and others – directed that the investigation cover a broader period.²⁸¹ In the **Kenya** situation, in response to the Prosecutor's public notice of his intention to seek the authorisation to commence an investigation, Pre-Trial Chamber II developed a procedure to obtain the views and concerns from Kenyan victims. Consultations were carried in Kenya with victim populations and the results were reported back to the Pre-Trial Chamber, including their characteristics and current situations, such as the difficult security context and their perceptions and fears about the process of collecting representations.²⁸² Victims' representations were reflected in the Chamber's decision on among other things, what areas of the country were affected by the violence,²⁸³ and in its decision on the appropriate time range for the investigation.²⁸⁴

²⁷⁸ De Brouwer and Heikkilä (2013), 'Victim Issues', p. 1317.

²⁷⁹ ICC RPE, Rule 50(1).

²⁸⁰ Safferling (2012), *International Criminal Procedure*, p. 310.

²⁸¹ ICC, *Côte d'Ivoire Situation*, PTC III, ICC-02/11-14, 3 October 2011, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire.

²⁸² Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10, Kenya Situation (ICC-01/09-6-Red) Pre-Trial Chamber II, 29 March 2010. Much of the VPRS Report and Annexes was redacted for security reasons.

²⁸³ ICC, *Kenya Situation*, PTC II, ICC-01/09-19, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para 177.

²⁸⁴ *Ibid.*, paras. 204-05.

One way to strengthen oversight of decisions on investigations by a special court or tribunal is to provide in the rules a timeframe within which the investigating authority (whether police or prosecutor) has to formally decide. It should be required to make that decision public – whether or not to investigate a complaint received. This should be followed by a review. It should be possible to review both the decision not to investigate (or proceed with a prosecution) and the scope of the investigation launched.

Depending on the set-up of the special chamber or tribunal, and the degree of oversight exercised over decisions to investigate crimes, the right to bring a private prosecution within such proceedings may be either unnecessary and/or impractical. This is a matter that should be considered in light of the country’s legal tradition and the rules applicable to investigations before the Court.

II. Pre-trial stage

1. Key issues and international standards

The pre-trial stage follows the opening of an investigation and is prior to the beginning of the public trial of the accused. It includes the investigation, arrest and charging of the accused, decisions on pre-trial detention or bail, filing of the indictment and pre-trial proceedings concerning jurisdiction or other matters. This stage sets the scene for any later prosecution, and may involve a number of other decisions that impact directly on victims’ interests.

The pre-trial stage is crucial for a successful prosecution and to setting the boundaries for such prosecution. It is therefore also crucial to victims of international crimes so that they can effectively defend their interests in the proceedings.²⁸⁵ The European Court of Human Rights has found that victims and their families should be given access to investigations and court documents.²⁸⁶ According to this Court, a thorough investigation “must include the possibility of the complainant having effective access to the investigation procedure”.²⁸⁷ In addition, in cases concerning international crimes (such as alleged extraordinary rendition and torture), the European Court has stressed that “the gravity of the issues involved require particularly intense public scrutiny of the investigation”.²⁸⁸

At the end of the investigation, victims do not necessarily have a “right” to require the prosecution of a particular accused person.²⁸⁹ The state does however have the obligation to bring to justice any individual against whom there is sufficient evidence of committing an international crime, and this is intimately connected to victims’ right to

²⁸⁵ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, para. 495-97. IACtHR, *Castillo Páez v Peru*, Judgment, 3 November 1997, para. 90.

²⁸⁶ ECtHR, *Ogur v Turkey* (1999), App. No. 21594/93, 20 May 1999, para. 92.

²⁸⁷ ECtHR, *Çakıcı v Turkey* (1999), App. No. 23657/94, 8 July 1999, para. 114.

²⁸⁸ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, para. 497.

²⁸⁹ See, eg. UN HRC, *Vicente et al. v Colombia*, Comm. No. 612/1995, UN Doc. CCPR/C/60/D/612/1995, 29 July 1997, para. 8.8; ECtHR, *Perez v France* (2004) App. No 47287/99, 12 February 2004, paras. 68 and 70.

an effective judicial remedy.²⁹⁰ Decisions on whether or not to prosecute, and on what charges, therefore directly impact victims' rights.

Victims must at least be heard in the process and/or have the right to review. The ACmHPR Fair Trial Principles provide that prosecutors shall "consider the views and concerns of victims when their personal interests are affected ...".²⁹¹ The European Court of Human Rights has criticised states for failing to provide victims with sufficient reasons for decisions not to prosecute and for not subjecting these decisions to judicial review.²⁹² The requirement that victims be given the opportunity to ask for review of a decision not to prosecute has recently been made concrete in the EU Victims' Directive, applicable to all European Union states.

Even stronger rights have been recognised in the Inter-American system, where victims are held to have the right both to state investigation of crimes, and to state prosecution of those suspected of perpetrating the offense and to punishment of those found guilty.²⁹³ In cases concerning serious violations, the court has held that "only a criminal trial could guarantee [the victims] the appropriate remedy; namely the punishment of the perpetrators".²⁹⁴

Jurisprudence is therefore coalescing towards recognising – if not the right of victims to demand prosecution of an individual perpetrator – the right to be involved in the investigation to the extent necessary to protect their legitimate interests, and the right to have the opportunity to request review of a decision not to prosecute.

2. Right to participate in investigation

(i) Domestic practice

In most of the common law **adversarial** jurisdictions surveyed, victims are or were traditionally not given a formal role in shaping the investigation. While victims can cooperate with police and/or prosecutors in their investigation, including by providing witness statements, most of the jurisdictions surveyed did not provide formal rights to ask that specific lines of inquiry be followed,²⁹⁵ or specific rights to access the documents gathered in the investigation.²⁹⁶

An exception to this is inquests by a coroner (a judicial officer) into the cause of certain violent or unexplained deaths. Here, the families of the deceased may play a more active role and may be granted access to certain investigation documents (for example where a death occurs in custody, guidelines in **England and Wales** provide that evidence should be provided to the family ahead of the inquest).²⁹⁷ It should be noted however that the role of an inquest is not to establish the criminal or civil liability of any named individuals.

²⁹⁰ See, eg. UN Basic Principles on Remedy and Reparation, para. 22(f).

²⁹¹ ACmHPR Guidelines on Fair Trial in Africa, F(2)(h)(4).

²⁹² ECtHR, *Hugh Jordan v United Kingdom*, App. No. 24746/94, 4 August 2001, para. 122.

²⁹³ IACtHR, *Paniagua-Morales et al v Guatemala*, Judgment, 8 March 1998, para. 155-156.

²⁹⁴ IACtHR, *Castillo Páez v Peru*, Judgment (Reparations and Costs), 27 November 1998, para. 105-07.

²⁹⁵ For example in Ireland, it is well established that members of the *Garda Síochána* enjoy a large measure of discretion in conducting the pre-trial investigation (and are not obliged to consider the views of the victim), and that an investigation can only be challenged in "the most exceptional case": *Fowley v Conroy* [2005] 3 IR 480.

²⁹⁶ See further OPBP Country Reports on Australia, England and Wales, India, Ireland, and USA.

²⁹⁷ See, e.g., in relation to England and Wales, INQUEST (2011), 'The Inquest Handbook', January 2011, <http://www.inquest.org.uk/help/handbook/section-1-3-what-is-an-inquest>, Section 1.3.

However, in practice, victims do provide information and evidence to the police during their investigation, and informal intervention is likely to be taken into account if it might benefit the development of the investigations.²⁹⁸ In a number of common law jurisdictions, victims are entitled to information about the status of the investigation, which may allow for greater informal involvement in the investigation by giving the victim an opportunity to raise concerns and suggest new lines of inquiry.²⁹⁹

Under the Victim's Charter in **Ireland**, police are required to keep victims informed of the status of the investigation, however in the past this has not tended to work well in practice. To address this, the *Gardaí* has recently introduced 28 divisional units staffed by civilian liaisons to inform victims on the status of investigations. A victim can ask for information on a particular case, and they can expect to receive an answer in a few days. If the relevant officer is away for any reason the civilian liaison will follow up with other officers who can provide information on the case. This has significantly enhanced the ability of victims to obtain information about the status of investigations.³⁰⁰

In some **inquisitorial systems**, victims can have a more formal role in the investigation where it is carried out by an investigative judge.³⁰¹

In **Cambodia**, for example, during judicial investigations, Civil Parties have the right to request the investigating judge to question the Civil Party, question witnesses, interrogate the charged person, conduct a confrontation or visit a site.³⁰²

When the investigating judge decides to hear an expert witness, Civil Parties are entitled to be informed about the conclusion of the expert and can request additional expertise or even appoint a counter-expert.³⁰³ Additionally, Civil Parties may request the closing of the investigations one year after having been admitted as Civil Parties.³⁰⁴

For each request, Civil Parties can seize the Investigation Chamber to order the investigation judge to decide on the request where the investigation judge failed to do so within a certain amount of time. Civil Parties can also challenge measures taken by the investigating judges through either a request for annulment or an appeal,³⁰⁵ and can also provide their own observations on any appeal filed by the prosecution or defence.³⁰⁶

In other inquisitorial systems victim participation during the investigatory phase is more limited, although victims usually have the right to legal representation and some access to the case file.

²⁹⁸ Interview with US lawyer, 2 July 2015.

²⁹⁹ E.g., in Australia: all Charters entitle the victim to receive information regarding the investigation (see OPBP Country Report: Australia, para. 15; England & Wales: Code of Practice for Victims of Crime, Part A, Section 1.

³⁰⁰ Information from Irish lawyer, 5 August 2015.

³⁰¹ Note that this is not the case in all jurisdictions surveyed, however; the victim's ability to play a formal role in investigations is more limited, for example, in CAR, DRC, France and Germany.

³⁰² Cambodia CCP, Art. 134.

³⁰³ *Ibid*, Art. 170.

³⁰⁴ *Id*, Art. 286.

³⁰⁵ *Id*, Art. 253 and 268.

³⁰⁶ *Id*, Art. 260.

A number of **hybrid systems** have however enshrined formal rights for victims in the investigative process. Examples include:

- **Italy:** where the victim has the right to make pleadings and provide an indication of relevant evidence at any stage of proceedings.³⁰⁷ In the investigation phase, pleadings are generally filed before the prosecutor, while indication of evidence is given to the judge. The victim can also take part in hearings on pre-trial admission of evidence, cross-examine those providing such evidence, and request a hearing on the admission of other evidence.³⁰⁸
- **Argentina:** where a victim who is intervening as a *querellante* in a public prosecution may suggest investigative steps to the public prosecutor; if these are rejected the victim can request a hearing before the judge.³⁰⁹ The public prosecutor must also allow the parties (including the victim as *querellante*, and civil parties) to attend acts carried out during the preparatory investigations, unless they will interfere with the development of the proceedings.³¹⁰ Victim parties can also request the pre-trial admission of evidence, provide information during the investigations, and can request amendments to the ordinary timeline for the investigation.³¹¹ Similar provisions exist in **Guatemala** and **Chile**.
- In **Brazil**, victims have the right to be heard by police authorities, and the right to request the presentation of any kind of evidence, the gathering of which is nonetheless subject to a decision by the competent police authority.³¹²
- In **Norway** a victim has the right, through legal counsel, to suggest certain investigative steps, and can request that an expert is appointed by the court during the investigation to assess the personal injuries to the victim if this is necessary for the civil claim.³¹³

In other hybrid jurisdictions surveyed, rights are more limited. Most jurisdictions do at least provide a right to information from the prosecutor on the status of the investigation,³¹⁴ and some provide the victim or the victim's representative with access to the investigation file, though this is often subject to the prosecutor's discretion.³¹⁵

In practice, victims – sometimes supported by external funders – have assumed primary investigatory functions where resources of the state criminal justice actors are limited. This has happened, for example in the **DRC**. In relation to military trials conducted in the DRC, ICTJ has reported that:

... [UN agencies] and NGOs that represent victims as civil parties during trials ... have consistently assumed the preliminary identification of victims and witnesses and

³⁰⁷ Italy CCP, Art. 90.

³⁰⁸ *Ibid*, Art. 394, 398, 401.

³⁰⁹ Argentina CCP, Art. 227.

³¹⁰ *Ibid*, Art. 228.

³¹¹ *Id*, Arts. 79, 229, 232-233 CPP

³¹² Brazil CCP, Art. 16; Penal Code, Art. 6, IV.

³¹³ Criminal Procedure Act, Sections 107, 237 and 264.

³¹⁴ See eg. Colombia, Mejía Gallego (2014), 'La participación de las víctimas', pp. 49-50; interview with Colombian lawyer, 24 June 2015.

³¹⁵ Eg. In Chile, the victim has access to the registers of the case during the investigation stage, excluding registers and documents that the Public Prosecutor decided to keep secret, if (s)he considers it necessary in order to ensure the efficacy of the investigations. In such cases, the Public Prosecutor cannot maintain the secrecy for more than forty days, and interveners may request the supervisory Judge to put to an end the secrecy of the documents and registers, or that (s)he limits it in its duration or scope: Chile CCP, Art. 182. Cf. Brazil, where the victim's access to the casefile during the investigation is to be determined by the competent police authority, in light of the circumstances of each case, taking into account the interests of society and the need for confidentiality: Brazil CCP, Art. 20.

logistical arrangements for interviews. Logistics and expenses related to both investigations and mobile trials (such as transport and per diems for magistrates; per diem and judicial fees of legal representatives, victims and witness protection measures; and transport and transfer of accused and convicted persons) are also typically supported and funded by stakeholders.³¹⁶

(ii) Application to international crimes

Apart from a limited number of inquisitorial and hybrid systems surveyed, victims do not tend to have strong rights to request or demand that particular investigatory steps are taken. Victims' rights tend to be stronger to be given access to the file, and/or be kept informed of the status of the investigation. These rights can be important, particularly in view of the fact that in many jurisdictions prosecutors do take victims' views and information into account throughout the investigation in an informal way.

In relation to international crimes, cooperation with victims at an early stage has proved important for the development of the case. Some crimes are more "visible" than others, with crimes against marginalised or discriminated groups – including victims of sexual and gender based violence – missing from the picture or under-represented.³¹⁷ Engaging victims at the earliest stage possible can help investigators and prosecutors to be aware of the multidimensional nature of international crimes, and to investigate and charge appropriately.

At the **Extraordinary Chambers in the Courts of Cambodia**, the intervention of Civil Parties at the investigations stage resulted in investigations and subsequently in charges of forced marriage, a crime that resulted in mass victimisation but remained hidden until then.³¹⁸

Similarly, during investigations in the **Nkezabera case** in Belgium, victims' organisations brought forward witnesses and other evidence that led to the inclusion in the indictment of charges related to sexual violence. The case subsequently became one of the first universal jurisdiction cases to prosecute sexual violence as an international crime.³¹⁹

Early engagement of victims can therefore help investigators to get it right from the outset. It is likely to help prosecutors to understand and better reflect the magnitude of the crimes committed and thereby do justice to victims.³²⁰

³¹⁶ ICTJ (2015), 'The Accountability Landscape in Eastern DRC', p. 25.

³¹⁷ See for instance ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998: extensive evidence of Akayesu's encouragement of both individual and gang rape, as well as forced nudity, resulted in the submission of an amended indictment by the prosecutor on 17 June 1997 that included charges of rape and other inhumane acts characterised as crimes against humanity and that referenced rape in the counts of genocide. Akayesu was later convicted for, *inter alia*, rape as a crime against humanity, and rape as a crime of genocide. However, the failure to include charges at the outset prevented future prosecutions for sexual violence crimes at the ICTR. See, REDRESS and African Rights (2008), 'Survivors and Post-Genocide Justice in Rwanda- their experiences, perspectives and hopes', November 2008, <http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>, pp. 95-98.

³¹⁸ See, ECCC, Case No. 002/19-09-2007-ECCC-OCIJ, Decision of Office of the Co-Investigating Judges, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, Document No. D268/2, 18 December 2009.

³¹⁹ Interviews with Belgian lawyers, September 2013. Ephrem Nkezabera was convicted in 2009 of war crimes for giving specific orders to rape and subsequently execute Tutsi women, among other charges. See also, Civil Society Letter for the 16th Meeting of the EU Genocide Network, 'Investigating and prosecuting sexual and gender-based violence as crimes under international law', May 2014, [http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-\(ns\).pdf](http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-(ns).pdf).

³²⁰ See, José Manuel Romero (2010), 'El Supremo vence al juez de la democracia', *El País*, 15 May 2010; Baltasar Garzón, *Auto. Diligencias previas proc. abreviado 399/2006, Juzgado Central de Instrucción Nº 005, Audiencia Nacional*, 16 October 2008

Where an investigation is ongoing and there are large numbers of potential victims involved, it may be argued that it is impractical to afford each potential victim strong individual *rights* at the investigation phase. Practice at the ECCC, described above, however, shows that in inquisitorial systems at least this may be practical and serve useful purposes.

These challenges have been reflected in the practice at the ICC. Practice initially allowed for victim input into the investigation itself, but formal rights in this regard have subsequently been substantially limited by the Appeal Chamber.³²¹ Nevertheless, the ICC Office of the Prosecutor increasingly recognises the importance of engaging with victims at this stage, providing in its Policy Paper on Participation that it “welcomes direct interaction with victims and victims associations starting at the earliest stages of its work in order to take their interests into account when it defines the focus of its investigative activity”.³²²

The extent to which victims may have formal rights to participate in the investigation itself may therefore be driven to a large extent by the legal tradition of the domestic jurisdiction. However, it is in the investigators’, victims’ and general public’s interest to provide transparency as to the status of the investigation and the steps taken, when they concern such grave crimes, and to seek victims’ input. This is also in accordance with the human rights jurisprudence outlined above.

Investigators can and should take active steps to engage potential victims in the investigation at an early stage. A variety of prosecution services specialised in the investigation and prosecution of international crimes in **Europe** and **North America** have produced leaflets and posters with information on their mandate, providing contact details of prosecutors and encouraging victims to come forward. These leaflets/ posters are distributed in those services’ own countries by the Red Cross, asylum service providers, immigration authorities and others and enable victims/ witnesses to provide information electronically through their websites, which also contain useful information about their work and past cases.³²³ To complement these efforts members of the Dutch unit, for example, took the opportunity while visiting Rwanda to conduct radio interviews and provide information about previous cases in which perpetrators had been convicted, with a view to encouraging further victims to come forward for a new

(copy on file with REDRESS); Ángeles Lucas (2014), ‘Argentinean Franco crimes judge: “You see people’s fear of testifying”’, *El País*, 23 May 2014. In April 2014 a Spanish court rejected the Argentinian extradition requests on the basis of amnesty laws; see Patricia Rafael and Jim Yardley (2014), ‘No Extradition for Franco-Era Police Inspector’, *The New York Times*, 30 April 2014. See also, the OTP ICC (2010), Policy Paper on Participation, April 2010, which emphasises that as part of its prosecutorial strategy, the OTP is systematically addressing “the interests of victims in the work of the Office, seeking their views at an early stage, before an investigation is launched, and continuing to assess their interests on an on-going basis”, p. 3, at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-M.1-ENG.pdf. The OTP also stresses that it “welcomes direct interaction with victims and victims associations starting at the earliest stages of its work in order to take their interests into account when it defines the focus of its investigative activity” (p. 8). Accordingly, the OTP ICC takes a “victim-centred approach in all aspects of [its] work.” See, OTP Prosecutorial Strategies, 11 October 2013, p.13, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf. For a perspective on how insufficient consultation and engagement of victims can lead to failed prosecutions, see UN News Centre (2014), ‘DR Congo mass rape verdict fails to deliver justice to victims, says UN envoy’, 8 May 2014.

³²¹ ICC, *Situation in the DRC*, ICC-01/04-556, 19 December 2008, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, para. 45; ICC, *Situation in the Republic of Kenya*, ICC-01/09-24, 3 November 2010, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, para. 9.

³²² OTP ICC (2014), ‘Policy paper on Sexual and Gender Based Crimes, June 2014, <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>, para. 2.

³²³ REDRESS is aware of leaflets and/or websites used by units of police and/or prosecutors specialised in the investigation and prosecution of international crimes in Denmark, Germany, The Netherlands and the United States.

investigation. It is important that investigation and prosecution services are known, accessible and considered trustworthy so as to encourage victims to come forward.

As an example of outreach, the **Extraordinary African Chambers (EAC) in Senegal** - established to investigate and prosecute former president of Chad Hissène Habré - established a communications office shortly after it was established and began its investigations, and has been publicising both the court and ongoing investigations in both Chad and Senegal. This has included prosecutors conducting radio interviews and outreach sessions with victims during a number of rogatory commissions in Chad. In addition to this, networks of local NGOs and victims' associations are assisting victims, over 1,000 of whom have applied to join the proceedings to date. An international NGO with experience of outreach to victim communities is also implementing a "sensitisation" project in partnership with the EAC to train journalists and media about international justice issues and lay the groundwork for further outreach.³²⁴

Similarly, investigators can take other practical steps to integrate victims' evidence, concerns and perspectives in their investigation. The **OTP ICC policy** paper on participation for instance refers to "town hall meetings with victims groups, which have contributed to the definition of incidents and charges brought forward by the prosecution"³²⁵ emphasising that there is "scope for further development of such interaction during early stages of its work", and that it "pro-actively" monitors and considers open source information and information sent by victims groups, NGOs and others".³²⁶

Victims of international crimes have the right to a prompt, thorough, effective and impartial investigation, and the effectiveness of investigations are enhanced by early engagement with victims.

Where victims have the right under domestic law to formally participate in investigations or to specific information about the investigation, these rights should be made practical and adapted as appropriate for international crimes prosecutions, including for any special chamber or tribunal.

In addition, police or prosecutors investigating international crimes, including those committed on a large scale, should develop a strategy for communicating updates on steps taken in the investigation to victims of the crimes being investigated, and the wider public, to the extent that such communication will not endanger the investigation or prejudice the rights of the accused.

³²⁴ See website of the Extraordinary African Chambers: <http://www.chambresafricaines.org/>; Martien Schotsmans, Director of RCN Justice & Démocratie, in conversation with REDRESS in March 2014.

³²⁵ OTP ICC (2010), Policy Paper on Victims' Participation, p. 7.

³²⁶ Ibid.

3. Rights regarding pre-trial detention

(i) Domestic practice

When a person is charged with a crime, a court will usually determine whether they should be held in detention pending trial. This is an area in which victims across different types of legal systems will often have a right to be heard.

In a number of common law jurisdictions, including **Australia**, **Kenya** and the **USA** (although there the law is unsettled³²⁷), the authorities deciding on the issue of pre-trial detention and bail are obliged to consider the victim's position. For example **Kenya's** Victim Protection Act provides that victims have the right to "have their safety and that of their families considered in determining the conditions of bail and release of the offender".³²⁸ Similarly, across nearly all **Australian** states authorities must consider victims' perceived need for protection in deciding bail applications.³²⁹ The prosecutor will usually bring victims' concerns to the attention of the court, as victims in Australia cannot make direct submissions during bail submissions.

In other common law countries, however, victims do have the right to make representations on pre-trial detention. In **India**, the Criminal Procedure Code has been interpreted by the Courts to recognise the right of the complainant or any "aggrieved party" to move the High Court or the Court of Sessions for cancellation of a bail granted to the accused.³³⁰ Similarly in **Bangladesh**, victims may privately engage a lawyer (as a "pleader" who acts under the direction of the public prosecutor) who may also make submissions to the Court on pre-trial detention.³³¹

Victims in a number of inquisitorial and hybrid jurisdictions also hold similar rights to provide submissions on pre-trial detention. In **CAR**, for example, where an accused person requests provisional release, the civil party must be notified and may present observations within 48 hours.³³² In **Brazil** (after the indictment is offered) and **Chile**, victims who have intervened as prosecution assistants or *querellante* respectively may request an order for pre-trial detention from the judge.³³³ In **Italy**, specific provisions have been introduced which require the authorities to communicate any modification or withdrawal of precautionary measures to the victim of violent offences, and victims can exercise their general right to file pleadings and indicate relevant evidence in respect of decisions on pre-trial detention.³³⁴

(ii) Application to international crimes

Domestic legal systems of all types recognise that it is important that victims are heard on decisions related to bail or conditional release of the accused (whether this is

³²⁷ Interview with US lawyer, 2 July 2015.

³²⁸ Section 10(1)(b).

³²⁹ OPBP Country Report: Australia, para. 28.

³³⁰ India CCP, s. 439(2) CCP; *Puran v Rambilas* (2001) 6 SCC 338 and *R Rathinam v State* (2000) 2 SCC 391. See further S. Muralidhan (2004), 'Rights of Victims in the Indian Criminal Justice System', International Environmental Resource Centre, <http://www.ielrc.org/content/a0402.pdf>, p. 2.

³³¹ Sujayet Ullah, 'Protection of Victims of Crime and Victims of Abuse of Power: The Legal system in Bangladesh vis a vis the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power – an Overview', United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), Resource Materials 70, www.unafei.or.jp/english/pdf/RS_No70/No70_13PA_Ullah.pdf.

³³² CAR CCP, Art. 100.

³³³ Brazil CCP, Art. 311; Chile CCP, Art. 139.

³³⁴ Italy CCP, Arts. 90 and 299.

through the Prosecutor or by victims raising any concerns directly). This is because of the real risk that release may pose both for the safety of victims, witnesses and their families, and to the integrity of investigations (for example where accused persons may attempt to induce witnesses to change their evidence, or not to provide it).

The same risks exist in relation to international crimes, and are often exacerbated by the powerful position of many of those accused of international crimes, especially in comparison to the vulnerable position of many victims and witnesses. This right is therefore tied not just to victims' right to an effective remedy, but also to their right of protection.

Recognising this, the rules at the ICC provide victims with the specific right to be heard before conditional release is granted. This right applies to victims who have communicated to the court by that point, and who would be at risk as a result of release or the condition imposed.³³⁵

In the *Lubanga* case, "victims were allowed to participate in proceedings referring to pre-trial detention from the very beginning. Victims' representatives thereby observed that a release would endanger the entire prosecution process and in fact lead to impunity of the accused. In addition they alleged, that release would strengthen the cause of some paramilitary groups in Ituri (DRC) and thus encourage them to resume fighting. ... When at the trial stage the release of Lubanga was discussed, victims' representatives argued in a similar way and the Trial Chamber took due recourse to the observations presented to the Chamber, even if the Chamber ordered the release".³³⁶

Victims of international crimes taking part in domestic criminal procedures should have the opportunity to be heard (whether through written submission or orally) on conditional release of the accused.

4. Right to challenge decision not to file an indictment or to influence scope of the indictment

(i) Domestic practice

Across all jurisdictions surveyed, accused persons are brought to trial on the basis of a document setting out the charges alleged against them. This frames the issues for trial. Although this document may have different technical legal names in different jurisdictions, for the purposes of this report it will be referred to as the "indictment".

Once the investigation has concluded, a prosecutor or investigative judge will decide whether the evidence is sufficient to present an indictment against the accused. In some jurisdictions, prosecutors are required by law to prosecute where there is sufficient evidence that a crime has been committed (those countries following the "principle of legality", including **Germany** and **Italy**).³³⁷ In other jurisdictions, the prosecutor may have a discretion as to whether or not to prosecute (this may be

³³⁵ ICC RPE, Rule 119(3).

³³⁶ Safferling (2012), *International Criminal Procedure*, p. 313 (citations omitted).

³³⁷ See further, Margaret M. deGuzman and William A. Schabas (2013), 'Initiation of Investigations and Selection of Cases', in in G Sluiter et al (eds), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, pp. 160-161.

exercised, for example, under the “principle of opportunity” found in some civil law systems (lack of public interest, nature and seriousness of the offence, evidence available), or because it is not seen to be in the public interest to do so, but this is generally accompanied by some form of oversight.³³⁸

Given the importance of this decision for victims’ right of access to a judicial remedy, victims in many jurisdictions have rights to be heard, to object to or to appeal such decisions. These rights extend across adversarial, inquisitorial and hybrid systems.

Right to be heard in relation to the indictment

The first way for victims to have input is before the decision is made. Some jurisdictions (including **Argentina**,³³⁹ **Ireland**,³⁴⁰ **Guatemala**,³⁴¹ **South Australia**³⁴² and **USA**³⁴³) provide a specific requirement that authorities at least consult with victims before deciding not to pursue a prosecution.

In addition, victims may have input into the *scope* of the indictment when a plea bargain is being negotiated between the prosecutor and the accused. Such rights are given to victims in the **USA**, for example, under the CVRA.

These rights must be respected regardless of the number of victims involved in the case: in a case involving approximately 190 victims (concerning an explosion at an oil refinery), the Appeal Court held that victims should have been given the opportunity to provide submissions to the prosecutor before the plea agreement was reached.³⁴⁴ According to the court it should have been possible to notify and include the victims in the decision-making process.³⁴⁵

Right to challenge the prosecutorial decision not to file an indictment

Second, victims often have the right to seek review of any decision once it is made. The **EU Victims’ Directive** provides victims with an enforceable right to review decisions of national authorities on a decision not to prosecute.³⁴⁶ The review “must be carried out by a person or authority other than whoever made the original decision. If the highest prosecuting authority took the decision not to prosecute, the review must be carried out by the same authority, but it should not be the same official”.³⁴⁷

The right to review can only be effective if a formal decision is taken to close the case, if that decision and the reasons for it are communicated to the victim, and if the victim has

³³⁸ *Ibid.*, p. 161-162, referring to France. The principle of opportunity is also applicable in e.g., Argentina, Colombia, Chile and Guatemala.

³³⁹ Argentina CCP, Art. 79.

³⁴⁰ Ireland Victims of Crime Charter, s 4: the DPP undertakes to consider victims views when deciding whether or not to prosecute (note however that this is not legally enforceable).

³⁴¹ Decree 18/2010, Art. 7.

³⁴² *Victims of Crime Act 2001* (SA) s 9A; DPP (SA), *Statement of Prosecution Policy & Guidelines* (October 2014) [127] 22.

³⁴³ *US v Heaton*, 458 (D Utah 2006) F Supp 2d 1271, 1271, 1272-1273. See further Jefri Wood (2008) ‘The Crime Victims’ Rights Act of 2004 and the Federal Courts’, Federal Judicial Center, 2 June 2008, www.uscourts.gov/file/17923/download?token=3YI7M9xr.

³⁴⁴ *In re Dean*, 527 F.3d 391 (5th Cir May 7, 2008), at Part III, A.

³⁴⁵ *Ibid.*

³⁴⁶ EU Victims’ Directive, Art. 11.

³⁴⁷ EC Directorate Justice, Guidance Document related to the transposition and implementation of [the EU Victims’ Directive], December 2013, (‘EC Guidance Document’), http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf, p. 31.

been informed of his or her right to review, all of which are expressly recognised in the 2012 Directive.³⁴⁸ Many of the jurisdictions surveyed have included in procedural rules the duty to inform victims of any such decision and (in some jurisdictions) the reasons for it.³⁴⁹

Similar to review of decisions not to investigate, rights to review decisions not to prosecute are provided in different ways:

- **Administrative review:** such as in Chile,³⁵⁰ Denmark,³⁵¹ England and Wales, Ireland,³⁵² and Norway.³⁵³ In **England and Wales**, for example, the Victims Right to Review Scheme (VRR) introduced by the Crown Prosecution Service (CPS) in 2013 offers a free-of-charge, administrative procedure which allows victims to simply write to the CPS and request reconsideration of their case.³⁵⁴ The outcome of this review may also be independently reviewed. To date over 13% of VRR applications received have resulted in a change of decision by the CPS.³⁵⁵
- **Separate judicial review or constitutional law proceedings:** In the **England and Wales** decision of *R v Christopher Killick*, the court held that victims should not *have* to seek recourse to separate judicial review of a decision not to prosecute, leading to the VRR outlined above (although they still have that option).³⁵⁶ However in other jurisdictions, such as **Ireland**, separate judicial review proceedings are the only legally enforceable right victims have to seek review. In Ireland, a decision would only be overturned on very limited grounds (where it can be shown that the prosecutor acted in bad faith or in pursuit of an improper motive or policy).³⁵⁷ Similar proceedings may be brought in **Brazil**³⁵⁸ and **Kenya**.³⁵⁹
- **Right to be heard before supervisory judge:** As outlined in the previous section, in some jurisdictions proceedings can be brought by a victim directly before a Judge. If the prosecutor does not intend to file an indictment in such proceedings this decision may be subject to a hearing in which the victim has the opportunity to provide submissions. This is the case, for example, in **Colombia**,³⁶⁰ and in **Guatemala**³⁶¹ and **Chile**³⁶² where *querrela* proceedings are brought directly before a judge. In other jurisdictions, such as **Brazil** and **Italy**, in any case the decision not to indict is taken by a judge at the request of the

³⁴⁸ EU Victims' Directive, Arts. 6(3) and 11(3), Recital 26.

³⁴⁹ See eg. Bangladesh, s. 157(2); Norway Circular Letter on Prosecution, s. 25(8); France CCP, Art. 40-2, al. 2; Germany CCP, s. 171; England and Wales Code of Practice for Victims of Crime, pp. 19 and 35.

³⁵⁰ Chile CCP, Art. 167.

³⁵¹ Administration of Justice Act, s. 724(1) (except where the decision is based on the specific statutory ground of *tiltalefrafald*, s. 722 Administration of Justice Act).

³⁵² Ireland Victims of Crime Charter, p.30 (reconsideration by the DPP).

³⁵³ Circular Letter on Prosecution, para. 20(7), 21(3).

³⁵⁴ CPS, Victims' Rights to Review Scheme (VRR), revised version of December 2013, http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/.

³⁵⁵ See REDRESS et al. (2014), 'Driving Forward Justice', p. 21.

³⁵⁶ [2011] EWCA Crim 1608.

³⁵⁷ *Evison v DPP* [2002] 3 IR 260.

³⁵⁸ Federal Law No. 12.016.

³⁵⁹ When the public prosecutor exercises his *nolle prosequi* power, the High Court has the power to ensure it was not exercised arbitrarily, oppressively or contrary to public policy: Jonathan John Mwalili (1998), 'The Role and Function of Prosecution in Criminal Justice', UNAFEI, Resource Materials Series No. 53, www.unafei.or.jp/english/pdf/RS_No53/No53_23PA_Mwalili.pdf, pp. 221-22.

³⁶⁰ The decision of the judge may then be appealed to a higher court: C-209/2007; Mejía Gallego (2014), 'La participación de las víctimas'.

³⁶¹ Guatemala CCP, Arts. 345 Bis and Ter.

³⁶² Chile CCP, Art. 170.

prosecutor or police. In **Italy**, the victim has the right to make submissions against such a request,³⁶³ and if the judge is of the view that the prosecution should go ahead he or she can instruct the prosecutor to carry out further investigations or bring charges against the accused. In **Brazil**, although there is no requirement for the judge to take the victim's views into account except in cases of urgency,³⁶⁴ the victim may be given the opportunity to provide informal input, and if the victim is represented by counsel the Judge has the duty to receive this lawyer at his or her Chambers.³⁶⁵ Similarly in **India**, where the prosecutor seeks to withdraw a prosecution, the Supreme Court has ruled that "the informant must be given an opportunity of being heard so that he can make his submissions to persuade the magistrate to take cognizance of the offence and issue process".³⁶⁶

- **Direct appeal by the victim before a judge:** In the **CAR** a prosecutor's decision not to file an indictment is directly appealable by a civil party before a judge.³⁶⁷ In other jurisdictions, such as **Germany**, while the initial review is taken by an administrative body, ultimate appeal lies to the Court.³⁶⁸ If the motion is successful, the Appeal Court orders that the alleged crimes are indicted and taken to trial by the prosecution. If the motion is rejected by the Appeal Court, the same alleged crime can only be charged when new factual allegations or evidence come to light.

Another potential option in some jurisdictions is for the victim to take over the prosecution where the prosecutor does not pursue it. In some hybrid jurisdictions, including **Argentina**, where the prosecutor decides not to file an indictment, the victim is granted the right to assume the role of a private prosecutor from that point forward, formulate their own indictment, and pursue the proceedings on their own behalf.³⁶⁹ Similarly, in a number of common law jurisdictions, if the prosecutor decides not to bring an indictment, a victim could bring a private prosecution (as outlined above at page 46). However, such private prosecutions are often subject to restrictions such as requiring permission to proceed, or potential intervention of the prosecutor, and the prosecutor's decision not to file an indictment in the case may be taken as a factor towards refusing such permission or closure of the case by the prosecutor.

Right to influence the scope of indictment

Even where an indictment is filed, victims may be dissatisfied with its scope –the types of crimes it covers, the geographical spread of the crimes included, or the form of criminal responsibility alleged. In some jurisdictions surveyed, victims have formal rights to influence the scope of the indictment or to present their own version of the indictment. In others, the victim's influence on the scope of the indictment is limited to their input (formal or informal) into the lines of inquiry carried out in the investigation.

³⁶³ Italy CCP, Art. 410.

³⁶⁴ Complementary Law No. 35, Art. 35, IV and Federal Law No. 8.625, Art. 43, XIII.

³⁶⁵ Federal Law No. 8.906, Art. 7, VIII.

³⁶⁶ *UPSC v S Papiah* (1997) 7 SCC 614.

³⁶⁷ CAR CCP, Art. 128 (Appeal against closure order of investigative judge is allowed by a civil party).

³⁶⁸ Germany CCP, Art. 172(2). Note an appeal is not allowed where the prosecution is not pursued for certain statutory reasons listed in Art. 153 ff CCP (eg. petty crimes).

³⁶⁹ Argentina CCP, Arts. 237, 239, 245bis. See further above p.47.

Guatemala and **Chile** provide examples of strong rights from a victim's perspective in this regard. In those jurisdictions, a victim who is a civil party to the prosecution case (*querellante*) may present their own indictment once the investigative stage has come to an end. The victim may also indicate formal defects in the indictment and request their correction, or request an expansion of the scope of the indictment.³⁷⁰ Similarly, in **Colombia**, the Constitutional Court has ruled that victims can issue observations in relation to the indictment, establishing their position, without affecting the autonomy of the Prosecutor in the adversarial proceeding.³⁷¹ In **Cambodia**, victims have the right to appeal the "closing order" of the investigative judge, which contains the alleged facts and applicable law. This allows the civil parties to argue for a redefinition of the scope of the case.³⁷² However, the decision of the investigative chamber on the indictment on such appeals are final.³⁷³ In **Norway**, the victim is also allowed to appeal the content of the indictment, although this is only when the criminal trial is subject to the procedure applicable in cases of confession.³⁷⁴

Right to challenge the decision on proceeding to trial

In some inquisitorial and hybrid systems, an indictment that is filed by a prosecutor must then be confirmed by an investigative judge before proceeding to trial, and such decisions are usually appealable by victims with party status in the proceedings. In **Germany**, for example, victims who are admitted to the proceedings as civil parties are allowed to challenge the investigating judge's decision to close the case.³⁷⁵ Similar provisions exist in **Colombia**, **Guatemala**, and **Chile**. In **CAR**, if an investigative judge closes the investigation, victims who have constituted themselves as civil parties have the opportunity to provide a statement to the investigative judge within five days.³⁷⁶

(ii) Application to international crimes

The analysis of state practice above shows that in domestic legal systems of all types victims have strong rights to review decisions not to prosecute. The strongest rights in this regard are where judicial supervision is engaged either directly by the initiation of proceedings, or where appeal to a judicial officer is possible as of right following a decision not to prosecute. Formal rights to influence the scope of the indictment are more limited, although in a number of jurisdictions victims have the right to be heard by the prosecutor, and in other cases, informal influence through consultation with victims is common.

This is consistent with the human rights jurisprudence set out at the beginning of this chapter. The right to review decisions not to prosecute is grounded in victims' right to an effective remedy and right to the truth.

There are even more reasons to recognise these rights in relation to international crimes. Victims of international crimes have even stronger rights to a remedy, to the

³⁷⁰ Guatemala CCP, Art. 337; Chile CCP, Art. 261.

³⁷¹ See further, Huertas Díaz et al (2011), 'Los Derechos de la Víctima'; Mejía Gallego (2014), 'La participación de las víctimas'.

³⁷² Cambodia CCP, Art. 268.

³⁷³ *Ibid*, Art. 417.

³⁷⁴ Norway Circular Letter on Prosecution, s. 21(3).

³⁷⁵ Germany CCP, Art. 400(2).

³⁷⁶ CAR CCP, Art. 113.

truth, and to reparation (including measures of satisfaction such as prosecution).³⁷⁷ Victims have a direct legal interest in decisions taken on whether or not an alleged perpetrator should be prosecuted. In addition, for the reasons outlined in the previous chapter, international crimes are also more likely to result in impunity. It is therefore vital that at crucial junctures – such as the decision as whether to file an indictment and on the scope of the indictment – victims are given the opportunity to express their views and to engage judicial oversight of such decisions. In addition, as outlined in the previous chapter, the complexity of international crimes means that it is important that prosecutors have input from a wide range of victims to ensure that the charges reflect the multi-layered nature of the crimes committed.

Challenges may arise where there are large numbers of victims. However, prosecutors and courts have been able to fashion procedures by which victims' views can be taken into account, even when there are large numbers of victims.

In order to ensure that victims can be heard before a decision is made, prosecutors should conduct outreach activities (see previous chapter) to ensure that victims have information about the stage of the procedure, and to invite comments from victims. As discussed above, even before the trial starts groups of victims will often already have their own joint legal representation, meaning that the number of submissions made will be much more limited than the actual number of victims.

Where a special chamber or tribunal has been established to try international crimes, specific procedures should be introduced into the court's rules to enable greater victim participation in the framing of the indictment. Such procedures could also be introduced into the general domestic law in relation to international crimes.

Where decisions are made not to prosecute, victims must have the option to review that decision. Although the first level of review may be administrative, for international crimes in particular, ultimate recourse should be available to a court by way of appeal. In these proceedings, where there are large numbers of victims, procedures for common legal representation can be put in place to allow for greater efficiency.

5. Issues concerning mediation and restorative justice

(i) Domestic practice

Another important issue that may arise in domestic criminal law is whether a case can be diverted to mediation or other restorative justice processes. While mediation can generally be used as part of restorative justice processes in domestic criminal matters (usually involving property crimes and minor assaults), there are concerns about such processes being used in relation to crimes under international law. UN human rights treaty bodies have indicated that mediation should not be used in such cases.³⁷⁸ In fact it

³⁷⁷ See above pp. 7-8.

³⁷⁸ In relation to violence against women see, Committee on the Elimination of Discrimination Against Women, Concluding Observations on DRC, CEDAW/C/COD/CO/6-7 (2013), para. 12; Angola, CEDAW/C/AGO/CO/6 (2013), para. 20; Lesotho, CEDAW/C/LSO/CO/1-4 (2011), para. 23; Finland, CEDAW/C/FIN/CO/6 (2008), para. 174; Czech Republic, CEDAW/C/CZE/CO/5 (2010), para. 23. In relation to violence against children see, e.g., Committee on the Rights of the Child, Concluding

is the duty of the State to investigate and prosecute those involved in crimes that are recognised as crimes under international law and gross human rights violations.³⁷⁹

Even for minor matters where mediation can be used, international human rights principles establish that mediation should never be used in criminal matters without the consent of both parties. The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters make clear that “[n]either the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes”.³⁸⁰

Legislation in a number of jurisdictions addresses this latter aspect. For example, in **Kenya**, Section 15 of the Victim Protection Act provides victims with the right to choose whether or not to participate in restorative justice processes. Where the victim elects to do so, the process only proceeds on condition that the participation of the offender shall not prejudice any of the offender's rights under any law and the process does not violate Article 159(3) of the Constitution (which provides constraints on the use of traditional dispute resolution mechanisms). The **EU Victims’ Directive** also requires safeguards concerning the use of restorative justice processes, and indicates that they should only be used “if they are in the interest of the victim, subject to any safety considerations, and are based on the victim’s free and informed consent, which may be withdrawn at any time”.³⁸¹

(ii) Application to international crimes

Customary international law and a number of international treaties require that crimes under international law, including genocide, crimes against humanity, war crimes, torture and enforced disappearance are prosecuted and punished. It is therefore not appropriate for such crimes to be diverted to restorative justice processes.

If special chambers or tribunals have jurisdiction over minor crimes that do not amount to international crimes, there may be scope for diversion of these crimes. However, such processes must have built-in safeguards taking account of any power disparities between the victim and alleged perpetrator, be subject to safety considerations, and require the victim’s free and informed consent, which may be withdrawn at any time.

International crimes should not be diverted to restorative justice processes.

Observations on Costa Rica, CRC/C/CRI/CO/4 (2011), para. 54; Nicaragua, CRC/C/NIC/CO/4 (2010), paras. 58-59.

³⁷⁹ See Updated Impunity Principles, Principle 19. See also the four Geneva Conventions, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Articles 5-7; UN HRC, General Comment No. 31, para. 18. See further OHCHR, ‘Rule of Law Tools for Post-Conflict States: Amnesties’, available at www.ohchr.org/Documents/Publications/Amnesties_en.pdf, pp. 11ff.

³⁸⁰ Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex), Principle 13. See also Principle 7.

³⁸¹ EU Victims’ Directive, Art. 12.

III. Trial stage

1. Key issues and international standards

The trial stage is the climax of criminal proceedings – providing a public forum in which the evidence is presented and tested, witnesses are heard, and a determination is made as to whether the accused is guilty of the crimes alleged or not. In some jurisdictions this stage consists of separate sets of proceedings (e.g. preparatory stage/oral hearing, trial/sentencing proceedings).

Participation by victims – including through attendance and giving testimony – can contribute to the truth. It can also serve important reparative aims for victims: providing a forum in which they can speak of what happened to them, and see evidence of the crimes committed publicly revealed.³⁸²

In the words of one lawyer who represents victims of international crimes:

When you come out of court you have heard witnesses saying things they never said before and that they have never told anybody. They tell you afterwards, after so many years and after such a vacuum, in front of a judge and even if he is a foreign judge that they felt confident to reveal more. ...[W]hat many of the witnesses say after concluding their testimony is 'Now I can die. I have done what I needed to do and I am helping the families and the victims that have not been able to tell their story'.³⁸³

However, participating directly in the trial process may be traumatising for some victims, particularly in an adversarial setting where they are not given the freedom to tell their story in narrative fashion.³⁸⁴

For the most part, international human rights law has not developed detailed standards on the extent to which victims should be able to participate directly in criminal trials. The UN Basic Principles on Justice for Victims of Crime and ACmHPR Fair Trial Principles provide that in judicial processes the “views and concerns of victims” should be allowed “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”.³⁸⁵ What amounts to “appropriate stages of the proceedings” depends to a large extent on the domestic criminal justice system, and this continues to evolve, even in common law jurisdictions. In addition, it is clear that at all stages victims should be treated fairly, and with dignity and respect.³⁸⁶ Where rights to participate in the trial do exist in national law, these must be observed.³⁸⁷

³⁸² Interview with Ms. Karinna Fernández Neira, 2 July 2015 – ‘*The presence of the victim during the proceedings is important not only in order to reach adequate solutions to the conflict, but also so that the victim can better understand the characteristics of the process in which (s)he is involved, avoiding revictimisation*’; Interview with Mr. Juan Pablo Delgado Díaz, 3 July 2015 – ‘*If the victim understands the evolution of the proceedings, and (s)he feels part of the proceedings and comfortable with the solution offered to the harm (s)he suffered as a consequence of the commission of the crime, (s)he will reach a greater level of satisfaction*’; Interview with US Lawyer, 2 July 2015. See further, Stover et al. (2011), ‘Confronting Duch’; E Erez and P Tontodonato (1990), ‘The Effect of Victim Participation in Sentencing on Sentence Outcome’, 28 *Criminology* 451, pp. 452, 453; Beloof (1999), ‘The Third Model of Criminal Process’, pp. 293, 294, 296, 297, and 298.

³⁸³ Statement of Manuel Ollé Sesé in REDRESS and FIDH, *Trial Strategies*, p. 39.

³⁸⁴ See further Stover et al. (2011), ‘Confronting Duch’ at p. 524-25.

³⁸⁵ UN Basic Principles on Justice for Victims of Crime, Principle 6(b); ACmHPR Fair Trial Principles, N(f)(2).

³⁸⁶ UN Basic Principles on Justice for Victims of Crime, Principle 4; UN Basic Principles on Remedy and Reparation, para. 10; ACmHPR Fair Trial Principles, Principle N(a).

³⁸⁷ ECtHR, *Perez v France*, App. No 47287/99, 12 February 2004, para. 66.

2. Existing rights in domestic jurisdictions: domestic models of participation and active rights during the trial stage

Part One of this report briefly outlined a number of domestic models for victim participation in criminal procedures with certain characteristic features. This chapter expands on the participation rights at trial that are often associated with four of these models.

(i) *The Auxiliary Prosecutor*

This form of participation is available in a number of hybrid jurisdictions that provide victims with the opportunity to take part in the proceedings through a legal representative alongside the public prosecutor. Although the prosecution is still led by the public prosecutor, the victim's representative often has extensive rights to provide opening and/or closing statements, request or adduce new evidence, request the examination of witnesses, question or cross-examine witnesses, propose amended charges, raise objections, participate in oral debates on points of fact and law, and file interlocutory appeals.³⁸⁸

Countries in which this type of procedure is available include Argentina (autonomous *querellante*), Brazil (prosecution assistant), Chile (*querellante*), Guatemala (adhesive *querellante*), and Germany (*Nebenkläger*).

(ii) *The Civil Party*

Civil parties usually have extensive participatory rights in the trial. Such rights may include the right to be legally represented, to make opening and closing statements, to adduce evidence, to cross-examine witnesses, and to make statements on fact and law.³⁸⁹

DRC is an example of a jurisdiction with a civil party system. In DRC, an "injured party" can join a public prosecution as a "civil party" and claim damages. During the trial, the civil party is represented by his or her own lawyer, and has the right to deliver opening and closing statements, the right to call witnesses, and to raise objections.³⁹⁰

In **France**, civil parties have rights to request expert evidence, to ask questions or make observations during interrogations, cross-examinations and hearings, to cross-examine the accused, to request transfer of the case to another jurisdiction or disqualification of the Judge.³⁹¹ In **Cambodia**, civil parties enjoy nearly the same rights as the prosecution, including the right to present evidence, to raise objections, to question and cross-examine witnesses, to make written submissions and closing statements, and to request the disqualification of judges.³⁹²

³⁸⁸ E.g., Brazil: right to provide closing statements, request new evidence, request the examination of witnesses, question or cross-examine witnesses, propose amended charges, raise objections, participate in oral debates on points of fact and law, and file interlocutory appeals (Brazil CCP, Arts. 212, 271(1), 403(2), 411(6), 584(1), 598 Brazil); Argentina (deliver opening and closing statements, request summons of witnesses for trial, cross-examine witnesses, request expansion of scope of indictment) (Argentina CCP, Arts. 245, 261, 262, 264, 268).

³⁸⁹ E.g., Italy: rights to deliver oral statement at preliminary hearing (Art. 421 CCP), present evidence at trial (Art. 493 and 496 CPP), call witnesses (Art. 497 CCP), Cross-examine witnesses called by other parties (Art. 498(2) CCP), deliver closing arguments (Art. 523 CCP).

³⁹⁰ Information from DRC lawyer, 10 August 2015.

³⁹¹ France CCP, Arts. 120, 156, 312, 442-1, 662, 665.

³⁹² Cambodia CCP, Arts. 298, 312, 324-327, 334, 335, 560.

Other jurisdictions allowing this sort of participation include **CAR, Chile, Italy, Guatemala, and Senegal.**

(iii) The Intervener

Other jurisdictions provide victims with certain defined participation rights in the trial, and/or a more general right to be heard on matters that affect their interests. Given the different approaches adopted across jurisdictions, these are set out in greater detail below.

This form of participation has been recently introduced through the Victim Protection Act in **Kenya**, which entered into force in October 2014. That Act provides that where the personal interests of a victim have been affected, the court shall permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (in such a way that is not prejudicial to the rights of the accused and a fair and impartial trial).³⁹³ As the provision is new, practice is still developing, however in a recent case concerning the alleged killing of a girl by police officers, lawyers for the victim's family sought an order allowing them to participate in the trial by making submissions on matters of law and public policy, and this was granted despite strong objections from counsel for the accused.³⁹⁴ Victims are also able to provide a Victim Impact Statement – a statement setting out the economic, emotional and physical impact of the crime – to be taken into account in sentencing procedures, and in relation to any consideration of victim protection and welfare.³⁹⁵

In **Denmark**, victims do not have the general right to deliver opening and closing statements, to present evidence, to call witnesses, to cross-examination or to raise objections in relation to the criminal case (the question of guilt and sentencing). However, as an exception the victim's legal counsel is allowed to cross-examine the alleged offender and to object to evidence presented about the alleged victim's sexual record.³⁹⁶ In practice, the court can allow the victim's legal counsel to cross-examine witnesses and/or give statements in relations to procedural matters of importance to the victim, e.g. questions on whether the alleged offender should be present during the examination of the victim and whether the trial should be closed.³⁹⁷ Note that civil party participation is also possible, in which case the victim is considered to be a party to the latter part of the trial and their legal counsel is allowed to present evidence and give a closing statement regarding reparation.³⁹⁸

In **Norway**, victims (through counsel) have the right to deliver statements on procedural matters impacting on the victim, to deliver a statement after presentation of each piece of written evidence and after each testimony, and to deliver a closing statement.³⁹⁹ They cannot adduce evidence themselves but have a right to suggest that the public prosecutor present certain evidence during the trial, a request that is reviewable by the court.⁴⁰⁰

³⁹³ Victim Protection Act 2014, s. 9.

³⁹⁴ See *Republic v Gitahi & Anor* [2014] Case No. 41/2014, High Court Mombasa, Ruling of 1 December 2014, available at: <http://www.imlu.org/2011-06-30-23-44-4/2011-08-04-18-06-26/news/item/108-the-late-kwekwe-mwandaza-s-case-hearing-criminal-case-number-41-of-2014-in-mombasa.html>.

³⁹⁵ Victim Protection Act 2014, s.12.

³⁹⁶ Administration of Justice Act, s. 741 c(1).

³⁹⁷ OPBP Country Report: Denmark, para. 47, citing Commission Report 1485/2006, p. 38.

³⁹⁸ *Ibid.*, citing Commission Report 1485/2006, pp. 38-39.

³⁹⁹ Norway Criminal Procedure Act, ss. 107, 303 and 304.

⁴⁰⁰ Criminal Procedure Act, s. 264.

In **Colombia**, victims previously had a much greater role in the trial proceedings, but this has been reduced following the introduction of a more adversarial system. Supreme Court jurisprudence has reintroduced some rights, but the position of a *querellante* in Colombia is now more like an intervener than a subsidiary or auxiliary prosecutor. At the preparatory hearing, victims have the right to request evidence and its discovery, to make observations in relation to evidence, and to make declarations on admissibility of evidence. However at the oral hearing, victims do not have the right to make an opening statement, to challenge evidence, to question witnesses or to cross-examine witnesses.⁴⁰¹ They do have the right to deliver closing statements.⁴⁰²

In the **United States**, at the Federal level and in many states, victims have the right to be reasonably heard at public proceedings in the district court involving release, plea, sentencing or any parole proceedings.⁴⁰³ Victims also have due process rights to the assistance of counsel depending on what the “particular situation demands”,⁴⁰⁴ and in practice, if other rights of victims are being clearly violated the counsel is generally allowed to object (for example if the prohibition on questioning a victim about their prior sexual history is being violated).⁴⁰⁵

Bangladesh and **India** provide the possibility of victim involvement through the appointment of a person known as a “subsidiary prosecutor”, who acts in proceedings under the direction of the public prosecutor.⁴⁰⁶ However, the role is strictly limited and subordinate to that of the public prosecutor,⁴⁰⁷ and is therefore more like an “intervener” role. In India, the “subsidiary prosecutor” appointed by the victim may, with the permission of the court, submit written arguments once evidence is closed in a case.⁴⁰⁸ This appears to still be the interpretation of the role, even though a more recent amendment has been introduced to allow the Court to “permit the victim to engage an advocate of his choice to assist the prosecution”.⁴⁰⁹

(iv) Victim Impact Statement Model

A number of common law countries such as **Australia** (all states), **England and Wales**, **Ireland**⁴¹⁰ and **Uganda** do not allow for victims to be represented at trial. These jurisdictions limit victims’ active rights at the trial stage to the provision of a “Victim Impact Statement” at sentencing after a defendant is found guilty. This is either a written document or oral statement setting out the economic, emotional and physical impact that a crime has had on the individual. The purpose of these procedures is to ensure that victims’ perspectives are heard in a way which “do[es] not and should not dictate sentences, but should allow more intelligent sentencing decisions”.⁴¹¹ In some

⁴⁰¹ Judgment C-209/07.

⁴⁰² Colombia CCP, Art. 443.

⁴⁰³ CRVA, Ch. 237, s. 3771 (a)(4).

⁴⁰⁴ *Mathews v. Eldridge* (1976), 424 US 319, 334.

⁴⁰⁵ Interview with US lawyer, 2 July 2015.

⁴⁰⁶ Bangladesh CCP, ss. 493 and 495 CCP, see further Ullah, ‘Protection of Victims of Crime’, p. 135.

⁴⁰⁷ *Shiv Kumar v Hukam Chand and another* [(1999) 7 SCC 467], paras. 13-14.

⁴⁰⁸ India CCP, s. 301(2).

⁴⁰⁹ *Ibid*, s. 24 (8).

⁴¹⁰ Note that in Ireland, one exception is that a victim of certain specified sexual offences is entitled to separate legal representation if an accused applies to the court for leave to adduce evidence of the victim’s prior sexual history: Criminal Law (Sexual Offences)(Amendment) Act 2007, s. 3; Criminal Law (Sexual Offences) Act 2006, s. 6(2). Note also that in Ireland, victim impact statements are currently only allowed for certain specified crimes (e.g., sexual abuse, physical injury, murder), but this is likely to change in the new legislation implementing the EU Victims’ Directive.

⁴¹¹ See Victim Support, ‘Victims’ Justice? What victims and witnesses really want from sentencing’, November 2010, <https://www.victimsupport.org.uk/sites/default/files/Victim%20Support%20sentencing%20report%20Dec-2010.pdf>, p. 21.

jurisdictions, victims may be cross-examined on the content of their Victim Impact Statement.⁴¹²

(v) Summary Table

The table below provides an example of a jurisdiction that fits generally within each of the above types of models, with an indication of active rights provided to victims in each.

Right provided	Brazil (Auxiliary Prosecutor)	Kenya (Intervener)	Cambodia (Civil Party)	England & Wales (VIS)
Separate representation at trial	X	X	X	
To deliver opening and/or closing statements	X		X	
To request or introduce evidence	X	X	X	
To examine evidence	X		X	
To raise objections to evidence	X		X	
To make other statements to the court on matters of fact and law	X	X	X	
To be heard on any issue affecting their interests		X		
To be heard in relation to sentencing	X	X	X	X

Although victims’ rights to participate in criminal trials tend to be more limited in common law countries, many of these countries have nonetheless introduced a variety of procedures to enable victims’ voices to be considered.

3. Application to international crimes

In civil law jurisdictions, victims’ involvement in the trial proceedings is uncontroversial, even if the sheer number of victims may present some practical challenges. However in common law jurisdictions with adversarial proceedings – where the evidence presented is only that which is necessary to prove or rebut the prosecution’s “case” – extensive victim participation, akin to adding a third ‘party’ to the proceedings, has been criticised

⁴¹² E.g., in the Australian state of Victoria, the defendant may request cross-examination of the victim or a medical expert who prepared a report attached to the statement: Crimes (Sentencing) Act 2006 (Vic), s. 13(1).

by some as risking disruption to the structure and balance of the proceedings, weighting it against the accused.⁴¹³ According to Safferling:

[i]n a system that generally leaves the presentation of evidence to the parties, procedural fairness is likely to suffer due to imbalances between the parties. Clearly, where an additional party is permitted to join the proceedings on the side of the prosecution, the equality of arms is distorted in favour of the prosecution and to the disadvantage of the accused. ... Furthermore, delays in the proceedings are inevitable in cases where victims participate, not only because of the possible need for extra translations, but also because the court faces a vast amount of further input in the form of motions, objections, opinions, etc.⁴¹⁴

On the other hand, for many victims, the right to be heard assumes pivotal importance at the trial phase. Victims have been silenced and marginalised by the crimes committed against them and the circumstances in which they were committed. Many victims have spent years campaigning for justice, gathering evidence, pursuing legal challenges and overcoming various procedural and practical obstacles. After all of this, their ability to attend the trial⁴¹⁵ and to be heard will often be of profound personal importance, because it allows victims to tell their story.⁴¹⁶ A lawyer representing victims who made a statement in the *Mpambara* case stated that:

I believe that the court, by listening to victims, watching the victims, realises that it is not only about suspects. And the consequences of the crimes are still visible in a very concrete way. [...] The damage and the harm they suffered are still ongoing, and that is something the court won't realise unless they see the victims.⁴¹⁷

The reality of different procedural traditions in jurisdictions where international crimes trials take place must therefore be acknowledged and carefully considered when making general recommendations in relation to victim participation in the trial stage. However, states undertaking such trials from an adversarial tradition can draw experiences from other adversarial systems where provision has been made for greater victim participation during the trial phase, such as those under the “intervener” model, outlined above.

⁴¹³ See, e.g., Safferling (2012), *International Criminal Procedure*, p. 529; Interview with US Lawyer, 2 July 2015; Erez and Tontodonato (1990), ‘The Effect of Victim Participation in Sentencing’, p. 454; Beloof (1999), ‘The Third Model of Criminal Process’, pp. 298, 299.

⁴¹⁴ Safferling (2012), *International Criminal Procedure*, p. 529.

⁴¹⁵ Interview with civil party to a case in France, May 2014.

⁴¹⁶ See further, Stover et al. (2012), ‘Confronting Duch’.

⁴¹⁷ See REDRESS, *The Appeal of Joseph M*, which includes footage of a VIS in *Mpambara*.

The practice of the ICC provides an example of how this can be approached in practice by a specialised court or tribunal. The Rome Statute provides victims with the opportunity to present and have considered their views and concerns on matters affecting their personal interests, 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”.⁴¹⁸

The Rules therefore leave a large degree of discretion to the judges conducting the trial. The practice of the ICC has generally developed to allow victims (i) to make an opening and closing statement,⁴¹⁹ (ii) to attend and participate in hearings and status conferences through written submissions and oral argument, (iii) to introduce evidence and challenge admissibility of evidence with leave of the court, and (iv) to question witnesses and/or the accused (under the strict control of the court).⁴²⁰

Where there are a large number of victims admitted to participate in proceedings, the court can, and has, limited the number of lawyers representing them.⁴²¹

In international crimes cases, it may be difficult to ensure meaningful but efficient legal representation of victims where there are a large number of victims (as discussed above in Part Two). Geographical distance between victims and the court where the trial is being held may also pose challenges.⁴²² None of these challenges are insurmountable; it is important for policy-makers to carefully consider the operating context when coming up with creative solutions to enable meaningful and effective victim participation.

The ***Bweremana-Minova Case in the DRC***, concerning sexual violence, provides an example of how issues of geographical distance were partially addressed to allow at least some victims to take part in the trial: “Despite the fact that lawyers representing the victims were in regular contact with their clients, the considerable distance between the court and the villages where the events had occurred (more than an hour and a half by expensive transport) made victims’ participation in the proceedings difficult. At the opening of the trial, there were only the defendants, judges, lawyers, members of the press, and a dozen international observers. No victims were present. In an attempt to overcome these difficulties and collect testimonies directly from victims, the OMC organised mobile hearings (*audience foraines*) in Minova from February 11–19, 2014. In total, 42 hearings were held during the trial. However, while 1,016 victims constituted themselves as civil parties, only 52 civil parties for the crime of rape and 76 civil parties for the crime of pillage participated in the hearings”.⁴²³

Positive measures may therefore need to be taken to allow victims to participate in the trial, and these should be carefully considered before the trial begins. In addition to considering the physical location of the trial, it is important for victims’ rights to protection, legal representation, translation, and other special measures to be guaranteed in the trial, and to reimbursement of expenses. These rights may be crucial to allow victims’ active participation rights to be fulfilled.

⁴¹⁸ Rome Statute, Art. 68(3).

⁴¹⁹ This is recognised in ICC RPE Rule 89(1): *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-1788-tENG, 22 January 2010, Decision on the Modalities of Victim Participation at Trial.

⁴²⁰ See Safferling (2012), *International Criminal Procedure*, p. 529.

⁴²¹ ICC RPE, Rule 90(2)-(4).

⁴²² Information from DRC lawyer, 7 August 2015.

⁴²³ ICTJ (2015), ‘The Accountability Landscape in Eastern DRC’, p. 31.

IV. Post-trial stage: Appeal and enforcement

1. Key issues and international standards

Following the conclusion of the trial stage certain parties will have rights to appeal aspects of the proceedings. In most common law jurisdictions with jury trials, appeals cannot be brought against an acquittal, even by the prosecutor,⁴²⁴ although a convicted person may appeal their conviction. Appeals can usually be brought by either the prosecutor or convicted person against sentence. In civil law jurisdictions appeals can usually be brought against both verdict and sentence.

International human rights law does not specify rights to victims in respect of appeals against acquittals or participatory rights in appeal.⁴²⁵ However, given the importance of conviction of the accused to an effective remedy and reparation, the general principle that victims should be heard where their interests are affected would tend towards providing them with a right to make submissions in appeals lodged by other parties.

After the proceedings are finalised any sentence of imprisonment or reparation order must be enforced. Victims generally have limited rights in relation to the enforcement of the sentence. In this respect, victims are not generally seen as having the right to insist on a particular length of punishment, though often victims' views will be taken into account in parole hearings or other procedures whereby convicted perpetrators may seek early release. Appropriate punishment of the convicted perpetrator has been seen by the Inter-American Court as a right accruing directly to victims of serious human rights violations.⁴²⁶

2. Appeal rights

(i) Domestic practice

Right to file an appeal

In most common law jurisdictions surveyed the victim does not have the right to appeal either the verdict or sentence (in most jurisdictions no appeals are allowed against an acquittal). **India** and **Bangladesh** are two notable exceptions. In India following an amendment introduced in 2009, victims, and their "legal heirs" are allowed to appeal an acquittal with prior leave of the High Court.⁴²⁷ In **Bangladesh**, victims who initiated the proceedings by filing a complaint are entitled to appeal both acquittal (on points of law) and sentence.⁴²⁸

⁴²⁴ This is for "prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts". Note however, largely following relevantly recent amendments, in some limited circumstances proceedings may later be reopened, acquittals quashed, and defendants re-investigated and re-prosecuted. See further Australian Law Reform Commission, 'Traditional Rights and Freedoms—Encroachments by Commonwealth Laws', ALRC Interim Report 127, Chapter 10.

⁴²⁵ See, e.g., ECtHR, *Berger v France* (2002), App. No. 48221/99, 3 December 2002, paras. 35 and 38.

⁴²⁶ See, e.g., IACtHR, *Castillo Páez v Peru*, Judgment (Reparations and Costs), 27 November 1998, para. 105-07; IACtHR, *Paniagua-Morales et al v Guatemala*, Judgment, 8 March 1998, para. 155-156.

⁴²⁷ India CCP, s. 378(4). See further *Ram Phal & Ors. v State*, Delhi High Court, CRLA 1415/2012, 28 May 2015.

⁴²⁸ Bangladesh CCP, ss. 417 and 417A.

Some common law jurisdictions do, however, give victims specific rights to request the public prosecutor to consider making an appeal, and the public prosecutor is obliged to take the victim's views into account.⁴²⁹ In others, victims' input may be sought informally by prosecutors.⁴³⁰

In a number of inquisitorial and hybrid systems, victims acting as civil parties or auxiliary prosecutors enjoy rights to appeal decisions which affect their interests. In **DRC, CAR, Cambodia** and **France**, civil parties may appeal the question of damages.⁴³¹ In **Brazil**, the victim can file an appeal if the prosecution has not done so by the legal deadline.⁴³² In **Italy** the victim can request the prosecutor to consider an appeal and the prosecutor must give reasons if she refuses to file an appeal thereafter;⁴³³ the civil party can appeal in respect of civil claims.⁴³⁴ In **Argentina, Colombia, Chile** and **Guatemala**, a victim (and civil parties in Argentina, Chile and Guatemala) is entitled to file an appeal when the judgment is contrary to his or her interests.⁴³⁵ In **Germany**, a civil party may appeal a judgment, but is not allowed to challenge the sentence imposed.⁴³⁶

Right to join the prosecutor's appeal

Some jurisdictions also provide victims with the right to join a prosecutor's appeal. In **Argentina**, for example, the autonomous *querellante* can adhere to the challenge filed by any of the parties, by giving reasons for such adhesion.⁴³⁷ In **Cambodia**, civil parties may only file appeals in relation to civil damages but may also join prosecution appeals on other issues.⁴³⁸

Right to participate in appeal proceedings

Where civil parties or auxiliary prosecutors have filed an appeal or joined the prosecution's appeal, they generally have the same active rights as at trial stage. In **Cambodia**, for example, active rights at this stage include the right to submit an appeal brief, question the accused during appeal hearings, testify, and make closing statements.⁴³⁹

In most common law jurisdictions victims do not have the right to participate in appeal proceedings. An important exception, however, is the **United States**, where victims have the right to be heard in appeal proceedings.⁴⁴⁰ Similarly, in **Bangladesh**, where a victim has filed an appeal the court will hear submissions from his or her legal representative before making a decision.⁴⁴¹

⁴²⁹ See, e.g., South Australia: *Victims of Crime Act 2001* (SA) s 10A; DPP (SA), *Statement of Prosecution Policy & Guidelines* (October 2014) 25; Victoria: DPP (Vic), *Director's Policy - Appeals by the DPP to the Court of Appeal* (22 August 2014), [21] 5.

⁴³⁰ E.g., Uganda (Country Brief, Uganda, para.6).

⁴³¹ DRC CCP, Art. 96(3); CAR CCP, Art. 194; Cambodia CCP, Art. 382, 402; France CCP, Art. 186.

⁴³² Brazil CCP, Art. 598.

⁴³³ Italy CCP, Art. 572.

⁴³⁴ *Ibid*, Art. 575.

⁴³⁵ Colombia, see Mejía Gallego (2014), 'La participación de las víctimas'; Chile CCP, Art. 352; Guatemala CCP, Art. 398.

⁴³⁶ Germany CCP, Art. 400-01.

⁴³⁷ Argentina CCP, Art. 298.

⁴³⁸ Cambodia CCP, Art. 383.

⁴³⁹ *Ibid*, Arts. 391-396. See also, e.g., Germany CCP, Art. 323(1).

⁴⁴⁰ CRVA, Ch. 237, s. 3771 (d)(3); OPBP Country Report: USA, paras. 14, 22.

⁴⁴¹ Bangladesh CCP, s. 423(1).

(ii) Application to international crimes

Victims' rights vary significantly in relation to appeals, ranging from no rights whatsoever to full rights to appeal and to participate in appeal proceedings.

In relation to international crimes there are two types of decisions where it is particularly important for victims to have a right to appeal. First, where civil proceedings or reparation orders are connected to a criminal trial, victims making the civil claim should be given the right to appeal the reparation decision, as it impacts directly on their right to reparation, which is firmly recognised under international law.

In addition, where victims have sought orders concerning the extent of their own participatory rights, they should have the ability to enforce those rights by filing appeals to a higher court against decisions concerning those rights. It could be argued that providing such rights would risk multiple interlocutory appeals by victims, unnecessarily slowing down proceedings. To guard against this risk, the right to appeal could be made subject to permission from the higher court.

At the ICC, victims may seek leave to participate in interlocutory appeals brought by others;⁴⁴² they do not have the ability to seek to appeal decisions other than orders for reparation. For example, when the Chamber appointed a common legal representative in the *Ruto* case, victims who were interested in a review of the decision appointing counsel had no avenue to seek a review.⁴⁴³

At a minimum, victims should have the right to appeal and participate in appeals concerning reparation that are part of the criminal proceedings. Victims should also have the right to appeal against decisions on procedural requests they have made directly concerning their participation in proceedings under the relevant criminal procedure, but such appeals may be subject to permission from the higher court.

3. Rights regarding enforcement of sentence

(i) Domestic practice

A number of jurisdictions surveyed require that victims are notified of changes in the custodial status of the accused,⁴⁴⁴ and in a number of **Australian states** victims are given the right to make submissions on the issue of parole.⁴⁴⁵ In **Ireland**, the Prison Service has a duty to consider the impact on the victim in cases of temporary release.⁴⁴⁶

In **Argentina**, Enforcement Judges have control over the effective enforcement of the sentence.⁴⁴⁷ During this stage, victims have the right to be informed of any procedure which could decide on the anticipatory release of the accused, on the extinction of the

⁴⁴² ICC, *Lubanga*, AC, ICC-01/04-01/06-1335, 16 May 2008, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation".

⁴⁴³ ICC, *Ruto, Kosgey & Sang*, PTC II, ICC-01/09-01/11-330, 9 September 2011, Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims".

⁴⁴⁴ Including Australia: OPBP Country Report: Australia, para. 70; Ireland: Victims of Crime Charter, section 6; USA: CRVA, Ch. 237, Sec. 3771 (a)(2); Brazil CCP, Art. 201, § 2º; Norway: OPBP Country Report: Norway, para. 53.

⁴⁴⁵ See e.g., Victims Rights and Support Act 2013 (NSW) s 6.16; Victims' Charter Act 2006 (Vic) s 17.

⁴⁴⁶ Ireland Victims of Crime Charter, Section 6.

⁴⁴⁷ Argentina CCP, Art. 56.

penalty, or on the extinction of the security measure. In order to exercise such right, the victim must have expressly requested this of the prosecutor, indicating her/his address and the means of communication through which (s)he will receive the communications.⁴⁴⁸

Victims in other jurisdictions surveyed did not have specific rights in relation to enforcement, apart from execution of reparation orders made in their favour.⁴⁴⁹

(ii) Application to international crimes

While there is only limited practice concerning victims' rights in relation to the enforcement of sentences, when a sentence is manifestly not applied, states may violate their own obligations to appropriately punish those convicted of serious human rights violations, including international crimes.⁴⁵⁰

Victims' rights to demand enforcement of civil awards made in their favour are much clearer. Without such enforcement their right to an effective remedy, including reparation, is violated. Where the state is responsible to pay reparation, a number of human rights courts have also found that non-enforcement of such awards will also violate individuals' right to a fair trial.⁴⁵¹

In the **DRC** a number of criminal trials have taken place for international crimes where reparation orders have been made, holding both the individual perpetrator and the state jointly and severally liable. However, reparation has typically not been paid. Victims are required to fulfil complicated and expensive procedures to initiate enforcement proceedings, which is beyond the capacity of many to do.⁴⁵²

States should introduce clear and straightforward procedures to carry out the enforcement of reparation awards, without requiring further action from the victim. Where the reparation award is not enforced, victims should have the right to request oversight of the relevant court.

⁴⁴⁸ *Ibid*, Art. 325.

⁴⁴⁹ Eg. DRC CCP, Article 109 ("*L'exécution est poursuivie par... la partie civile, en ce qui concerne les condamnations prononcées à sa requête...*").

⁴⁵⁰ See, e.g., UN HRC, General Comment No. 31, paras. 8, 18.

⁴⁵¹ See, e.g., ACmHPR, *Bissangou v Congo*, Comm. No. 253/02; ECtHR, *Burdov v Russia (No. 2)* (2011) App. No. 33509/04, 15 January 2009.

⁴⁵² See, submission by REDRESS and SAJ in *SA v Democratic Republic of the Congo*, 20 November 2014, <http://www.redress.org/downloads/engcommunication-sa-v-drc20-nov-2014.pdf>.

PART FOUR: OTHER VICTIMS' RIGHTS

This report focuses on victims' active rights in criminal proceedings, that is, the rights they have that can have direct influence on the criminal proceedings. However these are not the only rights that victims have. Victims also have the right to reparation for the harm they have suffered. In addition, and crucial to both active rights to participate in proceedings, and to their rights to reparation, victims have the right to have their safety and privacy protected, and rights to information, assistance, and support. Without the latter rights, victims will not be in a position to effectively exercise the active participation rights afforded to them.

This report will only briefly deal with these other rights of victims by giving a snapshot of domestic practice. However, their importance cannot be overstated, and they should equally be carefully considered for criminal proceedings concerning international crimes.

I. Other rights

In many of the jurisdictions surveyed, across all types of criminal justice system, victims hold extensive rights from the moment they make a criminal complaint. These can be broadly categorised as:

- Rights to information
- Rights to support
- Rights to assistance in the criminal proceedings
- Rights of access to documents in the criminal proceedings
- Rights to protection of privacy and psychological integrity
- Rights to protection of safety
- Specific rights for particularly vulnerable victims

The requirement to afford these rights is present in many national jurisdictions and is reflected in the UN Victim's Declaration and the UN Basic Principles on Remedy and Reparation, and in a variety of national, regional and international human rights decisions. The requirement is also enshrined in law for EU member states in the recently adopted EU Victims' Directive. Importantly, the EU Victims' Directive, while acknowledging differences among legal systems, applies to all "victims" as defined in Article 2(1)(a), irrespective of their role in national proceedings, whether they are witnesses for the prosecution or are participating in a more independent way,⁴⁵³ even if they are identified in the course of investigations opened *ex officio* by the authorities.⁴⁵⁴

⁴⁵³ See, EU Victims' Directive, Recital 20; EC Guidance Document, pp. 10-11. The European Court of Justice held that all rights contained in the 2001 Framework Decision applied to victims acting as private prosecutors; Case C-404/07 *Katz* [2008] ECR I-7607, para. 41.

⁴⁵⁴ As specified in Recital 22 of the EU Victims' Directive. This places an onus on authorities who identify victims in the course of investigations to recognise their status as early as possible and inform them about their rights from the point of first contact with the authorities.

The below summary is not exhaustive. Rather it attempts to illustrate the types of rights that victims may hold by reference to particular examples.

1. Domestic practice

(i) *Rights to information*

Victims in most jurisdictions surveyed have rights to information from the very moment they make a complaint, first about procedures and their rights, and later about the status of the criminal proceeding and important decisions pertaining to it.

Information and notification are particularly important for victims' ability to exercise active participation rights. However, provision of information and notification also "send a message to victims that they are not forgotten and they recognise their interest in the case...Victims who are informed of their rights and notified of developments in their case tend to be more satisfied with the justice system and feel that they are treated fairly".⁴⁵⁵

These rights to information can be broadly broken down further into a number of further categories.

Rights to information about procedures and support

Article 4 of the **EU Victims' Directive** imposes a positive obligation on criminal justice authorities to provide information to victims from the outset about their rights.⁴⁵⁶ This article has been referred to as a 'Bill of Rights' for victims,⁴⁵⁷ in that it must be applied – proactively and *ex officio* – in all cases even without the request of the victim. Its purpose is to ensure that victims are treated with respect, are able to make informed decisions about their engagement with the criminal justice process, and can access other rights to which they are entitled.⁴⁵⁸

'Article 4 information' which must be provided to victims includes:

- Procedures for making complaints with regard to a criminal offence and victims' role in those procedures
- How and under what conditions they can obtain protection
- How and under what conditions they can access legal advice, legal aid and any other sorts of advice
- How and under what conditions they can access compensation
- How to apply for reimbursement of expenses incurred when participating in criminal proceedings
- How and under what conditions they are entitled to interpretation and translation

⁴⁵⁵ Jo-Anne Wemmers (2010), 'Victims' rights and the International Criminal Court: perceptions within the court regarding the victims' right to participate', 23 *Leiden Journal of International Law*, p. 641.

⁴⁵⁶ EU Victims' Directive, Article 4(1), Recital 22; EC Guidance Document, pp. 13-16, Victim Support Europe (2013), *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe* ('VSE Handbook for Implementation'), p. 9.

⁴⁵⁷ EC Guidance Document, p. 13.

⁴⁵⁸ EU Victims' Directive, Recital 26. This interpretation of Article 4 is supported by a number of normative standards, such as UN Basic Principles and Guidelines on Remedy and Reparation, Principle 24.

- The type of support they can obtain and from whom, including basic information about access to medical support and any relevant specialist support, such as psychological support or alternative accommodation
- Any special measures for victims living in Member States other than where the crime was committed
- Procedures for making complaints where their rights are not respected by the competent authorities
- Contact details for further communication about their case.

A significant number of the jurisdictions surveyed (including **Australia**,⁴⁵⁹ **Bangladesh**,⁴⁶⁰ **Brazil**,⁴⁶¹ **Chile**,⁴⁶² **Colombia**,⁴⁶³ **England and Wales**,⁴⁶⁴ **France**,⁴⁶⁵ **Germany**,⁴⁶⁶ **Guatemala**,⁴⁶⁷ **Ireland**,⁴⁶⁸ and **Norway**⁴⁶⁹) provide rights to similar kinds of information about procedures, rights and support services when a complaint is filed. For example, in **Australia**, all states provide a central ‘one-stop’ Victims Services resource agency to help victims.⁴⁷⁰ Through free telephone helplines and internet and written resources, the agencies provide an avenue for victims to receive information about their rights and where to go for legal, counselling and other services.

Rights to information on the progression and outcome of proceedings

Victims are also entitled to information about significant developments in the criminal proceedings. Again, the rights guaranteed in the **EU Victims’ Directive** in this regard are extensive. These provisions reflect developing international standards regarding victims’ right to information from state authorities – which are derived from the right to a fair hearing, effective remedy and adequate reparation under Articles 6 and 13 European Convention on Human Rights. For example the European Court has found that Greece and Bulgaria deprived complainants – who alleged mistreatment amounting to torture, and death in police custody, respectively – of their rights to seek compensation and participate in proceedings by ignoring their requests for information on progress with their complaints.⁴⁷¹

The EU Victims’ Directive provides victims with an express right to be afforded information and updates about the progress of their case, which begins during the

⁴⁵⁹ OPBP Country Report: Australia para. 42

⁴⁶⁰ OPBP Country Report: Bangladesh, p. 4.

⁴⁶¹ OPBP Country Report: Brazil para. 10

⁴⁶² Chile CCP, Art. 78

⁴⁶³ Colombia CCP, Arts. 11.e, 135, Mejía Gallego (2014), ‘La participación de las víctimas’.

⁴⁶⁴ OPBP Country Report: England and Wales, para. 9

⁴⁶⁵ France CCP Arts. 53-1, 75.

⁴⁶⁶ Germany CCP Art. 406h.

⁴⁶⁷ Decree 18/2010 Art. 7, modifying article 117 of the Code of Criminal Procedure, recognises the right of victims to be informed of the rights to which (s)he is entitled.

⁴⁶⁸ OPBP Country Report: Ireland para. 23

⁴⁶⁹ OPBP Country Report: Norway para. 18.

⁴⁷⁰ For details of the organisation for each jurisdiction see, Standing Council on Law and Justice (2013), *National Framework of Rights and Services for Victims of Crime – 2013-2016*, p. 29.

⁴⁷¹ ECtHR, *Zontul v Greece* (2012), App. No. 12294/07, 17 January 2012, para. 71; *Ognyanova and Choban v Bulgaria* (2006), App. No. 46317/99, 23 February 2006, paras. 43, 136-137. Similar rulings have been made by the Committee Against Torture: see *Dimitrijevic v Serbia and Montenegro*, Comm. No. 207/2002, CAT, A/60/44, 24 November 2004, para. 5.4; *Hajrizi Dzemajl et al. v Serbia and Montenegro*, Comm. No. 161/2000, CAT, A/58/44, 21 November 2002, 85 CAT/C/29/D/161/2000, para. 9.5-9.6. See also, Updated Impunity Principles, Principles 11, 12 and 24; UN Principles and Guidelines on Remedy and Reparation, para. 24.

investigation stage and continues until the conclusion of proceedings.⁴⁷² Victims' ability to review decisions not to prosecute may also hinge upon this information. Victims must be informed of various developments in their case, including:

- Decisions not to proceed with or to end an investigation, and decisions not to prosecute an accused, along with reasons for that decision;
- The nature of the charges brought against the accused;
- In general, victims must be given "information enabling the victim to know about the state of the criminal proceedings";
- The time and place of the trial;
- Any final judgment in the trial, and reasons for this decision (unless it was made by a jury);
- When the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from detention or escapes.

Again, similar rights already exist in many of the jurisdictions surveyed. In **England and Wales**, victims have the rights set out in the EU Victims' Directive. In **Ireland**, there is an enhanced undertaking in respect of keeping victims of sexual and violent offences informed about the progress of the case. In **Colombia**, the victim must be informed of significant steps in the case, including when the accused is released on bail. In **CAR**, the Judge has the duty to notify the civil party or his or her legal counsel, within 24 hours, of a request for provisional release and they may present observations within the next 48 hours.⁴⁷³ In other jurisdictions, rights are less extensive, for example, in **India** the complainant, who may not be the victim, has a right to receive a single update at the conclusion of the investigation.

(ii) Rights to support

Right to understand and be understood

As a matter of common sense, in order for victims to be able to protect their own interests, they must be able to understand the proceedings and be understood in them. The **EU Victims' Directive** recognises this and requires states to enable victims to make their complaint in a language they can understand, and receive translated copies of documents related to their case free of charge, if they require.⁴⁷⁴ This right goes beyond mere translation: information must be provided in an appropriate manner so that it can be effectively understood.⁴⁷⁵ To do so, authorities must take an individual approach to victims, bearing in mind their linguistic abilities as well as their intellectual and emotional capacity, literacy and other characteristics.⁴⁷⁶ This will be of particular importance when providing information to victims originating from or located in other countries: these victims are less likely to be familiar with the legal system of the forum

⁴⁷² See, EU Victims' Directive, Art. 6 and Recitals 26-27 and 30-33; EC Guidance Document pp. 18-20. This is distinct from national authorities' positive duties to inform victims about their rights.

⁴⁷³ CAR CCP, Art. 100.

⁴⁷⁴ EU Victims' Directive, Arts. 3, 5(2)-(3) and Recital 21.

⁴⁷⁵ Recital 21 provides that information should be given "by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and accessible language. It should also be ensured that the victim can be understood during proceedings. [...] Particular account should be taken of any difficulties in understanding or communicating...".

⁴⁷⁶ EU Victims' Directive, Arts. 3, 4(1)(f), 5(2) and 7, and Recital 21; EC Guidance Document p. 14; VSE (2013), *Handbook for Implementation*, p. 9 and pp. 14-15.

state, and linguistic, social or cultural barriers may impede their understanding of relevant procedures.

Provision of access to consular assistance

In **Chile**, where prosecutors now provide foreign victims of crime, as well as defendants, with access to consular assistance.

Staff of the **Chilean** Public Prosecutor's office realised that reliable statistics were not available on the numbers of foreigners and migrants who participate in national criminal proceedings and who do not have a good knowledge of the national language. Bearing in mind the increased migrant flows which Chile has received in the past decade (traditional south-to-south migration and recently also migrant flows from Africa and Asia), a special panel on migrants' rights was created. This panel, echoing the responsibilities derived from the American Convention on Human Rights, recognised the obligation of consular assistance not only in relation to the accused, but also in relation to victims who intervene during the proceedings, so that they can have full and informed knowledge on the development of the proceedings as well as on their rights. The objective of this panel was to promote migrants' access to justice, to neutralise discriminatory actions and to reverse arbitrariness suffered by foreigners and migrants during criminal proceedings, either as victims or as accused.⁴⁷⁷

Interim compensation / emergency funding

A number of jurisdictions (including **Australia**, **India** and the **USA**) can award interim compensation or emergency funds to help the victim meet urgent expenses. This can be awarded *inter alia* on the recommendation of the police, or on the determination made by an independent commissioner or tribunal.

Right to support services

The **EU Victims' Directive** requires states to provide extensive support to victims, regardless of whether they play a role in the proceedings, whether proceedings ever take place or even whether the perpetrator is identified. The right to support for victims, and in some circumstances their families, must be confidential and free of charge.⁴⁷⁸ The Directive expressly states that this right is formally separate from the status of the accused.⁴⁷⁹ National authorities are under a positive obligation to facilitate victims' referral to these services "from the moment [they] are aware of the victim",⁴⁸⁰ although victims should also be able to access support services directly, without referral.

'Support' is not defined within the Directive but its provisions make clear that it is intended to encompass a range of general and specialist victims' services. General victim support includes provision of information and advice about victims' rights, entitlements and legal proceedings; emotional and psychological support; and various kinds of practical assistance.⁴⁸¹ In addition, in accordance with their specific needs and the degree of harm they have suffered, victims must be able to access specialist support.

⁴⁷⁷ Information from interview with Ms. Karinna Fernández Neira, 2 July 2015.

⁴⁷⁸ EU Victims' Directive, Art. 8(1) and Recitals 37.

⁴⁷⁹ *Ibid*, Art. 8(5) and Recitals 19 and 40.

⁴⁸⁰ *Id*, Art. 8(2) and Recital 40.

⁴⁸¹ See, *Id*, Arts. 8(1)-(2) and 9(1), Recitals 37 and 40; EC Guidance Document p. 24-28; VSE *Handbook for Implementation*, pp. 17-19.

This comprises measures which prevent further victimisation but can also help to repair harm suffered as a result of the crime: medical care, forensic examination, psychological counselling and trauma care, access to shelters or safe accommodation, and specific services for children, among others.⁴⁸²

Other jurisdictions also provide such support to victims of crime. In the **USA**, for example, support can include childcare and assistance with transportation and parking.⁴⁸³

In Kenya, **Section 11(1) of the Victim Protection Act** provides that any person dealing with a victim shall ensure that the victim is immediately secured from further harm before any other action is taken in relation to the victim. These shall include placing the victim in a place of safety, in case of a vulnerable victim; securing food and shelter until the safety of victim is guaranteed; securing urgent medical treatment for the victim; immediate psychosocial support for victim; police protection for the victim where appropriate; placing the victim with a relative where appropriate; rescuing and placing in a place of safety, any other persons related to the victim who may still be in the custody or control of the offender. In practice, police will try to assist victims to access places of protection such as children's homes or women's shelters, or assist individuals to access the Witness Protection Programme. However, resources are limited and in some cases support will be limited to advising on self-help measures, such as advising a victim to move.⁴⁸⁴

(iii) Rights to assistance in the criminal proceedings

Right to legal representation

Independent legal representation is essential to ensure that victims can effectively participate in proceedings. Lawyers representing victims play a fundamental role in ensuring victims can understand their rights and the conduct of proceedings, conveying victims' views and concerns, and ensuring that their interests are safeguarded throughout the proceedings. Legal advice and representation is often crucial to enable victims to access rights which flow from their participation in the proceedings, including support, protection and compensation. It can also make it easier for victims to come forward with evidence and information, and to testify as witnesses.

All jurisdictions that allow for victim participation in the criminal proceedings as an auxiliary prosecutor, civil party, or intervener allow victims to be represented by counsel. A number of additional jurisdictions that do not provide for victim participation, also provide victims with the right to legal representation nevertheless. The **EU Victims' Directive entitles** victims in European Union countries with the additional right to be accompanied by a legal representative when they are interviewed during investigations.⁴⁸⁵

⁴⁸² EU Victims' Directive, Art. 8(3) and 9(2)-(3), Recitals 38-39.

⁴⁸³ Office for Victims of Crime, Attorney General Guidelines Victim and Witness Assistance, Office of Justice Programs, US Department of Justice, p. 28 (g) (2).

⁴⁸⁴ Information from Kenyan lawyer, 12 August 2015.

⁴⁸⁵ EU Victims' Directive, Art. 20(c). The Directive also makes special provision for legal representation of child victims; Art. 24(1)(c) and Recital 60.

The **Indian Supreme Court** recognised the important role legal representation for victims can play in *Delhi Domestic Working Women's Forum v. Union of India*.⁴⁸⁶ As reported by Muralidhan:

"The case arose out of an incident in which six women, working as domestic servants in Delhi, were raped by eight army personnel in a moving train between Ranchi and Delhi. The members of the petitioner forum, when prevented by the employers from meeting the victims, sought the court's directions for expeditious and impartial investigation of the offences. The court indicated the following "broad parameters for assisting the victims of rape":

- The complainants in sexual assault cases had to be provided with legal representation. It was important to have someone well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, ... counselling or medical assistance. It was important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represented her till the end of the case.
- Legal assistance would have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station; the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
- The police was under a duty to inform the victim of her right to representation before any questions were asked of her and the police report should state that the victim was so informed.
- A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. An advocate would be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained".⁴⁸⁷

Right to legal aid

Legal aid is granted for victim participation in many, but not all, of the jurisdictions surveyed. Such a right exists, for example, in **Argentina**,⁴⁸⁸ **Colombia**,⁴⁸⁹ **Italy**,⁴⁹⁰ **Bangladesh**,⁴⁹¹ **Cambodia**,⁴⁹² **Denmark**,⁴⁹³ and **Germany**.⁴⁹⁴ In relation to European Union countries, the **EU Victims' Directive** specifies that victims must enjoy access to legal aid "where they have the status of parties to criminal proceedings".⁴⁹⁵

⁴⁸⁶ *Delhi Domestic Working Women's Forum v Union of India* (1995) 1 SCC 14.

⁴⁸⁷ S. Muralidhan (2004), 'Rights of Victims in the Indian Criminal Justice System', International Environmental Resource Centre, <http://www.ielrc.org/content/a0402.pdf>, pp. 1-2.

⁴⁸⁸ Argentina CCP Art. 80.

⁴⁸⁹ Colombia CCP, Art. 11.h.

⁴⁹⁰ OPBP Country Report: Italy OPBP paras. 13, 24 and 41.

⁴⁹¹ OPBP Country Report: Bangladesh, p. 8.

⁴⁹² Cambodian CPP, Articles 150, 245, 313, 376, and 426.

⁴⁹³ OPBP Country Report: Denmark, paras. 27-32.

⁴⁹⁴ Germany CCP Art. 397(2), 397a.

⁴⁹⁵ EU Victims' Directive, Art. 13; see also EC Guidance Document, p. 34, and VSE, *Handbook for Implementation*, p. 44.

Most jurisdictions apply criteria to determine eligibility for legal aid, such as having an arguable case or an income that falls below certain thresholds.⁴⁹⁶ Nationality and residency requirements,⁴⁹⁷ and the need to prove eligibility with reference to an applicant's residence,⁴⁹⁸ often exclude victims of crimes committed extraterritorially, who may be resident abroad. Although legal aid applicants can sometimes apply for exemption from these rules, these very applications may require legal assistance.⁴⁹⁹

In **Colombia**, in theory victims have the right to access free legal aid during certain parts of the criminal proceedings. However, state-provided legal services for victims are often substandard, and is only provided during the trial phase. This makes the role of the prosecutor in promoting the victim's interests during the investigation phase even more important.⁵⁰⁰

In other jurisdictions where legal representation is allowed but is not covered by legal aid (such as the **USA**), non-governmental organisations will sometimes provide legal representation to victims, although their capacity can be limited.⁵⁰¹

Right to familiarisation with court proceedings

In some jurisdictions victims have specific rights to familiarisation with the court proceedings before trial. For example, in **Australia**, victims have the right to be informed about trial procedures prior to appearing as witnesses, and victims must be given at least a copy of their statement. In **England and Wales** there is a right to be notified of court dates, and an opportunity to interact with the prosecuting lawyer before trial. In **England and Wales** and **Ireland** victims are also offered court familiarisation visits.

Right to translation during oral hearings

A number of jurisdictions provide victims as a matter of right with translation during oral hearings.⁵⁰² This is part of victims' right to understand and to be understood, as set out in the **EU Victims' Directive** (discussed above). In other jurisdictions where participation rights are weaker, victims may still have specific rights to interpretation in oral hearings. This is the case, for example, in some states of the **USA**, such as in Oregon where specific

⁴⁹⁶ For examples see Article 667, *Code Judiciaire* ('Belgian Judicial Code'); Articles 7 and 9-2, *Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique*, as implemented by *Décret n°91-1266 du 19 décembre 1991 portant application de la loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique* ('French Law on Legal Aid'); in Germany, Article 1, *Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen* ('Law on legal advice and representation for citizens with low incomes'); in the Netherlands, Articles 12, 34 and 44(4), *Wet op de rechtsbijstand* ('Dutch Legal Aid Act').

⁴⁹⁷ Article 668, *Belgian Judicial Code*; Article 3, *French Law on Legal Aid*. The UK government has also proposed introducing a legal aid 'residence test' which would distinguish among applicants on the basis of their immigration status; see *Public Law Project v Secretary of State for Justice* [2014] EWHC 2365; REDRESS *Submission to Government on Proposed Legal Aid Changes*, 18 October 2013, paras. 6-14.

⁴⁹⁸ In The Netherlands eligibility for legal aid is usually assessed with reference to an applicant's tax records and social security number; Article 25(2), *Wet op de rechtsbijstand* ('Dutch Legal Aid Act'). Foreign nationals also experience practical difficulties accessing legal aid in Spain; see VICS project, p. 90-91.

⁴⁹⁹ For example section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) allows applications for 'exceptional' legal aid funding in the UK. However cases in which this is granted have been extremely rare, and efforts to enforce this mechanism have given rise to subsequent litigation: *R (Gudanaviciene & Others) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWHC 1840 (Admin).

⁵⁰⁰ Interview with Colombian lawyer, 24 June 2015.

⁵⁰¹ Interview with US lawyer, 2 July 2015.

⁵⁰² Including Australia, Argentina, Denmark, England and Wales, Guatemala, India.

legislation has been enacted granting victims the right to be assisted by a translator free of charge, even if the victim does not intervene in proceedings.⁵⁰³

Reimbursement of expenses

Victims of international crimes have stressed how the costs of taking part in criminal proceedings can significantly limit their ability to participate, emphasising how “the small difficulties have an impact”.⁵⁰⁴ It is common practice in many jurisdictions to reimburse witnesses and, where applicable, civil parties, for expenses incurred as a result of their participation in criminal proceedings.⁵⁰⁵ These expenses usually include the cost of travelling to court, accommodation, loss of earnings while away from work, or providing childcare during time spent away from home. For example in **Uganda**, the court registry provides an allowance to victims to cover transport costs, meals and accommodation.

The **EU Victims’ Directive** recognises that victims incur these expenses, and requires states to reimburse costs incurred as a result of their “active participation” in criminal proceedings.⁵⁰⁶ In addition, victims are entitled to the return of property seized in the course of criminal proceedings.⁵⁰⁷

(iv) Rights to access documents in the criminal proceedings

Rights to access case file and other information during the investigation

In most countries, victims with some autonomous or participating status will be entitled to see aspects of the case file. In addition, in **Argentina**, victims who participate as *querellantes* can request the prosecutor, prior to the formalisation to the preparatory investigation, to provide information on the facts that will be analysed during the investigations, on the investigative steps carried out and investigative steps still to be taken.⁵⁰⁸ In **Denmark** and **Norway** there is a limited right to access the case file, though this right is enjoyed to a greater extent by the victim’s counsel. In **Brazil**, access to the case file is decided by the police.⁵⁰⁹

Such rights also exist to some extent in some adversarial systems. For example in the **USA** there is currently a split in authority as to whether victims have the right to access information during the pre-trial stage of the proceedings, where one Circuit has dictated that victims do not have this right of ‘discovery’ (accessing and examining registers and documents), while another Circuit has established that they do have the possibility of accessing the Prosecutor’s files in order to protect their rights.⁵¹⁰

⁵⁰³ Interview with US lawyer, 2 July 2015.

⁵⁰⁴ Statement of Wolfgang Blam in REDRESS and FIDH (2010), ‘Universal Jurisdiction Trial Strategies - Focus on Victims and Witnesses: A report on the Conference held in Brussels, 9-11 November 2009’, November 2010, http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf, pp. 18-19.

⁵⁰⁵ Center for the Study of Democracy (2009), ‘Member States’ legislation, national policies, practices and approaches concerning the victims of crime: Final Study’, July 2009, http://ec.europa.eu/justice/news/consulting_public/0053/bg_study_on_victims_07_2009_final_en.pdf, p. 74.

⁵⁰⁶ To “the extent that the victim is obliged or requested by the competent authorities to be present and actively participate” in the case; Article 14 and Recital 47 of the EU Victims’ Directive, EC Guidance Document, p. 35. These expenses do not include legal fees.

⁵⁰⁷ EU Victims’ Directive, Art. 15 and Recital 48. For example see Section 111k of the German CCP.

⁵⁰⁸ Argentina CCP, Art. 223.

⁵⁰⁹ OPBP Country Report: Brazil para. 4.

⁵¹⁰ Interview with US lawyer, 2 July 2015.

Rights to access other information

For example, in **Argentina** and **Italy**, among other things, the indictment must also be shared with the victim. In **Brazil**, the victim has the right to access all the evidence presented at the indictment hearing. In **Colombia**, during the formal investigation stage, victims additionally enjoy the right to know the evidentiary elements and the physical evidence on which the indictment has been based.⁵¹¹

The Victim Protection Act in **Kenya** also provides victims with rights to information that go beyond those normally granted to victims in adversarial systems. It requires that the victim be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence.⁵¹²

(v) Rights to protection of privacy and psychological integrity

Rights to protection of privacy

Many jurisdictions provide victims with rights to privacy during criminal proceedings, though this is to be distinguished from anonymity which has usually been held to violate the accused person's fair trial rights.

Under the **EU Victims' Directive**, States have a specific overarching obligation to protect victims' privacy.⁵¹³ This duty includes measures to protect victims' dignity, such as preventing publication of pictures of crime scenes or deceased victims; and disclosure of, or cross-examination about, details of victims' private lives which are unnecessary for the case. This may be important in the context of media interest in the case, or in light of defence and prosecution access to victims' immigration files or medical records.

Section 8 of the **Kenyan** Victim Protection Act recognises victims' right to privacy and confidentiality. A victim has the right to privacy from the media, whether print, electronic or other types; from unreasonable intrusion from health professionals; of confidentiality of their communication with victim support service providers; or from any other person.

Rights to 'special measures' during trial

The **EU Victims' Directive** provides that during prosecutions, courts should allow for 'special measures' such as holding closed hearings, using communication technology, e.g. video-link, or avoiding unnecessary questions about the victim's private life.⁵¹⁴ At both stages of proceedings, victims have a right to avoid contact with the accused and his or her family.⁵¹⁵

⁵¹¹ Mejía Gallego (2014), 'La participación de las víctimas', pp. 49, 50.

⁵¹² Victim Protection Act 2014, s. 9(1)(e).

⁵¹³ EU Victims' Directive, Art. 21 and Recital 54. See generally EC Guidance Document, pp. 39-48; VSE *Handbook for Implementation*, pp. 27-30.

⁵¹⁴ EU Victims' Directive, Arts. 23(3) and 24(1)(b), Recitals 58-59; EC Guidance Document pp. 46-47; VSE *Handbook for Implementation*, pp. 30-31, 38-40. The Directive allows a margin of appreciation which recognises that such measures may be subject to operational or practical constraints.

⁵¹⁵ EU Victims' Directive, Art. 19 and Recital 53.

These rights are reflected in the law of many of the jurisdictions surveyed, and include rights such as to:

- have counsellors or support persons accompany the victim in court (Brazil, England and Wales, Ireland)
- have separate waiting facilities for victims (Ireland)
- provide evidence outside of court where it is unreasonable or inconvenient for a witness to testify in court (India)
- have a separate waiting area for the victim (Brazil)
- give evidence through a live link (Brazil, Denmark, Italy)
- give evidence in the absence of the accused (Brazil, Norway, Denmark)
- get frequent breaks while testifying (Brazil, Denmark)
- have *in camera* trials or parts of trials (Denmark, Italy, Guatemala, Chile, DRC, England and Wales, Guatemala, India)
- give anonymous evidence (Denmark)

In **DRC**, specific legislation relating to victims of sexual violence allows a judge to make direct requests to a medical officer and a psychologist to examine the victim in order to determine appropriate medical care to address psychosocial trauma.⁵¹⁶ In addition, rules of procedure and evidence exclude defences relating to victims' consent;⁵¹⁷ court protection measures for victims of sexual violence are provided in the form of security, physical and psychological well-being, dignity and privacy;⁵¹⁸ and closed sessions may be ordered at the request of victims of sexual violence.⁵¹⁹

(vi) Right to protection of physical safety

All individuals have rights under international human rights law to protection from violence. Victim and witness protection is a condition precedent to justice. Nevertheless, it represents a real and persistent challenge. A Dutch prosecutor interviewed by REDRESS had indicated that witnesses were threatened and intimidated in practically every international crimes case her team had worked on.⁵²⁰ In countries where the crimes took place, victims and their supporters have been targeted by persons in positions of political, military or economic power, by their neighbours and even by their own families – some have even been ostracised by other survivors.⁵²¹

⁵¹⁶ Art. 14 bis, Loi no. 06/019 du 20 juillet 2006.

⁵¹⁷ Art. 14 ter.

⁵¹⁸ Art. 74 bis.

⁵¹⁹ Art. 74 bis.

⁵²⁰ Hester van Bruggen, Chief Prosecutor, International Crimes Team, Public Prosecution Office of the Netherlands, REDRESS and FIDH (2010), 'Trial Strategies', p. 24. In *Mpambara* the court found that "great pressure had been exercised on a number of witnesses not to tell the truth"; see *Prosecutor v Joseph Mpambara*, Judgment of The Hague District Court, para. 32.

⁵²¹ REDRESS documented the barriers placed in front of Rwandan victims who testified at the ICTR, from receiving government assistance. REDRESS (2012), 'Testifying to Genocide: Victim and Witness Protection in Rwanda', October 2012, <http://www.redress.org/downloads/publications/TestifyingtoGenocide.pdf>, p. 27 and general overview at pp. 23-30.

The **EU Victims' Directive** provides victims with an express right to protection, which operates during both investigation and prosecution stages.⁵²² States have a duty to protect victims against violence, intimidation or reprisals ('physical protection'). This includes taking measures against any actual or potential violence, intimidation or reprisals, carried out either by state actors or private parties. This may involve use of injunctions, protection and restraining orders, or relocation.⁵²³ States also have a duty to prevent secondary or repeat victimisation and traumatisation. This involves providing all necessary support to victims to empower them before, during and following their engagement in proceedings, reducing their sense of vulnerability by fostering a safe and secure environment for all dealings with the court and court officials and limiting the inconvenience of participating in proceedings, such as avoiding undue delays; minimising interviews; and allowing victims to be accompanied during interviews by a legal representative and a supportive person of their choice.⁵²⁴

To ensure that all victims can enjoy effective protection, authorities are also obliged to conduct individual assessments of victims to determine their specific protection needs.⁵²⁵ Assessments must take into account victims' personal characteristics and the type, nature and circumstances of the crime. Persons who have suffered "considerable harm due to the severity of the crime" or who are "particularly vulnerable" should be paid "particular attention".⁵²⁶ The Directive does not define these terms, but provides a number of indicators which should be used to assess risks posed to victims.⁵²⁷

Many states have introduced specific protective measures for witnesses and victims. Of the jurisdictions surveyed, several (including **Australia, Brazil, Colombia, Denmark, England and Wales, Ireland, Italy Kenya** and the **USA**) have full-fledged witness protection programmes, while in other countries such as **Uganda**, draft legislation has been prepared. In some countries, courts are empowered to make protection orders in specific cases. At times, this may include orders to relocate witnesses. Anonymity of certain victims (based on age or nature of offence) is allowed in some jurisdictions, including **Ireland, Norway** and **Denmark**, though this is not the norm.

In **Colombia**, a highly developed system for the protection of people at risk has been developed, with over ten thousand people under its protection. The National Protection Unit, which is dependent on the Ministry of Internal Affairs, was created with the aim of implementing precautionary measures of the Inter-American Commission and provisional measures of the Inter-American Court in relation to the protection of human rights defenders, activists or journalists who themselves were usually victims. With time, it has been widened to other categories of victims. It has a very sophisticated system of risk evaluation that offers different levels of protection (from providing a cell phone with a direct line to the unit, to the provision of armoured cars or escort).⁵²⁸

⁵²² EU Victims' Directive, Arts. 18-20 and 23-24.

⁵²³ *Ibid*, Art. 18 and Recitals 7 and 52. The EU has also adopted a number of specific instruments designed to strengthen protection of victims of crime: Directive 2011/99/EU of 13 December 2011 on the European Protection Order; Regulation No. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. See also EU Human Trafficking Directive, Articles 12-13 and 15-16, Recitals 19-20 and 22.

⁵²⁴ EU Victims' Directive, Arts. 20 (a)-(d) and 23(2), Recital 53.

⁵²⁵ *Ibid*, Art. 22 and Recital 55-56. Art. 12(3) of the EU Human Trafficking Directive also provides for individual risk assessment.

⁵²⁶ *Id*, Art. 22(3) and Recital 38.

⁵²⁷ See further, *Id*, Arts. 22(3)-(4) and 24, Recitals 55-57.

⁵²⁸ Interview with Colombian lawyer, 24 June 2015.

In **India**, a lack of protection for victims and witnesses has been a constant barrier to justice, and although the Supreme Court has ordered the establishment of protection programmes, implementation has been lacking. Specific rights for particularly vulnerable victims

Many states recognise the need to provide additional rights to particularly vulnerable victims such as children, victims of sexual violence, victims of domestic violence, victims of trafficking, disabled victims, victims from indigenous communities and victims of organised-crime or terrorist offences.

Section 17(1) of Kenya's Victim Protection Act provides that a court or competent authority may declare a victim to be vulnerable.

Once designated as vulnerable, the victim must receive special consideration from the criminal justice agencies and victim support service providers in matters related to victim protection and welfare services.

Additional rights set out in law in other jurisdictions for certain types of vulnerable victims and witnesses include:

Reporting and investigation

- Use of specially trained police officers (Australia, India)
- The provision of legal representation from the time of making the complaint (India)
- Video-recording for the statement of certain categories of victims (Australia, India, England and Wales)
- Requiring that police officers dealing with children are not wearing their uniform (India)
- Criminalising the refusal by authorities to file a complaint of sexual violence (India)
- Providing for a speedy medical examination in case of sexual offences, only by registered medical personnel (India)
- Requiring that complaints of violence against women be recorded only by women officers (India)
- The use of special educators or interpreters for disabled victims of violence against women (India)
- The presence of family or support persons when dealing with the police (England and Wales, Norway (for child victims))
- Recording the statement of some categories of victims outside the police station in a convenient location (India)

Counselling and other support

- special counselling support for children (Australia and India)
- special support schemes for disabled victims, and victims of sexual violence (Australia)

- the use of special measures as a matter of course in proceedings
- the right to receive urgent and preventive judicial protection⁵²⁹
- mandatory school attendance for child victims (Brazil)

Protection

- Anonymity from the public as the default rule for victims of sexual violence (Australia and India) and allowed in England and Wales
- Access to urgent judicial protective measures (Argentina, Guatemala)

Decision to Prosecute and Modification of Charges

- Special right to be consulted on a decision not to prosecute, or a decision to modify or drop charges (Australia – New South Wales, England and Wales)

Rights at Trial

- Giving evidence by live link (Australia, England and Wales, India, Ireland, Italy, Norway, USA)
- Having screens, curtains, single visibility mirrors or other devices to shield the victim from having to look at the accused while testifying (Australia, England and Wales, India)
- Allowing in camera proceedings, particularly in cases of sexual violence (England and Wales, India)
- Removal of wigs and gowns (England and Wales, Ireland)
- Allowing communication aids (England and Wales)
- Using pre-recorded testimony in court (England and Wales, Ireland, Italy, USA)
- Allowing the help of intermediary for testifying in court (England and Wales, Ireland)
- Using a separate legal counsel in cases of sexual violence (India, Ireland)
- Relaying questions for cross-examination through the judge in cases of sexual violence (India)
- Giving frequent breaks to the witness (India)

Compensation

- provisions for mandatory and automatic restitution in cases of domestic abuse (USA)
- Solidarity Fund from which victims of mafia-related or terrorist offences can obtain compensation (Italy).

Enforcement

- victims of sexual or violent offences can enrol to receive updates about the different stages in the offender's sentence, including release (England and Wales, Denmark).

⁵²⁹ E.g., Argentina: Law 26.485/2009 on Comprehensive Protection to prevent, sanction and eradicate violence against women, Art. 16; Law 26.364/2009 on Prevention and Sanction of Human Trafficking, and Victim Support, Art. 6.

II. Reparation

Reparation is a broad concept which comprises restitution, rehabilitation, satisfaction and guarantees of non-repetition in addition to compensation.⁵³⁰ Reparation, including compensation, can play a crucial role in acknowledging victims' suffering and ameliorating the hardship, poverty or ill-health they suffer as a result of the crime. For some victims, payment of compensation may also signal an offender's acceptance of responsibility for his or her actions and attempt to make amends, so that compensation can be seen as an intrinsic element of the justice process.

In most legal systems, there are four main avenues for victims of crime to access compensation and other forms of reparation: (i) compensation orders made against the offender in the course of criminal proceedings; (ii) separate civil proceedings; (iii) fundamental rights actions; and (iv) administrative reparations schemes, including national criminal compensation schemes and reparation programmes for mass violations. While victims therefore generally have the possibility of pursuing separate civil or fundamental rights proceedings, these are often complex and expensive, and require the victim to prove the whole case against the defendant. For this reason from a victim's perspective, the provision of compensation through criminal proceedings is often preferable. This avenue for reparation is briefly outlined below.

States will bear obligations to provide reparation to victims when responsibility for the underlying crime or human rights violation rests with the state. This may be, for example, the state where the convicted person is a soldier; or a company or a firm, which employed the convicted person.⁵³¹

Individual perpetrators may equally bear responsibility for any harm attributable to them, and states have obligations to ensure that processes to secure remedies against individual perpetrators are effective. This principle is also incorporated into the UN Basic Principles on Remedy and Reparation which provides that where individual perpetrators are without funds,

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

Often, domestic courts will recognise the dual nature of the obligations owed to victims by determining that the state and the individual perpetrator are jointly and severally liable. In other instances, states have focused on the responsibility of particular actors. For instance, in **India** compensation is always paid by the state, while in the **USA** it is always borne by the convicted person. In other jurisdictions (e.g., **Australia, England and Wales, Ireland, Denmark and Norway**) compensation can be sought from the state or the offender.

⁵³⁰ See for example UN Basic Principles on Remedy and Reparation, paras. 15-23; CAT General Comment No. 3, paras. 9-10.

⁵³¹ See submission by REDRESS and SAJ in *SA v Democratic Republic of the Congo*, 20 November 2014, <http://www.redress.org/downloads/engcommunication-sa-v-drc20-nov-2014.pdf>.

1. Domestic practice

(i) Types of reparations delivered through criminal proceedings

Within national criminal justice proceedings, reparation has traditionally (although not always) been limited to financial compensation for losses incurred by victims as a result of the crime committed against them, due to the limited powers available to criminal courts as well as the current structure of state compensation schemes. Reparation is limited to compensation in many of the jurisdictions surveyed, including **Australia, Denmark, England and Wales, Germany, India** and the **USA**. Jurisdictions differ in how compensation is computed: some relate compensation to actual expenses,⁵³² while others include damages for pain and suffering.⁵³³

In other jurisdictions, including **DRC**, the primary form of reparation available to the victims is restitution, such as an order to replace a destroyed building, car or computer where possible. Where this is not possible, the court will allocate damages.

Some jurisdictions providing for civil party participation have, however, recently introduced amendments to their laws to broaden the scope of the definition of reparation that can be provided. For example, in **Guatemala**, a recent amendment recognises that reparation comprises not only restoration of the right affected by the crime and compensation for the damage caused, but also the acknowledgement of the victim as a right holder against whom the crime was committed.⁵³⁴ **Colombian** law also incorporates the idea of “integral reparation” in its procedure.⁵³⁵

(ii) Process for claiming reparation

Most jurisdictions provide the opportunity for victims to be awarded compensation through criminal proceedings. In European Union countries such a right *must* be provided: the **EU Victims’ Directive** recognises victims’ right, in the course of criminal proceedings, to a decision on compensation by the offender within a reasonable time.⁵³⁶

Decisions on compensation are generally delivered in one of two ways. First, victims (and their heirs/successors) can enforce this right by acting as civil parties (or in some cases as auxiliary prosecutors), in jurisdictions where this mechanism is available.⁵³⁷

In other countries prosecutors are responsible to seek a decision on compensation, and victims may have little or no control or input over the application. For example, in **England and Wales**, where the civil party mechanism does not exist, the court must always consider imposing a ‘compensation order’ when sentencing a guilty offender, either as an alternative or in addition to other forms of sanction. The prosecution should make submissions to the sentencing judge about an appropriate compensation order.⁵³⁸ In other states including **Denmark** and **Norway** the prosecution also has the

⁵³² E.g., Ireland, USA.

⁵³³ E.g., Australia, Denmark, England and Wales, Germany.

⁵³⁴ Decree 7/2011, Art. 7.

⁵³⁵ Mejía Gallego (2014), ‘La participación de las víctimas’.

⁵³⁶ EU Victims’ Directive, Art. 16(1) and Recital 49. Article 16(2) encourages Member States to “promote measures to encourage offenders to provide adequate compensation to victims”. This right applies “except where national law provides for such a decision to be made in other legal proceedings”, for example through a separate civil claim.

⁵³⁷ This mechanism is available, in various forms, in at least 23 Member States.

⁵³⁸ S130, Powers of the Criminal Courts (Sentencing) Act 2000. These usually award only a nominal or token amount, so that victims of ordinary offences are almost always required to bring separate civil proceedings if they want to obtain compensation for their actual losses.

responsibility to seek compensation on behalf of victims, by presenting a formal request or claim during criminal proceedings.⁵³⁹

2. Practical Challenges

In practice, access to reparation including compensation often remains elusive for victims of serious international crimes who participate in domestic criminal proceedings. Despite the growing number of cases being prosecuted, very few victims who have participated in criminal proceedings – either as civil parties or in other roles – have been awarded or actually obtained compensation.

Difficulties may arise when an offender is convicted on some counts but acquitted on others, so that some victims receive compensation but others are excluded.⁵⁴⁰ Further, satisfying the burden of proof may be difficult for victims of crimes committed historically or during conflict, who may be unable to access paperwork and official records, or to have them validated, notarised or translated. In the *Ntuyahaga* case, prosecuted in Belgium, the court refused to award compensation to many civil parties surviving relatives of persons killed during the 1994 Rwandan genocide – on the basis that the victims' death certificates were not sufficiently detailed to prove they were related to the claimants. The court also rejected claims where death certificates were not available, or where certificates did not specify the date or location of death.⁵⁴¹

In addition, where statutes of limitation have been removed for serious international crimes prosecutions, procedural rules for reparations claims have not always been amended accordingly: for example legislation extending victims' ability to obtain compensation in the Netherlands did not apply retrospectively, excluding victims of the 1994 Rwandan genocide. Inconsistencies among states on whether criminal courts must apply civil or criminal procedural rules in respect of compensation claims open further gaps between victims of 'ordinary' and international crimes. When civil rules are applied in criminal courts, claims for crimes committed several years ago may be barred by civil limitation periods which are generally much shorter than those which apply in criminal law.⁵⁴²

Even when a court awards victims with compensation, they face the process of enforcing orders against the perpetrator, who may have few if any financial resources. In the case of Joseph M in **The Netherlands**, two victims were awarded compensation of 680 Euro and 7,120 Euro in costs each.⁵⁴³ The victims were advised that they could be assisted in enforcing the claim by a bailiff who they would need to pay. As the perpetrator is indigent, the decision has yet to be enforced.⁵⁴⁴ Even where the perpetrator does have assets, such as property, they may be located in another country, so that victims will need to undertake enforcement proceedings in foreign jurisdictions. When the perpetrator has been involved in the commission of mass atrocities,

⁵³⁹ REDRESS and FIDH (2010), 'Extraterritorial Jurisdiction in the EU', p. 45; Center for the Study of Democracy (2014), 'Final Study on Victims of Crime' p. 80.

⁵⁴⁰ This was seen in *Mpambara*, which three victims joined as civil parties. Two of the victims were awarded compensation but the defendant's acquittal on sexual violence charges due to a lack of corroborating evidence meant that one of the victims received nothing, even though the court had found him to be a credible and consistent witness. See Liesbeth Zegveld (2010), 'Prosecution of international crimes of sexual violence in Dutch courts', in International Bar Association, *Equality of Arms Review*, January 2010, pp. 12-13. A similar issue arose regarding a partial acquittal in *Basebya*.

⁵⁴¹ Bernard Ntuyahaga case. See also Luc Walley, REDRESS and FIDH (2010), 'Trial Strategies', p. 60.

⁵⁴² REDRESS and FIDH (2010), 'Extraterritorial Jurisdiction in the EU', p. 46.

⁵⁴³ The amount of 680 Euro represents the maximum amount of compensation available for crimes committed in 1994.

⁵⁴⁴ Letter from the prosecutor in the case to the victims' representative, 3 April 2014, copy on file with REDRESS.

competing claims may also arise from other victims. For example, one of the convicted perpetrators in the *Kibungo* case owned property in Rwanda. Some of the civil parties filed a separate claim against the offender before Rwandan courts to enforce part of the Belgian criminal compensation order against the properties, and eventually obtained an order to enforce the sale of the property. However this was disputed and eventually execution was prevented by other victims in Rwanda.⁵⁴⁵

Some states including **France** and **The Netherlands** have sought to address difficulties faced by victims when seeking to enforce criminal compensation awards by establishing national schemes under which the state assumes responsibility for enforcement of the awards.⁵⁴⁶ If victims are unable to obtain payment from offenders, the state pays the victim directly and subsequently pursues the offender for the debt. These schemes are considered best practice.

In addition, authorities should strengthen their capacity to conduct effective financial investigations and asset-confiscation measures from the outset of investigations. The failure to identify and freeze assets *before* suspects are arrested allows them to hide, dissipate or redistribute assets later. Asset confiscation and freezing should be a routine matter for serious international crimes investigations, just as they are for counter-terrorism operations.⁵⁴⁷

PART FIVE: CONCLUSIONS

Victims' rights to an effective remedy, to reparation and to the truth are firmly established in international law. Those rights require that victims have access to criminal proceedings concerning them, and although the exact parameters of that access are not defined in international human rights law, it is clear that "procedural

⁵⁴⁵ Interview with Belgian lawyer, September 2013; testimony of Luc Walley in REDRESS and FIDH (2014), 'Trial Strategies', p. 60.

⁵⁴⁶ Similar schemes operate in states including Austria, Bulgaria and Greece; Center for the Study of Democracy (2014), 'Final Study on Victims of Crime', p. 77.

⁵⁴⁷ Interview with former international crimes practitioner, May 2014. See discussion of efforts to confiscate illegally obtained assets of political actors in Switzerland by Philip Grant, REDRESS and FIDH (2014), 'Trial Strategies', pp. 61-63.

models that do not allow for *any* victim participation as such are no longer acceptable”.⁵⁴⁸

International human rights law has established particularly strong rights around a number of stages, however. First, in relation to the initiation of investigation, it is clear that victims have rights to ensure that such an investigation is undertaken where prima facie evidence exists of an international crime. Second, during the investigation it is clear that victims must have sufficient access to the investigation to protect their legitimate interests. Third, in relation to the prosecution, states are obligated to afford victims the means to review of a decision not to prosecute. Any domestic criminal justice process concerning international crimes must allow – at the very least – victims to participate in these ways and provide the means to enforce these rights.

In addition, engaging with victims of international crimes (by sharing information with them, consulting them and affording victims with the opportunity and wherewithal to express their views) at an early stage of criminal proceedings – in framing the investigation and prosecution strategy, is important at a practical level to enable effective prosecutions. Such engagement may help investigators and prosecutors to properly reflect the complex nature of the crimes, to reach potential witnesses, and to identify priorities for prosecution. Prosecutors and investigators can and should take proactive steps to enable this engagement. More formal links with NGOs active on victims’ issues can also be helpful in this process.

In relation to the trial stage, no particular form of participation is mandated by international human rights law, however a number of courts and bodies have held that victims’ right to the truth and to justice requires that they should be heard during the trial on matters affecting their interests. The survey of domestic practice shows that many jurisdictions already have extensive provisions allowing for victim participation during the trial, although where large numbers of victims are involved a balancing against the defendant’s right to a fair trial may require flexibility in both the form and timing of the participation. A number of other jurisdictions that traditionally did not provide an avenue for victims to participate in the trial have now introduced procedures giving a greater voice to victims, showing that it is both possible and desirable. As discussed in Part One, recognising the place of victims within the public trial – if appropriately managed – may not only have rehabilitative effects, it can also be seen as a moral imperative.

Where there are large numbers of victims involved in a single criminal proceeding, respecting active participation rights may lead to practical and logistical challenges. However these can be addressed, particularly through the allocation of sufficient resources, careful consideration of the timing of participation, and introducing collective components to the participation procedure where this is appropriate in light of the operating context and the situation and perspectives of victims. Collective complaints and common legal representation will inevitably lead to a dilution of individual participatory rights, so it is important that sufficient safeguards are in place to ensure the interests of victims (including any necessary divergences) are properly respected in each.

Where a specialised chamber or tribunal is established, clear procedures that set the scope and purpose of victim participation should be defined from the outset, and

⁵⁴⁸ De Brouwer and Heikkilä (2013), ‘Victim Issues’, p. 1349.

provided with appropriate logistical support. This is important both to allow effective participation and to shape victims' legitimate expectations, avoiding later disappointment. As this report briefly examined, the provision of information, protection and assistance are key in themselves and to allow victims to access their active participatory rights and right to reparation.

Victims' rights demand a certain level of active participation in criminal proceedings, and particularly with international crimes, victims' participation can serve important practical ends. This review shows that domestic jurisdictions have either longstanding acknowledgment of the place of victims in criminal proceedings, or that procedures are developing in that direction.

That place is even more necessary in relation to international crimes, and – drawing inspiration from the models provided in this report – states can and should take positive steps to ensure that it can be effectively occupied.

Appendix 1: Recommendations

1. UNDERSTANDING OF “VICTIM”

- 1.1. Any individual who suffered harm (including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights) as a result of a crime under international law should be considered a “victim” with certain rights, although the extent of rights may depend on their proximity to the crime.
- 1.2. Where a victim has died as a result of the crime, the rights that would have been accorded to them pass to their immediate family members or successor.
- 1.3. Access to an effective judicial remedy requires effective legal representation, including where there are a large number of victims.
- 1.4. Territorial limitations should not apply to who is considered a “victim” with rights in criminal proceedings. Given that victims of international crimes are often forced to flee the jurisdiction or flee to other parts of a country, special measures should be taken to ensure that such victims are not unduly disadvantaged in their access to information, their ability to receive assistance and to participate actively in proceedings.

General Strategies: Domestic Criminal Justice System

- 1.5. States should undertake a mapping of rights and assistance available to victims in the domestic criminal justice system, and the definitions (if any) of different statuses accorded those rights.
- 1.6. Where necessary, States should introduce specific amendments to their law to allow for victims of international crimes to participate in criminal proceedings, to claim reparation, and to obtain information and support. In this regard:
 - a. Legislation should define the category of victims who are entitled to participatory and information rights in criminal proceedings: this should at least include those who were directly targeted by the crime and the family members or successor of a direct victim who is deceased. The definition should not be subject to territorial limitations in respect of the victim.
 - b. Legislation should define who is *prima facie* entitled to act as the family member or successor of a direct victim who is deceased, and how any disputes in this regard are to be determined. In this, domestic criminal or civil procedure will usually provide ready-made standards.
 - c. Legislation should determine the category of victims who are entitled to seek reparation for international crimes: this should include any person who has suffered harm as a result of an international crime, and should not be subject to territorial limitations. The definition should specifically include witnesses, those intervening to prevent or respond to the crime, and immediate family members of the direct victim, who suffered harm as a result of the criminal act.

The precise line between harm that is “as a result of” a criminal act, and harm that is seen to be too remote from it may be a matter of domestic

jurisprudence and interpretation. However, in that interpretation it is important to take into account the specific nature of the international crimes alleged, and it may be helpful for domestic bodies to consider the jurisprudence of the International Criminal Court in this regard.

- d. States should consider on the basis of their own law and the nature of the crimes committed, whether legal persons, including companies, are included in the definition of victim.
- 1.7. States should provide specific support to immediate family members and dependents of victims of crime under international law, who suffer harm as a result of the crime, and define in legislation who falls into this category. This may include the right to counselling and explicit reference to the right to claim for emotional injury caused as a result of hearing about or witnessing the crime.
- 1.8. States should consider introducing provisions to allow associations to represent collective interests under criminal procedure law, including to initiate and participate in criminal proceedings, where their objects are directly related to the crime alleged. While organisations filling such a role may be required to meet certain criteria these should not be so restrictive so as to present a barrier to participation. Victims should retain the right to participate in their own capacity.

General Strategies: Specialised Chambers or Tribunals

- 1.9. The Rules of a Specialised Chamber or Tribunal should incorporate at least the definitions set out in 1.6, above and define rights afforded to each category of victim.
- 1.10. The Chamber or Tribunal may consider introducing different modes of victim status in the proceeding, with different participatory rights and different registration requirements attached.
- 1.11. Consideration should be given to whether institutions and organisations who suffer direct harm as a result of crimes within the jurisdiction of the Court or Tribunal will be given “victim” status.
- 1.12. Evidentiary standards for proving victim status in proceedings concerning international crimes should take into account the particular challenges victims may face in providing such proof, and pragmatic solutions should be adopted.
- 1.13. The State should provide specific support to immediate family members and dependents of victims of crimes under the jurisdiction of the Specialised Chamber or Tribunal.
- 1.14. The State may consider how to develop partnerships with donors and UN agencies to provide support and assistance to victims and family members.
- 1.15. The Rules should address the potential for victims to be represented by common legal representatives, and should ensure that in the selection of such representatives victims are given the opportunity to provide input, the distinct interests of the victims are represented, and that any conflict of interest is avoided. In addition transparent systems of oversight should be in place to assess the conduct of common legal representatives. Consideration should also be given to retaining a role for previously engaged victims’ lawyers as a link between groups of victims and common legal representatives.

2. INITIATION OF PROCEEDINGS

- 2.1. Victims of international crimes must have equal access to an effective judicial remedy. Complaints procedures should therefore be accessible to them, regardless of economic status, gender, geographic location, language, or other factors.
- 2.2. Victims of international crimes have the right to an effective judicial remedy, which includes a prompt, effective and impartial investigation into their complaint. They must therefore have a way to ensure that decisions not to investigate their complaint are reviewed.

General strategies

- 2.3. States should establish specialised investigation and prosecution units for international crimes, which should adopt prosecutorial strategies appropriate to the domestic context and the State's international legal obligations.
- 2.4. Where international crimes have been committed on a wide scale within a state's jurisdiction:
 - a. States should establish a special unit responsible for providing information and assistance to victims of international crimes;
 - b. a comprehensive mapping of crimes and victim groups should be carried out before determining a prosecutorial strategy;
 - c. outreach to victims' groups should be conducted at an early stage to ensure they are aware of mechanisms of justice and are able to provide input into the prosecutorial strategy; and
 - d. once a prosecutorial strategy is determined, outreach should be conducted to victims' groups and the wider public to ensure that they are aware of the strategy and any objective criteria for prioritising cases.

Victims' active rights in the normal criminal justice system

- 2.5. Victims of international crimes should be able to complain to the police or other authorities in the normal way. Crimes involving mass victimisation should be investigated by specialised investigation teams, or such a team should be established.
- 2.6. States should consider introducing provisions to allow victims of international crimes to file a complaint before a wider range of public servants, who then have the duty to forward it to the competent authorities.
- 2.7. Victims should have the right to review of a decision not to investigate their complaint or an unreasonable delay in opening an investigation. This may be administrative review at first instance (by a higher officer or an independent statutory body), but should allow for further review to a judicial officer if the first review upholds the original decision.
- 2.8. If there is no judicial oversight of decisions not to investigate it is essential that victims have the right to bring a private prosecution or to otherwise initiate a criminal proceeding directly before a judge.

Victims' active rights in a specialised chamber or tribunal

- 2.9. There should be procedures by which victims can complain of their alleged victimisation, and significant outreach should be undertaken to ensure that victims know of the procedure and are able to use it. Outreach to victims should be a required component of the proceedings from the outset until the final judgment and beyond.
- 2.10. Special chambers and tribunals should adopt a pragmatic approach to proof of victim status, appropriate to the context.
- 2.11. The rules should provide for oversight of decisions on the opening/closing of investigations, and allow for broad victim input into the process. The category of victims able to make representations should extend to all victims of crimes under the Chamber's jurisdiction.

3. PRE-TRIAL STAGE

- 3.1. Victims of international crimes have the right to a prompt, effective and impartial investigation, and the effectiveness of investigations can be enhanced by early engagement with victims.
- 3.2. Victims of international crimes have the right to the truth and the right to reparation, including measures of satisfaction such as the effective investigation of the suspected perpetrator and, where sufficient evidence exists, prosecution and punishment of the persons responsible for the crimes committed against them. Victims therefore have a direct interest in decisions taken on whether or not an alleged perpetrator should be prosecuted, and on what charges, and have the right to seek review of such decisions.
- 3.3. Victims have the right to be protected from further victimisation. In some circumstances, the conditional release of the accused may put victims at risk, and may jeopardise the investigation and prosecution. Victims should therefore have the right to be heard in relation to such decisions.

General strategies

- 3.4. Police and prosecutors should carry out extensive outreach to engage with victims and wider communities, including, for example, town hall meetings, radio interviews, and distribution of information leaflets.
- 3.5. Police or prosecutors investigating international crimes should seek to engage with victims and victims' groups at the earliest stage of proceedings to ensure that information that victims can provide to the investigation is available to investigators, and to ensure that victims' views are taken into account in developing the investigative strategy.
- 3.6. Police or prosecutors investigating international crimes, including those committed on a large scale, should develop a strategy for communicating updates on steps taken in the investigation to victims of the crimes being investigated, and the wider public, to the extent that such communication will not endanger the investigation or prejudice the rights of the accused.

Victims' active rights in the normal criminal justice system

- 3.7. States should review their general criminal procedure law to ensure that victims

can participate in pre-trial proceedings in some manner that allows them to:

- a. Provide written or oral representations to the court in relation to any hearing on pre-trial detention of the accused;
 - b. Request review of decisions not to prosecute following an investigation into a complaint they have made or proceedings they have joined as a party (where applicable). This may be administrative review at first instance, but given the gravity of the crimes alleged and the potential for entrenched impunity, should be subject to judicial appeal.
- 3.8. Regardless of the legal tradition, states should consider introducing a procedure for automatic judicial review of indictments issued in relation to international crimes, prior to proceeding to trial, with provision for victims and the defence to make observations on the scope of the indictment prior to its confirmation.
- 3.9. States should ensure that legislation prohibits cases of alleged international crimes from being diverted to restorative justice processes under general domestic criminal law.

Victims' active rights in a specialised chamber or tribunal

- 3.10. The Rules of Procedure of the Chamber should provide victims who have contacted the Chamber concerning a particular investigation the right to:
- a. Provide representations to any hearing on pre-trial detention of the accused;
 - b. Provide representations on any pre-trial hearings concerning jurisdiction or admissibility.
- 3.11. The Rules of Procedure of the Chamber should provide victims who have contacted the Chamber in respect of an investigation with the right to appeal any prosecutorial decision to close that investigation without a prosecution.
- 3.12. The Rules of Procedure of the Chamber should make any indictment subject to confirmation by a Pre-Trial Chamber, and provide victims who have contacted the Chamber in respect of an investigation with the right to make representations as to the scope of the indictment.

4. TRIAL STAGE

- 4.1. Victims of international crimes have a direct interest in the conduct of the trial proceedings and such proceedings should allow the opportunity for their views and concerns to be taken into account.

General strategies

- 4.2. Steps should be taken to ensure that victims have physical access to the trial proceedings, including by the use of “mobile courts” where appropriate.

Victims’ active rights in international crimes cases

- 4.3. States should provide victims of international crimes with at least the same rights to participate in trial proceedings as those applicable to victims of other serious crimes in their jurisdiction (although this may be subject to provisions on common legal representation).
- 4.4. States should always provide victims with the right to make observations, for example in the form of victim impact statements, in relation to sentencing.
- 4.5. Where the state’s domestic criminal law does not allow victims to take part in the trial stage as a party to the proceedings, legislators should consider introducing (i) provisions specific to international crimes which give the trial court the possibility to “permit victims’ views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court, in such a way that is not prejudicial to the rights of the accused and a fair and impartial trial”, or (ii) other specific provisions for victim participation in trials of international crimes such as the ability to provide opening or closing statements, to request the introduction of new evidence, and to question witnesses.

Victims’ active rights in a specialised chamber or tribunal

- 4.6. When developing the Rules of Procedure for a specialised tribunal or chamber, consideration should be given to introducing more specific and detailed rights for victims to participate in the proceedings, including:
 - a. Making opening and/or closing statements;
 - b. Requesting the introduction of particular evidence;
 - c. Questioning witnesses;
 - d. Raising objections;
 - e. Making other written or oral submissions on points of fact and/or law.

Such rights may be subject to specific provisions on common legal representation.

5. POST-TRIAL STAGE

- 5.1. Victims’ have a direct interest in the conduct of appeal proceedings. Such proceedings should allow the opportunity for their views and concerns to be taken into account.
- 5.2. States’ obligation to prosecute and punish perpetrators of international crimes requires that sentences are enforced.

- 5.3. Victims' right to an effective remedy and reparation requires that sentences and reparation orders are enforced.

General strategies

- 5.4. Prosecutors should ensure that victims are provided with information as to existing rights they have to file any appeal, and information as to any appeals filed by the convicted person or prosecution.

Victims' active rights in criminal proceedings

- 5.5. Victims should be afforded the opportunity to present their views and concerns in any appeal proceedings initiated by the convicted person or prosecution.
- 5.6. States should provide victims of international crimes with the at least the same rights to appeal and to participate in appeal proceedings as those applicable to victims of other serious crimes in their jurisdiction.
- 5.7. States should ensure that reparation awards are automatically enforced, without the victim being required to undertake a separate procedure or pay additional fees.
- 5.8. States should ensure that there is a procedural mechanism by which victims can seize the court or tribunal directly on issues of non-enforcement of a reparation award.

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Appendix 3: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

A. Victims of crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (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;
 - (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;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of

property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of abuse of power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and

mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

Appendix 4: 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

The General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments and the Vienna Declaration and Programme of Action,

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of the 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 by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005 and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* the 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 annexed to the present resolution;
2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;
3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

*64th plenary meeting
16 December 2005*

Annex

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

Preamble

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
- (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

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