# The Participation of Victims in International Criminal Court Proceedings

## A Review of the Practice and Consideration of Options for the Future

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## List of Abbreviations.

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| ASP | Assembly of States Parties |
| CAR | Central African Republic |
| Draft Guidelines | Draft Guidelines governing the relationship between the Court and Intermediaries |
| DRC | Democratic Republic of Congo |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| G.A. Res | General Assembly Resolution |
| ICC | International Criminal Court |
| Mtg | Meeting |
| OPCD | Office of Public Counsel for the Defence |
| OPCV | Office of Public Counsel for Victims |
| OTP | Office of the Prosecutor |
| PIDS | Public Information and Document Section |
| Regulations | Regulations of the Court |
| Rules | Rules of Procedure and Evidence |
| Sess. | Session |
| Statute or RS | Rome Statute |
| U.N. | United Nations |
| U.N. GAOR | General Assembly Official Records (United Nations) |
| VRWG | Victims' Rights Working Group |

## Now is the time to ask the right questions

Until recently, international criminal courts and tribunals established since Nuremberg have given only sparse consideration to victims' views and concerns and limited space for their active engagement with such institutions beyond the role of prosecution witness. These judicial bodies have generally been physically and conceptually removed from the communities most affected by the crimes, causing alienation and disillusionment and marginalising their relevance to societies in transition.

In order to address these shortcomings, the International Criminal Court (ICC) Statute and for instance, newer specialised criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), have gone some distance to incorporate processes that positively engage with victims and to a certain extent, their communities. The array of measures that have been put in place is the focus of this Report: victims' ability to participate in legal proceedings independent from any role they may have as prosecution witnesses. Victim participation in international criminal justice processes reflects, in many respects, participatory rights recognised domestically,[1] as well as certain international standard-setting instruments which have progressively recognised the importance of involving victims in the criminal justice process.[2]

Broadly speaking, victim participation provisions have been seen as a step forward in international criminal justice.[3] Victims will certainly have much to contribute to the establishment of the truth, given their experience of the crimes.[4] Their 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. As is underscored in the Court'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 in the justice process contributes to closing the impunity gap and is one step in the process of healing for individuals and societies.[5]

[1] Victims may have participatory rights to a certain degree depending on the jurisdiction in question. Many civil law countries permit victims to join proceedings as a civil party, or subsidiary prosecutor, and common law countries have progressively recognised a limited array of victim procedural rights, such as the ability to provide victim impact statements and, in certain circumstances, to challenge the decision to end an investigation or prosecution or to institute a private prosecution.

[2] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); United Nations 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, Adopted by General Assembly Resolution 60/147 of 16 Dec. 2005.

[3] Claude Jorda & Jérôme de Hemptinne, '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, 2002, pp. 1387, 1388; T. van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', in H. von Hebel, J. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos, The Hague, The Netherlands:* T.M.C. Asser Press, 1999, p. 87.

[4] Jorda & de Hemptinne, ibid, at p. 1388. See also, 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.

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

However, victims' experiences of processes designed to be participatory have been mixed,[6] and the view of lawyers, academics and certain Court staff about the merits of such processes are also variable. Some hold steadfast to the view that strengthening victims' role in criminal proceedings taints the rights of the defence whereas others point to the procedural difficulties of such involvement, referring mainly to the potential for delays,[7] escalation of costs and other inefficiencies.

Some of these critics have pointed to the cumbersome processes that have developed at the ICC to give evidence to these concerns. As has been noted by Stahn, "[i]n the ICC, the application of victims for participation in proceedings is increasingly perceived as a burden by all organs of the court (including the registry) and their processing is hampered by capacity constraints."[8] Similarly, Schabas has indicated that:

> an elaborate and costly regime of victim representation and participation has developed. Much of the institutional energy of the Court in its first decade has been devoted to addressing this. But it is not apparent that the right scheme for victim participation has been found. One suspects that if the victims understood that many millions had been invested - mainly in professional salaries and international travel - in order to ensure the respect of their rights, they might ask if they could simply be given the money instead.[9]

Certain ICC staff have commented on the practical challenges of successfully implementing the system of victim participation.[10] Indeed, the challenges of the Registry to implement the system of victim participation are well-documented in official Court reports to the Assembly of States Parties[11] and filed before different Chambers,[12] and mainly relate to the strain on the Registry to process "applications in a timely manner so as to keep pace with the proceedings and enable victims to effectively exercise their rights under the Statute" in which the main reasons cited for such strain are "the lack of appropriate resources in the Registry, parties, legal representatives of applicants and Chambers to deal with the volume of applications".[13] Others, mainly former ICC staff persons, have commented on why they believe the system is flawed and has failed to afford to victims a meaningful

[6] See, J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions', (2011) *International Criminal Law Review* 11,263–298; M. Mohan, 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal' (2009) *International Criminal Law Review* 9 733-775; E. Stover, M. Balthazard and KA Koenig, 'Confronting Duch:civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia', (2011) *International Review of the Red Cross* 98, p. 882.

[7] Yet note the comments of Judge Fulford, the Presiding Judge in the 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.

[8] C. Stahn, 'Between "faith" and "facts": by what standards should we assess international criminal justice?', (2012) Leiden Journal of International Law, vol. 25, no. 2, 251-282, p. 268 and accompanying footnote.

[9] W. Schabas, 'The International Criminal Court at ten' (2011) 22 Crim.L.F., pp. 500-501.

[10] F. McKay, 'Victim Participation in Proceedings before the International Criminal Court', American University Human Rights Brief, (2008) 15(3), 2-5 p. 5.

[11] See, e.g., Proposed Programme Budget for 2012 of the ICC, ICC-ASP/10/10, 21 July 2011, para. 420.

[12] See, e.g., Request for instructions on victim's applications for participation and reparations received by the Registry, *Lubanga* (ICC-01/04-01/06-2817), Trial Chamber I, 2 Nov.2011.

[13] ICC, Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 Sept. 2012, (on file with the authors), p. 2.

means to express their views and concerns.[14] Even certain sitting International Criminal Court judges, and notably Judge Christine Van den Wyngaert has publicly critiqued the system of victim participation, noting that it is costly, ineffective, the main rationales for participation have not been borne out by the practice and that

> it may well be that victims' participation in criminal trials of the kind that are held before the ICC, i.e., trials with massive amounts of victims, cannot be more than symbolic, […], may be a new cause of secondary victimization.[15]

Undoubtedly, the judicial practice underscores such tensions. And, States Parties, armed with the views of some that the system of victim participation is not working, have sought to encourage the various organs of the Court to review the system with a view to streamlining procedures and reducing the associated budgets.[16] The Court,[17] including the Registry[18] and the Judges,[19] as well as several working groups within the Assembly of States Parties such as the Study Group on Governance[20] and through the joint facilitation on Victims, Affected communities and the Trust Fund for Victims and on Reparations of the Hague Working Group,[21] have thus begun to consider the ways and means to review and restructure the system of victim participation.

REDRESS has been one of the main supporters of victim participation and remains to be so. We firmly subscribe to the view that involving victims of horrific crimes in processes that concern them is not only appropriate in moral terms, it is consistent with emerging principles which recognise victims' rights to be informed about processes that concern them and to engage in the judicial process. More broadly, it is consistent with the vision of the drafters of the Rome Statute who had in mind that a permanent international criminal court with a mandate over the worst possible crimes needed to effectively engage the victims of these same crimes. That is not to say that the system of victim participation in practice today and as developed in the jurisprudence of the different Chambers is without flaws; there is certainly room for improvement, as would be the case for any ambitious, visionary and new legal framework.

REDRESS' key concern is that the debate at the Court and amongst States Parties about the system of victim participation is not focused on the right questions. Those who always predicted that victim participation would never work today feel vindicated by the system's growing pains. Those who were in favour of the system and those within the Registry with the task of trying to make it work have been slowly pushed into a corner. With ever shrinking budgets, ever expanding tasks dictated by the different and often inconsistent Chamber rulings and little remit of their own to re-structure the

[14] C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', (2008) 6 Northwestern Journal of International Human Rights 459-545.

[15] C. Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 CASE W. RES. J. INT'L L. (2012) 475-496, p. 495.

[16] ICC-ASP/10/Res.5, on Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 9th plenary meeting, on 21 December 2011, by consensus, para. 49.

[17] ICC Revised Strategy in Relation to Victims, dated 28 May 2012. Report on the ICC Revised Strategy in Relation to Victims: Past, Present and Future, dated 28 May 2012.

[18] ICC, Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 Sept. 2012.

[19] Victim participation features amongst the issues considered by the judges in their review: *Lessons Learnt: First Report to the Assembly of States Parties*, 21 Aug. 2012, Section III.

[20] Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011.

[21] Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations, ICC-ASP/11/32, 23 October 2012; The Report identifies the 'unsustainably of the current system for victims to apply to participate in proceedings as the most pressing major concern and proposed to focus the work of the facilitation on this topic', para. 24, which refers to the findings of its earlier July report.

work more efficiently, Registry officials are put in a position where they are destined to fail, which simply fuels the sceptics and contributes to the calls to further shrink the budget. The debate on "what to do" focuses mainly on cost reduction and progressive marginalisation of the system, when instead, it should be focused on an analysis of what the overall goals of the system are and how they can be achieved given the reality of masses of victims of crimes within the jurisdiction of the Court.[22] Analysis should focus on where the system has worked and where it could be improved or changed to be more efficient or effective, and this is the emphasis of this Report.

This Report analyses the system of victim participation as it has developed at the ICC. First, it considers the practice by which victims have applied to participate in legal proceedings and by which their applications have been considered and decided by different Chambers. It then considers the effect of victim participation, in particular the ways in which victims have participated in legal proceedings and the contributions that have been made as a result. Further, it considers the role of legal representatives of victims, including common legal representatives and examines the various challenges in this regard. Throughout, the Report analyses the various statements that have been made regarding the need to reform the system and the concrete reform proposals that have come to light, particularly those which have focused on:

(1) The desire to simplify the victim application process and thus reduce the need for detailed judicial oversight;
(2) Consideration of the utility and feasibility of the suggestions to increase "collective" approaches or partly "collective" approaches to victim applications;
(3) Consideration of suggestions to revise the way in which applications to participate in proceedings are processed and assessed;
(4) Review of suggestions to amend the way in which victims may practically participate in proceedings;
(5) Analysis of proposals to increase the role of the Office of Public Counsel for Victims (OPCV) *in lieu*, or in some combination with, private legal representatives.

There is also consideration of what "meaningful participation" may, or should, mean and what steps may be taken by the Court and other stakeholders to enhance such meaning.

Finally, the Report concludes with a number of recommendations for the way forward. In particular, several principles to guide the eventual consideration of reforms are provided, as well as a number of options for consideration. Some of the recommendations which have been put forward by different stakeholders diverge from the legal framework set out in the Rome Statute and/or the subsidiary rules and regulations put in place by the Assembly of States Parties and/or Court organs. The impact of such divergences is also considered, having regard to the sanctity of the Rome Statute system as a whole. Whilst there are ways in which the ICC's core texts can be amended, the impact of making such amendments must also be considered.

REDRESS reminds that the task of enabling victims to participate effectively in ICC legal proceedings is inherently challenging. There are undoubtedly logistical and informational hurdles, security constraints associated with the ongoing conflicts and insecure and unstable environments in which many victims live as well as administrative and efficiency concerns. Beyond these practical challenges, there are significant legal challenges associated with the practical application of the system taking into account the rights of all the parties and the context of an international criminal trial. This does not mean that victim participation is impossible or that it is not worth doing, if that were even an option for the sceptics to pursue. The judges and staff at the Court have the principal

[22] By their nature, genocide, crimes against humanity and war crimes are crimes that will entail mass victimisation. This is a reality that the system of victim participation must contend with, and should have been contended with, when the procedures for victim participation were initially developed. Mass victimisation is not a 'problem' or 'constraint' that can justify the failure of the system: it is the basis upon which the system must be developed.

responsibility to develop workable systems in conformity with the Rome Statute and Rules of Procedure and Evidence. Further creativity must be deployed to strengthen a system which works in some respects but is underperforming. The victims, in all their differences, must be the starting point for any re-conceptualisation of a system that should be designed with them in mind, with their different wants and needs, their diverse locations, their potentially huge numbers. This daunting challenge is the grand beacon of international justice, and not the thread which will unravel it and cause its ultimate demise.

## 1. The Practice of Victim Participation before the ICC: Issues and Challenges

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."

The Registry has reported that:

> the rate at which the Court received applications has increased by 300 per cent, from 187 applications received on average per month in 2010, to 564 in 2011. As at the end of April 2012, 19,422 applications for participation and for reparations have been submitted, and 4,107 victims have been accepted to participate in proceedings before the Court. In the future, while the number of victims who decide to apply to the Court may fluctuate, it can be predicted that they will continue to involve the same high numbers as currently received.[23]

Whilst the large numbers of applications have posed logistical challenges for the Registry and other parties, the numbers also evidence an interest from victims and affected communities in engaging with the Court, which is important for the broader success of the Court as a credible, effective and relevant justice institution.

In the most general terms, the test in Article 68(3) of the Rome Statute is an individual test. Whether victims may participate in proceedings and in what way is context specific. It depends on the specific proceedings in which a victim is seeking to participate, the degree of connection a particular victim may have with the crimes under consideration in those proceedings and whether the specific interests of the victim are engaged by those proceedings. Thus, up until recently, the different Chambers which have interpreted Article 68(3) have recognised that each victim who wishes to participate in particular proceedings must submit an application explaining how he or she meets the criteria in the Article and the application is considered individually on its own merits.

There are certain benefits to this individualised approach - for each victim who wishes to participate, there is a clear consideration of whether that particular person has such a right. Being granted participatory status in this personal and individualised way can be the first form of recognition by an official body that a particular individual suffered harm. Acknowledgement of victims' suffering and that a wrong was done to them is one of the reasons why victims engage with the justice process. Also, where there is an insufficient connection between applicants and the proceedings, there is no or little risk of such persons participating. The detailed, individualised scrutiny therefore avoids the problem of persons expressing views and concerns about issues and accused persons in respect of which they have little connection.

However, the main challenges of the current approach concern the amount of time and energy it can take to process each application individually. These challenges have put strain not only on the Registry, but also on the applicants, the parties as well as the judges required to consider the applications. The joint facilitation on *Victims, Affected Communities and the Trust Fund for Victims and Reparations*, of the Hague Working Group of the Bureau of the Assembly of States Parties has termed the victim application process "unsustainable", going further to suggest that:

> leaving this matter unresolved might, in fact, place the credibility of the entire Rome Statute system and the Court's work at risk, if it results in the system's failure to protect victims' rights and interests and ensuring that they are fully represented and

[23] ICC, Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 Sept. 2012, p.2.

are able to participate in the proceedings, ***matters at the core of the Rome Statute*** [emphasis added].[24]

## 1.1 Determining whether the applicant is a 'victim' in accordance with Rule 85 of the Rules of Procedure and Evidence

Rule 85 defines victims as:

(a) "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;" or may include

(b) "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."

In its jurisprudence, the ICC has clarified who may qualify as a "victim" for the purpose of participation. The various Chambers initially applied a four-tiered test considering whether:

(1) the victim applicant is a natural person or an organization or institution;
(2) a crime within the jurisdiction of the Court appears to have been committed;
(3) the victim applicant has suffered harm, and
(4) such harm arose "as a result" of the alleged crime within the jurisdiction of the Court.[25]

This four part test was first set out in January 2006 by Pre-Trial Chamber I in relation to victims' applications to participate in proceedings in the situation in the Democratic Republic of Congo (DRC),[26] and has since been adopted in numerous subsequent decisions.[27] In recent jurisprudence relating to proceedings in which charges have been brought and/or confirmed, the test has been reformulated into three parts, namely whether:

(1) the identity appears duly established;
(2) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspects are charged; and
(3) whether the applicant has suffered harm that appears to have arisen "as a result" of the crime(s) charged.[28]

[24] Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations, ICC-ASP/11/32, 23 October 2012, para. 24.

[25] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre Trial Chamber I, 17 Jan. 2006, para. 79; *Fourth Decision on Victims' Participation, Bemba (ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008*, para 30; Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010, para 19.

[26] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, para. 79.

[27] E.g., Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, *Kony, Otti, Odhiambo & Ongwen* (ICC 02/04-01/05-356), Pre-Trial Chamber II, 21 Nov. 2008, para 7.

[28] Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-267), Pre-Trial Chamber II, 26 Aug. 2011, para. 40.

### *The identity appears duly established*

In most aspects of this test, the jurisprudence has been relatively consistent and uncontroversial. However, with regards to minors and deceased persons, the different Chambers have so far failed to provide clarity and predictability for victims. With respect to child applicants, certain Chambers have allowed, on a case by case basis, child applicants to apply without a guardian,[29] whereas other Chambers have deemed applications "incomplete" due to the lack of a guardian's signature.[30] With respect to deceased victims, certain Chambers have determined that only natural, live persons may apply to participate in proceedings.[31] In contrast, in *Bemba*, it was determined that applications could be made on behalf of deceased persons.[32] While the Single Judge recognised that a deceased person could not participate in the proceedings, he took the view that the deceased person's rights could be represented by their successor so long as the successor was also a victim recognised as a participant in the proceedings.[33] In *Katanga & Ngudjolo,* while requiring that close parents of a deceased victim could only apply in their own name and not on behalf of the deceased victim, the Chamber accepted that, in cases where a victim dies after having filed an application, a person appointed by the family can continue the action triggered by the victim.[34] In the *Lubanga* case, Trial Chamber I recognised one victim who had been killed, and permitted his uncle to act on his behalf. Contrary to Trial Chamber II, Trial Chamber I concluded that the person acting on behalf of a victim in these circumstances does not have to be a relative or a legal guardian because within the Rules, the "person acting" is undefined and unrestricted.[35] Following the approach of Trial Chamber I and Pre-

[29] Decision on the treatment of applications for participation, *Katanga & Ngudjolo* (ICC-01/04-01/07-933), Trial Chamber II, 26 Feb. 2009; Decision on the applications by victims to participate in the proceedings, *Lubanga* ( ICC-01/04-01/06-1556), Trial Chamber I, 15 Dec. 2008, paras. 95-96.

[30] Decision on the Applications for Participation Filed in Connection with the Investigation in the DRC by Applicants*, Situation in the DRC* (ICC-01/04-545), Pre-Trial Chamber I, 4 Nov. 2008, at para. 33; Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, *Situation in Uganda* (ICC-02/04-172), Pre-Trial Chamber II, 21 Nov. 2008, paras. 19-20; Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89, *Situation in Uganda* (ICC-02/04-180), Pre-Trial Chamber II, 10 March 2009; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 Dec. 2007.

[31] Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 Dec. 2007; Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the DRC by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06", *Situation in the DRC* (ICC-01/04-423-Corr), Pre-Trial Chamber I, 31 Jan. 2008,, para 24-25; Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-267), Pre-Trial Chamber II, 26 Aug. 2011 para. 47.

[32] Fourth Decision on Victims' Participation*, Bemba (*ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008.

[33] *Ibid.,* para. 44.

[34] However, the person appointed on behalf of the deceased victim would be limited to the views and concerns exposed by the victim in the initial application. A family link would also have to be demonstrated; see Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure, *Katanga & Ngudjolo* (ICC-01/04-01/07-1669), Trial Chamber II, 23 Nov. 2009; Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure, *Katanga & Ngudjolo* (ICC-01/04-01/07-1737), Trial Chamber II, 22 Dec. 2009, paras. 30-32; Judge Kaul dissented and considered that the relatives of the deceased should be able to represent the interests of the deceased persons as well as their own in both the trial and reparation phases.

[35] Annex 2, Order issuing confidential and public redacted versions of Annex A to the "Decision on the applications by 7 victims to participate in the proceedings of 10 July 2009" (ICC-01/04-01/06-2035), *Lubanga* (ICC-01/04-01/06-2065-Anx2), Trial Chamber I, 23 July 2009, at p.15.

Trial Chamber III, Trial Chamber III also accepted applications made on behalf of deceased victims in the *Bemba* trial.[36]

### *Linkage with a crime within the jurisdiction of the Court*

The second part of the test under Rule 85 requires the applicant to demonstrate a linkage to a crime within the jurisdiction of the Court. The crime must be one of the crimes listed in Article 5 of the ICC Statute, e.g., genocide, crimes against humanity or war crimes; it must have been committed after the entry into force of the Statute; and must relate to an alleged crime that either took place on the territory of a State Party, concerns an accused person who is a national of a State Party, or is otherwise referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. The Court's approach to this tier of the test has largely depended on the phase of the proceedings before the Court.

During the investigation phase, all crimes within the remit of the investigation will be relevant, i.e. "the temporal and territorial limits of the relevant situation."[37] For example, in the *Kenya* situation, the relevant alleged crimes were identified as any "crime against humanity in accordance with Article 7 of the Statute committed within the territory of Kenya between 1 June 2005 and 26 November 2009."[38] However, where the investigation is not limited to a specific crime listed in Article 5 of the Statute, victims may demonstrate harm resulting from any crime falling under the jurisdiction of the Court, within the temporal and territorial limits of the relevant situation.[39]

Once there are charges against specified persons, a *case* is opened and the scope of the test is adjusted in relation to applications to participate in the proceedings of that case. Thus, there must be a link between the incident described by the victim applicant and the case.[40] The Appeals Chamber has held that "whilst the ordinary meaning of Rule 85, does not *per se* limit the notion of victims to the victims of the crimes charged, the effect of Article 68(3) of the Statute is that the participation of victims in the trial proceedings, […] is limited to those victims who are linked to the charges".[41]

Once charges have been confirmed, the case is transmitted to the Trial Chamber, which relies on the more detailed temporal and material elements of the crimes as confirmed to set the framework for victim participation during trial.[42]

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[36] Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, *Bemba* (ICC-01/05-01/08-807), Trial Chamber III, 30 June 2010 para. 80.

[37] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, para. 100.

[38] Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010.

[39] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, para. 100.

[40] Fourth Decision on Victims' Participation*, Bemba (*ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008; Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, *Abu Garda* (ICC-02/05-02/09-121), Pre-Trial Chamber I, 25 Sept. 2009 para. 12; Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* ( ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 2; Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *Katanga & Ngudjolo* (ICC-01/04-01/07-579), Pre-Trial Chamber I, 10 June 2008, para. 65; Decision on victims' applications for participation, *Situation in Uganda* (ICC-02/04-101), Pre-Trial Chamber II, 10 Aug. 2007, para. 11.

[41] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* ( ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008,para. 58.

[42] First Decision on Victims' Participation in the Case, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-17), Pre-Trial Chamber II , 30 March 2011.

### *Whether the "victim" suffered harm*

The term "harm" is not defined in either the Statute or the Rules of Procedure and Evidence. In the Court's jurisprudence, "harm" has been taken to refer to notions of hurt, injury and damage.[43] Rule 85(b) of the Rules of Procedure and Evidence which concerns organisations or institutions, provides that legal persons must have "sustained direct harm" while Rule 85(a) does not make that specification with regards to natural persons.

As with other determinations relating to victims' procedural rights, the threshold set by different Chambers to determine the existence of "harm" was low, in relation to proceedings during the investigation phase of a situation.[44] The threshold has been interpreted as higher in the pre-trial and trial phases of a case.

"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.[45] Chambers have referred to the following non-exhaustive forms of damage to satisfy the requirement of "harm" under the Statute: emotional suffering related to the loss of family members;[46] forced recruitment into rebel movements and participation in hostilities resulting in continuous psychological problems;[47] emotional and physical suffering related to enslavement and detention;[48] beatings and torture[49] including incommunicado detention, the denial of medical treatment and limited access to food;[50] displacement of families;[51] injury by gunshots;[52] and economic loss, due in particular to looting, destruction and burning of houses.[53]

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[43] The Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* ( ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para.31-32.

[44] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, para. 82.

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

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

[47] Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, *Katanga & Ngudjolo* (ICC-01/04-01/07-357), Pre-Trial Chamber I, 2 April 2008, p. 11.

[48] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006.

[49] *Ibid.,* para. 173.

[50] Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 Dec. 2007, para. 40.

[51] *Ibid.*

[52] See Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, *Katanga & Ngudjolo* (ICC-01/04-01/07-579), Pre-Trial Chamber I, 10 June 2008, paras. 71, 115.

[53] Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-267), Pre-Trial Chamber II, 26 Aug. 2011, para. 29; Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, paras. 132 and 162; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 Dec. 2007, para. 40.

### *The harm must have been "as a result" of the alleged crime*

When Pre-Trial Chamber I first evaluated Rule 85(a) in relation to participation in the investigation phase, it indicated that "it is not necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes".[54] It considered it sufficient to determine whether "there are grounds to believe that the [individual applicant] suffered harm as a result of the commission of those crimes".[55]

At the Pre-Trial phase of a case, a more robust causal link has been held to be required. In the *Lubanga* case, the Pre-Trial Chamber indicated that there must be: "a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant".[56] It indicated that the causal link is demonstrated once sufficient evidence is provided to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant.[57] The same approach was taken in the *Katanga* and *Ngudjolo* case as well as in other cases.[58] In *Gbagbo*, the Single Judge stressed that it was not necessary to demonstrate that the alleged crimes charged by the Prosecutor were the only or substantial cause of the harm suffered by the applicant but that it was sufficient to demonstrate that the alleged crimes could have objectively contributed to the harm suffered.[59]

At the trial phase, participation has been held to be limited to those victims who are linked to the charges, as confirmed, and whose personal interests are affected by the trial.[60] The threshold criteria concern whether there is enough *prima facie* evidence to establish that victim applicants suffered harm as a result of the crimes for which the accused is charged.[61]

In the *Bemba* case, it was reiterated that applications submitted on the basis of harm not covered by the charges should be rejected.[62] Similarly, in the *Katanga* case, the Victim Participation and Reparations Section (VPRS) was instructed to only transmit applications which referred to acts in the confirmed charges, that is, acts relating to the attack on the village of Bogoro on 24 February 2003 said to be carried out by troops of the *Force de résistance patriotique en Ituri* and *Front des nationalistes et intégrationnistes.*

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[54] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC (*ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006, para. 94.

[55] *Ibid.,* paras.124, 135, 153, 167, 176, 186.

[56] Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06-172-tEN), Pre-Trial Chamber I, 29 June 2006, p. 6.

[57] *Ibid.,*pp. 8–9.

[58] Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, *Katanga & Ngudjolo* (ICC-01/04-01/07-579), Pre-Trial Chamber I, 10 June 2008, at para. 66-67. See also, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, *Abu Garda* (ICC-02/05-02/09-121), Pre-Trial Chamber I, 25 Sept. 2009, para. 13; Fourth Decision on Victims' Participation*, Bemba (*ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008, para.75.

[59] Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-01/09-01/11-138), Pre-Trial Chamber I, 4 June 2012, para 31.

[60] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* ( ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 58.

[61] Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, *Bemba* (ICC-01/05-01/08-807), Trial Chamber III, 30 June 2010.

[62] Decision on 653 applications by victims to participate in the proceedings, *Bemba* (ICC-01/05-01/08-1091), Trial Chamber III, 23 Dec. 2010; Decision on 772 applications by victims to participate in the proceedings, *Bemba* (ICC-01/05-01/08-1017), Trial Chamber III, 18 Nov. 2010.

### *There must be a sufficient link with the accused person*

The link with the accused has also been considered in the jurisprudence. In the *Al Bashir* case Pre-Trial Chamber I rejected applications when the harm suffered did not appear to be linked to the forces under Al Bashir's command, or, were of a different nature from those specified in the arrest warrant.[63] The Chamber nevertheless indicated that it was not necessary for applicants to specifically identify Al Bashir as the perpetrator; the identity of the person responsible only needs to be provided "to the extent possible". In the *Bemba* case, the Chamber indeed recognised that applicants might not be in a position to attribute responsibility for their victimisation. Therefore, the mere reference in the applications to other persons or warring groups would not, as such, automatically serve to exclude the applicant.[64]

## 1.2 Strain on victim applicants

The process has been cumbersome and frustrating for victim applicants. Because of the individualised processing requirements, victims are requested to provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative which represents their interests collectively with the interests of other victims also being represented. Thus, there is an apparent mismatch between the typical way in which victims will ultimately participate and the information they are required to produce in order to enable them to participate. The emphasis on eligibility to participate, as opposed to the modalities of participation[65] once eligibility has been determined, may be frustrating for certain victims, when it becomes clear to them that ultimately, after the cumbersome process of proving their eligibility to participate there is little scope for their individual voices to be heard by the Court.

Often victim applicants do not have easy access to the requisite proof to submit to the Court. Also, they may misunderstand what is required which leads to incomplete applications and extensive back and forth communication, made more complicated by the poor infrastructure and limited communications capacity of many victims located in situation countries. In some countries civil records and identification documents are non-existent or difficult to access.[66]

Judges have tried to ease the burden on victims to prove identity. In considering the context in Uganda, the Single Judge evaluating applications from victims noted, that:

> [i]n a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an on-going conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties. On the other hand, given the profound impact that the right to participate may have on the parties and, ultimately, on

[63] Decision on 8 Applications for Victims' Participation in the Proceedings, *Al Bashir* (ICC-02/05-01/09-93), Pre-Trial Chamber I, 9 July 2010.

[64] Decision on 653 applications by victims to participate in the proceedings, *Bemba* (ICC-01/05-01/08-1091), Trial Chamber III, 23 Dec. 2010.

[65] The modalities of participation are considered in the later section 3.

[66] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *Situation in the DRC* (ICC-01/04-374), Pre-Trial Chamber I, 17 August 2007, para. 14.

> the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted.[67]

In order to decide what is appropriate, Chambers have requested the VPRS to provide reports on the legal and administrative systems concerning identity documentation in the different countries,[68] and have adapted standards to local contexts.[69] In the Uganda situation, the Single Judge determined that the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the holder.[70] Similarly, in the DRC situation, the Chamber decided in August 2007 to allow a wide range of documents to prove identity, kinship, guardianship or legal guardianship.[71] Chambers have also admitted a signed declaration from two witnesses, who have to provide a proof of their identity, attesting of the victim's identity or relationship with the person acting on his/her behalf.[72] Similar positions on identity documents have been taken by the Pre-Trial Chambers in the cases[73] and by the Trial Chambers.[74]

Despite the allowances made by the judges as illustrated above, challenges remain for victims to obtain the necessary documents. In particular, many child applicants do not possess national identity documents, are not eligible for voting cards and student identity cards are not regularly available and/or are too costly to procure. Also, given the haphazard recording of births in many of the areas in which victims are located, the dates of birth registered on official documents can differ from victims' recollections of these dates. Consequently, discrepancies will regularly exist between the dates victims cite in their application forms and those listed in official documents, leading to confusion in the review and consideration of victims' applications by the Court.[75]

Local intermediaries assisting victims with applications have sought reimbursement of costs to obtain identity documents, to make copies of application forms and other documents and for travel. The Registry's position has been that it cannot assist the applicants to obtain the necessary documentation.[76] In the past, it had indicated that it can provide information, training and copies of the forms, but as it is a neutral body, further assistance could amount to a bias incompatible with fair

[67] Decision on victims' applications for participation, *Situation in Uganda* (ICC-02/04-101), Pre-Trial Chamber II, 10 Aug. 2007, para 16.

[68] *Ibid.*, para. 20.

[69] See Decision on victims' applications for participation, *Situation in Uganda* (ICC-02/04-101), Pre-Trial Chamber II, 10 Aug. 2007; Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011.

[70] Decision on victims' applications for participation, *Situation in Uganda* (ICC-02/04-101), Pre-Trial Chamber II, 10 Aug. 2007, para 16.

[71] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *Situation in the Democratic Republic of Congo* (ICC-01/04-374), Pre-Trial Chamber I, 17 Aug. 2007.

[72] Regarding the two witnesses, Trial Chamber IV has stated that the "[a]s regards the credibility of witnesses called upon to sign statements, the Chamber will take into consideration, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community. In these instances, the Trial Chamber will welcome any information the VPRS considers relevant, which should be included in the reports provided to the Chamber." Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011, para. 23.

[73] Fourth Decision on Victims' Participation*, Bemba (*ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008, para. 37; First Decision on Victims' Participation in the Case, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-17), Pre-Trial Chamber II , 30 March 2011,para.7.

[74] Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 Jan. 2008, paras. 87–89.

[75] Discussions held by REDRESS staff with legal representatives for victims in the DRC situation.

[76] Assistance in relation to photocopying documentation may sometimes be provided.

trial.[77]Affected communities and local organisations are frustrated by the lack of support. The result has been that large numbers of application forms lack documentary support and are thus submitted "incomplete".

As a result of these challenges, and the inability of the Registry to swiftly process the applications, years have sometimes gone by before applications have been fully considered and approved. As described below, the late admission of victims to the procedure has meant that many potentially eligible victims that submitted their applications in good time have missed out on crucial hearings.

## 1.3 Strain on the Registry

The victim participation application process has also been cumbersome for the Registry. The VPRS has been tasked by different Chambers with a range of jobs. The first of these is ensuring applications are complete and requesting from applicants or their counsel any missing information. Once applications have been sent to VPRS, its staff sometimes meet victims or intermediaries to seek supplementary information "in order to ensure that such application[s] contain, to the extent possible, the information [required] before transmission to a Chamber."[78] Given the limited VPRS field presence, and the extensive reliance on local intermediaries to assist victims, incomplete application forms have constituted one of the main challenges to victim participation so far. Obtaining missing information is time consuming. The legal aid scheme of the Court does not currently provide financial assistance until victims have been recognised and granted victim status by the Court. Thus, the scheme does not provide support to help victims complete applications or obtain the necessary supporting documentation. In some instances, such as the Situation in Central African Republic (CAR), the Office of Public Counsel for Victims fulfilled this support role, and in recent practice the OPCV has been assigned by Chambers to represent unrepresented applicants known to the Court until their status has been determined.[79] However, OPCV does not have any staff based in the field.

Given the general obligation of VPRS to assist victims and groups of victims,[80] it is in principle incumbent upon it to obtain the missing information, either through its own intermediaries, or where a legal representative has been selected, through the legal representative. However, such legal representatives rarely have the necessary financial and logistical means to undertake this work. At present, there is little in the way of strategies on the side of the Registry to ensure that missing information is collected expeditiously and to identify the necessary resources needed. This might involve considering the possibility to base more Registry staff in the Court's field offices in order to allow closer and constant interactions with relevant groups. VPRS has increasingly relied on the legal representatives to ensure that applications are filled out accurately and completely. However, with the current limited resources for legal aid, these expectations may be unrealistic.

[77] C. Ferstman and M. Goetz, 'Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff/Brill Publishers, 2009) at p. 331.

[78] Regulation 86(4) of the Regulations of the Court.

[79] Notification of appointment of common legal representatives, *Banda & Jerbo (*ICC-02/05-03/09-215), Trial Chamber IV, 14 Sept. 2011.

[80] Regulation 86(9) of the Regulations of the Court.

VPRS is also responsible for producing a confidential report on the applications for the relevant Chambers containing summaries of the original applications, grouping of applications based on timeframe, circumstance or issue. Information that may be relevant to the Chamber's decision on whether the applicants comply with the definition of victim in Rule 85, as well as any preliminary assessment as to the strength of applications may also be included.[81] In addition, information concerning any safety or security risks and proposed redactions to the applications, for protection purposes when transmitting to the parties, is included in the Registry's reports, after having consulted with the legal representatives to ensure that the redactions are limited to those strictly necessary for security reasons[82] and providing all necessary written explanations. The VPRS will also be involved in grouping victims in view of ensuring common legal representation if/when relevant proceedings arise;[83] reviewing applications to participate which have been rejected, to establish whether, in light of events or information received subsequent to the original rejection, the application should be reconsidered. Taking into account the large number of applications, it is clear that the tasks as described, to which the different Chambers keep adding, are labour intensive.

In its report to the Assembly of States Parties relating to the proposed 2012 budget, the Court noted that the increased workload "has put very high pressure on the [VPRS] each year and makes it unfeasible to absorb the additional workload generated by the Kenya and Libya situations without additional staff."[84] This lack of resources has also affected VPRS' ability to fulfil its other duties, including its capacity to adequately consult victims in the organisation of common legal representation as well as assisting victims to complete applications to participate in proceedings.

### *Meeting Court Deadlines*

Regulation 86(3) of the Regulations of the Court[85] provides that "victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate." Often the relevant Chamber has tied deadlines for processing applications to the Registry's receipt of the applications (e.g. 60 days after having received the applications[86]) or to the stages in the ongoing proceedings (e.g. 45 days before the commencement of the confirmation of charges hearing[87]). Whilst victims have not always been able to comply with such deadlines given the paucity of outreach and limited support they receive in the field to complete their applications, it is appropriate that these deadlines exist and that Court proceedings are not unduly delayed to await victim applications. Several challenges have been noted, however, in the administration of such deadlines.

First, the communication of the existence of a deadline has at times occurred very close to the actual deadline. For instance, in the *Abu Garda case*, the Court indicated on 19 August 2009 that VPRS had to submit its completed Report by 11 September 2009. When Chambers have set staggered

[81] However, initially, some Chambers, such as Trial Chamber I in *Lubanga* cautioned VPRS to avoid expressing views on the merits. See, Decision on the implementation of the reporting system between the Registrar and Trial Chamber in accordance with Rule 89 and Regulation of the Court 86 (5), *Lubanga* (ICC-01/04-01/06-1022), Trial Chamber I, 9 Nov. 2007.

[82] See for example Order on the transmission of 7 new victims' applications observations and the submission of observations, *Lubanga* (ICC-01/04-01/06-2698), Trial Chamber I, 8 March 2011,para.2

[83] Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010, para. 22.

[84] Proposed Programme Budget for 2012 of the ICC, ICC-ASP/10/10, 21 July 2011, para. 420.

[85] ICC-BD/01-01-04.

[86] Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010, para 18; Decision on Victims' Participation in Proceedings, *Situation in CAR* (ICC-01/05-31), 11 Nov.2010.

[87] Order setting a deadline for the transmission of applications for victims' participation, *Mbarushimana* (ICC-01/04-01/10-78), Pre-Trial Chamber I, 15 March 2011.

deadlines, such as in the *Katanga* case where the Chamber, on 26 February 2009 ordered applications to be submitted to VPRS by 20 April 2009 for onward transmission to the Chamber by 4 May 2009,[88] it has allowed for outreach and more time for Registry processing. Yet, the amount of time required for processing will depend on the circumstances. In the *Gbagbo case*, a staggered approach was also adopted. However, considering that minimal outreach had previously been undertaken, that a new form allowing collective applications was being put into operation for the first time, and that only VPRS was authorised by the Chamber to assist victims wishing to apply on a collective manner, a one-month deadline for applications to be received appeared too short to give victims a realistic opportunity to apply for participation.[89]

Second, even when victims have managed to comply with the deadlines, the VPRS has not always been able to process the applications in advance of the deadline and thus such applicants were denied the opportunity to participate in key hearings, at no fault of their own. In order to build in its own efficiencies, the Registry should, even in the absence of more specific instructions by a Chamber, adopt its own internal guidelines on what timeframes should be applied with regards to the review of incoming victim applications and the timeframe for requesting and obtaining missing information from applicants. It is important that the Registry respond to victim applications within clear deadlines. This is necessary both as a matter of the general accountability of the Registry to provide an acceptable service to stakeholders and to treat victims with consideration and respect.[90] It is regrettable that due to limited resources and a high number of applications received in 2011, only 10% of received applications were acknowledged within the seven days of receipt target set by the Registry.[91]

VPRS has had significant difficulty to keep pace with the Chambers' demands and the demands from applicants and legal representatives. In June 2011, VPRS requested more time to submit 1,800 victim applications to the Chamber in the *Ruto case.*[92]In the *Muthaura* case, the same challenge arose in relation to 550 further applications.[93] In both cases, the Chamber extended the deadline by 20 days.[94] While the Registry was in the end able to assess, for the purpose of completion, most if not all the applications received, and transmitted complete applications to the Chamber, 1,700 applications were deemed incomplete by the Registry in the *Ruto case* and never transmitted to the Chamber. In September 2011, in the *Bemba case*, the Chamber approved VPRS' proposal to submit applications on a rolling basis in nine sets of 200-350 applications until 13 January 2012 (799 applications were

[88] Decision on the treatment of applications for participation, *Katanga & Ngudjolo* (ICC-01/04-01/07-933), Trial Chamber II, 26 Feb. 2009. See also, Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011, para. 30.

[89] Second decision on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-86), Pre-Trial Chamber I, 5 April 2012.

[90] See, the recommendation of the VRWG to the 10th ASP session, Dec. 2011. It is striking that 4 years after a decision was deferred pending submission of additional information on 16 victim applications in the Uganda situation and *The Prosecutor v. Kony et al*, in February 2012, missing information had only been collected by the Registry with regards to 3 applicants. See Transmission of consolidated applications including supplementary information, *Situation in Uganda* (ICC-02/04-190), Pre-Trial Chamber II, 29 Feb. 2012 and Transmission of consolidated applications including supplementary information, *Kony, Otti, Odhiambo & Ongwen* (ICC-02/04-01/05-411), Pre Trial Chamber II, 29 Feb.2012.

[91] Report on activities and programme performance of the ICC for the year 2011, ICC-ASP-11/8, 4 May 2012, p. 51.

[92] Request for instructions on the processing of victims' applications, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-144), Pre-Trial Chamber II, 24 June 2011.

[93] Request for instructions on the processing of victims' applications, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-134), Pre-Trial Chamber II, 24 June 2011.

[94] Decision on the Registrar's "Request for instructions on the processing of victims' applications", *Ruto, Kosgey & Sang* (ICC-01/09-01/11-147), Pre-Trial Chamber II, 28 June 2011; Decision on the Registrar's "Request for instructions on the processing of victims' applications", *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-137), Pre-Trial Chamber II, 28 June 2011.

pending by the beginning of September 2012).[95] Over 1,700 victims were granted participatory status only after the Prosecution had already concluded the presentation of its evidence and too late to be considered for the purpose of appearing in person before the Court.[96] While the sheer number of applications received in *Bemba* has put a strain on all entities involved, in practice these victims were deprived of their ability to participate, testify or present their views and concerns. Similar challenges arose in the *Mbarushimana case* where 470 victims who applied to participate ahead of the deadline set by the Chamber, were denied the opportunity to have their applications adjudicated. The VPRS had informed the Chamber that limited human resources and the demands from other proceedings would not make it possible for all applications to be transmitted to the Chamber by the set deadline.[97] The VPRS suggested that the Chamber "seeks the views" of the applicants as "other victims" under Rule 93, rather than limiting participation in the confirmation of charges hearing only to those victims granted status in the case. This proposal was dismissed, on the basis that it would "operate to circumvent the system of victim participation and create a more limited form of participation for all of the victim applicants in question."[98]

In *Lubanga,* 15 victims were granted participation status in February 2011 though they had applied in early 2010. Seven victims were granted participation status as late as July 2011, when only the closing statements of the trial remained.[99] In November 2011, VPRS asked for guidance from the Chamber on how to proceed with regards to 27 applications for participation which, due to lack of resources, it had not been able to process and file ahead of the closing arguments in the *Lubanga trial*.[100] These were applications that were initially incomplete, but rendered complete already by July 2011. On 27 January 2012, the Trial Chamber ruled that given that the evidence and the submissions in the trial had concluded and the Chamber was in deliberation, the Registry should only transmit the 27 new applications for participation to the Chamber if/when sentencing and reparation proceedings were to start.[101] Despite the guilty judgment issued by the Chamber in March 2012, these applications were neither transmitted to the Chamber nor ruled upon prior to the decisions on sentence and reparation principles.

The VPRS has stressed that in 2011 and 2012, the shortfall in staff capacity to process all of the applications received from victims had required the section to "prioritize the work according to the progress of judicial proceedings," and that "a backlog exist[ed] in some situations."[102] It has also indicated that, as a result of this severe understaffing, the Registrar had to allocate additional

[95] Decision setting a timeline for the filing of observations on pending victims' applications, *Bemba* (ICC-01/05-01/08-1726), Trial Chamber III, 9 Sept. 2011, p. 3 and Report on the Activities of the Court (covering the period 1 Oct. 2011 to 15 Sept 2012), ICC-ASP-11/21, 9 October 2012 para 19.

[96] The Prosecutor concluded its evidence in March 2012. 1377 victims were granted participatory status in May 2012 while another 331 were granted participatory status in July 2012. See Decision on 1400 applications by victims to participate in the proceedings, *Bemba (*ICC-01/05-01/08-2219), 21 May 2012, and Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings", *Bemba (*ICC-01/05-01/08-2247), 19 July 2012.

[97] Proposal on victim participation in the confirmation hearing, *Mbarushimana* (ICC-01/04-01/10-213), Pre Trial Chamber I, 6 June 2011.

[98] Decision on the "Proposal on victim participation in the confirmation hearing", *Mbarushimana* (ICC-01/04-01/10-229), Pre-Trial Chamber I, 10 June 2011, p. 5.

[99] Redacted version of the Decision on the applications by 7 victims to participate in the proceedings, *Lubanga* (ICC-01/04-01/06-2764-Red), Trial Chamber I, 25 July 2011.

[100] Request for instructions on victim's applications for participation and reparations received by the Registry, *Lubanga* (ICC-01/04-01/06-2817), Trial Chamber I, 2 Nov.2011.

[101] Order on the applications by victims to participate and for reparations, *Lubanga* (ICC-01/04-01/06-2838), Trial Chamber I, 27 Jan. 2012.

[102] Advance version of the Proposed Programme Budget for 2013 of the ICC, ICC-ASP-11/10, 13 August 2012, para 433.

resources to the Section during 2011 and 2012 for urgent staffing needs, in order to enable the section to meet the demands of all Chambers. Finally, the section also undertook a pilot project in which seven contractors were hired for six months at €1,000 per month each, to carry out intensive processing of victims applications, particularly in the *Bemba case*.[103]

The development of the first phase of VPRS' database for processing victims' applications has now been completed. However, the database does not yet allow application data entry and legal analysis. Furthermore, VPRS field staff and other sections do not have access to it.[104] It is also not clear whether the database would be readily usable for collective applications which have begun to be implemented in the *Gbagbo case* and could possibly be implemented in other situations and cases. Funds to enable the further development of the database have been requested in the 2013 budget. This should be considered as an urgent priority.

At the same time, considering the current expectations of Chambers in terms of analysis of the substance of the applications, it is evident that a well-functioning and scalable database must be complemented with additional resources. Time and resources could also be saved by the provision of "complete" applications. The Court reported that in 2010, only 66% of applications evaluated were properly completed.[105] In 2011, while 90% of applications received from the Central African Republic were properly completed, this was the case for only 40% of the applications coming from the DRC and 50% of the Kenya applications.[106] Improving the quality of the assistance provided to victims at the outset (currently provided by "intermediaries" – mainly local organisations with very limited resources) may increase efficiency. Training and supporting intermediaries, if complemented by the necessary resources, should significantly reduce front-end problems in the application process.

## 1.4 Strain on the Parties and the Chambers

In addition to the clear impacts on victims and on the VPRS, the processing and examining of a large number of applications requires considerable efforts by the Court as well as by defence counsel, potentially adding to the length of proceedings and the preparatory work of parties.

This time strain is most evident in relation to the parties' consideration of whether an applicant satisfies the test for being considered a "victim" pursuant to Rule 85. In practice, Chambers have relied almost exclusively on the Registry's own reports to determine whether the test they formulated for determining "victim" status is satisfied. However, this report, which synthesises all the information from the application forms, is only available to Chambers. Redacted victim applications are shared with the Prosecution and the Defence for their observations. In *Mbarushimana,*[107] *Ruto*,[108] and *Gbagbo*[109] the relevant pre-trial Chambers decided that the Prosecution should receive unredacted victim applications, the Defence should receive redacted versions and the Common Legal Representatives representing victims received both redacted and

[103] *Ibid*, para 433.

[104] *Ibid*, para 444.

[105] Report on programme performance of the ICC for the year 2010, ICC-ASP/10/16, 5 July 2011, p. 38.

[106] Report on activities and programme performance of the ICC for the year 2011, ICC-ASP-11/8, 4 May 2012, p. 51.

[107] Decision requesting the Parties to submit observations on 14 applications for victims' participation in the proceedings, *Mbarushimana* (ICC-01/04-01/10-181), Pre-Trial Chamber I, 24 May 2011.

[108] Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-249), Pre-Trial Chamber II, 5 Aug. 2011.

[109] Second decision on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-86), Pre-Trial Chamber I, 5 April 2012.

unredacted versions. In contrast, the Trial Chambers decided not to share the unredacted versions with the Prosecution, based on the principle of equality of arms.[110] Thus, while the Chambers benefit from the Registry's preliminary analysis and assessment of applicants' victim status, the Prosecution and Defence are only able to consider each individual victim application, requiring them to independently assess the completeness of the forms, the presentation of identity documents, etc. Recently, this has involved providing observations on hundreds of applications within a very short time frame, usually two weeks.[111] The most common objections from the Defence have concerned incomplete forms, concerns over redactions in the description of events,[112] anonymity of the applicants,[113] the large number of applications, and also the insufficient identification of alleged perpetrators in the description of events.[114] Equally, the Prosecution has regularly pointed to insufficiencies in the information presented, incomplete forms and incoherencies.

Undoubtedly, the lack of clarity with respect to the interpretation of Article 68(3) of the Statute led to litigation on the process of submitting, evaluating, and adjudicating applications to participate in proceedings, as well as numerous rulings on appeal. With the growing jurisprudence however, many aspects are now relatively settled and therefore the argument that victim participation pursuant to Article 68(3) necessarily results in extensive litigation is not necessarily well-founded going forward. On the other hand, the requirement that each application is individually adjudicated, which is discussed more fully below, may well continue to contribute to delays, unless a more administratively efficient process may be found which satisfies judges' needs for certainty and respects the rights of the defence.

In this respect, the different Chambers have not accepted any defence arguments contending that victim participation as enshrined in article 68(3) is in and of itself prejudicial to defence interests. In addition, other commentators have reiterated the principle in article 68(3) confirming that "there is nothing prejudicial *per se* to the rights of the accused in allowing victim participation in international criminal proceedings, provided that some fundamental principles of due process and fair trial are respected and granted primacy over any other potentially conflicting interest."[115]

[110] See, e.g., Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011, para. 36 ; Decision inviting the parties' observations on applications for participation, *Lubanga* (ICC-01/04-01/06-1308), Trial Chamber I, 6 May 2008, para. 30; Decision on the treatment of applications for participation, *Katanga & Ngudjolo* (ICC-01/04-01/07-933), Trial Chamber II, 26 Feb. 2009, para. 53.

[111] First Decision on Victims' Participation in the Case, *Situation in Kenya* (ICC-01/09-02/11-23), 30 March 2011, para. 22.

[112] See, e.g., Response on behalf of Mr.Ruto and Mr. Sang to the First transmission of redacted applications to participate in the proceedings, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-102), Pre-Trial Chamber II; Decision on the 138 applications for victims' participation in the proceedings, *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 Aug. 2011.

[113] Response on behalf of Mr.Ruto and Mr. Sang to the First transmission of redacted applications to participate in the proceedings, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-102), Pre-Trial Chamber II, 3 June 2011.

[114] See, e.g., Decision on the 138 applications for victims' participation in the proceedings, *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 Aug. 2011., at para. 31.

[115] S. Zappala, `The Rights of Victims v. the Rights of the Accused', Journal of International Criminal Justice 8 (2010), 137-164, p. 139.

## 2. Possible reforms to the victim application process

### 2.1 Strengthening the existing system (minimal structural changes)

In consideration of six years of judicial decisions and practice, a number of recommendations can or have been made to make the current victim application process more efficient, without significantly affecting the procedures that different Chambers have put into place. These fall into the following categories and will be assessed in turn:

(1) strengthening outreach to victims;
(2) strengthening the quality of initial applications;
(3) enabling parties to see the Registry's reports on victims' applications;
(4) setting clear timeframes to anticipate processing requirements;
(5) avoiding duplicative decision-making and
(6) separating the application process for participating in the proceedings from applications seeking reparations.

The Court has indicated in a recent report that it requires additional funding in order to address the current processing backlogs and to maintain an efficient and effective system which operates along the lines of the existing system.[116] To some, the requirement of additional funds may signal that the existing structure must be changed. This is not necessarily the case. A financially-driven reform agenda is unlikely to produce the most effective results. Each option should be considered on its own merits, financial considerations being only one of a number of objectives, the key one being to develop a system of meaningful participation as anticipated by the drafters of the Rome Statute.

#### *2.1.1 Strengthening outreach to victims*

Effective victim participation is contingent on victims receiving information about the Court, the proceedings and the outcomes thereof. The fundamental principle of open justice, namely that "justice must not only be done, but be seen to be done" is as applicable and relevant to the ICC as to any other court of law. Information provision is also crucial to make victim participation meaningful and to clarify what victims may expect from the Court process. In the ICC's revised strategy in relation to victims, it stresses "a commitment to realise victims' right to information related to the Court, its activities and processes. The Court is committed to meeting victims' need to understand this information: tailoring it to the different cultures and circumstances of affected communities, as well as with an awareness of different attitudes toward the ICC, the alleged crimes and justice in affected communities."[117]

Given the remoteness of the Court to victims and the challenges facing most victims of crimes coming within its jurisdiction, field presence and related work on the ground are vital to ensure that victims receive sufficient information about the Court and its processes. Thus, ensuring sufficient budget for the outreach capacity of field offices is important to maximise the effectiveness of outreach to victims and affected communities. In this regard, it is noteworthy that the PIDS budget, which includes numerous other functions as well as outreach, has never reached above 3.5% of the Court's overall budget.[118] The figure includes outreach activities to affected communities (more than 50% of the amount is "situation related"), but also public information, library, visits to the Court, etc. It does not include VPRS activities when meeting with intermediaries, applicants and participating

[116] See, ICC, Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 September 2012, paras. 22, 24-25.

[117] ICC Revised Strategy in Relation to Victims, 28 May 2012, para. 15(b), on file with REDRESS.

[118] 3.2 % in 2010, 3.3% in 2011 and 3.4% forecast for 2012.

victims. VPRS' costs amount to 1.6% of the Court's total expenses in 2010[119], in 2011 it was 1.3% of the budget and in 2012, 1.5%.[120] PIDS and VPRS have 13 and 8 field staff respectively, in Uganda, the DRC, Kenya and CAR to deal directly with the affected communities for purposes of outreach.

It is essential that the budget for field outreach be preserved, if not enhanced. While the outreach budget has not increased significantly in relation to the rest of the Court's budget, the budget for outreach, similar to that for legal aid, has almost consistently been a target area for the ASP's Committee on Budget and Finance, with the recurring question whether outreach should be seen as a core activity of the Court, or whether it could be financed with alternative means.[121] The challenge can be demonstrated by the debate around outreach in situations under preliminary examination. Communication in situations under preliminary examination was included in the Court's revised Strategy on Victims presented informally in the summer of 2011.[122] Despite recent ASP statements to the contrary and the obligations to provide information to victims and affected communities as set out in the ICC Statute and related rules, States' reaction to the draft document and to such early outreach intervention was described as follows:

> [m]any States expressed concern that the current formulation of the objective referring to communication to all victims including in situations under preliminary examination was too far-reaching and not realistic.[123]

Also important is the need for sufficient planning and coordination amongst all those with the mandate and obligation to inform victims and wider communities. While the Public Information and Documentation Section (PIDS) is responsible for most of the ICC's public information and outreach to affected communities, including victim groups, the Office of the Prosecutor and VPRS have related responsibilities. For instance, the Office of the Prosecutor is obliged to consult, inform and notify victims when seeking authorisation to initiate an investigation or when deciding not to initiate an investigation or prosecution. The Victims' Participation and Reparations Section has the obligation to ensure that standard application forms are available to victims, groups of victims, or intergovernmental and non-governmental organisations, which may assist in their dissemination and to notify participating victims of proceedings before the Court, including the dates of hearings and any postponements thereof, and the date of delivery of the decision, as well as of request, submissions, motions and other documents relating to such request, submissions or motions. Furthermore, the Registry is obliged to take necessary measures to give adequate publicity to the decision to hold a confirmation of charges hearing and otherwise at the request of the Chamber, and to give adequate publicity of the reparations proceedings, to the extent possible, to other victims, interested persons and interested States.

While it is clear that coordination exists in practice and that VPRS is actively involved in PIDS activities, it seems that at the strategic level, the question of how and when PIDS activities can and should contribute to effective and meaningful victim participation is not yet sufficiently developed. For instance, there is an absence of references to victim participation in the Court's "Report on the Public Information Strategy (2011-2013)"[124] and in the description of PIDS' work in the most recent

[119] €1,617,900 of €104,596,000, Report on budget performance of the ICC as at 30 June 2011, ICC-ASP/10/11, 17 August 2011, p. 58.

[120] Proposed Programme Budget for 2013 of the International Criminal Court, ICC-ASP-11/10, 13 August 2012, p.127.

[121] See, e.g., Report of the Committee on Budget and Finance on the work of its 17th session ("CBF 17th Session Report"), ICC-ASP/10/15, 18 Nov. 2011, para. 25.

[122] Report of the Bureau on victims and affected communities and Trust Fund for Victims, ICC-ASP/10/31, 22 Nov. 2011.

[123] *Ibid.,* para. 15.

[124] Report of the Court on the Public Information Strategy 2011-2013, ICC-ASP/9/29, 22 Nov. 2010.

"Report on the activities of the Court" submitted to the eleventh session of the Assembly of States Parties.[125] It is therefore welcome that in the recent discussions around the revised strategy relating to victims, performance indicators of outreach activities are more closely linked to the participation of victims in the proceedings. However, it does not demonstrate how the different stages of the proceedings impact on timing and planning of outreach activities and vice versa.

### *2.1.2 Strengthening the quality of initial applications*

One of the challenges with the current victim application process is the high number of faulty initial applications. The current Standard Application Form was adopted by the Presidency in 2010 and was reduced from 17 to 7 pages following significant insistence by civil society groups.[126] It now enables victims to apply to participate in proceedings and to apply for reparation in a single form, however, the form is available only in English and French despite calls for it to be translated into Arabic in view of the Darfur and Libya situations and cases before the Court. The Standard Application Form is available on the internet, at field offices, outreach events and from intermediaries.

The jurisprudence requires VPRS to submit "complete" applications to Chambers for their consideration.[127] The legal aid scheme of the Court does not currently provide financial assistance until victims have been recognised and granted victim status by the Court. Thus, the scheme does not provide support to complete applications or obtain the necessary supporting documentation. In some instances, such as the Situation in Central African Republic, the Office of Public Counsel for Victims fulfilled this role, and in recent practice the OPCV has been assigned by Chambers to represent unrepresented applicants known to the Court until their status has been determined.[128] Until a recent decision from the Pre-Trial Chamber in the *Gbagbo case* instructing VPRS staff to assist applicants wishing to fill out a group application form,[129] VPRS had provided only limited direct assistance to applicants to fill out the relatively complex forms, but had sought to provide training to intermediaries and support to lawyers as a means of reaching victims indirectly.

Once applications have been sent to VPRS, its staff sometimes meet victims or intermediaries to seek information "in order to ensure that such application[s] contain, to the extent possible, the information [required] before transmission to a Chamber."[130] Given the limited VPRS field presence, and the extensive reliance on local intermediaries to assist victims to complete forms, incomplete application forms have constituted one of the main challenges to victim participation so far. Obtaining missing information is time consuming for the Court as well as victims and intermediaries. Investing in better initial completion of the forms would provide significant savings overall.

Given the obligation of VPRS to assist victims and groups of victims,[131] it is incumbent upon it to obtain the missing information, either through its own intermediaries, or where a legal

[125] Report on the Activities of the Court (covering the period 1 Oct. 2011 – 15 Sept. 2012), ASP-11/21, 9 October 2012.

[126] Available from the Court's website under "Structure of the Court", "Victims" and "Forms": http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf.

[127] For what constitutes a 'complete' application according to established jurisprudence, see discussion in REDRESS, *Justice for Victims, the ICC's Reparations Mandate*, May 2011, p.37.

[128] *The Prosecutor v Banda & Jerbo* [Situation in Darfur], Notification of appointment of common legal representatives, 14 Sept. 2011, ICC-02/05-03/09-215.

[129] *The Prosecutor v. Laurent Gbagbo* [Situation in Cote d'Ivoire], Second decision on issues related to the victims' application process, 5 April 2012, ICC-02/11-01/11-86, para. 27; The Single Judge indicated that *only* VPRS staff could assist victims to complete the collective application form.

[130] Regulation 86(4) of the Regulations of the Court.

[131] Regulation 86(9) of the Regulations of the Court.

representative has been selected, through the legal representative, assuming that the necessary financial and logistical support is afforded to the legal representative to undertake this work. VPRS should formulate strategies to ensure that missing information is collected expeditiously and identify the necessary resources needed. This might involve considering the possibility to base more of its staff in the Court's field offices in order to allow closer and constant interactions with relevant groups. VPRS has increasingly relied on the legal representatives to ensure that applications are filled out accurately and completely, however with the current limited resources for legal aid, these expectations may be unrealistic.

Another approach would be to ensure sufficient support is provided to intermediaries, to enable them to better assist victims who wish to complete application forms. Recently the Court has described an intermediary as: "someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations or affected communities more broadly on the other".[132]

The *Draft Guidelines governing the relationship between the Court and Intermediaries* [Draft Guidelines][133] provide that the Court might interact with intermediaries for the purposes of, *inter alia*, assisting victims with the submission of an application, requests for supplementary information and informing them about decisions concerning their participation. ICC jurisprudence and statements confirm that intermediaries have played a fundamental role in the Court's work.[134] The first cases have also brought to light the challenges of using intermediaries including errors made by persons helping victims to fill out forms,[135] objections to intermediaries using victim participation to achieve a political or personal agenda,[136] and objections regarding intermediaries influencing victims when filling out forms.[137]

The *Draft Guidelines* once adopted, should improve the transparency and sustainability of these relationships. However, a limitation of the *Draft Guidelines*, is their sole relevance to intermediaries that are selected by the Court, whereas in practice there is limited control over the selection of intermediaries; intermediaries are often selected by the victims or the circumstances in which the victims find themselves. Furthermore, unless sufficient resources are specifically set aside to manage relationships with intermediaries, particularly for systematised and regular training, much of the text will be meaningless.

[132] ICC, *Draft Guidelines governing the Relations between the Court and Intermediaries*, Draft April 2012 (on file with REDRESS). For comments on previous drafts of the Guidelines, see VRWG, *Intermediaries' guidelines: Outstanding Issues*, April 2011, www.vrwg.org/VRWG_DOC/2011_VRWG_Intermediaries.pdf; REDRESS, *Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries*, 15 Oct. 2010, www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf.

[133] Draft Guidelines, Ibid.

[134] Decision on the Applications for Participation Filed in Connection with the Investigation in the DRC by Applicants, *Situation in the DRC* (ICC-01/04-545), Pre-Trial Chamber I, 4 Nov. 2008, para. 25.

[135] Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11, *Mbarushimana* (ICC-01/04-01/10-441), Pre-Trial Chamber I, 23 Sept. 2011.

[136] Defence Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, *Banda & Jerbo* (ICC-02/05-03/09-113), Pre-Trial Chamber I, 6 Dec. 2010.

[137] Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims (public redacted version), *Katanga & Ngudjolo* (ICC-01/04-01/07-1491-Red-tENG), Trial Chamber II, 23 Sept. 2009, paras. 40-43.

### *2.1.3 Enabling Parties to see the Registry's Reports on Victims' Applications*

At present, the Registry's reports which summarise victims' applications are only made available to Chambers. It may be more efficient for these reports (redacted as appropriate) to be made available to the Parties. In the Court's Report on the *Review of the System for Victims to Apply to Participate in Proceedings*, one of the options proposed is that the Registry could prepare and disclose a *prima facie* report on the victims' applications, highlighting borderline cases, that would then serve as the basis for observations from the parties.[138] Whilst concerns have been raised that this may compromise the Registry's neutrality, to a certain extent, the Registry already performs this function, though its reports go solely to Chambers and not to the parties. Thus, disclosing to the parties would enhance transparency, and also potentially reduce the time required by the parties to review victim applications despite the fact that it would likely require additional work on the Registry's part to redact the report. Related options put forward by the Court of limiting or eliminating the parties' input to the victim application process[139] would seem to unduly restrict the right to defence.

### *2.1.4 Setting clear timeframes to anticipate processing requirements*

In addition to severe resource constraints, one of the reasons why VPRS has had difficulty to process applications in time to enable victims' applications to be decided in advance of key hearings, has been the failure, in some cases, for the relevant Chambers to sufficiently coordinate with VPRS in advance.[140] In order to address such concerns, clear timeframes should be established by Chambers regarding deadlines for submissions of applications by victims and for processing of applications by the Registry. However, timeframes and deadlines for victim applications will only work if accompanied by significant and targeted outreach carried out well in advance of the expiry of the deadlines. For example, one of the options put forward by the Court is to limit the timeframe to receive applications to participate in proceedings to the Pre-Trial stage,[141] however this is unlikely to work unless the level of outreach carried out in the earliest phases of proceedings was significantly enhanced. Furthermore, victims' interest in proceedings will peak at the commencement of trial, and there may be certain interests that they have as a result of the conduct of trial proceedings, which could not have been known in prior phases. In addition, victims may have protection concerns, which may incitate them to wait until they are certain the case will go to trial and they know which charges have been confirmed, before applying for participation. In any situation, sufficient time for outreach should be allowed between the setting up of a deadline and the deadline itself. Outreach in relation to proceedings before the ICC should start as soon as possible to ensure victims have enough information and are ready to apply for participation, as appropriate, when a Chamber sets a deadline.

Furthermore, in order to enhance efficiencies with the VPRS, internal targets at the Registry should be established to ensure that applications are processed within an acceptable timeframe. Targets should be set for the Registry to obtain missing information in relation to victims' applications for participation.

[138] See, ICC Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 Sept. 2012, paras. 50-51.

[139] Ibid., paras. 57-64.

[140] See, Section I.1.3 *Strain on the Registry*, "Meeting court deadlines", above.

[141] See, ICC Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 Sept. 2012, paras. 65-71.

### *Enabling victims' representations under Article 15(3)*

One example of an area in which better planning in advance of deadlines would maximise the efficiency of the victim participation process is victims' representations under Article 15(3) of the ICC Statute. Article 15(3) enables victims to make representations to a Pre-Trial Chamber before it decides upon the Prosecutor's request to open an investigation into a new situation. In the Kenya and Ivory Coast situations, VPRS was asked to compile victims' representations pursuant to Article 15(3), which has proven to be an important exercise to connect affected communities with the ICC process. However, the VPRS will typically be required to act within strict time restrictions, so as not to unduly delay the Chambers decision whether to authorise the initiation of an investigation.

Regulation 50(1) provides that victims have 30 days to make their representations following notice given by the Prosecutor under Rule 50 of the Rules.[142] In the Kenya situation, VPRS was initially given 11 days to compile the representations and prepare a report thereon. However, the exercise of mapping victims across Kenya and soliciting their representations in a safe manner required four months.[143] In the Ivory Coast situation, less than one month was granted, leaving only two weeks in between the deadline for submitting victims' representations and VPRS' submission of a report reflecting the representations. This deadline was subsequently extended by one month, on the basis that "due consideration should be given to the victims' representations"[144] and the "importance of taking the views of the victims into account."[145] In the Ivory Coast situation, the Court received more than 450 documents, including written materials, CDs and videotapes. In the Kenya situation, VPRS and PIDS approached individuals and organisations acting as interlocutors for affected communities who responded to a written questionnaire.

In both situations, VPRS was asked to assess the representations in accordance to the criteria on the definition of victims set out in Rule 85, which is not a condition provided for in Article 15(3) and which, as recognised by the Chamber, is an "exercise that requires significant work on the part of the VPRS."[146] However, VPRS underlined in its report in the Kenya situation that "given the limited nature of this proceeding, such assessment need not reach the standard established by Chambers to determine whether persons are entitled to participate in proceedings."[147]

Similarly, the jurisprudence of the Court makes clear that victims are entitled to participate in court proceedings relating to "situations" before the Court (e.g. investigations into particular contexts in a country or a region of a country prior to the issuance of an arrest warrant), so long as they meet the criteria for participation set out in Article 68(3) of the Rome Statute. The Registry has been put on notice by Chambers to ensure that it is ready to submit to Chambers all relevant, complete victim

[142] Rule 50 of the Rules of Procedure and Evidence provides for an authorisation of an investigation as follows: "When the Prosecutor intends to seek authorisation from the Pre-Trial Chamber to initiate an investigation pursuant to art.15, para. 3, the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims is and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims..."

[143] Situation in the Republic of Kenya, Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exo-Corr) and annexes 1 and 5, 29 March 2010, ICC-01/09-17-Corr-Red; See Annex 5, 29 March 2012, ICC-01/09-17-Anx5-Corr-Red.

[144] Situation in the Ivory Coast, Decision on the VPRS request for an extension of time to report on victims' representations pursuant to Regulation 35 of the Regulations of the Court, 28 July 2011, ICC-02/11-9, para. 4.

[145] Ibid., para. 5.

[146] Ibid.

[147] Situation in the Republic of Kenya, Public Redacted Version Of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 - 10, 29 March 2010, ICC-01/09-06-Red, para. 9(c).

applications should a "proceeding" arise in which victims are potentially eligible to participate.[148] It is thus crucial that resources are set aside to ensure that the applications from eligible victims within that situation can be completed in time. In order to achieve this, the VPRS must work closely with victims, intermediaries and legal representatives at the earliest possible stage to ensure that applications submitted are as complete as possible.

### *2.1.5 Avoiding duplicative decision-making*

In all proceedings, it is the seized Pre-Trial (often through delegation to a Single Judge) or Trial Chamber that assesses applications in relation to Rule 85.[149] The manner in which victims may participate in a separate manner is determined on the basis of the criteria for participation in appropriate stages of proceedings under Article 68(3). The Appeals Chamber has held that Regulation 86(8), which provides that "a decision taken by a Chamber under Rule 89 shall apply throughout the proceedings in the same case", is "confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation."[150] However, Judge Sang-Hyun Song issued a powerful dissent and indicated, referring to his earlier dissent when the same issue arose in the *Lubanga* case, that:

> In my Dissenting Opinion of 13 February 2007, I stated that in my opinion, "the approach of the majority [...] leads to unnecessary procedural steps that are bound to slow down the appellate process." This prediction has been confirmed by the Appeals Chamber's practice over the past two and a half years. For every appeal under article 82 (1) of the Statute in which victims wish to participate, the Appeals Chamber needs to render a decision on their right to do so. Each time the Chamber grants an application for participation, there is another round of submissions. This inevitably, and in my view unnecessarily, delays the appellate proceedings. Therefore, I would have accepted the Victims' Response in the present case. It was unnecessary to reject the Victims' Response and then permit the victims to file their observations again.[151]

In general, Trial Chambers should follow Pre-Trial Chamber decisions on admissibility of victims' applications. This has been the position taken by most, though not all, Trial Chambers. In *Lubanga*, Trial Chamber I considered that it was bound to re-assess the four applications for participation

[148] Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre Trial Chamber II, 3 Nov. 2010, para. 21, in which "The Chamber stresses the importance of the VPRS to be ready at any time to present complete applications together with the assessment when an issue requiring judicial determination arises before the Chamber"; Decision on victims' participation in proceedings, *Situation in the DRC* (ICC-01/04-593), Pre Trial Chamber I, 11 April 2011, para. 13; See also, more recently, Decision on Victim's Participation in Proceedings, *Situation in Uganda* (ICC-02/04-191), Pre Trial Chamber II, *Situation in Uganda*, 12 March 2012, para 28.

[149] On 20 August 2009, the Registry submitted a report to the Appeals Chamber informing that applicants a/0443/09 - a/0450/09 sought to participate in the Prosecutor's appeal against the exclusion of genocide charges. The Registrar sought guidance as to the circumstances in which she should transmit victims' applications to the Appeals Chamber in order for it to determine victim status. The Appeals Chamber held that the Pre-Trial or Trial Chambers were in a better position to assess victims' applications, especially due to their familiarity with the facts underlying the case. It therefore instructed the Registrar to file the applications, as well as her report, for determination before Pre-Trial Chamber I. See the Appeals Chamber decision in Decision on the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the "Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" and on the Request for an Extension of Time, *Al Bashir* (ICC-02/05-01/09-48), Appeals Chamber, 23 Oct. 2009.

[150] Reasons for the "Decision on the Participation of Victims in the Appeal against the Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Bemba* (ICC-01/05-01/08-566), Appeals Chamber, 20 Oct. 2009, para. 14.

[151] Dissenting opinion of Judge Sang-Hyun Song (ICC-01/05-01/08-623), 29 Nov. 2009.

accepted by the Pre-Trial Chamber.[152] In contrast, Trial Chamber II in *Katanga*[153] held that victims granted participatory status in Pre-Trial proceedings could in principle participate at trial without re-applying. This Chamber distinguished decisions on victim status from decisions defining the modalities of participation.[154] However, it held that it could rule *de novo* on applications where participation had been authorised at the pre-trial stage solely on the basis of a crime corresponding to a charge that was not confirmed by the Pre-Trial Chamber. It was also held that applications which Pre-Trial Chamber I rejected on the ground that they were incomplete would be re-assessed only if the Registry subsequently transmitted a complete application with its corresponding report.[155] In *Bemba*, Trial Chamber III similarly decided that the individuals granted participatory status by the Pre-Trial Chamber could continue to participate in trial proceedings, subject to any objection for good cause based on new material.[156] Trial Chamber IV in *Banda and Jerbo* considered that victims that participated in the pre-trial phase are in principle authorised to participate at trial, subject to the following exceptions:

(1) where the victim was authorised to participate solely on the basis of the commission of a crime corresponding to a charge which was not confirmed by the Pre-Trial Chamber; and
(2) where new information has emerged since the original decision authorising the victim to participate in the proceedings.[157]

Trial Chamber III in *Bemba* requested VPRS to review the applications that had been rejected by the Pre-Trial Chamber, to determine whether, in light of subsequent events or information, the applications should be reconsidered.[158] Trial Chamber IV in *Banda and Jerbo* made a similar request.[159]

### *Victims participating in a case should participate in related situation proceedings*

Similarly, where a victim has participatory status in a case, she/he should be automatically eligible to participate in proceedings arising in relation to the investigation (situation proceedings). In the DRC situation, applicants whose status had been granted by the Trial Chamber were automatically considered as victims eligible to participate in the situation.[160] The Appeals Chamber has since

[152] Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008, para. 112; Decision on the applications by victims to participate in the proceedings, *Lubanga* ( ICC-01/04-01/06-1556), Trial Chamber I, 15 Dec. 2008, paras. 54 -59.

[153] Decision on the treatment of applications for participation, *Katanga & Ngudjolo* (ICC-01/04-01/07-933), Trial Chamber II, 26 Feb. 2009.

[154] Decision on the treatment of applications for participation, *Katanga & Ngudjolo* (ICC-01/04-01/07-933), Trial Chamber II, 26 Feb. 2009, para. 10.

[155] Ibid., para. 14.

[156] Decision defining the status of 54 victims who participated at the pre-trial stage and inviting the parties' observations on applications for participation by 86 applicants, *Bemba* (ICC-01/05-01/08-699), Trial Chamber III, 22 Feb. 2010.

[157] Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011 para. 16.

[158] Decision defining the status of 54 victims who participated at the pre-trial stage and inviting the parties' observations on applications for participation by 86 applicants, *Bemba* (ICC-01/05-01/08-699), Trial Chamber III, 22 Feb. 2010, at para. 39.

[159] Decision on the Registry Report on six applications to participate in the proceedings, *Banda & Jerbo* (ICC-02/05-03/09-231), Trial Chamber IV, 17 Oct. 2011 at para 18.

[160] Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the DRC by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06", *Situation in the DRC* (ICC-01/04-423-Corr), Pre-Trial Chamber I, 31 Jan. 2008.

confined victims' participation during the situation to *judicial proceedings*, which "includ[e] proceedings affecting investigations, provided [that victims'] personal interests are affected by the issues arising for resolution."[161] As a result, Pre-Trial Chambers have begun to issue framework decisions on the participation of victims at the situation stage. Such decisions have clarified which scenarios would lead to victims' applications being assessed in the context of a situation as well as the criteria against which they would be assessed: verification that the victims meet the Rule 85 requirements, whether participation would be *appropriate* and whether victims' interests are concerned by the issue at stake in the said judicial proceeding.[162] However, none of these framework decisions suggest that applications already admitted in the context of a case would be exempted from a new assessment of the Rule 85 criteria.

### *Where applicants are victims in more than one case*

In the *Banda and Jerbo* case, the Chamber did not find it necessary to assess whether the events described by the applicants constituted one of the crimes with which the suspects were charged, nor did it assess whether there was a sufficient causal link between the events and the alleged harm. This was because the same assessment had already been done for those applicants in the *Abu Garda case*, relating to the same event and charges.[163]

## *2.1.6 Separating the application process for participating in the proceedings from applications seeking reparations*

In its report on the review of the system for victims to apply to participate in proceedings, the Court identifies the separation of the application process for participating in the proceedings from applications seeking reparations as one area which may promote efficiencies in the current victim application process.[164] The rationale for separating out these procedures appears to be that it would lessen the number of applicants wishing to participate in proceedings, as it is assumed that many victims are more interested in reparations.[165] However, it is difficult to be clear at this stage of the Court's history and without the benefit of rigorous population testing in existing and possibly future situation countries, that victims are simply more interested in reparations. Even if it were so, it would not necessarily follow that victims would not be interested in participating in proceedings and/or that they would refrain from seeking to participate in accordance with the rights they are accorded under the Rome Statute.

Separating out the application process for participating in the proceedings from applications seeking reparations would have the advantage of avoiding the problematic scenario which arose in the *Lubanga* case wherein victims' applications for reparations in which they detailed their individual harm were not considered by the Trial Chamber and instead passed directly to the Trust Fund for

[161] 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 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 Dec. 2007, *Situation in the DRC* (ICC-01/04-556), Appeals Chamber, 19 Dec. 2008, paras. 56-57.

[162] Decision on victims' participation in proceedings, *Situation in the DRC* (ICC-01/04-593), Pre-Trial Chamber I, 11 April 2011; Decision on Victims' Participation in Proceedings, *Situation in CAR* (ICC-01/05-31), Pre-Trial Chamber II, 11 Nov. 2010; Decision on Victim's Participation in Proceedings, *Situation in Uganda* (ICC-02/04-191), Pre-Trial Chamber II, *Situation in Uganda*, 12 March 2012; Decision on Victims' Participation in Proceedings, *Situation in Kenya* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010; Decision on Victims' Participation in Proceedings Related to the Situation in Libya, *Situation in Libya* (ICC-01/11-18), Pre-Trial Chamber I, 24 Jan. 2012.

[163] Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, *Banda & Jerbo* (ICC-02/05-03/09-89), Pre-Trial Chamber I, 29 Oct. 2010 paras. 8-9.

[164] ICC, Report on the Court's Review of the Victim Application System, 24 Sept. 2012, para. 23.

[165] *Ibid*.

Victims for consideration of a collective award.[166] It would not necessary reduce or limit applications to participate in proceedings. It may also, in certain circumstances, result in duplication at the reparations phase, if victims who were authorised to participate in the proceedings are requested to complete new forms with the same or similar information, and the parties are asked to comment on same and the relevant Chambers asked to judicially determine applicants' eligibility for a second time.[167] It is worth noting here that this consideration was among the reasons that led to the originally separate forms for participation and reparation to be combined in a new form in 2010. As such, the recommendations made in the above sub-section on avoiding duplicative decision-making appear equally relevant here.

## 2.2 A collective application process?

Many of the proposals currently on the table give a predominant place to a 'collective' application or participation process. The ICC's own *Report on the Review of the System for Victims to Apply to Participate in Proceedings* gives important consideration to the possibility of collective victim applications.[168] Also, the Hague Working Group facilitators on victims' issues and reparations considered the issue of collective victim applications and collective participation of victims as a focus of their discussions, making the suggestion that a collective approach should be the basic approach and that the judges should not be required to examine each individual application.[169] This emphasis is not surprising, given that, a collective approach already features within the ICC statute in certain areas (the ability for the Court to appoint a common legal representative to jointly represent victims' interests; the ability for the Court to award collective reparations through the Trust Fund for Victims).

Given the number of individual victim applications to process, a collective application process would also appear to be a simple way in which to promote efficiency and, considering that the modalities of participation may, in most respects be collective, through a common legal representative, introducing a collective application process may appear more logical to victims and more consistent with the form of participation they ultimately receive. A collective approach to victim participation was used to a certain extent in the Kenya situation in the context of an Article 15(3) procedure, which enables victims to make representations to a Pre-Trial Chamber before it decides upon the Prosecutor's request to open an investigation into a new situation. In that context, the VPRS collected the statements and views of victims and presented them in a consolidated file, to the Chamber. However, the procedures provided in Articles 15(3) on the one hand and 68(3) of the Rome Statue and Rule 89 of the Rules on the other, have substantial differences.

On 6 February 2012, the Single Judge considering victim applications in the *Gbagbo* case 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

[166] See, Decision establishing the principles and procedures to be applied to reparations, *Lubanga (*ICC-01/04-01/06-2904), Trial Chamber I, 7 Aug. 2012. At the time of writing, this aspect of the decision was under appeal.

[167] The Court itself recognises some of these disadvantages. See, ICC Report on the Review of the System to Apply to Participate in Proceedings, 24 September 2012, para.29.

[168] ICC, Report on the Court's Review of the Victim Application System, 24 Sept. 2012

[169] Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations, ICC-ASP/11/32, 23 October 2012, para. 20.

a single collective application to participate in proceedings.[170] This was the first time such a procedure was suggested by any Chamber, and the approach has sparked much interest from some corners and trepidation from others. 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.[171]

Strong concerns were voiced by OPCV in particular about the detrimental effect such a system was likely to have for victims' participation and the ability to check the credibility of the applications.[172] The Chamber found it essential that *only* VPRS be allowed to assist groups of victims to fill in the new collective form. The obligation of the Registry, and VPRS as the specialised unit on victims, to take "gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings" was also stressed.[173]

Whilst it may be possible to make certain efficiencies with a collective application process, though this in itself is not obvious or clear, such a procedure inevitably introduces challenges, which are summarised as follows:

### *2.2.1 Article 68(3) of the Rome Statute and related rules appear to require an individualised application process*

As indicated above, and in accordance with the established jurisprudence of pre-trial, trial and appeals Chambers, Article 68(3) of the Rome Statute which sets out the framework for victim participation and the related rules of procedure, appears to require an individualised application process. This understanding seems to be shared by the VPRS, which has indicated that:

> [S]ome of the relevant provisions governing the Court seem to provide for an individual treatment of applications for participation. Subject to further interpretation by Chambers - which the Registry cannot anticipate – an exclusively collective approach, which would give no place for an individual treatment of applications made by each individual victim, seems barely compatible with the Registry's understanding of the requirements of these rules. The Registry's view at this stage is that developing a collective approach therefore would not exempt the Court from considering applications for participation on an - at least partially - individual basis in the same time.[174]

Similarly, the Office of Public Counsel for Victims has queried the compatibility of a collective application procedure with the Statute and relevant rules which it believes require an individualised

[170] See the "Decision on issues related to the victims' application process", Gbagbo (ICC-02/11-01/11-33), Pre-Trial Chamber III, 6 February 2012.

[171] Second decision on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-86), Pre Trial Chamber I, 5 April 2012.

[172] See, in particular, OPCV Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' application process, *Gbagbo* (ICC-02/11-01/11-40), Pre-Trial Chamber II, 14 Feb. 2012; Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-51), Pre-Trial Chamber I, 8 March 2012.

[173] Second decision on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-86), Pre-Trial Chamber I, 5 April 2012, para 29.

[174] ICC-02/11-01/11-29-Red, para. 25.

process,[175] also submitting that in accordance with the relevant provisions, "in order to enable victims to effectively participate in the proceedings, the Court shall apply a strictly personalised and/or individualised approach to every person wishing to participate as victim."[176] The defence has raised similar concerns about the compatibility of a collective approach with the existing statutory and regulatory framework.[177]

The standard individual declarations that applicants must submit as part of the collective application process developed for the *Gbagbo* case does not provide opportunity for the Court to review individuals' personal details relating to the manner in which they experienced the victimization. This is an obvious and necessary result of a collective application process – that individual characteristics become less relevant in favour of the group. The OPCV has placed emphasis on this issue in its submissions,[178] however, in REDRESS' view it is not a fatal flaw in itself, particularly given that under the existing individualised application process, the personal information of applicants is used to determine *eligibility* to participate, it does not necessarily characterise the nature or modalities of that participation once eligibility is determined, which in almost all cases is through the filter of a common legal representative. Thus, maintaining an individual application process which simply determines eligibility for what eventually amounts to a collective participation process does not appear to be the most compelling argument for maintaining the *status quo*.

A more worrisome consideration is whether a collective application process is consistent with the Statute and Rules. In the Hague Working Group discussions:

> It was posited that the Court should not be inhibited by the existing legal framework of the Rules of Procedure and Evidence in analysing and proposing ways forward, some of which could require amendments to the existing legal framework. Furthermore, it was up to States Parties and the Court to progressively review the Rules of Procedure and Evidence in light of experience and lessons learnt. Some delegations expressed their preparedness to adapt the legal framework if, as a result of consultations, it was deemed necessary.[179]

Yet, it is unclear whether the changes under consideration would require revision of the Rules of Procedure and Evidence only, or also Article 68(3) of the Statute. Certainly, OPCV and the Defence have raised concerns about the compatibility of a collective approach with the Rome Statute, and the Court has noted, that while the *partially* collective approach adopted in the *Gbagbo* case was determined to comply with Article 68(3) of the Statute,[180] a *fully* collective application process "would represent a major shift, as it involves not only moving away from the individualized approach

[175] See, OPCV Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' application process, *Gbagbo (*ICC-02/11-01/11-40), Pre-Trial Chamber III, 14 Feb. 2012, paras. 13-23.

[176] See, OPCV Observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation, Gbagbo (ICC-02/11-01/11-66), Pre-Trial Chamber III, 19 March 2012, para. 10.

[177] See, *Requête de la Défense suite à la « Decision on issues related to the victims' application process »* (ICC-02/11-01/11-33), *Gbagbo (*ICC-02/11-01/11-41), Pre-Trial Chamber III, 15 Feb. 2012, paras. 12-16.

[178] See, OPCV Observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation, Gbagbo (ICC-02/11-01/11-66), Pre-Trial Chamber III, 19 March 2012, para. 15.

[179] Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and on Reparations, Oct/Nov 2012, para. 21.

[180] Second decision on issues relating to the victims' application process, Gbagbo (ICC-02/11-01/11), Pre-Trial Chamber III, 5 April 2012.

to dealing with victims' applications in the legal framework, but also a shift from individual to collective participation."[181] The Court has noted further that:

> the fully collective application options are untested and have not been the subject of judicial determination, so it is uncertain whether they would require amendments to the legal framework, especially Article 68(3) RS…[182]

To date, States have wisely refrained from making any significant amendments to the legal framework of the ICC, despite the recent opportunity provided by the Review Conference, given the very careful balances that were achieved in the Treaty negotiations at Rome. To re-open issues could open a Pandora's Box, particularly in the current difficult financial climate. It should not be acceptable to do away with aspects of the Rome Statute system that appear to certain states to be too costly or superfluous. It is a different matter to revise certain procedures to make an existing system more effective, having the benefit of several years of experience. It is this latter goal which should guide those considering making changes to the system of victim participation: make the existing system more efficient and effective; do not seek to change the nature or purpose of the system which was developed through careful negotiations.

### *2.2.2 Potential to silence different or marginalised voices*

A "collective" approach necessitates a clear and legitimate 'collective' or series of 'collectives'. The collective pursuit of claims is premised on actual or perceived similarities between group members' individual claims. Yet, victims rarely speak with one voice. Each will typically have his or her own interests and will have experienced victimisation in a unique way. Experiences of mass violations are gendered with women and girls experiencing disproportionately higher rates of sexual violence and will also invariably experience other forms of violence differently. Individuals' recollections of their suffering may also differ, making it difficult for a common factual narrative to be agreed amongst a large group of victims. In rape cases, the views, expectations and fears of victims may differ depending on whether the violation led to pregnancy. Circumstances such as whether the victim was reintegrated in her community, or whether the victim may have relocated away from the conflict zone or outside of the country impact on the desire for, and expectations of justice and reparation. Victims may agree on a general strategy during trial but may want different reparations. Or, they may agree on association in the criminal action (as participant or civil party), but have different views in relation to the aggravating and extenuating circumstances relevant to the guilt of the accused. This can be the case for victims who have suffered harm at the hands of their own tribe, political party, and community.

The defence has raised a number of concerns with the collective application procedure, including that, encouraging victims to develop collective approaches may stymie the voices of those who have different views or do not subscribe to the narrative of the conflict or crime base put forward by the Office of the Prosecutor.[183] The OPCV has raised similar concerns, also noting that victims of gender crimes may be discouraged from participating or "[be put]in a very delicate and potentially (re)-traumatizing situation, which would additionally clearly defeat the purpose of the application process and will violate the obligation of the Court pursuant to article 68(1) of the Statute."[184] There is a tension between grouping for practical reasons and grouping according to legal categories

[181] ICC Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 September 2012, para. 39.

[182] *Ibid*., para.41.

[183] See, Requête de la Défense suite à la « Decision on issues related to the victims' application process » (ICC-02/11-01/11-33), *Gbagbo (*ICC-02/11-01/11-41), Pre-Trial Chamber III, 15 Feb. 2012.

[184] See, OPCV Observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation, *Gbagbo* (ICC-02/11-01/11-66), Pre-Trial Chamber III, 19 March 2012, para. 17.

(similar harm suffered, similar strategy for trial/reparation). Victims may prefer to form a group in relation, for example, to affinities, family units, geographical location. However, groupings by affinities can lead to some victims' voices and interests not being fully represented inside the 'group'. Tensions may arise for potential new members when the pre-existing group is not all-embracing of victims' experiences; certain ethnic or other identities may predominate, or the group may emphasise certain forms of victimisation.

Also, challenging terrain, poor infrastructure and transportation can impede victims from communicating with each other and organising themselves. Victims of the same group, depending on the criteria on which the group was based may not all speak the same language. During the course of proceedings, victims may relocate to a different region inside or outside of the country, often without leaving contact details.

Assessing whether there are common positions within the diversity, and equally, determining fundamental areas of division, requires extensive consultation, not least to ensure that any diversity is not lost through a collective approach. Thus, should the Court pursue a collective application process, sufficient funds should be set out for sustained field-based consultations. In countries where victims are already organised in formal groups, lack of resources may significantly impede focal points to keep members informed and consulted, making any notion of participation much less meaningful.

### *2.2.3 Challenges to determine the most 'legitimate' voice or voices to lead the group*

Victims that applied as a group or were later asked to group themselves, are typically directed to appoint a representative who will serve as the main interlocutor between the Court and the grouped victims. A group representative or interlocutor has the role of conveying the views and concerns of the group or at times serving as a form of intermediary.

Numerous persons may claim to speak "on behalf of a group". Where victims' groups are already constituted, legitimacy concerns have sometimes arisen with regards to who the group purports to represent, and whether the person representing the group is a legitimate representative. Victims' groups may be dominated by political figures with certain issues treated as important only when they served political ends. Victims' poverty and illiteracy makes them susceptible to manipulation.

The Court has raised such types of concerns, noting "these possible collective options may create numerous practical and legal obstacles relating to the constitution of an association and the selection of representatives, which may require significant and time consuming engagement by the Registry and also judicial consideration. It was asserted that formation of an organized group may be difficult for victims in some circumstances, including for security reasons, and could cause local tensions. Where victims do not already identify themselves as part of a group, they may not readily have confidence in someone designated as 'representative of the community' to speak on their behalf. The Pre-Trial Chamber in *Gbagbo* rejected the idea that a representative of the group would be designated for each collective application."[185] The Court, in its Report also notes that even if a fully collective approach is adopted, "it may be necessary to give individual victims the right to 'opt out' of the association or community, for the purposes of participation in proceedings before the Court."[186]

### *2.2.4 Protection risks*

Collective participation implies that victims in a group know and trust each other, and have the possibility to discuss issues together. However, in many of the situations currently before the ICC,

[185] ICC Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 September 2012, para. 44.

[186] Ibid., para. 40.

victims may come from different, and often divided communities; the sharing of information for the purpose of collective action may prove impossible and also dangerous for certain victims.

## 2.3 A tiered application process, contingent on the type or extent of participation sought?

On 3 October 2012, in both the *Muthaura & Kenyatta* and *Ruto & Sang* cases, Trial Chamber V outlined a new procedure for and modalities of victim participation, citing the "large number of victims involved and also unprecedented security concerns and other difficulties that may be associated with the completion of a detailed application form."[187]

Trial Chamber V 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 in accordance with Rule 89 of the Rules of Procedure and Evidence. 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",[188] in order to facilitate communication with the Court and their contact with the common legal representative.

In many ways, though untested, this is a far more attractive and potentially effective efficiency measure than the resort to a partially or fully collective application process and/or collective participation procedure before the relevant Chamber, described above. In particular, the tiered application and participation process in principle, places emphasis on the substance of participation as opposed to the eligibility process, and avoids the scenario of complicated and protracted application processes for victims who will ultimately, in most circumstances, be represented through a common legal representative who most often is raising very generalised views and concerns.

In many ways, it would seem that the common legal representative would represent the latter category of victim participants akin to the way an *ad hoc* counsel for the defence would represent very generalised interests of the defence in accordance with Article 56(2)(d) of the ICC Statute, prior to the appointment of actual defence counsel.[189] In certain decisions regarding the role and appropriate scope of the ad hoc counsel of the defence, because of the limitations of the role, Chambers have ruled that certain arguments the ad hoc counsel sought to make exceeded the scope of the mandate, for instance in relation to attempts to challenge the jurisdiction of the Court and/or the admissibility of the situation.[190] In the Kenya cases, Trial Chamber V does not purport to circumscribe the nature of the views and concerns that "victim participants" may seek to put forward in this differentiated procedure, other than noting that the more detailed application process would be reserved for "victims who wish to present their views and concerns individually by appearing

[187] Decision on victims' representation and participation, *Muthaura & Kenyatta* (ICC-01/09-02/11-498) Trial Chamber V, 3 Oct. 2012, para. 23. Decision on victims' representation and participation, *Ruto & Sang* (ICC-01/09-02/11-460) Trial Chamber V, 3 Oct. 2012, para. 24.

[188] Ibid., *Muthaura & Kenyatta*, para. 24; *Ruto & Sang*, para. 25..

[189] See, e.g., Decision on the Prosecutor's Request for Measures under Art. 56, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 26 April 2005.

[190] Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005, Situation in the DRC (ICC-01-04-93), Pre-Trial Chamber I, 10 Nov. 2005, paras. 2- 3; *Conclusions aux fins d'exception d'incompétence et d'irrecevabilité*, Situation in Darfur (ICC-02-05-20), 9 Oct. 2006, para. 6.

directly before the Chamber".[191] It may be that victims do not wish to attend in person, but they may wish to raise, through their legal representative, very concrete issues relating to their victimisation specifically, or to some issue currently before the Court.

Arguably, any views and concerns that "victim participants" may seek to make would be eligible to be made, so long as these would be seen to comply with the test in Article 68(3) of the Statute. It would be expected, however, that certain of these views and concerns may go beyond very generalised submissions, and insofar as the "victim participants" are not seeking to make such submissions orally in person or through video-link, such submissions would be able to be made under the abbreviated procedure. This, however, is not precisely stated in the relevant decisions, and would ideally need to be clarified. It would be unfortunate and would counteract the rights of victims as set out in the Statute if the nature of what victims could contribute in written filings would be circumscribed by the differentiated procedure.

It is expected that this approach will alleviate the burden on victims, intermediaries and the Registry in relation to applications when victims do not seek to appear in person. However caution is warranted in drawing such conclusions prior to the full implementation of the decision as it cannot be presumed that a high number of victims would not in fact, wish to appear in person.

In addition, it would be important for the Registry to ensure that the common legal representative has the resources, capacity and support in the field to maintain constant communication with the "victim participants" to be represented. Bearing in mind the Court's commitment to provide access to, and victims' rights to receive, adequate and regular information about ongoing proceedings, the differentiated approach would not lessen the Court's obligations to ensure adequate transmission of information to victims, and regular communication between the common legal representative and clients, to ensure that whatever views and concerns are put forward, adequately and fully reflect the views of actual victims on the ground. To the contrary, communication with "victim participants" would need to be regular and detailed, particularly during trial, given that should an issue arise in which a particular "victim applicant" would wish to intervene in person, they would need to apply in good time. Furthermore, the selection of a few to appear in person before the Court may lead to tensions on the grounds, with the "non-selected" victims feeling left out. In that respect, outreach and a two way communication system with the common legal representative will be essential to enable victims to make an informed decision as to which form of participation they wish to exercise and to understand the limitations of the system.

As the Registry, the Parties and ultimately the relevant Chamber would have no prior information about the particular "victim participant", the details required by Rule 89 would need to be transmitted quickly before the particular is decided by the relevant Chamber. The Registry would need to request any missing information, the Registry would then prepare a report to Chambers, transmit the application (possibly in redacted form) to the parties, who would need time to respond and then the Chambers would decide. As this type of application would only be undertaken on an *ad hoc* basis in relation to a concrete matter during the course of proceedings, as opposed to as it now occurs - in a generalised way, typically at the start of any particular phase of proceedings, the consideration of the application may necessarily result in delays during the proceedings. Without further thought given to how it might work, such an abridged procedure may end up becoming more distracting for parties and ultimately for Chambers.

[191] Decision on victims' representation and participation, *Muthaura & Kenyatta* (ICC-01/09-02/11-498) Trial Chamber V, 3 Oct. 2012, para. 24. Decision on victims' representation and participation, *Ruto & Sang* (ICC-01/09-02/11-460) Trial Chamber V, 3 Oct. 2012, para. 25.

## 2.4 Moving forward

For the reasons mentioned, none of the proposals are easy solutions that would provide a quick fix to any of the efficiency challenges noted in relation to ongoing proceedings. The proposal with the most intrinsic limitations is the proposal for a fully collective approach, which would appear to significantly deviate from the current statutory framework and, in the context of conflict situations and diverging victim affiliations and identities, may further alienate certain victims from the Court and detract from the overall goal of victim participation. The proposal for a differentiated approach contingent on how victims wish to engage with the Court appears to have more promise, though as indicated, much further thought would need to given, and much further input from parties and other stakeholders sought, to determine the viability of such an approach. Sufficient budget would need to be set aside to enable common legal representatives to effectively carry out their work on the ground. Given that they will be raising views and concerns on behalf of potentially huge numbers of victims, for the legitimacy of this role, and the avoidance of any sense of tokenism, it is vital that they are provided with the capacity and resources to regularly consult with victim communities, including exile communities.

## 3. The modalities for victims to participate in proceedings: promoting meaningful participation

In order for a victim to be able to participate at a given phase of the proceedings, the Chamber will determine whether the victim's interests are particularly affected and whether participation in the manner requested is appropriate and consistent with the rights of the defence and a fair and expeditious trial. The Rome Statute does not limit participation to any particular stage of proceedings. The appropriateness of the timing of an intervention by one or more victims or by their legal representative has been determined by Chambers on a case by case basis, taking into consideration the rights of the accused, the need to ensure that the proceedings are effective and expeditious and the interests of the victims concerned.

### 3.1 Participation of victims prior to the authorisation of an investigation

In accordance with Article 15(3) of the Statute and Rule 50 of the Rules of Procedure and Evidence, the Prosecutor has the obligation to notify victims of alleged crimes committed in a particular place that he or she intends to request authorisation of the Pre-Trial Chamber to open an investigation into those crimes. Article 15(3) entitles victims to "make representations to the Pre-Trial Chamber." This procedure is limited in nature, and is not comparable to the procedure enabling victims to participate in proceedings pursuant to Article 68(3), which, although it also sets out many restrictions, is more open ended in terms of the forms and modalities of the participation that victims may ultimately enjoy.

Furthermore, Article 15(3) only applies to investigations which are initiated by the Prosecutor on his or her own motion (*proprio motu*). When an investigation is opened as a result of a Security Council referral or a referral from a State Party, Article 15(3) does not apply and victims' first opportunity to be heard is at the investigative stage described below. At the time of writing, the only *proprio motu* investigations commenced by the Prosecutor relate to the situations of Kenya and Cote d'Ivoire. The situations in Democratic Republic of the Congo, Central African Republic, Mali and Uganda were referred by the territorial states whereas the situations in Darfur, Sudan and Libya were referred by the Security Council of the United Nations.

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 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 issued a detailed decision on 10 December 2009, setting out a procedure to obtain the necessary views and concerns from victims in Kenya. It requested VPRS to "(1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto."[192] In response to this request, the VPRS and PIDS carried out consultations in Kenya with victim populations and reported back to the Pre-Trial Chamber with what was learnt about those victim populations, including their characteristics and current situations, such as the

[192] Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, *Kenya Situation* (ICC-01/09-4) Pre-Trial Chamber II, 10 Dec. 2009, para. 9.

difficult security context and their perceptions and fears about the process of collecting representations.[193]

The representations made by victims, both in their summarised form as collated and presented by the VPRS and in their individual forms as annexed to the VPRS report, appear to have been useful to the Pre-Trial Chamber in determining whether there is a "reasonable basis to proceed" and thereby to authorise the commencement of the investigation.[194] The Pre-Trial Chamber is mandated to examine all available information, including the Prosecution's request, the supporting material as well as the victims' representations. Pre-Trial Chamber II indicated that the victims' representations were of significant guidance to it, in its consideration of the impact of the crimes and the harm caused to victims and their families,[195] which is one of the prongs of the test it used to determine the gravity of the alleged crimes. Victims' representations were cited by Pre-Trial Chamber II in its consideration of whether the attacks were directed against a civilian population.[196] Victims' representations were also cited as authority for the Chamber in determining what areas of the country were affected by the violence,[197] and in its decision on the appropriate time range for the investigation.[198] Victims' representations were also cited by the Chamber when considering the lack of willingness of the Republic of Kenya to investigate the crimes.[199]

Similarly, in Cote D'Ivoire, following the Prosecutor's request for authorisation to commence an investigation, Pre-Trial Chamber III ordered the VPRS to provide a single consolidated report on the representations received by victims, with the actual representations in annex.[200] The Registry received more than 1,000 representations, providing an array of information which was duly summarised for presentation to the Chamber.[201] As was indicated by Judge Fernandez de Gurmendi, "these representations, considered as a whole, served to confirm the gravity of the situation, the widespread character of the alleged crimes and the fact that they appear to have been directed against civilians."[202] Victims' representations constituted part of the available information used by Pre-Trial Chamber III to conclude that there is a reasonable basis to believe that the attack carried out by pro-Gbagbo forces against the civilian population in Côte d'Ivoire was widespread and systematic,[203] that murders,[204] acts of rape[205] and enforced disappearance[206] were committed by pro-

[193] 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.

[194] See, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Kenya Situation* (ICC-01/09-19) Pre-Trial Chamber II, 31 March 2010.

[195] Ibid., paras. 62, 155, 196, 171.

[196] Id., paras 108-110.

[197] Id., para 177.

[198] Id., para. 204-205.

[199] Id., para 185.

[200] Order to the VPRS Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, *Cote D'Ivoire Situation* (ICC-02/11-6), Pre-Trial Chamber III, 6 July 2011.

[201] Report on Victims' Representations (Public redacted version with Annexes A, B, C, D, and E and confidential *ex parte* Annexes 1 to 1089 available only Registry), *Cote D'Ivoire Situation* (ICC-02/11-11-Red), Pre-Trial Chamber III, 30 Aug. 2011. See also, Addendum to the Report on Victims' Representations (Public Redacted Version) (ICC-02/11-13-Red.) Pre-Trial Chamber III, 9 Sept. 2011.

[202] Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15b of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire, *Cote d'Ivoire Situation* (ICC-02/11-15), Pre-Trial Chamber III, 3 Oct. 2011, para. 50.

[203] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire, *Cote D'Ivoire Situation* (ICC-02/11-14), Pre-Trial Chamber III, 3 Oct. 2011, paras. 61, 62.

Gbagbo forces from 28 November 2010 onwards. Victims' representations were part of the available information used by the Chamber to conclude that crimes including murders, rapes, imprisonment and deprivation of liberty, carried out by pro-Ouattara forces in Duékoué and other towns in the west of Côte d'Ivoire in March 2011, were carried out in a widespread and systematic manner.[207] Victims' representations, both individual and collective were also part of the available information which led the Chamber to conclude that there was an armed conflict not of an international character from 25 February 2011 until 6 May 2011,[208] and to confirm the absence of any indication that an investigation would not serve the interests of justice.[209] In several instances, Pre-Trial Chamber III's review of victims' representations and other supporting material led it to conclude that there was a reasonable basis to believe that certain crimes additional to those identified by the Prosecutor were committed.[210]

## 3.2 Participation during the investigation phase

Victims have been accorded the right to participate during the investigation phase. The first decision to recognise this right related to the DRC situation and held that victims would be granted a general right to participate in the investigation.[211] Pre-Trial Chamber I noted that "persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC."[212] The decision indicated that "victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively".[213] As it was a framework decision, the Chambers did not decide on any particular mode of participation, however it anticipated that victims could participate in a variety of investigation proceedings, such as to present their views and concerns and to file documents relating to the investigation, to participate in proceedings relating to the protection of victims and witnesses and the preservation of evidence and in other proceedings initiated by the Prosecution or defense and/or to seek other "specific measures."[214] Relatively similar approaches to victim participation during the investigation phase were taken by Chambers in relation to the Uganda[215] and Darfur (Sudan)[216] situations. The Appeals

[204] Ibid., paras. 66, 67; 133; 134.

[205] Id., paras. 71, 72; 147; 148.

[206] Id., paras. 81, 82.

[207] Id., paras. 104, 105, 107, 108, 110, 111, 113, 114, 156, 157, 160, 161, 164, 165.

[208] Id., paras. 126, 127.

[209] Id., para. 208.

[210] Id., paras. 92-116; 146; 147; 165; 169. However, note Judge Fernandez de Gurmendi's Separate and partially dissenting opinion (ICC-02/11-15) 3 Oct. 2011, paras. 35-45 and 46-52.

[211] Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS 5 and VPRS (public redacted version), *DRC Situation* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 Jan. 2006.

[212] Ibid., para. 71.

[213] Ibid.

[214] Id., paras. 71-75.

[215] Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06 (Public Redacted Version) *Situation in Uganda* (ICC-02/04-101) Pre-Trial Chamber II, 10 Aug. 2007.

[216] Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Darfur Situation (ICC-02105-110), Pre-Trial Chamber I, 3 Dec. 2007.

Chamber eventually reversed this trend and curtailed victim participation during the investigation,[217] noting that participation can take place only within the context of *judicial* proceedings, and that the investigation phase as a whole is not a judicial proceeding, though there may be discrete opportunities for participation within the investigation phase to the extent that victims' personal interests are affected by the issues arising for resolution. Later decisions taken by Pre-Trial Chamber II in the Kenya and Central African Republic situations further circumscribe victim participation, emphasising that participation would be contingent on instances when judicial determination is 'required'.[218]

To date, victims have not significantly contributed during the investigative phase. Their ability to express views and concerns about key issues affecting their interests has been minimal. In the DRC situation, most interventions by victims during the investigation phase concerned the methods of handling the applications, including issues of anonymity. In the CAR, Kenya and Ivory Coast situations, at the time of writing there were no public records of victims requesting to participate in the investigation phase, with the exception of one applicant's request to respond to an application for appearance as *amicus curiae*.[219] Part of the reason for the dearth of requests to participate in actual proceedings relates to the de-prioritisation of 'situation' applications in the queue of pending applications piled up at the VPRS and the resulting, relatively low, number of confirmed situation participants. Another reason may relate to the limited disclosure that participating victims obtain – they are only provided access to public documents, which may hinder their ability to understand with any precision, the nature of the investigation, in order to provide any useful views thereon. However, the Chambers' rulings on victim participation during the situation phase have also made clear that victims will be unlikely to impact on what arguably impacts them the most – the nature and scope of the Prosecutor's investigation, and this may also have impacted on victims' interest to engage in such proceedings.

Victims are specifically allowed to express their views and concerns when or if the Prosecutor decides not to proceed with a particular investigation or prosecution. However, this scenario has never transpired in practice, as the Prosecutor has refrained from taking such a formal step.[220] The former Prosecutor decided, in relation to the DRC Situation, to temporarily postpone certain lines of investigation, instead of permanently ending investigations, though efforts of certain victims to express their views and concerns proved futile.[221] He initially indicated that he was continuing to investigate other potential crimes, and that the OTP "will, if and when the collection of evidence meets the threshold of Article 58(1)(a) of the Rome Statute (Statute) in relation to the further allegations of crimes currently under investigation, seek to amend the REDACTED in order to add

[217] 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 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 Dec. 2007, *DRC Situation* (ICC-01/04-556), Appeals Chamber, 19 Dec. 2008; Identical decision in 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 3 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 Dec. 2007, *Darfur Situation* (ICC-02/05-177) Appeals Chamber, 2 Feb. 2009.

[218] Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Kenya Situation* (ICC-01/09-24), Pre-Trial Chamber II, 3 Nov. 2010, paras. 10, 12; Decision on Victims' Participation in Proceedings Relating to the Situation in the Central African Republic, *Situation in CAR* (ICC-01/05-31), Single Judge Hans-Peter Kaul, Pre-Trial Chamber II, 11 Nov. 2010, adopting the approach of the Kenya decision *in toto*.

[219] Victim's Response to the Application of Professors Max Hilaire and William A. Cohn to Appear as Amici Curiae, *Situation in Kenya* (ICC-01/09-11), Pre-Trial Chamber II, 20 Jan. 2010.

[220] See, G. Bitti, "Les victimes devant la Cour pénale Internationale," Revue de science criminelle et de droit pénal comparé, Avril/Juin 2011, n. 2, p. 298.

[221] Discussed in C. Chung, "Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?" Northwestern Journal of International Human Rights Vol. 6, Issue 3 (Spring 2008) pp. 510-511. See, also, Bitti, ibid., pp. 320-322.

substantial new charges to the ones already charged".[222] However, at the end of June 2006, the Office of the Prosecutor informed the Pre-Trial Chamber that it had suspended its investigation into other crimes potentially committed by Mr. Lubanga, citing security concerns.[223] In this document, the Prosecutor indicated that his decision to suspend the investigation "does not exclude that he may continue his investigation into crimes allegedly committed by Thomas Lubanga Dyilo after the close of the present proceedings. In the event that these additional investigations establish reasonable grounds to believe that Thomas Lubanga Dyilo is responsible for additional crimes, the Prosecutor will apply to the Pre-Trial Chamber for a new warrant of arrest against … [him] or will submit a further document containing the charges for confirmation by the Pre-Trial Chamber respectively."[224] No new charges have subsequently been brought to the attention of the Pre-Trial Chamber, and now that the proceedings have ended, it is doubtful that the Prosecutor would apply for a new warrant of arrest.

A request made by a legal representative for victims to make submissions on the Prosecutor's decision to suspend the investigation was rejected on the basis that the Prosecutor had not taken a decision not to investigate or not to prosecute, under paragraph l(c) or 2(c) of article 53 of the Statute, in relation to the Situation in the DRC.[225] An application by the Women's Initiatives for Gender Justice to make submissions on this point was equally unsuccessful. They sought to intervene in the Pre-Trial phase of the *Lubanga* case,[226] however this was denied and they were granted leave to make those submissions in the broader 'situation' of the Democratic Republic of the Congo investigation. They noted that:

> The Statute does not expressly set out the checks and balances to deal with the situation where the Prosecutor decides not to bring any proceedings against a particular person, or not to include certain crimes in the charges brought against a particular person. However, this cannot mean that the exercise of the Prosecutor's discretion in such circumstances is absolute, unfettered and unreviewable, no matter how unreasonable or arbitrary it may be. Therefore the Women's Initiatives proposes to argue that the Pre-Trial Chamber has an inherent general duty to satisfy itself that the Prosecutor is exercising his or her discretion correctly, even when deciding not to prosecute a particular person, or not to prosecute a person for particular crimes. The Pre-Trial Chamber cannot usurp the Prosecutor's discretion, but it has a duty to intervene if the Prosecutor, in exercising his or her discretion, has for instance failed to take into account relevant matters, or has taken into account irrelevant matters, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.[227]

This argument, which should have been considered substantively by the Pre-Trial Chamber in the *Lubanga* case, was instead virtually ignored in the situation proceedings. The OTP opposed the filing

[222] Prosecutor's Information on Further Investigation, *Lubanga case* (ICC-01/04-01/06-170) 28 June 2006, Office of the Prosecutor, para. 2.

[223] Ibid., paras. 7, 9.

[224] Id., para. 10.

[225] See, Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding 'Prosecutor's Information on further Investigation', *Situation in the DRC* (ICC-01/04-399), 26 Sept. 2007.

[226] Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (With Confidential Annex 2), *Lubanga* (ICC-01/04-01/06) Pre-Trial Chamber, 7 Sept. 2006; Decision on Request pursuant to Rule 103(1) of the Statute, *Lubanga* (ICC-01/04-01/06) Pre-Trial Chamber, 26 Sept. 2006.

[227] Women's Initiatives for Gender Justice, Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae with confidential annex 2, *Situation in the DRC* (ICC-01/04-313), Pre-Trial Chamber, 13 Nov. 2006, para. 13.

in the 'situation' proceedings on the basis that the submissions were "irrelevant to any live issue before the Chamber and therefore hypothetical" and because the Women's Initiatives was "asking the Chamber to exercise powers that are more extensive than those envisaged by the Rome Statute".[228] In August 2007, more than ten months after the Women's Initiatives re-filed their request, the Pre-Trial Chamber rejected it on the basis that "the investigations in the Situation in the DRC are ongoing and the Prosecutor has not taken any decision not to investigate or prosecute".[229] Not only did the Court miss an important opportunity to consider whether and to what extent it may oversee the exercise of the Prosecutor's discretion, it basically provided an important loophole for the Prosecutor: never say that you are closing an investigation, simply suspend it (even indefinitely), and no one will have the ability to question your judgment.

## 3.3 Participation in the Pre-Trial Phase of a Case

Participation in the Pre-Trial phase tends to revolve around the confirmation of charges hearing. The jurisprudence makes clear that the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to "stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings."[230] Hence, the relevant Chambers will consider, at one time, whether particular victims may participate in the pre-trial stage of a case. In general, the interests of victims are understood to be affected at this stage of the proceedings since it involves the determination of whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution's Document containing the charges.[231] Only victims that can show a sufficient connection to the crimes included in the Prosecution's Document containing the charges may be eligible to participate.

During pre-trial, victims do not have full access to the Prosecution's case and cannot tender new evidence.[232] Participation is thus confined to the consideration of the evidence on which the prosecution and the defence rely on at the hearing.[233] The Single Judge in the *Muthaura* case stressed that there was no general right for participating victims to access confidential *inter partes* documents, and that the question whether or not specific rights were to be granted to victims ought to be determined on a case by case basis, upon a specific and motivated request by their legal representative.[234] In the *Gbagbo case*, OPCV, representing all victims participating in the

[228] Prosecution's Response to Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Situation in the Democratic Republic of Congo, *Situation in the DRC* (ICC-01/04-316) 5 Dec. 2006, para. 1.

[229] Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, *Situation in the DRC* (ICC-01/04-373), 17 Aug. 2007, para. 5.

[230] Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, *Situation in Darfur, Sudan* (ICC-02/05-121), Pre Trial Chamber I, 6 Feb. 2008, p. 6.

[231] *Ibid.*

[232] Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga & Ngudjolo* (ICC-01/04-01/07-474), Pre-Trial Chamber I, 13 May 2008; See also Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, *Katanga & Ngudjolo* (ICC-01/04-01/07-428-Corr), Pre-Trial Chamber I, 25 April 2008, para 6, in which the Chamber found that the "*confirmation hearing has a limited scope and by no means can it be seen as an end in itself*" and the Prosecutor should carefully analyse the evidence on which it intends to rely so as to limit it to "*the very core evidence of the case*".

[233] Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga & Ngudjolo* (ICC-01/04-01/07-474), Pre-Trial Chamber I, 13 May 2008, para. 17.

confirmation of charges hearing, was granted access to the Prosecutor's Document containing the charges, list of evidence and Element-Based Chart, though only after first obtaining the agreement of the Prosecution.[235]

Anonymous victims have been granted access to public documents only, though the party or participants can decide to notify them of confidential documents if they so wish. With respect to confidential and/or *ex parte* documents and transcripts, the Chambers have mostly determined on a case by case basis and upon receipt of a specific and motivated request whether victims' legal representatives will be granted access to such documents.[236] Legal representatives of anonymous victims are able to be present at public status conferences and confirmation hearings only, however, attendance at *in camera* or *ex parte* hearings may be authorised by the Pre-Trial Chamber on a case by case basis.[237]

Whether victims' legal representatives may put questions to witnesses, first arose prior to the confirmation of charges hearing in *Lubanga*. Since the victims were anonymous, they were initially not allowed to question witnesses, add any point of fact or any evidence. However, their lawyer was allowed to request leave to intervene on a case by case basis.[238] In the end, the lawyer did successfully request leave to put one question to the sole witness called by the prosecution.[239]

Outside of the confirmation of charges hearing, victims have submitted observations on a number of issues during the pre-trial phase. In addition to questions concerning their ability to participate in proceedings, such filings have related to a range of issues, including:

- Challenge to the jurisdiction of the Court;[240]
- Interim release;[241]
- Challenges to admissibility;[242]
- The location of the confirmation of charges hearing.[243]

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[234] Decision on the Request for Access to Confidential inter Partes Material, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-326), Pre-Trial Chamber II, 14 Sept. 2011.

[235] Decision on OPCV requests for access to confidential documents in the record of the case, *Gbagbo* (ICC-02/11-01/11-166), Pre-Trial Chamber I, 27 June 2012.

[236] Decision on the 138 applications for victims' participation in the proceedings, *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 Aug.2011, para. 42.

[237] In *Bemba*, the Single Judge made no differentiation between anonymous and non-anonymous victims at the pre-trial phase, Fourth Decision on Victims' Participation*, Bemba (*ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 Dec. 2008, para. 101.

[238] 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), Pre-Trial Chamber I, 22 Sept. 2006, pp. 7-8.

[239] Transcript of 21 Nov. 2006, *Lubanga* (ICC-01/04-01/06-T-39-ENG), Pre-Trial Chamber I, 21 Nov. 2006.

[240] Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006, *Lubanga* (ICC-01/04-01/06-349), Pre-Trial Chamber I, 24 Aug. 2006; Observations on behalf of victims on the Defence Challenge to the Jurisdiction of the Court, *Mbarushimana* (ICC-01/04-01/10-417), Pre-Trial Chamber I, 12 Sept. 2011.

[241] Observations of victims a/001/06, 1/002/06 and a/003/06, in respect of the application for release filed by the Defence, *Lubanga* (ICC-01/04-01/06-530), Pre-Trial Chamber I, 9 Oct. 2006.

[242] In the *Ruto* case, victims, through the OPCV, were invited to participate in the proceedings on the admissibility challenge by the Government of the Republic of Kenya. See, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-101), Pre-Trial Chamber II, 30 May 2011.

Opening and closing statements made by victims' legal representatives during the confirmation of charges hearing have been important for victims to express views and concerns in relation to the charges, however the time allotted to victims' legal representatives has become progressively shortened. In the confirmation of charges hearing in the *Lubanga* case, legal representatives were allowed to make opening and closing statements of 45 minutes each, enabling them to address points of law and modes of liability with which the Prosecution had charged the accused. In the *Katanga* case, there were four teams of legal representatives for non-anonymous victims and one team representing an anonymous victim. The two hours allocated for the opening and closing statements, respectively, was equally divided among the four teams. In *Mbarushimana* the two legal representatives representing 93 and 37 victims respectively, shared 30 minutes for opening remarks and 40 minutes for closing remarks.[244] In *Bemba*, that time was further reduced to 20 minutes for opening statements and 40 minutes for closing statements, equally divided between the legal representative of 34 victims and OPCV representing 20 victims.[245] In *Abu Garda*, the four legal representatives representing 74 victims were given 60 minutes for opening statements, 30 minutes to question the three witnesses respectively and one hour for closing statements. [246] In *Banda and Jerbo*, where both accused waived their right to attend, the Chambers allowed the five legal representatives to speak, yet the time was limited to 10 minutes per statement, which rendered the statements somewhat superficial. In the *Ruto* case, the common representative of 327 victims was given 30 minutes to open and close respectively.[247] The same applied to the lawyer representing 233 victims in the *Muthaura* case[248] and will also be applied in the *Gbagbo case*.[249]

In the *Katanga* case, the three teams representing non-anonymous victims shared one hour to address matters related to jurisdiction, admissibility or other procedural issues and seven and a half hours to discuss the prosecution's evidence.

### *Victims' ability to present views and concerns on the nature and scope of the charges*

One of the main interests of victims in the Pre-Trial phase of a case is the nature and scope of the charges brought by the Prosecutor. As already indicated in the previous section, victims' ability to comment on the scope of the investigation in the situation phase has been limited and in practice, ineffective. Victims' ability to comment on such issues during the pre-trial phase of a case has been equally limited. The first reason for this is that the only victims that have been authorised to participate in the pre-trial phase of a case are those victims whose harm suffered is determined to be

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[243] In the *Ruto* Case, the Chamber decided that victims should submit their observations through the OPCV. See, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-106), Pre-Trial Chamber II, 3 June 2011.

[244] Transcript of Confirmation of Charges Hearing, *Mbarushimana* (ICC-01/04-01/10-T-6-Red2-ENG), Pre-Trial Chamber I, 16 Sept. 2011; Transcript of Confirmation of Charges Hearing, *Mbarushimana* (ICC-01/04-01/10-T-9-ENG), Pre-Trial Chamber I, 21 Sept. 2011.

[245] Schedule of the Confirmation Hearing in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08-336-Anx), Pre-Trial Chamber III, 29 Dec. 2008.

[246] Decision Amending the Schedule for the Confirmation Hearing – Annex 1, *Abu Garda* (ICC-02/05-02/09-182-Anx1), Pre-Trial Chamber I, 29 March 2011; Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, *Abu Garda* (ICC-02/05-02/09-121), Pre-Trial Chamber I, 25 Sept. 2009; Transcript of Confirmation of Charges Hearing, *Abu Garda* (ICC-02/05-02/09- T-12-Red-ENG ), Pre-Trial Chamber I, 19 Oct. 2009.

[247] Decision on the Schedule for the Confirmation of Charges Hearing – Annex 1, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-294-Anx), Pre-Trial Chamber II, 25 Aug. 2011.

[248] Decision on the Schedule for the Confirmation of Charges Hearing – Annex 1, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-321-Anx), Pre-Trial Chamber II, 13 Sept. 2011.

[249] Annex to Decision on the VPRS request for an extension of time to report on victims' representations pursuant to Regulation 35 of the Regulations of the Court, *Situation in the Ivory Coast* (ICC-02/11-9), Pre-Trial Chamber III, 28 July 2011.

sufficiently connected to the charges brought by the Prosecutor. Thus, in most instances, such victims will invariably have less direct interest in seeing a widening or re-direction of the charges, given that what they have suffered is already covered by the charges. Efforts by victims who fall outside the scope of the charges to make submissions to the Pre-Trial Chamber on the scope of the charges have failed, on the circular reasoning that they do not have a sufficient connection with the existing charges to be granted the authorisation to participate in proceedings.

Nonetheless, there have been instances in which victims who have been recognised by the Pre-Trial Chamber as having the ability to participate in the Pre-Trial phase of a case, have sought to make submissions on the scope of the charges. In the *Ruto* case, the Prosecutor, in his Document Containing the Charges, listed the crimes against humanity of murder, deportation or forcible transfer of population and persecution.[250] The common legal representative for victims called on the Pre-Trial Chamber to exercise its power under Article 61(7)(c)(ii) of the Statute to request the Prosecutor to consider broadening the charges to include acts of destruction of property, looting and infliction of physical injuries.[251] She argued that almost all of the 327 victims she represented experienced these crimes, and that there seemed to be no issue that the crimes had occurred. In its consideration of her request, the Pre-Trial Chamber did not make a determination as to whether it was possible or indeed desirable for it to make such a request to the Prosecutor. It indicated that, under the Amended document containing the charges, "the acts of burning, looting and destructing property were the 'coercive acts' … through which forced displacement actually occurred" and thus "already encompassed in counts 5 and 6, contrary to what the Legal Representative of victims argues". [252] The Pre-Trial Chamber's response reflects a narrow view of cumulative charging whereby only distinct crimes may justify a cumulative charging approach. The only ICC statutory criterion for the Pre-Trial Chamber to apply at the confirmation stage is the sufficiency of evidence.[253] Moreover, the Chamber considered that the Common Legal Representative's request would imply requesting the Prosecutor to add a new charge, rather than to amend the existing ones – an action that the Chamber indicated was not permitted under the Statute.[254] Yet, this is an overly narrow reading of Article 61(7)(c)(ii). The Article refers to "amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court". It is not confined to an amendment that narrows or lessens the charges. It simply refers to an amendment, which could, in certain circumstances, mean an amendment to widen the charges and this would necessarily result in a new charge.

## 3.4 Modalities for participation at trial

During the trial, participation is decided on the basis of the evidence or issue under consideration at any particular point in time.[255] Involvement in, or presence at, a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident, are

[250] Prosecution's Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), *Ruto, Kosgey and Sang* (ICC-01/09-01/11-242), 1 Aug. 2011.

[251] Final written observations of the Victims' Representative in relation to the confirmation of charges hearing, *Ruto, Kosgey and Sang* (ICC-01/09-01/11-344) 30 Sept. 2011.

[252] Decision on the Confirmation of Charges Pursuant to Article 61(7)(A) and (B) of The Rome Statute, *Ruto, Kosgey and Sang* (ICC-01/09-01/11-373) 23 Jan. 2012, paras. 277 and 278.

[253] Article 61(7) of the Rome Statute.

[254] Decision on the Confirmation of Charges, *Ruto*, para. 278.

[255] Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 Jan. 2008, para. 101.

examples of the factors that the Chamber will be looking for, to grant participation at any particular stage in the trial.[256]

In *Katanga* it was decided that it was sufficient to establish "personal interest" at the beginning of trial. Victims were recognised as having a legitimate personal interest to help the Chamber to determine the truth about what exactly happened, to provide their knowledge of the context in which crimes were understood to have been committed or by drawing attention to relevant information, including testifying in person where the Chamber may deem it appropriate.[257]

During trial, victims' legal representatives are entitled to attend and participate in all proceedings in accordance with the terms of the ruling of the Chamber[258] unless, in the particular circumstances of the case, the Chamber is of the view that an intervention should be confined to written observations or submissions. Under Rule 89(1) of the Rules, the possibility for victims to make opening and closing statements is expressly recognised.[259] The Prosecutor and the Defence have the opportunity to respond to any oral or written observation by victims' legal representatives. Victims may also participate in interlocutory appeals,[260] so long as they meet the requisite conditions. However, there is no right for victims to appeal decisions other than orders for reparation. In practice, this has meant that victims cannot seek to review decisions in relation to motions they have themselves filed and are dependent on the parties' willingness to seek review of such rulings; an unlikely occurrence if the issue at stake is only relevant to victims' interests. For example, when the Chambers 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.[261]

It has been recognised that participating victims should have access to the full case index. Victims should be provided with a public version of the prosecution's "summary of presentation of evidence" and upon a specific request, subject to a demonstration of relevance to their personal interests, material in its possession and public evidence listed in the annexes to the summary.[262]

Chambers have recognised the link between examining witnesses and their mandate to determine the truth, supporting the "presumption in favour of a neutral approach to questioning on behalf of victims".[263] A Chamber may allow a victims' representative to "press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming".[264] Victims' legal representatives have

[256] *Ibid*, para. 96.

[257] Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 Jan. 2010, paras. 60-61.

[258] Rule 91(2) of the Rules of Procedure and Evidence.

[259] Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 Jan. 2010.

[260] 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", *Lubanga* ( ICC-01/04-01/06-1335), Appeals Chamber, 16 May 2008.

[261] 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", *Ruto, Kosgey & Sang* (ICC-01/09-01/11-330), Pre-Trial Chamber II, 9 Sept. 2011.

[262]Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008.,para. 138.

[263] Decision on the Manner of Questioning Witness by the Legal Representatives of Victims, *Lubanga* ( ICC-01/04-01/06-2127), Trial Chamber I, 16 Sept. 2009, para. 28. See also, Decision on Directions for the Conduct of the Proceedings, *Bemba* (ICC-01/05-01/08-1023), Trial Chamber III, 19 Nov. 2010, para. 15.

[264] Decision on the Manner of Questioning Witness by the Legal Representatives of Victims, *Lubanga* ( ICC-01/04-01/06-2127), Trial Chamber I, 16 Sept. 2009, para. 28.

questioned all types of witnesses, including defence witnesses,[265] expert witnesses,[266] and insider witnesses.[267] In principle, when seeking to examine witnesses, victims' legal representatives must make a written application seven days before the witness' first appearance[268] which must be notified to the parties. Even if such an application is granted, the relevant Chambers may nonetheless restrict questioning if the proposed questions have been sufficiently covered or if it is determined that the authorisation would otherwise violate the right of the accused, the interests of the witness and the need for a fair, impartial and expeditious trial. Alternatively, the Chamber may choose to put the question to the witness itself. If the legal representative wishes to ask un-anticipated questions during the examination, the questions must first be submitted to the Chamber, and the request would only be granted if it is determined to be necessary for the ascertainment of the truth or for clarification of the witness testimony.[269]

Victims may also express their "views and concerns" by challenging the admissibility of evidence[270] or by submitting evidence themselves[271] - both oral and documentary evidence.[272] Even if victims are not parties as such, "their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background."[273] While, in principle, victims' legal representatives will not be able to call witnesses other than the victims they represent, if they identify other victims or persons whose testimony they think should be considered, they may take the initiative to bring this to the attention of the Chamber, which may decide to call them as witnesses.[274]

The Court has recognised that participating victims can also tender oral evidence in their own right, independently from the Prosecution or Defence. Victims who participate in this way become witnesses of the Court, through the Chamber's prerogative under Article 69(3) to "request the submission of all evidence that it considers necessary for the determination of the truth." In deciding

[265] Decision on the Defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, *Lubanga* ( ICC-01/04-01/06-2340), Trial Chamber I, 11 March 2010.

[266] Transcript of 7 January 2010, *Lubanga* ( ICC-01/04-01/06-T-223-ENG), Trial Chamber I, 7 Jan. 2010, p. 25, line 17 - p. 31, line 11; See, Report for the ICC: Document, *Lubanga* ( ICC-01/04-01/06-1655-Anx), Trial Chamber I, 20 Feb. 2009.

[267] Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, *Bemba (*ICC-01/05-01/08-1729), Trial Chamber III, 9 Sept. 2011, para. 15.

[268] Decision on Directions for the Conduct of the Proceedings, *Bemba (*ICC-01/05-01/08-1023), Trial Chamber III, 19 Nov. 2010, para. 18.

[269] *Ibid*, para. 20: "The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused."

[270]Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* ( ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 101; Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG ), Trial Chamber II, 22 January 2010, para. 104.

[271]Transcript of hearing on 17 June 2009, *Lubanga* ( ICC-01/04-01/06-T-193-ENG), Trial Chamber I, 17 June 2009, p.8, lines 15-25; Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008.

[272] Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG ), Trial Chamber II, 22 Jan. 2010, para. 101.

[273] Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga & Ngudjolo* (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para. 82.

[274] Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga & Ngudjolo* (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para. 45.

whether to grant a victim leave to testify, the relevant Chambers will require: (i) discrete applications; (ii) with notice given to the parties; (iii) a demonstration of personal interests that are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection orders; (v) a determination of appropriateness; and (vi) consistency with the rights of the accused and a fair trial.[275] In the *Katanga* and *Bemba* cases, additional criteria needed to be satisfied, namely that the victims' legal representative explain how testimony would help the Chamber understand the facts, and provide a signed summary of the testimony, which the parties would have seven days to respond to.[276] The Chambers required victims' legal representatives to explain *inter alia* the relevance of the testimony to the assessment of the charges and whether the testimony would be typical of experiences of a larger number of victims, or unique to the concerned victim. [277]

In *Lubanga*, the procedures relating to individuals who participated both as victims and as witnesses, so called "dual status victims", were considered carefully and subject to several reports and status conferences, and in general, the modalities for such victims has been determined on a case by case basis.[278] The Chamber eventually authorised three participating victims to give evidence under oath after the conclusion of the Prosecution's case.[279] In *Katanga*, the Chamber authorised four non-anonymous victims to testify.[280] In *Bemba*, the two common legal representatives sought to call 17 victims to appear before the Chamber. However, considering the impact this would have on the rights of the accused and a fair and impartial trial, the legal representatives were instructed to narrow the list to no more than eight individuals,[281] and ultimately, two victims were allowed to testify in the trial.[282]

Victims may also present their views and concerns in person, rather than through their legal representative. Chambers have noted that to do so is not the same as giving evidence; it is "in essence, the equivalent of presenting submissions,... [and] will not form part of the trial evidence".[283] In *Bemba,* for the first time, three victims were authorised to present their views and concerns only, and via video link.[284] As their presentation does not form part of the evidence, victims' statements were not given under oath, and victims were not questioned by either party. The Chamber asked that

[275] Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, paras. 4 and 104.

[276] Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga & Ngudjolo* (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para. 20.

[277] Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba (*ICC-01/05-01/08-2138), Trial Chamber III, 22 Feb. 2012, para 23-24; Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga & Ngudjolo* (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para. 30.

[278] Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 Jan. 2008, para. 134.

[279] Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, *Lubanga* (ICC-01/04-01/06-2032), Trial Chamber I, 9 July 2009.

[280] Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, *Katanga & Ngudjolo* (ICC-01/04-01/07-2517), Trial Chamber II, 9 Nov. 2010. In the end only two testified.

[281] Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba (*ICC-01/05-01/08-2027), Trial Chamber III, 21 Dec. 2011, paras. 9-12.

[282] Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, *Bemba (*ICC-01/05-01/08-2138), Trial Chamber III, 22 Feb. 2012.

[283] Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, *Lubanga* ( ICC-01/04-01/06-2032), Trial Chamber I, 9 July 2009, para. 25.

[284] Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08, *Bemba (*ICC-01/05-01/08-2220), Trial Chamber III, 24 May 2012.

they focus on the harm suffered and on the consequences of the alleged conduct for their life.[285] Trial Chamber V, in both Kenya related cases, recently endorsed this possibility and specifically spelled out that victims may be able to appear in person to present their views and concerns during the trial proceedings "including during opening and closing hearings".[286]

Others issues that victims have made submissions on concern:

- The legal characterisation of the facts described in charges against Lubanga;[287]
- Observations on Katanga[288] and Ngudjolo Chui's[289] detention;
- The conditional interim release of Bemba;[290]
- Responding to the defence's admissibility challenge in *Bemba.*[291]

## 3.5 Modalities for participation relating to reparations

After a conviction, the competent Chamber has the ability to afford reparations to, or in respect of victims, including restitution, compensation and rehabilitation.[292] The Chamber can make the award directly to victims, or where appropriate, through the Trust Fund for Victims. A new 'combined' participation and reparation application form was devised by the Registry and approved by the Presidency in 2010, replacing the lengthy first set of Standard Application Forms.

In accordance with Regulation 56 of the Regulations of the Court, the Trial Chamber may hear witnesses and examine evidence for the purposes of a decision on reparations at the same time as for the purposes of trial. Jurisprudence from the *Lubanga* trial and confirmed in the *Bemba* trial has developed this principle in relation to a) hearing evidence relating to reparation in general, b) specific

[285] Hearing transcripts of 25 June 2012, *Bemba* ( ICC-01/05-01/08-T-227) , Trial Chamber III, 25 June 2012; Hearing transcripts of 26 June, *Bemba* (ICC-01/05-01/08-T-228), Trial Chamber III, 26 June 2012.

[286] Decision on victims' representation and participation, *Muthaura & Kenyatta* (ICC-01/09-02/11-498), Trial Chamber V, 3 October 2012, and Decision on victims' representation and participation, *Ruto & Sang* (ICC-01/09-01/11-460), Trial Chamber V, 3 October 2012.

[287] Demande conjointe des représentants Légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, *Lubanga* ( ICC-01/04-01/06-1891), Trial Chamber I, 22 May 2009.

[288] Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur la détention de German Katanga (Règle 118-2), *Katanga & Ngudjolo* (ICC-01/04-01/07-955), Trial Chamber II, 12 March 2009; Observations des victimes a/0333/07 et a/110/08 sur la détention de Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve), *Katanga & Ngudjolo* (ICC-01/04-01/07-951), Trial Chamber II, 12 March 2009; Observations des représentants légaux de victimes sur la détention préventive de M. Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve), *Katanga & Ngudjolo* (ICC-01/04-01/07-950), Trial Chamber II, 12 March 2009; Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2), *Katanga & Ngudjolo* (ICC-01/04-01/07-1252), Trial Chamber II, 29 June 2009.

[289] Observations des représentants légaux de victimes sur la détention préventive de M. Mathieu Ngudjolo Chui (Règle 118-2), *Katanga & Ngudjolo* (ICC-01/04-01/07-924), Trial Chamber II, 24 Feb. 2009; Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur la détention de Mathieu Ngudjolo Chui (Règle 118-2), *Katanga & Ngudjolo* (ICC-01/04-01/07-923), Trial Chamber II, 24 Feb. 2009; Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Règle 118-2), *Katanga & Ngudjolo* (ICC-01/04-01/07-1192), Trial Chamber II, 5 June 2009.

[290] Decision on the Request of the Prosecutor for Suspensive Effect , *Bemba* (ICC-01/05-01/08-499), Appeals Chamber, 3 Sept. 2009.

[291] Observations de 18 Représentante légale des victimes a la requête de la Défense en vue de contester la recevabilité de l'affaire conformément aux articles 17 et 19(2) (a) du Statut de Rome, *Bemba (*ICC-01/05-01/08-740), Trial Chamber III, 29 March 2010; Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted, *Bemba (*ICC-01/05-01/08-742), Trial Chamber III, 1 April 2010.

[292] Article 75 of the Rome Statute.

questioning of witnesses in relation to reparation and c) testimony given by participating victims in relation to reparation. Trial Chamber I in the *Lubanga* case set out its approach as follows:

> In the judgment of the Chamber, Regulation 56 of the Regulations does not, […] undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.
>
> In discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.
>
> … The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.[293]

This approach has been endorsed by Trial Chamber III in the *Bemba* trial.[294] In relation to questioning of witnesses for reparations purposes, the Trial Chamber in *Lubanga* also held that, as provided for under Rule 140(2)b of the Rules, parties could question witnesses on "other relevant matters" which includes *inter alia*, "… reparation issues (properties, assets and harm suffered)."[295] As for victims' personal testimony in relation to reparation, a small number of victims have requested and have been granted leave to testify in person in a number of the trials.[296] Enabling victims to present evidence in person has mainly been framed in the context of the Chamber's right under article 69 "to request the submission of all evidence that it considers necessary for the determination of the truth." However, when granting the request by three victims to testify, Trial Chamber I in the *Lubanga* case indicated that "this evidence may assist the Chamber in its consideration of

[293] Decision on victims' participation, *Lubanga* (ICC-01/04-01/06-1119) 18 Jan. 2008, paras. 120-122.

[294] Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, Bemba (ICC-01/05-01/08-807-Corr) 12 July 2010, para 28.

[295] Decision on various issues related to witnesses' testimony during trial, Lubanga, (ICC-01/04-01/06-1140) 29 Jan. 2008, para. 32.

[296] See, e.g., Rachel Irwin, *Latest News : Three victims to testify* http://www.lubangatrial.org/2009/08/07/latest-news-three-victims-totestify/, 7 Aug. 2009, Lubanga Trial Blog, Open Society Institute; Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, *Lubanga* (ICC-01/04-01/07-2517) 9 Nov. 2010; Decision on 653 applications by victims to participate in the proceedings, *Katanga & Ngudjolo* (ICC-01/05-01/08-1091) 23 Dec. 2010.

reparations for certain victims, if these arise later in the proceedings."[297] Similarly, in the *Katanga and Ngudjolo* case, the Chamber stated that: "the appearance of Victims […] was of a nature to contribute in a significant and effective manner to the search for the truth and to the process of establishing the facts." It furthermore underlined that "victims' testimonies could later on assist the Chamber should it have to proceed with an assessment of all the harms suffered by victims."[298]

Before the Chamber can make an order for reparations, it must consider representations to be made by the convicted person, the victims and other interested persons or States.[299] Reparations proceedings can be triggered either by requests filed by victims, or on the Court's own motion.[300] In terms of timing, the relevant rules do not specify where such proceedings might constitute a separate 'reparations phase' after conviction, to take place as part of the trial in the context of hearings on sentencing.[301] At the time of writing, the only practice available is the 7 August 2012 decision in the *Lubanga* case establishing the principles upon which reparations would be considered in that particular case.[302] In advance of the decision, the Trial Chamber solicited input from the parties, participating victims and others on the modalities for reparation and these were extensively cited in the 7 August decision. Whilst it was only intended to be a decision establishing the process, it already determined that reparations should, in the particular case, be awarded through the Trust Fund for Victims, and transferred all outreach and consultation to the Trust Fund in furtherance of this goal. Thus, no reparations proceedings as such will be held by the Court to determine its approach to reparations, though the Court will have occasion to confirm the implementation plan developed by the Trust Fund in due course.

## 3.6 The impact of decisions relating to victims' legal representation on victims' effective participation

One of the greatest challenges relating to victims' effective participation in the different phases of proceedings has and continues to relate to the policies taken by the Court in relation to victims' legal representation. Legal representatives are in most respects the vehicle by which victims can participate. They are essential to victims' understanding of proceedings, and to conveying victims' views and concerns and ensuring that their interests are safeguarded throughout the proceedings. Considering the procedural complexities of the proceedings, the large numbers of victims inevitably impacted by the mass crimes under the jurisdiction of the ICC and the physical and conceptual distance between most victims and the ICC in The Hague, it is difficult to conceive of meaningful participation without effective legal representation.

[297] Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, *Lubanga* (ICC-01/04-01/06-2032-Anx) 26 June 2009, para 29.

[298] Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, *Katanga* (ICC-01/04-01/07-2517) 9 Nov. 2010, para 20.

[299] Article 75(3) of the ICC Statute.

[300] See rules 94 and 95 of the Rules of Procedure and Evidence.

[301] Article 76(3) provides that "representations under Article 75 [on reparations] shall be heard during the further hearings referred to in Article 76(2), and if necessary during any additional hearing. Article 76(2) provides that "before the completion of the trial, the Trial Chamber may on its own motion and shall at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to sentence…"

[302] Decision establishing the principles and procedures to be applied to reparations*, Lubanga* (ICC-01/04-01/06) 7 Aug. 2012.

### *The appointment of common legal representatives*

The first issue has been the Court's policy relating to the appointment of counsel, particularly common legal representatives for victims. While the Statute provides that victims are entitled to choose their common legal representation, in practice, victims may be dispersed and not be part of a group that identify the same lawyer as their representative. Frequently, victims have identified a variety of lawyers and then VPRS, as the designated entity in the Registry, is tasked with assisting victims in making their choice of common representative.[303] Failing any conclusive agreement, the Chamber may request the Registrar to choose a representative.[304] The Chamber may also appoint the representative on its own motion, "when the interest of justice so require" and can appoint counsel from the OPCV.[305]

The Rules clearly stipulate that victims are to be provided the opportunity to arrive at their own choice of common legal representative before any such counsel is imposed,[306] though in practice, this need for consultation has been given little weight, the reason most often cited being the lack of time and resources.[307] For instance, in *Gbagbo,* despite ordering the Registry to consult with victims "as to their wishes with regard to legal representation" and to make a recommendation to the Chamber as to who should be appointed common legal representative,[308] the Single Judge went on to disregard the recommendation from the Registry and appoint a counsel from OPCV "in light of the short time remaining until the scheduled date for the confirmation hearing."[309]

Once a choice of counsel is made, the victims may request a review of the decision within 30 days.[310] However, in practice, it has been difficult for victims to oppose an appointment. In *Ruto*, five applicants opposed the appointment and asked for a review of the Registrar's choice in accordance with Regulation 79(3) of the Regulations of the Court.[311] However, the Chamber ruled that the appointment had been made under Regulation 80, which allows *the Chamber* to appoint counsel for victims, rather than under Rule 90(3) which relates to situation where a Chamber requests *the Registrar* to choose a counsel. A review of counsel's appointment under Regulation 80 cannot be sought.[312] Furthermore, the Chamber also held that, as the clients were represented by the new

[303] Rule 90(2) of the Rules of Procedure and Evidence.

[304] Rule 90(3) of the Rules of Procedure and Evidence.

[305] Regulation 80 of the Regulations of the Court. See Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Ruto, Kosgey & Sang* (ICC-01/09-01/11-249), Pre-Trial Chamber II, 5 Aug. 2011; Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-01/09-01/11-138), Pre-Trial Chamber I, 4 June 2012.

[306] Rules 90(2) and 90(3) of the Rules of Procedure and Evidence.

[307] Report of the Bureau on victims and affected communities and Trust Fund for Victims (ICC-ASP/10/31) 22 Nov. 2011, para. 8. See also Decision on common legal representation of victims for the purpose of trial, *Bemba* (ICC-01/05-01/08-1005), Trial Chamber III, 10 Nov. 2010, para. 14; Decision on the 138 applications for victims' participation in the proceedings, *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 Aug.2011, para. 47 which makes reference to a confidential *ex parte* filing of the Registry in which it indicates that there would be practical challenges if consultation with victims was attempted, due to the security situation in the Kivus (ICC-01/04-01/10-263-Conf-Exp).

[308] Second decision on issues related to the victims' application process *Gbagbo* (ICC-02/11-01/11-86) Pre-Trial Chamber I, 5 April 2012, para. 44.

[309] Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-01/09-01/11-138) Pre-Trial Chamber I, 4 June 2012, para. 42.

[310] Regulation 79(3) of the Regulations of the Court.

[311] 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", *Ruto, Kosgey & Sang* (ICC-01/09-01/11-330), Pre-Trial Chamber II, 9 Sept. 2011.

[312] Ibid., para 14.

common legal representative at the time of the request for review, the former legal representative had acted inappropriately by addressing the clients rather than going through the newly appointed legal representative.[313] In *Banda and Jerbo*, the appointment was also challenged by two Darfuri victims who requested to continue with their selected legal representatives in the Trial phase, without requesting legal aid for their costs.[314] However, in the end, the Chamber confirmed the Registry's appointment, holding that the interests of the two Darfuri victims were not significantly distinct from the interests of the other victims, thus did not warrant a separate legal representation.[315]

### *The role of OPCV*

A related point concerns the role of OPCV in the representation of victims. As part of the strategic reviews of the efficiency of victim participation and legal representation being undertaken by the Registry, many actors have recommended an enhanced role for OPCV, on the basis that it would reduce the costs of victim legal representation. Recently, the Committee on Budget and Finance has noted that "a strengthening of the role of the Office of Public Counsel for Victims could lead to an overall reduction of costs, if sufficient resources were provided" and also stressed that "while acknowledging the benefits of using external counsel, the Committee had already made the point that a system in which victims would be represented only by the Office of Public Counsel for Victims would be more cost efficient".[316]

REDRESS emphasises that should OPCV be systematically appointed to represent victims, field structures, including field staff, will be required. Consideration needs to be given as to whether such costs would come from the regular budget of the office (recruitment of additional staff, extra resources to travel to and within situation countries, etc.) or drawn from the legal aid budget (as ordered in the recent *Gbagbo* case).[317]The Registry in its *Supplementary report on four aspects of the Court's legal aid system,* acknowledged the strong concerns from civil society and the legal profession against "an overly enhanced or exclusive role of the OPCV"[318] and recommended "that the system ought to be maintained as a two-tier system as currently established, where both OPCV and external lawyers and other relevant team members (or professionals) can be engaged in the representation of victims in Court proceedings."[319] Informal consultations of the Bureau of the Assembly of States Parties' The Hague Working Group on legal aid has seen comments by States on the issue with some already asking what statutory provisions they would need to change. However, no consensus was found on the issue of an enhanced role of the OPCV.[320]

[313] Id., para. 17.

[314] Request of Victims a/1646/10 and a/1647/10 for the Trial Chamber to review the Registry's "Notification of appointment of common legal representatives of victims" in accordance with Regulation 79(3), *Banda & Jerbo* (ICC-02/05-03/09-228), Trial Chamber IV, 30 Sept. 2011.

[315] Decision on common legal representation, *Banda & Jerbo* (ICC-02/05-03/09-337) Trial Chamber IV, 25 May 2012.

[316] CBF report on activities at the 18th session, (ICC-ASP/11/5), 22 May 2012, paras. 57 .

[317] Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-01/09-01/11-138), Pre Trial Chamber I, 4 June 2012, para. 44.

[318] Supplementary Report of the Registry on four aspects of the Court's legal aid system, (CBF/19/6), 17 August 2012, para. 50.

[319] *Ibid*, para.54.

[320] Bureau report on Legal Aid, Oct 2012.

To date, the Court has applied three different models of legal representation:

(1) Representation by self-organised external counsel (e.g., Lubanga; Katanga and Ngudjolo and Mbarushimana cases and in the initial phases of the Banda and Jerbo case);
(2) Representation by a common legal representative (e.g., Bemba); and
(3) Representation by counsel from the OPCV.

Each model has strengths and weaknesses.

While established within the Court structure, the independence of OPCV is guaranteed by Registry Regulation 115(1). Regulation 80(1)[321] provides that the Chamber may appoint counsel from the Office of Public Counsel for Victims, and OPCV has reported that, as at the beginning of September 2012, a total of 3,579 victims were represented by the Office in the different situations and cases.[322] In most cases, OPCV has been requested to represent applicants who are unrepresented either because they have not selected their own counsel, or pending counsel being appointed.

In addition, OPCV has represented groups of victims throughout the proceedings. In *Gbagbo*, for the first time, counsel from OPCV was appointed as the common legal representative of victims participating in the confirmation of charges hearing and related proceedings.[323] The original version of Regulation 81(4) provided that the OPCV shall provide support and assistance to the legal representative for victims, and to victims, including, where appropriate, legal research and advice and appearing before a Chamber in respect of specific issues. In *Lubanga*, the Trial Chamber described these Regulation 81(4) functions as the OPCV's "core functions."[324] Since, Regulation 81(4) has been amended to reflect a larger list of functions OPCV can undertake. These include advancing submissions when victims' applications are pending, or when a legal representative has not yet been appointed and representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.[325]

While recognising the invaluable work of the OPCV, REDRESS has voiced its opposition to proposals for a complete shift of *all* legal represention of victims requiring legal aid being undertaken by OPCV.[326] To do so would unnecessarily compromise victims' choice of counsel. In the October 2012 decisions of Trial Chamber V in both the *Muthaura & Kenyatta* and *Ruto & Sang* cases, [327] the Trial Chamber developed a new procedure whereby a Kenyan-based common legal representative will be appointed and it adjoined the OPCV to that counsel to appear on a day-to-day basis before the Court during ongoing proceedings and to otherwise assist the common legal representative. Without going

[321] Formerly Regulation 80(2).

[322] Report on the Activities of the Court (covering the period 1 Oct. 2011 to 15 Sept 2012), ICC-ASP-11/21, 9 October 2012, para. 104.

[323] Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-01/09-01/11-138), Pre-Trial Chamber I, 4 June 2012.

[324] Decision on the role of the OPCV and its request for access to documents, *Lubanga* ( ICC-01/04-01/06-1211), Trial Chamber I, 6 March 2008, para. 32.

[325] The Regulations of the Court were amended pursuant to art. 52 of the Rome Statute and entered into force on 29 June 2012. They shall remain in force if there are no objections from a majority of States within six months from 2 July 2012, date of circulation to States Parties.

[326] REDRESS, *Comments and proposals on the Legal aid consultation June 2012*, June 2012, available at http://www.redress.org/downloads/publications/1207review_of_legal_aid_consultation.pdf

[327] Decision on victims' representation and participation, *Muthaura & Kenyatta* (ICC-01/09-02/11-498) Trial Chamber V, 3 Oct. 2012; Decision on victims' representation and participation, *Ruto & Sang* (ICC-01/09-02/11-460) Trial Chamber V, 3 Oct. 2012, para. 24.

into the relative strengths or weaknesses of the outcome, it appears that the Chamber did not consult with participating victims about this approach. Moreover, the Registry has proceeded to advertise for a common legal representative despite the fact that a common legal representative was already appointed in the cases. Continuity of counsel is thus at issue, as is the ethics of summarily switching appointed counsel in the absence of any wrongdoing by existing counsel. For the participating victims of these two cases, should a different counsel be appointed, it will be the second time that they are forced to change counsel without consultation.[328] The Court should be doing more than paying lip-service to honour its obligation to consult with participating victims about their legal representation. Victims' participation is invariably indirect – through counsel, and thus choice of counsel is fundamental to how they experience participation.

## 3.7 Moving Forward

A review of the modalities of victims participation throughout the trial process demonstrates that, in some respects, victim participation has contributed substantively to court proceedings and has provided a meaningful avenue for victims to express their views and concerns. This has not always been the case, and one would hope that the Court's jurisprudence will continue to mature to give effect to these important rights in the most effective way. It is important that all actors both inside and outside the Court strive to ensure that victim participation does not become an example of tokenism; this was not what the drafters had in mind, nor would this align with victims' rights as progressively recognised internationally.

Further consideration should be given by the different Chambers, to the appropriate role of victims in providing views and concerns about the nature and scope of the charges, taking into account the existing statutory and regulatory framework, the rights of the defence and the independence of the Prosecutor. Victims will have important views about such matters and they should not be stifled by excessive formalism or narrow readings of procedures.

[328] At Pre Trial stage, without consultation with the victims, new counsels were appointed to represent victims in both cases.

## 4. Recommendations

All points discussed in this report merit careful consideration. The following recommendations draw out guiding principles and concrete steps towards making the right of victims to participate effective and meaningful in ICC proceedings:

### ***To States***

#### *Review of victims' related issues including collective approaches*

- Ensure that any review of the Court's policy on victims related issues, including application for and modalities of participation in proceedings, aims at ensuring effective and meaningful procedures -not merely less costly ones - and that it is based on a careful analysis of where the system has worked and where it could be improved or changed to make it more efficient and effective;

- Ensure that victims are at the centre of any re-conceptualisation of a system that concerns them, taking into account their different needs, diverse locations and their potentially large numbers.

- Ensure sufficient funds are set aside for sustained field based consultations with victims, especially, should a collective application system be pursued.

- Give due consideration to the problems associated with collective applications and participation processes, including protection risks, challenges in determining the most 'legitimate' voice or voices to represent victims' groups, the potential to silence divergent or dissenting voices and the fact that Article 68(3) of the Rome Statute and related rules appear to require an individualised application process.

#### *Support to the Court, the Registry and Victims Participation and Reparations Section (VPRS)*

- Continue to give full support to the Court's outreach activities as essential elements of the implementation of the Court's judicial mandate.

- Ensure sufficient resources are allocated to reinforce the capacity of field offices in order to maximise the effectiveness of the Court's outreach to victims and affected communities.

- Ensure that VPRS is given adequate resources in order to avoid situations where victims are unable to exercise their rights as enshrined in the Rome Statute, as has happened in the Mbarushimana, Ruto & al. and Muthaura & al cases last year.

- Provide resources to enable the further development of VPRS' database for processing victims' applications.

- Ensure that VPRS is able to base more of its staff in field offices in order to allow closer and constant interactions with relevant groups.

***Support to Intermediaries***

- Recognise the crucial role played by intermediaries in the implementation of the Court's mandate in relation to victims' rights and adopt without further delay the Draft Guidelines on intermediaries submitted by the Court.

- Ensure adequate resources are in place to implement the Guidelines, once adopted.

## ***To the Court***

***Regarding proposals for a review of the victims' application and participation system including collective approaches***

- Ensure that any review of the Court's policy on victims related issues aims at ensuring effective and meaningful procedures - not merely less costly ones - and that it is based on a careful analysis of where the system has worked and where it could be improved or changed to make it more efficient and effective.

- Ensure that victims are at the centre of any re-conceptualisation of a system that concerns them, with their different needs, diverse locations and their potentially large numbers.

- Seek further input from the parties, victims, other stakeholders and experts to determine the viability and impact on victims of proposals for review of the existing victims' participation system.

- Ensure sufficient funds are requested for sustained field based consultations with victims, especially, should a collective application system be pursued.

- Give due consideration to the problems associated with collective applications and participation processes, including protection risks, challenges in determining the most 'legitimate' voice or voices to represent victims' groups, the potential to silence divergent or dissenting voices and the fact that Article 68(3) of the Rome Statute and related rules appear to require an individualised application process.

- Ensure that the ability of participating victims to voice their views and concerns and the nature of their participation are not diminished or circumscribed as a result of a more collective or tiered application process.

- Ensure that common legal representatives have the necessary resources, capacity and support in the field to be able to maintain adequate communication with the "victim participants" and to enable victims to make an informed decision as to which form of participation they wish to exercise.

***Information and Outreach***

- Ensure that decisions setting deadlines for the receipt of applications to participate allow sufficient time for outreach prior to the expiry of such deadlines.

- Undertake early outreach in relation to ICC proceedings ahead of Chambers' decisions setting deadlines, to ensure that victims have sufficient time to apply or formulate views.

- Ensure sufficient planning and coordination amongst all those within the Court with the mandate and obligation to inform victims and wider communities.

- Translate the application form for victims' participation into other languages including Arabic as a matter of urgency.

- Include references to victim participation in the Court's Reports on its Public Information Strategy as well as in the descriptions of PIDS' work in the Court's Activity Report to the ASP.

***Processing applications and request for additional information***

- Develop strategies to ensure that missing information is collected expeditiously and identify the resources needed.

- Timelines should be established by the Registry and communicated to victims and those working with them so as to ensure that applications are submitted and processed within an acceptable timeframe.

- Provide adequate support for victims and their legal representative in order to enable them to obtain all the information and documentation required.

- Consider basing more VPRS staff in the Court's field offices.

- Ensure that VPRS is able to adapt and quickly respond to orders from the Chambers in relation to representations under Article 15(3) of the Rome Statute and to facilitate victims' participation in proceedings relating to an investigation. For example, consider creating a roster of trained and vetted persons who could be deployed to assist field staff at short notice.

***Harmonisation of the jurisprudence and modalities of participation***

- Harmonise approaches in relation to deceased victims and child applicants.

- Ensure that applications for participation are examined in a timely manner so that victims can meaningfully participate in proceedings once admitted.

- Set clear timeframes regarding deadlines for submissions of applications by victims and for the processing of applications by the Registry.

- Ensure sufficient time is available for outreach to take place between the setting up and expiry of deadlines for application.

- Consider possible efficiency gains which could be achieved through streamlining the assessment of victims' applications by Chambers. This could include reviewing the need for Trial Chambers to consider anew victims' applications which have been accepted at the Pre-Trial stage and/or automatic eligibility for victims to participate in situation proceedings once they have been granted participatory status in a given case within the same situation.

- Further consideration should be given by the different Chambers, to the appropriate role of victims in providing views and concerns about the nature and scope of the charges, taking into account the existing statutory and regulatory framework, the rights of the defence and the independence of the Prosecutor.

### *Legal Representation and the role of the OPCV*

- Ensure participating victims are fully consulted about their legal representation and that such consultation is the rule, rather than the exception with regards to appointment of common legal representation.

- Enhance the mechanism enabling victims to challenge the appointment of a Common Legal Representative by the Registry and/or the Chamber and provide them with a real opportunity to do so.

- Ensure adequate field structures, including field staff are available to ensure victims are regularly informed and consulted by their counsel.

- Reject calls for a complete shift of *all* legal representation of victims requiring legal aid to the OPCV. While the OPCV has a crucial role to play in assisting Legal Representatives, the Court need not move towards a system where OPCV is the only representative since this would deny victims the ability to choose their counsel and exclude the contributions that external counsel bring to the system.

### *Support to Intermediaries*

- Ensure that intermediaries receive support, training and protection to enable them to better assist victims who wish to complete application forms, to ensure quality work and avoid delays in the proceedings.