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# Regulation 55 and the Rights of the Accused at the International Criminal Court

*Susana SáCouto & Katherine Cleary Thompson\**

## INTRODUCTION

To date, more than 12,000 individuals have applied to participate as victims in the proceedings before the International Criminal Court (ICC).<sup>1</sup> While well over 5,000 have successfully obtained victim status and have exercised some form of participation before the Court,<sup>2</sup> the process established under the documents governing the ICC by which individuals apply for and receive permission to participate in proceedings has proved inefficient for the applicants, the parties, and the Court, as well as frustrating for victims. Over the past few years, certain Chambers of the Court have experimented with implementing new application models in the individual cases before them, and various proposals have been made for courtwide reform of the procedure, although none have yet been adopted. This article briefly outlines the victim application process as originally conceived under the ICC's Rules of Procedure and Evidence and related documents and makes recommendations aimed at ameliorating a broken and unsustainable system.

It is important to stress that the analysis and recommendations in this article are limited to the process by which victims apply to participate in proceedings before the ICC; it does not address the process for qualifying for reparations in a case. While the definition of "victim" is the same for both the participation and reparations schemes at the ICC, the two are de-linked, meaning an individual may choose to participate in proceedings without seeking reparations and may apply for reparations even if he or she did not participate in the proceedings prior to judgment. Moreover, the scope of the ICC reparations scheme remains very much up for debate, as the Court has yet to issue courtwide principles addressing how the reparations process will work in practice; the one decision considering such principles in a single case is currently on appeal. It is therefore not timely at this juncture to opine on the appropriate process by which victims should apply for reparations.

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\* Susana SáCouto is the Director and Katherine Cleary Thompson is the Assistant Director of the War Crimes Research Office (WCRO) of the American University Washington College of Law (WCL). The subject matter addressed herein forms part of a broader WCRO report, entitled *Regulation 55 and the Rights of the Accused at the International Criminal Court*, prepared in collaboration with the International Bar Association's (IBA) Hague Office and published by the WCRO in October 2013. We are grateful for the generous support of the Open Society Institute, the Swiss Federal Department of Foreign Affairs, and the WCL, without which this article would not have been possible.

## GENERAL BACKGROUND

### THE LEGAL FOUNDATIONS OF THE ICC VICTIM PARTICIPATION SCHEME

The fundamental provision governing victims' right to participate in proceedings before the ICC is found at Article 68(3) of the Rome Statute, which provides, in part, that "[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial..." Hence, although the statute guarantees victims a right to express their "views and concerns," Article 68(3) does not specify the means by which this should occur, instead leaving the Chambers significant discretion to give meaning to the right.

Along with Article 68(3) of the Rome Statute, a number of provisions in the ICC Rules, as well as those found in the Regulations of the Court and the Regulations of the Registry, govern the victim participation scheme at the ICC. For purposes of this article, the most important of these provisions is Rule 89, which governs the process by which victims apply to participate in proceedings before the Court. It states that, "in order to present their views and concerns," victims must make a "written application" to the Registrar who will transfer the application to the parties and the relevant Chamber. Rule 89 also states that the Prosecution and Defense will have an opportunity to submit observations on each application, but ultimately the Chamber determines if an applicant will be given victim status.



*The ICC Building in The Hague, courtesy Aurora Hartwig de Heer*

### BRIEF REVIEW OF THE SCOPE OF VICTIM PARTICIPATION IN PRACTICE

To date, the ICC has conducted confirmation of charges hearings in nine cases, and five cases have reached the trial stage. By and large, the scope and manner of victim participation has been the same in each of these cases. Because this article focuses on the process by which an individual is recognized as a victim with the right to participate at the ICC rather than the scope of

participation, we will only briefly outline two of the most salient features of the participation scheme here. The first is that in each case, every victim has been represented by an attorney, and, in all but the very first case, each legal representative has been selected by the Court and has been charged with representing large numbers of victims. Thus, for example, in the *Katanga & Ngudjolo* case, the Chamber divided the 366 victims that participated in the trial among two groups, each group represented by a different common legal representative.<sup>3</sup> Similarly, in the *Bemba* case, all 4,121 participating victims have been placed into one of two groups with each group represented by a common lawyer.<sup>4</sup> In each of the Kenya cases, all of the victims in each case are represented as a single group by a common legal representative.<sup>5</sup>

The second important aspect of the victim participation scheme, for purposes of this article, is that, with one exception, all participation takes place through a common legal representative.<sup>6</sup> In other words, the Court permits the legal representatives, not victims themselves, to attend status conferences and hearings, make submissions to the Chamber, tender evidence, examine witnesses, and deliver opening and closing statements.<sup>7</sup> The one exception to this general rule is that, in the first three cases to go to trial, the Trial Chamber has allowed a limited number of victims, after submitting an application and obtaining the approval of the Chamber, to appear personally in the trial proceedings to testify under oath or to present their views to the Court. Specifically, in the *Lubanga* case, three victims were granted the right to testify in person in The Hague.<sup>8</sup> In the *Katanga & Ngudjolo* case, the Chamber initially decided that four victims would be permitted to testify in The Hague but later revoked the victim status of two due to concern about the veracity of their accounts.<sup>9</sup> Finally, in the *Bemba* case, the Chamber permitted two victims to give evidence under oath in The Hague, and three victims to present their views and concerns via video-link.<sup>10</sup> Otherwise, no individual victim or group of victims has personally participated in any manner in a case being tried at the ICC.

#### OBTAINING VICTIM STATUS AT THE ICC UNDER THE CURRENT LEGAL REGIME

In the first three cases tried at the ICC, the Chambers, Registry, and parties followed the application procedure laid out in Rule 89 of the ICC Rules. Each individual wishing to participate in proceedings before the ICC submitted an application to the Victims Participation and Reparations Section (VPRS), the organ of the Registry charged with assisting victims,<sup>11</sup> for an individualized determination. As described by Judge Christine Van den Wyngaert, one of the three judges on the Trial Chamber that presided over the *Katanga & Ngudjolo* case, the “long and cumbersome process” went as follows:

[VPRS receives] the applications, which arrive in the form of very lengthy standard forms plus supporting

evidence. These forms – and especially the supporting evidence – may have to be translated into one of the working languages of the Court. Once that is done, the applications must be sent to the parties for observations. In almost all cases victims are afraid of being identified publicly and ask for the redaction of identifying information. This means that their names are blackened out, as well as any passages in their story that may lead to their identification. In principle, these redactions must each be checked and approved by the competent Chamber. The parties are then given a deadline to make observations. However, as they usually only receive heavily redacted forms, their submissions are unavoidably somewhat abstract. The Chamber is then required to decide – on a case-by-case basis – whether each applicant meets the criteria of Rule 85 and whether his or her interests are affected by the proceedings.<sup>12</sup>

The process was further drawn out by the fact that applications submitted by the VPRS to the Chambers were often incomplete. For instance, in 2010, the Court reported that only 66 percent of the applications received were accurately completed.<sup>13</sup> When applications were incomplete, the Chamber had to remit the application back to the VPRS and the VPRS had to follow up with the applicant in an attempt to fill in the missing information or supporting documentation.<sup>14</sup>

Unsurprisingly, this application process consumed a great deal of resources. For instance, although relatively few victims participated in the first case to be tried at the ICC, the *Lubanga* case, the Defense “repeatedly complained ... that the burden of responding to applications to participate, and the ‘potentially detrimental’ allegations raised therein, was impairing the [D]efense’s preparation for the hearing.”<sup>15</sup> The situation was much worse for the Defense in *Bemba*, which currently has 4,121 participating victims.<sup>16</sup> In that case, the Defense filed multiple submissions to the Chamber explaining that the time spent on examining and making submissions on the victim applications was to the complete detriment of its capacity to investigate and prepare its own defense for the trial.<sup>17</sup> The Chambers suffered under this system as well as noted by Judge Van den Wyngaert who wrote that “before the start of the hearings on the merits in the *Katanga* case, for several months, more than one third of the Chamber’s support staff was working on victims’ applications.”<sup>18</sup> Finally, the system placed significant strain on the VPRS, which is required to not only process thousands of individual applications, but to obtain information and documentation missing from incomplete applications, prepare reports for the Chambers on the applications, and redact sensitive information before transmitting the applications to the Prosecution and Defense.<sup>19</sup>

Of course, the sluggish pace of individual application processing and adjudication in these early cases also meant that

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### The Court permits the legal representatives, not victims themselves, to attend status conferences and hearings, make submissions to the Chamber, tender evidence, examine witnesses, and deliver opening and closing statements.

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Indeed, even in the first few years of the Court's operations, during which the overall number of applications was relatively low and the Court itself was operating in a limited number of situations, some applicants waited more than two years to receive word on their victim status ... [T]he Chambers must remain vigilant in ensuring that appointed legal representatives carry out their mandate in an effective manner, and that victims have been organized into the appropriate number of groups.

the victims themselves had to wait significant amounts of time between submitting their applications and learning whether they had been recognized by the Court, and before gaining any participatory rights. Indeed, even in the first few years of the Court's operations, during which the overall number of applications was relatively low and the Court itself was operating in a limited number of situations, some applicants waited more than *two years* to receive word on their victim status.<sup>20</sup> Unfortunately, such "persistent backlogs... resulted in many victims losing out on presenting their views and concerns in relation to key proceedings."<sup>21</sup> This situation had not improved by 2011, as ongoing delays in processing applications meant that "a large number of applicants" in the *Bemba* case "were admitted at a very late stage," by which time a "significant part of the trial had [already] unfolded."<sup>22</sup> In addition to lamenting the slow pace of processing applications, victims' advocates have also complained that victims find the application procedure complicated, noting that most victims need assistance in completing the standard forms.<sup>23</sup> The frustration victims experience when completing the forms is compounded by the fact that, once they do obtain victim status, their interests are represented collectively by a legal representative and, thus, their participatory rights are limited.<sup>24</sup> As the organization REDRESS has explained:

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.<sup>25</sup>

Finally, even with this individualized review, the heavy redactions impede effective review of the applications by the parties,<sup>26</sup> calling into question the meaningfulness of the review. Indeed, in the *Lubanga* case, with relatively few victims and thus presumably more opportunity and resources for the Defense to devote to reviewing the applications, all three of the victims who came before the Chamber to testify at their own request were subsequently stripped of their victim status after the Chamber determined that the accounts they gave to the Court were "unreliable."<sup>27</sup> Similarly, as mentioned above, two of the four victims who received permission from the *Katanga & Ngudjolo* Trial

Chamber to present testimony to the Court were later denied that privilege, and had their victim status revoked after their legal representative "expressed doubts as to the veracity of the statements provided by" the victims to the Court.<sup>28</sup> In these cases, the applications of the five individuals had been reviewed by the parties and victim status had been granted by the Chamber. It was not until they provided the Court with far more detailed statements that the Chamber was able to determine that the individuals did not, in fact, meet the criteria to participate as victims in the case.

## ANALYSIS AND RECOMMENDATIONS

### THE VICTIM APPLICATION PROCESS IS UNSUSTAINABLE AND MUST BE DRAMATICALLY REFORMED

By 2011, the Court could no longer ignore the extent to which the number of victim applications burdened the parties involved in proceedings, as well as the Chambers, and the amount of time that victim applicants had to wait to receive recognition by the Court. In April of that year, representatives of certain branches of the Court expressed their concerns to the Assembly of States Parties (ASP) over the Court's strategy toward victim participation, stressing that the resources available to them were insufficient to deal effectively with the influx in the number of victim applications submitted to the Court.<sup>29</sup> These representatives noted that within the first five months of 2011, the number of applications submitted per month escalated 207 percent from the average number submitted in the whole of 2010.<sup>30</sup> They also stressed that the increase in the number of situations substantially contributed to this increase.<sup>31</sup> In 2007, the VPRS was processing around thirty applications per month in relation to four situations.<sup>32</sup> By the time of the *Bemba* trial, this number increased to around 500 applications in relation to seven situations, but the VPRS's resources remained the same.<sup>33</sup> The representatives of the Court further reported that the Registry had to, on several occasions, notify the Chambers that it was backlogged and would be unable to process applications within the deadlines the Chambers set.<sup>34</sup> Against this background, the ASP requested that the Court "review the system for victims' applications to ensure its sustainability, effectiveness and efficiency, and to report thereon to the Assembly."<sup>35</sup>

In response, the Court analyzed a number of potential reforms, including maintaining the current process, but increasing the funding available to the Registry, the parties, and the legal representatives of victims; simplifying the standard application form used by individual victims; and eliminating the ability of the parties to comment on applications. Unfortunately, the

majority of the proposals considered in the Court's report fail to resolve the fundamental problems outlined above. For instance, increasing the funds available to the Court and parties will not resolve the fact that enormous amounts of time will still need to be devoted to processing the applications, meaning proceedings will continue to be delayed and victims will continue to wait for long periods of time before receiving recognition by the Court. Other options, such as simplifying the application form or eliminating the ability of the parties to comment on the applications, will only marginally reduce the workload on the Registry and Chambers, and thus also only marginally improve the problems of timing.

Another option considered by the Court's 2012 report was implementing a collective approach to obtaining victim status.<sup>36</sup> The report set forth various ways in which this could be accomplished, including the approach adopted by Trial Chamber V in the two Kenya cases currently being tried before the ICC.<sup>37</sup> Specifically, Trial Chamber V adopted a bifurcated approach that largely does away with the individualized application process.<sup>38</sup> Under this approach, only those victims who wish to share their views and concerns personally before the Court are required to go through the application procedures established under Rule 89.<sup>39</sup> In addition to submitting a written application to the Registry, these individuals must indicate, through the common legal representative, why they are the best representative of the group as a whole.<sup>40</sup>

For victims who wish to participate without personally appearing before the Court, the Chamber determined that they should be allowed to present their views and concerns through a common legal representative without needing to complete the application process established in Rule 89.<sup>41</sup> Instead, the Chamber created a system under which victims may simply *register* as victim participants by submitting their names, contact information, and information regarding the harm suffered to the VPRS.<sup>42</sup> The VPRS will then automatically enter this information into a database, without any individualized review by the parties or a decision from the Chamber, and the database will be shared with the Court-appointed common legal representative for victims, who will then verify which victims are eligible to participate in the case.<sup>43</sup>

As yet another alternative, the Chamber stated that the common legal representative will be permitted to present the views and concerns of non-registered victims who contact the common legal representative directly so long as the representative determines that such individuals qualify as victims of the case.<sup>44</sup> Importantly, once the common legal representative determines that a victim is in fact eligible to participate in the case, that victim will enjoy the same rights granted to victims in previous cases, including the right to access to court records, filings, and proceedings;<sup>45</sup> the right for the common legal representative to make opening and closing statements;<sup>46</sup> the right to question witnesses;<sup>47</sup> and the right to present evidence through the common legal representative.<sup>48</sup> In addition to establishing this registration system, the Chamber mandated that the VPRS provide the Chamber with "detailed statistics" on the victim population as represented by its registration database and prepare a report every two months, in consultation with the common legal representative, "on the general situation" of these victims.<sup>49</sup> For

the reasons discussed immediately below, we recommend that the bifurcated approach applied in the Kenya cases be adopted courtwide.

#### **THE ICC SHOULD ADOPT THE BIFURCATED APPROACH INTRODUCED IN THE TWO KENYA CASES AS THE PROCESS BY WHICH INDIVIDUALS OBTAIN VICTIM STATUS FOR PARTICIPATION IN ALL CASES**

##### *The Two-Tiered Approach is the Most Efficient of the Available Options*

The bifurcated application system would considerably enhance efficiency and expediency of the process by which individuals obtain victim status at the ICC, lifting a significant burden on the Registry, the parties, and the Chambers, and also increasing the likelihood that victims will be able to express their views and concerns to a legal representative early in the life of a case.

As explained above, the significant delays seen in the processing of applications arises due to the limited time and resources of the Registry, the incomplete status of the majority of applications received by the Court, and the lengthy process by which the parties submit comments on applications before the Chamber reviews and ultimately rules on them. Since the two-tiered approach does not require victims to apply to participate in proceedings unless they want to appear in Court personally, the system dispenses with the burden placed on victims and the Registry to ensure that applications are complete and all necessary documentation has been submitted. At the same time, the parties and Chambers are relieved from the requirements of reviewing applications from all victims except those who wish to address the Court in person. While it is true that this approach deprives the Defense of the opportunity to challenge whether individuals meet the status of "victim" under Rule 85, experience has demonstrated that the review conducted by defense teams of individual applications may not necessarily be effective at weeding out unqualified applicants, likely due to the fact that most victims' applications are heavily redacted before being transmitted to the parties for comment. Moreover, the Defense will no longer have to worry about the Chambers receiving potentially false and/or damaging information contained in victims' applications. It is also important to remember that the Defense will still have an opportunity to respond to each of the legal submissions made on behalf of "registered" victims during the course of the proceedings – including opening and closing statements, challenges to the admissibility of evidence, *etc.* – the same way it has always had an opportunity to respond to submissions made on behalf of victims who obtained their status through the Rule 89 application process. Finally, while the bifurcated approach will almost certainly require an increase in the funds and resources allocated to common legal representatives to ensure that they are able to engage in the "process of registering and assessing the victims" they are representing,<sup>50</sup> this increase in resources will be offset by the significant decrease in the resources required by the Registry, the parties, and the Chambers under the individualized application system.

One question that has been raised is whether a bifurcated approach will in fact prove more efficient, as the possibility

exists that every individual victim will seek not only to register, but also to apply to participate in person before the Chamber, which will require adherence to the application procedure currently set forth in Rule 89. While theoretically possible, in the first three trials at the ICC only a very small proportion of the participating victims applied to the Chamber for leave to personally appear before the Court, and nothing inherent in the registration system suggests that this number would increase just because the victims in the case registered rather than applying through the Rule 89 process. In the event that this does become an issue, or there is a reasonable basis to expect that it will, a Chamber could request that the common legal representative conduct its own review of victims wishing to participate personally to select those that best represent the views and concerns of the largest number of victims, and limit the application procedure to those victims. Notably, this occurred in the *Bemba* case, in which the legal representatives originally requested that the Chamber permit a total of seventeen victims to appear personally before the Court.<sup>51</sup> Even though each of these seventeen individuals had already been approved through the Rule 89 application process, the Chamber found that it would be excessive to consider such a large number of victims for purposes of personal participation before the Chamber and therefore limited the maximum number of victims *permitted to apply* to appear personally to eight.<sup>52</sup> Ultimately, the Chamber granted five of the eight the right to personally participate in the proceedings.<sup>53</sup> Again, there is nothing inherent in the registration system that would prevent a Chamber from adopting the same approach if it feels overwhelmed by the number of applications from victims wishing to participate in person under the bifurcated approach.

#### *The Two-Tiered Approach Will Likely Not Undermine the Meaningfulness of Victim Participation*

While adopting the Kenya approach will likely require changes to Rule 89 of the ICC Rules and corresponding regulations, the nature of the victim participation regime under Article 68(3) will not be undermined. As described above, with the single exception of the possibility for a handful of victims to appear before the Trial Chambers personally to give evidence or express their views and concerns, all victim participation at the ICC takes place through common legal representatives. Hence, in practice, the “views and concerns” of victims contemplated in Article 68(3) are communicated to the Court almost exclusively through a lawyer. Whether that lawyer connects with his or her clients after they have completed a lengthy and frustrating application process requiring final approval from the Court, or after receiving their contact information upon a simple act of registration by the victims, does not change the nature of the lawyers’ representation or the manner in which the victims access the

Court. If anything, the registration process *improves* the victims’ experience with the Court because it does away with the “apparent mismatch” identified by REDRESS between the application process and the victim’s ultimate mode of participation, which has led to disappointment on the part of victims. In addition, the registration process ensures that the Court recognizes victims at an earlier stage in proceedings, which gives victims quicker access to their legal representative and information relating to the proceedings, as well as the opportunity to express their views and concerns to the Chamber at an earlier stage.

Importantly, reporting by the VPRS to the Trial Chamber on the implementation of the bifurcated process in the *Ruto & Sang* case confirms that victims have been satisfied with the registration option thus far.<sup>54</sup> For example, the first report highlights that, in the Eldoret region, “[t]he majority of the participants were in favor of the proposed system of participation of victims because they considered it less cumbersome than the individual application process and because they thought that it would be more reliable for the [common legal representative] to verify his clients in person.”<sup>55</sup> Similarly, in the Nakuru region, “[p]articipants thought that generally the [registration] system would be easier for intermediaries and for victims than the more extensive application process used in the pre-trial proceedings,”<sup>56</sup> and in Turbo/Lugari, a “majority of participants were in favour of the new system of participation because... the individual application system was viewed as complicated.”<sup>57</sup>

Interestingly, the periodic reports themselves have developed into an additional avenue through which participating victims are able to present their views and concerns to the Chamber alongside any submissions made by the common legal representative. For instance, in the majority of the reports, victims expressed concerns about their security and feared reprisals after cooperating with the Court.<sup>58</sup> Others expressed that they suffered from poverty because they were forcibly displaced from their homes, but the government failed to do anything to aid them in this matter.<sup>59</sup> Others asked the VPRS why rape was not charged in the proceedings and requested that it be added at a later stage if possible.<sup>60</sup> Of course, this is not to imply that the Chamber has the authority to address such concerns, but again, a key purpose behind the victim participation scheme is providing victims with an avenue to express their views to the Court, and the VPRS reports contribute to this goal.

As recognized in the ICC’s 2012 report on potential changes to the application process, one potential criticism of the registration process as applied in the Kenya cases, in which all victims registering in the case have been assigned to a single common legal representative, is that certain individuals, such as victims of sexual violence, may find it more difficult to

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in the first three trials at the ICC only a very small proportion of the participating victims applied to the Chamber for leave to personally appear before the Court, and nothing inherent in the registration system suggests that this number would increase just because the victims in the case registered rather than applying through the Rule 89 process

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voice their experiences for fear of stigmatization or retaliation. However, this is actually a criticism of the manner in which victims are grouped for purposes of common legal representation rather than the process by which individuals obtain victim status. Indeed, in the *Katanga & Ngudjolo* case, which involved charges of sexual violence, all individuals granted victim status for purposes of participation were placed in one of two groups: one comprised of former child soldiers and the other comprised of all victims other than former child soldiers.<sup>61</sup> Hence, even though the *Katanga & Ngudjolo* case followed the individualized application process laid out in Rule 89, any victims who were not child soldiers but who suffered sexual violence would be placed in the general group of victims of other types of harm. While this may not have been the correct approach, the issue was not the result of the application process. Along the same lines, while it happens to be the case that the Chambers determined in each of the Kenya cases that all victims could participate in a single group, there would be nothing preventing a Chamber following the bifurcated approach from appointing multiple legal representatives for victims and ordering the VPRS to establish various databases of registered victims according to the harm suffered or some other criteria. Of course, the Chambers must remain vigilant in ensuring that appointed legal representatives carry out their mandate in an effective manner, and that victims have been organized into the appropriate number of groups. To achieve this, we endorse REDRESS's recommendation, noted above, that the Chambers set up a "two way communication system" with common legal representatives.

Another criticism of the bifurcated approach is that the lack of judicial approval for registered victims may undermine the credibility of their views and concerns, creating a hierarchy of statuses whereby the Chamber will grant more weight to the

submissions of victims who participate in person.<sup>62</sup> Yet, it may equally be argued that the views of victims who appeared in person in the first three cases tried by the Court may have been given more weight than the views and concerns of the thousands of victims who were merely represented through a common legal representative, even though these victims obtained their status through the Rule 89 process. In other words, there is nothing to suggest this hypothetical "hierarchy" of victims results from the registration process, as opposed to the reality that only a very minute proportion of participating victims will be given the opportunity to actually address the Court in person.

Regardless of the process by which individuals obtain victim status, it is up to the Chamber presiding over the case to consider the views and concerns of victims as presented by their legal representative.

Ultimately, the victim participation regime at the ICC seeks to ensure that victims experience restorative justice by having their views and concerns considered by the Court. In practice,

the ICC Chambers have implemented a system by which these views and concerns are, in the vast majority of instances, shared with the Court through common legal representatives. Whether or not these representatives learn of the views and concerns of the victims they represent, in order to transmit those views and concerns to the Court, after the victims have completed a lengthy and complicated process resulting in formal approval of their status by a Chamber, or whether the representatives gain access to the victims through a registration process should not have any impact on the overall participation scheme. By contrast, loyally adhering to a flawed application system that has forced victims in the past to wait more than two years to simply gain victim status may in many cases prevent many victims from communicating their views and concerns in a timely and meaningful manner.

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Regardless of the process by which individuals obtain victim status, it is up to the Chamber presiding over the case to consider the views and concerns of victims as presented by their legal representative.

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## ENDNOTES

<sup>1</sup> See International Criminal Court, *Twenty-Third Diplomatic Briefing: Figures from the Registry*, at 3 (29 May 2013), <http://www.icc-cpi.int/iccdocs/db/Registry-Figures-30-April-2013.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, ¶¶ 2-4 (July 22, 2009); International Criminal Court, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, ICC-ASP/11/22, ¶ 5, n. 6 (Nov. 5, 2012) [hereinafter ICC Report].

<sup>4</sup> See Prosecutor v. Bemba, Case No. ICC-01/05-01/08-1005, Decision on common legal representation of victims for the purpose of trial, ¶ 6 (Nov. 10, 2010).

<sup>5</sup> See, e.g., Prosecutor v. Ruto, et al., Case No. ICC-01/09-01/11-243, Proposal for the common legal representation of victims, ¶ 4 (Aug. 1, 2011); Prosecutor v. Muthaura, et al., Case No. ICC-01/09-02/11-212, ¶ 45 (Aug. 1, 2011).

<sup>6</sup> See Christine 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. 475, 480 (2012) [hereinafter Van den Wyngaert].

<sup>7</sup> *Id.*

<sup>8</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1562, Decision on the application by 3 victims to participate in the proceedings, ¶ 45 (Dec. 18, 2008).

<sup>9</sup> Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-2517-tENG, Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, ¶ 20 (Nov. 9, 2010); Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-3064-tENG, Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika's request for leave to terminate his mandate as said victims' Legal Representative, ¶¶ 42, 49 (July 7, 2011).

<sup>10</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2138, Decision on the supplemented applications by the legal representatives of

victims to present evidence and the views and concerns of victims, ¶ 55 (Feb. 22, 2012); Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2220, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08, ¶ 7 (May 24, 2012).

<sup>11</sup> See International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, Reg. 86(9) (2004).

<sup>12</sup> Van den Wyngaert, *supra* note 6, at 481-82.

<sup>13</sup> See REDRESS Trust, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future*, at 22 (October 2012) [hereinafter REDRESS].

<sup>14</sup> See, e.g., Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, ¶ 28 (Feb. 26, 2009); Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2138, Decisions on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ¶ 35 (Feb. 22, 2012).

<sup>15</sup> Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NORTHWESTERN J. OF INT'L HUMAN RIGHTS 459, 491 (2008).

<sup>16</sup> ICC Report, *supra* note 3, at 4, n. 6.

<sup>17</sup> See, e.g., Prosecutor v. Bemba, Case No. ICC-01/05-01/08-945, Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, ¶ 3 (Oct. 11, 2010); Prosecutor v. Bemba, Case No. ICC-01/05-01/08-1053, Defence Observations on the "Seventh Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings," ¶ 5 (Nov. 26, 2010).

<sup>18</sup> Van den Wyngaert, *supra* note 6, at 493.

<sup>19</sup> See REDRESS, *supra* note 13, at 18-19.

<sup>20</sup> Mariana Pena, *Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT'L. & COMP. L. 497, 512 (2009).

<sup>21</sup> Mariana Pena & Gaëlle Carayon, *Is the ICC Making the Most of Victim Participation?*, INT'L J. OF TRANSITIONAL JUSTICE, 11 (2013).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *id.* at 7.

<sup>24</sup> REDRESS, *supra* note 13, at 16.

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2659-Corr-Red, Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings, ¶ 16 (Feb. 8, 2011).

<sup>27</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 502 (Mar. 14, 2012).

<sup>28</sup> Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-3064-tENG, Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika's request for leave to terminate his mandate as said victims' Legal Representative, ¶ 48 (July 7, 2011).

<sup>29</sup> International Criminal Court, *Assembly of States Parties, Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, ICC-ASP/10/31, at 3 (Nov. 5, 2012).

<sup>30</sup> *Id.* at 6, n. 8.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* ¶ 12.

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

<sup>34</sup> *Id.* at 6, n. 8.

<sup>35</sup> ICC Report, *supra* note 3, at ¶ 1.

<sup>36</sup> *Id.* ¶¶ 39-49.

<sup>37</sup> *Id.* ¶ 39.

<sup>38</sup> See generally Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-460, Decision on victims' representation and participation (Oct. 3, 2012).

<sup>39</sup> *Id.* (requiring victims appearing before the Court in person or via video-link to satisfy the Rule 89 application requirements). *Id.* ¶ 56.

<sup>40</sup> *Id.* ¶ 56.

<sup>41</sup> *Id.* ¶ 25.

<sup>42</sup> *Id.* ¶ 49.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* ¶ 52.

<sup>45</sup> *Id.* ¶¶ 64-66.

<sup>46</sup> *Id.* ¶ 73.

<sup>47</sup> *Id.* ¶¶ 74-75.

<sup>48</sup> *Id.* ¶ 77.

<sup>49</sup> *Id.* ¶ 55.

<sup>50</sup> Anushka Sehmi, *New Victim Participation Regime in Kenya*, VICTIMS' RIGHTS WORKING GROUP, 6 (Spring 2013), available at <http://www.vrwg.org/downloads/130617EnglishVersion.pdf>. Indeed, common legal representatives will likely need not only additional financial resources, but also additional staff members in the field, as well as the funds to compensate those staff members.

<sup>51</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08-2027, Second order regarding the applications of the legal representatives of victims to prevent evidence and the views and concerns of victims, ¶ 9 (Dec. 21, 2011).

<sup>52</sup> *Id.* ¶¶ 9-12.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., Prosecutor v. Ruto & Sang, ICC-01/09-01/11-566-Anx, First periodic report on the general situations of victims in Kenya (Jan. 23, 2013).

<sup>55</sup> *Id.* ¶ 11(b)(i).

<sup>56</sup> *Id.* ¶ 11(a)(i).

<sup>57</sup> *Id.* ¶ 11(c)(i).

<sup>58</sup> See, e.g., *id.* ¶¶ 11-12.

<sup>59</sup> See, e.g., Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-661-Anx, Second periodic report on the general situation of victims in Kenya, ¶¶ 3-5 (Mar. 25, 2013).

<sup>60</sup> *Id.* ¶¶ 3-5, 8.

<sup>61</sup> See Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-1328, Order on the organization of common legal representation of victims, ¶¶ 2-4 (July 22, 2009).

<sup>62</sup> See Tatiana Batchvarova, *Comment on the Victims Decision of Trial Chamber V*, PhD Studies in Human Rights Blog (Oct. 18, 2012); Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-469, Request to present views and concerns of victims on their legal representation at the trial phase, ¶ 16(a) (Nov. 6, 2012).



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