The Victims of Victim Participation in International Criminal Proceedings

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# THE VICTIMS OF VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS

*Charles P. Trumbull IV*

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## CONCLUSION

The preamble to the Rome Statute of the International Criminal Court (ICC) provides a grave reminder that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The emphasis on victims and human suffering in the preamble is intentional. Unlike the statutes of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Rome Statute makes the interests of victims a high priority. Among other significant victim-oriented reforms, the Rome Statute grants victims extensive participatory rights in

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proceedings before the ICC. For the first time in international criminal law, victims have the right to present their views on the decision to authorize an investigation, the admissibility of a case, and issues that affect their personal interests.2

Victim participation in criminal trials is not a novel concept. Many civil law countries permit victims to join proceedings as a third party, or “subsidiary prosecutor.”3 In these countries, the victim (or often the victim’s legal representative) can request investigatory measures, review the evidence against the accused, submit declarations, present evidence, cross-examine witnesses, and make closing arguments.4 However, despite this common practice in civil law countries, international criminal proceedings, which have largely been based on the adversarial system, have not afforded victims the same rights.

The right of victims to participate in proceedings before the International Criminal Court is thus one of the most notable aspects of the Rome Statute.5 Commentators have applauded the new role for victims at the ICC, calling it a “landmark development,”6 a “major innovation,”7 a “significant step forward,”8 and a “major structural achievement.”9 The participation of victims, they say, will ensure that victims’ interests, which should be a priority for international criminal justice, are taken into account. Furthermore, participation will help to restore victims’ dignity, contribute to the reconciliation process, and bring to light facts and evidence that can be used at trial.10

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9. Stahn et al., supra note 5.
10. Aldana-Pindell, Emerging Universality, supra note 5, at 675.
The idea that victims benefit from participating in criminal proceedings has been virtually undisputed.11 Even the critics of victim participation seem to accept this idea; instead of criticizing the goals of victim participation, they argue that it may unduly prejudice defendants and create substantial administrative costs.12 This Article challenges that assumption and posits that participation in international criminal trials is not in the victims' best interests. Specifically, this Article argues that victims are not likely to benefit from the right to participate, and, more importantly, that their participation places costs on other groups of victims. These groups include the actual victims of crimes that might be prosecuted by the ICC Prosecutor and the future victims of human rights atrocities. This Article's focus is on proceedings before the ICC, but its conclusions are applicable to proceedings before any international criminal tribunal.13

This Article proceeds as follows. Part I discusses the emerging norms regarding victims' rights in international law and the factors that influenced the victim participation scheme in the Rome Statute. Section A focuses on the victims' rights movement in domestic and international law; Section B examines the case law on victim participation from several treaty-based international human rights tribunals; and Section C explains how criticisms of the ICTY and the ICTR resulted in extensive rights for victims in the ICC. Next, Part II explains the statutory framework that governs the victims' role in ICC proceedings. It then discusses the emerging jurisprudence on victim participation and identifies a number of significant issues relating to victim participation that remain to be resolved.

11. See Emily Haslam, Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315 (Dominic McGoldrick et al. eds., 2004) (noting a "widespread assumption that victims either do or can benefit from participating in international criminal proceedings").


Part III argues that the reasons supporting victim participation in national courts do not justify allowing victim participation in international criminal proceedings. This Part explains why victims in international proceedings are unlikely to receive the same benefit from participation that victims in domestic courts receive. It further argues that the participation of some victims imposes a significant cost on other victims who are unable to participate.

Finally, Part IV examines the implications of the costs created by victim participation. Section A argues that the debate on victim participation must consider not only the interests of the defendants, but also the competing interests of the different groups of victims. Section B discusses how international courts may tailor victim participation to best accommodate competing interests.

I. THE RISE OF VICTIMS' RIGHTS

The emphasis on victims' rights in the Rome Statute reflects growing concerns that criminal justice systems have marginalized victims. Specifically, the following three factors contributed to shaping the victim participation scheme in the Rome Statute: (1) a movement in domestic and international law to recognize the rights of victims;\(^{14}\) (2) case law from two human rights courts that have interpreted human rights conventions as conferring standing to victims; and (3) a desire to avoid the criticisms levied against the ICTY and the ICTR.

A. The Victim Rights Movements

The success of victim rights movements significantly influenced the decision of the drafters of the Rome Statute to ensure victims a greater role in proceedings before the ICC than before any other international tribunal.\(^{15}\) The victim rights movement started in the 1960s, with the aim of shedding more light on victims' experiences and advocating "for an enhancement of the role and rights of crime victims during the criminal

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14. Kuhner, supra note 12, at 134 ("A notable feature of developments in the thinking on criminal law during recent years is the increase in the emphasis being placed on the victim."); Stahn et al., supra note 5, at 226 (stating that the involvement of victims in ICC proceedings "can also be seen as a corollary of the broader trend in criminal proceedings generally to give victims access to justice").

15. Sam Garkawe, Victims and the International Criminal Court: Three Major Issues, 3 INT'L CRIM. L. REV. 345, 348 (2003) ("It was thus not surprising in the context of these national victim movements that the issue of the appropriate role of victims in international criminal courts was given considerable attention by those responsible for the establishment in the 1990s of the new international criminal court[1].")
The Victims of Victim Participation

The movement has gained momentum over the past four decades, with successes at both the national and international level. In recent years, the most significant impact of the victim rights movement has come in countries with common law legal systems. In these countries, victims' roles have traditionally been far more limited than in countries with civil law jurisdictions. In fact, most civil law jurisdictions have long provided substantial participatory rights for victims. In Argentina, for example, victims can retain legal representation to act on their behalf as "victim-prosecutor." The victim-prosecutor can make recommendations to the investigative magistrate, review the evidence against the accused, submit declarations, present evidence, cross-examine witnesses, and make closing arguments.

Common law jurisdictions, on the other hand, have adversarial systems that pit prosecutor against defendant, leaving no role for a third party. The victims' role in most common law jurisdictions is thus limited to that of witness. As a witness, the victim can only speak if called by the prosecution (or defense) and can only answer questions that are posed to him or her. In some countries, such as the United States, the victim has also been granted a limited role at sentencing, once the battle between prosecutor and defendant has ended.

Victim rights advocates have long criticized the nominal role afforded to victims in adversarial proceedings. It is unjust, they argue, "that the person most affected [sic] by the criminal act—i.e., the victim—seem[s] to have the least power." Specifically, they criticize the fact that victims do not have the right to consult with the prosecutor, do not have any say in plea bargains, and are subject to harsh cross-examination when called to testify. As a result, they claim, the criminal law system leaves "victims..."
powerless, voiceless and demoralized,

and even serves to "magnif[y] their suffering." This "secondary victimization" is an unacceptable cost in the criminal justice system. As Professor Laurence Tribe has commented,

The rights in question—rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused or convicted offender—are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate.

Victim rights groups have successfully lobbied lawmakers in several common law countries to enact laws granting more significant protections and rights to victims. The U.S. Congress, for example, enacted two pieces of legislation to protect victim interests in federal courts. In 1990, Congress passed the Victims Bill of Rights. The statute reaffirmed that "[v]ictims of crime should be treated with compassion, respect and dignity throughout the criminal justice process." Among other procedural rights, the statute granted victims the right to have an advisory role in prosecutorial decisions, to be present at all proceedings, and to have information about the conviction and sentencing of the defendant. Then, in 2004, Congress passed the Crime Victims' Rights Act, which

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26. U.N. HANDBOOK, supra note 3, at 34 (stating that secondary victimization is the "harm that may be caused to a victim by the investigation and prosecution of the case or by details of the case being publicized to the media").

It is the crime victim who has been directly injured by the crime committed, not the state. In a very important sense, the crime 'belongs' to the crime victim; therefore, the victim is entitled to expect the legal system to serve his interests . . . consistent with justice and fairness.

Id.

30. Id.
guaranteed victims the right to "reasonably be heard at any public pro-
ceeding in the district court involving release, plea, sentencing, or parole
proceedings." Further reforms in the United States are likely as the vic-
tim movement gains strength and more funding. As one commentator
has stated, "[V]ictim involvement in the criminal process is becoming
and will continue to become a reality of [the U.S.] criminal justice proc-
ess."32

In the United Kingdom, "demands for victims to have influence over
prosecutorial discretion, the acceptance of a plea, or the length of sen-
tence have grown in recent years."33 These demands have met with some
success. The Victims' Charter, enacted in 1996, provides victims with a
number of services throughout the criminal process and "sets out the
considerations to be borne in mind by police officers and court staff
when in contact with victims."34 The Charter also requires the prosecutor
to consider the victim's views when deciding whether to prosecute a
suspect.35 A number of other countries have enacted similar "Bills of Vic-
tims' Rights," and/or have created victim compensation schemes.36

The success of the victim rights movement at the domestic level en-
couraged victim rights groups to launch campaigns at the international
level.37 These efforts culminated in the unanimous agreement of the U.N.
General Assembly in 1985 on the Basic Principles of Justice for Victims
of Crime and Abuse of Power (Basic Principles).38 These Basic Princi-
pies reflected "the collective will of the international community to
restore the balance between the fundamental rights of suspects and of-
fenders, and the rights and interest of the victim."39 They also marked a
significant step toward recognizing rights of victims.40 Specifically, the
Basic Principles affirmed two notions that are now widely shared: that
"victims should be treated with compassion and respect for their dignity";
and that victims "are entitled to access to the mechanisms of justice and

32. O'Hara, supra note 23, at 233.
33. See SCOTTISH PARLIAMENT INFO. CTR., THE ROLE OF THE VICTIM IN THE SCOTTISH
research/pdf_res_notes/rn01-09.pdf.
34. CRIMINAL PROCEDURE: A WORLDWIDE STUDY, supra note 3, at 131.
35. Id. at 132.
36. Garkawe, supra note 15, at 348 n.11.
38. Id.
40. Id.
to prompt redress."41 The Basic Principles also urged States to take measures to improve victims' access to justice, including "allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings," "taking measures to minimize inconvenience to victims," and "avoiding unnecessary delay in the disposition of cases."42

More recently, in 2005, the U.N. Commission on Human Rights adopted a resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law (Guidelines).43 These Guidelines call on States to guarantee victims of serious international crimes similar rights to those provided in the Basic Principles.44 Most importantly, the Guidelines state that victims of violations of international human rights law have the right to "equal and effective access to justice," "reparation for harm suffered," and "access to relevant information concerning violations and reparation mechanisms."45 The Guidelines also stress that, "in adopting a victim-oriented [perspective]," the international community "affirms its human solidarity . . . with victims of violations of international human rights and humanitarian law as well as with humanity at large."46

B. Victims' Standing in Prosecutions

Case law from treaty-based international human rights tribunals also influenced the decision to provide participatory rights for victims in the ICC. Over the past two decades, this case law has "create[d] norms that respond to many of the concerns expressed by surviving human rights victims about their exclusion from the criminal proceedings, especially when [S]tates rampantly refuse to comply with their duty to prosecute."47 In general, the case law supports two propositions: (1) a State's duty to
prosecute serious crimes is also a private right that is owed to victims; and (2) the participation of victims is necessary to enforce this private right.

A State’s duty to prosecute serious crimes has traditionally been understood as an obligation to the public, not as a private right that could be enforced by individual victims. Vélásquez-Rodríguez changed this understanding of a State’s duty to prosecute. In that case, the Inter-American Court of Human Rights (IACHR) interpreted Articles 8.1 (right to a fair trial), 25 (right to a remedy), and 1.1 (obligation on States to enforce rights provided in the Convention) of the American Convention on Human Rights as “prescribing [S]tates to provide victims of right of life and personal integrity violations an effective prosecution as a remedy for [these] violations.” According to the IACHR, these provisions require each State “[1] to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, [2] to identify those responsible, [3] to impose the appropriate punishment and [4] to ensure the victim adequate compensation.” In subsequent cases,
the IACHR added that prosecutions must be conducted within "a reasonable time" by a competent, independent, and impartial tribunal.\(^6\)

The second major development in victim rights case law is the emerging "principle that victims should have greater access to the criminal process to ensure that criminal prosecutions are effective and that [S]tates are accountable to victims."\(^57\) A number of recent decisions from the European Court of Human Rights (ECHR), for example, "require or recommend that victims be kept informed about the proceedings, that they have the right to request information about the investigation or trial, and that they have a right to access relevant documents to ensure their meaningful participation."\(^58\) In recent years, the ECHR has also criticized governments for not requiring the prosecutor to justify a decision not to prosecute\(^9\) and for not subjecting such decisions to judicial review.\(^60\)

\section*{C. Criticism of Ad Hoc Tribunals}

The desire to avoid the criticisms lodged against the ICTY and the ICTR also influenced the Rome Statute drafters' decision to grant victims extensive participatory rights in ICC proceedings.\(^61\) Although the

\begin{flushleft}
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\item Aldana-Pindell, \textit{Vindication, supra note 47}, at 1417.
\item Id.
\item See Kelly and Others v. United Kingdom, 2001-III Eur. Ct. H.R. 1, 32; Id. at 35.
\item We should be hesitant to interpret these European Court of Human Rights (ECHR) decisions as granting "due process rights" to victims. No treaty confers participatory rights to victims, and these decisions do not purport to create new, individual rights. Nor do these decisions say that the right to participate is inherent in the right to an effective prosecution. Indeed, these decisions "contemplate significant flexibility for state compliance" with their treaty obligations. Aldana-Pindell, \textit{Vindication, supra note 47}, at 1407. As the ECHR stated in Hugh Jordan v. United Kingdom, "[t]he [victim] . . . must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests." 1020 Eur. Ct. H.R. 300, ¶ 109 (2001) (emphasis added). Similarly, in Bazorkina v. Russia, the ECHR stated that Article 13 requires "effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible." Eur. Ct. H.R. App. No. 69481/01, ¶ 161 (2006) (Chamber Judgment). Thus, where the State has adopted procedures that ensure fair and effective prosecutions, victim participation is not required. The court has never confronted the question of the process owed to victims in good faith criminal prosecutions because "[s]urviving human rights victims overwhelmingly file human rights complaints only when the state has refused to prosecute, has deliberately or recklessly obstructed the criminal process, or has conducted a sham prosecution." Aldana-Pindell, \textit{Vindication, supra note 47}, at 1414.
\item David Donat-Cattin, Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings, in \textit{COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT} 869, 871 (Otto Triffterer ed., 1999) (stating that "the inclusion of norms on victims' participation in the Court's proceedings (cf. article 68, para. 3) was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the ad hoc Tribunals").
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two ad hoc tribunals were landmark achievements in the continuing struggle against impunity for serious violations of international law, they have been widely criticized for ignoring the rights and needs of victims.  

Practitioners, scholars, and victims’ advocates have commented that the ICTY and ICTR have done little to help the persons whom they were ostensibly intended to serve, namely the victims of the atrocities. In fact, victims’ associations in Rwanda became so frustrated with the ICTR that they cut off all cooperation with the tribunal. These associations complained that the ICTR (1) hired investigators who had participated in the genocide, (2) provided inadequate protections for victims and witnesses testifying at trial, (3) permitted defense counsel to harass victims, (4) failed to protect victim confidentiality, (5) did not let victims meaningfully participate at trial, and (6) did not permit victims to claim reparations.

Dissatisfaction with these tribunals extends beyond victims. Most Rwandans have a negative opinion of the ICTR, as do people from the former Yugoslavia of the ICTY. Common criticisms of both tribunals include the inaccessibility of trials, the lack of emphasis on restorative justice, and the small number of persons prosecuted. Commentators also stated that victims’ interests were repeatedly overlooked as they were considered to be “extraneous” to the proceedings themselves. As one commentator noted, “It was the failure of these Tribunals to take the interests of victims sufficiently into account that motivated many NGOs, individuals, and some governments to argue for a new approach that would safeguard the interests of victims at the ICC.”

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62. Jean-Marie Kamatali, From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans, 12 NEW ENG. J. INT ‘L & COMP. L. 89, 96 (2005) (“Denying victims [participation and compensation] is not only a justice delayed, but also a justice denied.”); id. at 99 (stating that bringing justice and reconciliation to Rwandans was only secondary to the ICTR’s main interest in deterring future crimes).


65. Id. at 6.

66. Kamatali, supra note 62, at 90; see also Donat-Cattin, supra note 61, at 871 (“[T]he fact that Rwandan public opinion does not understand that justice was is [sic] done . . . is probably the major problem for the ICTR . . . .”).


68. Jorda & de Hemptinne, supra note 63, at 1390.

69. Haslam, supra note 11, at 320. Some of these complaints are inevitable given the fact that both tribunals were intended primarily to further the interests of the international community, rather than the States in which the atrocities occurred. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, stated that the tribunal
In sum, the success of the victim rights movement, the case law of the international human rights tribunals, and the criticisms of the ICTY and the ICTR together ensured a greater role for victims in proceedings before the ICC. The drafters of the Rome Statute generally agreed that the two ad hoc tribunals had elevated the international community’s desire for retribution over the legitimate interests of the victims in ascertaining the truth, seeking reparations, and reconciliation. The drafters also believed that “international criminal law had hitherto objectified victims,” considering them primarily instruments in securing convictions against defendants. Thus, one of the drafters’ central goals with the Rome Statute was to “put the individual back at the head of the international criminal justice system, by giving it the means to accord the victims their rightful place.” Kofi Annan “described victims’ concerns as the ‘overriding interest’ that should drive the Rome Conference, and many delegates heeded his call.” As a result, according to many, the drafters of the Rome Statute created a “more expansive model of interna-

70. See Haslam, supra note 11, at 321 (“The advocacy of non-governmental organizations ... also helped to ensure the Rome Statute and Rules of Procedure and Evidence incorporated strong provisions on victims’ rights.”).

71. Id. at 325.

72. Id. at 316 (quoting Elizabeth Guigou, Keeper of the Seals, Minister of Justice, Opening Speech at the International Meeting on Access of Victims to the ICC (Apr. 27, 1999)).

tional criminal law that encompasses social welfare and restorative justice[,]” and not just retribution and deterrence.74

II. VICTIM RIGHTS IN THE ROME STATUTE

The concern for victims led to three features of the Rome Statute that are unprecedented in international criminal law. First, the Rome Statute includes a number of provisions that are intended to protect victims’ well-being. Article 43 establishes a Victims and Witnesses Unit (VWU), which provides protective measures, counseling, and other appropriate measures for victims and witnesses.75 The VWU must include staff with “expertise in trauma, including trauma related to crimes of sexual violence.”76 In addition, Article 68 mandates that the Chambers “shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims,” and grants the Chambers the discretion to hold part of the proceedings in camera and to permit evidence to be presented by electronic means.77

The second feature unique to the Rome Statute is the opportunity for victims to receive reparations.78 Pursuant to the ICC Statute, the Chamber may award both individual and collective reparations.79 Individual reparations can be awarded only to victims of crimes committed by the defendant, and can be made directly against the defendant if convicted.80 These reparations can be awarded directly by the Chamber, or, “where at the time of making the order it is impossible or impracticable to make

74. Id. at 315; see also Donat-Cattin, supra note 61, at 873 (“[I]t is clear that the search for the truth—not retribution or punishment of given individuals—is the most significant goal of the ICC proceedings.”); Christopher Mutukumaru, Reparation to Victims, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 264 (Roy S. Lee ed., 1999) (“There was a gradual realization that there had to be a recognition in the Statute that the victims of crimes not only had (as they undoubtedly did) an interest in the prosecution of offenders but also an interest in restorative justice . . . .”).

75. Rome Statute, supra note 1, art. 43(6).

76. Id.

77. Id. art. 68(1)–(2).

78. See id. art. 75. A victim seeking reparations must submit a written request to the Registrar with the following information: (1) the identity and address of the claimant; (2) a description of the injury; (3) the location and date of the incident; (4) to the extent possible, the identity of the perpetrator; (5) any relevant supporting documents, including names and addresses of witnesses; and (6) a claim for compensation, rehabilitation, or restitution of assets. Rules of Procedure and Evidence, ICC-ASP/1/3, R. 94, available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf [hereinafter ICC Rules].

79. ICC Rules, supra note 78, R. 97.

80. See id. R. 98 (providing for reparations against a convicted person); see also Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, Regulation 46 (“Resources collected through awards for reparations may only benefit victims . . . affected directly or indirectly by crimes committed by the convicted person.”).
individual awards directly to each victim,” the Chamber can order reparations to be awarded through the Victim Trust Fund (VTF). The Chamber may also order the VTF to award collective reparations. These reparations are intended to address injuries at a societal level, and thus may benefit victims of perpetrators not convicted by the ICC. Collective awards are funded primarily through voluntary contributions to the VTF.

The third feature unique to the Rome Statute, as will be discussed in depth below, is the right of victims to participate in ICC proceedings. The scope of these rights was one of the most controversial issues in the drafting of the Rome Statute. Representatives from common law countries generally opposed victim participation during the guilt/innocence stage, while representatives from civil law jurisdictions advocated more extensive participation than is currently permitted. The final draft of the statute was “a delicate balance between the views of those who wished victims and witnesses to be able to play a very active role similar to that of a partie civile[,] and those who were concerned that the court might be overwhelmed by a large number of victims, possibly limiting the effectiveness of the prosecution or defense.”

A. Victim Participation in the ICC

The Rome Statute contemplates victim participation, in some way, in all stages of the “proceedings.” At the same time, it grants significant

81. ICC Rules, supra note 78, R. 98(2).
82. See Rome Statute, supra note 1, arts. 79, 116.
83. ICC Rules, supra note 78, R. 98(3).
84. Di Giovanni, supra note 8, at 42.
85. The ability for victims to seek reparations directly from the ICC marks a significant shift in international law, as reparations have traditionally been considered a matter of state responsibility. It also reflects “a growing international consensus that reparations play an important role in achieving justice for victims.” Linda M. Keller, Seeking Justice at the International Criminal Court: Victims’ Reparations, 29 T. Jefferson L. Rev. 189, 190 (2007) (citation and quotation marks omitted).
86. See infra Part II.A.
87. Christopher Keith Hall, The First Five Sessions of the UN Preparatory Commission for the International Criminal Court, 94 Am. J. Int’l L. 773, 783 (2000) (“Some of the most important matters before the working group on the Rules included the definition of victims, [and] the extent of participation of victims . . . .”).
88. Id.
89. To facilitate this participation, the Rules state that a victim may be represented by legal counsel. ICC Rules, supra note 78, R. 90(1). Moreover, the Court provides for the creation of a Victim and Witnesses Unit. Id. R. 16–19. Furthermore, victims who are unable to pay for legal representation may apply for financial assistance from the Court’s legal assistance fund. Id. R. 90(5).
discretion to the Chambers to determine when the participation of victims is appropriate. Thus, the "question of whether victims may participate in proceedings and in which form they may do so cannot be answered in general, but must be determined individually. The form of participation will vary depending on the specific proceedings in which [it] takes place."

Victims may play an important role in all stages of the proceedings before the ICC. First, as in all criminal law systems, victims help to alert the ICC Prosecutor to crimes that fall within the Court's jurisdiction. Then, if the Prosecutor decides to seek authorization from the Pre-Trial Chamber (PTC) to initiate an investigation *propio motu*, he must notify the victims known to him, or those known to the VWU. These victims are then entitled to submit representations to the PTC on whether to authorize an investigation. They also have the right to be informed of the Chamber's decision. Similarly, if the Prosecutor decides not to open an investigation after receiving information of alleged crimes, victims are entitled to notification and an opportunity to submit representations (after which the PTC may order the Prosecutor to proceed with the investigation). At this preliminary stage, the Rome Statute also grants victims the right to submit "observations" on the admissibility or jurisdiction of a case before the Court.

After the PTC has authorized an investigation, persons seeking to participate must submit an application to the Chamber. To be eligible, an applicant must first show that he is a victim by providing evidence that he (1) is a natural person; (2) who suffered harm; (3) caused by a crime; (4) that is within the jurisdiction of the Court. Rule 85 does not

90. *See* Rome Statute, supra note 1, art. 68(3).
91. Stahn et al., supra note 5, at 224.
92. *See* Rome Statute, supra note 1, art. 15; Situation in Uganda, Case No. ICC-02/04-101, Decision on Victims' Applications for Participation a/0010/06, a/0063/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶¶ 90-105 (Aug. 10, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-101_English.pdf [hereinafter Uganda, Decision on Applications].
93. *See* Stahn et al., supra note 5, at 226 ("*Propio motu* proceedings under Article 15 are typically initiated by information submitted by victims.").
94. ICC Rules, supra note 78, R. 50(1).
95. *See* ICC Rules, supra note 1, art. 15(3).
96. ICC Rules, supra note 78, R. 50(5).
97. *See* ICC Rules, supra note 78, R. 92(2).
98. *See* Rome Statute, supra note 1, art. 53(3)(b).
99. *Id.* art. 19(3). The Statute also provides victims the opportunity to submit their views on proposed admissions of guilt. *See id.* art. 65.
100. ICC Rules, supra note 78, R. 89(1).
define "harm," but the Chambers have interpreted it to include physical, mental, emotional, or economic loss. An applicant who establishes the four criteria outlined in Rule 85(a) will be entitled to participate in the proceedings, subject to the conditions in Article 68(3). That Article provides that

where the interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

This provision has created substantial confusion, as will be discussed below.

Assuming that the Chamber determines that participation in the specific proceeding is appropriate, victims may participate in two ways. The first is direct participation. Rule 89, for example, states that the victims may be permitted, at the discretion of the Chamber, to make opening and closing statements. The second, and more common method of participation, is vicarious participation—that is, participation through the victim's legal representative. In principle, victims have the right to choose their own legal representative. If a large number of victims ap-

library/cases/ICC-01-04-101_tEnglish-Corr.pdf [hereinafter Congo, Decision on Applications]. The Chamber assesses the information in the application "on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber." Congo, Decision on Applications, supra, ¶ 15. The Appeals Chamber recently affirmed that "[m]aterial, physical, and psychological harm are all forms of harm that fall within [Rule 85] if they are suffered personally by the victim." Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01-04-01/6-1432, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶ 32 (July 11, 2008), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf [hereinafter Congo, Judgment on Prosecutor’s Appeal].

102. Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01-04-01/6-1119, Decision on Victims’ Participation, ¶ 92 (Jan. 18, 2008), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1119-ENG.pdf [hereinafter Congo, Decision on Victims’ Participation]. A person whose injury was caused indirectly by a crime committed by the suspect may also be recognized as a victim. Id. ¶ 91.

103. The word "shall" in Article 68(3) of the Rome Statute was adopted over the alternative wording "may," suggesting that the drafters "reject[ed] the thesis that it was simply an interest of the victims to participate." Donat-Cattin, supra note 61, at 880.

104. See also Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04-01/05-134, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06 (Feb. 1, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-134_English.pdf [hereinafter Uganda, Decision on Legal Representation].

105. See ICC Rules, supra note 78, R. 90(1) (stating that a "victim shall be free to choose a legal representative").
ply to participate in the same proceedings, however, the Chamber may order the Registrar to appoint a common legal representative. Legal representatives are entitled to attend and participate in the proceedings, unless the Chamber determines that the “representative’s intervention should be confined to written observations or submissions.” The legal representative may also request leave from the Chamber to question a witness, expert, or the accused. The Chamber, upon receiving such a request, may order the legal representative to submit written notice of the proposed questions, and may then determine the “manner and order of the questions” that can be asked during the proceedings.

Finally, the ICC Statute and Rules allow victims a significant degree of participation in reparations proceedings. Rule 96 requires the Registrar to “take all necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.” Before issuing an order on reparations, the Trial Chamber “may invite and shall take account of representations” from victims. At the reparations hearing, the victims’ representatives may, “with the permission of the Chamber, question witnesses, experts and the person concerned.” Legal representatives of victims adversely affected by a reparations order may also file an appeal with the Appeals Chamber.

In addition to these provisions that expressly grant victims the right to participate, the Chamber is also permitted, at all stages of the proceedings, to seek the views of victims “on any issue.”

B. Interpreting Article 68(3) of the Rome Statute

Article 68(3) of the Rome Statute is frustratingly vague. It allows victims to present their “views and concerns” in “proceedings” when their “personal interests” are affected, but does not define any of these

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106. Id. R. 90(2)-(3).
107. Id. R. 91(2).
108. Id. R. 91(3)(a).
109. Id. R. 91(3).
110. Proceedings on reparations occur after the verdict, but before the sentencing.
111. ICC Rules, supra note 78, R. 96.
112. Rome Statute, supra note 1, art. 75, para. 3.
113. ICC Rules, supra note 78, R. 91(4).
114. Rome Statute, supra note 1, art. 82(4).
115. ICC Rules, supra note 78, R. 93.
116. One commentator notes that much of the confusion relating to victim participation could be avoided “if the victim standing rule was not so vague.” Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 St. Louis U. Pub. L. Rev. 249, 269 (2007).
terms. As a result, Article 68(3) has sparked significant debate among the parties, the judges, and commentators, whose interpretations of the article are often influenced by their conception of the purpose or utility of victim participation. For example, the Prosecutor and Defence have consistently opposed victims’ applications to participate in ICC proceedings. Victims’ legal representatives, on the other hand, have urged the Chambers to interpret provisions on victim participation, specifically Article 68(3), broadly. Thus far, the Chambers have generally sided with the victims’ legal representatives by permitting extensive participation.

1. Proceedings

The definition of “proceedings” in Article 68(3) was one of the first contested issues relating to victim participation under the Rome Statute. In June 2005, prior to the arrest of Thomas Lubanga, six persons applied to participate in the investigation of the “situation” in the Democratic Republic of the Congo (DRC). The Prosecutor opposed the applications, arguing that the investigation of a situation is not a “proceeding” as contemplated in Article 68(3). Pre-Trial Chamber I rejected this argument, relying primarily on dicta from human rights court decisions, as well as the drafting history of the Rome Statute. In its opinion, the Chamber noted that both the European Court of Human Rights and the Inter-American Court of Human Rights have interpreted conventions on the right to judicial process to grant victims certain participatory rights during the investigation of alleged human rights abuses. The Chamber also stated that, from a teleological standpoint, victim participation dur-

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117. See Rome Statute, supra note 1, art. 68(3).
118. Throughout this Article, I spell “Defence” the way it appears in the Rome Statute.
119. See, e.g., Congo, Judgment on Prosecutor’s Appeal, supra note 102 (describing the Prosecutor’s and Defence’s opposition to the victims’ requests for participation during trial); Congo, Decision on Application, supra note 101 (noting the Prosecutor’s opposition to the applicants’ request to participate in the proceedings).
120. See Congo, Judgment on Prosecutor’s Appeal, supra note 101, ¶¶ 50–51, 80–82.
121. Congo, Decision on Victims’ Participation, supra note 102; Congo, Decision on Applications, supra note 101; Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04/01/05-252, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06 (Aug. 10, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-252_English.pdf [hereinafter Uganda, Decision on Victims’ Applications for Participation].
122. Congo, Decision on Applications, supra note 101. A “situation” is usually defined by time and territory. At the situation stage, the Chamber determines whether there is evidence that crimes within the jurisdiction of the Court have been committed in a specific territory. Id.
123. Id. ¶ 25.
124. Id.
125. Id. ¶¶ 52–53.
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ing the investigation is “consistent with the object and purpose of the victims participation regime established by the drafters of the Statue [sic],” as well as with “the growing emphasis placed on the role of victims by the international body of human rights law.”

The Chamber granted the applicants victim status and stated that “persons accorded the status of victims will be authorized, 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.”

Pre-Trial Chamber II also determined that Article 68(3) permits victims to participate in proceedings relating to the investigation of a situation. During this stage, the Chamber wrote, the personal interests of the victims “pertain to the privacy and protection of victims themselves and possibly the preservation of evidence.” Thus, the Chamber ruled that victims may present their views and concerns on protective measures taken by the Court, and, in some cases, may be permitted to submit their views “even prior to the consideration of the merits of their application.” The Chamber further stated that victims may be entitled to participate in proceedings under Article 56, which permits the PTC to authorize the Prosecution to collect evidence that “may not be available subsequently for the purposes of a trial.”

The definition of “views and concerns” under Article 68(3) has been the focus of numerous submissions before the Chambers. The Pre-Trial and Trial Chambers have interpreted this phrase liberally, holding that it

2. Views and Concerns

The definition of “views and concerns” under Article 68(3) has been the focus of numerous submissions before the Chambers. The Pre-Trial and Trial Chambers have interpreted this phrase liberally, holding that it

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126. *Id.* ¶ 50.
127. *Id.* ¶ 71. The victims were only permitted to participate in the situation. They later applied to participate in the case against Lubanga, but the Pre-Trial Chamber denied the applications. See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case of the Prosecutor v. Thomas Lubanga Dyilo (June 29, 2006), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172-tEnglish.pdf [hereinafter Congo, Decision on the Applications for Participation].
128. *Id.* ¶ 97.
129. *Id.* ¶ 99.
130. *Id.* ¶ 100.
131. *Id.*
permits victims to question witnesses and introduce evidence. For example, in its decision on victim participation in the Lubanga trial, Trial Chamber I stated that "the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right . . . to request the presentation of all evidence necessary for the determination of the truth." Trial Chamber I added, "It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth, and if in this sense the Court has requested the evidence." This decision thus appears to provide victims with the same right as the Defence and Prosecution to introduce evidence in ICC proceedings. The only limitation imposed by the Trial Chamber—that the evidence must assist in the determination of the truth—applies equally to the Prosecution and Defence, as only relevant evidence can be admitted.

The ICC Prosecutor has consistently opposed this liberal interpretation of Article 68(3). In its request for leave to appeal the Trial Chamber’s decision above, the Prosecutor wrote that the Trial Chamber "provides for modalities of participation that go further than the 'expression of views and concerns' as defined by Article 68(3) of the Rome Statute." According to the Prosecutor, “modalities of participation may not infringe upon the parties’ rights or overlap with the exclusive functions of the Prosecution.” Thus, although victims’ views and concerns may cover a “wide range of issues” and are not limited to matters related to the evidence presented, Article 68(3) should not be interpreted to permit victims to autonomously tender evidence.

The Appeals Chamber recently affirmed the Trial Chamber’s broad interpretation of “views and concerns.” The Appeals Chamber noted that “it is important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility of evidence in trial proceedings lies primarily with the parties, namely the Prosecutor and the Defence.” It determined, however,

133.  See, e.g., Congo, Decision on Victims’ Participation, supra note 102, ¶ 108.
134.  Id.
135.  Id.
136.  Id.
137.  Id.
138.  Id.
139.  Id. ¶¶ 3–4.
140.  Id.
141.  Id. ¶ 93.
that provisions of the Rome Statute cited by the Prosecutor do not “preclude the possibility for victims” to participate in these ways.\textsuperscript{142} It explained, “If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, [the victims’] right to participate in the trial would potentially become ineffectual.”\textsuperscript{143}

Judge Pikis dissented, arguing that the majority opinion wrongly expanded the role of the victims, who are not “parties” to the proceedings. Pikis argued that the Court must strictly preserve the adversarial nature of the proceedings, in which “two sides are cast in the position of adversaries, in connection with the determination of the only issue raised before the Chamber, the guilt or innocence of the accused.”\textsuperscript{144} In adversarial proceedings, Pikis notes, the defendant is presumed innocent and “cannot have more than one accuser.”\textsuperscript{145} Permitting victims to introduce evidence and to question witnesses, Pikis argues, wrongfully shifts the burden away from the Prosecutor and unduly prejudices the rights of the Defence.\textsuperscript{146} For this reason, victims are explicitly limited to presenting their “views and concerns,” which must be “referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent that they are affected by the proceedings.”\textsuperscript{147}

3. Personal Interests

The third, and perhaps most contested, issue with respect to victims’ rights before the Court is the test for determining “when the personal interests of the victim are affected” under Article 68(3). Again, the Pre-Trial and Trial Chambers have interpreted this phrase broadly. Pre-Trial Chamber I stated that “the personal interests of victims are affected in general at the investigatory stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to

\textsuperscript{142} Id. \S 94.
\textsuperscript{143} Id. \S 97.
\textsuperscript{144} Id. \S 14 (Pikis, J., dissenting).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. \S 15. In a previous concurring opinion, Judge Pikis interpreted “views and concerns” to mean “opinions” or “preoccupations.” Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06 OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/05 concerning the “Directions and Decision of the Appeals Chamber” of February 2, 2007, \S 15 (June 13, 2007) (Pikis, J., concurring), available at http://www.icc-cpi.int/library/cases/01-04-01-06-925_English.pdf [hereinafter Congo, Decision of the Appeals Chamber].
request reparations for harm suffered." Likewise, Pre-Trial Chamber II stated that "this [personal interest] requirement is met whenever a victim . . . applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear for one or more individuals." Trial Chamber I adopted a similar interpretation of the personal interest requirement, stating that victims have an interest in receiving reparations, expressing their views and concerns, verifying particular facts, establishing the truth, protecting their dignity, and ensuring their safety. The Trial Chamber concluded that participation at trial should "encompass their personal interests in an appropriately broad sense." This broad interpretation has effectively rendered the personal interest requirement superfluous.

Pursuant to the Chambers' interpretations of these three phrases, victim participation before the ICC is effectively limited only by the second prong of the test in Article 68(3): that participation must not unduly prejudice the rights of the defendant. In light of this interpretation, the Pre-Trial and Trial Chambers have permitted victims to present their views on a vast number of issues, including E-protocol procedures and the storage of documents that may be introduced as evidence at trial.

The Appeals Chamber, however, has indicated that it may adopt a less expansive interpretation of Article 68(3), especially on procedural issues. The Appeals Chamber was required to interpret Article 68(3) for the first time after victims in the Lubanga case filed an application to respond to the Defence's submission on the appealability of the Pre-

148. Congo, Decision on Applications, supra note 101, ¶ 63; see also Donat-Cattin, supra note 61, at 879 ("It appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct.").
149. Uganda, Decision on Victims' Applications for Participation, supra note 121, ¶ 9.
150. Congo, Decision on Victims' Participation, supra note 102, ¶ 97.
151. Id. ¶ 98.
152. See Uganda, Decision on Victims' Applications for Participation, supra note 121, ¶ 9. The Chamber stated that the fact that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct [is] a self-evident assumption; accordingly . . . reference to personal interests as a condition for being allowed to present views in Court . . . does nothing but mirror such assumption.

Id. (internal quotations omitted).
153. Rome Statute, supra note 1, art. 68(3).
155. See Congo, Decision of the Appeals Chamber, supra note 147.
156. A party may appeal a non-final order if it involves an "issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which . . . an immediate resolution by the Appeals Chamber may materially advance the proceedings." Rome Statute, supra note 1, art. 82(1)(d).
Trial Chamber’s order.\textsuperscript{157} Both the Defence and the Prosecutor opposed the victims’ application, arguing that the issue of whether the Pre-Trial Chamber’s order was appealable did not affect the victims’ personal interests.\textsuperscript{158} The Chamber ultimately rejected the victims’ application, but the judges were divided on the central question of whether the victims’ interests were affected by the appeal.\textsuperscript{159}

The majority opinion (Judges Kourula, Kirsch, and Pillay) stated that Article 68(3) requires the Chamber to determine “whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”\textsuperscript{160} Although the majority stated that it must make this determination on a “case by case basis,” it also noted that victims’ personal interests are clearly affected “when their protection is in issue and in relation to proceedings for reparations.”\textsuperscript{161} In the instant case, the majority concluded that the victims’ personal interests would not be affected by the Court’s preliminary decision on whether Lubanga was entitled to bring his interlocutory appeal. The majority explained, “The decision of the Appeals Chamber on the preliminary issue will neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation.”\textsuperscript{162}

Judge Pikis wrote a concurring opinion. He said that Article 68(3) must be interpreted in light of the adversarial nature of the trials at the ICC.\textsuperscript{163} In that context, permitting victims to “either reinforce the prosecution or dispute the defence,” for example, would impermissibly shift the burden of proof away from the Prosecutor and force the defendant to face “a second accuser.”\textsuperscript{164} For this reason, Pikis wrote, it is not appropriate to find that the victims have a personal interest in issues relating to the guilt of the accused.\textsuperscript{165} He concluded by noting that the participation of victims is most appropriate “at the outset of proceedings,” at which time the victims can “alert[] the Court and the parties to the implications of the case on [their] personal interests,” and to “how best [those interests] may be safeguarded.”\textsuperscript{166} Judge Pikis thus agreed with the majority that the victims’ personal interests were not affected by the issue of whether Lubanga could appeal the PTC’s order.

\textsuperscript{157} Congo, Decision of the Appeals Chamber, supra note 147.
\textsuperscript{158} Id. \textsuperscript{\textsuperscript{7}, 9.}
\textsuperscript{159} See id. \textsuperscript{\textsuperscript{26; id. \textsuperscript{\textsuperscript{16 (Song, J., concurring).}}}}
\textsuperscript{160} Id. \textsuperscript{\textsuperscript{28.}}
\textsuperscript{161} Id.
\textsuperscript{162} Id. \textsuperscript{\textsuperscript{26.}}
\textsuperscript{163} Id. \textsuperscript{\textsuperscript{16, 19 (Pikis, J., concurring).}}
\textsuperscript{164} Id.
\textsuperscript{165} Id. \textsuperscript{\textsuperscript{20.}}
\textsuperscript{166} Id.
Judge Song disagreed with the reasoning of the other four judges, concluding that the victims’ personal interests were affected by the appeal. 167 Citing several decisions by the Inter-American Court on Human Rights and the European Court on Human Rights, Judge Song stated that “victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice.” 168 Given this general interest in justice, he wrote, victims necessarily have an interest in any procedural or substantive issue that could affect the outcome of the case. 169 Judge Song concurred in the majority’s order, however, because he agreed that the victims’ request to comment on the preliminary issue on appeal did not satisfy the second prong of the Article 68(3) test. 170

In sum, as the ICC has not yet conducted a full trial, the extent and manner of victim participation remains uncertain. The Pre-Trial and Trial Chambers have interpreted Article 68(3) broadly, essentially concluding that the article permits participation any time that it does not unduly prejudice the defendant. This expansive reading of Article 68(3), however, does not necessarily entail unlimited participation. The Chambers have interpreted Article 68(3) to give them the discretion to deny participation when they deem it appropriate to do so. 171 The Chambers have also not hesitated to reject victims’ request to participate at certain hearings. 172 Further, the number of participants may be limited by external factors. For example, Pre-Trial Chamber II’s decision that victims are not entitled to legal representation during the application process may make it more difficult for victims to apply for and be granted the right to participate. 173

The Appeals Chamber has not fully clarified the scope of victim participation under Article 68(3), but its interpretation of the article will have a significant effect on both current and future ICC proceedings. If the Appeals Chamber decides to follow the liberal interpretation favored by the Pre-Trial and Trial Chambers, it would substantially expand both

167. Id. ¶ 16 (Song, J., concurring).
168. Id.
169. Id.
170. Id.
171. See Rome Statute, supra note 1, art. 68(3).
172. See Jouet, supra note 116, at 261.
173. See Uganda, Decision on Legal Representation, supra note 104, ¶ 11 (holding that “applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative”). But see Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-374, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, ¶ 44 (Aug. 17, 2007), available at http://www.icc-cpi.int/library/cases/ICC-01-04-374_English.pdf [hereinafter Congo, Decision on Requests of Legal Representative] (appointing the Office of Public Counsel for Victims (OPCV) to provide support and assistance to unrepresented applicants).
the potential number of victims and the scope of victim participation in the proceedings. Further, should the Appeals Chamber interpret “proceedings” as applying to “situations,” then hundreds of thousands of victims would be permitted to participate in any situation currently before the Court.\footnote{174} Finally, a broad interpretation of Article 68(3)’s “personal interests” requirement, such as that proposed by Judge Song, could lead to victim participation at each hearing and/or written submission, an outcome that would substantially lengthen the criminal justice process.

The Appeals Chamber’s resolution of these issues, however, will do more than simply clarify the manner and extent of victim participation. The Chamber’s interpretation of Article 68(3) will also reveal to the international community what the Court believes to be its primary mission. A narrow interpretation of Article 68(3) indicates that the Court’s principal objective is to bring human rights abusers to justice. A more liberal interpretation, on the other hand, while undoubtedly making prosecutions more cumbersome, will also suggest that the Court believes that giving (at least some) victims a voice, and recognizing their suffering, is one of its central objectives.

III. EXAMINING VICTIM PARTICIPATION

The proper role for victims at the ICC continues to be widely debated. Advocates of a greater role for victims in international criminal proceedings invoke the same arguments that succeeded in national victim rights campaigns. Critics, on the other hand, rely on arguments made in common law jurisdictions, stating that victim participation must be limited to protect the defendants’ right to a fair and expeditious trial.\footnote{175} While these two sides differ on whether certain modalities of participation unduly prejudice defendants’ rights, they seem to agree that “the legal profession should work to ensure the maximum participation of victims in international criminal proceedings provided that their participation is consistent with the rights of the accused and the demands of expediency.”\footnote{176} Significantly,

\footnote{174. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-103, Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 5 (June 23, 2006), available at http://www.icc-cpi.int/library/cases/ICC-01-04-103_English.pdf [hereinafter Congo, Prosecution’s Application for Leave].}

\footnote{175. Garkawe, supra note 15, at 357; Gioia Greco, Victims’ Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis, 7 INT’L CRIM. L. REV. 531, 546 (2007); Jorda & de Hemptinne, supra note 63, at 1388–89; Stuhn et al., supra note 5, at 236.}

\footnote{176. Haslam, supra note 11, at 316.}
then, both sides assume that "victims either do or can benefit from participating in international criminal proceedings."\textsuperscript{177}

This Part questions this assumption that participation in international criminal proceedings furthers victims' interests. Section A briefly summarizes the arguments most commonly offered in support of expansive victim participation. Section B discusses why the justifications for permitting victims to participate in domestic criminal proceedings do not apply in the international context. Furthermore, it argues that victim participation in international trials places costs on other victims whom the Chamber does not recognize.

\textbf{A. Arguments for Victim Participation}

The arguments in favor of increased victim participation in the ICC typically mirror those made by victim rights advocates in national courts. These arguments provide three main justifications for victim participation.

First, according to advocates, guaranteeing victims a right to participate will help avoid "secondary victimization," and will even contribute to the rehabilitation of the victim.\textsuperscript{178} Participation may help rehabilitate a victim in several ways. The simple act of testifying, for example, can be therapeutic. Victims may "find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault."\textsuperscript{179} This truth-telling process validates the victims' experience and permits them to heal.\textsuperscript{180} Further, being able to participate in other ways may also provide benefits to the victim. Playing

\begin{itemize}
  \item \textsuperscript{177} See id.
  \item \textsuperscript{178} As one commentator observed, victims must be permitted to participate in ways "which not only do not further compound or reinforce their victimization but which respect their experiences and facilitate their rehabilitation." \textit{Id.} at 317 (citing Women's Caucus for Gender Justice, \textit{Victims and Witnesses in the ICC Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC} (July 26–Aug. 1999)). Implicit in this claim is the normative argument that the international community should "put the individual back at the heart of the international criminal justice system" and move from an offender-focused system to a victim-focused one. \textit{Id.} at 316 (quoting Elisabeth Guigou, supra note 72). According to this argument, the interests and concerns of the victims, which are largely ignored in the adversarial system, should be a priority for international criminal justice. Because the prosecutor cannot adequately protect the rights of victims, victims must be afforded the opportunity to participate in the proceedings.
  \item \textsuperscript{180} Regarding the military junta trials in Argentina, Carlos Nino commented, "What contributes to re-establishing [the victims'] self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators acts' [sic] are officially condemned." Haslam, supra note 11, at 316.
\end{itemize}
a role in the prosecution, for example, “may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.” Participation may also restore a victim’s dignity by giving him “a sense of agency and capacity to act that the original abuse sapped.” Similarly, “[i]f trials symbolize society’s acknowledgement and condemnation of what survivors suffered, those who participate in them . . . may feel especially acknowledged and validated.”

Second, victims’ advocates say that the right to participate is a necessary corollary of victims’ right to seek reparations. Because the prosecutor’s interest lies exclusively in securing a conviction, the victim must be permitted to participate in order to ensure that information relevant to the award for reparations is brought to light. Participation is thus important because it helps to fulfill the potential legal duty to provide victims with a remedy and offers the additional benefit of furthering the reconciliation process in communities affected by human rights atrocities.

Finally, some argue that the participation of victims may lead to more successful prosecutions. The victims’ legal representative in the Situation in Uganda, for example, stated that “[v]ictims’ participation can serve to clarify the facts and to assist the Court to fight impunity.” Victims are likely to have the most information about their own victimization and therefore “have the capacity to provide the Court with

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182. O’Connell, supra note 179, at 337.
183. Id. at 328; see also Jorda & de Hemptinne, supra note 63, at 1389.
184. For international human rights courts decisions on the right to seek reparations, see supra notes 78–85 and accompanying text.
186. See Congo, Decision on Applications, supra note 101, ¶ 72 (“The close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations . . .”).
187. Bassiouni, supra note 5, at 205–06; see also Situation in Uganda, Case No. ICC-02/04-106, Response of Legal Representative of Victims a/0119/06 to the Prosecutor’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06, ¶ 23 (Aug. 31, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-02-106_English.pdf [hereinafter Uganda, Response of Legal Representative] (stating that victims can help to clarify facts and fight against impunity).
188. Uganda, Response of Legal Representative, supra note 187, ¶ 23.
relevant and important information regarding the crimes.\textsuperscript{189} This capacity "should not be stifled by the potentially difficult task of incorporating their views into the proceeding . . . "\textsuperscript{190}

B. Traditional Arguments Do Not Apply to International Criminal Trials

The arguments justifying victims' right to participate in domestic prosecutions do not support victim participation in international criminal proceedings. First, legally recognized victims will not substantially benefit from having the right to participate. Even assuming that participation has a rehabilitative effect, victims who participate in international trials are not likely to receive the same benefit as victims who participate in domestic trials. Indeed, their participation may have unintended negative consequences. Second, the participation of legally recognized victims creates a distributive problem. Specifically, it places costs on (1) the actual but unrecognized victims of crimes within the jurisdiction of the Court and (2) future victims.

1. Effects on Participating Victims

The supposed reasons for permitting victims to participate in domestic trials—rehabilitation, reparations, and more effective prosecutions—cannot justify victim participation in the international context. Assuming that participation can be therapeutic, its effect will be significantly lessened due to the large number of victims who choose to participate in international criminal proceedings. Similarly, courts are not likely to award individual reparations where large numbers of victims are involved, thus limiting the need for victims to participate. Lastly, the argument that victim participation may aid the Prosecutor is questionable and in many cases incorrect.

a. Rehabilitation

As an initial matter, it is unclear whether victim participation will help to either avoid secondary victimization or rehabilitate the victim.\textsuperscript{191}

\textsuperscript{189} Stahn et al., supra note 5, at 238; see also Jorda & de Hemptinne, supra note 63, at 1388 (stating that "[victim] attendance in person at the trial may help in establishing the truth").
\textsuperscript{190} Stalin et al., supra note 5, at 238.
\textsuperscript{191} Haslam, supra note 11, at 317; see also Lynne Henderson, The Wrongs of Victims' Rights, 37 Stan. L. Rev. 937, 1010 (1985) (noting that simple, common-sense reforms will likely provide a greater benefit to victims than participatory rights); Wayne A. Logan, Confronting Evil: Victims' Rights in an Age of Terror, 96 Geo. L.J. 721, 747 (2008) (noting that
The underlying causes of secondary victimization have little to do with whether the victim is permitted to participate in the proceedings. Rather, secondary victimization often results from factors such as (1) the indifference of the principal actors in the criminal justice system toward victims; (2) the victims' inability to find necessary counseling or medical treatment; (3) intrusive questioning by law enforcement; (4) threats by the defendant prior to or after trial; (5) harassing or invasive questions during cross-examination; or (6) publication by the media of details of the crime.

These problems can be, and have been, addressed through victim-oriented provisions in the Rome Statute. Article 68, for example, states that the Court “shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” The Statute also establishes the Victims and Witnesses Unit, which is designed to advise the Court on the “appropriate protective measures, security arrangements, counseling and assistance” for victims. Finally, under the Statute, the Chambers have significant discretion to take measures to protect victims, such as preserving victim and witness anonymity, permitting victims of sexual violence and child victims to testify in camera, and limiting questions that the Chamber determines to be harassing or abusive. Efforts by the ICC’s victim outreach programs will also likely help to remedy the perception that the criminal justice system is too removed from the actual victims.

Furthermore, with respect to rehabilitation, any beneficial effect that victims receive from participation in domestic trials may be

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193. FIDH, Victims in the Balance, supra note 64.
195. FIDH, Victims in the Balance, supra note 64. Indeed, one of the main complaints regarding the ICTR was the lack of safety measures for witnesses and victims. In one horrible situation, a Hutu woman who testified in the Akayesu trial was killed, along with her family, upon returning to Rwanda. Handbook of Women, Psychology and the Law 314 (Andrea Barnes ed., 2005).
196. FIDH, Victims in the Balance, supra note 64, at 8 (stating that witnesses felt that “they had been treated with scorn, considered to be liars, cheats, mentally disturbed fools, and feeling that they, in turn, had been accused”).
197. U.N. Handbook, supra note 3, at 34.
198. Rome Statute, supra note 1, art. 68(1).
199. Id. art. 68(4).
200. See id. art. 68(2).
201. This claim has been seriously questioned by a number of scholars. Arthur Lurgio and Patricia Resick point out that “[v]ictim participation in the prosecution of cases has been commonly regarded as stressful and disruptive to victims’ recovery.” Arthur J. Lurgio &
substantially reduced in international criminal proceedings. In domestic trials, where there is usually only one victim, the victim has the opportunity to play a significant role in the prosecution. This central role in the proceedings may help to restore the victim's dignity. The number of victims involved in trials for crimes against humanity, war crimes, and genocide, however, make it impossible for an individual victim to participate in a meaningful way. The participating victims will likely be appointed a common legal representative, who will then participate in the proceedings on behalf of the victims. Virtually all decision-making power will necessarily be ceded to this legal representative, due to the conflicting interests and desires among the legally recognized victims. Accordingly, victims are unlikely to have a form of participation or decision-making power that is any more direct than what they have in common law jurisdictions.

b. Reparations

The claim that victim participation is necessary to protect victims' interests in receiving reparations is also questionable. A number of commentators have noted that it is unrealistic to expect that the ICC will be

Patricia Resick, *Healing the Psychological Wounds of Criminal Victimization: Prediction Postcrime Distress and Recovery*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 50, 60 (Arthur J. Lurigio et al. eds., 1990). The U.N. Handbook on Justice for Victims cautions that “placing the victim in a decision making role may lead to even greater harassment and intimidation by the defendant and may otherwise cause the victim anxiety.” U.N. HANDBOOK, supra note 3, at 36. For these reasons, the majority of victims in countries that provide opportunities for direct participation elect not to do so. Id. at 36. Even the right to testify may undermine the recovery process. As Professor Henderson notes, “testifying is not necessarily cathartic. Catharsis encompasses articulation and expression of traumatic experiences in appropriate settings. The appropriateness of the setting is essential because the process of emotionally reliving a traumatic event can be extremely painful and frightening.” Henderson, supra note 191, at 980. A study of victim participation at the ICTY concluded that “testifying at the ICTY, far from having a curative effect for all, can be damaging for some victim-witnesses.” Haslam, supra note 11, at 318. This is due to the fact that the interests of the victims and the inherent functions of the court are misaligned. Victims want to elicit the truth, tell their stories, and inform others of their suffering. International tribunals, on the other hand, “are hardly ever interested in hearing [victims’] stories for their own sake.” Id. at 324. The ability of victims to tell their stories is subject to several limitations, including judicial resources, the desire to avoid duplicative testimony, and the due process rights of the defendants. Thus, victims are often cut short, or unable to provide a full account of their victimization, thereby limiting the therapeutic effect of the testimony.

Sudan Victim Lawyers Recount Their Experiences with the ICC so Far, BULL. (Victims Rs. Working Group, London, U.K.), Summer/Fall 2007, available at http://www.vrwg.org/Publications/04/ENG09.pdf [hereinafter Sudan Victim Lawyers] (stating that Sudan victims have conflicting interests, complicating joint legal representation); King, supra note 24, at 378–80 (documenting conflicting desires among victims of the same offender).
able to provide meaningful reparations to individual claimants. To explain, the Prosecutor's strategy of focusing on high-level officials and those most responsible for serious crimes means that thousands of victims may be entitled to seek reparations from a single defendant. These victims, however, are unlikely to receive meaningful compensation because most perpetrators of serious crimes under international law are indigent or able to hide their assets. For these reasons, some commentators are concerned that victims may have unreasonable expectations about the compensation they may receive and will subsequently feel cheated when they are awarded nominal or symbolic reparations. As a result, these commentators argue that the Court should focus on awarding collective reparations, which may include monuments or museums to memorialize the victims, money to rebuild destroyed infrastructure, or the creation of community centers. Assuming that the ICC does adopt a practice of awarding collective reparations, the benefit of individual participation for both the victim and the Court is significantly reduced.

c. The Effect on Prosecutions

Lastly, the claim that victim participation may assist the prosecution is dubious, and, in many cases, false. The ICC Prosecutor consistently opposes victims' request to participate in the proceedings, especially during the investigation stage, when victim participation may interfere...
with his ability to conduct a focused investigation.\textsuperscript{212} For example, if victims submit requests to preserve evidence,\textsuperscript{213} the Prosecution may be ordered to follow investigatory leads that are potentially unrelated to the focus of its investigation or inconsistent with its overall strategy.\textsuperscript{214} The Prosecutor has also expressed a concern that, in extreme cases, persons sympathetic to the defendant may submit fraudulent applications to participate in order to gain information about, or even obstruct, an investigation.\textsuperscript{215}

Victim participation during the trial may also frustrate the prosecution of a defendant.\textsuperscript{216} As one commentator has noted, "[A] prosecutor and a victim's counsel may not have the same theory of the case, which would lead them to make inconsistent arguments and undermine the

\textsuperscript{212} Uganda, Decision on Victims' Applications for Participation, \textit{supra} note 121, ¶¶ 90–104. For this reason, the Prosecutor has argued that "the regime of victim participation in the Statute and the Rules is one of gradually escalating participation, where the degree of participation increases as the proceedings progress." Situation in the Democratic Republic of Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01-06-993, Prosecution's Submissions on the Role of Victims in the Proceedings Leading up To, and During, the Trial, ¶ 29 (Oct. 19, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-993_English.pdf [hereinafter Congo, Prosecutor's Submissions].

\textsuperscript{213} Congo, Decision on Applications, \textit{supra} note 101, ¶ 100. Pre-Trial Chamber II recently clarified that victims cannot engage in "evidence gathering," and that their role is limited to presenting their "views and concerns" on the need to preserve specific pieces of evidence. Situation in Uganda, Case No. ICC-02-04-112, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Victims' Applications for Participation, ¶ 31 (Dec. 20, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-02-04-112_English.pdf [hereinafter Uganda, Decision on Application for Leave]. However, in the Chamber's earlier decision on victims' applications for participation in the same matter, the Chamber noted that "[t]he participation of victims in the context of the procedure set out in [Article 56] ... may therefore be permitted." Uganda, Decision on Victims' Applications for Participation, \textit{supra} note 121, ¶¶ 100–01.

\textsuperscript{214} In its response to applications to participate in the situation in Darfur, the Prosecutor commented that "the ruling that victims may participate in the situation ... has had an impact upon the timely and efficient conduct of investigations." Situation in Darfur, Sudan, Case No. ICC-02-05-81, Prosecution's Reply Under Rule 89(1) to the Applications for Participation of Applicants a0011/06, a0012/06, a0013/06, a0014/06 and a0015/06 in the Situation in Darfur, the Sudan, ¶ 22 (June 8, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-02-05-81_English.pdf.

\textsuperscript{215} Situation in the Democratic Republic of Congo, Case No. ICC-01-04-103, Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1–VPRS 6, ¶ 18 (Jan. 23, 2006), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-103_English.pdf [hereinafter Congo, Prosecutor's Application to Appeal]. The Prosecutor notes that, given the thousands of potential applications, it will be difficult to determine whether an applicant is lying. According to the Prosecutor, "the risks of fabricated request for participation aimed at infiltrating the Court's investigative activities are apparent and should not be underestimated." Id. ¶ 18. Pre-Trial Chamber II has acknowledged this risk, stating that "the possibility that some individuals might try to obtain information or interfere with the ongoing proceedings cannot be entirely ruled out ...." Uganda, Decision on Application for Leave, \textit{supra} note 213, ¶ 35.

\textsuperscript{216} See, e.g., Jorda & de Hemptinne, \textit{supra} note 63, at 1412.
The Victims of Victim Participation

prosecutor's ability to secure a conviction.”217 This conflict has already arisen in the Lubanga case. The Prosecutor there charged Thomas Lubanga, the former leader of the Union of Congolese Patriots, with committing serious violations of the laws and customs applicable in armed conflicts not of an international character.218 At the confirmation of charges hearing, however, the victims’ representative stated that Uganda’s involvement in the hostilities was common knowledge, and urged the PTC to re-characterize the conflict as international.219 The Chamber agreed with the victims’ representative and amended the charges against Lubanga to include war crimes committed during an international conflict.220 The Prosecutor objected to this characterization, likely because he had not intended to prove—or did not believe that he could prove—that there was an international conflict.221

A victim may also inadvertently undermine the Prosecutor’s strategy at trial by presenting questionable evidence, calling unreliable witnesses, or providing defense witnesses an opportunity to redeem mistakes made during the Prosecutor’s cross-examination.222 The risk that a victim may frustrate the prosecution’s efforts is compounded by the fact that victims do not have any formal right to access all of the evidence in a given case. Without access, the victim is unlikely to “fully understand the theories and strategies of the [Prosecutor].”223 As a result, it is doubtful that a victim—except in his role as witness—will be able to help the Prosecutor establish guilt or rebut the defendant’s case.

d. Unintended Consequences

Victims who participate in the proceedings may also face unforeseen consequences.224 For one, in order to protect the due process rights of the

219. Id.
220. Id. ¶ 204 (stating that the counts relating to a non-international conflict still stand, but that they are limited to conduct occurring during a three-month period in the summer of 2003).
221. As a result, both the Prosecutor and the Defence appealed the PTC’s decision confirming the charges. See Situation in the Democratic Republic of Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01-06-915, Decision on the Prosecutor and Defence’s Applications for Leave to Appeal the Decision on the Confirmation of Charges (May 24, 2007), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-915_English.pdf.
223. Id.
224. Victims whose applications are rejected by the Chambers may also suffer trauma upon being denied victim status. There are several potential obstacles confronting a victim
defendant, participating victims may be denied the opportunity to testify as witnesses.\textsuperscript{225} Accordingly, some victims may never be able to tell their stories or to receive any of the (potentially) therapeutic effects of giving testimony. The Prosecutor likewise may lose the opportunity to present information that could help incriminate the defendant.

Second, victims may become frustrated if they are denied the opportunity to participate in proceedings. The Pre-Trial and Trial Chambers have repeated that participation is not a “once-and-for-all-event.”\textsuperscript{226} Victims must submit a new application prior to each hearing or stage in the proceedings.\textsuperscript{227} The Chamber then considers on a case-by-case basis whether participation is appropriate.\textsuperscript{228} In other words, victims who are recognized to participate in one stage of the proceedings may be prohibited from participating in subsequent proceedings. Similarly, victims who have invested significant time and energy in participating in the investigation of a situation may suddenly be left without recourse if the Prosecutor who wishes to participate in the proceedings. First, a victim must show proof of identity. Although the Pre-Trial Chambers have recently expanded the forms of identity that an applicant may submit, for many victims who have been forced out of their homes and into refugee camps, this seemingly simple requirement may foreclose the possibility of participation. See Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04-01/05-282, Decision on Victims’ Applications for Participation (Mar. 17, 2008) (rejecting victims’ applications for lack of proper identity). Second, “Many victims . . . stand to be excluded . . . for having suffered the ‘wrong’ crimes, committed by the wrong perpetrators at the ‘wrong’ time.” Di Giovanni, supra note 8, at 27. This occurs because applicants must show that they were injured by one of the three crimes within the jurisdiction of the court: crimes against humanity, war crimes, or genocide. Rome Statute, supra note 1, art. 5. Furthermore, because the Court only has jurisdiction over crimes committed after the State’s ratification of the Rome Statute, victims who were injured prior to ascension will not qualify as victims. Id. art. 11.

The psychological effects on the victims who are denied legal recognition are speculative at this point. Yet, we can assume that persons who have suffered atrocious human rights abuses will suffer some additional harm on being told that they do not qualify as victims. From the victim’s perspective, it may seem unjust that he cannot participate because his injury occurred a year before the country ratified the Rome Statute, while other persons, perhaps suffering less severe injuries, are permitted to participate merely because their injury occurred later in time. Situation in Uganda (Prosecutor v. Kony et al.), Decision on Victims’ Application for Participation, Case No. ICC-02/04-01/05-282, ¶ 119 (Mar. 17, 2008) (rejecting the application of an individual who was allegedly kidnapped, shot, and forced to kill others on the ground that the alleged crimes occurred before the Rome Statute entered into force). The rejection of an application may also be perceived either as an accusation that the victim is lying or as a denial of the injury suffered.

\textsuperscript{225} Jorda & de Hemptinne, supra note 63, at 1409. Trial Chamber I, however, has indicated that it will not per se bar participating victims from giving testimony. In its opinion outlining the general participatory rights for victims in the \textit{Lubanga} trial, the Chamber stated that “when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case.” Congo, Decision on Victims’ Participation, supra note 102, ¶ 134.

\textsuperscript{226} Congo, Decision on Victims’ Participation, supra note 102, ¶ 101.

\textsuperscript{227} See, e.g., ICC Rules, supra note 78, R. 89.

\textsuperscript{228} Rome Statute, supra note 1, art. 68(3).
decides, pursuant to Article 53, not to prosecute the person responsible for their injuries.\textsuperscript{229} This occurred in the situation in the Democratic Republic of the Congo, in which the first victims recognized to participate in the investigation of the situation were denied the opportunity to participate once the case against Thomas Lubanga commenced.\textsuperscript{230}

Finally, mass participation could jeopardize victims’ safety.\textsuperscript{231} The Victims and Witnesses Unit is in charge of protecting victims who participate in ICC proceedings. However, like all organs of the ICC, the VWU has limited resources. As a result, the VWU will have less money to spend on each victim as more victims apply to participate. Thus, if significant numbers of victims participate, it will be difficult for the VWU to take effective measures to ensure each victim’s safety.

In sum, although the victim-oriented provisions in the ICC are likely to contribute positively to victims’ experiences in the international criminal justice system, it is too early to predict whether participatory rights will provide any additional benefit to the victim. On the other hand, there is a possibility “that the introduction of victim participation will not ameliorate, and may worsen, the position of [the] victim-witness.”\textsuperscript{232}

2. The Cost for Unrecognized Victims

To determine the proper role for victims in an international criminal justice system, we must consider the effects of a participation regime on the victims who are unable to take part in the proceedings. Domestic victim rights movements have largely ignored this issue because the vast majority of crimes involve only one victim. Thus, in the domestic context, there is no reason to question how the participation of one victim affects the interests of anyone beside the defendant. This is not the case with international crimes. Crimes falling within the ICC’s jurisdiction may involve hundreds of thousands of victims, most of whom will not be legally recognized by the Court. These actual, but

\textsuperscript{229} Jérôme de Hemptinne & Fracesco Rindi, Comment, ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Stage of Proceedings, 4 J. INT’L CRIM. JUST. 342, 348–49 (2006) (“In such a situation, the victims (potentially very large in number and as a result of their participation possibly suffering from a degree of emotional distress) may be abruptly thrown out of the proceedings and left without any protection.”).

\textsuperscript{230} Congo, Decision on the Applications for Participation, supra note 127, ¶ 9.

\textsuperscript{231} Situation in Darfur, Sudan, Case No. ICC-02/05-81, Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, ¶ 27 (June 8, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-05-81_English.pdf [hereinafter Darfur, Prosecution’s Reply]; see also Congo, Prosecution’s Application for Leave, supra note 174, ¶ 13 (stating that participation in the situation can lead to the exposure of victims and witnesses and jeopardize their safety).

\textsuperscript{232} Haslam, supra note 11, at 334.
unrecognized, victims face substantial costs as a result of the ICC participation scheme. Specifically, allowing legally recognized victims to participate in proceedings will limit unrecognized victims’ access to justice by increasing the cost and length of trials and decreasing the number of cases that can be heard before the Court.

a. The Increased Cost of Prosecutions

Lengthy criminal proceedings consume more judicial resources than shorter ones. At the ICC, victim participation will undoubtedly prolong proceedings, thus increasing the cost of each prosecution. At this point, it is difficult to say the extent to which victim participation will prolong proceedings in the ICC, because the Chambers are still determining the extent and scope of permissible participation under the Rome Statute. Thus far, however, victim participation has increased the Prosecution’s workload in the following ways.

Applications: The Prosecutor must respond separately to each victim’s application for participation. This, as the Prosecutor notes, is a “resource-intensive and extremely time consuming exercise.” As of August 2007, the Court had received 175 applications for participation in proceedings regarding the Situation in the Democratic Republic of the Congo (DRC); another forty-nine for participation in the Situation in Uganda; and twenty-one applications for participation in the Darfur proceedings. This number of applications is expected to increase significantly for two reasons. First, victims in the DRC, the Central African Republic, Uganda, and Sudan are still largely unaware of the functions of the ICC. The Court and various NGOs are currently working to inform victims of their right to apply to participate. As these outreach efforts become more successful, we can expect more applications for victim participation. Second, the Pre-Trial and Trial Chambers

233. Commentators have predicted that victim participation will lead to “substantial delays” in the administration of justice, because judgments will be delivered only “after several months or years of discussion and confrontation.” Jorda & de Hemptinne, supra note 63, at 1412; see also Jouet, supra note 116, at 279 (“Slowing down cases and increasing resources for the Court, Prosecutor, and defense may be the only way of containing the increased workload associated with victim participation.”).

234. Congo, Application for Leave, supra note 137, ¶ 11.

235. Id.; see also Situation in Uganda, Case No. ICC-02/04-85, Prosecution’s Reply Under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, ¶ 14 (Feb. 28, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-85_English.pdf [hereinafter Uganda, Prosecution’s Reply] (stating that responding to applications diverts resources away from conducting a timely investigation).

236. See Congo, Prosecution’s Application for Leave, supra note 174, ¶ 34. For an overview of the Court’s outreach efforts, see http://www.icc-cpi.int/outreach.html.
have expanded the circumstances under which persons may submit applications for participation. Both Chambers have ruled that victims may apply to participate in proceedings related to the investigation of a situation. The Prosecutor has objected to these decisions, fearing that they would invite hundreds of thousands of persons to submit applications. Although it is too early to determine how these opinions will affect the number of applications received by the ICC Prosecutor, hundreds of thousands of persons are now entitled to apply to participate.

A number of other issues ancillary to victims' applications for participation also delay the Prosecution's efforts.

**Victim Anonymity:** Applicants frequently request the Registry to redact information in their applications that could reveal their identities. The Defence has objected to this anonymity on several occasions, claiming that it cannot submit a meaningful reply to the applications if the details of the victims' identities are withheld. However, the requests continue.

**Requests for Investigatory Measures:** As stated above, victims' requests for specific investigatory measures may hinder the Prosecutor's ability to carry out a focused investigation. The ICC Prosecutor has previously noted that conducting "conflicting or contradictory evidence gathering activities at the request of multiple victims could seriously affect the fairness and the efficiency of the Prosecution's investigations." Of course, the Chamber may not order the specific investigation requested. However, even in that case, the Prosecutor may still have to respond to the request and explain why it is not warranted.

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238. Id.
239. See Darfur, Prosecution's Reply, supra note 231, ¶ 26. Applying the Chamber's prior ruling to the Darfur context would open the situation to participation by "any person who claims to have suffered prejudice or harm as a result of an international criminal act [occurring] in Darfur in conflict between the Government of the Sudan and the rebel forces since 1 July 2002," regardless of any actual connection to the Prosecution's investigation or the case itself. Id.
240. Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Request of the OPCV in Relation to the Applications of Victims, Case No. ICC-01/04-01/06-1315 (May 9, 2008).
243. See Rome Statute, supra note 1, art. 56(3).
Victims' Access to Documents: A recurring battle in the first two years of the proceedings before the Court has been whether victims have a right to view the Prosecutor's documents and evidence.\textsuperscript{244} The Prosecutor and Defence generally oppose requests to view documents, and the Chamber must issue a decision after each such request.\textsuperscript{245}

Determining the Manner of Participation: Prior to each hearing or appeal, the relevant chamber must consider whether victims are entitled to participate, and, if so, in what manner.\textsuperscript{246} This determination can lead to proceedings within proceedings, as the parties generally disagree on the proper scope of participation, if any.\textsuperscript{247} For example, the following issues have already arisen regarding applications for victim participation in a particular stage of the proceedings: (1) whether parties are entitled to receive unredacted copies of applications;\textsuperscript{248} (2) whether victims' per-

\textsuperscript{244} See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-957, Submissions on Preliminary Issues, \textsuperscript{11} 10–12 (Sept. 24, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-957-\textit{tEnglish.pdf} [hereinafter Congo, Submissions] (requesting all documents presented by parties before the Pre-Trial Chamber and the transcripts of the hearings); Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01-04-01-06-462, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 in the Confirmation Hearing (Sept. 22, 2006), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462\textunderscore \textit{tEnglish.pdf} [hereinafter Congo, Decision on Arrangements].

\textsuperscript{245} See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-1017, Prosecution's Response to the "Request of the OPCV to access documents in the case record related to applicants a/0004/06 et al.," \textsuperscript{12} 4 (Nov. 8, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1017\textunderscore \textit{English.pdf} [hereinafter Congo, Prosecution's Response to "Request"] ("Access to confidential portions of the record by applicants who seek to become victim participants in a case should be granted only in highly exceptional situations, once an applicant has established a compelling case that the specific material sought directly affects his or her interests."); Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-353, Prosecutor’s Response to "Observations concernant les modalités de la participation des Victimes," \textsuperscript{13} 24 (Aug. 25, 2006), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-353\textunderscore \textit{English.pdf} [hereinafter Congo, Prosecutor’s Response to "Observations"] (stating that victims should not have unfettered access to entire records).

\textsuperscript{246} See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-824, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled "Décision sur le demande de mise en liberté provisoire de Thomas Lubanga Dyilo," \textsuperscript{14} 40 (Feb. 13, 2007), \textit{available at} http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-824\textunderscore \textit{English.pdf} [hereinafter Congo, Judgment] (stating that Article 68(3) requires a specific determination by the Appeals Chamber regarding whether victim participation in the particular appeal is appropriate).

\textsuperscript{247} Congo, Decision on Victims' Participation, \textit{supra} note 102, \textsuperscript{15} 31 (Blattman, J., dissenting) (criticizing this approach and stating that it "may create a tendency to cause delays and legal insecurities because it adopts a system in which every application is to be evaluated on a case-by-case basis for every procedural action").

\textsuperscript{248} Congo, Decision on Requests of Legal Representative, \textit{supra} note 173, \textsuperscript{16} 29–31; Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04-01/05-208, Prosecution's Further Submissions Supplementing its "Application to Lift Redactions from Application for Victims' Participation to be Provided to the OTP", dated 6 February 2007, and Request for
sonal interests are affected by a hearing;\(^{(2)}\) (3) whether victims who have not yet been recognized may participate in certain proceedings;\(^{(4)}\) (4) whether victims have a personal interest in an interlocutory appeal;\(^{(5)}\) (5) whether the Appeals Chamber is bound by the Trial Chamber’s decision on victim participation;\(^{(6)}\) (6) whether and how victims may participate anonymously;\(^{(7)}\) (7) whether victims’ representatives may participate anonymously;\(^{(8)}\) (8) whether victims have the right to access confidential documents;\(^{(9)}\) (9) whether victims or their representatives are permitted to introduce evidence at trial;\(^{(10)}\) (10) whether participating victims can testify as witnesses;\(^{(11)}\) and (11) the amount of time that should be allotted to victims’ opening and closing statements.\(^{(11)}\) On each of these issues, the Chamber must let the Defence and the Prosecutor respond to the applicants’ request before issuing an opinion.

Beyond costs specific to the Prosecution, victim participation also delays the proceedings in the following ways.

Protective Measures: The Rome Statute and its accompanying Rules display significant concern for victim safety. For example, the Statute establishes the VWU and charges it with protecting victims.\(^{(20)}\) The victims’ legal representatives, however, “may have their own views as to what protective measures should be taken, and may consequently decide to autonomously initiate proceedings.”\(^{(21)}\) Furthermore, victims may present their views and concerns on the adoption of safety measures “prior to their opening and closing statements.”\(^{(22)}\) The Chamber has also had to determine whether OPCV has the right to view confidential documents in order to assist applicants. See generally Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04-01/05-222, Decision on the OPCV’s “Request to access documents and materials” (March 16, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-222_English.pdf.

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\(\text{249. See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01-04-01-06 OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007 (June 13, 2007).}\)

\(\text{250. Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Decision, in limine, on Victim Participation in the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation,” Case No. ICC-01-04-01-06-1355 (May 16, 2008).}\)

\(\text{251. Congo, Decision of the Appeals Chamber, supra note 147, § 5.}\)

\(\text{252. Congo, Judgment, supra note 246, § 43.}\)

\(\text{253. Congo, Decision on Arrangements, supra note 244.}\)

\(\text{254. Congo, Decision on Requests of Legal Representative, supra note 173, §§ 45–47.}\)

\(\text{255. See Congo, Decision on Victims’ Participation, supra note 102, §§ 105–07. The Chamber has also had to determine whether OPCV has the right to view confidential documents in order to assist applicants. See generally Situation in Uganda (Prosecutor v. Kony et al.), Case No. ICC-02/04-01/05-222, Decision on the OPCV’s “Request to access documents and materials” (March 16, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-222_English.pdf.}\)

\(\text{256. Congo, Prosecutor’s Submissions, supra note 212.}\)

\(\text{257. Congo, Decision on Victims’ Participation, supra note 102, §§ 132–37.}\)

\(\text{258. Id. § 117.}\)

\(\text{259. ICC Rules, supra note 78, R. 89(1).}\)

\(\text{260. Rome Statute, supra note 1, art. 43(6).}\)

\(\text{261. Congo, Application for Leave, supra note 137, § 13.}\)
to and irrespective of their being granted victim status in a given case.\textsuperscript{262} Potentially, then, tens or hundreds of thousands of persons may submit applications for participation, each requesting certain security measures to be taken. These proceedings relating to protective measures divert resources away from the Court's primary mission of bringing perpetrators of gross human rights abuses to justice.

\textit{Participation at Trial}: Victims' participation at trial is likely to significantly prolong the proceedings. In order to protect the due process rights of the defendant, the Trial Chamber will likely require the victims' legal representative to submit all proposed questions in advance.\textsuperscript{263} The Chamber will then permit the other parties to submit observations, ruling on the admissibility of each question prior to the proceeding.\textsuperscript{264} Furthermore, victims who want to tender or examine evidence at trial must provide notice to the other parties and seek leave from the Trial Chamber.\textsuperscript{265} Finally, the addition of a third party—assuming all victims share one common legal representative—increases the length of actual proceedings by approximately fifty percent.\textsuperscript{266} If the Court permits multiple victims to participate, for example, by giving opening or closing statements,\textsuperscript{267} it will only further increase the length of the proceedings.

b. The Decrease in Prosecutions

Increasing the cost of prosecutions will ultimately decrease the number of prosecutions that can be brought. The ICC has limited resources, and the Prosecutor cannot possibly prosecute every crime that falls within the jurisdiction of the Court.\textsuperscript{268} As Professor Mark Drumbl notes, when an ICC Prosecutor is faced with "‘competing situations of crisis’ . . . only some crises will be selected for investigation and prosecution."\textsuperscript{269}

Like all prosecutors, the ICC Prosecutor must exercise discretion in deciding which cases to pursue. On this front, the Prosecutor will take

\begin{flushleft}
\textsuperscript{262} Uganda, Decision on Victims’ Applications for Participation, supra note 121, ¶ 98.
\textsuperscript{263} ICC Rules, supra note 78, R. 91(2).
\textsuperscript{264} See id.
\textsuperscript{265} Congo, Judgment on Prosecutor’s Appeal, supra note 101, ¶ 104.
\textsuperscript{266} This presumes that each additional party will consume equal amounts of time during the proceedings.
\textsuperscript{267} See ICC Rules, supra note 78, R. 89.1 (stating that victims may make, at the discretion of the Chamber, opening or closing statements).
\textsuperscript{268} The ICC Prosecutor has stated that he will focus on senior officials and those most responsible for committing the human rights abuses. See Int’l Crim. Ct., Office of the Prosecutor [ICC-OTP], Paper on Some Policy Issues Before the Office of the Prosecutor 7 (2003), available at http://www.icc-cpi.int/library/organisations/otp/030905_Policy_Paper.pdf.
\end{flushleft}
The victims of victim participation into account "the conviction's value, the probability of conviction, and the cost of trying the case."\(^{270}\) Assuming resources remain constant, as the cost of prosecutions increases, the ICC Prosecutor will have to limit the number of cases that he decides to prosecute.\(^{271}\) This will lead to fewer perpetrators of human rights atrocities brought to trial, and more victims of human rights abuses left without any justice, truth, or opportunity to seek reparations.\(^{272}\)


\(^{271}\) The effect of increasing the cost of prosecutions is well-documented in criminal jurisdictions that have attempted to eliminate plea-bargaining. In each case, the ban proved unmanageable, or the practice continued unofficially. See Scott H. Howe, The Value of Plea Bargaining, 58 OKLA. L. REV. 599, 612 (2005). El Paso, Texas, for example, prohibited plea-bargaining in 1975. Id. As a result, the trial rate doubled within two years, overwhelming the two judges who were in charge of the criminal cases. Id. at 612 n.72. Although more judges were assigned to help with the criminal trials, the ban "essentially fell apart due to sub rosa bargaining at all levels of the prosecutor's office and the tendency of judges to bargain." Id. A similar ban in Alaska initially seemed manageable, but subsequent studies revealed that judges continued to grant more lenient sentences to defendants who pled guilty, thus encouraging the practice to continue informally. Id. at 612 n.71; see also Jayne W. Barnard, Allocation for Victims of Economic Crimes, 77 NOTRE DAME L. REV. 39, 66-67 (2001) ("A related concern about victim allocation is that selecting victims to testify and orchestrating victim impact presentations will demand increased time and attention from federal prosecutors and victim services personnel. These resources are always limited and jealously guarded."); Teresa White Cams & John A. Kruse, A Re-Evaluation of Alaska's Plea Bargaining Ban, 8 ALASKA L. REV. 27, 64 (1991).

\(^{272}\) The increased cost of prosecutions will likely influence the types of cases that are prosecuted as well. Prosecutors choose "each case according to its expected value per resources." Gazal-Ayal, supra note 270, at 2309. Assuming that the value of each conviction is the same, prosecutors will prefer to prosecute cheaper cases because they can prosecute more of them. Not all convictions, however, are created equal. A conviction for genocide may be more valuable to the prosecutor than a conviction for the war crime of targeting cultural sites. Thus, a prosecutor may decide to prosecute the genocide case, even though it is more expensive, if he believes that it will "yield a higher expected value per unit of resources, where the expected value is the conviction's value discounted by the probability of conviction." Id. Prosecuting expensive cases, however, entails a certain amount of risk. A prosecutor who loses an expensive case incurs not only the cost of the prosecution, but also the opportunity cost of the foregone prosecutions. The more costly the prosecution, the greater the opportunity cost. As the cost of prosecuting each case increases, the prosecutors are likely to react in one of three ways. First, risk-averse prosecutors may choose cases that have a high probability of conviction, but a lower conviction value. This would entail more prosecutions of lower-level officials against whom there is ample evidence of wrongdoing. Second, prosecutors may pursue cases that are less costly, i.e., those that are likely to have less victim participation. The third option is related to the second: prosecutors may make greater use of the plea bargain. Unfortunately, none of these options benefit actual victims. In the first two scenarios, victims of crimes that were not prosecuted will not receive justice. The last scenario also prejudices actual victims because their perpetrators receive discounted sentences. See Rebecca Hollander-Blumoff, Note, Getting to 'Guilty': Plea Bargaining as Negotiation, 2 HARV. NE GOT. L. REV. 115, 133 (1997) (stating that victims have a "tremendous emotional stake in seeing that perpetrators of crimes against them receive appropriate punishment").
The inability to prosecute serious offenders due to a lack of resources was a constant frustration for prosecutors and victims at the ICTY and the ICTR. At one point, the ICTY Prosecutor was forced to drop charges against fourteen lower-level officers in order to free resources for more “valuable” prosecutions. As one official at the ICTY explained, “[The Prosecutor] had to balance the available resources within the Tribunal and ... the withdrawal of charges against these accused was consistent with her office’s investigative and prosecutorial strategies.”

Another ICTY official voiced concerns about the ICTY’s inability to provide justice for victims, stating, “It also sometimes happened that cases of substantial importance to the victims [were] not followed up due to the excessive workload of the ad hoc Tribunals.”

Given the extra cost that victim participation adds to prosecutions, the ICC Prosecutor will likely face even more severe constraints than those in the ICTY. The victim participation scheme thus places a cost on the victims of human rights atrocities whose crimes are not prosecuted. Although the ICC has complimentary jurisdiction with state parties, in reality, an ICC prosecution represents the only possibility of redress for many victims. Accordingly, the victims of crimes that would have been prosecuted if the ICC Prosecutor had greater resources will never receive any justice or recognition of the crimes committed against them. Finally, reducing the number of prosecutions will not only leave a number of victims without any redress, but it may also negatively impact the perception of the Court in the countries in which the atrocities occurred.

3. Future Victims

Victim participation may negatively affect the interests of the international community. The crimes within the jurisdiction of the Court—war crimes, crimes against humanity, and genocide—are so heinous that they offend the interest of all humanity, and, indeed, imperil civiliza-

273. See, e.g., FIDH, Victims in the Balance, supra note 64. One of the main factors contributing to the Rwandan people’s dissatisfaction with the ICTR is the perception that too few persons were prosecuted. Id.
274. Rydberg, supra note 69.
275. Id.
276. Jorda & de Hemptinne, supra note 63, at 1392.
277. Anna Petrig, Negotiated Justice and the Goals of International Criminal Tribunals, 8 CHI-KENT J. INT’L & COMP. L. 1, 22 (2008) (noting that reducing the cost of prosecutions “would allow the investigation and prosecution of more cases, and thus more victims would have their suffering officially recognized and acknowledged by international tribunals”). Raquel Aldana-Pindell has documented in her studies on victims who bring cases before international tribunals, “the anguish suffered by surviving victims of gross human rights violations that result from the lack of effective prosecutions.” Aldana-Pindell, Vindication, supra note 47, at 1439–40.
tion itself." These crimes victimize not only individuals, but the international community as a whole. Thus, all persons have a stake in seeing that perpetrators of mass crimes are held accountable for their actions. In addition to seeking retribution for these crimes, the international community has an interest in deterring potential human rights abusers from committing similar crimes. In many cases, this interest in deterrence is so strong that it may trump the interest of the victim in seeking truth, justice, and reparations.

Allowing recognized victims to participate in ICC proceedings prejudices the interests of future victims in the same way that it prejudices unrecognized victims. As stated above, victim participation reduces the number of suspects that the ICC Prosecutor can investigate and prosecute. The decrease in the number of prosecutions, in turn, reduces the deterrent effect of international criminal law. To explain, criminal laws deter offenders—assuming that the offenders are rational actors—if the cost of the punishment multiplied by the risk of apprehension exceeds the benefit of committing the crime. Thus, a reduction in the number of prosecutions decreases the law’s deterrent effect, as it reduces the likelihood that any particular perpetrator of human rights abuses will be punished. Similarly, the reduction in the deterrent effect marginally increases the risk that each person will be the future victim of a crime within the jurisdiction of the Court.

279. See Donat-Cattin, supra note 61.
280. Petrig, supra note 277, at 21 (“It is hoped that convictions will contribute to the prevention of these types of crimes, which concern the international community as a whole, by putting an end to impunity for the perpetrators.”).
282. See Henderson, supra note 191, at 1010 (“The community’s protection of its right to exist, as manifested by its imposition of the criminal sanction, will therefore often negate the interest of the victim . . .”).
IV. DISTRIBUTIVE PROBLEM AND ITS IMPLICATIONS

The fact that the ICC has limited resources and is unable to prosecute all cases that fall within its jurisdiction creates a distributive problem. Increasing the participatory rights for legally recognized victims decreases the possibility that other victims will receive justice for the crimes committed against them. Thus, in deciding how best to protect or serve the interests of victims, we must recognize that victims have divergent interests, especially in the aftermath of human rights atrocities. Otherwise, reforms that are intended to further the interests of one group of victims may inadvertently frustrate the interests of another.

A simple hypothetical illustrates this point. In the imaginary country of Zurdan, twenty human rights abusers each committed crimes against 5,000 persons, making a total of 100,000 victims in the country. Each victim would like the perpetrator of the crime to be prosecuted and would also like to participate in the proceedings. For the sake of this example, imagine that each victim would receive five units of happiness from the conviction and an additional five units from being able to participate. Furthermore, say that all other persons (future victims) receive an aggregate of 5,000 units of happiness for each successful prosecution.

The Pre-Trial Chamber has authorized an investigation in the situation in Zurdan. The ICC Prosecutor has $50 million in his budget to prosecute crimes arising in that situation. For the sake of this example, the Prosecutor can choose three different types of trials: Option A, which does not permit any victim participation; Option B, which permits participation for one hundred victims; or Option C, which permits participation for 500 victims. Each Option A trial costs $5 million, each Option B trial costs $7 million, and each Option C trial costs $10 million. Thus, to summarize:

<table>
<thead>
<tr>
<th># of trials</th>
<th># of actual victims who benefit</th>
<th>Total units of happiness (including future victims)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All A</td>
<td>10</td>
<td>50,000</td>
</tr>
<tr>
<td>All B</td>
<td>7</td>
<td>35,000</td>
</tr>
<tr>
<td>All C</td>
<td>5</td>
<td>25,000</td>
</tr>
</tbody>
</table>

284. Although this may seem high, consider the large number of government officials, non-governmental organizations (NGOs), and court officials who work to achieve this objective.
If the Prosecutor chooses to proceed without any victim participation, he can prosecute half (ten) of the total number of offenders. Assuming each of the defendants is found guilty, 50,000 victims will receive justice. If the Prosecutor chooses Option B, which permits limited victim participation, the budget will permit him to prosecute only seven cases. The benefit of this strategy is that 700 victims will receive a significant benefit from being able to participate in the proceedings. On the other hand, 15,000 victims will no longer have any possibility of redress, unless the host country decides to prosecute the perpetrators. Finally, the Prosecutor may choose trials with extensive participation, or Option C. Again, the benefit is that the Prosecutor may be able to help 2,500 victims overcome their victimization through participation at trial. But, this benefit comes at the cost of the 25,000 victims who will no longer receive any justice for the crimes committed against them.

This example is an oversimplification of the various interests at stake, but it illustrates how different victims’ interests can be at odds. The Prosecutor’s decision to choose Option C over Option A confers a significant benefit on 2,500 victims, but denies a benefit to 25,000 other actual victims (and all future victims). The interests of these two sets of victims are thus unavoidably at odds. Victims who know that the Prosecutor will definitely prosecute their abuser will favor Option C. All other victims are likely to want the Prosecutor to choose Option A.285 It is commonly pointed out that the prosecutor’s and victims’ interests are not perfectly aligned. We must also recognize, however, that different victims’ interests are often in conflict as well.286

The ICC and future ad hoc tribunals must address this distributive problem as they establish rules governing victim participation. Reforms that increase the participation rights of victims must be balanced against

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285. This, of course, assumes that victims desire prosecutions. In most cases, this is a safe assumption. See Kühner, supra note 12, at 135 (“According to a variety of authorities, victims desire that offenders be prosecuted and punished . . . .”).

286. These competing interests exist, to a certain extent, in domestic legal systems as well. In adversarial systems, prosecutors attempt to strike the appropriate balance between the competing interests by using plea bargains. Despite the moral objections to discounting criminals’ sentences, most commentators argue that plea-bargaining is justified on consequentialist grounds. See Howe, supra note 271, at 611. Bargaining “provides a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant.” Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1915 (1992). These gains do not accrue solely to the prosecutor and the defendant. Rather, “the exchange presumably [has] social value, not just value to the bargaining parties.” Id. More specifically, two groups stand to benefit from the practice of plea bargaining. Society benefits from the increased number of prosecutions, which promotes the goals of retribution and deterrence. Plea bargaining also provides a benefit to the set of victims who, but for the resources saved by the plea bargain, would not receive any justice. These may include victims of relatively minor crimes, victims of crimes in “weak cases,” or victims of crimes that would be costly to prosecute, such as healthcare fraud.
the interests of other "key stakeholders in the criminal justice system." Thus far, commentators and judges have focused solely on balancing the interests of two parties: the participating victims and the defendant. These efforts fall short because they fail to consider the interests of the non-participating—and, to a certain extent, future—victims, who represent another key "stakeholder" in the criminal justice system. The drafters of the Rome Statute were legitimately concerned about protecting the interests of victims. However, if we fail to consider the impact that victim participation has on the interests of non-participating victims, the ICC may unintentionally represent a step in the wrong direction for victims' rights.

A. Balancing Test

Determining the optimal level of victim participation involves a three-part balancing test. The Court must weigh (1) the marginal benefit to the participating victim against (2) the potential prejudice to the defendant and (3) the cost of participation to the non-participating and future victims. Because an extensive discussion of victim participation at all stages of the proceedings is beyond the scope of this Article, I state only a few observations on each prong of this test.

First, the marginal benefit of victim participation will be greatest during proceedings in which the Prosecutor cannot adequately represent the victims' interests. The interests of the victims and the Prosecutor generally overlap, because they share the same goal of convicting the person who committed the crimes. Therefore, at stages of the proceedings at which their interests are aligned—namely, in establishing the guilt of the accused—the participation of victims other than in the role of witness is not likely to provide a significant benefit. At that point, the Prosecutor, who has greater resources and access to the evidence, is in a better position than the victim to convince the court of the defendant's guilt. The victims' interests, however, go beyond securing a conviction: victims also have an interest in their personal safety, in receiving reparations, and in learning the truth about what happened. Victim

288. See Greco, supra note 175, at 546–47; Jorda & de Hemptinne, supra note 63, at 1388; Stahn et al., supra note 5.
289. But see Commentary to the Second Preparatory Commission on Rules of Procedure and Elements of Crimes, supra note 185.
290. One of the main complaints with the ICTR has been the lack of safety measures for witnesses and victims. HANDBOOK OF WOMEN, supra note 195.
291. See also Guidelines, supra note 43, pmbl.
participation is thus most beneficial during proceedings related to these latter three issues. For example, with respect to determining the truth, victim participation would be most appropriate during admission of guilt proceedings, when the prosecutor’s and victims’ interests do not necessarily overlap.

Second, victim participation is most prejudicial to the defendant during the trial, when his interest in due process is the greatest. Participation at trial threatens the defendant’s due process rights in several ways. First, the recognition of victims prior to and during the trial stage “runs counter to the presumption of innocence.” Although the defendant can be convicted only if he is determined guilty beyond a reasonable doubt, the standard for recognizing victims creates “an appearance of prejudgment, if not actual prejudgment[,]” against the defendant. Second, in order to protect the safety of victims, the Chamber may be required to take special measures—such as permitting victims to testify in camera—that make it more difficult for the Defence to rebut the victims’ accusations. Third, unlike the Prosecutor, victims do not have an obligation to expose exculpatory evidence, nor is their conduct governed by a code of professional ethics. Moreover, many of the safeguards in civil law systems that are intended to discourage putative victims from abusing the legal system do not exist in the ICC.

Under the third prong, forms of victim participation that delay the proceedings or take up prosecutorial resources are most costly for non-participating victims because they limit the number of suspects that the Prosecutor can bring to trial. Participation is most likely to cause delays at three stages: (1) at the application phase, when the Prosecutor must respond to victims’ applications for participation in situations; (2) at the investigation stage, when victim requests for special investigatory measures may interfere with the Prosecution’s ongoing

293. Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-228, Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l’affaire Le Procureur c. Thomas Lubanga Dyilo et de l’enquête en République démocratique du Congo, at 5 (July 28, 2006), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228_French.pdf; see also King, supra note 24, at 399 (“Another troubling aspect of the VRA is that it erodes the constitutional protection that an accused is innocent until proven guilty.”); Stahn et al., supra note 5, at 223 (“Moreover, the early involvement of victims in the proceedings could be viewed as problematic in the light of the presumption of innocence.”).


295. Rome Statute, supra note 1, art. 68(1)-(2).

investigations; and (3) at the trial stage, when the Prosecutor and Defense are likely to oppose requests for participation, requiring the Chamber to carefully consider whether the requested participation will unduly prejudice the rights of the accused. On the other hand, victim participation in issues not directly related to the legal guilt of the accused (or after the guilt of the accused has already been determined) is not as likely to consume the same amount of judicial resources.

B. Recommendations

This balancing test indicates that the ICC can maximize the benefits of victim participation by taking several steps. First, the Appeals Chamber should reverse the PTC's decision that victims of a situation are entitled to apply to participate. The Court is simply not capable of processing tens or hundreds of thousands of applications for participation, nor would the participation of this number of persons significantly benefit any particular victim. Further, permitting persons to apply during the investigation of a situation will consume significant prosecutorial resources, limiting the number of investigations and prosecutions that it can undertake.

Second, the Chambers should be hesitant to interfere with the Prosecution's investigation. Victims can always contact the Prosecutor to inform him of evidence. Because the Prosecutor's primary objective is to secure convictions, the Prosecution will likely pursue the investigatory leads that best further this objective. Judicial interference with the process may undermine the Prosecutor's efforts, frustrating the victims' interest in seeking justice.

Third, in determining whether the victims' personal interests are affected, the Chambers should adopt the test proposed by the majority of the Appeals Chamber. That is, they should inquire "whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor." Providing victims with the right to participate in issues that are already of significant interest to the Prosecutor does little to further the Chamber's fact-finding objectives and will significantly prolong the proceedings.

Finally, the Trial Chambers should consider all evidence related to reparations at a separate proceeding, after the conclusion of the trial. This would afford victims many of the benefits that the participation scheme is designed to provide, while avoiding the costs to defendants and non-participating victims. Although a separate reparations hearing might entail the presentation of duplicative evidence, it would likely be

297. See de Hemptinne & Rindi, supra note 229, at 348.
298. Congo, Decision of the Appeals Chamber, supra note 147, ¶ 28.
more efficient, because the Trial Chamber would not need to constantly determine whether the participation of the victim would unduly prejudice the defendant. 299

CONCLUSION

The Framers of the Rome Statute were legitimately concerned about protecting victims' interests in international criminal proceedings. Until now, victims of mass atrocities have mostly been voiceless, and the world has largely ignored the impact that criminal proceedings have had on them. Past international criminal proceedings have undoubtedly left many victims feeling vulnerable and unsatisfied. They have also, on some occasions, inflicted additional trauma on those who have been called to testify.

The victim-oriented provisions in the Rome Statute and Rules of Procedure and Evidence are a significant step forward in addressing this problem. The Rome Statute guarantees that victims' interests will be taken into account at all stages of the proceedings and takes measures to ensure that the emotional and physical well-being of victims who participate in the proceedings is protected. The opportunity for victims to seek reparations, albeit in many cases collective or symbolic reparations, will also inject a desired element of restorative justice into international criminal law.

The international community, however, should keep two things in mind in the debate on how to best promote victims' interests in international criminal proceedings. First, crimes within the jurisdiction of the ICC generally involve thousands of victims, the vast majority of whom will not participate in the criminal proceedings. In light of this fact, international criminal law should aim to take into account the interests of all victims, not simply those recognized by the ICC. Second, victims of crimes within the jurisdiction of the Court do not always have a common interest; indeed, their interests often conflict. For this reason, measures that are intended to promote the interests of recognized victims may adversely affect the interests of other, unrecognized victims of human rights atrocities. The increased cost associated with victim participation limits the number of prosecutions that the Court can undertake, thus decreasing

299. Trial Chamber I recently announced that it would permit the Prosecution and victims to introduce evidence related to reparations during the trial. While the Chamber stated that this process would streamline proceedings, it will likely have the opposite effect, as the Trial Chamber will be forced to make "fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage." Congo, Decision on Victims' Participation, supra note 102, ¶ 122.
the possibility that the unrecognized victims of other human rights offenders will receive any redress for their injuries. The decrease in prosecutions also reduces the deterrent effect of international criminal law, imposing a cost on the entire international community.

The proper role for victims is one of the most important questions that the ICC will have to answer as it struggles to define its own role in international criminal law. For some, the Court represents a significant advancement in the international community’s efforts to end impunity for the most serious human rights abusers. To fulfill this objective, the Court should focus on prosecuting the most serious offenders of international law and send a message to potential human rights abusers that they will be held responsible for their crimes. This appears to be the view of the Prosecutor, for example, who has consistently rejected victims’ pleas to withdraw the arrest warrants for Joseph Kony and other top leaders of the Lord’s Resistance Army. For others, the ICC represents a shift away from the retributive model of criminal law to restorative justice. These individuals believe that the Court’s proper role, rather than focusing on prosecutions, is to shed light on human rights atrocities, acknowledge the suffering of victims, and promote reconciliation in regions destroyed by conflict. Regardless of the ultimate direction that the Court takes, it must carefully reconsider the often unquestioned assumption that increased participation is in victims’ best interests.