

**AN ANALYSIS OF THE DIFFICULTIES RELATED TO VICTIM
PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT
AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF
CAMBODIA**

**A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE
UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAWS IN
TRANSNATIONAL CRIMINAL JUSTICE AND CRIME PREVENITON- AN
INTENATIONAL AND AFRICAN PERSPECTIVE**



PREPARED UNDER THE SUPERVISION OF

PROF. LOVELL FERNANDEZ

AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE

29 OCTOBER 2012

ACKNOWLEDGEMENTS

I am truly indebted to a number of individuals that have assisted me in the production of this research paper. First, I would like to express my gratitude to the German Academic Exchange Service (*DAAD*), who offered me a scholarship to pursue the LLM at the University of Western Cape. I would also like to thank Prof. Lovell Fernandez, who has taken his time to be meticulous in guiding me through this research paper. Finally, I would also like to thank my parents, the Rt. Rev. Yona and Nshemire Katonene, my uncle and aunt Joe and Lillian Kahenano, my wife Samantha Atukunda Katonene, and my siblings Rachel and Amon Mwesigwa; for their continual prayers, encouragement and moral support.



DEDICATION

This research paper is dedicated to the child victims of the conflict between the Government of Uganda Army (UPDF) and the Lord's Resistance Army in Northern Uganda. They are the face of the horific nature of crimes against humanity and war crimes .



DECLARATION:

I Peter Mwesigwa Katonene, declare that **“An analysis of the difficulties related to victim participation before the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia”** is my work, that it has not been submitted for any degree or examination in any other university and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student..... Date.....

Signed.....

Supervisor..... Date.....

Signed.....



LIST OF ABBREVIATIONS

ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OCIJ	Office of Co-Investigating Judges
OPCV	Office of the Public Counsel for Victims
OPCD	Office of the Public Counsel for Defence
SCSL	The Special Court for Sierra Leone
STL	The Special Tribunal for Lebanon
TFV	Trust Fund for Victims
TRC	Truth and Reconciliation Commission
VPRS	Victims Participation and Reparation Section
VU	Victims Unit
VSS	Victim Support Section
UN	United Nations



Table of Contents

PETER MWESIGWA KATONENE	1
AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE	1
CHAPTER 1	8
VICTIM PARTICIPATION IS A NEW PHENOMENON	8
1. Abstract	8
1.2 Background	9
1.3 Research questions and objectives of the study	11
1.4 Significance of the study	12
1.5 Research methodology	13
1.6 Preliminary structure	14
Chapter One: Victim participation a new phenomenon	14
Chapter Two: Modalities of victim participation at the ECCC and ICC	14
Chapter three: The resultant challenges of victim participation in international judicial proceedings	16
Chapter Four: The effects of victim participation on international judicial proceedings	19
Chapter Five: Conclusion , alternatives and recommendations	20
CHAPTER 2	22
MODALITIES OF VICTIM PARTICIPATION AT THE ICC AND ECCC	22
2. Introduction	22
2.1. Modalities of victim participation at the International Criminal Court	24
2.1.1 Article 68(1) of the Rome Statute	25
2.1.2 Article 68(2) of the Rome Statue	27
2.1.3 Article 68(3) of the Rome Statue	29
2.1.4 Article 68(4) of the Rome Statute	31
2.2. Modalities of victim participation at the ECCC	32
2.2.1. Cambodian law with respect to victim participation (civil parties)	32
2.2.2. Victim (civil party) participation at the ECCC	33
2.3. Conclusion on the modalities of victim participation	37
CHAPTER 3	39
THE RESULTANT CHALLENGES OF VICTIM PARTICIPATION IN INTERNATIONAL JUDICIAL PROCEEDINGS	39
3. Introduction	39
3.1 The most significant challenges of victim participation at the ICC	40
3.1.1 The rights of victims verses the rights of the accused	40
3.1.2 The problem of determining whether a victim's personal interests have been affected	42
3.1.3 The growth in number of victim applications and the limited resources	43
3.2. Challenges of victim participation at the ECCC	45

3.2.1	<i>Lack of proper legal representation</i>	45
3.2.2	<i>Impracticability of victim participation requirements</i>	47
3.2.3	<i>ECCCs lack of concrete guidance for the mandate of the victims unit</i>	48
3.2.4	<i>Restrictions on victim participation</i>	49
3.3	<i>Conclusion</i>	50
CHAPTER 4		52
THE EFFECTS OF VICTIM PARTICIPATION ON INTERNATIONAL JUDICIAL PROCEEDINGS		52
4.	<i>Introduction</i>	52
4.1	<i>The rationale for victim participation</i>	52
4.2.	<i>The effects of victim participation on the ICC Proceedings</i>	54
4.2.1	<i>Enlightenment on the case at hand</i>	54
4.2.2	<i>Advance of victim rights through participation</i>	55
4.2.3	<i>Difficulties created by victim participation in court proceedings</i>	60
4.3	<i>The effects of victim participation on the ECCC</i>	65
4.3.1	<i>Protection guaranteed for victim civil parties</i>	65
4.4	<i>Conclusion</i>	66
CHAPTER 5		68
CONCLUSION, ALTERNATIVES AND RECOMMENDATIONS		68
5. 1.	<i>Conclusion</i>	68
5.2	<i>Alternatives and recommendations</i>	74
5.2.1	<i>Truth and reconciliation commissions</i>	74
5.2.2	<i>Expanding the mandates of court's sections</i>	75
5.2.3	<i>Promotion by all international criminal justice actors of victim participation</i>	77
5.2.4	<i>Increased funding for victim participation</i>	77
Bibliography		77
1.	Primary Sources	78
2.	Secondary Sources	80



CHAPTER 1

VICTIM PARTICIPATION IS A NEW PHENOMENON

1. Abstract

By any standard, victim participation is a relatively new phenomenon in international criminal law proceedings. Incredible advances have been made in the effort to end impunity for crimes against humanity, war crimes, genocide and, more recently, aggression. As a result, great strides have been made in ensuring the direct participation of victims of grave violations of human rights in court proceedings against their perpetrators. Prior to this, grave violations of human rights committed during conflicts or periods of mass violence were either largely ignored or even if action was taken, victims of the crimes hardly had a 'say' in the proceedings.

With the advent of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) a new dawn in the proceedings of international criminal law has emerged. The statutes that govern the ICC and ECCC have given a voice to victims in court proceeding buy ensuring victims participation.

Despite these advances, scholars have criticized victim participation for being inconsistent in its application at the International Criminal Court.¹ The criticism has come from scholars who have highlighted the unintended consequences of victim participation in court proceedings, arguing that their participation has resulted in the under- or misrepresentation of the actual experience of survivors of war, mass violence, or repression. These problems have arisen largely because the need to establish the guilt or innocence of the accused and to protect their due process rights, to abide by the rules of evidence and procedure, and to conserve judicial resources all cut against victim-witnesses' ability to tell their stories at these tribunals thereby resulting in a limited, and sometimes inaccurate, record of victims' experience.²

1.2 Background

The idea that victims should be allowed to participate in international criminal proceedings stems from a broader movement over the last several decades advocating for restorative, as opposed to merely retributive justice.³ Proponents of this restorative justice movement maintain that “justice should not only address traditional retributive justice, i.e., punishment of the guilty, but should also provide a measure of restorative justice by, inter alia, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries.”⁴ In other words, advocates of this movement believe that criminal justice mechanisms should serve the interests of victims, in addition to punishing

¹ Charles (2007-2008 : 804-818), Little (2006-2007 : 90) Marquardt (1995 :73).

² Carsten (2006: 219).

³ Petit & Ahmed (2010; 97).

⁴ McGonigle (2009: 104).

wrongdoers, and that the participation of victims in criminal proceedings is an integral part of serving victims' interests.

Although the concept of victim participation in criminal proceedings is not easily defined, it has been described as victims “being in control, having a say, being listened to, or being treated with dignity and respect.”⁵ Human rights activists supported the concept for several reasons. Many believed, as did victim advocates more generally, that participation in criminal proceedings has a number of potential restorative benefits, including the promotion of victims' “healing and rehabilitation.”⁶ Indeed, in its recommendations to the Preparatory Committee on the Establishment of the International Criminal Court (Preparatory Committee I), “participation is significant not only to protecting the rights of the victim at various stages of the proceeding, but also to advancing the process of healing from trauma and degradation.”⁷ Some believed that victim participation would bring the court “closer to the persons who have suffered atrocities” and thus increase the likelihood that victims would be satisfied that justice was done.⁸

A set of recommendations on the ICC elements of crimes and rules of procedure and evidence, noted “the right of victims to participate in the proceedings was included in the Rome Statute to ensure that the process is as respectful and transparent as possible so that justice can be seen to be done . . .”⁹ Finally, and significantly for the purpose of this study,

⁵ Doak (2005:25), Edwards (2004: 973), Heikkilä (2004: 141).

⁶ McKay (1999: 15).

⁷ SáCouto & Cleary (2008: 76).

⁸ SáCouto & Cleary (2008: 76).

⁹ Casesse (2003: 33).

human rights activists thought that victim participation might help address the under- or misrepresentation of the experiences of victims.¹⁰

1.3 Research questions and objectives of the study

The question this research paper poses is whether victim participation has increased the visibility of the actual lived experience of survivors in the context of war, mass violence, or repression? Under the Rome Statute, victims of the world's most serious crimes were given unprecedented rights to participate in proceedings before the court. Nearly a decade later, a similar scheme was established to allow victims to participate as civil parties in the proceedings before the Extraordinary Chambers in the Courts of Cambodia, created with UN support to prosecute atrocities committed by leaders of the Khmer Rouge during the period of 1975 to 1979. Although there are some significant differences in how the schemes work at the ICC and ECCC, both courts allow victims to participate in criminal proceedings independent of their role as witnesses for either the prosecution or defence. In other words, both have victim participation schemes intended to give victims a voice in the proceedings.

Have these new participation schemes before the ICC and ECCC, in fact, helped in satisfying the victims? What impact have they had on the ability of survivors of war crimes, crimes against humanity and genocide to tell their story and to talk about their experiences in their own words? In particular, has victim participation enabled more of them to tell their stories than would have been possible under the more traditional adversarial model employed by the *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda

¹⁰ Zappala (2006: 96).

(ICTR). Has it allowed them to expand the historical record produced by these tribunals with narratives that would otherwise have been left out because of prosecutorial or judicial decisions not to prosecute violations committed against them? Has it enabled victims to communicate a richer, more nuanced picture of their experiences than they were able to in the context of prior tribunals?

The aim is to explore whether these novel victim participation schemes, as implemented by the ICC and ECCC thus far, have actually allowed for greater recognition of victims' voices and experiences than was possible in proceedings before their predecessor tribunals. Have these schemes actually allowed victims to communicate a fuller and more nuanced picture of their experiences than they would have been able to do as victim-witnesses before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)? In other words, can the victim participation schemes at the ICC answer the call for increased visibility of the actual lived experience of survivors of human rights violations in the context of war, mass violence, or repression?

1.4 Significance of the study

Answering the questions above is a difficult exercise, as the ICC is at the border of completing its first case. This paper's assessment is based primarily on a review of the ICC rules and decisions regarding victim participation; victims' submissions; transcripts of the proceedings; and commentary on the experience of victim participants. Although victims have not been interviewed personally, the preliminary conclusions from this analysis are significant and warrant debate for a couple of reasons. First, victims whose interests these

schemes were intended to serve should not have to wait for a frank, albeit preliminary, assessment of whether participating in these schemes will truly enable them to tell their stories in ways that were not possible at other tribunals. This is particularly important for victims of human rights violations whose experiences have historically been under- or misrepresented. Second, human rights activists supported these schemes, at least in part, because of their expectation that participation would render more visible the actual experiences of victims in periods of conflict, violence, or repression.

If the victim participation schemes at these tribunals, as implemented, have fallen short of expectations, then perhaps we should acknowledge that the goal of visibility may never be fully achieved through direct participation in proceedings before international criminal bodies, and invest more effort in exploring other possibilities that might be as, if not better, suited to fulfilling that goal. The point here is not to suggest that victim participation ought to be abandoned altogether, but rather that we should acknowledge the limits of what can be achieved through these schemes and engage in a broader discourse about alternatives that might help us advance the project of surfacing the myriad ways in which violence and inequality are experienced by victims in the context of war, mass violence, or repression.

1.5 Research methodology

The study will be conducted using primary and secondary sources involving (library) desk research. Periodicals, archives and the Internet will be a source of this study. Furthermore, additional case law, academic books and articles will be used.

The study will be based on the victim participation provisions of the International Criminal Court and Extraordinary Chambers in the Courts of Cambodia. The focus will be on the relevant statutory documents, and the rules therein.

The methodological approach of this study will be to clarify first the factual and legal background of victim participation. Thereafter, the actual trials in the international tribunals will be analysed according to current international criminal law.

1.6 Preliminary structure

Chapter One: Victim participation a new phenomenon

This chapter will deal primarily with the introduction, background and rationale for the establishment of victim participation schemes at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia. It will focus on the involvement of human rights organizations in the inclusion of these aspects in the different tribunals and the projected impact it will have.

Chapter Two: Modalities of victim participation at the ECCC and ICC

This Chapter will deal with concerns of victim participation at the International Criminal Court. The gist is that ultimately, the victim participation scheme at the ICC, reflected primarily in Article 68(3) of the Rome Statute, establishes a general right of victims whose personal interests are affected, to present their “views and concerns” to the ICC and have

them “considered” by the court at appropriate stages of the proceedings.¹¹ Significantly, this right is separate from the right of victims to seek reparations. ¹²Indeed, under the Rome Statute, victims are not required to participate in pre-trial or trial proceedings before the ICC in order to make a claim for reparations, and victims may participate in proceedings without pursuing reparations. Thus, unlike victim participation in many domestic criminal justice systems, the primary purpose of which is to join a victim's claim for civil damages with a criminal action, victim participation at the ICC was envisioned as something more than a means by which victims could seek reparations.

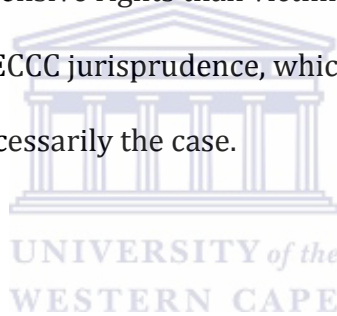
However, the legal instruments of the International Criminal Court are not explicit in dealing with the modalities of victim participation. According to Rule 89(1) of the Rules of Procedure and Evidence of the Court *“the Chamber shall then specify the proceedings and manner in which participation is considered appropriate”* and Article 68(3) provides that *“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”*

The chapter will also consider the modalities of victim participation at the ECCC. Nearly a decade after the victim participation scheme was established at the ICC, a similar scheme was set up to allow victims to participate in the proceedings before the ECCC. Neither the agreement between Cambodia and the United Nations on the framework of the ECCC, nor

¹¹ Rome Statute at Article 68(3).

¹² Rome Statute at Article 75.

the Law on the Establishment of the Extraordinary Chambers (ECCC Establishment Law) explicitly provides for a right of victims to participate in proceedings.¹³ However, the ECCC Establishment Law requires the ECCC to conduct proceedings in accordance with Cambodia's existing criminal procedures,¹⁴ which at the time the Establishment Law was passed included a mechanism by which victims of the crime being prosecuted could participate in the proceedings as civil parties.¹⁵ Thus, the Chamber's Internal Rules, drafted by the ECCC's judges in 2007, permit victims to exercise a right to take "civil action" during the criminal proceedings,¹⁶ giving civil parties a right to be "heard" by the Chambers.¹⁷ Nevertheless, as in the context of the ICC, victim participation at the ECCC is not without limits. Indeed, although one might expect that as "parties" to the proceedings, civil parties at the ECCC would have more extensive rights than victim participants at the ICC, the ECCC's Internal Rules as well as ECCC jurisprudence, which will be discussed more fully below indicate that this is not necessarily the case.



Chapter three: The resultant challenges of victim participation in international judicial proceedings

This chapter will deal with victim participation in a twofold manner. It will take the reception of victim participation before the ICC and the ECCC. The early history of victim

¹³ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S I-41273.

¹⁴ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Republic of Kampuchea, NS/ RKM/1004/006 (October. 27, 2004) [hereinafter ECCC Establishment Law] Article 33.

¹⁵ Provisions Dated September 10, 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (Sept. 10, 1992).

¹⁶ Extraordinary Chambers for the Courts of Cambodia, Internal Rules (Rev. 7), Rule. 23, (June 12, 2007).

¹⁷ Extraordinary Chambers for the Courts of Cambodia, Internal Rules (Rev. 7), Rule. 91(1), (June 12, 2007)

participation at the ICC and ECCC indicates considerable interest by victims in making use of their new participation rights. At the ICC, for example, from 2005 until the end of March 2011, 4,773 victims had applied to participate in the five situations that were then before the court being the Democratic Republic of Congo (DRC), Uganda, Central African Republic (CAR), Darfur and Kenya situations.¹⁸ Interestingly, the largest number of applicants was authorised to participate in the case against *Jean-Pierre Bemba*, a case arising out of the CAR situation. As of 31 March 2011, 1,366 victim applications had been granted in Bemba.¹⁹ Comparatively, only 122 persons had been granted victim status in the case against *Thomas Dyilo Lubanga*; 366 in the joint case against *Germain Katanga* and *Mathieu Ngudjolo*; and 89 in the joint case against *Abdallah Banda Abakaer Nourain* and *Saleh Mohammed Jerbo Jamus*, the only other cases currently at trial before the ICC.²⁰



At the ECCC, a total of 90 victims applied to participate as civil parties in the first case prosecuted by that tribunal, the case against *Kaing Guek Eav*, also known as “*Duch*.”²¹ *Duch* was found guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions in connection with his role as the commander of the detention and torture centre known as S-21 during the Khmer Rouge period.²² In contrast, nearly 4,000 victims applied for civil party status in the second case before the ECCC, a joint case against the

¹⁸ICC Registry Facts and Figures, at 4 (Apr. 8, 2011), [http:// 212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf](http://212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf). (Last visited, March 11, 2012).

¹⁹ ICC Registry Facts and Figures, at 4 (Apr. 8, 2011), [http:// 212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf](http://212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf). (Last visited, March ,11, 2012).

²⁰ ICC Registry Facts and Figures, at 4 (Apr. 8, 2011), [http:// 212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf](http://212.159.242.181/NR/rdonlyres/9B984A20-08A94127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf). (Last visited, March ,11, 2012).

²¹ *Prosecutors v. Kaing Guek Eav*, ECCC (Trial Chamber) Decision on the 26 July 2010. “Judgement”. 001/18-07-2007/ECCC/TC.

²² *Prosecutors v. Kaing Guek Eav*, ECCC(Trial Chamber) Decision on the 26 July 2010. “Judgement”. 001/18-07-2007/ECCC/TC.

four most senior living members of the Khmer Rouge regime.²³ Of those, 3,850 were granted the right to participate in the case.

These applicant numbers indicate not only a strong interest by victims in making use of their new participation rights but the numbers alone suggest that these victim schemes may, in fact, enable more victims to tell their stories than would have been possible at the *ad hoc* tribunals such as the ICTR and ICTY.

Second, this chapter will deal with the significant limitations that remain with regard to victim participation. Neither the considerable number of participants thus far, nor the examples just described tell the whole story of victim participation before the ICC and ECCC. First, as a general matter, victims do not get an opportunity to participate in proceedings unless the harm they experienced is linked to the charges being prosecuted by the court against the accused. The ICC defines “victims” as; *inter alia*, “any natural persons who have suffered harm as a result of any crime within the jurisdiction of the court.”²⁴

While the ECCC, requires that “In order for Civil Party action to be admissible, the Civil Party applicant shall ...b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be

²³ *Investigating Judges Issue Closing Order in Case 002*, Press Release (ECCC) Sept. 16, 2010 (indicating the court had received 3988 civil party applications). The four Khmer Rouge leaders are: 1) Ieng Sary, Khmer Rouge Deputy Prime Minister for Foreign Affairs; 2) Nuon Chea, second in command under Khmer Rouge leader Pol Pot; 3) Khieu Samphan, Khmer Rouge head of state; and 4) Ieng Thirith, Khmer Rouge Minister of Social Affairs. See *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007/ECCC-PTC, Case Information Sheets, <http://www.eccc.gov.kh/english/case002.aspx>. The case is referred to by the ECCC as Case 002. (Last visited in 20 March 2012)

²⁴ Rule 85 of ICC Rules of Procedure and Evidence.

based.”²⁵ Further, the charges against the accused still depend on what the prosecution chooses to pursue. Indeed, victims do not have the ability to independently initiate an investigation at either the ICC or the ECCC.²⁶

Chapter Four: The effects of victim participation on international judicial proceedings

This chapter will deal with the effects of victim participation schemes at the ICC and ECCC. One of the most troubling aspects of the victim participation schemes at the ICC and ECCC is the high expectations that the ICC and ECCC will serve the interests of victims better than the *ad hoc* or hybrid tribunals and that, therefore, more victims will be heard, and more of their stories told, than would have been possible at those tribunals. Indeed, such expectations were articulated as recently as in 2010 by some of the victims who made representations to the ICC in connection with the prosecutor's *proprio motu* investigation of the situation in Kenya under Article 15(3).²⁷ In the report to the court's Pre-Trial Chamber assigned to the Kenya situation, the Registrar noted “on some issues it appears that unrealistically high expectations already exist²⁸ about what the ICC can achieve in Kenya,” mentioning as an example of this “the desire of many victims to give evidence about their experiences . . . and the belief that most or many victims and eye-witnesses will have a chance to testify at the ICC.” As the Registrar's comments and initial assessments suggest this is not likely to happen.

²⁵ ECCC Internal Rules, Rule.23 bis (1)(b).

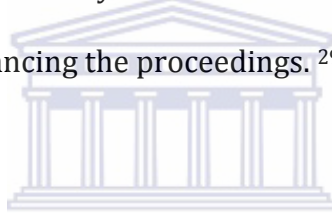
²⁶ Article 53 of the Rome Statute.

²⁷ *Prosecutor v William Ruto, Joshua Sang and Henry Kosgey*, ICC (Pre-Trial Chamber) Registrar's filing of 29 March 2010. “Public Redacted Version Of Corrigendum to the Report on Victims' Representations”, (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5, ICC-01/09. Paragraph 18.

²⁸ *Prosecutor v William Ruto, Joshua Sang and Henry Kosgey*, ICC (Pre-Trial Chamber) Registrar's filing of 29 March 2010. “Public Redacted Version Of Corrigendum to the Report on Victims' Representations”, (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5, ICC-01/09. Paragraph 18.

Furthermore, these expectations seem particularly problematic in cases against those most responsible for planning, organizing or masterminding serious international crimes, the focus of the ICC's and ECCC's prosecution efforts today. The large number of victims potentially affected in these cases means that the number of victims who might qualify to participate in proceedings may well reach into the thousands.

Finally, there has been immense criticism of 'fair trial' proceedings at the international criminal law level, condemning victim participation at these tribunals. The legal representatives of victims have been accused of acting as proxy prosecutors for the international courts as they have in many instances been seen to be performing the duties of the prosecutor, thereby unbalancing the proceedings.²⁹



Chapter Five: Conclusion , alternatives and recommendations

WESTERN CAPE

This chapter deals with alternatives to victim participation in international criminal law. Victim participation schemes at the ICC and ECCC have fallen short of expectations. Perhaps we should acknowledge the limits of participation during criminal proceedings and explore alternative possibilities that might be as, if not better, suited to the satisfaction of victims in international crimes. Alternative ways may complement the limited trial process by providing space for victims to tell their stories in other venues.

²⁹*Prosecutor v William Ruto, Joshua Sang and Henry Kosgey* , ICC (Pre-Trial Chamber), Decision of 23 January 2012. "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute". ICC-01/09-01/11-373. Paragraph 11-13

This chapter will establish a right for victims to be heard at the trial of an accused for the crime of which he or she is a victim.³⁰ The conclusion will also decipher the limits on the level of victim participation based on the type of truth-finding method the court uses. While the civil law/inquisitorial model heavily influence the ECCC, it is not a carbon copy and does have some common law/accusatorial aspects. These aspects, few as they may be, make victim participation as a subsidiary prosecutor inappropriate, as to do so violates the defendant's right to "equality of arms." This is not to say that victims should not participate before the tribunals, only that their involvement should be limited so as to protect the image of impartiality of the tribunal and the defendant's rights.



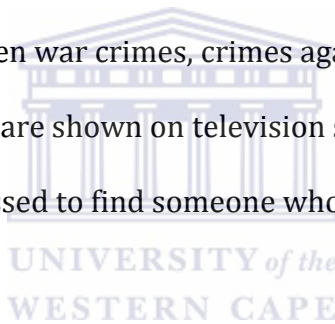
³⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN G.A. Res. 40/34, Annex, 6(b), U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985).

CHAPTER 2

MODALITIES OF VICTIM PARTICIPATION AT THE ICC AND ECCC

2. Introduction

With the advent of the Internet, satellites and cable television, it has become impossible for the world to remain ignorant when war crimes, crimes against humanity, and genocide are perpetrated. The faces of victims are shown on television screens and newspapers. For instance, one would be hard-pressed to find someone who has not heard of the tragedy that took place in 1994 in Rwanda.



Global knowledge of international crimes, has only rarely led to action. Too often, political considerations impasse international attempts at meaningful intervention, and victims are usually ignored. In the modern era, the international community's response to atrocity has often been to establish tribunals. Here, too, the faces and stories of victims are recalled, but usually in the context of witness testimony. While much time is spent ensuring that people accused of mass crimes receive a fair trial, the victims of those crimes have historically received little support at international war crimes tribunals. Neither the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the International Criminal Tribunal

for Rwanda (ICTR) nor the Special Court for Sierra Leone (SCSL) allow victims to participate as parties in their own right.

Indeed, victims and their families remained vulnerable to intimidation and retaliation as a result of the trial, long after the accused had been convicted or acquitted. In the first three years of the Rwandan Tribunal, some victims returned to their homes after having testified in Arusha (Tanzania), the seat of the Tribunal, and were killed.³¹

However, the ICC and the ECCC have set a precedent and allowed victims to participate in the court proceedings. The ICC and ECCC have made considerable strides in the recognition of victims of international crimes. The ICC was the first international court to permit victims to participate in their own right. Article 68(3) of the Rome Statute, provides for unprecedented access to the ICC's justice process for the victims of the world's most serious atrocities.³² The Rome Statute and the subsequent Rules of Procedure and Evidence, establish the basis upon which the court interprets and implements groundbreaking provisions enabling victim participation. The framework, from these rules, provides a basis for the incorporation of restorative justice principles as well as a theory of justice that contemplates a central role for victims. Victims are addressed in a manner that is different to that in traditional court proceedings, which do not focus on the concerns of the victim.

³¹ "Two witnesses who testified before the ICTR in the Jean- Paul Akayesu case and the Obed Ruzinda case were also killed". See the second Annual report of the ICTR covering the period from 1 July 1996 to 30 June 1997, U.N. Doc. A/52/582-S/1997/868 (1997), paragraph 51. Subsequent practice of the ICTR focused extensively on the protection of victims and witnesses, bringing about a uniform and effective methodology of protection.

³² Werle (2005: 88).

The ECCC provides for a unique case study with regard to the expanding role of victims. Established to try “senior leaders” of the Khmer Rouge and “those who were most responsible for the crimes and serious violations of Cambodian penal law,”³³ the ECCC is designed to allow victims a more robust, substantive role in the tribunal than any predecessor institution in modern international criminal law. As discussed in this chapter, the ECCC is a “hybrid” tribunal, which draws upon Cambodia's civil law system to allow victims to join as civil parties. This system affords victims many opportunities to influence the course of the investigation and the trial.

2.1. Modalities of victim participation at the International Criminal Court

The prime article for victim participation at the International Criminal Court is Article 68 of the Rome Statute. First, it is important to ascertain what the ICC defines as a victim. Rule 85 of the Rules of Procedure and Evidence provides that *“Victims’ means (a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”*

³³ The Communist Party of Kampuchea (also known as the Khmer Rouge) came to power in 1975. The Khmer Rouge, in an attempt to turn the country into a classless society, forced individuals to leave major urban centres and relocate to rural agrarian regions of the country. It also eliminated all laws and currency. See Tully (2006: 176-77).

This definition, is centred on the harm suffered by the victim as a result of the crimes and not the crime itself. The harm may be direct or indirect. However, the definition does not give clarity on the polarities between a direct and indirect victim. An illustration of a direct victim is one who has lost his house as a result of a war crime. An indirect victim, on the other hand, may be one whose community has lost a hospital as a result of a war crime. These factors will be analysed later and feature repeatedly in the discussion in this paper.

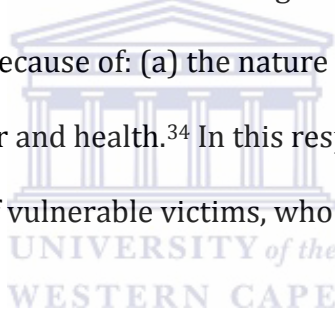
2.1.1 Article 68(1) of the Rome Statute

Article 68(1) of the Rome Statute, provides that, *“ The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”*

From this provision, the International Criminal Court has sought to ensure that it takes measures to protect victims and witnesses. Article 68(1) of the Rome Statute, as a general provision on victim protection, is the outcome of the blend of the first sentences of paragraphs 1 and 3 of article 68 of the ICC Draft Statute.

The Article 68(1) of the Rome Statute recognises a series of individual rights to be protected, with each of them covering a wide spectrum of situations. Safety, physical and the psychological well-being, privacy and in particular, the dignity of the individual victim or witness cover all areas of inalienable human rights defined in international and domestic legal instruments. Through the definition of this high standard of protection for victims and witnesses in Article 68(1), The Rome Statue has set a standard for the progressive development of law relating to the effective function of international criminal justice.

Meanwhile, the second sentence of Article 68(1) of the Rome Statute, deals with vulnerability. It emphasises protection of certain categories of victims/witnesses who are in situations of extreme danger because of: (a) the nature of their crimes and (b) their status, including their age, gender and health.³⁴ In this respect, the elements above help us to identify a particular “group” of vulnerable victims, who are always at risk of re-victimisation.³⁵



³⁴ United Nations Commission On Crime Prevention and Criminal Justice. *Handbook On Justice For Victims On The Use and Application Of The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N Doc E/CN. 15/1998/1 p 43.

³⁵ Re-victimisation can take place in the forms of the so-called “secondary victimization”, which is defined by the UN handbook on Victims Rights as “ the harm that may be caused to a victim by the investigation and prosecution of the case or by publicizing the details of the case in the media”. (United Nations Commission on Crime Prevention and Criminal Justice, *Handbook on Justice for Victims of Crime and Abuse of Power*, U.N. Doc E/CN. 15/ 1998/1 p 43.

2.1.2 Article 68(2) of the Rome Statute

Article 68(2) of the Rome Statute reads, *“As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.”*

Publicity of international criminal law is an essential guarantee for the accused of a fair trial. Transparency in the eyes of the general public makes criminal justice a visible mechanism of individual accountability, capable to deter future crimes. Yet, the protection of victims and witnesses justifies an exception to the general rule. The rationale for closed hearings or presentations of evidence through video-link or other electronic devices are the same as those behind the measures of protection envisaged in Article 68(1) of the Rome Statute, as regards vulnerability. However, non-disclosure of identity to the public or to the media is one thing, anonymity of witness/victims to the defence is another. The latter is unacceptable in light of the right of the defence to examine witnesses presented by someone “without identity”.³⁶ Yet, if anonymity is assessed as the only available measure of

³⁶ *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber), Decision of 24 September 2006. “Decision concerning Pre-Trial Chambers 1’s, Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Thomas Lubanga.” ICC-01/04-01/06-37.

protection, the relevant court chamber should order the anonymity. At the same time, the court should ensure that the testimony rendered by the anonymous victims or witness shall be weighed against this factor.³⁷

Alternatively, in the event that decide to participate in the proceedings and accept to lose their anonymity before testifying, their access to the courts proceedings may limit the unintended negative consequences connected with their vulnerability. In fact, should the accused threaten them or retaliate against them, their family or property, these victims will be able to promptly report any incident to the court, in accordance with Article 68(3) of the Rome Statute, for immediate and urgent remedial action.³⁸ Therefore, participating victims may decide, that the best way to protect themselves is to reveal their identity while seeking justice and telling their story in the face of the accused.

In the ICC's jurisprudence, the Pre- Trial and Appeals Divisions, as well as the office of the prosecutor, have made wide use of anonymity as a protective measure: names of victims and witnesses have been almost systematically expunged from the court's records, and decisions have been heavily redacted in their public versions to cover the identity and any information that could provide indicia on the whereabouts of the protected persons.³⁹

³⁷ Rule 63(4) of the ICC Rules of Procedure and Evidence.

³⁸ *Prosecutor v Thomas Lubanga*, ICC (Appeals Chamber), Decision of 21 July 2005. "Decision on the Prosecutors appeal against the decision of Pre-trial Chamber entitled " Decision Establishing General Principles Governing the Applications to restrict disclosure pursuant to Rule 81(2) and (4) Rules of Procedure and Evidence" ICC-01/04-01/06-568 and Pre-Trial Chamber, Decision on Protective Measures requested by Applicants." ICC-04-73.

³⁹ *Prosecutor v Thomas Lubanga* ICC (Pre-Trial Chamber Trial 1), Decision of 17 March 200. "Decison to Unseal the Warrant of Arrest against Thomas Dyilo and Related Documents." ICC-01/04-01/06-37.

2.1.3 Article 68(3) of the Rome Statute

Article 68(3) of the Rome Statute, provides that, *“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”*

Individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct. Offences of an immense magnitude, such as the ones within the jurisdiction of the court, victimise not only individuals, but also identifiable groups as a whole, as well as the international community.⁴⁰ However, without prejudice to the collective group of humankind, this provision is specifically addressed to the individual victims of a given crime.

‘The personal interests’ of the victims have to be found on a case-by-case basis by the relevant Chamber to permit the exercise of the victims right to participate. Conversely, this means that there must be a link between the criminal conduct investigated and the harm that they suffered.

⁴⁰ *Prosecutor vs. Erdemovic*, ICTY (Appeals Chamber), Judgement of 7 October 1997. Case No. IT-96-22-T. Paragraph 28.

Victims have the right to intervene in the proceedings before the ICC and not merely 'participate'. Article 68(3) of the Rome Statute, specifically provides that the "...[c]ourt shall permit their views and concerns to be presented and considered,". The initial practice of the Pre-Trial Chamber is in line with these literal interpretations of the text. In its first decision allowing victims to participate in the proceedings Pre-Trial Chamber 1 affirmed; that the chamber has a dual obligation; on one hand to, allows victims to present their views and concerns, and, on the other to examine them."⁴¹

The judges ensure that victims, through their Legal representatives, make correct use of their right to intervene. The role of the legal representative is clearly of dire importance.⁴² Even as the views and concerns of the victim, their families, dependants and persons who have suffered harm in intervening to assist victims may be presented also directly by themselves, it would be difficult for them to have the capacity to deal with the very technical procedures of the court with out the assistance of a legal expert.⁴³ Consequently, the ICC has preferred 'common' legal representation of multiple victims. In other words, on lawyer assisting multiple victims with their participation.

⁴¹*Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber), Decision of 17 Jan 2006, "Decision on the Applications for the Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6." ICC-01-04-101.

⁴² *Prosecutor v William Ruto and Joshua Sang*, ICC (Trial Chamber), Decision of 3 October 2012, "Decision on victims' representation and participation" ICC-01/09-01/11-460.

⁴³ *Prosecutor v William Ruto and Joshua Sang*, ICC(Trial Chamber) Decision of 3 October 2011, "Decision on victims' representation and participation." ICC-01/09-01/11-460.

2.1.4 Article 68(4) of the Rome Statute

Article 68(4) of the Rome Statute, provides that, *“The victims and Witness Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in Article 43(6).”*

Article 43(6) of the Rome Statute states that the victims and witnesses unit shall “provide protective measures on its own motion solely for witnesses, victims who appear before the court, and others who are at risk on account of the testimony given.” Therefore, the mandate of the victims and witnesses unit of the ICC is not defined exclusively in Article 68(4) of the Rome Statute, which includes reference to the surprisingly discriminatory language of Article 43(6) of the Rome Statute. This has been heavily criticised.⁴⁴ Indeed, while the court is empowered under Article 68 of the Rome Statute, to take appropriate measures to protect victims, who are the target of retaliation from offenders, the unit appears to be able to provide such measures only with respect to victims who testify before the court or whose identity and whereabouts have been made known in the course of testimonies before the court. Yet, an individual can be at risk even if he/she has survived a mass murder and no one witnessed his or her presences amongst the victims of the extermination. In such a situation, once there is reliable information concerning a plan of a suspect to kill that survivor, the court or the Prosecutor “shall” order measures of protection but the unit may not be in a position to implement them.⁴⁵

⁴⁴ Schabas (2007: 19) See also Boven (1999).

⁴⁵ Schabas (2007: 19) See also Boven (1999).

Having determined the modalities of victim participation at the International Criminal Court, it will then be appropriate to compare them with the modalities of victim participation in the Extraordinary Chambers in the Courts of Cambodia.

2.2. Modalities of victim participation at the ECCC

The legal principles in the Extraordinary Chambers in the Courts of Cambodia are a mixture of the national civil law system of Cambodia and international criminal law principles.

Therefore, we need to analyse victim participation in Cambodia itself and how it is played out in the ECCC.



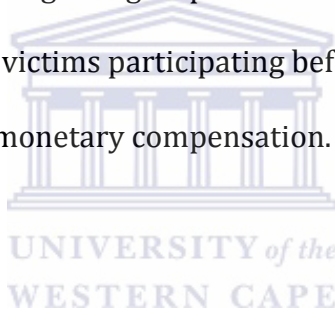
2.2.1. Cambodian law with respect to victim participation (civil parties)

A number of national jurisdictions have allowed victims broad rights to participate and to attach their civil claims to a criminal prosecution. Although national jurisdictions vary widely in their practice concerning the scope and manner of victim involvement in the criminal process, it is fair to say that the French system and those judicial systems based on the French model, such as that of Cambodia, offer a fairly broad example of successful victim participation.⁴⁶ Under Cambodian domestic law, victims may file charges against an individual, participate as witnesses for the court and participate as civil parties in criminal

⁴⁶ Boyle (2006: 310).

proceedings.⁴⁷ In this capacity, victims are granted full party rights, comparable to those of the accused. They may submit evidence, call witnesses and generally contribute to the prosecution.⁴⁸

Under Cambodian law, the rights of victims are almost always exercised individually. This has to do with the fact that the vast majority of crimes involve only one or two direct victims. However, the representation of groups of victims through victim associations is nothing new. In a limited number of circumstances, Cambodian courts have allowed certain national human rights organisations to take action in offences ranging from discrimination to torture.⁴⁹ Moreover, in previous prosecutions of the Khmer Rouge leadership for mass crimes, authorities recognised the right of groups of victims to participate as civil parties.⁵⁰ Nonetheless, the vast majority of victims participating before Cambodian court exercise their right individually and seek monetary compensation. This participatory model is not feasible, however, at the ECCC.



2.2.2. Victim (civil party) participation at the ECCC

Although the victim participation scheme is one of the most important features of the ECCC, the issue of victim involvement was one of the last issues taken up by judicial officers when drafting the Internal Rules.⁵¹ This oversight most likely had to do with the fact that Cambodian law provides for victim participation, either as an initiator of a complaint, as a

⁴⁷ Boyle (2006: 310).

⁴⁸ Boyle (2006: 310).

⁴⁹ Boyle, (2006: 310).

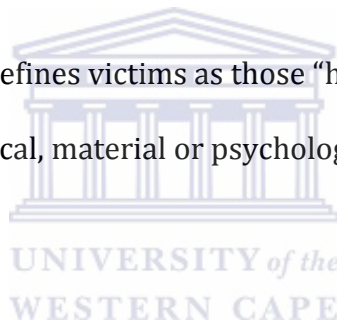
⁵⁰ Acquaviva (2008 :132).

⁵¹ Acquaviva (2008 :132).

witness for the court or as a civil party. However, it soon became apparent that the domestic victim participation scheme would not work at the ECCC due to the large number of victims and the complexity of the crimes charged.

The drafters of the Internal Rules of the ECCC, seem to have instead sought to create a workable approach to victim participation for mass crimes. The Rules allow victims the right to file complaints with the co-prosecutors, but they do not allow victims to initiate prosecutions as they can in the ordinary Cambodian courts. In regard to the Cambodian *partie civile* system, in order to qualify as a civil party before the ECCC, individuals must have been victims of crimes within the ECCC's jurisdiction.⁵²

In contrast to the ICC, the ECCC defines victims as those “having suffered actual personal injury.” Injury is defined as physical, material or psychological consequence of the offence.⁵³



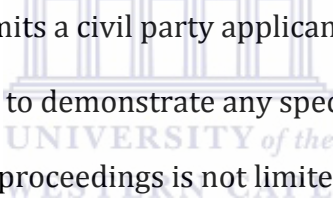
Victims applying to become civil parties may do so at any time during the judicial investigation stage before the actual trial commences. The co-investigating judges will either grant or deny civil party status and denials may be appealed to the Pre-Trial Chamber. However, an amendment to Rule 23(4) of the ECCC Internal Rules suggests that victims will not be able to appeal against a decision of the Trial Chamber rejecting a civil party application. This amendment, disadvantages applicants who apply once the case file

⁵² The ECCC has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations. See ECCC Statute, Articles 2, 4, 5, 6, 7, and 8.

⁵³ ECCC Internal Rules, Rule 23(2).

has been transferred to the Trial Chamber.

Once their participation is accepted, civil parties have the right to counsel, either individually or collectively, and are full parties to the proceedings. This means that they may not be questioned as witnesses, but instead have the same rights as a charged person or accused.⁵⁴ In this sense, they may request that specific investigations be carried out on their behalf and their legal counsel may submit applications to the court. Under domestic law, the court may only deny victims' rights, including participatory rights, if there is some 'uncertainty' regarding their application. In addition, under the ECCC's jurisdiction, victim applications may be refused if their participation would be 'inconsistent with international standards'.⁵⁵



Unlike the ICC, once the court admits a civil party applicant, the applicant may participate in all proceedings without having to demonstrate any special personal interests.⁵⁶ In other words, the applicant's role in the proceedings is not limited to their specific interest, such as a claim for damages. The Internal Rules state that the applicant may participate by supporting the prosecution generally. Moreover, the civil parties have argued that their right to participation encompasses the right to represent not only their individual interests in the case but also the wider community's interests. To this end, the lawyers for the civil parties in *Nuon Chen's* provisional detention appeal argued that the victims should be able to address the court on how the charged person could affect society if he were released

⁵⁴ ECCC Internal Rules, Rule 23(6-9).

⁵⁵ Boyle (2006: 307).

⁵⁶ *Prosecutor v Noun Chea*, ECCC (Pre-Trial Chamber), Decision of 20th March 2008, "Decision on Civil Party Participation in Provisional Detention Appeals," 002/19- 09- 2007 ECCC/ OCIJ (PRC01) Paragraph 49.

rather than how he could affect them personally or victims specifically.⁵⁷

Importantly, Rule 23 of the Internal Rules, concerning the purpose of civil party action before the court, provides that the purpose of the civil party action is to enable the party to participate in the proceedings against those responsible 'by supporting the prosecution'.⁵⁸ This wording could suggest the possibility that civil parties at the ECCC can support the prosecution in a way similar to the way in which an auxiliary prosecutor supports the public prosecutor in national systems.

The ECCC Internal Rules also recognise the fact that civil party participation must adapt to the special circumstances of the ECCC. This may be noted, for example, by the Internal Rules' strong discouragement of individual representation in order to prevent a backlog of complainants.⁵⁹ Instead, the Internal Rules provide that groups of civil parties may choose from a list of common lawyers, organised through the victims' unit, to represent them. If the victims are unable to agree on a common lawyer, either the Co-Investigating Judges or the Chambers may group the civil parties together, including members of victims' associations, under common representation.⁶⁰ Clearly this system was designed to make victim participation more manageable for the court.

⁵⁷ *Prosecutor v Noun Chea*, ECCC (Pre-Trial Chamber), Decision of 20th March 2008, "Decision on Civil Party Participation in Provisional Detention Appeals," 002/19- 09- 2007 ECCC/ OCIJ (PRC01) Paragraph 49.

⁵⁸ ECCC Internal Rules, Rule 23(1).

⁵⁹ ECCC Internal Rules, Rule 23(8).

⁶⁰ ECCC Internal Rules, Rule 23(8).

2.3. Conclusion on the modalities of victim participation

The similarities between the forms of victim participation at the two courts are:

- (i) The courts want victims to submit their concerns and to demonstrate how the crimes impacted their lives;
- (ii) Victims do not participate as a party; and
- (iii) Victims through their legal representative participate as a subsidiary, or auxiliary prosecutor.

Victims generally have the limited right to submit and/or read victim impact statements to the court. These statements reflect the physical and emotional harm they and their families have suffered as a result of the crime committed. It is also a way for victims to express their views as well as to influence the sentence handed out, questions of parole and sometimes plea-bargaining agreements.

Uniquely, in the ECCC victims have the opportunity of joining their civil claims to the criminal prosecution, making them civil parties in the case.⁶¹ As the civil party (*partie civile* in France), victims generally have the right to lead and challenge evidence but only insofar as it pertains to their claim for damages against the accused.⁶²

Victims participate by contributing to the prosecution and in the ECCC's case they also

⁶¹ Doak (2005) 311.

⁶² Doak (2005) 311.

attach their civil claim for damages.⁶³ In this form of participation the victim is usually referred to as 'auxiliary prosecutor', except they do not prosecute but defend victims rights. This mode allows victims to express their views and concerns, however, at the same time it places the burden of prosecution on only the prosecutor.



⁶³ Doak (2005) 311.

CHAPTER 3

THE RESULTANT CHALLENGES OF VICTIM PARTICIPATION IN INTERNATIONAL JUDICIAL PROCEEDINGS

3. Introduction

The inclusion of victims in the proceedings of the ICC and ECCC, as mandated under their respective statute's, suggests a move from the traditional retributive model of international criminal tribunals evidenced in the Nuremberg Trials and more recently in the tribunals for the former Yugoslavia and Rwanda. The ICC and ECCC are working toward a restorative model, which seeks to reverse the marginalization of victims from the criminal process.

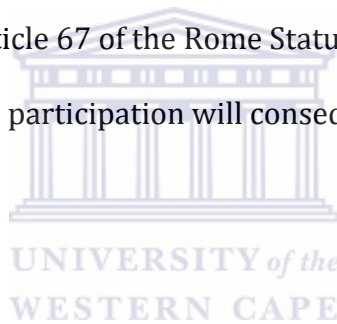
However, the ECCC and ICC, in developing a role for victims face enormous difficulties.

These difficulties arise through the attempt to reconcile provisions that give full effect to the rights of the victim with other rights the court is required to respect.

This chapter assesses challenges of victim participation in the ICC and ECCC. It considers why it is problematic to include victims in the justice process, within the competing interests before the court.

3.1 The most significant challenges of victim participation at the ICC

While the Rome Statute and the subsequent Rules of Procedure and Evidence endorse victim participation, the actual gains in terms of victim participation are dependent on how the victim engagement provisions are interpreted. While Article 68 (3) of the Rome Statute gives judges the power to determine the scope of participation it does not define the meaning of 'personal interests.' Second, at its creation, the court was given the power to decide at what part of the proceedings victims could participate. The jurisprudence of the court with respect to the victims' participatory rights and the reconciliation of the conflicting rights of victims and the accused are still evolving. Whenever the rights of the accused, which are defined in Article 67 of the Rome Statute, and the right to a fair and expeditious trial, are in jeopardy, participation will consequently be deemed inappropriate.⁶⁴



3.1.1 The rights of victims verses the rights of the accused

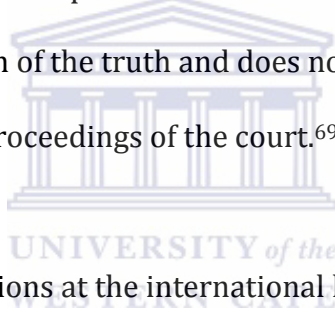
The right to a fair trial is a fundamental principle of international law.⁶⁵ The rights of the accused were well established in human rights law prior to the drafting and entering into force of the Rome Statute, and the inclusion of victims' rights in the Statute was a major innovation in this area of law. However, satisfying the rights of victims may conflict with the rights of the accused.

⁶⁴ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC (Pre-Trial Chamber) Decision of 20th August 2007, "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," ICC-02/04-101.

⁶⁵ Wright (1945:402).

Victim participation may be perceived as a pseudo prosecution. The accused not only has to defend himself against the prosecution, but also consider the allegations made against him by the Common Legal representative for Victims. ICC reports have revealed that, the ICC's prosecutions office alone is made up of 80 (eighty) full-time lawyers, while the defence legal aid scheme can only accommodates up to 5 (five) lawyers.⁶⁶ This is in principle unfair. The inclusion of a Victims Legal Representative exasperates the situation.

The participation of victims has the potential to impinge on the impartiality of proceedings.⁶⁷ Where the rights of the accused and the rights of victims collide and conflict, the Rome Statute determines that the rights of the accused prevail.⁶⁸ The Trial Chamber has ruled that a victim can only participate if their intervention could make a relevant contribution to the determination of the truth and does not prejudice the principles of fairness and impartiality of the proceedings of the court.⁶⁹



The political realities of prosecutions at the international level add to the challenge of ensuring that investigations and subsequent trials are carried out unimpeded. The inclusion of victims in proceedings, coupled with the additional layer of personality and motivation that this brings to the court, must be carefully managed by the court to ensure that the victims' role is viewed as complementary to and not at odds with the aims of the

⁶⁶ See ICC Budget and Finance, Report made Coalition of the International Criminal Court. Report on the 10th Session of the Assembly of State Parties to the Rome Statute 2011. Found at, http://www.coalitionfortheicc.org/documents/ASP10_report_final.pdf Last visited in 20 June 2011.

⁶⁷ Many human rights instruments confirm the right of the accused to a fair trial and the presumption of innocence including the International Covenant on Civil and Political Rights Article 14, opened for signature December. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights of 1948.

⁶⁸ Article 68(3) of the Rome Statute.

⁶⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC (Pre-Trial Chamber), Decision of 13 May , 2008. Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, /01/04/01/07/474, Paragraphs 31-44.

Prosecutor.

3.1.2 The problem of determining whether a victim's personal interests have been affected

The determination that one has his personal interests affected is extremely problematic for the ICC.⁷⁰ This has led to many disputes within the VPRS section of the ICC and the Trial Chambers.⁷¹ Some individuals have incurred a direct tangible loss from the crimes, for example the loss of a home through burning and looting. However, individual's losses cannot be quantified easily as a personal interest, for example is the loss of a distant relative. A distant relative in African traditional culture may be an indirect beneficiary of the deceased.⁷² These dynamics make it very difficult for one to determine personal interests in the strict sense.



The Appeals Chamber of the ICC, in its deliberation has decided that the determination of whether victims' personal interests have been affected will be considered on a case-by-case basis.⁷³ However, the Appeals Chamber, in the same decision, reversed an earlier decision of the Trial Chamber, which interpreted Rule 85 of the Rules of Procedure and Evidence as applying to any victim who suffered harm as a result of the commission of any crime within the court's jurisdiction. The Appeals Chamber stated that the victim participating must have a 'causal link' between the harm suffered and the charges in the case under

⁷⁰ Fiona Mackay- Head of the Victim Participation and Reparation Section, Keynote address to the ICC list of Counsel meeting held in Den Haag, July 2011.

⁷¹ Fiona Mackay- Head of the Victim Participation and Reparation Section, Keynote address to the ICC list of Counsel meeting held in Den Haag, July 2011.

⁷² *Prosecutor v. Ruto, Sang and Kosgey*- Legal Representatives minutes of meeting in Eldoret, Kenya with the Victims in the Case.

⁷³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Appeals Chamber) Decision of 11 July 2008, "Decision on the Appeals of the Prosecutor and the Defence Against Trial Chamber 1's Decision on Victim Participation." ICC-01/04-01/06 OA 9 OA 10 Paragraph 66.

consideration.⁷⁴ The question then is, what amounts to a ‘causal link’?

The Appeals Chamber of the ICC has acknowledged that participation must be meaningful.⁷⁵ However, the framework for victim participation developed by the court is proving to be impracticable and is failing to deliver ‘meaningful’ participation to victims.

3.1.3 The growth in number of victim applications and the limited resources

The numbers of those victims applying to participate before the court has grown exponentially. The ICC did not anticipate that the procedural issues relating to victim participation would prove so costly and time consuming.⁷⁶ The tendency of the court to grant concessions to victims, with respect to participation rather than “observe the compromises reached during the negotiation of the Rome Statute, when it was fully foreseen that the innovation of victim's participation could, if poorly defined or administered, overwhelm the core mandate of prosecuting and trying perpetrators of atrocities.”⁷⁷

Limited resources are a challenge for the court. Attention has been drawn to the concern that hundreds of victims may be prevented from participating in hearings because of lack

⁷⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Appeals Chamber) Decision of 11 July 2008, “Decision on the Appeals of the Prosecutor and the Defence Against Trial Chamber 1’s Decision on Victim Participation.” ICC-01/04-01/06 OA 9 OA 10 Paragraph 66.

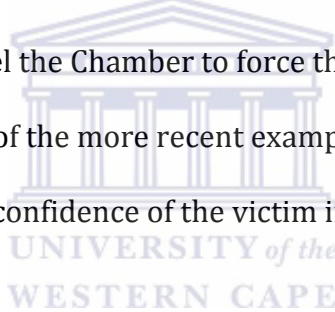
⁷⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Appeals Chamber) Decision of 11 July 2008, “Decision on the Appeals of the Prosecutor and the Defence Against Trial Chamber 1’s Decision on Victim Participation.” ICC-01/04-01/06 OA 9 OA 10 Paragraph 66.

⁷⁶ Schabas (2011: 348).

⁷⁷ Chung (2008: 438).

of resources.⁷⁸ The early years of the court have seen much time and resources being consumed by issues relating to the participation of a very limited number of victims.⁷⁹ In June 2011, the Victims Participation and Reparations Section (VPRS) informed Pre-Trial Chamber 2, investigating the Ruto, Kosgey and Sang case, that while it had received approximately 1,800 applications, it only had the resources to process approximately 400 of the applications by the court-appointed deadline of 8 July 2011.⁸⁰ The court has received approximately 2,350 applications to participate with respect to the Kenyan situation, so the problem is likely to worsen.

The lack of resources resulted in a situation that was almost embarrassing in Kenya in which the Victims Representative in the case of *Ruto et al* filed a compromising request to the ICC's Trial Chamber to compel the Chamber to force the ICC to provide her with funds to visit her victims.⁸¹ This is one of the more recent examples of the dire lack of resources that could have undermined the confidence of the victim in the ICC proceedings.



However, these challenges are not unique to the ICC. The ECCC has demonstrated too that victim participation has not occurred smoothly in the proceedings before it.

⁷⁸ Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) (available at <http://www.redress.org/downloads/StatementVictimParticipation>) (accessed on 15 June 2012.).

⁷⁹ Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) (available at <http://www.redress.org/downloads/StatementVictimParticipation>) (accessed on 15 June 2012.).

⁸⁰ Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) (available at <http://www.redress.org/downloads/StatementVictimParticipation>) (accessed on 15 June 2012.).

⁸¹ *Prosecutor v. William Ruto and Joshua Arap Sang*, ICC (Appeals Chamber) Decision of 23rd April 2012. "Decision on the Application of the Victims' Representative pursuant to Article 83 of the Regulations" ICC-01/09-01/11-409.

3.2. Challenges of victim participation at the ECCC

Reports have shown that the lesson that the ECCC offers is that victim participation increases the tribunal's legitimacy in the eyes of the local population. This public legitimacy is a result of enabling the victims to confront their accused tormentors and to describe publicly the harm they have suffered.⁸² However these reports may not be entirely true.

3.2.1 Lack of proper legal representation

A crucial issue for the future of victim participation at the ECCC is providing victims with access to legal counsel. A court cannot always rely on the prosecution adequately to represent the interests of victims, because, those interests might be reasonably expected to diverge at some point during the trial. An example would be the aggressive cross-examination of a rape victim at the ICTR, that was made even more damaging by the fact that several of the judges were seen laughing during the questioning, further adding to the victim's humiliation.⁸³ An independent counsel, dedicated to advancing the interests of the victim, could have intervened to prevent this incident in the Rwandan tribunal.

Although the Internal Rules of the ECCC provide victims the right to be represented "by a national lawyer, or a foreign lawyer in collaboration with a national lawyer,"⁸⁴ victims are not guaranteed representation in the same way as the accused person. An accused who is unable to afford legal representation, is entitled to be assigned both national and an

⁸² Fernando (1998:30).

⁸³ *UN Judges Laugh at Rape Victim*, Monitor, 3 December 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm>. (Accessed on the 30 July 2012).

⁸⁴ ECCC Internal Rules ,Rule 23.

international lawyer from a list of names of defence counsel compiled by the defence support section. Such assigned counsel are paid by the court.⁸⁵ Civil parties, in contrast, are only guaranteed the right to look at a list of lawyers maintained by the victims unit (VU) but do not receive assistance towards paying the costs of a legal representative.⁸⁶ Reliance only on the bare text of the Rule 23 of the ECCC Internal Rules would create a startling inequality of arms between victim civil parties and the prosecution and defence. Few if any, victims of the Khmer Rouge can be expected to afford to pay their own legal fees. The right to representation in the ECCC Internal Rules will be no right at all if the victims cannot afford the costs of being legally represented.

Victims are expected to be defended on a pro bono basis.⁸⁷ This may deter foreign lawyers from representing victims. As a result, it is likely that many lawyers representing victims will be Cambodians trained in the domestic system. This presents several challenges. Following the collapse of the Khmer Rouge in 1979, there were few lawyers left alive in Cambodia, and the profession has been struggling to rebuild itself over the past two decades.⁸⁸

⁸⁵ ECCC Internal Rules, Rule 22(1)(a).

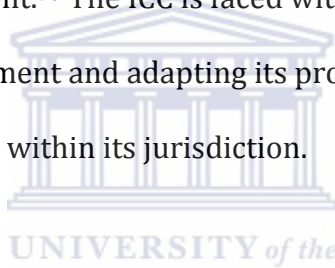
⁸⁶ ECCC Internal Rules, Rule 23(7)(a).

⁸⁷ ECCC Internal Rules, Rule 22(1) (only “Suspects, Charged Persons, Accused, or any other persons entitled to a defence lawyer under these IRs” are guaranteed the assistance of counsel, even when this is beyond their financial means). Since civil party representation cannot be construed as “defence,” and since Rule 12 does not provide civil parties with a guarantee of representation, this has been interpreted to mean that civil party lawyers must proceed pro bono or by procuring outside financial assistance.

⁸⁸ Fernando (1998 :102).

3.2.2 Impracticability of victim participation requirements

Experiences at the ICC have shown the impracticability of requiring victims to provide extensive documentary evidence of their injuries in order to prove an interest in the case. The very crimes that they suffered may also have deprived them of the ability to provide documentary evidence. In the early years of the ICC, the court required that all victims provide photographic identification before they could apply to participate.⁸⁹ This requirement proved nearly impossible to meet, as many victims were living in refugee camps in Chad and Northern Uganda, hours from the nearest government office where they could obtain such identification. Additionally, due to instability in the region, many of these offices were open only sporadically, which further exacerbated the difficulty of complying with the identification requirement.⁹⁰ The ICC is faced with a choice between adhering to a more rigid identification requirement and adapting its procedures to meet the needs of the victims of mass crimes who were within its jurisdiction.



The same seems to be true in Cambodia. Although the country is relatively peaceful, thirty years after the fall of the Khmer Rouge, the crimes of the regime and the passage of time mean that much of the evidence that could serve to link individual victims to the crimes that they suffered may have been lost or destroyed. Therefore, there is need for the court to adopt a more flexible evidentiary standard in determining the admissibility of civil party applications.

⁸⁹ Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) (available at <http://www.redress.org/downloads/StatementVictimParticipation> (accessed on 15 June 2012.)).

⁹⁰ Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) (available at <http://www.redress.org/downloads/StatementVictimParticipation> (accessed on 15 June 2012.)).

3.2.3 ECCCs lack of concrete guidance for the mandate of the victims unit

Rule 12 of the ECCC's Internal Rules states that "the Office of Administration shall establish a Victims Unit," but it speaks in broad terms and offers little concrete guidance.⁹¹ While the functions of the Victims Unit (VU) are similar in practice to those of the Victims' participation and Reparation Section (VPRS) at the ICC,⁹² the express language of the Rule seems to imply that the Cambodian Victims Unit was intended to serve primarily as a clearinghouse for complaints and civil party applications. The rule directs the Unit to maintain lists of lawyers, administer applications, and provide victims with information about their rights.⁹³ These mere duties are of little value to the average Cambodian.

This limited understanding of the Victims Unit's mandate is not the only plausible interpretation of Rule 12 of the ECCC Internal Rules. The provision requires the Victims Unit to "assist Victims" in lodging complaints and filing in victim civil party applications. Interpreted broadly, effective assistance could entail anything from designing outreach programs to partnering with a local civil society group. Most importantly, the rule also calls on the Unit to "facilitate the participation of Victims and the common representation of Civil Parties . . ."⁹⁴ In order to facilitate meaningful participation, the Unit would have to do far more than simply process applications. The rule leaves open the possibility that the Victims Unit could also guide them through the proceedings, offering the legal support and the necessary logistical assistance.

⁹¹ ECCC Internal Rules, Rule 12.

⁹² Rome Statute, Article 43(6).

⁹³ ECCC Internal Rules Rule 12.

⁹⁴ ECCC Internal Rules Rule 12.

3.2.4 Restrictions on victim participation

As the proceedings against *Duch* progressed, the rights of the victims changed markedly. The Trial Chamber increasingly sought to limit civil party participation. By the close of the trial, the Chamber shifted its previous general rulings,⁹⁵ and rendered a decision preventing the civil parties from making submissions on the issue of sentencing. Additionally, the Chamber made a *proprio motu* ruling, holding that the Civil Parties are prohibited from posing questions to the accused, expert witnesses or other defence witnesses regarding the character of the accused.⁹⁶ In its decision, the Chamber found that the Internal Rules were to be interpreted “restrictively,” such that they do not “confer a general right of equal participation [of the civil parties] with the co-prosecutors.”⁹⁷

Rhe French Judge sitting on the bench, Judge Lavergne, issued the first dissent in the proceedings pursuant to this issue. In his strong and detailed dissent, Judge Laverge asked: “how far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of civil parties before the ECCC and the purpose of the trial as a whole, characterised by the coexistence of two interrelated actions, namely criminal and civil actions?”⁹⁸

⁹⁵ *Prosecutor v. Kaing Guek Eav*, ECCC (Trial Chamber) June 22, 2009, trial transcript, at paragaph 92.

⁹⁶ *Prosecutor v. Kain Guek Eav*, ECCC (Trial Chamber), Decision of 12 October 2009. “Decision on Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Parties Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character”, 001/18-07-2007/ECCC/TC.

⁹⁷ *Prosecutor v. Kain Guek Eav*, ECCC (Trial Chamber), Decision of 12 October 2009. “Decision on Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Parties Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character”, 001/18-07-2007/ECCC/TC.

⁹⁸ *Prosecutor v. Kain Guek Eav*, ECCC (Trial Chamber), Decision of 12 October 2009. “Decision on Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Parties Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character”, 001/18-07-2007/ECCC/TC.

The revised Internal Rules adopted in February 2010 reflect this “restrictive” interpretation of the Rules. The revised Rules mark an important shift. They consolidate all of the civil parties into one group at the trial stage, thereby reducing the universe of available reparations and ultimately failing to capture the divergent needs of each civil party. Although it is difficult to conceive of a different manner in which to represent over 3,000 victims in a criminal trial while balancing the right of the accused to an expeditious trial, consolidation poses potentially crucial issues not currently addressed by the Internal Rules. Therefore, the exact scope of Civil Party participation at the ECCC remains ambiguous.

3.3 Conclusion

In conclusion, the ECCC has more to grapple with than the ICC. However, anyone who heard the civil parties recount the enormous cruelty suffered during the Khmer Rouge era, or the suffering of Children in the ICC’s *Lubanga* case, will be left with no doubt as to the importance, and indeed necessity, of victim participation at the criminal proceedings before the international courts and tribunals. The challenges the ICC and ECCC face hamper the satisfaction of this need.

The decision of the ICC and ECCC’s, to limit victim participatory rights, seem, founded principally on efficiency considerations and ignores the balance to be made between the right of the accused with the rights of the victims. Victim participation as a subsidiary prosecutor inappropriate, as this would amount to a violation of the accused’s fair trial rights. However, this is not to say that victims should not participate before the ICC and

ECCC; it is only that their involvement should be limited so not to prejudice the accused in having to be subjected to a secondary prosecution.



CHAPTER 4

THE EFFECTS OF VICTIM PARTICIPATION ON INTERNATIONAL JUDICIAL PROCEEDINGS

4. Introduction

The ICC and ECCC have been operational for several years now. Since the opening of the judicial proceedings, victim participation has gradually gone from a written provision to a judicial practice. These courts have undergone significant developments throughout this process. This chapter looks at the effects of victim participation in ICC and ECCC proceedings and reviews some of the most significant achievements made in this area.

4.1 The rationale for victim participation

There is a perception among those unfamiliar with the notion of victim participation that this mechanism serves only the interests of the victims to obtain reparations. If this were so the drafters of the Rome Statute would not have included two separate provisions and created two different regimes, one for participation⁹⁹

⁹⁹Rome Statute, Article 68(3).

and another for reparations.¹⁰⁰ Victims have their personal reasons for participating in judicial proceedings and the explanations might not always be the same for victims of the same crimes, let alone for victims of different crimes, coming from different countries, and with different social backgrounds.

However, it is possible to affirm that what moved the drafters of the statutes of the ICC and ECCC's to include victim participation among its provisions was something greater than the idea that victims should obtain reparations for the harm they suffered. Victim participation has to do with having those most affected by the crimes have a say at the proceedings in what happened to them, their families, and their communities.¹⁰¹



Opponents of the idea of victim participation frequently believe that victims' interest can and should be represented by the prosecution. However, the early victim participation experience shows that victims' interests are not exactly the same as those of the prosecutor. For example, when the ICC's prosecutor initially presented his case against *Thomas Lubanga Dyilo* from the Democratic Republic of Congo, he argued that the crimes he intended to prosecute Lubanga for had been committed during an armed conflict of a non-international character. The victims, however, argued that the conflict was of an international character and referred to the notorious and well-documented intervention of Uganda and Rwanda in the Ituri

¹⁰⁰ Rome Statute, Article 75.

¹⁰¹ *Prosecutor v William Ruto and Joshua Sang*, ICC (Trial Chamber), Decision of 3 October 2012, "Decision on victims' representation and participation" ICC-01/09-01/11-460.

conflict during which the crimes were committed. The judges found that the victims' argument was sound and modified the charges under which Thomas Lubanga was to be prosecuted.¹⁰² This example illustrates that victims' views are complementary to, and could sometimes be in opposition with, those of the prosecution. There could even be situations where victims agree with the defence.¹⁰³

4.2. The effects of victim participation on the ICC Proceedings

4.2.1 Enlightenment on the case at hand

Victims also bring views from the places where the crimes were committed. A very good example of this comes from a hearing in the case *The Prosecutor v. Jean-Pierre Bemba Gombo*,¹⁰⁴ where a discussion on local languages spoken in the Central African Republic became relevant, as the language spoken by the attackers had been one of the factors that helped victims identify them. The defence made challenges to the Prosecutor's arguments, bringing confusion as to the local languages spoken in the Central African Republic. The victims' legal representatives were the only ones in the courtroom to shed light on the situation and give an explanation on the local languages spoken in the country.¹⁰⁵

¹⁰² *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), Decision on the 29 of January 2017. "Decision on the Confirmation of Charges", Paragraphs 200-237, ICC-01/04-01/06-803-tEN

¹⁰³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC (Pre-Trial Chamber), Decision on the 16th of June 2009. "Decision on the Modalities at Pre-Trial Stage". ICC-01/04-01/07-474-36.

¹⁰⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC (Pre-Trial Chamber) Transcript of the 15 January 2009. "Transcript of the Confirmation of Charges Hearing". ICC-01/05-01/08-T-12-ENG WT 15-01-2009.

¹⁰⁵ "Contrary to what has been affirmed here, Lingala is not spoken in Central African Republic.

Another good example of positive input provided by victims is the matter of names in the Democratic Republic of Congo. During the trial of *Thomas Lubanga Dyilo*, the defence questioned the credibility of witnesses because of the numerous and frequent inconsistencies in the names of persons referred to in the witnesses' statements.¹⁰⁶ The victims' legal representatives drew the attention of the Chamber to the ways in which names are given in the Democratic Republic of Congo, thereby explaining apparent inconsistencies. This led to the Chamber's appointment to the appointment of an expert on names and other social conventions in the Democratic Republic of Congo. His duty was to advise the court on cultural social aspects in the Democratic Republic of Congo as a special court witness.

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

4.2.2 Advance of victim rights through participation

The statutes of the International Criminal Tribunal for Yugoslavia and Rwanda did

Indeed, although some Central Africans can speak Lingala, this does not mean that we can draw the conclusion that Lingala is spoken in the Central African Republic. It would be like concluding that English is the language of the Central African Republic because some people can speak it there. Sango is the national language, and French is also spoken in the Central African Republic as official language. Lingala has never been a lingua franca in the Central African Republic." *Id.* at 97-98.

¹⁰⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber), Decision of 20 March 2009. "Analyse relative à l'attribution et aux composants du nom en République démocratique du Congo". ICC-01/04-01/06-1793. Paragaraph 1-2.

not address the possibility of victim participation, nor did the Rules of Procedure and Evidence include any provisions relating to it.¹⁰⁷ Rather, participation at the tribunals was limited to witnesses and was dependent on the explicit request of one of the parties to appear. The *ad hoc* tribunals were widely perceived to have failed to connect with the communities affected by the atrocities and on whose behalf the proceedings were established.¹⁰⁸

International human rights NGOs, have played a particularly important role in promoting and advocating for the inclusion of victim participation. Amnesty International and Human Rights Watch were especially successful in encouraging states to support victim participation at the ICC. One such NGO, The Coalition for an International Criminal Court, effectively fostered state enthusiasm for the underlying principle that the court must eliminate impunity wholly and victim participation is a noble avenue to pursue so as to achieve this goal.¹⁰⁹ Due to NGO activists' engagement with the inclusion of victim participation, the drafters of the Statute too became engaged with the inclusion of the recognition of victims' rights in the legal document. The drafters recognised that victims had a unique voice to bring to the proceedings and it was their intention that victims would be present to give their views that would not necessarily be aligned to those of the prosecution. For the first time in any internationalised criminal court, victims were afforded the right to participate in proceedings and to obtain reparations.

¹⁰⁷ Cohen (2009: 352).

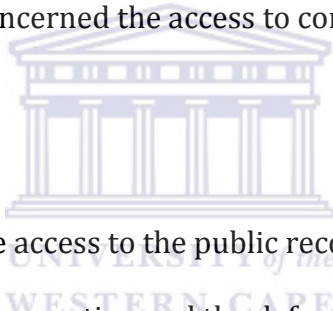
¹⁰⁸ SáCouto & Cleary (2008 :73-79).

¹⁰⁹ Struett (2002: 55).

The right to participate in the courts proceedings has in turn developed a number of procedural rights. These procedural rights are a result of the jurisprudence at the ICC. These rights are described below:

(i) Right to access the confidential record of the case

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

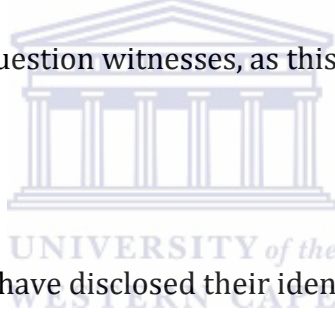


As a general rule, victims have access to the public record of the case, including public evidence filed by the prosecution and the defence. This is because confidential files normally have sensitive information on protection of witnesses and victims, or sensitive information pertaining to national security. However, in order for participation to be truly meaningful, it is often necessary that the victims' legal representatives have access to confidential material. The ICC Chambers have acknowledged that the parties to the case can decide to provide access to confidential documents to the victims' legal representatives should they feel that they contain information which affects the relevant victims' personal interests. In addition, the relevant Chamber can decide to allow legal representatives to gain access to other confidential materials which affect the victims' personal interests.

Finally, the legal representatives have access to the entire index of the case and can thereby identify confidential materials, which could potentially affect the victims' personal interest,¹¹⁰ and request the Chamber to authorise them to have access to them.¹¹¹

(ii) Right to question witnesses

The right to question witnesses is recognised in Rule 91(3) of the Rules of Procedure and Evidence of the ICC. Due to security reasons, victims are given the option to remain anonymous to the defence team.¹¹² Anonymous victims are barred from exercising the right to question witnesses, as this would be contrary to the rights of the accused.¹¹³



On the contrary, victims who have disclosed their identities have a right to question witnesses. In order for legal representatives to exercise this right, they must request the relevant Chamber leave to do so, and must show in their submission that the relevant witnesses' statements affect the victims' personal interests. Legal representatives are also often required to file a list of questions they intend to ask

¹¹⁰ The notion of “personal interest” is central to the idea of victim participation. See Rome Statute, Article 68(3).

¹¹¹ *Prosecutor v Abu Garda*, ICC (Pre-Trial Stage) Decision of 13 March 2009. “Decision on Modalities at the Pre-Trial Stage”. ICC-02/05-02/09-136. Paragraphs 11-15.

¹¹² *Prosecutor v. William Ruto, Henry Kosgey and Joshua Sang*, ICC (Pre-Trial Chamber), Legal Representative of Victims filing of 5 August 2011. “Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011”. ICC-01/09-01/11-292

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Pre-Trial Chamber) Decision of 22 September 2006. “Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing”. ICC-01/04-01/06-462-tEN,

the relevant witness or expert witness prior to the questioning.¹¹⁴ This is why timely access to the record of the case, including relevant confidential material, is crucial. In order to request leave to intervene, the victims' lawyers must have identified and anticipated the parts of the proceedings which are due to affect their clients' interests.¹¹⁵

c) Right to challenge and to tender evidence

Victims have the right to challenge the admissibility and the relevance of evidence presented by the prosecution and the defence. Judges have gone further than this and have acknowledged that victims can also submit their own evidence pertaining to the guilt or innocence of the accused.¹¹⁶ This has encountered opposition from both the defence and the prosecution. Regardless of the opposition, the Appeals Chamber of the ICC has confirmed the right for victims to challenge and tender evidence.¹¹⁷ Such a right implies obligations related to the parties' right to disclosure and inspection. It remains to be seen how many of these questions will be solved in practice since, so far, victims have made few attempts to introduce evidence.

¹¹⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC (Pre-Trial Chamber), Decision on the 16th of June 2009. "Decision on the Modalities at Pre-Trial Stage". ICC-01/04-01/07-474-36. See also *Prosecutor v Abu Garda*, ICC (Pre-Trial Stage) Decision of 13 March 2009. "Decision on Modalities at the Pre-Trial Stage". ICC-02/05-02/09-136.

¹¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Trial Chamber), Decision of 26 June 2009. "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/06 to express their views and concerns in person and to present evidence during trial." ICC-01/04-01/06-2032-Anx . Paragraph 25-40.

¹¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Trial Chamber), Decision of 26 June 2009. "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/06 to express their views and concerns in person and to present evidence during trial." ICC-01/04-01/06-2032-Anx . Paragraph 25-40.

¹¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Appeals Chamber) Decision of July 11, 2008, "Decision on the Appeal of the Prosecutor and the Defence against Trial Chamber 1's Decision on victim participation." ICC-01/04-01/06 OA 9 OA 10 Paragraph 66.

A prominent example is the request made by three victims in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to address the court in person in order to present their views and concerns, and to give evidence under oath. The Chamber had deferred a decision on whether the victims will be allowed to present their views and concerns in person. But it ruled positively on the victims' request to give evidence under oath.¹¹⁸ In response to the prosecution's concern that evidence to be presented by those victims could potentially duplicate other evidence presented in the trial, the Trial Chamber stated: “the account of each victim is unique none of their personal histories are the same.”¹¹⁹



4.2.3 Difficulties created by victim participation in court proceedings

Scholars are beginning to resist victim participation. Their argument is that large numbers of victims applying to participate could destabilise the proceedings and the court as a whole.¹²⁰ However, it must be recalled that the ICC has jurisdiction over mass crimes, which, by definition, imply that a large number of victims are involved. Therefore, a large number of victims should not be seen as a “problem” but rather as a departing point for the development of mechanisms to implement adequately the

¹¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Trial Chamber), Decision of 26 June 2009. “Decision on the request by victims a/0225/06, a/0229/06 and a/0270/06 to express their views and concerns in person and to present evidence during trial.” ICC-01/04-01/06-2032-Anx. Paragraph 25-40.

¹¹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC (Trial Chamber), Decision of 26 June 2009. “Decision on the request by victims a/0225/06, a/0229/06 and a/0270/06 to express their views and concerns in person and to present evidence during trial.” ICC-01/04-01/06-2032-Anx. Paragraph 25-40.

¹²⁰ War Crimes Research Office, American University Washington College of Law, *Victim Participation Before the International Criminal Court* (Nov, 2007), at 26.

Rome Statutes' provisions on victims' rights.¹²¹

Most domestic jurisdictions have also been reluctant to accept the idea that victims have a major role in international criminal law proceedings.¹²² The ICC Prosecutor shared the same fear initially. The prosecutor feared that victims' observations and requests could affect the independence or the integrity of the investigation.¹²³ These fears have, for the most part, disappeared since the practice of victim participation has demonstrated that victims are not there to compete with the prosecution nor to alter investigations, but to enrich proceedings with the perspective of those who suffered from the crimes.



The defence has been similarly reluctant to accept victims' participation. Some defence teams have reviewed victim applications for participation as they would scrutinise witnesses' statements and have consequently complained about anonymity. Others have contended that victim participation was contrary to the presumption of innocence, disregarding the fundamental principle that a victim is a victim "regardless of whether the perpetrator is identified, apprehended,

¹²¹ Mugambi (2007: 26).

¹²² War Crimes Research Office, American University Washington College of Law, *Victim Participation Before the International Criminal Court* (Nov. 2007), at 26 (demonstrating the reasons why the US senate is reluctant to authorise the ratification of the US into the Rome Statute.

¹²³ *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber), Prosecution's Reply of 15 August 2005. "Prosecution's Reply on the Applications for Participation 01/04/1-dp to 01/04/6-dp". ICC-01/04-84; *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber), Prosecutions Application of 23 January 2006. "Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6 ,ICC-01/04-103." *Prosecutor v Thomas Lubanga*, ICC (Trial Chamber), Prosecutor's Application for Review of 24 April 2006. "Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" ICC-01/04-143.

prosecuted or convicted.”¹²⁴

In order for victims to participate in the proceedings, they must file an application.¹²⁵ The experience at the ICC so far shows that the application process has been long and cumbersome for all parties involved, including victims. It has also been very contentious and has brought about much litigation during a phase which should be purely administrative, or, at the least, much more simple.¹²⁶ The defence has complained extensively of delays and the heavy workload caused by the need to respond to victims' applications.¹²⁷ It should not be forgotten that delays in these proceedings affect, first and foremost, the victims themselves, some of whom have waited over two years to have the court rule upon their applications. This has arisen because of delays inherent in the proceedings and, in some cases, the disregarding of deadlines in the transmission of the applications by the Registry to the Chambers. The filing of incomplete applications, partially due to the lengthiness and complexity of application forms, is also to blame for undue delays. Civil society groups have advocated for simplification of the forms as well as for more intense outreach and education in the field, showing how the forms must be filled in¹²⁸ to avoid delays at a

¹²⁴ Arguments in relation to the use of the term “victim” in Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber) Prosecution Request of 13 December 2007. “Request for Leave to Appeal the “Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” ICC-01/04-419

¹²⁵ Rule 89, Rules of Procedure and Evidence of the ICC.

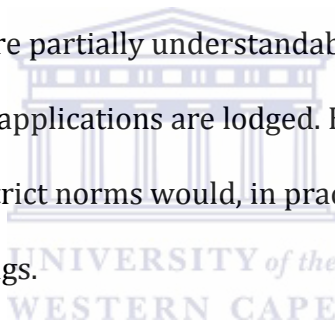
¹²⁶ *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber) Defence Observations of 29 June 2006. “Defence Observations on Victim Participation”. ICC-01/04-01/06-386. Paragraph 48.

¹²⁷ *Prosecutor v Thomas Lubanga*, ICC (Pre-Trial Chamber) Defence Observations of 29 June 2006. “Defence Observations on Victim Participation”. ICC-01/04-01/06-386. Paragraph 48.

¹²⁸ Redress, *Victims and the ICC: Still Room for Improvement, Paper prepared for the 7th Assembly of States Parties The Hague*, 1)4-22 Nov. 2008. Found at

later stage.

Victims may come from regions with cultural backgrounds, habits and legal customs that are relatively informal. The ICC's judicial proceedings are governed by strict rules and tend to be formalistic. The ICC judges need to be mindful of the need to be flexible and pragmatic.¹²⁹ In order for a victim to participate in the proceedings, they must be able to show that they qualify as victims *prima facie*.¹³⁰ However, the judges have demanded the submission of an increasing number of documents, for example identification cards, proof of relationship, etc.¹³¹ The requirements by the judges are partially understandable because judges must guarantee that no fraudulent applications are lodged. High requirements in terms of the standard of evidence or strict norms would, in practice, preclude victims from participating in the proceedings.



According to Rule 90(1) of the Rules of Procedure and Evidence, victims can choose

<http://www.redress.org/reports/ASP%20Paper%C20Draft%20Nov08.pdf> (Last visted, August 7 2012).

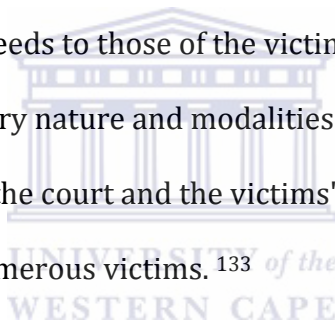
¹²⁹ “[I]n a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an on going conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties.” *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC (Pre-Trial Chamber), Decision of 10 August 2007, “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” ICC-02/04-101. Paragraph 16.

¹³⁰ *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC (Pre-Trial Chamber), Decision of 14 March 2008. “Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06”. ICC-02/04-125.

¹³¹ *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC (Pre-Trial Chamber) , Decision of 10 August 2007, “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” ICC-02/04-101. Paragraph 16.

a legal representative. Rule 90(5) states that victims “who lack the necessary means to pay for a common legal representative chosen by the court may receive assistance from the Registry, including financial assistance.” In compliance with this provision, the ICC Registry has put in place a legal aid system for indigent victims.

Given the overwhelming indigence among victims of the crimes under the jurisdiction of the court, financing legal aid is essential for victims to exercise their rights. When the scheme for legal aid for victims was established, it mirrored the legal aid scheme at the ICC. As a result, the system was inadequate since defence counsel have very different needs to those of the victims' lawyers.¹³² These differences result from the very nature and modalities of victim participation, the distance between the seat of the court and the victims' home, and the fact that one lawyer usually represents numerous victims.¹³³



The scheme still fails to appropriately take into consideration and adequately fund some of the most important aspects of the victims' legal representation. For example, a fundamental part of the responsibilities of a legal representative is to maintain contact and seek instructions from their clients.¹³⁴ This, in turn, requires a

¹³² The Legal Representation Team of the Coalition for the International Criminal Court, Submission to the 4th session of the Assembly of States Parties, Comments on the organization and resources of legal representation for victims and defendants at the ICC, Nov. 2005, http://www.iccnw.org/documents/LR_teampaper_Nov05.pdf p. 6 (last visited, August, 12, 2012).

¹³³ The Legal Representation Team of the Coalition for the International Criminal Court, Submission to the 4th session of the Assembly of States Parties, Comments on the organization and resources of legal representation for victims and defendants at the ICC, Nov. 2005, http://www.iccnw.org/documents/LR_teampaper_Nov05.pdf p. 6 (last visited, August, 12, 2012).

¹³⁴ ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res. 1 to Article 15 of the Rome Statute, (2005).

travel budget for that specific purpose, and the organisation of a support structure in the field.¹³⁵ The ICC at present has failed to accommodate this fully, thus resulting in the victims feeling marginalised by the judicial process.

4.3 The effects of victim participation on the ECCC

4.3.1 Protection guaranteed for victim civil parties

Victim civil parties of the ECCC are entitled to extra protective measures compared with being mere victims of the Khmer Rouge regime. The co-investigating judges, for example, may interview victim civil parties.¹³⁶ The Rules describe who may not be present at victim interviews, mandating that the interviews take place “in the absence of the accused, any other party, or their lawyers.”¹³⁷

The Internal Rules provide that once a victim has joined as a civil party, he or she “can no longer be questioned as a simple witness in the same case and . . . may only be interviewed under the same conditions as a charged person or accused.”¹³⁸ As such, a civil party is entitled to five days' notice before an interview takes place, during which time his or her lawyer may consult the prosecution's case file. No such provision is made for victims. Unlike victims, civil parties may not be questioned by

¹³⁵ *Prosecutor v. William Ruto and Joshua Arap Sang*, Communication of the victim representative of 23 July 2012, “Communication by the Victims’ Representative to the Trial Chamber of the decision of the Registrar dated 18 July 2012”, ICC-01/09-01/11-445.

¹³⁶ ECCC Internal Rules, Rule 55(5)(a)(1), with Rule 59.

¹³⁷ ECCC Internal Rules, Rule 60.

¹³⁸ ECCC Internal Rules, Rule 23(6)(a).

the Judicial Police, the investigators who work for the OCIJ but only by one of the investigating judges themselves.¹³⁹ These procedural protections aim to ensure that civil parties feel secure in presenting evidence to the co-investigating judges without fear of coercion by either the court or other agents of the Cambodian government, some of who have expressed frank opposition to the work of the tribunal.

As under the civil law system, not only the civil parties themselves, but also their relatives enjoy procedural protection. According to Rule 24(2), any relative of a civil party, including brother and sister in-laws and divorced spouses, enjoy the privilege of being interviewed only by the co-investigating judges and of testifying in court without having to take an oath. While typical in a domestic regime, this is the first time such an exemption has ever been applied in an international tribunal, and it seems certain to have a positive impact on the legitimacy of the proceedings.

4.4 Conclusion

The inclusion of victim participation in ICC and ECCC proceedings has created a number of positive influences and is a major achievement of the international criminal justice system. It has definitely brought about the evolution of the role of victims in judicial processes.

However, the interpretation and implementation of provisions dealing with victim

¹³⁹ ECCC Internal Rules, R. 63 (3)(b).

participation call for a sense of balance. These provisions may be misunderstood and eventually wrongly applied. While important landmarks have been established in the construal of victims' rights, a number of challenges lie ahead. All parties involved, including the parties to the proceedings, judicial actors as well as victims' legal representatives, must work together in order to make victim participation truly meaningful to overcome common hurdles.



CHAPTER 5

CONCLUSION, ALTERNATIVES AND RECOMMENDATIONS

5. 1. Conclusion

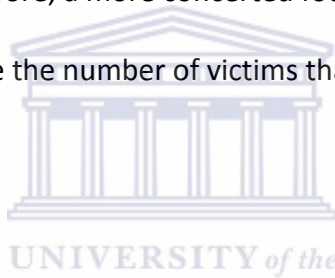
The inclusion of a regime of victim participation in international criminal law proceedings, is a major achievement of the international criminal justice system and corresponds to the evolution of the role of victims in judicial processes. The interpretation and implementation of the novel statutory provisions relating to victim participation call for a sense of balance as well as for creativity. While important landmarks have been established in the concept of victims' rights, a number of challenges lie ahead. All parties involved, including the parties to the proceedings, judicial actors as well as the victims' legal representatives must work together in order to make victim participation truly meaningful and to overcome common hurdles.

The drafters of the ICC Statute and the court's rules expected large numbers of victims to wish to participate.¹⁴⁰ The drafters gave a broad scope to the court to determine the contents of victims' rights, but in effect this has proven very challenging. Views on victim's involvement in proceedings differ and the court is shaping the process in its

¹⁴⁰ War Crimes Research Office, *Victim Participation Before the ICC 22*, (2007).

dealings with victims.¹⁴¹ The drafters of the Rome Statute resolved to do something meaningful for the victims, but from a criminal procedural point of view this is problematic.¹⁴²

The extension of Article 68 (3) of the Rome Statute to the investigative stage has had a massive impact on the resources of the court and may in fact be at odds with the broader goals of the participation of victims.¹⁴³ The ECCC, representatives of the court have already had to request additional funding from the United Nations in order to keep the court functioning.¹⁴⁴ Therefore, a more concerted focus on the use of court resources could in fact increase the number of victims that could potentially benefit from participation.



The initial broad based decisions delivered by two courts has led to the overburdening, as well as to uncertainty in the standards chosen. When compared with the other *ad hoc* tribunals the ICC and ECCC have under-performed. The ECCC has only completed one case, the *Kang Kek Iew* case, and the ICC has only recently completed the *Lubanga* trial. The considerable challenges in the operation of the ICC and ECCC, particularly the protracted slowness of the trials, have disappointed many commentators.¹⁴⁵ The court

¹⁴¹ Office of the Prosecutor, Policy Paper on Victims' Participation, ICC-CPI (April 2010), <http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril20> (accessed in August 29 2012).

¹⁴² Trumbull (2007-2008 :27).

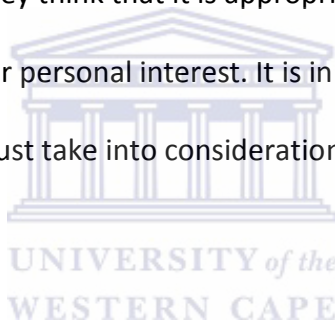
¹⁴³ Kuhner (2004: 95).

¹⁴⁴ See, UN Assistance Toward the ECCC trials. Found at, http://www.unakrt-online.org/05_publicinfo.htm (accessed on 3 October 2012).

¹⁴⁵ Schabas (2011: 358).

has been reluctant to reflect on its problems from the operational phase and is very reluctant to discuss its challenges.

Defence teams at the ICC have used the reference made in Article 68(3) of the Rome Statute of the right to a fair trial to argue that victims should not participate at certain stages because that would affect the right of the accused. This argument is flawed. The reference to the right to a fair trial, made in article 68(3) of the Rome Statute points to the modalities and not the principle of participation. In other words, the judges must accept victim participation if they think that it is appropriate because the stage or proceeding at hand affects their personal interest. It is in determining the way in which victims participate that they must take into consideration the right of the accused to a fair trial.



Defence teams at the ICC have also argued that the victim participation is burdensome, given number of applications. The rules of procedure and evidence require that the applications be submitted to the prosecution and the defence before judges make a decision.¹⁴⁶ It is also acknowledged that careful scrutiny of applications is important to avoid fraudulent claims. However, it is possible to speed up and simplify the process. The Registry needs to take a more proactive role in processing applications, seeking the judges' instructions on key matters, and centralizing responses to applications. It is hoped that once the most fundamental issues have been clarified, the judges will also

¹⁴⁶ Rules of Procedure and Evidence of the ICC, 2002 ICC-ASP/1/3 Rule 89(1).

delegate more authority to the Registry with a view to ensure faster and smoother proceedings for all the parties involved.

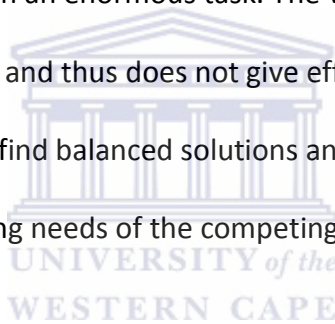
Following the ECCC's adoption of the revised Rules in February 2010, it is now unclear what role, if any, survivors continue to have in the proceedings before the ECCC. What is clear, however, is that these survivor-participants are no longer *bona fide*, victim civil parties, within the legal meaning of the term. Too many of their rights as victim civil parties have been stripped away in the interests of judicial management of the case file. The Chamber has every right to do this, but in ending civil party participation, they should be honest with the survivors. Sarah Thomas has stated, "[I]f civil party participation is replaced by representation of victims' collective interests, the court must explain to applicants that their participation rights have been eliminated."¹⁴⁷ Given the immense suffering and trauma experienced by these survivors, it is the very least the Chambers can do.

The challenges that have arisen in implementing civil party participation at the ECCC can be easily met without the need to scale back on victims' rights. For example, Rule 77(4) of the ECCC Internal Rules, which requires all parties to file their pleadings prior to a hearing in the Pre-Trial Chamber, should be scrupulously enforced. If victim civil parties deviate in their oral submissions from the substance of their written briefs, opposing counsel should be permitted to object on the grounds of relevance. The fact that the

¹⁴⁷ Thomas & Chy (2009: 217).

first civil parties were allowed to make oral submissions without submitting briefs has created some confusion around this issue, but this can be easily rectified in future proceedings.¹⁴⁸ By forcing civil parties to articulate their views in writing, the court can ensure that their submissions remain confined to the issues relevant at a particular hearing. The unpredictability of victim participation calls for the court to enforce the boundaries within which victim civil parties may recognize their rights. There is no justification for scaling back on those rights at the first sign of procedural difficulty.

The ICC and ECCC are faced with an enormous task. The victim participation scheme as it has developed, is cumbersome and thus does not give effect to the intention of the drafters. The two courts' must find balanced solutions and develop a clear strategy on how they will meet the diverging needs of the competing interests before them.



Litigation at the pre-trial stage of the ICC has proven helpful. The early litigation has clarified some fundamental issues. For example, the nature of the harm that the person must have suffered to qualify as a victim,¹⁴⁹ what a direct and an indirect victim is, and whether the latter may participate in ICC proceedings at all.¹⁵⁰

¹⁴⁸ *Prosecutor v. Nuon Chea*, ECCC (Trial Chamber), Decision of 1 July 2008. "Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, Case Against Nuon Che" 002/19-09-2007-ECCC/OCIJ.

¹⁴⁹ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC(Pre-Trial Chamber), Decision of 23 September 2009. "Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure". ICC-01/04-01/07-1491-Red. Paragraph 50-56.

¹⁵⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC(Trial Chamber), Decision of 8 April 2009. "Decision on indirect victims". ICC-01/04-01/06-1813.

The ICC and ECCC need to give real meaning and content to the rights contained in their respective statutes. They need to strive to attain the highest international human rights standards while ensuring that the process is fair and just for both the accused and victims. These courts must remain engaged with their goal, to seek an end to impunity for the most heinous of crimes and to uphold the need for accountability. Victim participation sends a clear message that justice is for the victims. Victim participation appropriately interpreted and meaningfully applied will contribute to this goal.

If international tribunals are to provide any measure of meaningful justice, they must make the inclusion of victims in the proceedings a central priority. Victim participation ensures greater access to evidence and enhances the legitimacy of the court. It allows victims to feel that their suffering is as much the focus of the trial as it was the focus the crimes. This, in turn, helps to assuage suspicions that international tribunals serve only the interests of the politically powerful. These concerns are especially important in the case of Cambodia, where the crimes took place over three decades ago, and where allegations of political interference have dogged the court from its inception.

Victim participation offers the most promising method to date for improving international criminal proceedings. As such, it should be embraced, supported, and expanded to meet the needs of international criminal justice in the twenty-first century.

5.2 Alternatives and recommendations

If, as the preceding discussion suggests, victim participation schemes at the ICC and ECCC have fallen short of expectations, perhaps we should acknowledge the limits of participation during criminal proceedings and explore alternative possibilities that might be as, if not better, suited to the task. Victim participation has made a difference for some victims. Indeed, many of the victims who participated in the *Duch* trial indicated some level of satisfaction with their participation in those proceedings.¹⁵¹

There is no merit in abandoning victim participation schemes altogether. But it is important to acknowledge the limits of what can be achieved through these schemes. This means that there is a need to explore alternative ways to complement the limited trial process by providing space for victims to tell their stories in other venues. The critical question is how to make the more complex victim experiences fully visible to victims. While a full exploration of possible alternatives is beyond the scope of this paper, a few thoughts are offered below.

5.2.1 Truth and reconciliation commissions

Truth and reconciliation commissions, (“TRCs”) are designed to establish a historical record of human rights violations without necessarily leading to individual criminal

¹⁵¹ *Prosecutor v. Kaing Guek Eav*, alias Duch, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 60 at 55-57 (Aug. 18, 2009) (quoting Hav Sophea, a civil party whose father, a soldier, was imprisoned at S-21, as saying: “Who were the masterminders who actually took my father to S-21? ... where did my father die? ... how can [you] ... really heal the wounds of the victims who lost their loved ones?”).

prosecution.¹⁵² TRCs may be considered as an alternative method to victim participation in criminal proceedings. TRCs have been praised for addressing issues in a comprehensive manner. A case in point will be the TRC set up in Sierra Leone after the civil war there, in the 1990s.¹⁵³ In this instance the TRC was set up parallel to the Special Court for Sierra Leone. The Special Court for Sierra Leone, lacked any provisions for victim participation¹⁵⁴, therefore, the authorities saw fit to set up a TRC that addressed matters of victims, particularly gender-based crimes. At the same time, however, other commentators have noted that one reason victims prefer trials over these commissions is that trials are perceived as providing stronger moral condemnation than TRCs, which have been characterized as transitional justice mechanisms with low expressive power.¹⁵⁵ Moreover, at the national level, a number of TRCs have suffered from significant political pressure as well as accusations of corruption, both of which have tended to undermine their legitimacy and effectiveness.¹⁵⁶

5.2.2 Expanding the mandates of court's sections

The ICC and ECCC should consider expanding the mandates for relevant court sections.

For instance, in 2010, the ECCC expanded the mandate of the Victim Support Section

¹⁵² Werle (2005: 75).

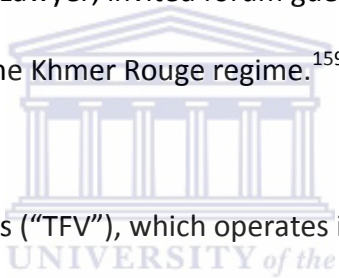
¹⁵³ Report on the Sierra Leone, Truth and Reconciliation Commission. Available at <http://www.sierraleonetr.com/index.php/view-the-final-report/download-table-of-contents> (accessed on 10 October 2012).

¹⁵⁴ Statute of The Special Court for Sierra Leone.

¹⁵⁵ Alexander Servos, *The Case for an International Truth and Reconciliation Commission*, Bepress Legal Series Paper 1210, at 15 (2006) (noting that a “major problem facing TRCs when compared to ICTs is a relative lack of prestige”).

¹⁵⁶ Alexander Servos, *The Case for an International Truth and Reconciliation Commission*, Bepress Legal Series Paper 1210, at 15 (2006) (noting that a “major problem facing TRCs when compared to ICTs is a relative lack of prestige”).

("VSS") to include "the development and implementation of non-judicial programs and measures addressing the broader interests of victims."¹⁵⁷ "Such programs," the Rules note, "may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organizations external to the ECCC."¹⁵⁸ Although it is still unclear how the VSS will implement this new mandate, the VSS has organized a series of forums designed to reach out to victim civil parties and to discuss, among other things, proposals and resources necessary for the implementation of non-judicial measures. Interestingly, in the context of one such forum, Mr Pich Ang, the new Cambodian Civil Party Lead Co-Lawyer, invited forum guests to share their stories about how they had suffered under the Khmer Rouge regime.¹⁵⁹



The ICC's Trust Fund for Victims ("TFV"), which operates in situations where the prosecutor has opened investigations, has a similarly broad mandate. Although the TFV's primary mandate is to assist the court in administering court-ordered reparations awards,¹⁶⁰ it also has a second mandate, which is to assist victims in situation countries under the court's jurisdiction, even if they do not have a link to the particular crimes or suspects being tried by the court. Currently, "the TFV is providing a broad range of support under its second mandate including vocational training, counselling, reconciliation workshops, reconstructive surgery and more to an estimated 70,000

¹⁵⁷ ECCC Internal Rules, at Rule.12bis(3).

¹⁵⁸ ECCC Internal Rules, at Rule. 12bis(3).

¹⁵⁹ The VSS Provided Training to Additional 148 Focal Persons, ECCC, Press Alert (26, November 2010), available at http://vss.eccc.gov.kh/en/component/docman/cat_view (accessed on 29 August 2012).

¹⁶⁰ ICC Rules of Procedure and Evidence, Rule 98(2)-(4).

victims of crimes under the ICC's jurisdiction.”¹⁶¹

5.2.3 Promotion by all international criminal justice actors of victim participation

The time has come for all parties involved to come to grips with the idea of victim participation. The notion has been included in the Rome Statute and it is, therefore, time to overcome the debate as to whether it must be accepted or not. The efforts of all actors involved must focus now on how to make participation meaningful for all: the prosecution, the defence, the court, and the victims themselves.

5.2.4 Increased funding for victim participation

Related to the issue of efficiency is another challenge facing the ICC and ECCC, namely the lack of funding and resources. The gross lack of funding will affect negatively the interests of one of the parties, be it the charged person or the victims. Moreover, the victims themselves might become frustrated by a process that does not have the funds to sustain itself, as seems to be the case for victims who have not yet heard from the court after filing individual complaints.

Bibliography

¹⁶¹ International Criminal Court Trust Fund, available at [http:// www.trustfundforvictims.org/](http://www.trustfundforvictims.org/) (accessed on 30 September 2012).

1. Primary Sources

a) Treaties and Declarations

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, resolution adopted by the UN General Assembly, 21 March 2006.

Charter of the United Nations (1945).

Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by the UN General Assembly, 9 December 1948.

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at the Hague , Netherlands , 7 August 1956.

International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

United Nations International Covenant on Civil and Political Rights, 16 December 1966.

United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948.

United Nations Commission on Crime Prevention and Criminal Justice, Handbook on Justice for Victims on the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N Doc E/CN. I January 1998.

b) Statutes and Regulations

Extraordinary Chambers in the Courts of Cambodia Internal Rules, 12 June 2007.

International Criminal Courts Rules of Procedure and Evidence, under the Rome Statute of the International Criminal Court, 17 July 1998.

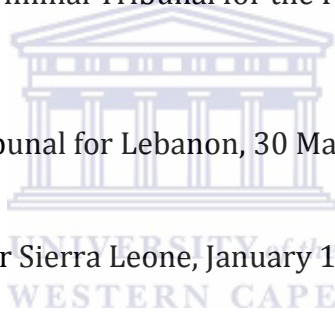
Rome Statute of the International Criminal Court, 17 July 1998.

Statute of the International Criminal Tribunal for Rwanda, 8 November 1994.

Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993.

The Statute of the Special Tribunal for Lebanon, 30 May 2007.

Statute of the Special Court for Sierra Leone, January 16 2002.



c) Case law

ICTY

Prosecutor v. Zejnil Delalic et al, Case No. IT-96-21-T.

Prosecutor v. Anto Furundzija, Case No. IT-95-17/I-T.

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-T.

ICTR

Prosecutor v. Jean Paul Akayesu, Case No. ICTR- 96-4-T

Prosecutor v. André Imanishimwe, Emmanuel Bagambiki & Samuel Ntagerura, Case No. ICTR 99-46-T.

Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T.

SCSL

Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T.

Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT.

ICC

The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08.

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07.

The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05.

Prosecutor v Abu Garda, ICC-02/05-02/09.

Prosecutor v Noun Chea, Case No, 002/19- 09- 2007 ECCC.

Prosecutor v. Kain Guek Eav, Case No 001/18-07 ECCC.

2. Secondary Sources

a) Books

Bassiouni Cherif. *The Legislative History of the International Criminal Court. International and comparative criminal law series.* Ardsley, N.Y: Transnational Publishers, (2005).

Bassiouni Cherif. *The Statute of the International Criminal Court: A Documentary History.* Ardsley, N.Y: Transnational Publishers, (1998).

Bassiouni Cherif. *International Criminal Law: Sources, Subjects, and Contents, Vol. I.* 3rd ed. Leiden, The Netherlands: M. Nijhoff Publishers, 2008.

Bitti Gilbert and Friman Hakan, '*Participation of Victims in the Proceedings*' in Roy Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers: (2001).

Brouwer Anne-Marie de & Groenhuijsen Marc, *The Role of Victims in International Criminal Proceedings*, in Sluiter, Göran and Vasiliev, Sergey (eds.), *International Criminal Procedure, towards a coherent body of law*, CMP Publishing, London 2009.

Casasse Antonio , *International Criminal Law*, Oxford University Press, USA (2003).

Fernando Basil, Cambodia: *The Courts and the Constitution-A Point of View, in Problems Facing the Cambodian Legal System*, Asian Human Rights Commission publishers, Hong Kong, (1998).

Lee, Roy and Friman Hakan, et.al. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence.* Ardsley, NY: Transnational Publishers, (2001).

Lee, Roy. *The International Criminal Court: the Making of the Rome Statute Issues, Negotiations and Results.* The Hague: Kluwer Law International, (1999).

Minow Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*; Beacon Press,(1998).

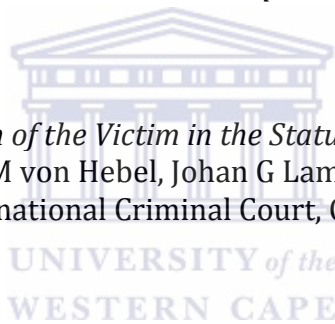
Schabas Willam, *An Introduction to the International Criminal Court*, 3rd edn. Cambridge: CUP, (2007).

Struett Michael, *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency* 5, 1st ed, Macmillan; California (2002).

Triffterer Otto, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn. Munich: Beck (2008).

Tully John, *A Short History of Cambodia: From Empire to Survival*, Sydney, Allen & Unwin (2006).

Van Boven Theo, 'The Position of the Victim in the Statute of the International Criminal Court' in Herman A M von Hebel, Johan G Lammers and Jolien Schukking (eds) *Reflections on the International Criminal Court*, Cambridge University Press (1999).



Werle Gerhard, *Principles of International Criminal Law*, 2nd ed, The Hague, and TMC Asser Press (2005).

b) Articles

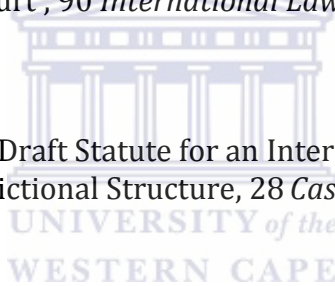
Acquaviva Guido, 'New Paths in International Criminal Justice?' 4 *Journal of International Criminal Justice*, (2008).

Bassiouni Cherif, International Recognition of Victims' Rights, 6 *Human Rights Review*, (2006).

Baum Lynne, Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court, 19 *Wisconsin International Law Journal*, (2001).

Baumgartner Elisabeth, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', 90 *International Law Review of the Red Cross*, (2008).

Berg Bradley, The 1994 I.C.L. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure, 28 *Case Western Reserve Journal of International Law*, (1996).



Blondel Erin, Victims' Rights in an Adversary System, 58 *Duke Law Journal*, (2008).

Bollinger Beth M., Defending Dual Prosecutions: Learning How to Draw the Line, 10 *Criminal Justice Journal* (1995).

Boyle Daniel, 'The Rights of Victims: Participation, Representation, Protection, Reparation', 4 *International Criminal Justice Journal*. (2006).

Carsten Stahn, Olásolo Héctor & Gibson Kate, Participation of Victims in Pre-Trial Proceedings of the ICC, 4 *International Criminal Justice Journal*. (2006).

Chung Christine, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? 6 *Northwest University Journal of International Human Rights*. 459, (2008).

Cohen Miriam, Victims' Participation Rights Within the International Criminal Court: A Critical Overview, 37 *Denver Journal of International Law and Policy*, (2009).

DeFrancia Cristian, Due Process in International Criminal Courts: Why Procedure Matters, 87 *Virginia Law Review Journal*, (2001).

Damaska Mirjan, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 *University of Pennsylvania Law Review*, (1973).

Dembour Marie & Haslam Emily, Victim-Witnesses at War Crimes Trials, 15 *European Journal of International Law*, (2004).

Diehm James, The Introduction of Jury Trials and Adversarial Elements Into the Proper Soviet Union and Other Inquisitorial Countries, 11 *Journal of Transnational Law & Policy*, (2001).

Doak Johnathan, 'Victims' Rights in Criminal Trials: Prospects for Participation', (2005) 32 *Journal of International Law and Society*, 294, (2005).

Edwards Ian, An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making, 44 *British Journal of International Law*, (2004).

Finegan Sharon, Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice, 58 *Catholic University Law Review*. (2009).

Finlay Lorraine, Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute, 15 *University of California Davis Journal of International Law*, (2009).

Flowers Roberta, A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors, 37 *Boston College Law Review*, (1996).

Gibson Kate & Rudy Daniella, A New Model of International Procedure?, 7 *Journal of International Criminal Justice*, (2009).

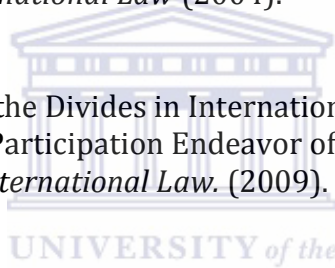
Howe Thomas, Eric Ortner & Allison Surowitz, In the International Criminal Court: Prosecutor v. Soldier Nationals of Katonia and Ridgeland, 17 *Pace International Law Review*. (2005).

Johnson Scott, Victim Participation in the International Criminal Court: Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court, 16 *ILSA Journal of International and Comparative Law*, (2010).

Jouet Mugambi, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 *St Louis University Public Law Review*, (2007).

Kuhner Timothy, The Status of Victims in the Enforcement of International Criminal Law, 6 *Oregon Review of International Law* (2004).

McGonigle Brianne, Bridging the Divides in International Criminal Proceedings: An Examination Into the Victim Participation Endeavor of the International Criminal Court, 21 *Florida Journal of International Law*. (2009).



Megret Fredric, Beyond "Fairness": Understanding the Detriments of International Criminal Procedure, 14 *UCLA Journal of International Law and Foreign Affairs*. 37, 73 (2009).

Mekjian Gerard & Varughese Mathew, Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court, 17 *Pace International Law Review*, (2005).

Menachem Elon, Law, Truth and Peace: "Three Pillars of the World," 29 *New York University Journal of International Law and Policy*, (1997).

Murray Juliana, Comment and Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals, 10 *Chicago Journal of International Law*. (2010).

Nedzel Nadia, The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems, 10 *Richmond Journal of Global Law and Business*, (2010).

Pena Mariana, Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead, 16 *ILSA Journal of International and Comparative Law*, (2010).

Pindell Raquel, In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes, 35 *Vanderbilt Journal of Transnational Law* (2002).

Rastan Rod, Review of ICC Jurisprudence 2008, 7 *North West Journal of International Human Rights*, (2009).

SáCouto Susana & Cleary Katherine, Victims' Participation in the Investigations of the International Criminal Court, 17 *Journal of Transnational Law & Contemporary Problems*, (2008).

Servos Alexander, The Case for an International Truth and Reconciliation Commission, *Bepress Legal Paper Series* 1210, (2006).

Sluiter Görjan, Due Process and the Criminal Procedure in the Cambodian Extraordinary Chambers, 4 *Journal of International Criminal Justice*. (2006).

Trumbull IV Charles, The Victims of Victim Participation in International Criminal Proceedings, 29 *Michigan Journal of International Law*, (2008).

Tuerkheimer Frank, Globalization of U.S. Law Enforcement: Does the Constitution Come Along? 39 *Houston Law Review*, (2002).

Turner Jenia, Legal Ethics in International Criminal Defence, 10 *Chicago Journal of International Law*. (2010).

Vanderpuye Kweku, Traditions in Conflict: The Internalization of Confrontation, 43 *Cornell International Law Journal*, (2010).

Wright James, Due process in International Law, 40 *American Journal of International Law*, (1945).

War Crimes Research Office, American University Washington College of Law, *Victim Participation Before the International Criminal Court*, 22 November 2007.

c) Electronic Sources

International Criminal Court Trust Fund, available at <http://www.trustfundforvictims.org/>

Office of the Prosecutor, Policy Paper on Victims' Participation, ICC-CPI (April 2010), <http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril20>.

Redress, Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court (July 15, 2011) available at <http://www.redress.org/downloads/StatementVictimParticipation15July2011.p>.

Report on the Sierra Leone, Truth and Reconciliation Commission. Available at <http://www.sierraleonetrsc.org/index.php/view-the-final-report/download-table-of-contents>

The VSS Provided Training to Additional 148 Focal Persons, ECCC, Press Alert, 26 November 2010, available at http://vss.eccc.gov.kh/en/component/docman/cat_view

UN Judges Laugh at Rape Victim, Monitor, Dec. 3, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm>.