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Victim Participation in Proceedings before the International Criminal Court

by Fiona McKay*

ONE OF THE UNIQUE ASPECTS of the International Criminal Court (ICC) compared to other international criminal tribunals is the element of victim participation. Victims may present their views and concerns to the ICC, where their interests are affected, potentially at any stage of the proceedings, from investigations to appeal. If an accused is convicted, the ICC may award reparations.

Such a role for victims in criminal proceedings is normal in some legal systems of the world, where victims can join criminal proceedings as civil parties. It is largely unfamiliar, however, to common law countries, like the United States, where victims may be called to testify as witnesses but play no further role in the proceedings and must bring a separate civil action if they wish to claim damages or another remedy for harm related to the crime. The closest process in the United States may be the notion of victim impact statements, whereby victims may address a court regarding the impact a crime had on them while the court considers sentencing. Before the ICC, victims may present their views to the ICC from a much earlier stage.

This innovation was introduced in order to give victims a voice in the proceedings and to address one of the deficiencies for which the *ad hoc* international criminal tribunals, such as those for Former Yugoslavia and Rwanda, were criticized, namely the sense of alienation that many victims felt as a result of being left out of the proceedings. It was also intended to reflect developments in international standards that recognize greater rights for victims of crimes, including the right to reparation.¹

Many of the details of how this participation will work are currently being shaped. The participation of victims has been the subject of a considerable amount of the ICC's early jurisprudence, and a number of appeals are currently pending on key elements that will have a significant impact in determining what the role of victims before the ICC will be.

Aside from the legal issues, there are also very real, practical challenges involved in making the ICC's scheme for victims' participation work. The Victims Participation and Reparations Section (VPRS) is one of several units in the ICC concerned with victims. The VPRS was established within the Registry of the ICC to assist victims and facilitate their access to the ICC, as well as to serve as the entry point for applications to participate in proceedings and to process such applications. Another unit of the ICC is responsible for protection and support (the Victims and Witnesses Unit), and two independent bodies have been established — an Office of Public Counsel for Victims to provide legal assistance and representation, and a Trust Fund



International Criminal Court/Gabriela Gonzalez-Rivas

Amputation survivors meet with André Laperrière, Director of the ICC Trust Fund for Victims, an independent organization created by the Rome Statute to aid the victims of crimes the ICC prosecutes.

for Victims of crimes within the ICC's jurisdiction and their families.

WHAT DOES "PARTICIPATION" MEAN?

According to Article 68(3) of the Rome Statute of the ICC (the Rome Statute):

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.²

Participating in proceedings should be distinguished from being called to testify as a witness. Some victims may be called as witnesses by one of the parties to give evidence that goes to the culpability or innocence of the accused, whereas appearing as a victim participant is entirely voluntary. Further, in participating, victims are pursuing their own interests, independent from the parties. Indeed, in the first major decision on victims' participation, dating from January 2006, the Pre-Trial

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“Indeed, . . . the first major decision on victims’ participation . . . noted that the Rome Statute grants victims an independent voice and role in the proceedings and that it should not be assumed that victims would be an ally of the Prosecutor.”

Chamber dealing with the situation in the Democratic Republic of the Congo (DRC) noted that the Rome Statute grants victims an independent voice and role in the proceedings and that it should not be assumed that victims would be an ally of the Prosecutor.³

On the other hand, victims’ participation before the ICC does not go as far as the role of victims in legal systems based on the civil law tradition, where their role can be likened to that of a third party in the proceedings. Before the ICC they are not treated as full parties: for instance, to date their lawyers have not been permitted full access to the documents in the record of the proceedings.

Further, the judges sitting in relation to any particular phase of proceedings have a duty to manage the participation of victims during that phase and to ensure that it does not prejudice the rights of the accused or impede the efficiency of the proceedings.⁴ The ICC’s Rules envisage that a legal representative of a victim might question a witness, or even the accused, but only after seeking specific authorization from the Chamber. The Rules also provide that where there are a number of victims, a Chamber may order them to join together and choose a common legal representative, in the interests of ensuring the efficiency of the proceedings.

While the parties sought leave to appeal some of the early decisions on victims, the pre-trial chambers rejected such applications. More recently, several issues have come before the Appeals Chamber in the run up to the ICC’s first trial, in the case of the *Prosecutor v. Thomas Lubanga Dyilo* (the *Lubanga* case). Following the transmission of the *Lubanga* case to the Trial Chamber for preparation for trial, a landmark decision on victims’ participation of January 2008 gave rise to several appeals from both the defence and the prosecution, which are currently pending before the Appeals Chamber. The principal main issues at stake are noted below.

AT WHICH STAGES MAY VICTIMS PARTICIPATE?

The question of what should be the role of victims during the preliminary stages of proceedings has been a contentious one. The ICC’s Statute and Rules provide some guidance on the matter, specifying, for instance, that victims may present their views and concerns in relation to decisions whether to proceed with an investigation or prosecution, in the context of challenges to jurisdiction or admissibility, and during a hearing to consider whether to confirm the charges against a person.⁵

In an early decision from January 2006, the Pre-Trial Chamber dealing with the situation in the DRC decided that victims may participate even as early as the investigations phase, when the Prosecutor is still conducting investigations into which crimes might have been committed and who might be responsible, and before a case has been opened against any individual. According to Pre-Trial Chamber I, the personal interests of the victims are affected at this stage in a general manner, in that participation enables them to clarify facts, punish those responsible for crimes and seek reparation for harm suffered. The Chamber went on to distinguish between victims of a *situation* and of a specific *case*, an approach subsequently adopted by Pre-Trial Chamber II in relation to the Uganda situation. The Prosecutor challenged this approach, arguing that victim participation during an investigation could jeopardize the integrity and objectivity of the investigation as well as impact its efficiency and security. It was not until early 2008, however, that the issue came before the Appeals Chamber, which is currently considering whether Article 68(3) of the Statute can be interpreted as providing for a procedural status of victim at the investigation stage of a situation and the pre-trial stage of a case.⁶

WHICH VICTIMS MAY PARTICIPATE?

Identifying which victims may participate is currently the subject of appeal before the ICC Appeals Chamber. The Rules of Procedure and Evidence give only a very general definition of who will be considered a victim before the ICC — a natural person who has suffered harm as a result of the commission of a crime within the jurisdiction the ICC. An organization or institution that suffered harm to its property dedicated to religion, education or similar purposes, or to monuments, hospitals or other places used for humanitarian purposes may also be considered a victim. While this is less detailed than the definition contained in international instruments, both the Pre-Trial Chamber and the Trial Chamber in the DRC situation have held that the notion of “harm” should be interpreted in the light of internationally recognized standards, and have referred to international instruments that contain a more detailed definition.⁷

The question of which victims should be allowed to participate in relation to a specific *case* — as opposed to the broader *situation* that is before the ICC — is the subject of a pending appeal. At the pre-trial stage of the *Lubanga* case, the judges of the Pre-Trial Chamber decided that only those victims able to demonstrate a direct causal link between the harm they allege

“A major challenge is how to inform victims about the ICC in general as well as about their own possible role as participants, when many victims are in inaccessible or insecure locations, cannot access regular media channels, and have high levels of illiteracy and little or no experience with criminal justice systems.”

to have suffered and the crimes in the arrest warrant would be entitled to participate in proceedings in relation to the case at that stage. When the case moved to the Trial Chamber, that Chamber departed from this approach, finding that indirect as well as direct victims of a crime may be accepted, and that the range of victims who might be authorized to participate in the trial would not be limited to those linked to the crimes contained in the charges; rather that whether the interests of a victim are affected by the trial will be determined instead by reference to whether the victim can establish a link with evidence the ICC will be considering during the trial, or is affected by an issue arising during the trial because his or her personal interests are “in a real sense engaged by it.”⁸ The Trial Chamber also noted that victims may have very general and wide-ranging interests, such as in being allowed to express their views and concerns, verifying particular facts, protecting their dignity and ensuring their safety, and being recognized as victims, and that their interests were not limited to receiving reparations.

As a result of applications from both the prosecution and the defence, the Appeals Chamber is currently considering the question of whether the harm alleged and the concept of “personal interests” must be linked with the charges against the accused.⁹

WHAT WILL VICTIMS PARTICIPATING IN PROCEEDINGS BE PERMITTED TO DO?

The ICC’s rules relating to victim participation envisage that victims may give opening and closing statements at trial, and may request authorization to make interventions, including questioning witnesses. During the confirmation of charges hearing in the *Lubanga* case, a legal representative of a victim was permitted to put a question to a witness.

Another issue currently on appeal is whether victims participating in proceedings will be able to introduce evidence during trial. The Trial Chamber, in its decision on victims’ participation of January 2008, held that victims participating in proceedings may be allowed to introduce and examine evidence if the Chamber finds it will assist in the determination of the truth.¹⁰

REPARATIONS

According to Article 75 of the Rome Statute, the ICC *shall* develop principles in relation to reparation, and in a particular

case *may* proceed to make an assessment of the harm done to victims, and *may* make specific awards of reparation directly against a person it has found guilty of crimes within the ICC’s jurisdiction. The Rome Statute sets out only a broad framework in relation to reparations. The framework is designed to enable an appropriate approach to be taken in each case. For instance, in line with international standards, reparation may take various forms, including compensation, restitution, and rehabilitation (as well as other forms such as non-material or symbolic measures), and it may be awarded on a collective or an individual basis.

To date, the ICC has not developed principles in abstract, and there have been very few pronouncements on the part of any of the Chambers. During preparation for the *Lubanga* trial, one question has been whether or not to consider evidence relating to reparations during the course of the trial itself, or only at a separate reparations stage if the accused is found guilty. The Prosecution suggested a wholly “blended approach” according to which reparations would be dealt with during the trial itself. The Chamber did not go that far, but decided to apply a regulation that allows the ICC to hear and examine witnesses relating to reparation during trial, where this is expedient in the interests of efficiency, for instance to avoid the need to call the same witness twice.¹¹

CHALLENGES FOR THE ICC IN ENABLING VICTIMS TO PARTICIPATE IN PROCEEDINGS

Some of the greatest challenges to victims’ participation before the ICC are not legal but rather relate to how to enable victims to effectively participate in proceedings. Many practical and logistical considerations exist in a context where the victims of the situations currently before the ICC are located in places that suffer from a state of insecurity.

A major challenge is how to inform victims about the ICC in general as well as about their own possible role as participants; when many victims are in inaccessible or insecure locations, cannot access regular media channels, and have high levels of illiteracy and little or no experience with criminal justice systems. The ICC’s Outreach Unit and the VPRS seek to develop strategies and tools aimed at reaching those populations as effectively as possible despite these difficulties.

Victims need to be not only informed, but also assisted and supported to go through the application procedure. The ICC

works with local non-governmental organizations (NGOs) and other intermediaries to try to ensure that victims have effective means of exercising their rights before the ICC, including the ability to choose a legal representative. Many local NGOs, however, experience difficulties in raising the necessary resources to carry out this work.

Another challenge for the Registry is how to process potentially large numbers of applications from victims. The ICC's Rules and Regulations provide that to participate in proceedings, victims must make a written application providing specific information designed to enable the relevant chambers to decide on their application. The VPRS has been assigned the task of receiving, following up on, and processing applications, and providing reports to the relevant chambers that will assist them when considering their decisions. The VPRS has worked to establish systems to enable the VPRS to handle large numbers of applications. Whilst it is difficult to predict the volume that may be received, and applications currently number in the hundreds rather than thousands, potentially large numbers of victims could seek to participate in proceedings.

For the judges, an important question is whether to permit withholding identities of victims from the public and the parties to protect victims from possible reprisals. The precise duties of the ICC to protect victims participating in proceedings, and those who have applied but whose applications have not yet been decided upon, remain to be resolved. A recent decision of the *Lubanga* Trial Chamber, ruling that the Victims and Witnesses Unit has a duty to protect victims from the moment they approach the ICC, has significant implications for that unit of the Registry, particularly given the challenges it faces in operating in some areas.

The judges have also had to deal directly with practical realities. Several chambers of the ICC have tackled the question of what documents to require applicants wishing to participate in proceedings to produce in order to prove their identity. Faced with the reality that most people in affected communities do not



USAID/Leah Werchick

Rape victims from the armed conflict in the DRC assemble in South Kivu, DRC.

have official proof of identity such as a passport or identity card, the judges have decided to accept alternative and less formal identity documents.

CONCLUSION

THE AMBITIOUS GOAL to give a meaningful role to victims in ICC proceedings has started to be tested and used, and as the first trial before the ICC approaches, it can be expected that further aspects will be clarified. Whilst the legal and practical challenges should not be underestimated, the ICC itself, as well as many committed partners, is seeking to give effect to this innovative mandate.

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ENDNOTES: Victim Participation in Proceedings before the International Criminal Court

¹ See generally, G.A. Res. 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); G.A. Res. 60/147, *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*, U.N. Doc. A/RES/60/147 (16 December 2005).

² Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> (last visited June 28, 2008) [hereinafter Rome Statute].

³ *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04-101-tEN-Corr, ¶ 51 (Pre-Trial Chamber I, 17 January 2006) [hereinafter Decision on Applications for Participation].

⁴ Rome Statute, *supra* note 2, art. 68(3); Rules of Procedure and Evidence of the International Criminal Court Rule R. 90, Doc. ICC-APS/1-3 (2002) available at www.icc-cpi.int/library/about/

[officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf](http://www.icc-cpi.int/library/about/Official_Journal.html) (last visited June 28, 2008) [hereinafter Rules of Procedure and Evidence].

⁵ See, e.g., Rome Statute, *supra* note 2, arts. 15(3) and 19(3); Rules of Procedure and Evidence, *supra* note 4, R. 92.

⁶ Leave to appeal was granted to the Office of Public Counsel for the Defence by Pre-Trial I on January 23, 2008.

⁷ Decision on the Applications for Participation, ¶ 81; *Situation in the Democratic Republic of the Congo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, ¶ 92 (Trial Chamber I, Jan. 18, 2008) [hereinafter Decision on Victims' Participation] (referring to the instruments cited in note 2).

⁸ Decision on Victims' Participation, *supra* note 7, ¶¶ 93–98.

⁹ Leave to appeal the Decision on Victims' Participation of January 18, 2008 was granted on February 26, 2008.

¹⁰ Decision on Victims' Participation, *supra* note 7, ¶¶ 108–109. Leave to appeal was granted on February 26, 2008.

¹¹ Regulations of the Court, reg. 56, May 26, 2004, ICC-BD/01-01-04, available at http://www.icc-cpi.int/about/Official_Journal.html (last visited June 28, 2008).