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Rethinking Victim Participation in International Criminal Tribunals

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Rethinking Victim Participation in International Criminal Tribunals

Cover Page Footnote

Assistant District Attorney, Philadelphia District Attorney's Office. This article represents the opinion of the author and not necessarily those of the Philadelphia District Attorney's Office. I would like to thank Eric Stover, Ayesha Rasheed, and Alexandra Zaretsky for their support and encouragement during the research and writing process. I would also like to thank the Notre Dame Journal of International & Comparative Law for their review of this note in preparation for publication.

**RETHINKING VICTIM PARTICIPATION IN INTERNATIONAL
CRIMINAL TRIBUNALS**

JULIA L. JACOVIDES¹

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^{*1} Assistant District Attorney, Philadelphia District Attorney's Office. **This article represents the opinion of the author and not necessarily those of the Philadelphia District Attorney's Office.** I would like to thank Eric Stover, Ayesha Rasheed, and Alexandra Zaretsky for their support and encouragement during the research and writing process. I would also like to thank the Notre Dame Journal of International & Comparative Law for their review of this note in preparation for publication.

INTRODUCTION

Since the Rome Statute introduced the concept of victim participation twenty-five years ago, international courts have tended to allow victims to be actively involved in judicial proceedings. Indeed, these courts rely on victims to provide context of the conflict, to make sense of the crime scene, and to put a face to otherwise abstract atrocities.

However, there has been extensive debate over the appropriate nature and extent of victim participation. In recent years, international courts have tended to allow victims to directly engage with proceedings. To civil law countries such as France, this is not a novel concept. Historically, victims in those jurisdictions have had the opportunity to request investigatory measures, review and present evidence to the court, cross-examine witnesses, and make closing arguments. However, to practitioners in common law systems such as the United States, such involvement approaches heresy.² These jurisdictions have largely denied victims the right to speak to the court, unless they are doing so as a witness. Because international courts combine features of both traditions, and because the nature of international crimes is so different from those adjudicated in civil and common law courts, it is clear that an approach to victim participation that strictly adheres to either tradition is unattainable and undesirable.

The questions then become: should victims of atrocity crimes³ be included in court proceedings at all? And, if they are included, to what extent should that inclusion take place outside the courtroom? This paper will argue that victims should be included, but that courts should think beyond the traditional common and civil law divide. Indeed, to answer these questions, this paper engages with two fields in order to provide scholars and practitioners insights as they develop victim participation schemes for future war crimes tribunals.

The field of international criminal justice evaluates the ways in which courts that adjudicate atrocity crimes engage with victims. In recent years, international criminal courts have granted greater participatory rights to victims, reflecting a belief that victim participation plays an important role in achieving justice.⁴

² See Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J. L. & POL'Y 229, 229–30 (2005) (“Given that virtually all law professors were trained in criminal law classes that ignored victim involvement in the criminal justice process, it is perhaps not surprising that it is considered heretical to suggest that direct participation by victims might be warranted.”).

³ See David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUDIES AND PREVENTION: INT'L J. (2006) 229, 237–48 (arguing the need for a single term to describe the crimes of genocide, crimes against humanity, and war crimes).

⁴ See UC Berkeley Human Rights Center, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, (2015), at 1,

Drawing on empirical research, this paper suggests a more nuanced approach to participation. It compares the practices of five tribunals: (1) the International Criminal Tribunal for the Former Yugoslavia (ICTY), (2) the International Criminal Court (ICC), (3) the Extraordinary Chambers in the Courts of Cambodia (ECCC), (4) the Special Court for Sierra Leone (SCSL), and (5) the German courts that are hearing cases involving war crimes in Syria. By comparing the practices of these courts, this paper demonstrates that meaningful victim participation is possible outside the traditional framework.

Procedural justice, the second field, provides a framework to consider the possible types of victim participation. Studies of procedural justice in American courts have found that victims are more likely to be satisfied with the outcome of a judicial proceeding if they believe the process has been fair. Scholars have isolated four factors that influence victims' belief in the fairness of the judicial process: whether they have had an opportunity to *voice* their views and opinions, whether the authorities have treated them with *respect*, whether they feel that they can *trust* the court and, finally, whether the decisionmaker is *neutral* and unbiased.⁵ Whether victims of international crimes value the same things remains unknown, but at least one study has found that there is some overlap.

This paper proceeds as follows. It first expands on the practice of victim participation in war crimes trials by exploring the divide between common and civil law traditions, and considering the arguments for and against the traditional forms of victim participation. It then turns to discuss the existing research on procedural justice in domestic and international courts. Next, it considers the possibility that an approach to victim participation that is grounded in procedural justice may successfully engage victims inside and outside the courtroom and, in doing so, expands the conversation beyond the traditional common and civil law divide.

https://humanrights.berkeley.edu/sites/default/files/publications/vp_report_2015_full_rev_b-4.pdf.

⁵ This four-part framework was used by Stephen Cody and Alexa Koenig in their analysis of an empirical study conducted between July 2013 and February 2014 by the Human Rights Center at UC Berkeley School of Law of 622 ICC victim participants in four countries with active ICC investigations and prosecutions: Uganda, the Democratic Republic of the Congo, Kenya, and Côte d'Ivoire. See generally Stephen Cody & Alexa Koenig, *Procedural Justice in Transnational Contexts*, 58 VA. J. INT'L. L. 1 (2018). Others have extensively analyzed the importance of each factor. See generally E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990) (offering study participants a voice led to "higher fairness judgments than no voice..."); see also Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANNU. REV. L. SOC. SCI. 171, 182–3 (2005) (providing an overview of the studies indicating the importance of neutrality, trust, and respect); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 298–9 (2003) (discussing the importance of neutrality and commenting that "trust and procedural justice are closely intertwined.").

Finally, it provides a comparative view of the practices of five courts that hear cases involving atrocity crimes. This final section proceeds along the four-part procedural justice framework—voice, respect, trust, and neutrality—and illustrates the range of ways in which these courts have encouraged, or prevented, perceptions of procedural fairness among victim participants. The paper concludes by suggesting that future war crimes courts should ground their victim participation schemes in principles of procedural fairness.

By providing a comparative analysis of the practices of five similarly situated courts, this paper makes two points. First, the current debate over whether and how victims should be included ought to be expanded to include considerations of victim participation and notions of fairness outside the courtroom, rather than granting victims more participatory rights during trial. Second, a blueprint for future courts seeking to do this already exists. This paper concludes with an acknowledgment that a successful victim participation scheme will require a delicate balance between the needs and rights of the prosecutor, the defendant, and the victims. Above all, it should be guided by the local dimensions of conflict and justice, and acknowledge the victims' wants and needs.

I. BACKGROUND

Because each court discussed in this paper included victims in different ways, it is helpful to consider the evolution in their approaches before turning to a more detailed discussion of their practices.

The ICTY, following the model set by the Nuremberg and Tokyo tribunals, as well as common law courts, allowed victims to participate only as witnesses for the prosecution or defense.⁶ From 1994 until 2017, the Tribunal heard cases concerning crimes committed during the conflict in the Balkans.⁷ It issued decisions that profoundly changed the international legal landscape, but victims lacked substantive participatory rights, which fostered feelings of resentment

⁶ For an exploration of the nature of victim participation at Nuremberg and Tokyo, see Luke Moffett, *The Role of Victims in the International Criminal Tribunals of the Second World War*, 12 INT'L CRIM. L. REV. 245 (2012).

⁷ See International Criminal Tribunal for the former Yugoslavia, *Key Figures of the Cases*, www.icty.org/en/cases/key-figures-cases (detailing the outcomes of indictments made against 161 accused individuals at the ICTY); see also Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 257 (2007) ("In sum, while the ICTY ... proceedings have little use for non-testifying victims, those victims serving as witnesses have virtually no choice but to abide by the awesome power of the courts' authority."); Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L. CRIM. L. REV. 243, 268–71 (2004) (highlighting aspects of the common law adversarial system at the ICTY).

towards the Tribunal. Indeed, victims could only participate as witnesses or through impact statements given at sentencing.⁸

Although the SCSL similarly restricted victims' roles in the courtroom, it undertook extensive efforts to engage victims outside proceedings. Towards the end of Sierra Leone's civil war, which lasted from 1991 to 2002, the United Nations established a tribunal with jurisdiction over serious violations of international humanitarian law and Sierra Leonean law.⁹ Unlike the ICTY, the Court in Sierra Leone immediately implemented an outreach program that focused on developing communication and transparency with the local population. Due to its out-of-court engagement with the affected population, the SCSL developed popular support for its agenda—even from those who were not directly involved in the trial.

In 2003, the ICC opened its doors and allowed victims to become directly involved in proceedings for the first time by presenting “their views and concerns” when their “personal interests” are affected.¹⁰ Like the SCSL, the ICC developed an outreach program that facilitates victim interactions with the court.¹¹ Its incorporation of victims into the judicial process is widely seen as an innovation.¹² At the start of an ICC case, the court's outreach section, its Victims Participation and Reparations Section (VPRS), and the Office of the Prosecutor work to identify potential community partners who can serve as intermediaries. They engage in workshops, recruit and train court intermediaries, and establish field offices in order to develop local relationships.¹³ After the court identifies local partners, and after the court formally accepts victim applicants as participants, the ICC allows victims to retain legal counsel.¹⁴ From then on, victims rely on their legal representatives, VPRS staff, and court intermediaries to remain connected with legal proceedings. Victims' experience with these groups has a big effect on their experience with the court as a whole.¹⁵ Over the years, the court has developed different approaches to victim participation, allowing some victims to choose whether to apply as

⁸ See Luke Moffett, *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*, CRIMINAL LAW FORUM 255 (2015).

⁹ Residual Special Court for Sierra Leone, *Homepage*, www.rscsl.org.

¹⁰ Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 33. Note, however, that the ICC has restricted victim participation during pre-trial investigations. They rarely have an opportunity to speak directly to the court at this time, and may only do so through a court intermediary. See International Criminal Court, *Victims before the International Criminal Court: A guide for participation of victims in the proceedings of the ICC*, at 17–18, www.icc-cpi.int/itemsDocuments/vprs/VPRS-Victims-booklet-format-ENG.pdf.

¹¹ See UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 1.

¹² See *id.* at 8.

¹³ See *id.* at 23–4.

¹⁴ See *id.* at 25.

¹⁵ See *id.*

individual participants or as a group.¹⁶ Victims may participate as early as the investigation stage, when they may be permitted to opine on the Prosecutor's decision to not open an investigation.¹⁷ Part IV of this paper relies on the findings of interviews conducted with ICC victim participants in four countries with active ICC investigations and prosecutions: Uganda, the Democratic Republic of the Congo, Kenya, and Côte d'Ivoire.

The ECCC, established in 2003 by formal agreement between the government of Cambodia and the United Nations, allowed victims to participate as full parties to the proceedings. This remains a high-water mark for advocates of expansive victim participation within the courtroom. The court hears cases related to grave violations of national and international law committed by the Khmer Rouge between 1975 and 1979.¹⁸ While trials occur in Phnom Penh, outreach by the court and non-governmental organizations takes place throughout Cambodia. For example, trial proceedings are broadcast on national radio, as are weekly programs summarizing case developments.¹⁹ For the first time, victims of atrocity crimes could participate as civil parties to the proceedings. This means that victims, through their lawyers, have many of the same rights as the prosecution or defense, and can request investigatory measures, call witnesses, make statements to the court, and more. Following the first trial, the court subsequently modified civil party rights in response to concerns about equality of arms and judicial efficiency.²⁰ However, the court's commitment to inclusivity remains the same, and the ECCC's experience with victim participation may therefore be instructive to future tribunals.

In recent years, dozens of national war crimes units have been established around the world, with the majority existing in prosecutor offices in Europe, Canada, and the United States. Some of these units, such as the German Central War Crimes Unit (ZBKV), exercise universal jurisdiction, which authorizes them to prosecute anyone believed to have committed serious crimes, even if that crime occurred outside the prosecuting country.²¹ Recent universal jurisdiction cases in

¹⁶ See *id.* at 26–8.

¹⁷ International Criminal Court, *Victims*, www.icc-cpi.int/about/victims.

¹⁸ Extraordinary Chambers in the Courts of Cambodia, *Introduction to the ECCC*, www.eccc.gov.kh/en/introduction-eccc.

¹⁹ Extraordinary Chambers in the Courts of Cambodia, *If we cannot attend the court hearings in person, how will we know what is happening inside the court?*, www.eccc.gov.kh/en/faq/if-we-cannot-attend-court-hearings-person-how-will-we-know-what-happening-inside-court.

²⁰ See John D. Ciorciari & Anne Hiendel, *Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands*, 56 VA. J. INT'L. L. 265, 320–6 (2016) (describing the ECCC's innovative approaches to allowing victims to describe their suffering to the court).

²¹ See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785–88 (1988) (describing the principle of universal jurisdiction as one that “assumes that every state

German courts have received significant media attention,²² including a conviction in January 2022 that marked the conclusion of the first war crimes trial of a former high-ranking Syrian official.²³ Victims in German proceedings have strong procedural rights, meaning that they may actively participate alongside the prosecution and defense as joint plaintiffs.²⁴ Similar to victims at the ECCC, they may retain their own legal representation, be present during trial, question a witness, make objections, and file appeals.²⁵ For example, in 2021 a German court convicted a former member of ISIS of committing genocide against the Yazidi community in Iraq, and convicted his wife, Jennifer W., of crimes against humanity for failing to help the five-year-old victim.²⁶ The victim's mother acted as both witness and co-plaintiff at each trial.²⁷ This meant that she had a series of protected rights, including a right to challenge the judge's orders, question the defendant and witnesses, appeal the court's decisions, and make statements.²⁸ Moving forward, national war crimes units may become the predominant method for victims of atrocity crimes in different countries to seek justice. In that case, Germany may serve as a model to those advocating for victim participation.

has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.”).

²² See Human Rights Watch, *These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts*, (2017), www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts#; see also Rick Gladstone, *An Old Legal Doctrine That Puts War Criminals in the Reach of Justice*, N.Y. TIMES, Aug. 10, 2021, www.nytimes.com/2021/02/28/world/europe/universal-jurisdiction-war-crimes.html (indicating that national courts are increasingly reliant on universal jurisdiction to “prosecute individuals accused of having committed heinous offenses that include crimes against humanity, war crimes, genocide and torture”); see also Deborah Amos, *War Crimes survivors turn to German courts when international tribunals are blocked*, NPR, Oct. 4, 2021, www.npr.org/2021/10/04/1042999638/war-crimes-survivors-turn-to-german-courts-when-international-tribunals-are-bloc (discussing Germany's use of universal jurisdiction in order to hear cases even if the alleged crimes happened outside their borders).

²³ Deborah Amos, *In a landmark case, a German court convicts an ex-Syrian officer of torture*, NPR, Jan. 13, 2022, <https://www.npr.org/2022/01/13/1072416672/germany-syria-torture-trial-crimes-against-humanity-verdict>.

²⁴ See Open Society Justice Initiative & Trial International, *Universal Jurisdiction Law and Practice in Germany*, <https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf> (comparing the procedural trial rights of victims who join as joint plaintiffs and those who do not).

²⁵ See *id.*

²⁶ *German court jails ISIL member for life over Yazidi genocide*, Al Jazeera, Nov. 30, 2021, www.aljazeera.com/news/2021/11/30/german-court-jails-isil-member-for-life-over-yazidi-genocide.

²⁷ Doughty Street Chambers, *Fifth conviction of an ISIS member in Germany for crimes against humanity committed against the Yazidis*, Oct. 25, 2021, www.doughtystreet.co.uk/news/fifth-conviction-isis-member-germany-crimes-against-humanity-committed-against-yazidis.

²⁸ See *Universal Jurisdiction Law and Practice in Germany*, *supra* note 23 at 26-27.

II. VICTIM PARTICIPATION IN WAR CRIMES TRIALS

Given the varying degree of victim participation in atrocity trials, it is perhaps unsurprising that the *extent* of victim participation is, as yet, an unsettled issue. On one side of the debate are those who argue that victims' roles should be limited to serving as witnesses, responsible only for providing judges with firsthand accounts of the alleged crimes.²⁹ On the other side, supporters of expansive participatory rights argue that victims should be allowed to actively engage with the court by, for example, presenting evidence or cross-examining witnesses.³⁰ This, they argue, will strengthen each side's case by bringing new facts to light, allowing victims to heal from their traumatic experience, and improving public understanding of the legal process.³¹ Scholars and jurists who debate this topic generally split along common law and civil law lines.³² Common law practitioners tend to favor reduced participatory rights, whereas those who work within a civil law jurisdiction are less opposed to victims' incorporation into proceedings.³³

This Part explores the ways in which international courts have included victims and provides an overview of the arguments in favor of and against this type of victim participation.

A. VICTIM PARTICIPATION IN COMMON LAW, CIVIL LAW, AND INTERNATIONAL COURTS

While the question of whether victims should be allowed to participate in legal proceedings is a relatively settled topic in civil and common law jurisdictions, the issue remains unanswered in international criminal courts. This is partly due to the fact that each new war crimes tribunal—from the ICTY to the SCSL to the ECCC—develops its own rules of evidence and procedure, deciding on an individual basis which features of each legal system to adopt.

Countries such as the United States and United Kingdom practice the common law system, in which the prosecution and defense make arguments to a judge who acts as a referee and guides the jury through the fact-finding process. Victims generally lack legal standing to pursue charges or present evidence on their

²⁹ See Eric Stover, Mychelle Balthazard & Alexa Koenig, *Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93(882) INT'L. REV. RED CROSS 503, 508 (2011).

³⁰ See *id.*

³¹ See *id.* at 513–514.

³² See *id.*

³³ See Charles P. Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L. L. 777, 778 (2008).

own.³⁴ Criminal prosecutions remain the exclusive domain of the state, and in these jurisdictions, the two-party nature of proceedings suggests direct participation by victims is almost “heretical.”³⁵ The post-war trials at Nuremberg and Tokyo, as well as the ICTY, adopted this approach.

By contrast, victims in civil law systems have greater opportunities to become involved in proceedings. In these cases, an investigating judge supervises the preparation of a dossier of evidence to which the defendant must respond at trial. During trial, the judge takes on a more prominent role, often questioning witnesses and directing the course of the trial. Victims, too, take on a more central role: they may initiate proceedings or seek compensation by joining the prosecution as a civil party. In doing so, they may retain legal representation, provide evidence, question witnesses, and make closing arguments.³⁶ Victim participation schemes at the ICC and ECCC offer victims similarly extensive participatory rights. In Germany, the combination of its civil law tradition and the EU Victims’ Rights Directive, which provides victims with several procedural rights, has produced a participatory regime that allows victims of international crimes to actively participate in criminal proceedings.³⁷

This distinction between common and civil law systems affects international criminal tribunals. For example, during the Rome Statute negotiations, the United States and United Kingdom argued against victim participation in court proceedings, stating that only the prosecutor should speak for the victims.³⁸ The ICC’s eventual innovations surrounding victim participation are due, in large part, to efforts by the delegation from France, which follows the civil law system and had pushed for greater victim involvement.³⁹

In recent years, international courts have tended towards greater participatory rights for victims. This may be for two reasons: first, the victims’ rights movement of the late 20th century; and, second, several UN initiatives. The success of victims’ rights movements in common law countries during the 1960s inspired activists to seek greater rights for victims globally.⁴⁰ Their efforts

³⁴ See Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, *supra* note 6, at 255.

³⁵ See O’Hara, *Victim Participation in the Criminal Process*, *supra* note 1, at 230, 234.

³⁶ Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 778.

³⁷ See *Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes*, FIDH, European Center for Constitutional and Human Rights, 11, 66 (Sept. 2020), <https://www.ecchr.eu/en/publication/report-breaking-down-barriers-access-to-justice-in-europe-for-victims-of-international-crimes/>.

³⁸ See UC Berkeley Human Rights Center, *The Victims’ Court?*, *supra* note 3, at 18.

³⁹ See *id.*

⁴⁰ See Stover, Balthazard & Koenig, *Confronting Duch*, *supra* note 28, at 511–512. Lobbying efforts

succeeded in 1985, with the unanimous agreement of the UN General Assembly on the Basic Principles of Justice for Victims of Crime and Abuse (“Basic Principles”).⁴¹ The Basic Principles urged states to consider “the views and concerns of victims” when their personal interests were affected during criminal proceedings, and recognized that victims have the right to be treated with “respect for their dignity.”⁴² Subsequent case law from regional human rights courts such as the Inter-American Court on Human Rights continued to recognize the legal standing of victims, stating that they have a right to be notified of developments in their case and a right to meaningful participation.⁴³

The trend towards greater victim participation may also be due to perceived shortcomings of the ICTY, which has been criticized for denying victims an opportunity to meaningfully participate at trial.⁴⁴ In doing so, critics comment, it failed to serve the community it was “ostensibly intended to serve, namely the victims of the atrocities.”⁴⁵ In an effort to avoid such a situation, courts have increasingly attempted to engage victims in the courtroom.

B. BENEFITS OF VICTIM PARTICIPATION

While the debate continues over whether victims should be allowed to participate, practitioners and scholars tend to agree on the benefits and consequences of victim participation.

Though it is difficult to draw generalizations, the literature indicates that there may be at least three benefits to victim participation at trial. First, including victims may strengthen the prosecutor’s case.⁴⁶ Proceedings at the ICTY and the ICC take place in The Hague, thousands of miles from the crime scene and the affected community. War crimes trials in Germany may likewise be far from the location of the offense. Allowing victims to participate helps focus the court’s

in the United States, for example, resulted in the 1990 Victims’ Bill of Rights, which states that victims have the right to be informed about decisions in the case, and to be present at all proceedings.

⁴¹ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (1985).

⁴² *Id.* at 1.

⁴³ See Raquel Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT’L L. 1399, 1417–22, 1434–6 (2002). (describing the acknowledgement and approval of victim-focused prosecutions at the Inter-American Court on Human Rights and European Court on Human Rights).

⁴⁴ See Stover, Balthazard & Koenig, *Confronting Duch*, *supra* note 28, at 513.

⁴⁵ Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 787.

⁴⁶ See, e.g., ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE*, 45 (2005) (“Victim and eyewitness testimonies form the ballast of most—if not all—of the prosecution’s cases [at the ICTY].”)

attention by putting a face to otherwise abstract atrocities.⁴⁷ Substantive participation, as at the ICC or ECCC, may enrich proceedings by inserting victims' voices into the legal environment. Even the act of providing live testimony can help judges make sense of the forensic evidence and context of the conflict because they have before them an individual who can offer clarifications in real time.⁴⁸

Moreover, some scholars suggest that participating may allow victims to heal from wartime trauma because the act of testifying may itself be therapeutic.⁴⁹ As one witness at the ICTY stated: testifying was “part of a cleansing process, a way of getting what happened to me and the others out of my system.”⁵⁰ Although allowing victims to speak may slow proceedings, in time, it can also contribute to community healing.

Allowing victims to play a role in the judicial process may also be therapeutic because it promotes the feeling that victims are taking back control of their lives after traumatic events deprived them of agency.⁵¹ Participating in a trial may be one way to regain a sense of control:

[Some victims] find value in taking action, in doing something, especially because they feel it may prevent these things from happening again to other people. The feeling that they can do something for others helps them focus outside themselves, feel less powerless, and feel that they can take action that is valuable.⁵²

A study conducted of civil parties who testified at the ECCC supports this idea. When asked their motivations to testify, many expressed that they needed to know what had happened to their loved one, or that they needed to tell their story.⁵³ Thus, allowing victims to participate in a trial may allow them to reclaim a part of their lives.

Finally, participation may promote victims' understanding of the “oblique

⁴⁷ See Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, *supra* note 6, at 257.

⁴⁸ See STOVER, THE WITNESSES, *supra* note 45, at 45–6 (indicating the importance of live testimony and physical evidence), 131 (“Despite all the fallibilities of live testimony ... it still provides decision-makers with the best weapon at our disposal for truth-seeking...”); see also Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 803 (“Victims' participation can serve to clarify the facts and to assist the Court to fight impunity.”).

⁴⁹ See *id.* at 802.

⁵⁰ Stover, *The Witnesses*, *supra* note 45, at 88.

⁵¹ Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L. J. 295, 337 (2005).

⁵² *Id.* at 338 (quoting a telephone interview with Rosa Garcia-Peltoniemi, then-director of Client Services and Psychological Services, Center for Victims of Torture).

⁵³ Stover, Balthazard & Koenig, *Confronting Duch*, *supra* note 28, at 518.

processes” of the international criminal justice system.⁵⁴ Instead of remaining outside the courtroom, hearing updates only through media reports, they become active and engaged participants. This may help to increase transparency and promote the affected community’s understanding of the court’s behavior and decisions.⁵⁵

Running through all these arguments is the belief that individual victims should be ““at the heart of the international criminal justice system.””⁵⁶ Indeed, over the past few decades, observers have come to view victim participation as essential both to a legitimate judicial process and to acceptance by the affected community of the legal outcome.⁵⁷ Increasingly, as international courts grant victims more participatory rights, they do so in the name of the victim. There is, however, some reason to believe that not all victims will receive the benefits from participating. This is discussed below.

C. DRAWBACKS TO VICTIM PARTICIPATION IN THE JUDICIAL PROCESS

Victim participation also presents its drawbacks, including the possible violation of defendants’ fair trial rights, interference with the prosecutor’s trial strategy, and re-traumatization of victims who engage with the court.

Defendants in international proceedings have the fundamental right to a fair trial, and a court’s decision to engage with victims pre-trial may violate that right.⁵⁸ Certain standards apply to all defendants, such as the right to be presumed innocent until proven guilty, the right to equal procedural rights between the defense and prosecution (“equality of arms”), and the right to be tried without undue delay.⁵⁹

⁵⁴ Harry Hobbs, *Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice*, 49 TEX. INT’L L. J. 1, 10 (2014).

⁵⁵ See *id.* at 11 (“In empowering people to understand decision making, victim participation can promote greater acceptance of the decision itself.”).

⁵⁶ Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 802 n.178.

⁵⁷ See UC Berkeley Human Rights Center, *The Victims’ Court?*, *supra* note 3, at 12; see also Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 777 (commenting on the victim-centric language of the Rome Statute).

⁵⁸ See Universal Declaration of Human Rights, UNGA Res. 217 A (III), 10 December 1948, Article 10; see also International Covenant on Civil and Political Rights, article 14(3), 16 December 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, *supra* note 6, at 249 (“[I]t is a fundamental principle of international law that every defendant, no matter how wicked or unpopular, has the right to an utterly just trial.”).

⁵⁹ See ICCPR, *supra* note 57, at article 14(2) (presumption of innocence); art. 14(3) (equality of

At the ICC, for example, the court recognizes individuals as victims when it accepts them as participants before trial begins.⁶⁰ In doing so, it may arguably be violating the defendant's presumption of innocence. For example, the ICC even allows victims to express an opinion about the prosecutor's decision not to open an investigation. By hearing victims' opinions before reaching a verdict, courts may give the impression of pre-supposing the defendant's guilt.⁶¹

The inclusion of victims at trial may also raise concerns regarding equality of arms.⁶² Rather than arguing against only the prosecutor, the defendant must now also respond to questions and objections raised by the victims' legal representatives. For example, in the first case before the ECCC, one defendant faced eight civil party lawyers who represented ninety individuals. Given the "sheer number" of victims in war crimes trials, this problem is likely to reemerge in future proceedings.⁶³

Including victims as parties to a war crimes trial may also risk a defendant's right to a timely trial.⁶⁴ This is because parties to such proceedings may be allowed to make submissions, cross-examine witnesses, present evidence, and make statements to the court.⁶⁵ The addition of a third party to the trial process will necessarily prolong these already extensive proceedings—by one estimate, as much as 50 percent.⁶⁶

arms); art. 14(3)(c) (right to trial without delay).

⁶⁰ See UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 25.

⁶¹ See, e.g., Situation in the Democratic Republic of The Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (17 January 2006) at 41–2 (deciding that victim participation in ICC proceedings at the investigation stage may be consistent with article 68(3) of the Rome Statute); Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, *supra* note 6, at 271-2 (explaining how the ICC has interpreted its procedural rules to allow victim participation at the investigation phase).

⁶² See Stover, Balthazard & Koenig, *Confronting Duch*, *supra* note 28, at 523 ("On several occasions [during the first trial at the ECCC], civil party lawyers took to their feet to oppose the prosecution directly or push for their own theory of the case, which bogged down the proceedings. In the meantime, the defence counsel argued that the civil party lawyers, who were eight strong, were acting as substitute 'prosecutors' and thus threatening 'equality of arms'....").

⁶³ Hobbs, *Victim Participation in International Criminal Proceedings*, *supra* note 53, at 13 (domestic offenses "generally only directly impact one or a few people, [whereas] the nature of international crimes means that the victimized often number in the tens, if not hundreds, of thousands."). For example, nearly 4,000 victims applied to participate in the second case before the ECCC. See Extraordinary Chambers in the Courts of Cambodia, *Statistics: Civil Party applicants per Case File*, www.eccc.gov.kh/en/statistics-civil-party-applicants-case-file.

⁶⁴ See Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *supra* note 32, at 816.

⁶⁵ See *id.*

⁶⁶ See *id.*

Extensive participatory rights, such as those given to victims at the ECCC, may also interfere with the prosecutor's ability to obtain a conviction. While both the victims and prosecution may have a shared interest in accountability, their methods of obtaining that accountability—for example, their lines of questioning or the evidence they present—may vary in ways that significantly shape the nature of the trial.⁶⁷ Consider, for example, debates over the role of victims' legal representatives that occurred during the first trial at the ECCC, including once when defense counsel objected to a line of questioning pursued by a victim representative, arguing that it “re-opened issues already addressed at length by the Prosecution.”⁶⁸ The Court decided that victims were allowed to support the prosecution, even if that entailed asking questions that addressed the defendant's culpability.⁶⁹ However, they could still ask questions intended to elicit details about the degree of harm inflicted on the victims and, in doing so, could conceivably interfere with the prosecutor's trial strategy.

Finally, the uncertainty of trials may actually cause further harm to victims of human rights violations.⁷⁰ While it is important to note that testifying does not necessarily mean that a victim will be re-traumatized, a number of studies have shown that testifying is accompanied by witness concerns for their safety, their family's safety, and the pain of recalling memories publicly.⁷¹ In the words of a civil party at the ECCC: “I kept thinking: ‘Will others be interested in what I say? In what I think? What I have suffered?’ ... Testifying before a court needs dignity; you need to be clear and understandable, and I was scared I might just collapse.”⁷²

⁶⁷ See Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, *supra* note 6, at 275 (“At the outset, it is important to dispel any notion that the Prosecutor is necessarily the ally of victim litigants.”).

⁶⁸ The KRT Trial Monitor, *Case 001 Report No. 10*, krtrialmonitor.files.wordpress.com/2012/07/aiji_eccc_case1_no10_28june09_en.pdf, (“Civil Parties should not act as additional prosecutors. [Defense counsel] submitted that Civil Party participation should be limited only to the issues of the victims' suffering and damages, and that the Civil Party Lawyers should only be allowed to ask questions directly related to the victims being represented.”).

⁶⁹ *See id.*

⁷⁰ See STOVER, *supra* note 45, at 130 (“The key . . . is to ensure that victim-witnesses . . . testify in an environment that is, to the greatest extent possible, *predictable* and *controlled*.”). Consider, also, that participation is not always voluntary, as when a victim-witness is subpoenaed to appear before the Court. *See, e.g.*, Rules of Procedure and Evidence, IT/32/Rev.50 (2015), at Rule 54, available at www.icty.org/x/file/Legal_Library/Rules_procedure_evidence/IT032Rev50_en.pdf [hereinafter ICTY Rules] (“[A] Judge or a Trial Chamber may issue . . . subpoenas . . . as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”); *see also* Jouet, *supra* note 6, at 257 (“Those called to testify face possible contempt charges for failing to appear or to state the truth . . .”).

⁷¹ *See, e.g.*, Stover et al., *supra* note 28, at 23.

⁷² *See id.* at 24.

Generally, those who have suffered trauma benefit from experiences that are as predictable and controlled as possible.⁷³ Trials are rife with uncertainty: at any point, either side can produce new evidence or the judge can interrupt the witness and, ultimately, the court may hand down a light sentence or even overturn a conviction on appeal.⁷⁴ This uncertainty may retraumatize victims.⁷⁵ While prosecutors and judges can take certain steps to make the trial as predictable as possible, for example, prosecutors can prepare their witnesses for harsh cross-examinations, the fact that trauma is highly individualized makes it difficult to construct a participatory scheme that meets the trauma needs of all victims.⁷⁶

There are also, of course, questions of cost. International criminal prosecutions cost governments and donors significant money. In 2020, for example, the ICC approved €8,091,900 (US \$9,237,146) for its Victims and Witnesses Section *only*.⁷⁷ While victim advocates say that this is insufficient to provide meaningful participation, others say that the money would be better spent on investigations and criminal trials with less victim participation.⁷⁸

III. VICTIM PARTICIPATION AND PROCEDURAL JUSTICE

The previous section considered the question of *whether* victims of atrocity crimes should be engaged in court proceedings, and it explained the answers of common and civil law courts. This part considers more deeply the question of *how* victims should be involved.

This section suggests that a victim participation scheme that is built on principles of procedural fairness may be an innovative third approach that allows

⁷³ See STOVER, *supra* note 45, at 130.

⁷⁴ See, e.g., Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 171, 175 (2004) (analyzing the testimony of eighteen victim-witnesses at the ICTY trial of Radislav Krstic and concluding that it “may be misguided” to “create a space for victims within the legal arena”).

⁷⁵ See STOVER, *supra* note 45, at 81–82 (“If we were ever prompted to design a system for provoking intrusive post-traumatic symptoms in victims of war crimes, we could not do better than a court of law.”).

⁷⁶ See *id.* at 130 (setting out five steps that prosecutors, defense attorneys, judges, and court staff could take to ensure that victim-witnesses participate in a controlled and predictable environment).

⁷⁷ The Victims and Witnesses Section provides logistical support, oversees protective measures, and offers psychosocial support to victims. This figure does not include the budgets for other divisions at the ICC that work with the affected community, such as the Office of Public Counsel for Victims, for which the ICC approved an additional €1,580,400 (US \$1,804,202). See ICC Assembly of States Parties, *Report on activities and programme performance of the International Criminal Court for the year 2020*, ICC-ASP/20/7 (12 August 2021), 142, 144.

⁷⁸ See UC Berkeley Human Rights Center, *supra* note 3, at 7–8.

courts to capitalize on the benefits of victim participation while minimizing its drawbacks. It suggests that international courts can improve perceptions of their fairness and legitimacy – not by giving victims greater participatory rights – but by involving them *both* in court proceedings and out-of-court outreach initiatives. It relies on interviews conducted with ICC victim participants in Uganda, the Democratic Republic of the Congo, Kenya, and Côte d'Ivoire (“ICC study”).

There are two ways to evaluate the fairness of a dispute resolution process such as a trial. The first, used exclusively until the 1970s, considers whether participants were satisfied with the *outcome*.⁷⁹ The second considers whether participants viewed the *process* itself as fair.⁸⁰ Studies indicate that participation in the process may increase the perception that the process is fair, and that perceptions of fairness can influence general opinion about a judicial outcome and a court's legitimacy. Positive procedural experiences, which the courts can control, may also “cushion” the effect of bad outcomes, which courts cannot control.⁸¹

Scholars vary in the specific criteria they use to assess procedural fairness, although certain themes arise repeatedly in studies of domestic proceedings.⁸² This paper adopts a four-factor model because it provides a straightforward approach through which to analyze procedural fairness.⁸³ It considers, first, whether participants have had an opportunity to *voice* their views and opinions.⁸⁴ Second,

⁷⁹ See Jo-Anne Wemmers, *Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims*, 16 INT'L REV. VICTIMOLOGY 211, 214 (2009); see also Moffett, *supra* note 7, at 257–58 (indicating that substantive outcomes relate to truth, justice, and reparations).

⁸⁰ See MacCoun, *supra* note 4, at 181–82 (providing background on the transition from the focus on outcome to the focus on procedural fairness); see also Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCH. 295, 295 (1974); Cody & Koenig, *supra* note 4, at 8 (explaining the impact of research by Thibaut and Walker on analyses of the fairness of a dispute resolution process).

⁸¹ Wemmers, *supra* note 78, at 214 (“Authorities working in the criminal justice system cannot guarantee favourable outcomes (if they could we would not need a trial), however they can guarantee fair procedures. Consequently, by treating victims fairly, authorities may be able to reduce or cushion the effects of negative outcomes, such as failure to convict.”); see also Laurens Walker et al., *The Relation between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416 (1979) (noting that perceptions of procedural fairness “partially determine” perceptions of outcome fairness).

⁸² For example, one paper's analysis of the “quality of decision making” and “quality of interpersonal treatment,” may be replaced by another's references to trust and neutrality. Compare Rachel Killean, *Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia*, INT'L CRIM. L. REV. (2016) with Wemmers, *supra* note 78, at 214–15.

⁸³ Cody and Koenig also used this four-factor approach to analyzing perceptions of procedural fairness among ICC victim participants. See generally Cody & Koenig, *supra* note 4.

⁸⁴ See *id.* at 10 (“[C]ourt participants want opportunities to *voice* their opinions as part of the process

whether participants have been treated with *respect* by the authorities.⁸⁵ Third, whether they feel that they can *trust* the court and, finally, whether the decisionmaker is *neutral* and unbiased.⁸⁶ Recent research suggests that these criteria, while still relevant, “can look very different” in an international context.⁸⁷ Indeed, in an international setting, the presence of these factors seems to arise from out-of-court interactions with the tribunal staff.

In a domestic context, for example, *voice* refers to victims’ opportunity to discuss the harm they suffered *in court*.⁸⁸ However, the ICC study indicates that few wished to participate in trial proceedings or even appear in a courtroom.⁸⁹ Indeed, for these respondents, having a voice often meant having local intermediaries and legal representatives serve as conduits for their concerns to the court.⁹⁰ As one Congolese respondent indicated: “The court listens and understands us through our lawyers who plead our case.”⁹¹ There is a further nuance: for other respondents, having a voice meant receiving “meaningful recognition of their suffering” from ICC staff, from whom participants sought ongoing communication and local dialogue.⁹²

Similarly, domestic studies have shown that *respectful* interactions between the victim and court staff may increase perceptions of procedural fairness. While this largely remained consistent for victim participants at the ICC, respondents also felt respected when they received consistent and personalized engagement from the court.⁹³ Infrequent visits from ICC staff signaled disrespect, and visits that yielded no concrete results were unsatisfactory. A Congolese respondent explained it this

and with the expectation that they will be listened to.”).

⁸⁵ See MacCoun, *supra* note 4, at 182–83 (“Those of a tough-minded bent usually find it almost impossible to believe that politeness could possibly approach the impact of the bottom line, be it a tort award, a criminal sentence, or a job layoff. Nevertheless, citizen ratings of the dignity and respectfulness of their treatment consistently emerge as primary correlates of procedural justice.”); see Cody & Koenig, *supra* note 4, at 10–11 (indicating that victim participants “want court personnel – judges, lawyers, and judicial staff – to treat them with respect.”); see also Jo-Anne Wemmers, *Procedural Justice and Dutch Victim Policy*, 20 LAW & POL’Y 57, 64–65 (1998).

⁸⁶ Cody & Koenig, *supra* note 4, at 11 (“[Victim participants] want a court they can *trust* . . . [and] they want court procedures and practices to be *neutral*, or unbiased in their application.”); see Wemmers, *supra* note 84, at 65.

⁸⁷ Cody & Koenig, *supra* note 4, at 11.

⁸⁸ See *id.* at 16.

⁸⁹ See UC Berkeley Human Rights Center, *supra* note 3, at 9–11 (describing the study of victim participants, ICC staff members, and ICC victim advocates). See Cody & Koenig, *supra* note 4, at 17–18.

⁹⁰ See, e.g., UC Berkeley Human Rights Center, *supra* note 3, at 43.

⁹¹ See *id.*

⁹² Cody & Koenig, *supra* note 4, at 18.

⁹³ See UC Berkeley Human Rights Center, *supra* note 3, at 4; see Cody & Koenig, *supra* note 4, at 25–26.

way:

Each time, the lawyer comes and talks to a person without trying to console her. In Africa, consoling someone means doing something. When someone's house has been burned, consoling means to bring a stick, or some other material so that person can rebuild his house. People from the court say they will do something. At first, we were spirited. Everyone was coming. But now, people are tired. The only thing that is happening is that they remind us of our past.⁹⁴

Domestic studies indicate that *trust* turns on visible displays of the court fairly exercising its authority. For victims in international courts, trust may instead turn on whether courts protect participants' physical safety through measures intended to prevent retaliation.⁹⁵ Many in the ICC study had safety concerns related to participating in trial. For example, most Kenyan respondents indicated that they did not feel safe participating in the trials due to reports of witness intimidation and disappearances. Some respondents had been directly threatened: one reported that a person at the market had told him, "We know you went to the ICC to give evidence and maybe your head will need to go."⁹⁶ Visible displays of protection by ICC staff – such as referring to each victim by code, not by name, in order to protect their identity – made many Ivorian respondents comfortable participating in the judicial process.⁹⁷ For victims of atrocity crimes, trust may also turn on whether courts maintained communication with victims throughout the lengthy duration of the case.⁹⁸ Frustration at the length of these trials may foster distrust and disappointment; communication can counteract that.⁹⁹

Finally, while participants in domestic proceedings seek displays of judicial *neutrality* – such as observing a judge make a decision after hearing evidence from both sides, or seeing the judge apply the law in a consistent manner across cases – respondents in the ICC study viewed the elimination of judicial bias as both undesirable and impossible.¹⁰⁰ They felt marginalized by the judicial processes in their own country and hoped that the ICC would provide a biased counterweight.¹⁰¹

⁹⁴ See UC Berkeley Human Rights Center, *supra* note 3, at 44.

⁹⁵ See Cody & Koenig, *supra* note 4, at 24; see, e.g., STOVER, *supra* note 45, at 115 (suggesting that war crimes courts in the former Yugoslavia will be evaluated by how well they can protect victims and witnesses).

⁹⁶ See UC Berkeley Human Rights Center, *supra* note 3, at 57.

⁹⁷ See *id.* at 67.

⁹⁸ See Cody & Koenig, *Procedural Justice in Transnational Contexts*, *supra* note 4, at 24–5.

⁹⁹ See UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 4.

¹⁰⁰ See Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, *supra* note 4, at 350 (describing the qualities of a neutral decision-making process).

¹⁰¹ See Cody & Koenig, *Procedural Justice in Transnational Contexts*, *supra* note 4, at 21.

Lengthy gaps in communication from the court, as well as judicial delays, encouraged this view. A Ugandan respondent put it this way: “A common thing that happens in Uganda is that when a court case is delayed people are always maneuvering to manipulate the case or taking bribes.”¹⁰² Respondents expected that the court was biased, but hoped that this partiality would be in their favor.¹⁰³ Additionally, many respondents in the ICC study could not describe the ICC, its mission, or its purpose. As a result, they could not evaluate the organization’s neutrality, and “misinformation always prevail[ed] over what really takes place in the court.”¹⁰⁴

Taken together, these studies allow us to construct a four-part framework for procedurally just victim participation schemes in international proceedings. Importantly, it indicates that victim participation in the proceedings can occur both inside and outside the courtroom. The next section uses this four-part framework to examine the ways in which war crimes tribunals’ interactions with victims may encourage participants’ perceptions of the court’s fairness.

IV. COMPARATIVE VIEW OF PARTICIPANT PERCEPTIONS OF JUDICIAL FAIRNESS IN ATROCITY TRIALS

This section considers whether a participatory regime that incorporates procedural fairness is possible. It examines the ways in which five war crimes courts have interacted with victims, both inside and outside the courtroom. In doing so, it concludes that it is possible to combine victim participation and procedural justice at international courts and, indeed, that it has already been done.

This part is organized along the four procedural justice factors discussed above: voice, respect, trust, and neutrality. Each section is arranged to represent opposite ends of a spectrum so to illustrate how differently the courts have addressed the issue. It also highlights the fact that courts with creative approaches to victim participation have tended to garner the most community support.

A. VOICE

Research suggests that victims in domestic courts prefer to discuss the harm they suffered in court, but that victims of atrocity crimes prefer to voice their concerns outside the courtroom. The tribunals discussed in this paper have, at times, denied victims any opportunity to voice their opinions and concerns to the court. At other times, however, they have allowed victims to participate in proceedings to

¹⁰² See UC Berkeley Human Rights Center, *The Victims’ Court?*, *supra* note 3, at 34.

¹⁰³ See Cody & Koenig, *supra* note 4, at 21.

¹⁰⁴ See UC Berkeley Human Rights Center, *supra* note 3, at 54.

such an extent that they have the same rights as the prosecutor or defense attorney. Some courts have even engaged victims in an informal dialogue, which preliminary research suggests may be what they really want.¹⁰⁵ This section illustrates each approach.

1. Victim Involvement in the Courtroom

At the ICTY, victims had no procedural rights and could not speak freely to the court.¹⁰⁶ As discussed above, they could not present evidence, make statements to the court, or file an appeal.¹⁰⁷ They could only address the court through their testimony or through impact statements given at sentencing.¹⁰⁸ Among early war crimes courts, even this degree of involvement appears to have been unusual. Victims at the SCSL, for example, had no right to be heard at sentencing. That right belonged exclusively to the Prosecutor and defendant, who could submit evidence to help the Trial Chamber determine an appropriate sentence.¹⁰⁹

Partly in response to the perceived shortcomings of the ICTY, the Rome Statute offered victims some procedural rights.¹¹⁰ These included the novel right to present their views and concerns to the court at stages of the proceedings that affected their personal interests.¹¹¹ Over time, the ICC's approach to victim participation has evolved. In earlier cases involving Uganda and the Democratic Republic of Congo, for example, individual victims submitted applications to the court, which then entered them into a database, shared them with chambers, redacted them, and passed them to the prosecution and defense.¹¹² This process took months, and many people saw the victim information prior to redaction. In

¹⁰⁵ See Cody & Koenig, *supra* note 4, at 16–8.

¹⁰⁶ See Jouet, *supra* note 6, at 257.

¹⁰⁷ See ICTY, Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), last amended by Security Council Resolution 1877 (2009), article 25 (indicating that only convicted persons or the Prosecutor may file an appeal); see Moffett, *supra* note 7, at 261 (suggesting that “victims in the [ICTY] were considered as objects, in the sense that justice is done on the basis of their suffering, without recognising them as subjects having needs and interests in determining the substantive outcomes.”).

¹⁰⁸ See Moffett, *supra* note 7, at 261.

¹⁰⁹ See Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone (2018), Rule 100 (‘Sentencing Procedure’), Rule 2 (defining ‘Party’ as the Prosecutor or the Defense) [hereinafter RSCSL Rules of Procedure and Evidence].

¹¹⁰ See Trumbull, *supra* note 32, at 786–87.

¹¹¹ See Rome Statute, *supra* note 9, at article 68(3).

¹¹² As background, in Uganda, the ICC investigated senior commanders in the Lord’s Resistance Army, a rebel group that had operated in the country’s north since the 1980s. In 2004, Congolese authorities referred conflict in the eastern part of the country to the ICC, which opened an investigation into ethnic violence between three groups. See UC Berkeley Human Rights Center, *supra* note 3, at 26, 29, 38.

Côte d'Ivoire, by contrast, the ICC applied a model that allowed victims to apply either as an individual (this is rare) or as a group, thereby masking their identity somewhat.¹¹³ The court employed a hybrid approach in the Kenyan cases, allowing individual victims to join as trial participants but only requiring applications from those who wished to actually appear in court.¹¹⁴ Because the common legal representative, not the court, reviewed and redacted the applications, this approach may provide more security to victims.¹¹⁵ It also gives them some choice in the way they participate before the court.

The ECCC went further and, during its first trial, included victims as civil parties with near full procedural rights. For the first time in an international criminal trial, victims could address the court throughout proceedings.¹¹⁶ While most reported a positive experience, trial transcripts indicate that several felt psychological relief at being able to tell their story, and others appear to have found it empowering to question the defendant. Interviews conducted with civil parties in 2013 and 2014 indicate that very few of them wanted more participatory rights during proceedings.¹¹⁷

2. *Dialogue Between Victims and the Court Outside the Courtroom*

Although the SCSL, like the ICTY, did not give victims procedural rights, it engaged the victim community with creative out-of-court initiatives. Within a year of the Tribunal's establishment, SCSL staff had launched a massive campaign that was designed to make the Court accessible, to teach the public about the Court's activities, and to respond to the public's questions and critiques.¹¹⁸ Throughout the Court's lifetime, the Outreach Programme was considered to be an integral component of the Court.¹¹⁹

The Court made itself accessible to people in informal settings. Public uproar over early indictments led the first prosecutor to travel across Sierra Leone,

¹¹³ The ICC was in the country to investigate post-election violence that had occurred between November 2010 and April 2011. *See id.* at 26–7, 60.

¹¹⁴ The ICC investigated and prosecuted post-election violence that had taken place in Kenya between December 2007 and February 2008. *See id.* at 27, 47.

¹¹⁵ *See id.* at 27.

¹¹⁶ *See Prosecutor v. Kaing Guek Eav alias 'Duch'*, Judgement, Case No. 001/18-07-2007-ECCC/TC, (July 26, 2010) (detailing the role of civil parties in the first trial before the ECCC); Stover et al., *supra* note 28, at 12 (“A civil party is an actual party to the criminal proceedings and thus shares many of the same procedural rights as the defence and prosecution.”).

¹¹⁷ *See* RACHEL KILLEAN, VICTIMS, ATROCITY AND INTERNATIONAL CRIMINAL JUSTICE 170 (2018).

¹¹⁸ *See* Kristin Xueqin Wu, *Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice*, 9 *UTRECHT L. REV.* 60, 67 (2013).

¹¹⁹ *See id.*

holding town hall meetings at which he explained the work of the Court, particularly the types of crimes that it would prosecute.¹²⁰ His efforts—and those of the court's outreach team that continued to spread the message—also provided an opportunity to build community support for the Tribunal's work by introducing its staff and allowing citizens to tell their stories.

Outreach staff also worked to teach the public about the Court's activities. For example, they created a discussion program on community radio that addressed questions or concerns about the Court's activities.¹²¹ To engage individuals who wanted to call in but could not afford it, Outreach officers developed a "flash" system: the individual would quickly call the court and an officer would call them back.¹²² To engage individuals who lacked continuous electricity, the Court set up small booths in shops and markets to allow individuals to charge their phones.¹²³ Because these were open to the public, even those who had not intended to participate but who needed to charge their phone could learn about the Tribunal.

The Outreach Programme, moreover, engaged and educated community members on wider issues related to the ongoing trials. It supported the creation of Accountability Now Clubs at universities, which engaged students and communities on issues of human rights, transitional justice, and the Court.¹²⁴ It engaged volunteers to organize training sessions for women's groups, victims, and former child combatants, as well as schoolchildren and university children.¹²⁵ Court officers would attend these sessions and speak about aspects of the trial process, such as the right to a fair trial and the rights of the defendant.¹²⁶

The Court's efforts paid off: a 2012 study indicated that 92 percent of respondents in Sierra Leone had heard of the Tribunal, and 69 percent felt that the Outreach program had successfully kept people informed about the Court's work.¹²⁷ This is a remarkable success. Consider, for example, the ICTY's experience. During the first six years of its existence, the Tribunal "almost totally

¹²⁰ See Janine Natalya Clark, *International War Crimes Tribunals and the Challenge of Outreach*, 9 INT'L CRIM. L. REV. 99, 107 (2009).

¹²¹ See Residual Court for Sierra Leone, *Outreach and Public Affairs*, www.rscsl.org/OPA.html; see also Wu, *supra* note 117, at 67.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *Outreach and Public Affairs*, *supra* note 120; see also Clark, *supra* note 119, at 107.

¹²⁵ See *Outreach and Public Affairs*, *supra* note 120.

¹²⁶ See Wu, *supra* note 117, at 67.

¹²⁷ Respondents were selected randomly from districts across Sierra Leone and Liberia. Overall, the most frequent professions were farmer, students, academics, and petty traders. See Sierra Leone Institute for International Law, *Manifesto 99, No Peace Without Justice*, Liberia NGOs Network Inc., & Coalition for Justice And Accountability *Impact and Legacy Survey for the Special Court for Sierra Leone*, 35, 46 (2012).

neglected victims in the former Yugoslavia.”¹²⁸ In an April 2005 study conducted in Serbia, only six percent of respondents said that they were well-informed about the ICTY’s organization and work.¹²⁹

The ICC also conducts outreach, though it appears to have taken a more traditional approach by conducting meetings and launching educational campaigns. It focuses first on identifying court intermediaries: unpaid locals who serve as conduits between the Court and affected community, and take a lead role in educating the community about the Court.¹³⁰ Even after identifying victims, many obstacles remain to meaningful participation. Victims may be traumatized, lack formal education, or access to the media.¹³¹ To prepare them for court, ICC staff and intermediaries conduct meetings and educational campaigns designed to teach the affected community about the criminal trial process.¹³² However, the ICC study found that some victims interacted only with the Court’s intermediaries, which left them with “the impression that the ICC did not value their views and their testimony.”¹³³

B. RESPECT

Research suggests that victims of atrocity crimes feel respected by the court when they receive consistent and reciprocal engagement, as well as material support to meet their most pressing needs. This section sets out the approaches of international courts that might encourage respect with victim participants. Overall, these courts appear to have found it difficult to meet these needs. There are individual bright spots, such as German investigators’ focus on victims’ sense of safety during the investigation phase. In the end, the needs of any particular victim will vary according to their experiences and desires in the moment. It is incumbent on the court to ensure that it has the tools ready to engage with the victim.

1. *Engaging in Ongoing Recognition of Victims’ Harms*

One way that courts can engage in ongoing recognition might be to ensure that they carefully prepare witnesses before they take the stand. International tribunals have struggled to do this. At the ICTY, for example, pre-trial interactions

¹²⁸ See Wu, *supra* note 117, at 63 (quoting Judge Gabrielle Kirk-McDonald, president of the ICTY in 1999).

¹²⁹ See Clark, *supra* note 119, at 109 (comparing results of studies conducted to evaluate the success of outreach programs at the ICTY and SCSL).

¹³⁰ See UC Berkeley Human Rights Center, *supra* note 3, at 23–24.

¹³¹ See *id.* at 24.

¹³² See *id.*

¹³³ See *id.* at 72.

between witness and the prosecutor varied.¹³⁴ Some witnesses stated they had only met briefly with the prosecutor prior to testifying, that the prosecutor had not prepared them for cross-examination, and that they had been disoriented by the physical layout of the courtroom.¹³⁵

Another approach to ongoing recognition might be to keep victims informed of developments in the case. Overwhelmingly, the ICC study indicated that victims wanted more communication from the court. In Uganda, for example, those who felt respected by the court said that it was the result of face-to-face meetings with ICC staff.¹³⁶ Infrequent visits by contrast, signaled disrespect.¹³⁷ Similarly, Kenyan respondents indicated that they would feel more valued if they received more frequent updates that explained the reason for court delays.¹³⁸ ICTY victims, likewise, linked the court's respect with the years-long silence they experienced after giving a statement to investigators.¹³⁹ An interview study conducted in Bosnia and Herzegovina in 1999, found "a striking lack of understanding" between respondents about the court. Although all indicated that they wanted to have more contact with the court,¹⁴⁰ they interpreted the court's "sporadic contact" with them as a marker of disrespect.¹⁴¹

Lack of contact can also foster confusion among the victim population, which can interfere with the efforts to raise public support for the court. For example, in an interview of civil parties at the ECCC, one indicated that they were unaware that charges had been dropped in a case until the interviewer mentioned it.¹⁴² Another civil party was unaware that a final judgment had been rendered in his case, until the interviewer mentioned it.¹⁴³ A third civil party was so surprised to hear from the court after a long silence, that he interpreted an invitation to attend proceedings as a summons from the Khmer Rouge: "The court invite me several times and I decide to attend but I ... don't know the purpose, and I feel worried that someone want to kill me."¹⁴⁴

¹³⁴ See STOVER, *supra* note 45, at 84.

¹³⁵ See *id.*

¹³⁶ See UC Berkeley Human Rights Center, *supra* note 3, at 35.

¹³⁷ See *id.*

¹³⁸ See *id.* at 55.

¹³⁹ See STOVER, *supra* note 45, at 84.

¹⁴⁰ See Laurel Fletcher & Harvey M. Weinstein, *A world unto itself?*, MY NEIGHBOR, MY ENEMY (Eric Stover & Harvey M. Weinstein eds., 2004), 33.

¹⁴¹ See *id.*

¹⁴² See KILLEAN, *supra* note 116, at 173.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 173–4.

2. *Providing Material Support to Victims*

Studies of victims of atrocity crimes reflect their desire to gain something more tangible from ICC staff than a personal visit; many wanted reparations.¹⁴⁵ In the ICC's cases in Uganda and DRC, for example, reparations motivated the majority of victim participants. Ivorian respondents felt disrespected because there had not yet been a conviction or decision on reparations.¹⁴⁶ Although all tribunals considered in this paper offer relief to victims, they vary by type, source, and enforcement method.

At the ICC and ECCC, for example, victims could receive financial restitution and reparations such as the construction of a memorial.¹⁴⁷ Following the conclusion of the ECCC's first case, reparations included naming Civil Party participants in the judgment and publishing defendant's statements of apology.¹⁴⁸ This expanded following the second case, where reparations included a national remembrance day, memorials around Cambodia and France, and testimonial therapy.¹⁴⁹ Interviews with civil parties, however, indicated a strong desire for individual reparations, indicating it is difficult to understand how the court has not made any provision for compensation.¹⁵⁰

By contrast, victims at the SCSL had no right to restitution directly from the tribunal, though the defendant may be required to forfeit his property.¹⁵¹ Similarly, victim witnesses at the ICTY were only allowed to obtain restitution for stolen property or compensation for injury.¹⁵²

¹⁴⁵ See Cody & Koenig, *supra* note 4, at 26.

¹⁴⁶ See UC Berkeley Human Rights Center, *supra* note 3, at 3, 66.

¹⁴⁷ See Rome Statute, *supra* note 9, at article 75 (establishing that the Court would provide reparations to victims, including restitution, compensation, and rehabilitation); Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at Rule 97 (detailing the process for assessing reparations), 98 (detailing awards that can be made to victims from the Trust Fund) [hereinafter ICC Rules]; STOVER, *supra* note 45 at 149 (remarking that the ICC, unlike the ICTY, awards reparations *directly* to victims); see also Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (revision 9), Rule 23(1) *quinquies*, Rule 105(1)(c) [hereinafter ECCC Internal Rules].

¹⁴⁸ See Killean, *supra* note 81, at 10.; see also The Center for Justice and Accountability, *Victims' Right to Remedy*, cja.org/what-we-do/litigation/khmer-rouge-trials/related-resources/victims-right-to-remedy/ (describing the reparations granted in every case at the ECCC).

¹⁴⁹ See Killean, *supra* note 81, at 10.

¹⁵⁰ See KILLEAN, *supra* note 116, at 177–8.

¹⁵¹ See RSCSL Rules of Procedure and Evidence, *supra* note 108, at Rule 105 (allowing victims to seek compensation in national courts), Rule 104 (“Forfeiture of Property”).

¹⁵² See ICTY Rules, *supra* note 69, at Rule 105, Rule 106.

3. *Providing Psychological Support to Victims*

All international tribunals in this paper have, to some extent, provided psychological support to victims, though the extent and nature to which such support's availability varies.

Some courts focused on avoiding secondary victimization, when they could obtain the funding for such programs.¹⁵³ Four years after the ECCC opened, for example, it received a €1.5m grant from the German Foreign Office, which provided funding to engage the services of a local organization named Transcultural Psychosocial Organization (TPO).¹⁵⁴ TPO began to provide all psychological assistance for civil parties,¹⁵⁵ and instituted efforts to avoid secondary victimization. TPO attempts to reduce victim participants' anticipatory anxiety, monitor their mental health, and offer emotional support at trial¹⁵⁶ and debriefing after proceedings.¹⁵⁷

Similarly, in Germany, court-appointed professionals focus on keeping victims oriented, which may lessen their uncertainty and avoid re-traumatization. They explain the features of the criminal justice process, familiarize them with the courtroom, and accompany them to-and-from court proceedings.¹⁵⁸ This type of support was provided during the trial of Jennifer W., the wife of the former ISIS member who was convicted of committing genocide against the Yazidi community in Iraq.¹⁵⁹ Such support expands to pre-trial events, as well.

German investigators rely on specialized interview tactics to support victims during the investigation phase. These include not repeating questions, allowing victims to bring a lawyer or support person, and making facilities appear neutral with few visible security measures.¹⁶⁰ Survivors of sexual violence may choose the gender of their interviewer, and investigators receive training by clinical psychologists on how to interview traumatized victims.¹⁶¹ They also use an internal guide of best practice to prepare them for the psychological, cultural, legal, and

¹⁵³ See KILLEAN, *supra* note 116, at 138 (indicating that "a lack of financial support continues to restrict the ECC's ability to deliver" support services that can protect victims from secondary victimization).

¹⁵⁴ See Stover, et al., *supra* note 28, at 14.

¹⁵⁵ See Ciorciari & Hiendel, *supra* note 19, at 305 (reviewing psychological support services offered by the ECCC and other international tribunals).

¹⁵⁶ See Transcultural Psychosocial Organization (TPO), *Justice and Relief for Survivors of the Khmer Rouge*, tpocambodia.org/justice-and-relief-for-survivors-of-the-khmer-rouge/.

¹⁵⁷ See *id.*

¹⁵⁸ See ECCHR, *supra* note 36, at 70.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 73.

¹⁶¹ See *id.*

security issues that might arise in these cases.¹⁶² Likewise, from its earliest days the Office of the Prosecutor at the ICC screened victims before they are interviewed, in an effort to ensure that particularly vulnerable victims “are capable of being interviewed by investigators.”¹⁶³

Victim participants in Germany may also receive psycho-social assistance outside of the trial, though it is limited for victims of crimes committed outside of the country.¹⁶⁴ Victims turn to treatment centers designed to help survivors, which offer support regardless of the victim’s residence status, health insurance, or ability to speak the local language.¹⁶⁵ In Germany, however, such centers are pressed for resources and must turn away thousands of patients every year.¹⁶⁶

C. TRUST

If they participate, victims of atrocity crimes rely on the court to protect their personal information and physical safety. By demonstrating their awareness of these concerns, courts can foster trust with victims.¹⁶⁷

1. Protecting Victims’ Personal Information

To protect the personal information and safety of participating victims, all the courts explored in this paper offer a number of protective measures.¹⁶⁸ The ECCC, for example, allows victims to list the court’s address as their own to reduce the risk of retaliation for their role in the trial.¹⁶⁹ Additionally, many courts – including the ICC and the ECCC – allow anyone who is at risk as the result of a witness’s testimony to use a pseudonym during proceedings.¹⁷⁰ The ICC and ICTY

¹⁶² See *id.* at 73–4.

¹⁶³ STOVER, *supra* note 45, at 150.

¹⁶⁴ See ECCHR, *supra* note 36, at 71.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ By this point, it is evident that significant overlap exists between the four factors. For example, communication plays a significant role in fostering both neutrality and respect, and a court may increase its legitimacy by encouraging victims to voice their opinions and concerns, or by protecting their physical safety and personal information. Because the four factors themselves are so distinct, however, this paper continues to treat them as separate.

¹⁶⁸ Only the ECCC, however, threatens to impose punishments for disclosure of the identity of a protected witness. Compare ECCC Internal Rules, *supra* note 146, at Rule 29(5) with Eric Stover, *Witnesses and the promise of justice in The Hague, MY NEIGHBOR, MY ENEMY* (Eric Stover & Harvey M. Weinstein eds., 2004), 111–12 (finding “that the ICTY had failed to adequately investigate, let alone punish, anyone for ‘witness tampering.’”).

¹⁶⁹ See ECCC Internal Rules, *supra* note 146, at Rule 29(4).

¹⁷⁰ See ICC Rules, *supra* note 146, at Rule 87(3); ECCC Internal Rules, *supra* note 146, at Rule 29(4)(b); see also

both allow victim participants to use audio-visual distortion¹⁷¹ or remove their identifying information from the case file.¹⁷² The ICC also allows witnesses to testify remotely through videoconferencing or “sound media.”¹⁷³ In Germany, courts offer witnesses the chance to testify anonymously, through pre-recorded testimony, or via video-link from a remote location if their testimony puts them at risk.¹⁷⁴ Finally, both the ICTY and ICC, as well as German courts, allow for *in camera* or closed proceedings to protect the witness’s testimony.¹⁷⁵

However, with the constant developments in technology, victim safety in the 21st century will depend in large part on the efforts of cybersecurity experts, in addition to these traditional protective measures.¹⁷⁶

2. *Protecting Victims’ Physical Safety*

Participating in a war crimes trial raises concerns over the victims’ physical safety. For example, more than a dozen Ivorian victim participants in the ICC study indicated that they had been threatened due to their involvement in the case.¹⁷⁷ There are a number of ways to respond. For example, ICC staff referred to victims by a code, not by name; this helped reassure victims that the court could protect their confidentiality.¹⁷⁸ Earlier international tribunals such as the ICTY relied on local authorities to protect witnesses, though many said the authorities lacked interest and funding to carry out such a role.¹⁷⁹ For example, a protected witness frequently told the ICTY that the family of the accused would repeatedly threaten her if she testified in The Hague.¹⁸⁰ Neither the court nor the local authorities conducted a meaningful investigation into these incidents.¹⁸¹

Germany’s national war crimes unit provides an instructive alternative, as

ICTY Rules, *supra* note 69, at Rule 75(B).

¹⁷¹ See ICC Rules, *supra* note 146, at Rule 87(3); see also ICTY Rules, *supra* note 69, at Rule 75(B).

¹⁷² See *id.*

¹⁷³ See ICC Rules, *supra* note 146, at Rule 87(3).

¹⁷⁴ See *Breaking Down Barriers*, *supra* note 36 at 72–3.

¹⁷⁵ See ICC Rules, *supra* note 146, at Rule 87(3); ICTY Rules, *supra* note 69, at Rule 75(B); *Breaking Down Barriers*, *supra* note 36, at 72.

¹⁷⁶ See e.g. UC Berkeley Human Rights Center, United Nations Office of the High Commissioner for Human Rights, *Berkeley Protocol on Digital Open Source Investigations*, (2022), at 31–41, https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf (recommending protection measures that investigators can take during open source investigations into potential human rights violations).

¹⁷⁷ See UC Berkeley Human Rights Center, *supra* note 3, at 67.

¹⁷⁸ See *id.*

¹⁷⁹ See STOVER, *THE WITNESSES*, *supra* note 45 at 95.

¹⁸⁰ See Stover, *Witnesses and the promise of justice in The Hague*, *supra* note 167, at 112.

¹⁸¹ See *id.*

it has had to be innovative with its personal protection plans for witnesses who live outside Germany. It vets local contacts and uses them to communicate with the witness or identify a safe spot for an interview.¹⁸² It also works with witnesses to craft an explanation for the witness's absence during trial, and provides them with emergency contact details or a safe house.¹⁸³ It may arrange for the witness's temporary relocation to another country for the duration of the trial. This, for example, was granted to the victim in the Jennifer W. case.¹⁸⁴ After proceedings conclude in Germany, witness relocation is possible – if the witness already lives in Germany.¹⁸⁵

The physical safety of victims is also at risk if those convicted of international crimes are granted early release. At the ICC, for example, dozens of Congolese respondents indicated that they were concerned of retaliation should the accused be released. ““I am still scared of the family of the accused or his armed groups. I want to make sure that my ... participation is not exposed, it must stay confidential.””¹⁸⁶

If that occurred, the SCSL developed a process to evaluate the danger to victims, witnesses, and the wider community.¹⁸⁷ In addition to ensuring that the prisoner meets certain behavioral requirements¹⁸⁸ and informing victims, witnesses, and their families, the Court seeks information from the region where the prisoner would be released: is it willing to host the released individual?¹⁸⁹ Did it acknowledge his crimes and the harm he inflicted?¹⁹⁰ Is there any evidence that the prisoner may incite violence?¹⁹¹ Under the court's rules, communities received formal notice of impending release¹⁹² and, following release, it continues to

¹⁸² See *Breaking Down Barriers*, *supra* note 36, at 72.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 73.

¹⁸⁵ See *id.* at 72.

¹⁸⁶ See UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 45.

¹⁸⁷ For an analysis of the SCSL's process for conditional early release of convicted persons, see generally Anika Ades, *Unconditional Injustices: Victim Participation and Early Release in International Criminal Law*, 52 N.Y.U. J. INT'L. L. & POL. 593, 606 (2020).

¹⁸⁸ Such as: (1) participating in remedial, educational, moral, spiritual, or other prison programs, (2) acknowledging and exhibiting remorse for the crimes for which he was convicted, (3) providing evidence that he has renounced a violent ideology, (4) evidencing a willingness to make individual or collective restitution, and (5) exhibiting empathy towards the victims. Residual Special Court for Sierra Leone, 'Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone', (2016) art. 5(D)(ii).

¹⁸⁹ See *id.* at article 5(E), article 5(F).

¹⁹⁰ See *id.* at article 5(F).

¹⁹¹ See *id.*

¹⁹² See *id.* at article 9(A).

monitor the situation.¹⁹³ Because this process requires continued compliance with the court's terms of release, the court may continue to protect victims' physical safety even after a convicted person has been released.

D. JUDICIAL NEUTRALITY

Finally, while participants in domestic proceedings seek displays of judicial *neutrality*, such as observing a judge make a decision after hearing evidence from both sides, victims of atrocity crimes appear to seek assurances that the court has not become corrupted or biased against them. Among Kenyan victims at the ICC, for example, there was a pervasive sense that the government would influence the court's decisions; nearly all rejected the idea that the Kenyan courts could objectively handle the case.¹⁹⁴ For many, even the ICC was biased.¹⁹⁵ Frequent trial delays and infrequent communication from the court compounded this sense of disquiet. Victim participants from Uganda raised similar concerns about the institution's neutrality: "A common thing that happens [here] is that when a court case is delayed people are always maneuvering to manipulate the case or [take] bribes."¹⁹⁶ Studies indicate that a lack of faith in the local legal system may lead to stronger support for an international court.¹⁹⁷

By maintaining regular communication with victims, courts can forestall concerns of improper judicial bias. Some courts, like the ICTY, largely failed to implement a communication policy. Others, like the SCSL, have developed innovative solutions to maintaining contact with victims.

The ICTY never made communication a core part of its strategy and, as a result, it remained isolated from the affected community and faced accusations of bias and partiality. A 1999 internal report criticized the court for failing to implement an outreach policy that informed those in the region about the court's mission and activities.¹⁹⁸ Even after the Court adopted a more aggressive outreach strategy, few in Serbia described themselves as well-informed about the court's

¹⁹³ See *id.* at article 11.

¹⁹⁴ See UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 53.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 34.

¹⁹⁷ See e.g. KILLEAN, VICTIMS, ATROCITY AND INTERNATIONAL CRIMINAL JUSTICE, *supra* note 116, at 163–4 (suggesting that support for the UN's involvement at the ECCC "appears to be influenced by a lack of faith in domestic law and an awareness of the ongoing corruption that pervades the Cambodian legal system"); see also UC Berkeley Human Rights Center, *The Victims' Court?*, *supra* note 3, at 34 ("Interviewees also felt that local bureaucratic hurdles and corruption would undermine attempts at national prosecutions.").

¹⁹⁸ See STOVER, THE WITNESSES, *supra* note 45, at 37–8.

organization and work.¹⁹⁹ Seventy-two percent said that they were not well informed, twenty-nine percent said they knew little, and forty-three percent said they knew very little.²⁰⁰ The consequences of this are clear: nationalist groups stepped into the void, projecting negative views about the nature of the tribunal's work, monopolizing its message, and suggesting that it was a politicized and biased court.²⁰¹

Over the course of its mandate, by contrast, the SCSL kept victim communities engaged by keeping informing them of judicial developments, even if nothing pressing had occurred. An example: although most trials occurred in Sierra Leone, one trial took place in The Hague – far out of reach of journalists, victims, and court officers.²⁰² The Court's Outreach Program, however, flew journalists from Sierra Leone and neighboring Liberia to witness and report on the trial.²⁰³ Because of an agreement between the Court's Outreach Program and the BBC, these reports were then sent to fifty-seven radio stations in both countries.²⁰⁴ In this way, the court kept the local communities informed about a complex trial.

CONCLUSION

Should victims of atrocity crimes be involved in the judicial processes related to those crimes? How can they be included in a way that encourages them to accept the judicial process as fair and legitimate? The continuing debate suggests that these questions have no simple answer. More importantly, the debate itself has been artificially limited to a discussion of *which* of the spectrum of procedural rights are appropriate for victims: few courts have expanded their understanding of

¹⁹⁹ See *id.* at 38 (detailing changes made to the ICTY's outreach program following critiques about its effectiveness); see also Clark, *International War Crimes Tribunals and the Challenge of Outreach*, *supra* note 119, at 109 (outlining responses to the survey conducted in Serbia in April 2005).

²⁰⁰ Clark, *International War Crimes Tribunals and the Challenge of Outreach*, *supra* note 119, at 109.

²⁰¹ See STOVER, THE WITNESSES, *supra* note 45, at 38 (summarizing interviews conducted with Bosnian judges and prosecutors, who described the ICTY as a “‘political’ organization that was ‘biased and incapable of providing fair trials.’”).

²⁰² Charles Taylor – the former president of Liberia who had supported the attempted overthrow of Sierra Leone's government – was tried in The Hague because of security concerns. See *Outreach and Public Affairs*, *supra* note 120; see also Clark, *International War Crimes Tribunals and the Challenge of Outreach*, *supra* note 119, at 108.

²⁰³ See *Outreach and Public Affairs*, *supra* note 120; see also Clark, *International War Crimes Tribunals and the Challenge of Outreach*, *supra* note 119, at 108.

²⁰⁴ See Clark, *International War Crimes Tribunals and the Challenge of Outreach*, *supra* note 119, at 108.

victim involvement to include out-of-court engagement.

The challenge then becomes how the international community can, in developing a war crimes court, build a victim participation scheme that is guided by victims' wants and needs, and acknowledges the local dimensions of a conflict. This paper attempted to answer that question by suggesting that future war crimes courts should ground their victim participation schemes in principles of procedural fairness. In practice, this may mean engaging with victims in extrajudicial settings, rather than giving them more participatory rights. For example, the court should find ways to make itself accessible to people in informal settings, and it should strive to engage community members on issues related to the ongoing trials. It should prioritize quality communication with victims, who should be informed the reason for judicial delays and should be made aware of the ways in which the court is protecting their physical safety.

Through communication, transparency, and psychosocial support, international courts may build a strong participatory regime that avoids re-traumatization and is not at odds with the interests of the prosecutor or the rights of the defendant.