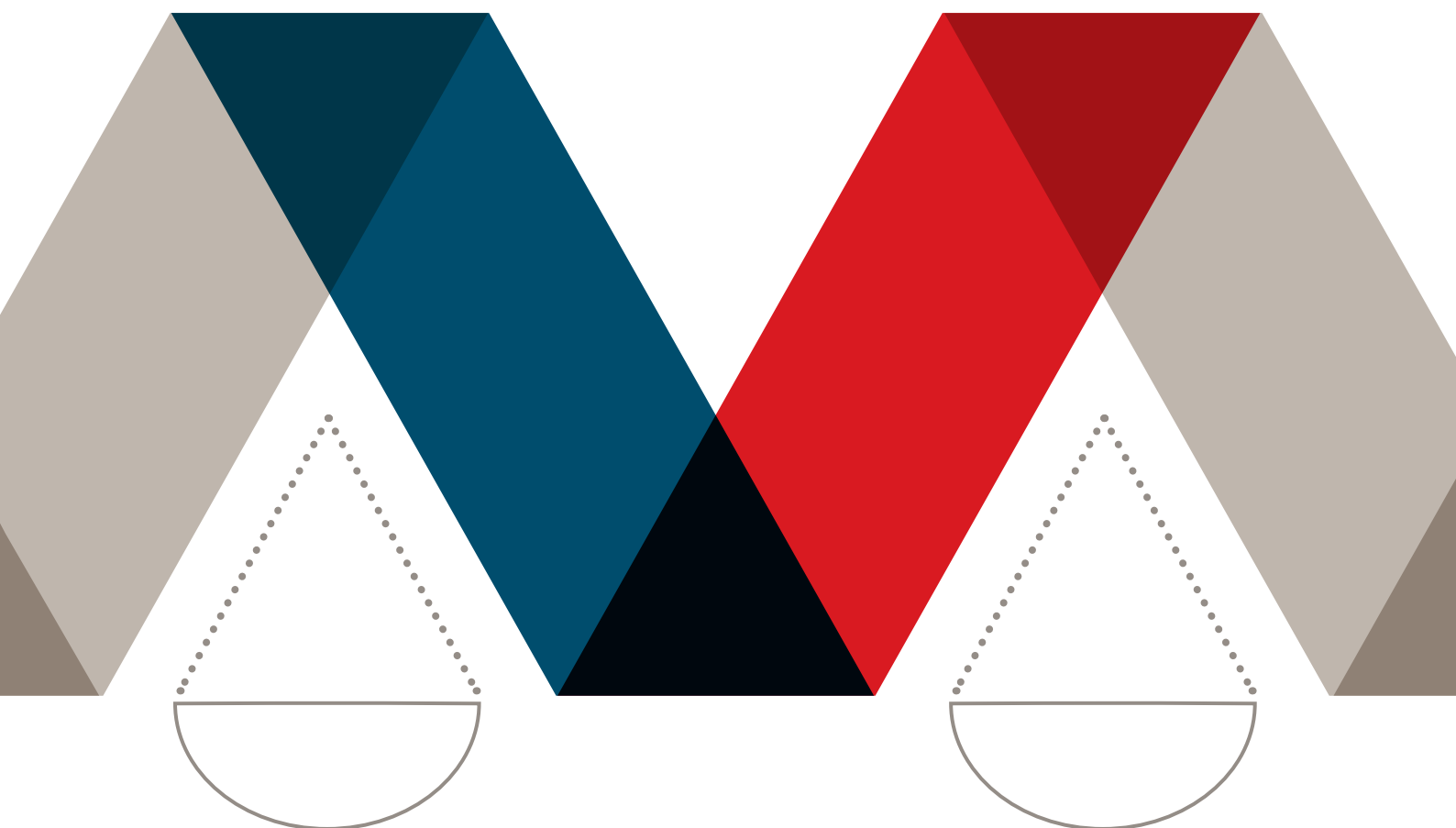


The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 3

The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process

MAY 2015





Published by the Victorian Law Reform Commission

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Preface

On 27 October 2014, the then Attorney-General for Victoria, the Hon. Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process. This important reference goes to the very heart of our criminal justice system, posing the challenging question: ‘What should the role of the victim be in the criminal trial process?’ Throughout this reference, the Commission’s consideration of this question will be informed by two interrelated sources of information—theory and practice.

Many academics and researchers approach the question of the role of victims in the criminal trial process by examining the underlying purposes of the criminal justice system and the relationship between the victim, the accused and the state. Why do we have a criminal justice system at all, what do we (as a society) want it to achieve, and for whom? The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory, and psychology) all make valuable contributions to the task of understanding and imagining a criminal justice system suited to purpose.

Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, hundreds of criminal trials and thousands of guilty plea hearings impact directly on the lives of victims, accused and witnesses. Listening to the experiences of these people—and of the people who work in the criminal justice system—is crucially important. It allows for a systematic identification of the issues that exist, and an informed consideration of practical initiatives for improvement which have been implemented or championed in Victoria and around the world.

Practice and theory are interrelated. They inform each other. The Commission encourages an approach to this reference which considers what we can learn from theory and what we can learn from practice, both individually and together (see Figure 1).

To facilitate and encourage this approach, the Commission is publishing a series of four information papers prior to consulting widely with the community. This is the third in that series. The four papers are:

- 1 The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory
- 2 The Role of Victims of Crime in the Criminal Trial Process: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?
- 3 The Role of Victims of Crime in the Criminal Trial Process: the International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process**
- 4 The Role of Victims of Crime in the Criminal Trial Process: Victims' Rights and Human Rights: the International and Domestic Landscape.

The first and second information papers aim to provide background information about the history of the modern criminal trial and its underlying principles and survey the evidence about who victims are and what they need from the criminal justice system. The third and fourth information papers then examine the International Criminal Court as a case study of victim participation, followed by a review of the sources of victims' rights internationally and in Australia. The papers in this series do not necessarily reflect the Commission's views and do not contain policy recommendations.

The Commission will publish a consultation paper on the reference in August 2015. That publication will mark the commencement of public consultation on the reference, and will invite submissions to the Commission. It is hoped that these information papers will assist in the public consultation process by providing relevant background information to the public in a helpful and convenient form. The Commission looks forward to public submissions following publication of the consultation paper.

Terms of reference

The Role of Victims of Crime in the Criminal Trial Process

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 27 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.

In conducting the review, the Commission should consider:

- a) the historical development of the criminal trial process in England and other common law jurisdictions;
- b) a comparative analysis of the criminal trial process, particularly in civil law jurisdictions;
- c) recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;
- d) the role of victims in the decision to prosecute;
- e) the role of victims in the criminal trial itself;
- f) the role of victims in the sentencing process and other trial outcomes;
- g) the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- h) support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

The Commission's approach to this reference

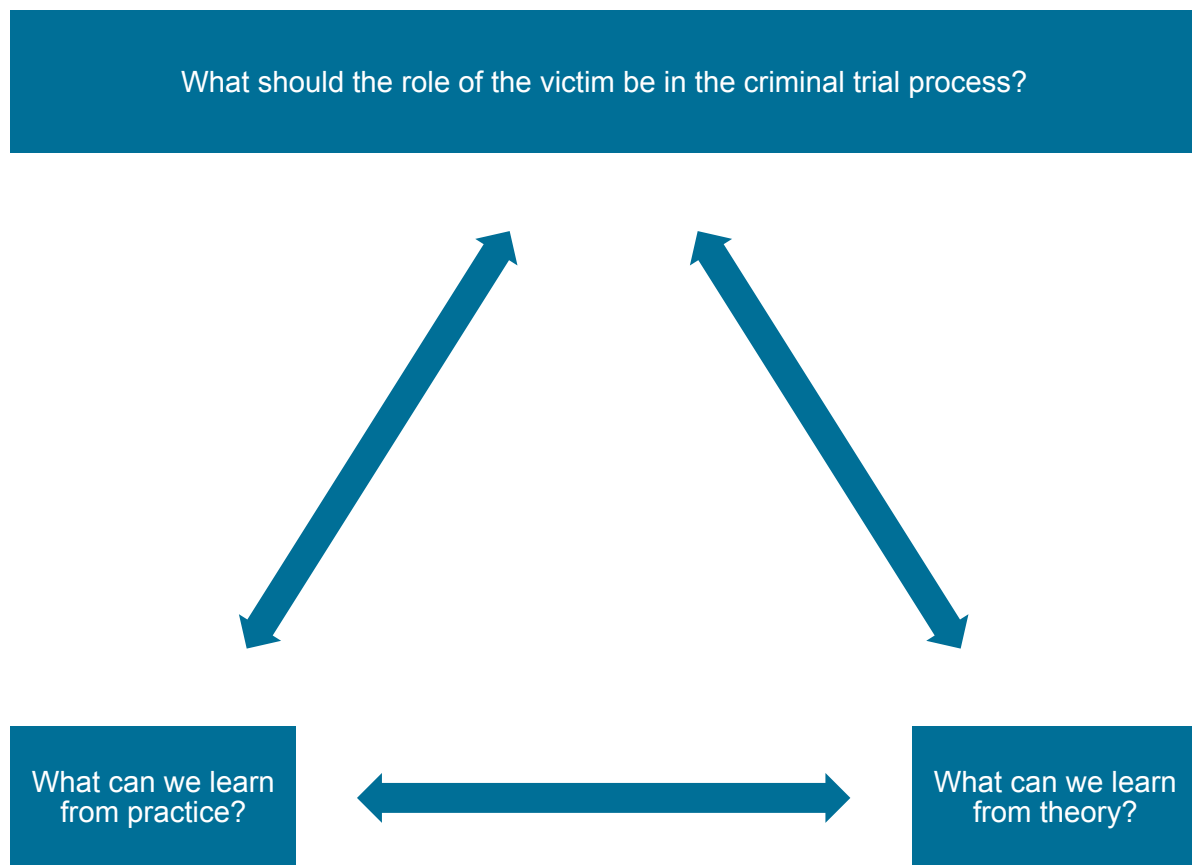


Figure 1: Practice and theory are interrelated

The International Criminal Court: a case study of victim participation in an adversarial trial process

Introduction

- 1 The terms of reference ask the Commission to review the role of victims in the criminal trial process, and in doing so to consider recent innovations in Victoria and other jurisdictions. The International Criminal Court (ICC)¹ model of victim participation has been described as representing 'a new era in victim participation in international criminal law'² and an important and major innovation in international criminal justice.³
- 2 The ICC was established by the Rome Statute on 1 July 2002.⁴ The ICC is located in The Hague in the Netherlands, and is mandated to investigate and prosecute the most serious crimes of concern to the international community.⁵ In particular, the ICC has jurisdiction over war crimes, crimes against humanity, and genocide.⁶
- 3 As will be outlined in more detail below, the Rome Statute allows victims to participate in trial proceedings—including pre-trial, trial and reparations proceedings—where their personal interests are affected and in a manner that does not infringe on the right of the accused to a fair trial.

¹ In this information paper, the term 'ICC' will be used to refer to the entire institutional structure of the ICC, which includes the Presidency, the Office of the Prosecutor, the Registry and other offices encompassing the Office of Public Counsel for Victims, the Office of Public Counsel for Defence and the Trust Fund for Victims, and the Chambers (the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber).

² Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 106.

³ René Blattmann and Kirsten Bowman, 'Achievements and Problems of the International Criminal Court: A View From Within' (2008) 6 *Journal of International Criminal Justice* 711, 714.

⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁵ *Ibid* preamble.

⁶ *Ibid* art 5.

- 4 The ICC's focus on crimes involving mass victimisation restricts to some degree a direct comparison with domestic criminal justice systems. Nonetheless, the Court's largely adversarial trial procedures and adherence to fair trial principles⁷ mean that it shares core features with the criminal trial process in Australia.
- 5 The ICC's novel and inclusive approach to victims is often described as comprising two primary elements: victims' participation in the criminal trial process ('victims' participation'), and the ICC's regime for redress and reparations ('redress and reparations'). This information paper will outline the principles and legal framework underpinning both these elements, before turning to the major criticisms of the ICC's framework for including victims.
- 6 This information paper outlines one example of a model in which the victim plays a different and enhanced role in the criminal trial process. Other models have been advanced by academics or developed in practical contexts. Efforts to increase victims' involvement in, and satisfaction with, the criminal trial process have led to the introduction of restorative justice processes before sentencing.⁸ Other examples will be discussed in the forthcoming consultation paper.
- 7 This information paper is a case study, intended to stimulate thought. It does not purport to provide in-depth analysis of the ICC's practices and procedures in relation to victims, and it does not necessarily represent the views of the Commission. It is intended to inform and assist the consideration of the terms of reference.

Including victims' participation and redress and reparations at the ICC

- 8 The incorporation of victims into ICC proceedings was driven by several interrelated factors. First, victims had been excluded from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), except when they appeared as witnesses.⁹ The ICTY's and ICTR's failure to consider the

⁷ Scott T Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court' (2009) 16 *ILSA Journal of International and Comparative Law* 489, 491; John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *Journal of International Criminal Justice* 17, 34; M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 443, 464.

⁸ See, for example, the United Kingdom (*Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1ZA) and New Zealand (*Sentencing Act 2002* (NZ) s 24A).

⁹ Fanny Benedetti, Karine Bonneau and John L Washburn, *Negotiating the International Criminal Court: New York to Rome 1994–1998* (Martinus Nijhoff, 2014) 12; Emily Haslam, 'Silences in International Criminal Legal Histories' in Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 180, 188. See also Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *The International Journal of Transitional Justice* 518, 520–521.

needs and interests of victims, or offer victims access to reparations or compensation, was widely considered to undermine the justice delivered by these tribunals.¹⁰

- 9 Secondly, and related to the first, in the lead-up to and during the Rome Statute negotiations, non-government organisations and states¹¹ campaigned forcefully to ensure the Rome Statute included provisions permitting victims to participate and to have access to compensation or reparations through the court.¹² In particular, non-government organisations working on women's rights and gender justice advocated for a greater role for victims at the ICC, in the hope that 'this new scheme would allow victims to tell their story in a way they were unable to as victim-witnesses before the Yugoslav and Rwanda tribunals'.¹³
- 10 Thirdly, states and non-government organisations involved in the drafting of the Rome Statute worked to ensure the Rome Statute accorded with international instruments relating to victims' rights, in particular the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,¹⁴ and the (then draft) *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.¹⁵
- 11 Finally, states with inquisitorial criminal justice systems, where victims' participation is more common, urged the inclusion of provisions relating to victim participation and redress into the Rome Statute. As described by Brianne McGonigle, provision for victims' participation and redress and reparations in the Rome Statute:

... is the result of intense discussions between drafters that were split between the adversarial and inquisitorial divide. The delegates from the French government were particularly intent on granting victims broad participatory rights. Consequently, the rule upon which broad victim participation rests is drawn from continental legal systems.¹⁶

¹⁰ Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge, 2014) 85, 88-89; Benedetti, above n 9, 11-12; Pena and Carayon, above n 9, 520-521.

¹¹ Including REDRESS, Human Rights Watch, Amnesty International, the (then) Women's Caucus for Gender Justice (now Women's Initiative for Gender Justice), France, the United Kingdom, and New Zealand. See Moffett, above n 10, 88.

¹² Moffett, above n 10, 87-88.

¹³ Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18(2) *Michigan Journal of Gender and the Law* 297, 317.

¹⁴ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 40th Sess, 86th plen mtg, UN Doc A/Res/40/34 (29 November 1985), annex.

¹⁵ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc. A/RES/60/147 (2005).

¹⁶ Brianne McGonigle, 'Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court' (2009) 21 *Florida Journal of International Law*, 114.

- 12 However, the drafters of the Rome Statute were also concerned to ensure that the inclusion of victim participation did not ‘undermine the rights of the defense or upset the balance of roles between the prosecution and the defense’.¹⁷ As Judge Usacka of the ICC has noted, while victim participation is drawn from the inquisitorial civil traditions, most other trial procedures are drawn from the adversarial common law traditions.¹⁸
- 13 The ICC model that emerged from the Rome Statute negotiations has two aspects that are particularly relevant to the question that underlies this reference: ‘What should the role of the victim be in the criminal trial process?’ These aspects are:
- the incorporation of participation rights for victims into a largely adversarial criminal trial process
 - the inclusion of a regime for redress and reparations.

Participation in proceedings

Underlying principles of victim participation

- 14 Proponents of victims’ participation at the ICC argue that it has three important benefits.
- 15 First, it benefits victims. It means that criminal justice processes are more likely to serve the interests of victims, rather than being solely focused on punishing the offender.¹⁹ Giving victims participatory status is an important way of formally and publicly recognising that victims have suffered wrongdoing.²⁰
- 16 Participation, it is argued, also gives victims an opportunity ‘to be heard, to voice views and concerns and to request reparations’.²¹ Victims’ involvement in the trial proceedings, including their ability to present evidence, ‘affords victims a means to bring to light materials and perspectives that are important to their interests in justice and the truth’.²² According to those advocating for victims’ participation at the ICC, affording victims the opportunity to participate allows them to contribute to fact-finding and truth-telling, which can in turn assist them to heal after victimisation.²³
- 17 Proponents of victims’ participation have also argued that, at a more general level, engaging victims in the criminal justice process empowers victims, recognises their

¹⁷ Christine Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ (2008) 6(3) *Northwestern Journal of International Human Rights* 461, 464.

¹⁸ Judge Anita Usacka, ‘Building the International Court’ (2011) 23 (2) *Pacific McGeorge Global Business & Development Law Journal*, 225, 229 (speech delivered in Salzburg, Austria on 19 July 2010).

¹⁹ SáCouto, above n 13, 314–315; Moffett, above n 10, 33.

²⁰ Victims’ Rights Working Group (VRWG), ‘Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation’ (8 July 2013) (VRWG); Moffett, above n 10, 33.

²¹ VRWG, above n 20, 1.

²² Moffett, above n 10, 102. See also Pena and Carayon, above n 9, 523-525.

²³ SáCouto, above n 13, 315; Women’s Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of the International Criminal Court*, United Nations Headquarters (4-15 August, 1997).

agency and helps restore their dignity.²⁴ In fact, some commentators have argued that ‘the primary motivation behind the creation of a victim participation scheme in the ICC context was a desire to achieve restorative—as opposed to retributive—justice’.²⁵ For many, the scheme of victims’ participation outlined below is the mechanism by which the court delivers restorative justice.²⁶

- 18 Secondly, victims’ participation benefits the ICC’s proceedings. Those in favour of victims’ participation argue that it ensures the Court receives a nuanced and complete version of events surrounding the alleged crimes in question.²⁷ In addition, victims can make a meaningful contribution by ‘providing the judges with important insights about the local situation’.²⁸ A former judge of the ICC, Judge Bruno Cotte, has explained:

The participation of victims could greatly assist the Judges to better understand contentious issues in light of their knowledge of the locations and their socio-cultural background. In that regard, the LRV [legal representative for victims] for the main group of victims clearly had knowledge of the field that we did not yet have; he intervened on occasions to bring factual additions based on his own knowledge of the locations and of the people concerned.²⁹

- 19 Thirdly, it is argued that victim participation will improve the relationship between victims and the ICC. The ICC Strategy in relation to victims suggests that victim participation will assist victims to ‘have confidence in the justice process and view it as relevant to their day to day existence rather than as remote, technical and irrelevant’.³⁰ From the Court’s perspective, ‘victim participation will contribute to the justice process at the Court and will make the proceedings more sensitive to victims’.³¹

Legal framework and participation in practice

- 20 The Rome Statute and the ICC’s Rules of Procedure and Evidence (the Rules)³² provide the legal framework for victim participation. The Court, which is comprised of Pre-Trial, Trial and Appeal Chambers, has also begun to develop a body of case-law, which

²⁴ REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of Practice and Consideration of Options for the Future* (October 2012) 5; Pena and Carayon, above n 9, 523-524; VRWG, above n 20, 1; Moffett, above n 10, 33.

²⁵ War Crimes Research Office, *Victim Participation at the Case Stage* (2009) 36.

²⁶ McGonigle, above n 16, 96 (‘This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice’).

²⁷ SáCouto, above n 13, 301.

²⁸ Christine Wyngaert, ‘Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 *Case Western Reserve Journal of International Law* 475, 487.

²⁹ Interview with Judge Adrian Fulford, *Access, Victims’ Rights Working Group Bulletin Issue 25, Winter-Spring 2014-2015*, 4.

³⁰ Assembly of States Parties, *Report of the Court on the Strategy in Relation to Victims*, Doc No ICC-ASP/8/45, 10 November 2009 [44].

³¹ *Ibid.*

³² International Criminal Court, *Rules of Evidence and Procedure*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) (*the Rules*).

provides additional detail about how this legal framework applies in practice. The following section will outline the primary provisions related to victims' participation and the relevant jurisprudence.³³

- 21 The term victim is defined in rule 85 of the Rules as: 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.³⁴
- 22 The primary provision governing victims' participation is article 68(3) of the Rome Statute, which provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.³⁵

Victims' status and their personal interests

- 23 The Court has repeatedly stated that article 68(3) does not mean that victims are parties to the proceedings.³⁶ Rather, as the provision makes clear, it permits victims to raise their views and concerns where their personal interests are affected.³⁷
- 24 The meaning of personal interests is not defined in the Rome Statute or the Rules. However, the Pre-Trial Chamber has held that 'the personal interest of the victims flows from: (i) the desire to have a declaration of truth by a competent body (right to truth); (ii) their wish to have those who victimized them identified and prosecuted (right to justice) and (iii) the right to reparation'.³⁸

³³ The Rome Statute and the Rules also contain numerous articles and rules providing rights to information about the proceedings, and protective measures. For a detailed list see Assembly of States Parties, *Court's Revised Strategy in Relation to Victims*, Doc No ICC-ASP/11/38, 5 December 2012, Annex.

³⁴ The Rules, art 85(a). There has been considerable jurisprudence on precisely what this provision means. For an outline of the various jurisprudence see Benjamin Perrin, 'Victim Participation at the International Criminal Court: Examining the First Decade of Investigative and Pre-Trial Proceedings' (2015) 15 *International Criminal Law Review* 298, 303–304.

³⁵ Rome Statute art 68(3).

³⁶ See for example *Prosecutor v Katanga and Chui*, (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [75]; *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial') (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [39]; *Prosecutor v Ruto and Sang* (Decision on Victims' Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [14]. See also Perrin, above n 34, 306; Wyngaert, above n 28, 475.

³⁷ Wyngaert, above n 28, 483.

³⁸ *Prosecutor v. Bahr Idriss Abu Garda* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, Doc No ICC-02/05-02/09) [3].

25 Similarly, the phrase ‘views and concerns’ is not defined exhaustively in the Rome Statute or the Rules. Therefore, the Chambers have discretion to define its content in the circumstances of any given case.³⁹

Manner and form of participation

26 The Rules provide more detail about how victims can participate in proceedings.⁴⁰

Applying to participate

27 Rule 89 requires that ‘in order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber’.⁴¹ The form and content of these applications, and the procedures for their determination, have varied between the different cases and have generated considerable jurisprudence.⁴²

Legal representation

28 Once victims have successfully applied to participate, rule 90 governs the appointment of legal representatives to individual victims or groups of victims. Victims ‘are free to choose a legal representative’,⁴³ and where there are multiple victims, they may choose a common legal representative.⁴⁴ In practice, nearly all victims in nearly all cases have had common legal representatives.⁴⁵ Where appointed, common legal representatives are responsible for representing the views and concerns of victims during proceedings.⁴⁶

³⁹ *Prosecutor v Katanga and Chui*, (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [53]; *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Case No ICC-01/09-01/11-460, 3 October 2012) [11].

⁴⁰ For a general description see Jo-Anne Wemmers, ‘Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Right to Participate’ (2010) 23 *Leiden Journal of International Law* 629, 630-632; Moffett, above n 10, 96-100; McAsey, above n 2, 108-110; McGonigle, above n 16, 110-135. See also Carolyn Hoyle and Leila Ullrich, ‘New Court, New Justice? The Evolution of ‘Justice for Victims’ at Domestic Courts and the International Criminal Court’ (2014) 12 *Journal of International Criminal Justice* 681, 689.

⁴¹ The Rules r 89(1).

⁴² For example, individual applications have been used in all cases, except for the *Gbagbo* case and both cases arising out of the Kenya situation. See *Prosecutor v Kenyatta* (Decision on Victims’ Representation and Participation, International Criminal Court, Trial Chamber V, Case No ICC-01/09-02/11-498, 3 October 2012) [23]; *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Case No ICC-01/09-01/11-460, 3 October 2012) [24] (where individual applications were required only for victims wishing to participate in actual proceedings. All other victims were required to register, but not apply individually). See *Prosecutor v Gbagbo* (Decision on Victims’ Representation and Participation, International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-810, 5 April 2012) [29-31] (where both individual and collective applications were allowed).

⁴³ The Rules r 90(1).

⁴⁴ The Rules r 90(2)–(5).

⁴⁵ Jo-Anne Wemmers ‘Where Do They Belong? Giving Victims a Place in The Criminal Justice Process’ (2009) 20 *Criminal Law Forum* 395, 411; Moffett, above n 10, 99-100. See also *Prosecutor v Lubanga* (Decision on victims’ participation, International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) (this was the only case in which individual victims sought

During the proceedings

- 29 The ICC Chambers have repeatedly emphasised that victims should ‘only participate actively if their intervention would make a relevant contribution to the determination of the truth and does not prejudice the principles of fairness and impartiality of the proceedings before the Court’.⁴⁷
- 30 Rule 91 permits victims’ legal representatives to attend and participate in proceedings, except where, in the relevant Chamber’s view, ‘the representative’s intervention should be confined to written observations or submissions’.⁴⁸ Trial Chambers have held that a key aspect of victim participation in hearings is the opportunity for victims to present their views and concerns in opening and closing statements.⁴⁹
- 31 Rule 91 also provides that if victims’ legal representatives want to question witnesses, experts or the accused, they must make an application to the Chamber and may be required to specify the questions to be asked.⁵⁰ If the Chamber decides to permit questioning, ‘taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial’, the judge may also elect to ask the witness the question on behalf of the victims’ legal representative.⁵¹

individual representation by outside counsel). Like the application process under rule 89, the appointment of common legal representatives has led to varied practices between the Chambers.

⁴⁶ *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Case No ICC-01/09-01/11-460, 3 October 2012) [41],[53]; *Prosecutor v Kenyatta* (Decision on Victims’ Representation and Participation, International Criminal Court, Trial Chamber V, Case No ICC-01/09-02/11, 3 October 2012) [41].

⁴⁷ *Prosecutor v Katanga and Chui*, (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [65]. See also *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’) (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [3], [40].

⁴⁸ The Rules r 91(2); See also *Prosecutor v Katanga and Chui*, (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [69]–[71]; Wemmers, above n 40, 630-632.

⁴⁹ *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [73] affirming the practice of Trial Chambers I, II and III. See also *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [68].

⁵⁰ The Rules r 91(3)(a). See also *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [72]; *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [74].

⁵¹ The Rules r 91(3)(b). See also *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [73].

32 Trial Chambers have ruled that questions must be expressed neutrally, limited to issues affecting the victims, ‘clarify or supplement evidence already given by witnesses’,⁵² and ‘shall not be repetitive of questions already asked by the calling party’.⁵³ In addition:

... questioning must have as its main aim the ascertainment of the truth, since victims are not parties to the trial and have no role to support the case of the Prosecutor. However, any intervention may potentially enable the Chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background.⁵⁴

33 The prosecutor and defence are entitled to respond to any submissions made orally or in writing by victims’ legal representatives.⁵⁵

34 The Rules also permit the victims or their legal representatives to have access to ‘the public record of the proceedings, including the index, subject to any restrictions concerning confidentiality’.⁵⁶

Tendering evidence and calling witnesses

35 Victims have been permitted to tender evidence and call witnesses during trials, even though ‘[t]he Statute does not explicitly grant victims the right directly to call a witness to give evidence or to tender documentary evidence’.⁵⁷ Trial and Appeal Chambers have relied on article 69(3), which permits the Trial Chamber to ‘request the submission of all evidence that it considers necessary for the determination of the truth’.⁵⁸ The Chambers

⁵² *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [78].

⁵³ *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [75]-[76].

⁵⁴ *Prosecutor v Katanga and Chui*, (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [75].

⁵⁵ The Rules r 91(2). See also *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [34].

⁵⁶ The Rules r 131(2); *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [64]-[69] (including a discussion of when access to confidential material should be permitted).

⁵⁷ *Prosecutor v Ruto and Sang* (Decision on Victims’ Representation and Participation, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [77]; *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [81]-[101]; *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’) (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [37] (also ruling on whether evidence presented by victims needs to be disclosed to the accused prior to the trial).

⁵⁸ Rome Statute, above n 4, art 69(3); *Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [86]-[105] (affirming the Trial Chamber’s decision); *Prosecutor v Lubanga* (Decision on victims’ participation) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [108]; *Prosecutor v Katanga*

have ruled that allowing victims to tender evidence and call witnesses is a potential mechanism for giving full effect to the right of victims to express their views and concerns pursuant to article 68(3).⁵⁹

- 36 Victims will only be permitted to submit evidence or call witnesses after they or their legal representatives have demonstrated, through a written application, the relevance of the evidence they plan to submit and how it will assist in determining the truth.⁶⁰ Allowing victims to participate in this way has been contentious, and the potential impact on the rights of the accused is explored in more detail below.

Other provisions

- 37 In addition to the overarching right in article 68(3), several other sections of the Rome Statute make provision for the involvement of victims at specified stages of the proceedings.⁶¹

Investigation phase

- 38 ICC investigations can be commenced in three ways:
- on the prosecutor's own initiative
 - on a request from the state in question
 - on a referral from the United Nations Security Council.⁶²
- 39 A prosecutor must request authorisation from a Pre-Trial Chamber under article 15 in order to proceed with an investigation that he or she has initiated.⁶³ Article 15(3) permits victims to make 'representations' to the Pre-Trial Chamber during authorisation proceedings.⁶⁴ According to Benjamin Perrin, victim representations have impacted

and *Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [81]. See also Moffett, above n 10, 102.

⁵⁹ *Prosecutor v Lubanga* (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [96]-[98]; *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [82]-[83].

⁶⁰ *Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [98]-[104]; *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [88].

⁶¹ See generally SáCouto, above n 13, 318-324.

⁶² Rome Statute art 13.

⁶³ Rome Statute art 15(3).

⁶⁴ Such representations must be made in accordance with the Rules. Relevantly, rule 50(1) stipulates that the prosecutor should inform victims of an application being made under article 15(3), that the Court may request further information from victims and if appropriate hold a hearing to determine the application, and give victims notice of the decision.

noticeably on proceedings under article 15.⁶⁵ For example, victim representations requested that the investigation of the situation in Kenya cover a time period longer than that sought by the prosecutor. The Pre-Trial Chamber complied, authorising an investigation that covered a four-and-a-half-year period, rather than two years.⁶⁶ Victim representations also resulted in the Pre-Trial Chamber authorising an investigation into rape and crimes of sexual violence as war crimes, which the prosecutor had not sought.⁶⁷

Pre-trial hearings regarding jurisdiction and admissibility

- 40 Article 19(3) permits victims to ‘submit observations to the Court’ during proceedings to determine whether a case falls within the ICC’s jurisdiction.⁶⁸
- 41 A recent review of rulings on this point has noted that ‘victims have regularly submitted observations related to jurisdictional and admissibility proceedings, but appear to have had little impact beyond generally supporting the Prosecutor’s position that the ICC has jurisdiction and that the cases and situations are admissible’.⁶⁹

Reparations

- 42 Article 75(3) requires the court to take into account ‘representations’ from victims in the making of any orders for reparations. This aspect of victims’ participation will be discussed in more detail below.

Participation in practice

- 43 In most cases, victims participate through their legal representatives. Victims’ legal representatives sit at a table next to the prosecutor and across from the defence.⁷⁰ Jo-Anne Wemmers believes that the presence of victims’ legal representatives in itself impacts on the dialogue in the courtroom and that the permanent presence of victims’ legal representation means that they ‘can continually exercise influence on the legal discourse’ such that ‘[v]ictims and their concerns become an integral part of the criminal justice process’.⁷¹
- 44 Despite the increasing body of jurisprudence outlining the precise ‘modalities of victims’ participation’ (as it is called in ICC publications), several commentators have noted that

⁶⁵ Perrin, above n 34, 319-327.

⁶⁶ Perrin, above n 34, 321-322; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-19, 31 March 2010) [207].

⁶⁷ Perrin, above n 34, 325; *Situation in the Republic of Côte d’Ivoire* (Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’) (International Criminal Court, Pre-Trial Chamber III, Case No ICC-02/11-14-Corr, 15 November 2011) [148].

⁶⁸ See also the Rules r 59 (which requires the registry to inform victims who have communicated with the Court in relation to ‘that case’ about the existence of proceedings with respect to jurisdiction or admissibility).

⁶⁹ Perrin, above n 34, 332 (citations omitted).

⁷⁰ Wemmers, above n 45, 411.

⁷¹ *Ibid.*

some of the practical aspects of victims' participation remain uncertain.⁷² This is in part due to what the drafters of the Rome Statute have described as 'constructive ambiguity' within the Statute, deliberately included in order to overcome disagreements during negotiations about the precise practices and procedures surrounding victim participation.⁷³ It also reflects both the variation in the circumstances of the cases heard by the ICC, and the reality that ensuring victims from different circumstances are able to properly participate while balancing the rights of the accused demands a degree of flexibility.⁷⁴ The result is that the exercise of victims' rights to participate is left largely up to the Court's individual chambers to determine.⁷⁵

- 45 To date, the bulk of ICC case law relates to the earlier stages of proceedings—that is, the investigation and pre-trial phases, and the application process and appointment of common legal representatives—rather than the trial and reparations stages.⁷⁶ While some general principles have been distilled, some inconsistency remains, with varying approaches being taken between chambers. As such, victims' participation at the ICC has been described as '... a varied system in need of harmonization'.⁷⁷

Rights to reparations and redress

- 46 In addition to affording victims the ability to participate in the trial proceedings, the Rome Statute sets out a framework for providing redress to victims of international crimes.
- 47 The ICC's regime for victim redress has two main aspects: (1) the power of the Court to award reparations to victims of crimes within its jurisdiction ('reparations'); and (2) the capacity of the Trust Fund for Victims to provide assistance to victims other than court-ordered reparations ('victim assistance').⁷⁸ An important feature of victim assistance is

⁷² See, eg. Independent Panel of Experts, *Report on Victim Participation at the International Criminal Court* (July 2013) [37]; Victims' Rights Working Group, *Making Victim Participation Effective and Meaningful* (June 2014) 2; Wemmers, above n 40, 629.

⁷³ Wyngaert, above n 28, 478-479.

⁷⁴ *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [53]-[54].

⁷⁵ Håkan Friman, 'The International Criminal Court and the Participation of Victims: A Third Party to the Proceedings' (2009) 22 *Leiden Journal of International Law* 485, 486.

⁷⁶ *Ibid* 486; Perrin, above n 34, 301.

⁷⁷ Solange Mouthaan, 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?' (2013) 21 *Cardozo Journal of International and Comparative Law* 619, 628.

⁷⁸ Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 1-2, 75-76; Linda Keller, 'Seeking Justice at the International Criminal Court: Victim's Reparations' (2007) 29 *Thomas Jefferson Law Review* 189, 190.

that it can be provided to victims who are not eligible for reparations and is not contingent on a finding of guilt and the making of a related reparations order.⁷⁹

Underlying principles

48 The ICC's scheme for reparations is not intended to be punitive in nature.⁸⁰ Rather, reparations under the Rome Statute offer the opportunity to redress:

the harm—in principle, the full harm, both material and moral—suffered by victims of crimes within the jurisdiction of the court. In practice, however, reparations will often serve merely to alleviate, rather than eliminate, such harm.⁸¹

49 The Court itself has stated that reparations 'oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts'.⁸²

50 Some commentators are more ambitious about the potential of reparations in the context of international crimes, arguing that reparations can restore social harmony in communities affected by conflict and help build peace.⁸³

51 The Trust Fund's victims' assistance function has also been described by Katharina Peschke as having transformative potential, for both individual victims and at a collective level:

at an individual level, the Trust Fund supports empowerment and restoration of dignity of victims through concrete activities which directly benefit them; and at a collective level, the Trust Fund supports efforts to promote reconciliation within affected communities and to restore the social fabric that has been torn by conflict.⁸⁴

⁷⁹ McCarthy, above n 78, 3; Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 *International Journal of Transitional Justice* 250, 267; Moffett, above n 10, 150.

⁸⁰ McCarthy, above n 78, 77-81; Moffett, above n 10, 153.

⁸¹ McCarthy, above n 78, 84.

⁸² *Prosecutor v Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 August 2012) [179]; *Prosecutor v Lubanga* (Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012) (International Criminal Court, Appeals Chamber, ICC-01/04-01/06, 3 March 2015) [65].

⁸³ Keller, above n 78, 190. *Prosecutor v Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 August 2012) [179] ('Reparations can assist in promoting reconciliation between the convicted person, the victims of the crime and the affected communities').

⁸⁴ Katharina Peschke, 'The Role and Mandates of the ICC Trust Fund for Victims' in T Bonacker and C Safferling, (eds), *Victims of International Crimes* (TMC Asser Press, 2013) 317, 322.

52 Moreover, delinking the Trust Fund's assistance mandate from the outcome of proceedings allows it to act earlier than would otherwise be possible, and does not confine its activities to cases on the prosecutor's agenda.⁸⁵

Legal framework

53 The primary provision setting out the Court's reparations function is article 75. Article 75(1) empowers the Court to 'establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation' and to 'determine the scope and extent of any damage, loss or injury to, or in respect of, victims'.⁸⁶

54 Reparations orders made under article 75(2) can only be made after the accused has been found guilty, only against the accused and only in favour of the particular victims involved in that case.⁸⁷

55 Reparations orders may be granted directly to victims, or directed through the Trust Fund for Victims.⁸⁸ The Trust Fund for Victims may also use its own resources to 'supplement' the amount of court-ordered reparations, and 'may also play a role in the design and implementation of reparations awards'.⁸⁹

56 Article 75(3) requires that the Court shall take into account representations made by victims when developing principles and making a decision under article 75(1) and when making a reparations order under article 75(2).

57 Article 76 allows for formal hearings to be held in which matters relating to reparations are addressed.⁹⁰ Rule 94 outlines the information victims should provide to the Registry if they wish to access reparations. Such information must be in writing and can include the names of witnesses the victim intends to call, and documentary evidence.⁹¹ It has been suggested that, relative to the trial stage, victims may be able to play a greater role in reparations proceedings, in part because there is no need to balance victims' interests against the rights of the accused.⁹² In its limited jurisprudence on reparations proceedings, the Court has indicated that 'victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective'.⁹³ In practice, non-government organisations, victims' rights

⁸⁵ Ibid 323.

⁸⁶ Rome Statute, art 75(1).

⁸⁷ Ibid art 75(2).

⁸⁸ Ibid.

⁸⁹ McCarthy, above n 78, 3.

⁹⁰ Rome Statute, art 76(2)-(3).

⁹¹ The Rules r 94(1)(a)-(g).

⁹² Moffett, above n 10, 163-164.

⁹³ *Prosecutor v Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 August 2012) [203].

groups, the parties, the Office of Public Counsel for Victims and the Registry have all made representations with respect to reparations proceedings.⁹⁴

- 58 Procedures with respect to reparations may not be confined to the formal, post-conviction, reparations hearing. Conor McCarthy notes that ‘to some extent, reparations proceedings are part of, and run in parallel with, the trial process as a whole’.⁹⁵ In part, this is because evidence which goes to reparations, such as the amount and nature of harm caused by the alleged crime, are often impossible to detach from questions related to the accused’s guilt or innocence.⁹⁶ Regulation 56 of the Regulations of the Court explicitly allows for this, permitting the Trial Chamber to hear witnesses and receive evidence going to reparations during the trial.⁹⁷

Victim assistance

- 59 Victim assistance is provided through the Trust Fund for Victims,⁹⁸ which, in addition to being ‘a medium through which the Court may make a reparations award’,⁹⁹ has the power to use ‘other resources for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims’.¹⁰⁰
- 60 The Trust Fund’s ‘other resources’ are voluntary contributions from governments, organisations, companies, individuals and other entities.¹⁰¹ The Regulations of the Trust Fund stipulate that such resources are to be used ‘to provide physical or psychological rehabilitation or material support for the benefit of victims and their families’.¹⁰²
- 61 The Court has confirmed the Trust Fund’s dual mandate—administering both reparations orders and using ‘other resources’ to provide victims with support.¹⁰³
- 62 The Trust Fund is currently administering seven projects: five in the Democratic Republic of Congo and two in Uganda.¹⁰⁴ The Trust Fund’s victim assistance programs are distinct

⁹⁴ Moffett, above n 10, 165-166; see generally *Prosecutor v Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 August 2012) [179].

⁹⁵ McCarthy, above n 78, 188.

⁹⁶ McCarthy, above n 78, 188-189.

⁹⁷ International Criminal Court, *Regulations of the Court*, Doc No ICC-BD/01-01-04 (adopted 26 May 2004) reg 56 (‘[t]he Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of the trial’).

⁹⁸ The Trust Fund for Victims is established by article 79 of the Rome Statute. See also Keller, above n 78, 200-202 (describing some of the problems associated with the receipt of voluntary contributions).

⁹⁹ McCarthy, above n 78, 85.

¹⁰⁰ Rome Statute, art 79(5); The Rules r 98(5). See also Keller, above n 78, 197-198.

¹⁰¹ International Criminal Court, *Regulations of the Trust Fund for Victims*, Doc ICC-ASP/4/Res.3 (adopted 3 December 2005) reg 21(a) and (d).

¹⁰² *Ibid* reg 50(a)(i).

¹⁰³ See *Situation in Uganda, Decision on Notification of Trust Fund for Victims*, 19 March 2008, ICC-02/04, 3; *Situation in the Democratic Republic of Congo, Decision on the Notification of the Board of Directors of the Trust Fund for Victims*, 11 April 2008, ICC-01/04, 7.

from reparations—they are separate from the judicial process and can be developed according to managerial, rather than legal, principles.¹⁰⁵

Problems and pitfalls

63 Generally speaking, criticisms of victim participation at the ICC can be divided into two groups: (1) those that are a product of the ICC's responsibility for prosecuting serious international crimes, which often involve large numbers of victims; and (2), those which are more relevant to domestic jurisdictions, including Australia.

Problems associated with mass victimisation

64 The following section sets out some key issues associated with the ICC's schemes for victims' participation and reparations and redress. It does not purport to be exhaustive.

65 First, the sheer volume of applications for victim status consumes a large portion of the Court's resources.¹⁰⁶ It is estimated that, as at December 2014, 10,000 victims had applied to the ICC to participate in proceedings.¹⁰⁷ Dealing with such a large number of victims imposes a considerable burden on the Court's Registry, its judiciary, the prosecutor and the defence:

- The Registry must devote considerable resources to processing the applications received from potential victims seeking victim status.¹⁰⁸
- The Court's judges must assess each application for participation to determine whether, in fact, a potential victim's 'personal interests are affected', and then whether the intervention proposed does not infringe the rights of the accused.¹⁰⁹ This must occur at each stage of the proceedings.¹¹⁰
- The prosecution and defence have a right to respond to applications to participate when they are made. Reviewing these applications and formulating a response takes significant time and other resources.

66 Secondly, the time taken to hear and determine applications for victims to participate lengthens proceedings. Many commentators have argued that this risks undermining the accused's right to an expeditious trial. A related concern is that victims' subsequent

¹⁰⁴ Trust Fund for Victims (accessed 10 April 2015) < <http://www.trustfundforvictims.org/>>.

¹⁰⁵ McCarthy, above n 78, 85-88.

¹⁰⁶ This concern has been repeatedly identified in the literature evaluating the effectiveness of the ICC's model of victim participation. See for example, Pena and Carayon, above n 9, 527-528; International Bar Association, *Enhancing the Efficiency and Effectiveness of ICC Proceedings: a Work in Progress* (International Bar Association Human Rights Institute, January 2011) 23; Wyngaert, above n 36, 492-493 (making the point that sizeable parts of the Court's budget are directed towards the victims' participation mechanism, not to mention the resources in terms of time spent by both the Court and the parties addressing and responding to victim-related issues).

¹⁰⁷ Access, Victims' Rights Working Group Bulletin Issue 25, Winter-Spring 2014-2015, 1.

¹⁰⁸ McGonigle, above n 16, 140.

¹⁰⁹ The Rules r 91(3). See also Wyngaert, above n 28, 483.

¹¹⁰ Wyngaert, above n 28, 482.

participation will also lengthen the trial proceedings. However, early assessments of the impact of victims on the length of the trial are not conclusive, with one judge asserting that victims' involvement has been 'focused, succinct and seemingly relevant', and has not added to the length of trials.¹¹¹ Conversely, another argued that 'the "victims' case" is taking up a lot of time', noting in particular that questions asked by the victims' legal representative often generate further questions by the defence.¹¹²

- 67 Thirdly, using a common legal representative for a large number of victims can undermine the very real differences between victims of the same crime.¹¹³ Victims will often have been affected in 'different, and at times, competing ways', and common legal representatives may find themselves navigating difficult conflicts of interest.¹¹⁴ This problem can be particularly acute where prosecutions include crimes involving sexual and gender-based violence.¹¹⁵ In this context, the Court has been accused of failing to recognise victims of gender-based violence as a 'special category of victims who have suffered a specific vulnerability due to war and their gender'.¹¹⁶ Even when grouped appropriately, it will be very difficult, if not impossible, for a common legal representative to relate the instructions of each victim to the Court.¹¹⁷
- 68 Fourthly, the ICC's reparations function, which is a key mechanism for delivering restorative justice, is unlikely to have enough resources to meet all victims' expectations.¹¹⁸ This is true both of reparations ordered against individual accused, and those delivered through the Trust Fund for Victims.¹¹⁹
- 69 Finally, given the huge number of victims affected by international crimes, prosecutions can only ever be commenced selectively. This risks creating inequality between victims, with only victims of crimes actually charged able to participate and receive reparations.¹²⁰
- 70 Judge Christine Wyngaert, a serving judge of the ICC, warned that '[v]ictims have vested enormous hopes in the ICC, which, through its outreach programs, has created immense expectations'.¹²¹ She suggested that if the problems associated with victims' participation at the ICC mean that participation is 'more symbolic than real', then this will undermine

¹¹¹ Judge Sir Adrian Fulford, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215, 222; McGonigle, above n 16, 146 (describing the ICC's judges as having 'taken care that victims' involvement does not disrupt proceedings').

¹¹² Wyngaert, above n 28, 493-494.

¹¹³ SáCouto, above n 13, 342-343; McGonigle, above n 16, 138-139.

¹¹⁴ McGonigle, above n 16, 139.

¹¹⁵ Mouthaan, above n 77, 641.

¹¹⁶ *Ibid.*

¹¹⁷ Wyngaert, above n 28, 489.

¹¹⁸ *Ibid.* 490.

¹¹⁹ *Ibid.* 490-492.

¹²⁰ Mouthaan, above n 77, 635-637; Wyngaert, above n 28, 492.

¹²¹ Wyngaert, above n 28, 494-495.

the entire project and may even result in the secondary victimisation that the scheme sought to avoid.¹²²

Problems more directly relevant to the domestic context

- 71 The ICC's regimes for victims' participation and reparations have also faced criticisms that are more relevant to domestic trial processes. Most of these problems relate to whether including victims in criminal trial proceedings impacts on the accused's right to a fair trial.
- 72 As in domestic adversarial criminal trials, accused persons before the ICC are entitled to a fair trial. The rights of the accused are enshrined in article 67 of the Rome Statute, and are well established in international law.¹²³
- 73 A principal criticism of victim participation at the ICC is that it has the potential to undermine the accused's right to be presumed innocent of the crimes alleged.¹²⁴ It has been argued that allowing 'victims' to participate in proceedings presumes that a crime has occurred, when this is in fact something the prosecutor should prove beyond reasonable doubt.¹²⁵ In the prosecution of most international crimes, the commission of the crime is accepted and the dispute pertains primarily to whether the accused is criminally responsible; nevertheless, 'the acceptance of victims and, therefore, the occurrence of the crime, may still adversely affect the perception of the accused and by extension, their right to a fair trial'.¹²⁶
- 74 The ability of victims to question witnesses, submit evidence and call witnesses is also subject to criticism. On its face, allowing victims to question witnesses and introduce evidence is at odds with the principles underpinning adversarial criminal trials, in which 'the right to introduce evidence in criminal proceedings belongs to and is a core right of the parties'.¹²⁷ Many commentators have argued that by exercising these rights, victims will operate as 'secondary prosecutors'.¹²⁸ This, the argument goes, undermines the principle of equality of arms, because it is unfair if the defence has to respond to two sets of accusations: those made by the prosecutor and those by the victim's legal representative.¹²⁹ Bridie McAsey argues that, even if victims cannot be characterised as secondary prosecutors, the Court's decision to 'allow appropriate questions to be put by

¹²² Ibid 495.

¹²³ For a more detailed explanation of fair trial rights, particularly as they exist in Victoria, see the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (2015).

¹²⁴ Salvatore Zappala, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 146-147; McAsey, above n 2, 118-119; Moffett, above n 10, 101.

¹²⁵ McAsey, above n 2, 118; Zappala, above n 124, 146-147.

¹²⁶ McAsey, above n 2, 118; Zappala, above n 124, 147.

¹²⁷ Friman, above n 75, 492.

¹²⁸ Zappala, above n 124, 144-152; McAsey, above n 40, 119-125.

¹²⁹ Wyngaert, above n 28, 488.

victims whenever their personal interests are engaged by the evidence under consideration' still risks generally undermining the right of the accused to a fair and impartial trial.¹³⁰

- 75 This is further complicated by the absence of disclosure obligations on the victims in the Rome Statute.¹³¹ Two issues arise here. First, the Appeals Chamber has confirmed that when victims are permitted to tender evidence or call witnesses during the trial, they are not required to disclose this evidence to the defence prior to the trial. The Appeals Chamber has noted that victims must meet several prior thresholds in order to be permitted to tender evidence or call witnesses, and as such there are 'adequate safeguards for the Trial Chamber to ensure that the accused's fair trial rights are respected'.¹³² McAsey argues that, nonetheless, there remains a risk the accused's defence lawyer will not have adequate time to review the material and prepare or amend their defence accordingly.¹³³
- 76 Second, the Appeals Chamber has confirmed that victims do not have an obligation to disclose exculpatory evidence in their possession. In justifying this conclusion, the Appeals Chamber emphasised that it is within the power of the Trial Chamber to require victims to disclose evidence in their possession, and in particular evidence with the potential to exculpate the accused.¹³⁴ Nevertheless, unless the parties are aware of the existence of exculpatory evidence in the possession of the victims, they are not able to request that the Chamber make such an order, and therefore such evidence may never come to light.
- 77 There is also a tension with respect to how the Court will deal with victims introducing evidence relevant to the issue of reparations during the trial stage. In the *Lubanga* case, the Trial Chamber discussed the advantages of allowing evidence relating to reparations to be led during the trial proceedings. The Trial Chamber noted that such a process would, in many cases, remove the need for victims to give evidence in two separate proceedings. The Chamber ruled that it would be able 'without difficulty, to separate out the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted)'.¹³⁵ Nevertheless, some commentators caution that 'the introduction of

¹³⁰ McAsey, above n 2, 117.

¹³¹ *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial') (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [72].

¹³² *Ibid* [52]-[53].

¹³³ McAsey, above n 2, 115.

¹³⁴ *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial') (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [85]-[86].

¹³⁵ *Prosecutor v Lubanga* (Decision in Victims' Participation) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [121].

evidence relating to the extent of harm caused to victims runs the risk of prejudging the accused's guilt'.¹³⁶

- 78 Since few of the Court's cases have proceeded to trial, the implications of allowing victims to introduce evidence and question witnesses largely remains to be seen. Perrin, in a recent and detailed analysis of the Court's jurisprudence with respect to the investigative and pre-trial stages, has concluded that 'while the literature has overwhelmingly focused on concerns about the possibility that victim participation could undermine the rights of the accused to a fair trial, such concerns have arisen infrequently in practice at the investigative and pre-trial phases'.¹³⁷

Restorative and retributive justice

- 79 It has been said that the schemes for victims' participation and reparations at the ICC represent a shift in international criminal prosecutions from purely retributive justice¹³⁸ to incorporate a more restorative approach.¹³⁹ Restorative justice can be understood as 'an umbrella concept', based on the values and principles of respect for the dignity of the individual; victim and offender participation; and reparations.¹⁴⁰
- 80 Whether this dual focus is possible or preferable is far from settled. McGonigle argues that pursuing retributive and restorative justice concurrently gives rise to 'an indisputable tension'. She posits that there is a fundamental incompatibility between establishing, according to fair procedures, the guilt or innocence of the accused on the one hand, and the 'ancillary goal' of ensuring the inclusion of victims and their meaningful participation on the other.¹⁴¹
- 81 Salvatore Zappala asserts that the essential weakness of the ICC is its 'ambiguous normative framework':

There is no doubt that the inclusion in the ICC Statute of victim participation in the proceedings was not the result of thorough reflection on the status and role of victims of international crimes in international law ... The decision to include victims' concerns in the ICC system was motivated by the widespread support of civil society, the commitment of some academic circles, and the support of some delegations. However, the difficulties of

¹³⁶ McCarthy, above n 78, 190.

¹³⁷ Perrin, above n 34, 336.

¹³⁸ That is, an approach focused primarily on determining guilt and imposing punishment. The proceedings before the ICTY and the ICTR are considered to have been retributive in focus. See SáCouto, above n 13, 314-315.

¹³⁹ War Crimes Research Office, *Victim Participation at the Case Stage* (2009) 36. Keller, above n 78, 191; McGonigle, above n 16, 96 ('This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice').

¹⁴⁰ Wemmers, above n 45, 395.

¹⁴¹ McGonigle above n 16, 102-103. See also Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective Within Criminal Justice* (Ashgate, 2000) 185, 193.

negotiations and the presence of several other more problematic issues to be tackled at the Rome Conference did not allow for a deeper debate ... Subsequently, when drafting the RPE [Rules of Procedure and Evidence], the diverging legal traditions and ensuing difficulties of some delegations in accepting the very notion of victim participation in the proceedings, necessarily perpetuated what can be characterized as an ambiguous normative framework.¹⁴²

82 To the extent that the goals of the ICC are explicit in the Rome Statute, they are found in the provisions of the Preamble. These are:

- the acknowledgement of victims of atrocities
- the maintenance of international peace and security
- the deterrence or prevention of international crimes
- the punishment of the most serious crimes
- ending impunity for perpetrators.

Notably, despite this list of goals, neither the Preamble, nor the substantive provisions of the Rome Statute, provide a clear statement on the purpose of victim participation.

83 Mirjan Damaska argues that there are too many goals to be reposed in any one court.¹⁴³ According to Damaska, many of the goals of the ICC are unattainable due to institutional constraints, and 'the professed goals do not constitute a harmonious whole; rather, they pull in different directions, diminishing each other's power and creating tensions'¹⁴⁴. Ultimately, Damaska argues, a system with too many goals 'generates disparities between declaration and achievement, and uncertainty about their relative importance produces disorientation'.¹⁴⁵

84 In contrast, Jonathan Doak argues that the ICC's approach is 'significant insofar as that it illustrates that it is possible to put in place a mechanism for victim participation in a forum that largely adopts adversarial procedures without infringing the rights of the accused'.¹⁴⁶ In a similar vein, Wemmers argues that 'we need to begin to recognize that crime affects victims as well as society and that victims belong in the criminal justice system'. In Wemmer's view, the ICC is an example of the way in which this can be achieved through the incorporation of restorative justice principles into the criminal justice system.¹⁴⁷

¹⁴² Zappala, above n 124, 159.

¹⁴³ See generally, Mirjan Damaska, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329 (Damaska, 2008); Mirjan Damaska, 'The International Criminal Court Between Aspiration and Achievement' (2009) 14 *UCLA Journal of International Law and Foreign Affairs*, 19.

¹⁴⁴ Damaska, 2008, above n 143, 331.

¹⁴⁵ *Ibid* 365.

¹⁴⁶ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart Publishing, 2008) 137–138.

¹⁴⁷ Wemmers, above n 45, 416.

Conclusion

- 85 This information paper has sought to set out the basic framework of the ICC as a case study of victim participation in an adversarial trial process. Whether any or all of the procedures adopted at the ICC are applicable to a domestic criminal trial is worthy of consideration, as is the underlying question of whether those procedures would serve to enhance the criminal justice system's capacity to deliver for victims, accused and the community alike.
- 86 The Commission will publish a consultation paper in August 2015 inviting public submissions, and will then commence a period of public consultation on the reference. The Commission looks forward to public submissions following publication of the consultation paper.

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The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 3

The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process

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