

Howard Varney
Katarzyna Zduńczyk
Marie Gaudard
December 2017

The Role of Victims in Criminal Proceedings

INTRODUCTION

This briefing paper focuses on the role of victims of human rights violations in criminal proceedings. This paper will provide examples of recent developments in the advancement of victim participation in criminal proceedings in international criminal law and domestic jurisdictions.

Article 8 of the Tunisian Transitional Justice Organic Law of 2013 (hereinafter “TJ Law”)¹ provides for a comprehensive transitional justice framework in Tunisia, including the creation of a justice mechanism—the Specialized Criminal Chambers (SCCs), which is mandated to adjudicate cases of gross human rights violations (GHRVs).²

Invariably victims have little or no role to play in criminal justice proceedings, unless they happen to be a witness. In most jurisdictions, particularly in common-law countries, their rights are limited to attending the proceedings and being kept informed of progress. In Tunisia victims must apply to become civil parties if they wish to participate, though it is yet unknown whether victims may approach the SCCs directly. Questions regarding the participation of victims will become particularly relevant following the closure of the Truth and Dignity Commission (TDC).

WHO IS A VICTIM?

According to article 10 of the TJ Law:

“A victim shall mean any individual, group or legal entity having suffered harm as a result of a violation. Under the Public Law shall also be considered as victims family members who were harmed as a result of their kinship to the victim as well as any person who was harmed while intervening to help the victim or to prevent the violation. This definition shall include every region which was marginalized or which suffered systematic exclusion.”³

While the TJ Law provides for detailed procedures regulating how victims interact with the TDC, it is silent on the role of victims before the SCCs. The TJ Law also does not set out the rules of procedure before the SCCs.⁴ It is noted that the proceedings before the TDC are largely victim-oriented, while the proceedings before the SCCs are punitive in nature and aimed at holding perpetrators to account. Nonetheless, this should not exclude victims from playing a role in the judicial process.

TABLE OF CONTENTS

Introduction	1
Who Is a Victim?	1
Why Victim Participation in Criminal Justice Proceedings?	3
Victims before Domestic and International Courts	4
Victims’ Rights Vis-à-Vis the Specialized Criminal Chambers	9
Victims’ Participation	12
Institutional Structure of Victims’ Participation	13

¹ Basic Law relating to the Establishment and Organization of Transitional Justice, December 24, 2013 [No. 2013-53] (hereinafter “TJ Law”) available at: <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> (last visited August 30, 2017).

² Decree relating to the Establishment of the Criminal Chambers Specialized in Transitional Justice within the Tribunal of First Instance the Courts of First Instance Sitting in the Appeal Courts of Tunis, Gafsa, Gabés, Sousse, Le Kef, Bizerte, Kasserine, and Sidi Bouzid, August 8, 2014 [no. 2014-2887].

³ Article 10 of the TJ Law, *supra* note 1.

⁴ For a discussion on a victims’ participation before the special chambers see also: Human Rights Centre –UC Berkeley School of Law/Redress/ICTJ, *Victim Participation at the International Crimes Division in Uganda: Stakeholder Roundtable January, 16 and 17, 2017 REPORT*, 2017, available at: <http://www.redress.org/downloads/icd-victim-participation-round-tablereport.pdf> (last visited December 5, 2017).

The Role of Victims in Criminal Proceedings

ABOUT THE AUTHORS

Howard Varney is a Senior Program Adviser with the ICTJ. His areas of expertise include investigations, prosecutions, institutional reform, reparations and public interest litigation. Howard is also a practicing advocate at the Johannesburg Bar.

Katarzyna Zduńczyk is a legal professional currently working as a Rapporteur for the International Organizations project at the Oxford University Press. She specializes in criminal justice and international human rights law and has previously worked at the International Criminal Court and interned at the International Center for Transitional Justice.

Marie Gaudard holds a Master's degree in International Humanitarian Law, specializing in Peace Building and State Reconstruction from the University of Aix-en-Provence in France. She has interned with the International Center for Transitional Justice.

The role of victims in criminal proceedings before international or hybrid courts has evolved considerably over the years. Traditionally, international law did not recognize the rights of victims but rather provided for their protection, thus applying a rather paternalistic approach.⁵ While due process rights of an accused were guaranteed, it was only in the 1980s that meaningful attention was devoted to the rights of victims in criminal proceedings.⁶

The statutes of the early international and hybrid tribunals did not provide for the participation of victims in international criminal proceedings. However, the Rome Statute of the International Criminal Court (hereinafter “the ICC Statute”) has expanded the role of the victims in the proceedings, thereby considerably promoting their interests.⁷ Following the International Criminal Court’s (ICC) example, more statutes of hybrid tribunals have facilitated victims’ participation, namely, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the Kosovo Specialist Chambers (KSCs). Victims were also allowed to participate and obtain reparations at the Extraordinary African Chambers in the Courts of Senegal.⁸

The international criminal justice system now recognizes that victims can contribute to a more meaningful justice process by having their voices heard and their interests protected. Moreover, there is recognition that the criminal justice process itself can play a significant restorative role for victims through the provision of reparations.

WHY VICTIM PARTICIPATION IN CRIMINAL JUSTICE PROCEEDINGS?

General

Justice can contribute to healing. Nyamata Gatere, a survivor of the Rwandan genocide, asserted, “Firstly, we need to think about justice for the survivors. A justice, which offers a place for truth that will eclipse the fear, a justice to reconcile.”⁹

Although criminal justice is typically focused on the role of accused persons, the trend in international criminal justice is increasingly focused on victims’ needs. Describing criminal justice as retributive and deterrent has been viewed as an “outdated and unhelpful caricature, as the goal should be more meaningful participation of victims in the process.”¹⁰ Particularly in the context of mass atrocity or systemic crime, the goals of justice ought to include rebuilding public trust in the courts and reaffirming the faith of the population in the values of democracy and the rule of law.¹¹ Primarily, criminal justice ought to be about upholding the “dignity of victims as rights-bearing citizens.”¹²

Providing a victim the right to participate in criminal justice proceedings helps to address “secondary victimization.”¹³ The simple act of testifying can be therapeutic.¹⁴ Victims “find meaning

5 ICJ, *International Law and the Fight Against Impunity: A Practitioners Guide* (2014), available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf> / (last visited December 7, 2017), 117–18.

6 *Ibid.*

7 K. Tibori-Szabó and M. Hirst, *Victim Participation in International Criminal Justice: Practitioners’ Guide* (2017), 2. See the following articles in the ICC Statute: article 15(3), article 19(3), article 43(6), article 53(1), article 57(3), article 64(2) and (6), article 68, article 75, article 79, article 82(4), article 85(1), and article 87(4) of the Rome Statute of the International Criminal Court 1998, 2187 UNTS 3 (hereinafter “ICCSt.”) available at:

https://www.icc-cpi.int/nr/rdonlyres/e9a9eff7-5752-4f84-be94-0a655eb30e16/o/rome_statute_english.pdf (last visited August 26, 2017).

8 Article 14 and 27, Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between June 7, 1982 and December 1, 1990, available at: <http://www.chambresafraicaines.org/pdf/accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf> (last visited August 27, 2017) (hereinafter “EACSt.”).

9 J. Hatzfeld, *Dans le nu de la vie: Récits des marais rwandais* (2000), 225.

10 M. Wierda and P. Seils, OHCHR, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (2006), 4, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (last visited December 7, 2017).

11 H. Varney, “Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions—Can They Work Together?” in *Our Freedoms: A Decade’s Reflection on the Advancement of Human Rights*, eds. IBA (2007), available at: <https://www.ibanet.org/Article/NewsDetail.aspx?ArticleUid=42003df9-59e7-46d1-9277-coe268619dda> (last visited December 7, 2017).

12 Wierda and Seils, *supra* note 10.

13 C. P. Trumbull IV, “The Victims of Victim Participation in International Criminal Proceedings,” *Michigan Journal of International Law (MJIL)* 29 (2008), 777, at 802, available at:

<http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1156&context=mjil> (last visited September 21, 2017).

14 *Ibid.*

in being heard and in bearing witness to what happened.”¹⁵ Despite the constraints of criminal legal proceedings, victim testimony can be deemed a form of truth-telling, which validates the victims and permits them to heal. Moreover, playing a role in ensuring that the strongest possible case against the accused is compiled and that all available evidence is placed before the court “may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.”¹⁶

Participation helps to restore victims’ dignity by giving them a sense of agency and capacity to act. Similarly, if trials symbolize society’s acknowledgment and condemnation of what survivors suffered, those who participate in them may feel especially recognized and validated.¹⁷

The right of victims to participate helps to give effect to their right to reparations. Whereas the prosecutor’s primary interest is to secure a conviction, victims ought to be permitted to place relevant information before the court to assist with the determination of a reparations award. Such participation helps to afford victims a remedy and promotes restorative justice in the affected communities.¹⁸

The participation of victims may lead to more successful prosecutions. Victims can be a rich source of information about their own abuse as well as the victimization of others. Moreover, they can act as a check and balance where prosecutors fail to pursue the truth or act carelessly. The Victims’ Legal Representative in the Uganda situation at the ICC stated that “victims’ participation can serve to clarify the facts and to assist the Court to fight impunity.”¹⁹

It should be noted that trials have the potential to add to victims’ trauma and frustration. This is particularly so when the process does not meet their expectations. It is important that victims are supported throughout the proceedings. Victims should be monitored and assessed in each stage of the criminal proceeding in order to detect and address any trauma or concerns.²⁰ It will be necessary to make provision for their participation and protection in a statute or the internal rules governing the conduct of the SCCs.

Victims before the Specialized Criminal Chambers in Tunisia

Prosecutors and victims should work in harmony because their goals in criminal trials overlap. Prosecutors represent the state and must act in the public interest. In so doing they must respect the rights of both the accused and the victims.²¹ Where victims are legally represented, they stand a better chance of upholding their rights and protecting their interests. They can also help to ensure that the most compelling case is presented to the court.²²

Modalities Governing Victim Participation

The SCCs could potentially rely on the provisions related to victims’ participation set out in Tunisia’s Code of Criminal Procedure (hereinafter “the Code”), complemented by rules *lex specialis* included in a future statute or internal rules for the SCCs. The Code provides for victim participation as a civil party in section IV at articles 36 to 46.²³ Under article 7 of the Code, victims

15 J. O’Connell, “Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?” *Harvard International Law Journal (HILJ)* 46 (2005), 295, at 330 (quoting from a telephone interview with Mary Fabri, clinical psychologist).

16 Victims’ Right Working Group, Y. Danieli, *Victims: Essential Voices at the Court*, Bulletin Issue No. 1 (2004), 6, available at: <http://www.redress.org/downloads/publications/ENG01.pdf> (last visited September 21, 2017).

17 In the Eichmann Trial in Israel, 46 survivors testified, which permitted Israel to comprehend better the painful past. See D. Ofer, “Israel” in D. S. Wyman (ed.), *The World Reacts to the Holocaust* (1996), 839.

18 Trumbull IV, *supra* note 13, 803.

19 Response of Legal Representative of Victims a/01 19/06 to the Prosecutor’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/o 111/06 to a/0127/06, T 23, *Situation in Uganda* (ICC—02/04-106), Pre-Trial Chamber II, August 31, 2007 available at: https://www.icc-cpi.int/CourtRecords/CR2007_03827.PDF (last visited September 21, 2017).

20 J. Fernandez, “Variation sur la Victime et la Justice Pénale Internationale” (2006) at §15, available at: <https://amnis.revues.org/890#ftn8> (last visited September 21, 2017).

21 B. L. Gershman, “Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality,” *Lewis and Clark Law Review (LCLR)* 5 (2005), 559, at 560–561.

22 *Ibid.*, at 560.

23 Law no. 68-23, The Code of Criminal Procedure of Tunisia of July 24, 1968, available in French at: http://www.wipo.int/wipolex/en/text.jsp?file_id=201853 (last visited December 7, 2017) (hereinafter “Tunisian Code of Criminal Procedure”).

have the option of being admitted as a civil party either before the “civil chambers” in order to claim compensation for damage caused (“l’action civile”) or before the criminal chambers and join “the criminal trial” as a civil party (“l’action publique”).

Where the public prosecutor does not proceed with a case, article 36 of the Code²⁴ stipulates that a civil party may either request the opening of the investigation (“demandeur l’ouverture d’une information”) or take direct proceedings against an accused person in court.²⁵

Alternatively, a new comprehensive legal framework could be enacted to govern victims’ participation before the SCCs. Lastly, as per article 8 of the TJ Law, judges could incorporate international standards for victims’ participation.²⁶

In light of the above and given the fact that two transitional justice bodies have been created in Tunisia, the SCCs and TDC, it has to be asked to what extent victims will be allowed to approach the SCCs directly. It should be noted that proceedings before the TDC and the SCCs differ significantly.²⁷ The TDC and the SCCs ought to complement each other, with victims playing a role in both mechanisms.²⁸

VICTIMS BEFORE DOMESTIC AND INTERNATIONAL COURTS

Domestic Jurisdictions and Victims’ Involvement in Criminal Proceedings

There has been a stronger tradition of victim participation in civil-law countries, with victims sometimes participating not just as witnesses but also as “civil parties.”²⁹

The common-law system generally provides for an adversarial type of criminal proceedings.³⁰ The prosecution and defence play dominant roles in the proceedings while the judge stands above as the arbiter or referee.³¹ The role of victims in most common-law systems is limited to that of a witness. As witnesses, victims can speak only if called upon by the prosecution or defence and can answer only those questions posed to them.³²

By contrast, courts within the civil-law system in continental Europe, most of Latin America, and many countries in Africa and Asia, one or more investigating judges generally supervise the collection of evidence to be introduced at trial.³³

Unlike the relatively passive role of the common-law judge, the judge in the civil-law tradition is inquisitorial, actively controlling the trial’s direction and questioning witnesses. In such systems, victims tend to play a more active role. Victims who become civil parties can initiate a prosecution, participate in the proceedings, and claim reparations for harm suffered.³⁴ Victims may join criminal proceedings as parties and pursue a claim for damages caused by the crime. In general, a victim as a civil party has the following three rights:

24 Art 36 of the Tunisian Code of Criminal Procedure reads: The case dismissed by the Prosecutor of the Republic does not affect the right of the injured person to trigger the public action under his or her own responsibility. In that case, he or she can, by forming a civil party, either ask for the opening of an inquiry, or summon directly the defendant before the Court.

25 Art 36 of the Tunisian Code of Criminal Procedure: “Dans ce cas, elle peut, en se constituant partie civile, soit demander l’ouverture d’une information, soit citer directement le prévenu devant le tribunal.”

26 In September 2016, in a case against the LRA Commander Col. Thomas Kwoyelo, a court in the Northern Uganda ruled that victims would be allowed to participate in a manner similar to that provided in the International Criminal Court’s Rules of Procedure and Evidence. See e.g., ASF, “A First in Uganda: Victims Participate in Criminal Proceedings against an LRA Warlord,” 2016 available at: <http://www.asf.be/blog/2016/10/18/a-first-in-uganda-victims-participate-in-criminal-proceedings-against-a-lra-warlord/> (last visited December 1, 2017).

27 See e.g., A. Bisset, *Truth Commissions and Criminal Courts*, 1st ed. (2012).

28 Abo Academy University, J. P. Pérez León Acevedo, *Victim’s Status at International and Hybrid Criminal Courts: Victims’ Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants* (2014), 108, available at: https://www.doria.fi/bitstream/handle/10024/95860/perez_juan.pdf?sequence=2 (last visited September 21, 2017).

29 Human Rights Centre, US Berkeley School of Law, *The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court* (2015), 16, available at: https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf.

30 Pérez León Acevedo, *supra* note 28.

31 *The Victims’ Court?*, *supra* note 29, 24.

32 Pérez León Acevedo, *supra* note 28, 84.

33 *The Victims’ Court?*, *supra* note 29, 16.

34 J. Doak, “Victims’ Rights in Criminal Trials,” *Journal of Law and Society (JLS)* 32 (2005), 294, 311.

The Role of Victims in Criminal Proceedings

- Right to initiate a prosecution,
- Right to participate and be heard as a party in criminal proceedings, and
- Right to pursue a claim for civil damages in the criminal action.³⁵

By way of example, under Polish law, victims can exercise all three rights. In a public prosecution victims may participate in the proceedings as a party by assuming the role of subsidiary prosecutor, alongside the public prosecutor or instead of him.³⁶ Acting as a subsidiary prosecutor, victims may examine witnesses, receive and file submissions, and appeal a judgment.

If a victim decides not to intervene as a subsidiary prosecutor, she may still participate in the proceedings, but her rights remain limited to, for example, being heard as a last witness in the proceedings. Moreover, in the case of privately prosecuted offences, a victim may bring an indictment as a private prosecutor with the public prosecutor intervening only if the public interest so requires.³⁷ Lastly, victims may apply for reparations, such as compensation, moral damages, or exemplary damages³⁸ in the criminal proceedings.³⁹

In France, victims may participate in a trial as a witness without a specific legal status in the proceedings, or a victim may play a more active role by formally becoming a civil claimant or party.⁴⁰ The civil party in the criminal trial is a victim who has a claim for damages and can exercise significant rights in the criminal investigation and trial in relation to the civil claim.⁴¹ A civil claimant can help the prosecutor to prove the guilt of an accused by adducing evidence.⁴²

A victim without specific legal status has the right to:

- be informed about the date of the trial;⁴³
- be present in the courtroom throughout the whole trial, if it is public, or after testimony has been provided;
- appear before court and give testimony, if called as a witness;⁴⁴
- have expenses related to participation in the trial reimbursed.⁴⁵

As formal civil claimant has additional entitlements as provided by the Code of Criminal Procedure,⁴⁶ including the right to:

- be present throughout the whole trial, regardless of whether or not it is public;⁴⁷
- be represented and assisted by a lawyer;
- initiate a prosecution;⁴⁸

35 R. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?" *California Law Review (CLR)* 78 (1990): 539, at 615.

36 Article 53, Criminal Procedure Code of the Republic of Poland, Act of June 6, 1997 (Hereinafter the "Polish Code of the Criminal Procedure").

37 Articles 59(1) and 60(1), Polish Code of the Criminal Procedure.

38 Article 46(2) of the Criminal Code of the Republic of Poland, Act of June 6, 1997 (Hereinafter "Polish Criminal Code").

Exemplary damages are granted when assessing moral or physical damages is particularly difficult due to circumstances of the case or due to limited evidence.

39 Article 46 of the Polish Criminal Code. Until 2015, it was possible to initiate a claim for civil damages in the criminal proceedings. However, as a way to foster the expediency of the criminal proceedings and due to their limited applicability in practice, the provisions were removed in 2015.

40 Article 2 of the French Code of Criminal Procedure, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154&dateTexte=20171207> (last visited December 7, 2017).

41 European Justice Website—France. Available at: https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FR-maximizeMS-en.do?clang=en&idSubpage=2&member=1 (last visited December 7, 2017).

42 Articles 156, 281, 312, 315, 330, 444, and 459 of the French Code of Criminal Procedure.

43 *Ibid.*, Article 391.

44 *Ibid.*, Article 61.

45 *Ibid.*, Articles 10-2 (4) and (5).

46 See French Code of Criminal Procedure, *supra* note 40.

47 This is an obligation as a civil claimant: article 306 French Code of Criminal Procedure.

48 Article 1(2) French Code of Criminal Procedure reads: A prosecution may also be initiated by the injured party under conditions set out by the Code.

- participate in the criminal proceedings by:
- asking the court to call witnesses or oppose witnesses being heard;⁴⁹
- asking questions of witnesses and the defendant through the president of the court;⁵⁰
- asking for any investigative action necessary to reveal the truth;⁵¹
- making a written submission regarding technical aspects of the proceedings, in respect of the law and/or the facts;
- receiving free copies of statements, declarations, minutes, and experts' reports and paid copies of other documents;⁵²

An important advantage of this model is that victims have a voice in the criminal process and are granted a set of important participatory rights.⁵³ However, not all systems within the civil-law tradition provide for this suite of rights. Sometimes, victim participation is limited to the pursuit of civil claims.⁵⁴ Moreover, unless victims take the initiative and carry out their own investigation, a court may not necessarily come to their assistance.⁵⁵

Recent Developments in International Criminal Law

International Criminal Court

Until the ICC was created, victims were largely considered “clandestine passengers” of international justice.⁵⁶ The ICC Statute⁵⁷ recognizes the right of victims to participate in the proceedings before the court, not in their capacity as a “party” but rather as a participant.⁵⁸ Although the ICC Statute does not provide for the right of victims to file a “civil action,” it provides for a right to reparation, which is independent of their right of participation.⁵⁹

Article 68(3) of the ICC Statute sets out victims' rights at various procedural stages (i.e., pretrial, trial, and appeal):

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

Victims are also permitted to submit observations concerning jurisdiction or admissibility under article 19 of the ICC Statute.⁶⁰

Article 15(3) of the ICC Statute, which deals with the initiation of the investigation by the Prosecutor, provides that victims may make representations to the Pretrial Chamber, in accordance

49 *Ibid.*, articles 281, 329, 330, and 435.

50 *Ibid.*, article 312, 442, and 454.

51 *Ibid.*, article 456.

52 *Ibid.*, article 81-1, article 156.

53 M. E. I. Brienens and E. H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (2000), 27, available at: https://www.wodc.nl/binaries/ewb-2989-volledige-tekst-dl-1_tcm28-75458.pdf (last visited September 22, 2017).

54 Doak, *supra* note 34, 311.

55 See Brienens and Hoegen, *supra* note 53, 1069.

56 Second Preparatory Commission for the International Criminal Court: Working Group on the Rules of Procedure and Evidence, *Proposal by Columbia: Comments on the Report on the International Seminar on Victims' Access to the International Criminal Court* (document PCNICC/1999/WGRPE/INF/2), PCNICC/1999/WGRPE/DP.37, August 10, 1999.

57 Article 75 ICCSt.

58 Tibori-Szabó and Hirst, *supra* note 7, 4.

59 Article 75(1) ICCSt: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”

60 Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, *Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Pre-Trial Chamber II, ICC-02/04-01/05-320, October 21, 2008, 7, available at: https://www.icc-cpi.int/CourtRecords/CR2008_05875.PDF (last visited September 22, 2017).

with the Rules of Procedure and Evidence.⁶¹ Further provisions concerning victims' rights and their participation before the ICC are contained in the ICC Rules of Procedure and Evidence.⁶²

Extraordinary Chambers in the Courts of Cambodia

The ECCC is the first hybrid court to allow victims to act as civil parties at trial. This means that victims have quite a meaningful role at the ECCC beyond being called as witnesses.⁶³ The Internal Rules of the ECCC probably constitute the most sophisticated approach to the participation of victims in international criminal proceedings. The ECCC Internal Rules provide for:

- a) Definitions of "civil party," "victim," and "victim associations." A Civil Party is a victim who is admitted by the Court as a civil party.⁶⁴

Rule 23(1) of the ECCC Internal Rules provides that the purpose of the "Civil Party" action is to support the prosecution and seek collective and moral reparations. The procedure of the Court sets out fundamental principles, which include the right of a victim to:

 - Participate in proceedings as a civil party by supporting the prosecution.⁶⁵
 - Seek collective and moral reparations.⁶⁶
- b) A Victims Support Section that is empowered to:
 - Assist victims to lodge complaints and make civil party applications;
 - Compile list of victim associations;
 - Support the attendance of victims in hearings;
 - Undertake outreach activities.⁶⁷
- c) The Civil Parties Legal Section that:
 - Provides legal representation for civil parties, where feasible (when no conflict), in a single consolidated group;
 - Makes oral and written submissions on behalf of victims and leads victim evidence and examines witnesses.⁶⁸
- d) Civil party claims for collective and moral reparations include acknowledgment of harm and benefits but not monetary payment.⁶⁹

Ninety-three civil parties took part in the proceedings in the Duch trial (Case 001) before the ECCC. All were represented by lawyers and organized into four Civil Party groups. Some 22 Civil Parties were selected to appear before the Chamber.⁷⁰

61 Article 15(3) ICCSt: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

62 See e.g., Section III, Subsections 1, 3, 4 of the ICC Rules of Procedure and Evidence (hereinafter "ICC RPE"), available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> (last visited August 31, 2017).

63 E. Stover, M. Balthazard, and K. A. Koenig, "Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia," *International Review of the Red Cross (IRRC)* 93 (2011): 503, available at: <https://www.icrc.org/fre/assets/files/review/2011/irrc-882-stover-balthazard-koenig.pdf> (last visited September 22, 2017).

64 See Rules 23–23 *quinquies* of the Internal Rules (Rev.9) of the Extraordinary Chambers in the Courts of Cambodia in relation to definitions as contained in the ECCC Internal Rules' Glossary (hereinafter "ECCC RPE"), available at: https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf (last visited August 26, 2017).

65 *Ibid.*, Rule 23, Rule 23 *quater* (Victims' Association); Rule 31(10); Rule 46(4)), Rule 55(10), Rule 59, Rule 74(4), Rule 94(1)(a).

66 *Ibid.*, Rule 23 and Rule 23 *quinquies*.

67 *Ibid.*, Rule 12bis; Pérez León Acevedo, *supra* note 28, 84.

68 Rule 12 ter (6) ECCC RPE.

69 Rule 23 *quinquies* and Rule 113 ECCC RPE.

70 ECCC, Judgment, July 26, 2010, Case File No. 001/18-07-2007/ECCC/TC, at 218, available at: https://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgement_Case_001_ENG_PUBLIC.pdf (last visited December 7, 2017). See also: E. Stover, M. Balthazard, and A. Koenig, *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 *International Review of the Red Cross* 882, June 2011. Available at: <https://www.icrc.org/eng/assets/files/review/2011/irrc-882-stover-balthazard-koenig.pdf> (last visited December 7, 2017).

In November 2011, the ECCC Trial Chamber began its second trial (Case 002), hearing evidence against three former top-ranking Khmer Rouge leaders. Some 3,866 victims participated as Civil Parties, but only 31 victims were chosen to testify due to “the evidence they could provide on suffering, the relationship between this evidence and the crimes being tried in Case 002/01, and the diversity of impacts (suffering) represented.”⁷¹

Kosovo Special Chambers

Article 22 of the KSCs Statute sets out the rights of victims.⁷² These include:

- A definition of victim, which provides that: “A Victim is a natural person who has personally suffered harm, including physical, mental or material harm, as a direct result of a crime within the jurisdiction of the Specialist Chambers”;⁷³
- The right to apply to participate in the proceedings;⁷⁴
- Rights to “notification, acknowledgement and reparation”;⁷⁵
- Right to be represented by a Victim’s Counsel provided by the Registry’s Victim Participation Office;⁷⁶
- Right to be represented in pretrial and trial proceedings when the personal interest of victims is impacted and when it is not prejudicial to the rights of the accused;⁷⁷

In addition, victims have a right to be consulted before the Rules of Procedure are amended.⁷⁸ They also have a right to apply to the Specialist Chamber of the Constitutional Court when their rights and freedoms are violated.⁷⁹

The Special Tribunal for Lebanon

The STL Statute⁸⁰ and the STL Rules of Procedure and Evidence (hereinafter “STL RPE”)⁸¹ include provisions concerning victims’ protection and participation, both as victims and as witnesses, in the criminal proceedings.

Provisions that provide for the victim’s right to participate include:

a) Article 17 of the STL Statute:

“Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

71 ECCC Website, L. Olsen, “The Purpose of Hearing Victims’ Suffering,” 7 June 2013, available at: <https://www.eccc.gov.kh/en/blog/2013/06/07/purpose-hearing-victims-suffering> (last visited December 7, 2017). See also: Cambodian Human Rights and Development Association (ADHOC) and Harvard Humanitarian Initiative, N. Kirchenbauer and others, *Victims Participation before the Extraordinary Chambers in the Court of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association’s Civil Party Scheme for Case 002*, January 2013, available at: <https://www.eccc.gov.kh/sites/default/files/Victims-participation-before-ECCC-Baseline-Study-Jan-2013.pdf> (last visited December 7, 2017).

72 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, August 3, 2015 (hereinafter “KSCSt”). available at: <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office-3-aug-2015> (last visited August 26, 2017); see also, Rules 113–114 and 167–168 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers including *Rules of Procedure for the Specialist Chamber of the Constitutional Court*, August 25, 2017, KSC-BD-03/Rev1/2017/1 of 127 available at: <https://www.scp-ks.org/en/documents/rules-procedure-and-evidence-kosovo-specialist-chambers-including-rules-procedure> (last visited December 5, 2017).

73 Article 22 (1) KSCs Statute.

74 *Ibid.*, article 22 (2).

75 *Ibid.*, article 22 (3).

76 *Ibid.*, article 22 (5).

77 *Ibid.*, article 22 (6).

78 *Ibid.*, article 19 (4).

79 *Ibid.*, article 49 (3).

80 Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, May 30, 2007 (hereinafter “STLSt.”) available at: <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal> (last visited August 26, 2017).

81 Rules of Procedure and Evidence of the Special Tribunal for Lebanon, STL-BD-2009-01-Rev.9, March 20, 2009 (hereinafter “STL RPE”), available at: https://www.stl-tsl.org/images/RPE/RPE_EN_April_2017.pdf (last visited September 25, 2017).

- b) Rule 51 of the STL RPE, titled “Victims’ Participation Unit”:
 - (A) The Registrar shall set up a unit within the Registry responsible for assisting the victims in participating in the proceedings in accordance with the Statute and the Rules.
 - (B) The Unit shall exercise the following functions: [...]
 - (iii.) receive applications from victims seeking to participate in the proceedings in accordance with Rule 87, verify that these applications are complete and, once this has been done, transmit them to the Pre-Trial Judge; [...].”
- c) Rule 87 of the STL RPE includes “Modes of Participation of Victims in the Proceedings.”

In light of this provision, at the pretrial and trial stages, victims are entitled to all documents disclosed by parties to the proceedings, unless it is not in the interest of justice. Furthermore, during the trial stage, victims can also call, examine, and cross-examine witnesses; file briefs and submissions; and present other evidence. Victims may also present their views at the sentencing stage and participate in appeals subject to authorization by the Appeals Chamber.

Provisions that provide for the protection of victims:

- a) Rule 50 of the STL RPE, titled “Victims and Witnesses Unit”: “The Registrar shall set up a unit responsible for protecting witnesses, victims who participate in the proceedings and, where appropriate, others at risk on account of their interaction with the Tribunal.”
- b) Rule 93 of the STL RPE, titled “Questioning of Anonymous Witnesses by the Pre-Trial Judge”—at any stage of the proceedings and if certain conditions are met:
 - “[...] at the request of the Prosecutor, the Defence, or a legal representative of a victim participating in proceedings, the Pre-Trial Judge shall question the witness in the absence of the Parties or any legal representative of a victim participating in the proceedings.”
- c) Rule 115 of the STL RPE, titled “Interim Non-Disclosure of Identity”:
 - “In exceptional circumstances, the Prosecutor may apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until appropriate protective measures have been implemented.”
- d) Rule 116 of the STL RPE, titled “Application and Grounds for Non-Disclosure.”⁸²
- e) Rule 124 of the STL RPE, titled “Testimony by Video-Conference Link.”⁸³

VICTIMS’ RIGHTS VIS-À-VIS THE SPECIALIZED CRIMINAL CHAMBERS

In this chapter the rights of victims common to all the examples analysed above (the ICC, ECCC, KSCs, and STL) are set out. It is suggested that these rights constitute the international standards for the participation of victims in criminal proceedings. Since these rights are internationally recognized, they ought to be incorporated as enforceable rights by the SCCs.

⁸² Rule 116(A) STL RPE: “Where information in the possession of the Prosecutor is not obtained under or otherwise subject to Rule 118, and its disclosure would ordinarily be required under Rule 110 or 113, but such disclosure (i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties, the Prosecutor may apply ex parte to the Trial Chamber sitting in camera to be relieved in whole or in part of an obligation under the Rules to disclose that material.[...]”

⁸³ Rule 124 STL RPE: “At the request of either Party, the Pre-Trial Judge or a Chamber may, in the interests of justice, order that testimony be received via video-conference link.”

Right to an Effective Remedy and to a Fair Trial

A number of human rights treaties and instruments refer to the right of victims to an effective remedy,⁸⁴ and various international bodies declare that the states' duty to investigate and prosecute gross human rights violations derives from these victims' rights.⁸⁵

In this context, the term "remedy" has two facets, namely procedural and substantive. The former is closely related to a victim's right to a fair trial by an independent and impartial court.⁸⁶ The latter relates to the outcome of the proceedings and relief afforded to victims.⁸⁷ As confirmed by the African Commission of Human Rights in *Jawara v The Gambia*, remedies must be available, effective, and sufficient.⁸⁸ As specified by the European Court of Human Rights (ECtHR), a remedy is effective only if it is available, sufficient, and certain both in law and in practice.⁸⁹ The effectiveness of the remedy does not depend, however, on the certainty of a favorable outcome for the applicant⁹⁰ and must be assessed not only in light of the formal remedies available but also by taking into account the general legal and political context in which they operate as well as the personal circumstances of the applicant.⁹¹

The right to an effective remedy typically entails a right to an investigation, judicial proceedings, and prosecution and punishment of those responsible for human rights violations as well as the right to obtain reparations.⁹² To make this right truly effective, states ought to ensure that victims and/or their families have standing at all stages of criminal proceedings and are able to act as party to these proceedings.⁹³

Right to Be Treated with Dignity and Respect

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter "Declaration of Justice") adopted unanimously by the UN General Assembly provides that "[v]ictims should be treated with compassion and respect for their dignity."⁹⁴ Similarly, the so-called Van Boven/Bassiouni Principles stipulate that "[v]ictims should be treated with humanity and respect for their dignity and human rights [...]".⁹⁵

84 Article 2(3) of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (hereinafter "ICCPR") (ratified by Tunisia on April 30, 1969) available at: <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited September 25, 2017); while the African Charter does not explicitly provide for the right to an effective remedy, the latter might be interpreted from two relevant provisions of the Charter. In this regard see articles 7 and 26 of African [Banjul] Charter on Human and Peoples' Rights 1982, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, available at: <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (last visited September 25, 2017); ratified by Tunisia March 16, 1983; article 8 of the Universal Declaration of Human Rights, GA Res. 2017 A, December 10, 1948; articles 8 and 13 of the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. A/RES/47/133, December 18, 1992; article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 (Tunisia acceded the Convention on November 29, 1956) available at: <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> (last visited September 25, 2017); articles 4, 12, and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (hereinafter "CAT") (ratified by Tunisia on September 23, 1988) available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last visited September 25, 2017); articles 8, 12, 17(2), and 20(2) of the International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3 (Tunisia ratified in 2011).

85 IACtHR, *Case of Trujillo Oroza v. Bolivia*, Judgment, February 27, 2002, Series C No. 92, §99.

86 D. Shelton, *Remedies in International Human Rights Law*, 2nd ed. (2005), 7. See also: ECtHR, *M.S.S. v. Belgium and Greece*, Judgment, January 21, 2011, No. 30696/09, §288: "The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief."

87 *Ibid.*, Shelton, 7.

88 ACHPR, *Jawara v. The Gambia*, May 11, 2000, No. 147/95-149/96, § 32: "A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint." See also: ECtHR, *McFarlane v. Ireland*, Judgment of the Grand Chamber, September 10, 2010, No. 31333/06, §107: "the only remedies which Article 35 paragraph 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice."

89 ECtHR, *Kudła v. Poland*, Judgment, October 26, 2000, App. No. 30210/96 §152.

90 *Ibid.*, *Kudła v. Poland*, §157.

91 ECtHR, *Van Oosterwijck v. Belgium*, Judgment, November 6, 1980, App. No. 7654/76, §36-40.

92 IACtHR, *Case of Durand and Ugarte v. Peru*, Judgment, August 16, 2000, Series C No.68, §130.

93 ICJ, *International Law and the Fight Against Impunity*, *supra* note 5, 122.

94 Principle 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, November 29, 1984 (hereinafter "Basic Principles of Justice"), available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/40/34 (last visited September 9, 2017).

95 Principle 10 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, December 16, 2005 (hereinafter "Van Boven/Bassiouni Principles"), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No5/496/42/PDF/No549642.pdf?OpenElement> (last visited September 9, 2017).

Victims of human rights violations have a right to be treated with dignity, which involves providing special care, protection, and respect. It also entails being informed about developments, scheduling cases in order to facilitate victim participation, and restoring property.⁹⁶

Right to Protection and Assistance

The Declaration of Justice requires that states must take all necessary measures to ensure the victim's security, including that of a victim's family and other witnesses to protect them from all intimidation or acts of reprisal.⁹⁷ The Declaration also contains provisions on the assistance that must be provided to victims before, during, and after the judicial proceeding. These measures typically include material, medical, psychological, and social support.⁹⁸ The victims' right to assistance also entails a right to legal representation throughout the proceedings. Victims should have a right to appoint the counsel of their choice at their own cost, although the statute may require the counsel be selected from the list authorized by the court.⁹⁹ If not in a position or unable to have a counsel of their choice, indigent victims should have the right to have a legal representative appointed by the relevant body, free of charge.¹⁰⁰

The Van Boven/Bassiouni Principles state that "[...] appropriate measures should be taken to ensure [victims'] safety, physical and psychological well-being and privacy, as well as those of their families."¹⁰¹ Moreover, states should "take measures to minimize inconvenience to victims and their representatives, prevent unlawful interference with their privacy, and ensure their safety from intimidation and retaliation before, during, and after legal proceedings."¹⁰² The Van Boven/Bassiouni Principles further stipulate that states should "provide proper assistance to victims seeking access to justice."¹⁰³

Right to Reparation

Traditionally, the right to reparation has not formed part of criminal proceedings. However, some domestic criminal justice systems have evolved along with the development of international criminal law to include reparations in criminal proceedings. This phenomenon has been mostly influenced by the jurisprudence of the ECtHR and Inter-American Court of Human Rights (IACtHR).¹⁰⁴ Various international treaties and instruments have provided for the right to reparation for victims of human rights violations,¹⁰⁵ and it has been declared a norm of customary international law.¹⁰⁶ According to the Van Boven/Bassiouni Principles, victims have the right to an "adequate, effective, and prompt reparation for harm suffered."¹⁰⁷

The IACtHR has held that "[r]eparations are measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and, at the same time, on the pecuniary and non-pecuniary damage caused."¹⁰⁸ Reparations for human rights violations under international law are integral, meaning that both material and moral damages should be repaired.¹⁰⁹ Reparation typically includes restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition.¹¹⁰

96 See UNODCCP, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999), available at: https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf (last visited September 9, 2017), 35.

97 Principle 6, Basic Principles of Justice, *supra* note 94.

98 *Ibid* Principles 14–17.

99 See e.g., 34(6) of the KSCs Statute.

100 See e.g., article 68(3) ICC Statute; UC BSL/Redress/ICTJ, *Victim Participation at the International Crimes Division in Uganda*, *supra* note 4.

101 Principle 10 of the Van Boven/Bassiouni Principles, *supra* note 95.

102 *Ibid*, Principle 12(b).

103 *Ibid*, Principle 12(c).

104 See e.g., D. Shelton, *Remedies in International Human Rights Law*, 1st ed. (2001), 432.

105 Articles 2(3), 9(5), and 14(6) ICCPR, *supra* note 84; article 13 and 14 CAT, *supra* note 84; article 6 of the International Convention for the Elimination of Racial Discrimination 1966, 660 UNTS 195; article 24 of the International Convention for the Protection of all Persons from Enforced Disappearance 2006, 2716 UNTS 3.

106 IACtHR, *Case of the Caracazo v. Venezuela*, Judgment, August 29, 2002, Series C No. 95, §76.

107 Principle 11(b) of the Van Boven/Bassiouni Principles, *supra* note 95.

108 IACtHR, *Case of Baldeón García v. Peru*, Judgment, April 6, 2000, Series C No. 147, §177.

109 ICJ, *International Law and the Fight Against Impunity*, *supra* note 5, 128.

110 Principles 18–23 of the Van Boven/Bassiouni Principles, *supra* note 95; IACtHR, *Case of Loayza TaMay v. Peru*, Judgment, November 27, 1998, Series C No 42, §85.

It should be emphasized that the status as a victim, for the purposes of reparation, applies “regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”¹¹¹

Right to Truth

Given the criminal nature of human rights violations, a criminal justice system can play an important role in fulfilling victims’ right to truth.¹¹² This is particularly the case where criminal proceedings involve a serious and meticulous investigation aimed at identifying and establishing the responsibility of perpetrators and determining individual guilt.¹¹³

VICTIMS’ PARTICIPATION

Determining If a Victim Should Be Permitted to Participate

Determining a victim’s status can be a complex and difficult exercise, especially when there are large number of victims of GHRVs. Courts have to balance various considerations such as the interest of victims, interest of justice, and the expediency of criminal proceedings. Following the ICC example, certain questions could be considered for the purpose of determining victim status.¹¹⁴

Who Will Decide on Applications to Participate?

According to Rule 89(1) of the ICC RPE, “[...] victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber.” Accordingly, ICC judges will examine each application and decide whether the applicant is entitled to participate in the proceedings and at what stages.

How to Make a Decision on Victims’ Status?

At the ICC, judges have to go through two steps:

a) STEP 1: Is the applicant a victim?

Whether a person is a victim is normally decided in accordance with relevant rules of the court in question. At the ICC, judges have to determine if a person is a victim of a situation or a case according to the definition contained in the Rule 85 of the ICC RPE. Judges typically consider the following criteria:

i. Harm suffered

Judges have to determine whether the victim suffered harm and, if so, what type. In this regard the ICC Pretrial Chamber, by interpreting *inter alia* Van Boven/Bassiouni Principles, established that “emotional suffering,” “physical harm,” and “economic loss” may all constitute a form of harm.¹¹⁵

ii. Link between harm and crime

The harm allegedly suffered must be directly linked to the crime. However, in relation to natural persons, “harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims.”¹¹⁶ In principle, victim status under the ICC Statute may be granted to a.) direct victims; b.) their close relatives; and, depending on circumstances, c.) those who were harmed when attempting to prevent the direct victims from

111 Principle 9 of the Van Boven/Bassiouni Principles, *supra* note 95

112 ICJ, *International Law and the Fight Against Impunity*, *supra* note 5, 119.

113 *Ibid.*, at 119.

114 International Criminal Court, Booklet: *Victims Before the International Criminal Court—A Guide for the Participation of Victims in the Proceedings of the Court*, available at: <https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/60910VPRSBookletEnglish.pdf> (last visited September 15, 2017).

115 Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Lubanga* (ICC-01/04-101-tEN-Corr.), Pre-Trial Chamber I, January 17, §172.

116 Judgment on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of January 18, 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, July 17, 2008, §32.

being harmed.¹¹⁷ Lastly, the harm suffered must be personal, and there must be a causal link between the “crimes charged” and the harm alleged, both for direct and indirect victims.¹¹⁸

- b) STEP 2: If victim status has been granted, is the victim entitled to participate in the full proceedings or a particular stage of proceedings?

Applicants are asked to indicate which stage or stages of the proceedings they would like to participate. At each stage of proceedings, the judges of the Chamber will consider which victims are entitled to participate.¹¹⁹ Once an arrest warrant is issued, victims may be identified.¹²⁰ When determining whether a victim is entitled to take part in the proceedings, ICC judges have to answer the following questions:

- Is the applicant a victim of the situation or case that is being dealt with by the Chamber?
- Are the victim’s personal interests affected at that point in the proceedings?
- Is it appropriate for the victim to present his or her views and concerns at that particular point in the proceedings?

What Type of Participation Should Be Permitted?

During criminal proceedings victims should be able to present their views and concerns directly to the judges. This is called participation, which is different from a victim being called as a witness. It normally happens through a legal representative. Ideally, a victim should be able to constitute a “civil party” to criminal proceedings. However, at the very least, a victim should be allowed to:

- Present and request evidence;
- Present, request, and obtain witness testimony;
- Have access to documentation and evidence;
- Lead their witnesses and cross-examine the opposing party’s witnesses;
- Question or challenge the evidence and witnesses presented by the defence;
- Call expert witnesses;
- Challenge and appeal court’s decisions, including judgments or final decisions;¹²¹
- Present observations on whether a court should proceed with an investigation or case;
- Present their views on what charges should be brought against accused persons;
- Attend and participate in hearings before the Court.

INSTITUTIONAL STRUCTURE OF VICTIMS’ PARTICIPATION

The provision of support for victims during criminal proceedings is closely related not only to the victims’ right to dignity but also the victims’ perceptions of the proceedings as fair and their confidence in the criminal justice system.¹²² During criminal proceedings many victims experience trauma and distress, which impacts on their health, finances, and personal relationships.¹²³

117 H. Olasolo and A. Kiss, “The Role of Victims in Criminal Proceedings before the International Criminal Court,” *International Review of Penal Law (IRPL)* 81 (2010): 125, at 137. See also: Redacted Version of Decision “on Indirect Victims”, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, April 8, 2009, §52.

118 *Ibid*, *Lubanga*, §52.

119 ICC *Booklet on Victims’ Participation*, *supra* note 114, 14.

120 *Ibid*, 15.

121 ICJ, *International Law and the Fight Against Impunity*, *supra* note 5, 122.

122 International Criminal Court, *Understanding the ICC*, available at: <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited September 19, 2017).

123 *Ibid*.

Best practices from the ICC and other tribunals suggest that the following institutional framework supporting victims should be created.

General Institutionalized Structure Supporting Victims

The manner in which structures supporting victims with administrative, logistical, and protection arrangements are established is closely linked to a range of rights granted to victims.

Examples include:

- a) At the ICC, the Victims' Participation and Reparations Section (VPRS) and the Victims and Witnesses Unit (VWU) have been established.
 - The VPRS informs victims of their rights relating to participation and reparations before the ICC and assists them in submitting applications to the Court. It also assists victims in obtaining legal advice and organizing their legal representation.
 - The VWU provides support and protection to witnesses and to victims and their family members who are at risk as a result of a witnesses' testimony. When victims testify as witnesses, the VWU provides administrative and logistical support, psychosocial care, and other appropriate assistance.
- b) At the ECCC, the Victims Support Section was created within the Office of Administration, which assists victims to lodge complaints and prepare civil party applications. It also compiles a list of victim associations, supports the attendance of victims in hearings, and undertakes outreach activities.¹²⁴
- c) At the KSCs, the Victims Participation Office provides legal assistance and representation to victims as well as offers "advice and other services associated with the work of the Specialist Chambers, as appropriate."¹²⁵ A Witness Protection and Support Office has also been created.¹²⁶

Legal Aid

Most statutes of international and hybrid tribunals have made provision for legal support for victims. However, the institutional framework and resourcing differ between the institutions.¹²⁷

At the ICC, the Office of Public Counsel for Victims (OPCV) was created in the Registry.¹²⁸ It provides support and assistance to victims and to legal representatives of victims, including legal research and advice. Lawyers from the OPCV may appear before a Chamber in respect of specific issues. It may also represent a victim or a group of victims in ICC proceedings. In the execution of its duties, the OPCV functions as an independent office from the Registry, Chambers, and the Office of the Prosecutor.¹²⁹

At the ECCC, the Civil Parties Legal Section deals with the representation of civil parties before the ECCC. No independent unit exists at the KSCs, but the Registry's Victim Participation Office, known as the Victim's Counsel, is authorized to provide counsel for victims.¹³⁰

¹²⁴ Rule 12 bis ECCC RPE.

¹²⁵ Article 22(5) KSCSt..

¹²⁶ *Ibid*, article 24(1)(b).

¹²⁷ M. Hirst, "Legal Representation of Participating Victims," in *Victim Participation in International Criminal Justice: Practitioners' Guide*, eds. K. Tibori-Szabó and M. (2017), 111.

¹²⁸ Regulation 81 of the Regulations of the Court adopted by the judges of the Court on May 26, 2004, titled "Office of Public Counsel for Victims" (ICC-BD/01-01-04), available at: https://www.icc-cpi.int/NR/rdonlyres/B92oAD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf (last visited September 20, 2017).

¹²⁹ *Ibid*, Regulation 81(3): The "Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office."

¹³⁰ Article 22(5) KSCSt..

Trust Fund for Victims

Trust funds established under international and hybrid tribunals have been mandated to implement reparations for victims as well as to provide assistance and support to victims and their families. At the ICC, the Trust Fund for Victims (TFV) was created by article 79 of the ICC Statute.¹³¹ The TFV's mission is to support and implement programs that address harm resulting from genocide, crimes of humanity, and war crimes. The TFV has a two-fold mandate, which is to:

- implement Court-Ordered reparations, and
- provide physical, psychological, and material support to victims and their families.

Other examples include the Trust Fund established by the UNTAET Regulation, which created the Special Panels for East Timor,¹³² and the Extraordinary African Chambers in the Courts of Senegal's Statute.¹³³

¹³¹ The Trust Fund for Victims, available at: <http://www.trustfundforvictims.org/> (last visited May 12, 2017).

¹³² UNTAET, Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, June 6, 2000 (hereinafter "UNTAET Reg."), available at:

<http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm> (last visited May 3, 2017). Section 25(1) of the UNTAET Reg. reads as follows: "A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims."

¹³³ Article 28(1) EACSt: "A Trust Fund shall be established for the benefit of victims of crimes within the jurisdiction of the Extraordinary African Chambers, and of the beneficiaries of such victims. The Trust Fund shall be financed by voluntary contributions from foreign governments, international institutions, non-governmental organizations and other entities wishing to support the victims."

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

The International Center for
Transitional Justice - ICTJ
Résidence Farah, Rue du Lac Huron,
Bloc B, 2ème étage, Appartement B2.1
1053 Les Berges du Lac, Tunis