

OBTAINING VICTIM STATUS FOR PURPOSES OF PARTICIPATING IN PROCEEDINGS AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
December 2013

ACKNOWLEDGMENTS

Susana SáCouto, War Crimes Research Office (WCRO) Director, and Katherine Cleary Thompson, WCRO Assistant Director, prepared this report. The WCRO also received research assistance from Washington College of Law (WCL) J.D. students Justin Miller and Merve Stolzman, as well as additional assistance from WCL J.D. Students Sophia Niazi, Kalli Wells, Melissa Bellitto and WCRO Staff Assistant Adam Deutsch. We are grateful for the generous support of the Open Society Institute, the Finnish Ministry of Foreign Affairs, the Swiss Federal Department of Foreign Affairs and the WCL, without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including Robert Goldman, Commissioner and Member of the Executive Committee of the International Commission of Jurists (ICJ) and WCL Professor, and the members of the WCRO's ICC Advisory Committee: Mary McGowan Davis, former Acting New York State Supreme Court Judge and Member of the International Judicial Academy and of the American Association for the ICJ; Unity Dow, Commissioner of the ICJ, Member of the ICJ's Executive Committee, and former Judge of the Botswana High Court; Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes and former Deputy General Prosecutor for Serious Crimes in East Timor; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); Chief Justice Phillip Rapoza of the Massachusetts Appeals Court and Reserve Judge of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Supreme Court Chamber and former Chief International Judge serving as Coordinator of the Special Panels for Serious Crimes in East Timor; and Juan Mendez, UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and former Special Advisor on Prevention to the Prosecutor of the International Criminal Court.

ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. It has also provided similar assistance to mechanisms and institutions involved in accountability efforts for serious international crimes at the domestic level, including the War Crimes Section of the Court of Bosnia and Herzegovina, Argentina's Assistance Unit for Cases of Human Rights Violations Committed under State Terrorism, Peru's Instituto de Defensa Legal (dedicated to representing victims in serious crimes cases before Peru's National Criminal Court), and the U.S. Department of State's Office of Global Criminal Justice.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at early stages of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO took on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

**OBTAINING VICTIM STATUS FOR
PURPOSES OF PARTICIPATING IN
PROCEEDINGS AT THE
INTERNATIONAL CRIMINAL
COURT**

WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
December 2013

Copyright © December 2013 by the War Crimes Research Office
American University Washington College of Law
All rights reserved
Printed in the United States of America

COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad,
2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy
Aurora Hartwig De Heer*

A village elder meets with people from the surrounding area.

Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

*Archbishop Desmond Tutu and Minister Simone Veil at the second
annual meeting of the Trust Fund for Victims, courtesy ICC Press
Office*

CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	4
II. GENERAL BACKGROUND	6
A. THE PURPOSE OF THE VICTIM PARTICIPATION SCHEME.....	6
B. LEGAL FOUNDATIONS FOR THE VICTIM PARTICIPATION SCHEME.....	9
C. BRIEF REVIEW OF THE SCOPE OF VICTIM PARTICIPATION IN PRACTICE.....	13
III. OBTAINING VICTIM STATUS AT THE ICC	16
A. THE EARLY CASES: <i>LUBANGA, KATANGA & NGUDJOLO</i>, AND <i>BEMBA</i>.	16
B. INNOVATIONS BY CHAMBERS: <i>GBAGBO</i>, THE KENYA CASES, AND <i>NTAGANDA</i>	22
C. PROPOSALS FOR COURTWIDE REFORM OF THE VICTIM APPLICATION PROCESS.....	37
IV. ANALYSIS AND RECOMMENDATIONS.....	49
A. THE VICTIM APPLICATION PROCESS IS UNSUSTAINABLE AND MUST BE DRAMATICALLY REFORMED	49
B. THE ICC SHOULD ADOPT THE BIFURCATED APPROACH INTRODUCED IN THE TWO KENYA CASES AS THE PROCESS BY WHICH INDIVIDUALS OBTAIN VICTIM STATUS FOR PARTICIPATION IN ALL CASES	51
C. RULE 89 AND RELATED REGULATIONS SHOULD BE AMENDED TO PROVIDE A LEGAL BASIS FOR THE BIFURCATED APPROACH	60



EXECUTIVE SUMMARY

One of the most lauded features of the permanent International Criminal Court (ICC) is its victim participation scheme, which allows individuals harmed by the crimes being prosecuted by the Court to share their views and concerns in proceedings against the persons allegedly responsible. To date, more than 12,000 individuals have applied to participate in proceedings before the ICC, and well over 5,000 have successfully obtained victim status. However, the process established under the documents governing the ICC by which individuals apply for and receive permission to participate in proceedings – which involves each individual victim submitting a detailed form with supporting documentation to the Court, observations on each application by the parties, and an individualized decision on the application by a Chamber of the Court – has proved inefficient for the applicants, the parties, and the Court. At the same time, the process has been frustrating for victims, as it can take more than two years for applicants to receive a decision on their status, meaning victims are often unable to share their views and concerns with the Court during key proceedings in the case. This frustration is compounded by the fact that, for the vast majority of victims, participation takes place through a common legal representative, appointed by the Court to represent significant numbers of victims together, raising the question as to why individual victims were required to endure such a lengthy and detailed application process.

Recognizing that the current system is both unsustainable and undesirable, various Chambers of the Court have been exploring alternative means by which individuals may obtain victim status in the cases before them, and the Court's Assembly of States Parties (ASP) is considering reforming the system courtwide. This report examines the different options that have been tried and/or that are under consideration by the ASP and ultimately recommends that the ASP amend the ICC Rules of Procedure and Evidence and relevant regulations to adopt the bifurcated system of registration and application used in the two Kenya cases currently being tried by the Court. Under this approach, only those victims who wish to share their views and concerns personally before the Court are required to go

through the individual application procedures established under the ICC's current rules. The remaining victims may simply *register* as victim participants by submitting their names, contact information, and information regarding the harm suffered to the Registry. The Registry will then automatically enter this information into a database, without any individualized review by the parties or a decision from the Chamber, and the database will be shared with the Court-appointed common legal representative. Importantly, once registered, the victims will enjoy the same rights granted to the overwhelming majority of victims in previous cases, including: the right to receive information from their common legal representative about the proceedings; the right to access court records, filings, and proceedings via their common legal representative; the right for their common legal representative to make opening and closing statements; and the right to question witnesses and to present evidence through their common legal representative.

As explored in detail below, the bifurcated system represents the most efficient option for reforming the victim application system, saving valuable time and resources for applicants, the Registry, the parties, and the Chambers. While it is true that this approach deprives the Defense of the opportunity to challenge whether individuals meet the status of "victim" under the ICC's Rules, experience has demonstrated that the review conducted by defense teams of individual applications may not necessarily be effective at weeding out unqualified applicants, likely due to the fact that most victims' applications are heavily redacted before being transmitted to the parties for comment. It is also important to remember that the Defense will still have an opportunity to respond to each of the legal submissions made on behalf of "registered" victims during the course of the proceedings – including opening and closing statements, challenges to the admissibility of evidence, etc. – the same way it has always had an opportunity to respond to submissions made on behalf of victims who obtained their status through the individualized application process. Most significantly, perhaps, the bifurcated approach is unlikely to undermine the meaningfulness of victim participation. Indeed, given the fact that this system will allow victims to gain recognition and the right to representation much more quickly than under the current system, the bifurcated approach is likely to make participation *more* meaningful for a large number of victims, as they will have earlier

access to information and, ideally, be able to communicate their views and concerns to the Court throughout the case.

I. INTRODUCTION

To date, more than 12,000 individuals have applied to participate as victims before the International Criminal Court (ICC).¹ While well over 5,000 have successfully obtained victim status and have exercised some form of participation in one or more of the twelve cases that have come before the Court thus far,² the process established under the documents governing the ICC by which individuals apply for and receive permission to participate has proved inefficient for the applicants, the parties, and the Court, as well as frustrating for victims. Over the past few years, certain Chambers of the Court have experimented with implementing new application models in the individual cases before them, and various proposals have been made for courtwide reform of the procedures, although none has yet been adopted. This report outlines the victim application process as originally conceived under the ICC's Rules of Procedure and Evidence and related documents, as well as the various alternative models that have been attempted by Chambers and considered in reports issued by the Court and outside groups, and makes recommendations aimed at ameliorating a broken and unsustainable system.

It is important to stress that the analysis and recommendations in this report are limited to the process by which victims apply to participate before the ICC; it does not address the process for qualifying for reparations in a case. While the definition of "victim" is the same for both the participation and reparations schemes at the ICC, the two are de-linked,³ meaning an individual may choose to participate in

¹ See International Criminal Court, *Twenty-Third Diplomatic Briefing: Figures from the Registry*, 3 (29 May 2013).

² *Id.*

³ See, e.g., International Criminal Court, *Victims' Participation and Reparation Section Booklet, Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, available at http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf (describing the different roles of victims before the ICC and distinguishing between participation and seeking an order of reparations from the Court); La Fédération Internationale des Droits de l'Homme, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter 4: Participation, at 5, April 2007,

proceedings without seeking reparations, and may apply for reparations even if he or she did not participate in the proceedings prior to judgment. Moreover, the scope of the ICC reparations scheme remains very much up for debate, as the Court has yet to issue courtwide principles addressing how the reparations process will work in practice, and the one decision considering such principles in a single case is currently on appeal.⁴ It is therefore not timely at this juncture to opine on the appropriate process by which victims should apply for reparations.

available at http://www.fidh.org/article.php3?id_article=4208 (“It is important to note that the procedure for requesting reparations is an independent procedure. Victims do not have to participate in pre-trial or trial proceedings in order to make a claim for reparations.”).

⁴ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of the Appeals against Trial Chamber I’s “Decision Establishing the Principles and Procedures to be Applied to Reparations” and Directions on the Further Conduct of Proceedings, ICC-01/04-01/06-2953 (ICC Appeals Chamber, 14 December 2012).

II. GENERAL BACKGROUND

A. The Purpose of the Victim Participation Scheme

The International Criminal Court's victim participation regime is a product of a broader movement seeking to achieve restorative, rather than strictly retributive, justice.⁵ Proponents of restorative justice contend that, to truly achieve justice, punishing the guilty is insufficient.⁶ Rather, it is also necessary to allow victims to participate in the proceedings and provide compensation to victims for their injuries.⁷ Proponents believe that participation provides victims with a sense of closure, empowerment, and healing.⁸ While there is no universal understanding of what victim participation should entail, it has been broadly described as victims "having a say, being listened to, or being treated with dignity and respect."⁹

⁵ See generally War Crimes Research Office, *Victim Participation Before the International Criminal Court*, at 8-14 (December 2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1.

⁶ *Id.*

⁷ Judges' Report, *Victims Compensation and Participation*, Int'l Criminal Tribunal for the Former Yugoslavia, CC/P.I.S./528-E, at 1, 14 September 2000, available at <http://www.un.org/icty/pressreal/tolbe.htm>.

⁸ See Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide*, REDRESS, 1999, at 15, available at <http://www.redress.org/downloads/publications/UJEurope.pdf> (arguing that victim participation is a powerful tool to help victims feel justice has been done).

⁹ Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 *J. of Law & Society* 294, 295 (2005) (citing I. Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 *Brit. J. of Crim.* 967, 973 (2004)). See also Mikaela Heikkilä, *INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME: A STUDY OF THE STATUS OF VICTIMS BEFORE INTERNATIONAL CRIMINAL TRIBUNALS AND OF FACTORS AFFECTING THIS STATUS*, 141-42 (2004) ("For the healing process of victims, it is... important that they have a sense of control over how their case is being dealt with, but also, more generally, that they are treated with dignity and respect."). Notably, in referring to "victim participation," we are discussing a role for victims in criminal proceedings other than as witnesses or as claimants for damages. See *infra* n. 46 *et seq.* and accompanying text.

In translating the desire to serve the goals of restorative justice, the drafters of the ICC Rome Statute were particularly influenced by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration), unanimously adopted by the UN General Assembly in 1985.¹⁰ The Declaration marks the first formal recognition at the international level that victims are assured “access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”¹¹ More specifically, the UN Victims Declaration

¹⁰ See generally United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34 (1985). See also E.S.C. Res. 1996/14, U.N. ESCOR, 1996 Sess., Supp. No. 1, 45th plenary mtg., at 38, ¶ 6, U.N. Doc. E/1996/96 (1997) (requesting that the Secretary-General “bring to the attention of the Preparatory Committee for the Establishment of an International Criminal Court the potential applicability of the basic principles contained in the Declaration”); Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 428 (Roy S. Lee ed., 2001) (noting that the UN Declaration was distributed to delegations attending the Preparatory Committee pursuant to the request by the Economic and Social Council). See also Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March-April and August 1996, U.N. GAOR 51st Sess., Supp. No. 22, vol. 1, ¶ 280, U.N. Doc. A/51/22 (1996) (noting that “attention was drawn” to the Victims Declaration as a basis of “further elaborat[ion] and more precisely formulat[ing]” draft Article 43 addressing victims). In 1997, the Preparatory Committee proposed language providing that “[t]he rules of procedure shall include provisions giving effect to the [Victims Declaration].” *Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, Art. 43(7), U.N. Doc. A/AC.249/1997/L.8/Rev.1 (14 August 1997).

¹¹ Judges’ Report, *supra* n. 7, at 1. The Judges’ Report goes on to note that, “[w]hile issues relating to what might generally be referred to as ‘victims’ rights’ have been addressed in many domestic law systems for long periods of time, consideration of these issues under international law is of relatively recent vintage. In 1985, the General Assembly adopted a Declaration of Basic Principles for Victims of Crime and Abuse of Power, which has served as the cornerstone for establishing legal rights for victims under international law and has led to a number of developments relating to victims.”). *Id.* See also M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 H.R.L. Rev. 203, 247 (2006) (noting that the UN Victims Declaration was the “first international instrument to articulate victims’ right to access justice and obtain reparation for their injuries.”).

encourages states to implement measures designed to ensure, *inter alia*, that victims are “treated with compassion and respect for their dignity.”¹² In addition, states are to facilitate the “responsiveness of judicial and administrative processes to the needs of victims” by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; [and]

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.¹³

The rights promoted by the Victims Declaration, including the right to receive information regarding relevant judicial proceedings and the right to present their views and concerns to a court, have been repeatedly recognized as fundamental to providing victims access to justice. Indeed, among the most important rights of victims in the context of their interactions with a criminal justice system in domestic systems is the right to receive information,¹⁴ as victims “repeatedly say

¹²UN Victims Declaration, *supra* n. 10, ¶ 4.

¹³*Id.* ¶ 6.

¹⁴ See, e.g., Marijke Malsch & Raphaela Carriere, *Victims' Wishes for Compensation: The Immaterial Aspect*, 27 J. Crim. Just. 239, 240 (1999) (“Victims of crime wish to receive information concerning the case at all stages of the process... Victims are more likely to feel that they were treated fairly by the criminal justice system when they are kept informed of the developments in their cases.”); Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 Int’l Review of the Red Cross 441, 444 (June 2008) (“As regards criminal proceedings, victims seem more satisfied when they are kept informed of developments or when they have the opportunity to play an active part, for example by giving their opinion on the proceedings.”); Joanna Shapland, *Victims and the Criminal Justice System*, in FROM CRIME POLICY TO VICTIM POLICY 210, 213 (Ezzat A. Fattah, ed. 1996) (describing results from a study of 278 crime victims in England and noting that the “major reason for dissatisfaction was lack of

that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities about developments in their cases.”¹⁵ Furthermore, research on “victim notification indicates that victims who are kept informed by authorities feel that they had an opportunity to express their wishes, that their wishes were taken into consideration by the authorities and that they had some degree of influence over the outcome of the case.”¹⁶ In addition, it is commonly understood that victims are more likely to be satisfied with the criminal justice system if their voice has been heard.¹⁷ Importantly, however, this does not mean that victims necessarily want “a role in the adjudication of their cases.”¹⁸ Rather, according to restorative justice experts Heather Strang and Lawrence Sherman, victims merely “seek the chance to present their views on the case to someone, and not necessarily a key decision maker.”¹⁹ It is the “chance to be heard at all” that is “usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.”²⁰

B. Legal Foundations for the Victim Participation Scheme

The fundamental provision governing victims’ right to participate in

information”); Jo-anne M. Wemmers, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 19 (1996) (“The informational needs of victims are often identified as the most common need of all victims.”)

¹⁵ Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 20 (2003).

¹⁶ United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, at 38 (1999).

¹⁷ Malsch & Carriere, *supra* n. 14, at 240 (“Allowing people to voice their opinions within a procedure increases victim satisfaction with justice.”).

¹⁸ Strang & Sherman, *supra* n. 15, at 24. See also Shapland, *supra* n. 14, at 211-12 (“[T]he victims in our study [involving 278 crime victims in England] were not expressing a desire to take over the criminal justice system. They did not want decision-making power – they were happy that the decisions to charge, to prosecute, to sentence, should be left with those who are taking them today.”)

¹⁹ Strang & Sherman, *supra* n. 15, at 24.

²⁰ *Id.*

proceedings before the ICC is found at Article 68(3) of the Rome Statute, which provides:

Where the personal interests of 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.²¹

Hence, although victims are guaranteed a right to express their “views and concerns,” Article 68(3) does not specify the means by which this should occur, instead leaving the Chambers significant discretion to give meaning to the right. At the same time, the provision makes clear that the Court may require that victims participate through legal representatives, as necessary and in accordance with the ICC’s Rules of Procedure and Evidence.

Along with Article 68(3) of the Rome Statute, the victim participation scheme at the ICC is governed by a number of provisions in the ICC Rules, as well as those found in the Regulations of the Court and the Regulations of the Registry. Perhaps the most important of these ancillary provisions is Rule 85, which provides the definition of “victim.”²² Specifically, Rule 85 states:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

²¹ Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force 1 July 2002, U.N. Doc. A/CONF.183/9, Art. 68(3) (1998).

²² International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, R. 85 (2002).

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.²³

Other relevant provisions in the rules include Rule 89, which governs the process by which victims apply to participate in proceedings before the Court. It states, in part:

1. In order to present their views and concerns, victims shall make [a] written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1^[24], the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a

²³ *Id.*

²⁴ Article 68(1) of the Rome Statute provides: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Rome Statute, *supra* n. 21, Art. 68(1).

victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings...²⁵

Rule 89 is supplemented by Regulation 86 of the Regulations of the Court and Regulation 99 of the Regulations of the Registry. Specifically, Regulation 86(1) reiterates that victims must make a written application to the Registry and mandates that the Registrar establish a standard application form.²⁶ While victims are not required to use the standard form, all applications must, “to the extent possible,” contain specific information,²⁷ such as the identity of the victim, the harm allegedly suffered at the hands of the accused, the location and date of the crime, evidence showing that the victim’s personal interest is affected, and designation of the stage of proceedings in which the victim wants to participate.²⁸ Subparagraph (5) of Regulation 86 requires that the Registrar “present all applications... to the Chamber together with a report thereon,” and that it “endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.”²⁹ Subparagraph (6) then specifies that the Registrar may, subject to an order of the Chamber, choose to submit a single report for multiple applications, “in order to assist [that] Chamber in issuing only one decision on a number of applications” and that “[r]eports covering all applications received in a certain time period may be presented on a periodic basis.”³⁰ Regulation 99 of the Regulations of the Registry provides that, upon receipt of an application pursuant to Rule 89, “the Registrar shall review the application and assess whether disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety

²⁵ ICC Rules, *supra* n. 22, R. 89.

²⁶ Regulations of the Court, ICC-BD/01-01-04, R. 86(1), *adopted* 26 May 2004.

²⁷ *Id.*

²⁸ *Id.* Reg. 86(2). The Registry or the relevant Chamber may request additional information from victims if necessary to complete the application. *Id.* Reg. 86(4), (7).

²⁹ *Id.* Reg. 86(5).

³⁰ *Id.* Reg. 86(6).

and security of the victim concerned” and “shall inform the Chamber of the results of the assessment.”³¹ A victim may also request that “all or part of the information he or she has provided to the Registry not... be disclosed to the Prosecutor, the defence, or other participants,” and the Registry will notify the Chamber of such request.³² The Chamber then has the authority to order the Registrar to redact information from the applications before being transferred to the parties or other participants.³³

Finally, Rules 90 and 91 of the ICC Rules relate to legal representation of victims. In particular, Rule 90 provides that, where a large number of victims are participating in a case, the Court may request that the Registrar appoint a common legal representative for a group of victims.³⁴ Rule 91 specifies that the legal representatives of victims are entitled to “attend and participate in the proceedings,” which “shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions.”³⁵

C. Brief Review of the Scope of Victim Participation in Practice

As indicated above, Article 68(3) leaves the Chambers of the Court a great deal of discretion to determine the exact scope and modalities of victims’ participation. To date, the ICC has conducted confirmation of charges hearings³⁶ in nine cases and five cases have reached the trial stage. By and large, the scope and manner of victim participation has

³¹ International Criminal Court, Regulations of the Registry, ICC-BD/03-01-06, Reg. 99(1), (3) (2006).

³² *Id.* Reg. 99(4).

³³ *See, e.g.*, Christine Van den Wyngaert, Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, 44 Case W. Res. J. Int’l L. 475, 482 (2012).

³⁴ ICC Rules, *supra* n. 22, R. 90(2)-(3).

³⁵ *Id.* R. 91(2).

³⁶ Pursuant to Article 61 of the Rome Statute, the Pre-Trial Chamber shall conduct a confirmation of charges hearing for each case to determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” Rome Statute, *supra* n. 21, Art. 61(5).

been the same in each of these cases. Because the focus of this report is the process by which an individual is recognized as a victim with the right to participate at the ICC, rather than the scope of participation, we will only briefly outline two of the most salient features of the participation scheme here.

The first aspect of the victim participation scheme worth highlighting is that in each case, every victim has been represented by an attorney, and in all but the very first case, each legal representative has been selected by the Court and has been charged with representing large numbers of victims. Thus, for example, in the *Katanga & Ngudjolo* case, the 366 victims who participated in the trial were divided among two groups, and each group was represented by a common legal representative.³⁷ Similarly, in the *Bemba* case, all 4,121 participating victims have been placed into one of two groups, with each group represented by a common lawyer.³⁸ In each of the Kenya cases, all of the victims in each case are represented as a single group by a common legal representative.³⁹

The second important aspect of the victim participation scheme, for purposes of this report, is that, with one exception, all participation takes place through a common legal representative.⁴⁰ In other words,

³⁷ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-1328, ¶¶ 2-4 (Trial Chamber II, 22 July 2009); International Criminal Court, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, ICC-ASP/11/22, ¶ 5, n. 6 (5 November 2012).

³⁸ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08-1005, ¶ 16 (Trial Chamber III, 19 November 2010); ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, at 4, n. 6.

³⁹ See, e.g., *The Prosecutor v. William Samoei Ruto, et al.*, Proposal for the Common Legal Representation of Victims, ICC-01/09-01/11-243, at 4 (Registry, 1 August 2011); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Proposal for the Common Legal Representation of Victims, ICC-01/09-02/11-214, ¶ 45 (Registry, 1 August 2011).

⁴⁰ See Van den Wyngaert, *supra* n. 33, at 480 (“Although it is theoretically possible for victims to appear individually, this would be totally impractical in view of the high number of victims, which tends to increase as time goes by and the Court

it is the legal representatives, not victims themselves, who are permitted to attend status conferences and hearings, make submissions to the Chamber, tender evidence, examine witnesses, and deliver opening and closing statements.⁴¹ The one exception to this general rule is that, in the first three cases to go to trial, the Trial Chamber has allowed a limited number of victims, after submitting an application and obtaining the approval of the Chamber, to appear personally in the trial proceedings to testify under oath or to present his or her views to the Court. Specifically, in the *Lubanga* case, three victims were granted the right to testify in person in The Hague;⁴² in the *Katanga & Ngudjolo* case, the Chamber initially decided four victims would be permitted to testify in The Hague, but later revoked the victim status of two because the Chamber was concerned about the veracity of their accounts;⁴³ and in the *Bemba* case, the Chamber permitted two victims to give evidence under oath in The Hague, and three victims to present their views and concerns via video-link.⁴⁴ Otherwise, no individual victim or group of victims has personally participated in any manner in a case being tried at the ICC.

becomes better known. For that reason, victims at the ICC are, in all cases, represented by common legal representatives.”).

⁴¹ *Id.* at 489.

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications by 3 Victims to Participate in the Proceedings, ICC-01/04-01/06-1562, ¶ 45 (Trial Chamber I, 18 December 2008).

⁴³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Authorizing the Appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, ICC-01/04-01/07-2517-tENG, ¶ 20 (Trial Chamber II, 9 November 2010); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Maintenance of Participating Victim Status of Victims a/0381/09 and a/0363/09 and on Mr. Nsita Luvengika’s Request for Leave to Terminate his Mandate as said Victims’ Legal Representative, ICC-01/04-01/07-3064-tENG, ¶¶ 42, 49 (Trial Chamber II, 7 July 2011).

⁴⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, ¶ 55 (Trial Chamber III, 22 February 2012); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Presentation of Views and Concerns by Victim a/0542/08, a/0394/08 and a/0511/08, ICC-01/05-01/08-2220, ¶ 7 (Trial Chamber III, 24 May 2012).

III. OBTAINING VICTIM STATUS AT THE ICC

As described in detail below, the process by which an individual obtains victim status before the ICC has gone through an evolution over the past several years, and the Court is still struggling to find an acceptable model that will work going forward. Specifically, the challenge is to find a process that will permit victims of crimes being prosecuted before the Court to be recognized as participants in the proceedings within a reasonable time, and enjoy the rights that go along with that status, without unduly taxing the very limited resources of the Court itself and the parties appearing before it.

A. The Early Cases: *Lubanga, Katanga & Ngudjolo, and Bemba*

In the first three cases tried at the ICC, the Chambers, Registry, and parties followed the application procedure laid out in Rule 89 of the ICC Rules and the accompanying regulations, described above.⁴⁵ In other words, each individual wishing to participate in proceedings before the ICC would submit an application to the Victims Participation and Reparations Section (VPRS), which is the organ of the Registry charged with assisting victims,⁴⁶ for individualized determination.⁴⁷ As described by Judge Christine Van den Wyngaert, one of the three judges on the Trial Chamber that presided over the *Katanga & Ngudjolo* case, the “long and cumbersome process” went as follows:

[VPRS receives] the applications, which arrive in the form of very lengthy standard forms plus supporting evidence. These forms – and especially the supporting evidence – may have to be translated into one of the working languages of the Court. Once that is done, the

⁴⁵ See *supra* n. 24 *et seq.* and accompanying text.

⁴⁶ See ICC, Regulations of the Court, *supra* n. 26, Reg. 86(9) (“There shall be a specialised unit dealing with victims’ participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims.”).

⁴⁷ See Van den Wyngaert, *supra* n. 33, at 481.

applications must be sent to the parties for observations. In almost all cases victims are afraid of being identified publicly and ask for the redaction of identifying information. This means that their names are blackened out, as well as any passages in their story that may lead to their identification. In principle, these redactions must each be checked and approved by the competent Chamber. The parties are then given a deadline to make observations. However, as they usually only receive heavily redacted forms, their submissions are unavoidably somewhat abstract. The Chamber is then required to decide – on a case-by-case basis – whether each applicant meets the criteria of Rule 85 and whether his or her interests are affected by the proceedings.⁴⁸

The process was further drawn out by the fact that applications submitted by the VPRS to the Chambers were often incomplete.⁴⁹ For instance, in 2010, the Court reported that only 66 percent of the applications received were accurately completed.⁵⁰ When applications were incomplete, the Chamber had to remit the application back to the VPRS and the VPRS had to follow up with the applicant in an attempt to fill in the missing information or supporting documentation.⁵¹

⁴⁸ *Id.* at 481-82.

⁴⁹ See REDRESS Trust, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future*, at 18 (October 2012) (“Given the limited VPRS field presence, and the extensive reliance on local intermediaries to assist victims, incomplete application forms have constituted one of the main challenges to victim participation so far.”).

⁵⁰ *Id.* at 22.

⁵¹ See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, ¶ 28 (Trial Chamber II, 26 February 2009); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, ¶ 35 (Trial Chamber III, 22 February 2012). See also REDRESS Trust, *supra* n. 49, at 16-18 (“Often victim applicants do not have easy access to the requisite proof to submit to the Court. Also, they may

As of November 2011, the ICC had received 9,910 applications for participation, and each application was reviewed according to this process.⁵² Although the VPRS grouped victim applications “when there [we]re links founded on such matters as time, circumstance or issue,”⁵³ pursuant to Regulation 86(5),⁵⁴ each application was nevertheless individually reviewed by the parties and the Court. Unsurprisingly, this consumed a great deal of resources. For instance, although relatively few victims participated in the first case to be tried at the ICC, the *Lubanga* case, the Defense “repeatedly complained... that the burden of responding to applications to participate, and the ‘potentially detrimental’ allegations raised therein, was impairing the [D]efense’s preparation for the hearing.”⁵⁵ The situation was much worse for the Defense in *Bemba*, which currently has 4,121

misunderstand what is required which leads to incomplete applications and extensive back and forth communication, made more complicated by the poor infrastructure and limited communications capacity of many victims located in situation countries. In some countries civil records and identification documents are non-existent or difficult to access... As a result of these challenges, and the inability of the Registry to swiftly process the applications, years have sometimes gone by before applications have been fully considered and approved.”); Mariana 55, *Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. Int’l. & Comp. L. 497, 512 (2009) (noting that the “filing of incomplete applications, partially due to the lengthiness and complexity of the application forms” was partly to blame for “undue delays” in the processing of victim applications).

⁵² Van den Wyngaert, *supra* n. 33, at 482.

⁵³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Implementation of the Reporting System Between the Registrar and the Trial Chamber in Accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, ¶ 19 (Trial Chamber I, 9 November 2007); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, ¶ 4 (Trial Chamber II, 26 February 2009) (affirming the Trial Chamber I’s instructions and making slight changes to the format, but not in relation to the grouping method); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on 722 applications by victims to participate in the proceedings, ICC-01/05-01/08-1017, ¶ 62 (Trial Chamber III, 18 November 2010) (grouping applications into four smaller groups according to the location of the harm).

⁵⁴ See *supra* n. 29 and accompanying text.

⁵⁵ Christine H. Chung, *Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 Northwestern J. of Int’l Human Rights 459, 490-91 (2008).

participating victims.⁵⁶ In that case, the Defense filed multiple submissions to the Chamber explaining that the time spent on examining and making submissions on the victim applications was to the complete detriment of its capacity to investigate and prepare its own defense for the trial.⁵⁷ It added that it was able to process the applications only because the Chamber granted it a time extension, and the Office of Public Counsel for the Defense (OPCD)⁵⁸ aided the defense team in examining the applications.⁵⁹ The Chambers were also taxed under this system, as noted by Judge Van den Wyngaert, who has written that “before the start of the hearings on the merits in the *Katanga* case, for several months, more than one third of the Chamber’s support staff was working on victims’ applications.”⁶⁰ Finally, the system placed significant strain on the VPRS, which is required not only to process thousands of individual applications, but to obtain information and documentation missing from incomplete applications, prepare reports for the Chambers pursuant to Regulation 86(5) of the Regulations of the Court, and redact sensitive information

⁵⁶ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, at 4, n. 6.

⁵⁷ See, e.g., *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Response to the Third Transmission of Victims’ Applications for Participation in the Proceedings, ICC-01/05-01/08-945, ¶ 5 (Trial Chamber III, 11 October 2010); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Observations on the “Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings, ICC-01/05-01/08-968, ¶¶ 5-6 (Trial Chamber III, 22 October 2010); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Observations on the “Seventh Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings”, ICC-01/05-01/08-1053, ¶ 5 (Trial Chamber III, 26 November 2010).

⁵⁸ The Office of Public Counsel for the Defense, established under Regulation 77 of the Regulations of the Court, is tasked with, among other things, supporting and assisting the Defense when necessary. Regulations of the Court, *supra* n. 26, Reg. 77.

⁵⁹ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Response to the Third Transmission of Victims’ Applications for Participation in the Proceedings, ICC-01/05-01/08-945, ¶ 6 (Trial Chamber III, 11 October 2010); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Request for an Extension of Time for the Filing of Submissions on the 18th Transmission of 350 Victims’ Applications, ICC-01/05-01/08-1992, ¶ 10 (Trial Chamber III, 7 December 2011).

⁶⁰ Van den Wyngaert, *supra* n. 33, at 493.

before transmitting the applications to the Prosecution and Defense.⁶¹

Of course, the “glacial” pace at which individual applications were adjudicated in these early cases also meant that the victims themselves had to wait significant amounts of time between submitting their applications and learning whether they had been recognized by the Court, and before gaining any participatory rights.⁶² Indeed, even in the first few years of the Court’s operations, during which the overall number of applications was relatively low and the Court itself was operating in a limited number of situations, some applicants waited more than *two years* to receive word on their victim status.⁶³

Unfortunately, such “persistent backlogs...resulted in many victims losing out on presenting their views and concerns in relation to key proceedings.”⁶⁴ This state of affairs caused Mariana Pena, who was at the time the Permanent Representative to the ICC of the International Federation for Human Rights (FIDH), to complain in 2009 that the current application system was a “long and cumbersome process for all parties involved, *including victims*.”⁶⁵ Pena also noted that the process “brought about a high amount of litigation during a phase which should be purely administrative.”⁶⁶ This situation had not improved by 2011, as ongoing delays in processing applications meant that “a large number of applicants” in the *Bemba* case “were admitted at a very late stage,” by which time a “significant part of the trial had [already] unfolded.”⁶⁷ In addition to lamenting the slow pace of processing applications, victims’ advocates have also complained that victims find the application procedure complicated, noting that most

⁶¹ See REDRESS Trust, *supra* n. 49, at 18-19.

⁶² Chung, *supra* n. 55, at 497.

⁶³ Pena, *supra* n. 51, at 512.

⁶⁴ Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, Int’l J. of Transitional Justice, 11 (2013).

⁶⁵ Pena, *supra* n. 51, 511 (emphasis added).

⁶⁶ *Id.*

⁶⁷ Pena & Carayon, *supra* n. 64, at 11. See also REDRESS Trust, *supra* n. 49, at 20 (“[E]ven when victims have managed to comply with the deadlines [established by Chambers in a case for the submission of applications], the VPRS has not always been able to process the applications in advance of the deadline and thus such applicants were denied the opportunity to participate in key hearings, through no fault of their own.”).

victims need assistance in completing the standard forms.⁶⁸ The frustration victims experience when completing the forms is compounded by the fact that, once they do obtain victim status, their interests are represented collectively by a legal representative and thus their participatory rights are limited.⁶⁹ As the organization REDRESS has explained:

Because of the individualised processing requirements, victims are requested to provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative which represents their interests collectively with the interests of other victims also being represented. Thus, there is an apparent mismatch between the typical way in which victims will ultimately participate and the information they are required to produce in order to enable them to participate.⁷⁰

Finally, even with this individualized review, it was difficult for the parties to effectively review the applications, given the heavy redactions,⁷¹ calling into question the meaningfulness of the review. Indeed, in the *Lubanga case*, in which there were relatively few victims and thus presumably the Defense had more opportunity and resources to devote to reviewing the applications, all three of the

⁶⁸ See, e.g., Pena & Carayon, *supra* n. 64, at 10; Victims' Rights Working Group, *Sudan Victim Lawyers Recount Their Experiences with the ICC So Far*, VRWG Bulletin, Issue 9, Summer/Autumn 2007, at 7.

⁶⁹ REDRESS Trust, *supra* n. 49, at 16.

⁷⁰ *Id.*

⁷¹ See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Version of the Corrigendum of Decision on the Applications by 15 Victims to Participate in the Proceedings, ICC-01/04-01/06-2659-Corr-Red, ¶ 16 (Trial Chamber I, 8 February 2011) (arguing that extensive redactions of vital information prevented the Defense from assessing whether the applicants met the criteria necessary to obtain victim status).

victims who came before the Chamber to testify at their own request were subsequently stripped of their victim status after the Chamber determined that the accounts they gave to the Court were “unreliable.”⁷² Similarly, as mentioned above, two of the four victims who received permission from the *Katanga & Ngudjolo* Trial Chamber to present testimony to the Court were later denied that privilege, and had their victim status revoked, after their legal representative “expressed doubts as to the veracity of the statements provided by” the victims to the Court.⁷³ In these cases, the applications of the five individuals had been reviewed by the parties and victim status had been granted by the Chamber, and it was not until they provided the Court with far more detailed statements that the Chamber was able to determine that the individuals did not, in fact, meet the criteria to participate as victims in the case.

B. Innovations By Chambers: *Gbagbo*, the Kenya Cases, and *Ntaganda*

By 2011, the Court could no longer ignore the extent to which the number of victim applications burdened the parties involved in proceedings, as well as the Chambers, and the amount of time that victim applicants had to wait to receive recognition by the Court. In April of that year, representatives of certain branches of the Court, including the VPRS and the Office of Public Council for Victims (OPCV),⁷⁴ expressed their concerns to the Assembly of States Parties

⁷² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 502 (Trial Chamber I, 14 March 2012).

⁷³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Maintenance of Participating Victim Status of Victims a/0381/09 and a/0363/09 and on Mr. Nsita Luvengika’s Request for Leave to Terminate his Mandate as said Victims’ Legal Representative, ICC-01/04-01/07-3064-tENG, ¶ 48 (Trial Chamber II, 7 July 2011).

⁷⁴ The OPCV, a wholly independent unit of the Court that falls within the remit of the Registry solely for administrative purposes, was established in September 2005 pursuant to Regulation 81 of the Regulations of the Court. According to Regulation 81(4), the mandate of OPCV is to: “provide support and assistance to the legal representative[s] for victims and to victims, including, where appropriate: (a) Legal research and advice; and

(ASP) over the Court's strategy toward victim participation, stressing that the resources available to them were insufficient to deal effectively with the influx in the number of victim applications submitted to the Court.⁷⁵ These representatives noted that within the first five months of 2011, the number of applications submitted per month escalated 207% from the average number submitted in the whole of 2010.⁷⁶ They also stressed that the increase in the number of situations substantially contributed to this increase.⁷⁷ In 2007, the VPRS was processing around thirty applications per month in relation to four situations.⁷⁸ By the time of the *Bemba* trial, this number increased to around 500 applications in relation to seven situations, but the VPRS's resources remained the same.⁷⁹ The representatives of the Court further reported that the Registry had, on several occasions, to notify the Chambers that it was backlogged and would be unable to process applications within the deadlines the Chambers set.⁸⁰ Against this background, the ASP requested that the Court "review the system for victims' applications to ensure its sustainability, effectiveness and efficiency, and to report thereon to the Assembly."⁸¹ The results of this review are described in Section III.C below. In the meantime, various Chambers of the Court began experimenting with alternative approaches to the application process used in the individual cases before them.

(b) Appearing before a Chamber in respect of specific issues. Regulations of the Court, *supra* n. 26, Reg. 81(4).

In addition, Regulation 80(2), which deals with the appointment of legal representatives for victims, permits a Chamber to appoint OPCV as the legal representative for victims. *Id.* Reg. 80(2).

⁷⁵ International Criminal Court, Assembly of States Parties, *Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, ICC-ASP/10/31, at 3 (5 November 2012).

⁷⁶ *Id.* at 6, n. 8.

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 12.

⁷⁹ *Id.*

⁸⁰ *Id.* at 6, n. 8.

⁸¹ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, ¶ 1 (referring to paragraph 49 of ICC-ASP/10/Res.5, which was adopted in December 2011).

1. *The Gbagbo Approach*

The first Chamber to explore a new application model for victims was Pre-Trial Chamber III, which presided over the *Gbagbo* confirmation hearing.⁸² Specifically, Single Judge Silvia Alejandra Fernández de Gurmendi began discussions in January 2011 with the VPRS and other Registry representatives to seek new approaches to the victims' application process that would improve the efficiency and substantive value of the victim participation scheme, including a possible collective approach.⁸³ The Registry, recognizing the substantial backlog of applications that had yet to be processed, outlined its views regarding the possibility of implementing a more collective approach to the application process.⁸⁴ It opined that an approach that allowed victims to participate only through a collective application would likely reduce its, the Chambers', and the parties' workload.⁸⁵ However, the Registry stated that implementing a collective process represented a "long term project" that would require more resources, radical changes in the application process, and significant amendments to the Court's legal framework, which, in its opinion, expressly calls for at least a partially individualized approach.⁸⁶ It recommended, in the short term, that the Single Judge implement what it called the "mixed" approach that would allow victims to apply either individually or as a group.⁸⁷ The Court could, at a later stage in the proceedings, consider in more detail whether a fully collective approach could be implemented in the long term.⁸⁸

In a 6 February 2012 decision, the Single Judge agreed to implement the Registry's recommendations, calling for a mixed approach in the short term, with the aim of possibly progressing toward a fully

⁸² *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11 (Pre-Trial Chamber III, 6 February 2012).

⁸³ *Id.* ¶ 1.

⁸⁴ *The Prosecutor v. Laurent Gbagbo*, "Organization of the Participation of Victims", ICC-02/11-01/11-29-Red, ¶ 19 (Pre-Trial Chamber III, 6 February 2012).

⁸⁵ *Id.* ¶ 23.

⁸⁶ *Id.* ¶¶ 25, 32.

⁸⁷ *Id.* ¶¶ 33-39.

⁸⁸ *Id.* ¶¶ 32, 49.

collective approach, applicable to all cases, in the long-term.⁸⁹ She acknowledged that while the Court cannot impose collective applications on victims, victims could, pursuant to Rule 89(3),⁹⁰ be “encouraged to join with others so that a single application is made by a person acting on their behalf.”⁹¹ To that end, the Single Judge requested that the Registry implement its proposal and formulate a collective application form that would provide such encouragement.⁹²

On 29 February 2012, the Registry submitted its proposal for a “partly collective application process”⁹³ that was compatible with the Court’s current legal framework, improved the “efficiency and substantive value of victim applications,” and could be implemented with the resources the Court had already allocated for the *Gbagbo* case.⁹⁴ The proposed application form had two parts: the group form, comprising eight pages, and a single-paged individual declaration form.⁹⁵ The group form was intended to outline the common elements of the group, such as the harm suffered or the crimes in question.⁹⁶ The individual form allowed victims to describe their personal injury,⁹⁷ detailing the

⁸⁹ *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Victims’ Application Process, ICC-02/11-01/11, ¶ 7 (Pre-Trial Chamber III, 6 February 2012).

⁹⁰ Rule 89(3) provides that another individual may apply on behalf of a victim if that victim granted him or her consent, is a child or is disabled. ICC Rules, *supra* n. 22, R. 89(3).

⁹¹ *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Victims’ Application Process, ICC-02/11-01/11, ¶ 8 (Pre-Trial Chamber III, 6 February 2012).
⁹² *Id.*

⁹³ *The Prosecutor v. Laurent Gbagbo*, Annex A: Report on the Registry’s Proposed Collective Application Form, ICC-02/11-01/11-45-AnxA, ¶ 10 (Registry, 29 February 2012). The Registry, reiterating its belief that a fully collective approach could not be implemented without amending the legal framework, stated that its proposed approach “would still allow for individual presentation and treatment of victims’ applications for participation, as required by the applicable law, while at the same time introducing a measure of collective management of the process.” *Id.* ¶ 10.

⁹⁴ *Id.* ¶ 8.

⁹⁵ *Id.* ¶ 11; *The Prosecutor v. Laurent Gbagbo*, Annex B: Proposed Partly Collective Application Form, ICC-02/11-01/11-45-AnxB (Pre-Trial Chamber III, 29 Feb. 2012).

⁹⁶ *Gbagbo*, Annex A: Report on the Registry’s Proposed Collective Application Form, *supra* n. 93, ¶ 11.

⁹⁷ *Id.*

individual harm, the events that led to it, and the date and location in which the injury occurred.⁹⁸ The collective application form was not mandatory, and victims had the choice to apply individually using the standard form the Court had been using previously.⁹⁹ Finally, the Registry proposed that additional VPRS staff be maintained in the field to assist victims in completing the relevant forms.¹⁰⁰

The Registry emphasized that having both forms available would substantially reduce the Court's workload and processing and analyzing applications would be less time-consuming.¹⁰¹ Assuming there were 100 victim applicants, it argued that under the previous system, each individual would submit the seven-page application form, together with his or her identity document. This would, in effect, mean that the Registry would have to process 800 pages. Under the Registry's proposed approach, there would be one group application, 100 individual declarations, and 100 identity documents, meaning that the Registry would only have to process approximately 210 pages of applications.¹⁰² However, the Registry also highlighted some potential challenges that the partly collective approach might present. For instance, a victim might submit both an individual application and a group application, in which case the Court may combine both and process the individual application together with the group application.¹⁰³ The Registry also noted the possible difficulties of identifying duplicates, but hoped that, given increased VPRS involvement on the ground, the Registry would be able to detect them early on in the process.¹⁰⁴ Additionally, it emphasized that a victim may belong to more than one group. In that instance, the Court could process an individual declaration for each relevant group application.¹⁰⁵ Finally, the Registry recognized that there could be

⁹⁸ *Gbagbo*, Annex B: Proposed Partly Collective Application Form, *supra* n. 95, at 9.

⁹⁹ *Gbagbo*, Annex A: Report on the Registry's Proposed Collective Application Form, *supra* n. 93, ¶ 12.

¹⁰⁰ *Id.* ¶ 11.

¹⁰¹ *Id.* ¶ 17.

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 21.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* ¶ 22.

discrepancies between the content contained in the group application and the individual declarations, particularly for victims of sexual violence.¹⁰⁶ It proposed that the Court could either request more information to remedy this problem, or encourage the victim to apply individually.¹⁰⁷

On 9 March 2012, both the Prosecution and the Defense filed observations on the proposed collective application approach. The Prosecution indicated that it did not object to the Registry's proposal, arguing that it was compatible with the Court's legal framework and that the application forms provided sufficient detail to make observations on them.¹⁰⁸ It suggested that victims would likely submit at least four collective applications, based on the four underlying incidents in the *Gbagbo* case.¹⁰⁹ It particularly welcomed the Registry's proposed increased presence in the field, stating that this would ensure that the applications are complete before they are submitted to the Court, and would, therefore, alleviate the significant amount of the time the Court had spent in the past in requesting supplementary material or information to complete transmitted applications.¹¹⁰ The Defense urged the Single Judge to reject the proposal, contending that instead of increasing the effectiveness and efficiency of the victims' application process, it would actually increase the amount of work by the parties.¹¹¹ The Defense further highlighted that the collective application form is not as detailed as the existing individual application form, particularly because it does not require that victims identify their date of birth or gender.¹¹²

¹⁰⁶ *Id.* ¶ 23.

¹⁰⁷ *Id.*

¹⁰⁸ *The Prosecutor v. Laurent Gbagbo*, Prosecution's Observations in Relation to Victims' Application Process, ICC-02/11-01/11, ¶ 5 (Office of the Prosecutor, 9 March 2012).

¹⁰⁹ *Id.* ¶ 8.

¹¹⁰ *Id.* ¶ 6.

¹¹¹ *The Prosecutor v. Laurent Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11, ¶ 10 (Pre-Trial Chamber I, 5 April 2012).

¹¹² *Id.* ¶¶ 19, 22.

On 19 March 2012, the OPCV filed its own observations on the practical implications of the Registry's partly collective procedure.¹¹³ Although it expressed support for "improving and expediting" the victims' application process, it opposed the Registry's particular proposal.¹¹⁴ Among the OPCV's objections was the claim that the partly collective application process would be inconsistent with the goals of the Court's legal framework. It argued that the proposal would deprive "victims' participation before the Court of its personalized and/or individualized character in favor of a clearly more generalized and/or collective one,"¹¹⁵ and contended that pressures to conform to views of the group or its leader compounds these concerns.¹¹⁶ It also asserted that the collective application form ignores the "real impact" of certain crimes on certain victims, particularly those who were subject to sexual violence, explaining that victims of gendered violence often cannot effectively participate collectively because of the hidden nature of those crimes.¹¹⁷ Moreover, the OPCV considered that the Registry's proposal might not lead to more expeditious proceedings as claimed,¹¹⁸ highlighting the limited amount of time and resources the Registry has at its disposal to assist all groups applying with the collective application,¹¹⁹ the likelihood of having duplicate applications,¹²⁰ and the Registry's limited experience in Côte d'Ivoire.¹²¹ Finally, the OPCV expressed concern that the individual declaration form did not guarantee that the victim's consent to have another act on his or her behalf was "voluntary and indisputable," particularly given that the person acting

¹¹³ See generally *The Prosecutor v. Laurent Gbagbo*, Observations on the Practical Implications of the Registry's Proposal on a Partly Collective Application Form for Victims' Participation, ICC-02/11-01/11 (Office of Public Counsel for Victims, 19 March 2012) (outlining the OPCV's objections to the proposed partly collective application process).

¹¹⁴ *Id.* ¶¶ 10, 12.

¹¹⁵ *Id.* ¶ 15.

¹¹⁶ *Id.* ¶ 16.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶¶ 25-33.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

on the victim's behalf need not show any direct connection to the victim.¹²²

Despite these concerns, the Single Judge opted to implement the partly collective application approach.¹²³ The Single Judge concluded that the information required in the Registry's proposed forms would be sufficient to determine whether an applicant qualifies as a victim under Rule 85 for the purpose of participating in the proceedings, and that further information could be obtained as necessary should a particular victim be called to testify at the confirmation of charges hearing.¹²⁴ The Single Judge also noted that the information contained in the Registry's proposed individual application fulfilled the requirements of Regulation 86 by providing, *inter alia*, the victim's identity and

¹²² *Id.* ¶ 30. In addition to receiving submissions from the parties and the OPCV on the collective process, the Chamber permitted REDRESS, a non-governmental human rights organization,¹²² to make its own general observations on the Registry's proposal. *The Prosecutor v. Laurent Gbagbo*, REDRESS Trust Observations to Pre-Trial Chamber I of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/11-01/11, ¶ 4 (REDRESS Trust, 16 March 2012). Relying on the experiences of other courts that have incorporated a collective victim application process into their framework, as well as on its own institutional knowledge, REDRESS laid out some specific challenges victims of mass crimes face when applying to participate in court proceedings. *Id.* ¶¶ 9, 18-20. First, it noted that the potential diverse views of victims could present difficulties when grouping victims. *Id.* ¶¶ 26-28. Second, it highlighted the challenges the Court might be faced with in communicating with victims, or in victims communicating amongst themselves. *Id.* ¶¶ 29-31. Specifically, REDRESS opined that factors such as weak infrastructure, harsh terrain, the fact that victims may speak different languages, that they might move, or the Court's limited resources to engage in outreach efforts, would be significant impediments in this regard. *Id.* The organization also expressed concern over victims' ability to constitute themselves into a group, particularly in instances involving sexual or gender-based violence. *Id.* ¶¶ 32-39. Finally, REDRESS emphasized that legitimacy of the group representatives might be of concern, highlighting the possibility that group leaders might coerce individual victims into following their own agendas, and/or that they may not be representative of the group as a whole. *Id.* ¶¶ 40-53.

¹²³ *See Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, *supra* n. 111.

¹²⁴ *Id.* ¶ 20; *see also* ICC Rules, *supra* n. 22, R. 85(a) ("Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.").

address, a description of the harm suffered from a crime within the Court's jurisdiction, a description of the incident, supporting documentation, and information on the affected personal interests of the victim.¹²⁵ Further, the Single Judge similarly concluded that the collective application form contains sufficiently detailed information to allow the legal representative "to fulfil his or her mandate pursuant to Article 68(3) of the Statute and Rules 90 and 91 of the Rules."¹²⁶

On 4 June 2012, the Single Judge granted 139 out of 158 applicants victim status for the confirmation of charges hearing.¹²⁷ Out of the 158 applicants, fifty-seven applied individually while the remaining 101 applicants applied through one of six collective applications.¹²⁸ On 6 February 2013, the Single Judge admitted an additional sixty individual applicants as victim participants.¹²⁹

2. *The Approach in the Kenya Cases*

Yet another approach to simplifying the victim application process was adopted by Trial Chamber V, which was at the time presiding over both the *Ruto & Sang* and *Kenyatta* cases.¹³⁰ Because the

¹²⁵ See *Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, *supra* n. 111, ¶ 21.

¹²⁶ *Id.*

¹²⁷ *The Prosecutor v. Laurent Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, ¶ 5, pp. 25-26 (Pre-Trial Chamber I, 4 June 2012).

¹²⁸ *Id.*

¹²⁹ *The Prosecutor v. Laurent Gbagbo*, Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-384, at 22-23 (Pre-Trial Chamber I, 6 February 2013).

¹³⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victim's Representation and Participation, ICC-01/09-01/11 (Trial Chamber V, 3 October 2012); *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victims' Representation and Participation, ICC-01/09-02/11-498, (Trial Chamber V, 3 October 2012). In May 2013, the Presidency of the ICC constituted Trial Chamber V(a) to preside over the *Ruto & Sang* case and Trial Chamber V(b) to preside over the *Kenyatta* case. See International Criminal Court Press Release, *ICC Presidency Decides on New Composition of Trial Chamber V*, ICC-CPI-20130521-PR906 (21 May 2013). Two of the three judges are the same for

decisions were the same, the following analysis will outline only the reasoning used in the *Ruto & Sang* case.

Trial Chamber V set forth its new plan for victim applications in a 3 October 2012 decision.¹³¹ Specifically, after noting the dramatic increase in victims' participation compared to the Court's earlier cases, Trial Chamber V determined that a more streamlined approach was warranted in order to ensure meaningful victim participation.¹³²

Instead of following the traditional protocol requiring each victim to submit an application pursuant to Rule 89(1), the Chamber devised a bifurcated approach to victim participation that is dependent upon the level of a victim's desired participation.¹³³ Specifically, only those victims who wish to share their views and concerns personally before the Court are required to go through the application procedures established under Rule 89.¹³⁴ In addition to submitting a written application to the Registry, these individuals must indicate, through the common legal representative, why they are the best representative of the group as a whole.¹³⁵ For victims who wish to participate without personally appearing before the Court, the Chamber determined that they should be allowed to present their views and concerns through a common legal representative without needing to complete the application process established in Rule 89.¹³⁶ Rather, the Chamber created a system under which victims may simply *register* as victim participants by submitting their names, contact information, and information regarding the harm suffered to the VPRS.¹³⁷ The VPRS will then automatically enter this information into a database, without any individualized review by the parties or a decision from the Chamber, and the database will be shared with the Court-appointed

each Chamber, but each is presided over by a different judge. *Id.*

¹³¹ *Ruto & Sang*, Decision on Victim's Representation and Participation, *supra* n. 130.

¹³² *Id.*

¹³³ *Id.* ¶ 25.

¹³⁴ *Id.* (requiring victims appearing before the Court in person or via video-link to satisfy the Rule 89 application requirements).

¹³⁵ *Id.* ¶ 56.

¹³⁶ *Id.* ¶ 25.

¹³⁷ *Id.* ¶ 49.

common legal representative for victims, who would then verify which victims are eligible to participate in the case.¹³⁸ As yet another alternative, the Chamber stated that the common legal representative would be permitted to present the views and concerns of non-registered victims who contact the common legal representative directly, so long as the representative determines that such individuals qualify as victims of the case.¹³⁹ Importantly, once the common legal representative determines that a victim is in fact eligible to participate in the case, that victim will enjoy the same rights granted to victims in previous cases, including: the right to access court records, filings, and proceedings;¹⁴⁰ the right for the common legal representative to make opening and closing statements;¹⁴¹ the right to question witnesses, either through OPCV acting on behalf of the common legal representative, or the representative himself or herself when the Chamber authorizes the representative to appear;¹⁴² and the right to present evidence through the common legal representative.¹⁴³ In addition to establishing this registration system, the Chamber mandated that the VPRS provide the Chamber with “detailed statistics” on the victim population as represented by its registration database and prepare a report every two months, in consultation with the common legal representative, “on the general situation” of these victims.¹⁴⁴

Although the registration process designed by the Chamber circumvented the requirements of Rule 89, the Chamber justified its decision by reference to the fact that the Rome Statute directs the Court to give precedence to the Statute in the event of any conflict between it and the Rules of Evidence and Procedure.¹⁴⁵ According to the Chamber, this meant that it could interpret Rule 89(1) in a manner

¹³⁸ *Id.*

¹³⁹ *Id.* ¶ 52.

¹⁴⁰ The Chamber retains the ability to decide on a case-by-case basis whether to allow them access to confidential information. *Id.* ¶¶ 64-66.

¹⁴¹ *Id.* ¶ 73.

¹⁴² *Id.* ¶¶ 74-75.

¹⁴³ *Id.* ¶ 77.

¹⁴⁴ *Id.* ¶ 55.

¹⁴⁵ *Id.* ¶ 22 (citing to Article 51 of the Rome Statute).

that would give life to the object and purpose of Article 68(3) of the Statute, as advancing the norms and purpose of Article 68(3) should take precedence over any technical requirements the Rules imposed.¹⁴⁶ The Chamber also enumerated three purposes for the victim registration procedure. First, it provides victims “with a channel through which they can formalize their claim of victimhood.”¹⁴⁷ Second, it establishes a personal connection between victims and their common legal representative and enables a way for victims to provide input and the representative to provide feedback.¹⁴⁸ Finally, it assists the Court in communicating relevant information to the victims.¹⁴⁹

No party participating in either of the Kenya cases was given the opportunity to submit observations on the Chamber’s proposal before it was implemented, although the Chamber did receive two *amicus* briefs filed in the *Ruto & Sang* case containing observations on the new system shortly after the Chamber delivered its decision.¹⁵⁰ First, Kituo Cha Sheria (Center for Legal Aid Empowerment), a non-governmental human rights organization in Kenya that is actively involved in enhancing community participation in the country’s Truth Justice and Reconciliation Process,¹⁵¹ filed a submission welcoming the Court’s approach and noting that initial reactions from intermediaries and victims in Kenya to the simplified registration

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ¶ 50.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The Chamber also acknowledged that some victims may wish to avoid even the less onerous registration process for security or privacy concerns. *Id.* ¶ 52. The Chamber emphasized that victim representation should be as inclusive as possible, and indicated that the common legal representative must present the views and concerns, in a general way, of even those victims who opt not to register. *Id.* It did not, however, describe how the common legal representative would know what the views and concerns of these un-registered victims would be.

¹⁵⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision Granting the Application by Kituo Cha Sheria for Leave to Submit Observations, ICC-01/09-01/11-473, ¶ 8 (Trial Chamber V, 15 November 2012).

¹⁵¹ *See The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Amicus Curiae* Observations of Kituo Cha Sheria Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/09-01/11-478 (Trial Chamber V, 23 November 2012).

process were positive.¹⁵² However, the organization also expressed concern regarding the lack of judicial oversight with respect to the registration process, and thus recommended that the Chamber “endeavour to undertake some form of judicial review in order to ensure a credible process.”¹⁵³ It also advised that the Court guarantee that, as a result of the registration system, “divisions amongst the victim populations do not arise and feelings of unfairness and resentment do not take hold within the various regions.”¹⁵⁴ The second *amicus* submission came from the attorney who served as legal representative of the *Ruto & Sang* victims during the pre-trial phase, Sureta Chana.¹⁵⁵ She observed that the new system presents the danger that victims will be divided into “first-” and “second-“ classes, thereby undermining the ability of victims in the second category to effectively tell their story and voice their concerns.¹⁵⁶ Chana, like Kituo Cha Sheria, also emphasized that the registration process must be implemented in a “principled and transparent way.”¹⁵⁷ Chana emphasized, however, that her ultimate critique was that the Court failed to adequately consult the victims themselves before making a decision on the manner in which it will collect and process victim applications, particularly because it is they who are “directly affected” by the Court’s decision.¹⁵⁸

3. *The Ntaganda Approach*

The most recent case in which a Chamber has attempted to simplify the victim application process is the *Ntaganda* case. As an initial

¹⁵² *Id.* ¶ 26.

¹⁵³ *Id.* ¶ 27.

¹⁵⁴ *Id.* ¶ 30.

¹⁵⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Request to Present Views and Concerns of Legal Representation at the Trial Phase, ICC-01/09-01/11-469, ¶ 16(a) (Trial Chamber V, 6 November 2012).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Request Pursuant to Ruel 103 of the Rules of Procedure and Evidence for Leave to Submit Observation as *Amicus Curiae*, ICC-01/09-01/11-519, ¶ 8 (Trial Chamber V, 24 December 2012).

matter, the Single Judge overseeing pre-confirmation proceedings in that case requested that the Registry present its observations on the partially collective approach adopted in *Gbagbo*.¹⁵⁹ In response, the Registry informed the Single Judge that the *Gbagbo* experience was an invaluable experiment into more collective processes, and that it had observed certain benefits with this approach.¹⁶⁰ For instance, the group meetings that the VPRS facilitated to discuss matters pertaining to the application process improved victims' psychological well-being.¹⁶¹ Additionally, grouping victims at the application stage improved not only the application process itself, but also the ability of victims to participate in that it made it easier for the victims' legal representative to interact with his or her clients when they are pre-grouped.¹⁶² However, the Registry also acknowledged that in some cases it may not be advisable or feasible to physically bring together groups of victims for the application process due to security concerns or discomfort of victims.¹⁶³ Indeed, the *Gbagbo* experience indicated that, where a group was not pre-existing or self-identified, victims within the group lacked trust, which resulted in reluctance to appoint a single contact person, even when he or she was to have no representational capacity.¹⁶⁴ Ultimately, for these reasons, the Registry did not recommend that the *Gbagbo* approach be adopted in the *Ntaganda* case.¹⁶⁵ Instead, it advised the Court to adopt a more flexible approach where individuals would still apply separately, but

¹⁵⁹ *The Prosecutor v. Bosco Ntaganda*, Decision Requesting the Victims Participation and Reparations Section to Submit Observations, ICC-01/04-02/06-54, ¶¶ 3, 5 (Pre-Trial Chamber II, 26 April 2013). The Single Judge did not explain why she chose to focus on the application process in *Gbagbo*, rather than that used in the two Kenya cases. *Id.*

¹⁶⁰ *The Prosecutor v. Bosco Ntaganda*, Registry Observations in Compliance with the Decision ICC-01/04-02/06-54, ICC-01/04-02/06-57, ¶ 7 (Pre-Trial Chamber II, 6 May 2013).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* ¶ 8 (indicating that some victims will be uncomfortable speaking in front of groups due to the nature of the harm suffered, community tensions, or stigmatization).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ¶ 10 (noting that this process ended up being time-consuming and burdensome on the Registry).

the VPRS would subsequently process the applications in a group.¹⁶⁶ This approach would provide that a victim is not permanently linked to a particular group, but could, later, be considered separately, or as part of another group, thereby avoiding the difficulty that arose in *Gbagbo*, where, if a victim needed to be evaluated separately from the collective application, the Registry had to disband and re-characterize groups in its database.¹⁶⁷

In line with the Registry's recommendation, the Single Judge rejected a collective approach, instead deciding to simplify the application process by paring down the standard application form from seven pages to a single page.¹⁶⁸ It directed the Registry to create a form, which asked the applicant for only such information as is "strictly required by law for the Chamber to determine whether an applicant satisfies the requirements set forth in rule 85 of the Rules,"¹⁶⁹ namely:

- (i) the identity of the applicant;
- (ii) a link between the victim and the crimes with which the suspect is charged; and
- (iii) information regarding the harm suffered by the applicant as a result of those crimes.¹⁷⁰

The Single Judge also observed that the Registry should group victims at the application stage in a manner that would "facilitate the application process and could be time-efficient and beneficial for victims' participation."¹⁷¹ However, the judge did not indicate whether this grouping would differ from or be more efficient than the grouping the VPRS had done in the *Lubanga, Katanga, and Bemba*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67 (Pre-Trial Chamber II, 28 May 2013).

¹⁶⁹ *Id.* ¶ 21.

¹⁷⁰ *Id.* ¶ 20.

¹⁷¹ *Id.* ¶ 34.

cases described above.¹⁷²

C. Proposals for Courtwide Reform of the Victim Application Process

1. 2012 ICC Report

As noted above,¹⁷³ in December 2011, the Assembly of States Parties, recognizing the continued backlog of victims' applications that had yet to be processed, and the limited amount of time and resources all parties to the proceedings had in assessing these applications, requested that the Court undertake a review of the application system. The results of this courtwide review, submitted to the ASP in November 2012, contained six possible reforms the Court could adopt in order to enhance the efficiency of the system, highlighting the advantages and disadvantages to of each option, discussing its compatibility with the Court's legal framework, and identifying the areas in which amendments may be necessary to reform the application process.¹⁷⁴

a) Keep the current system intact, but increase funding

The Court first considered continuing to implement the current system, but funding it in a manner that would ensure its effectiveness and sustainability.¹⁷⁵ Specifically, this option would involve increases in funding to support the Registry, the victims' legal representatives, and Defense teams and the OPCD.¹⁷⁶ While such an option would obviously reduce the resource burden placed on these various actors, the report ultimately disfavored the option, noting that even if resources could be increased to make the current system sustainable in the near term, the approach "may not be sufficiently tailored to the volume of applications expected given the scale of the crimes under

¹⁷² *Id.* ¶ 33.

¹⁷³ *See supra* n. 81 *et seq.* and accompanying text.

¹⁷⁴ *See generally* ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37.

¹⁷⁵ *Id.* ¶ 22.

¹⁷⁶ *Id.* ¶ 25.

the Court's jurisdiction."¹⁷⁷

b) Establish a partly collective application process

Next, the Court considered the partly collective application approach adopted in the *Gbagbo* case. As an initial matter, the report noted that this approach could be adopted without any amendment to the current legal framework.¹⁷⁸ In addition, this option proved to save the *Gbagbo* Pre-Trial Chamber a substantial amount of time.¹⁷⁹ However, given that the *Gbagbo* case remained in the pre-trial stage at the time of the report, a complete assessment of the effectiveness of the approach was not possible.¹⁸⁰ Furthermore, the report noted “[i]ndications... that the option may not be suitable for all circumstances, especially where no natural or pre-established groups can be identified and/or where victims are scattered over a wide geographical area.”¹⁸¹

c) Establish a fully collective application process

The third option reviewed by the Court was the fully collective application process. Such an approach would be based on collective applications submitted by a representative on behalf of a community or recognized association.¹⁸² Because this option represented a significant shift away from the default system, the Court considered several possible ways this option could be carried out. First, the process could be reformed to allow groups to apply collectively to the Court pursuant to the process outlined in Rule 89.¹⁸³ The Court's report noted that such an approach would require modifications to Rule 85 to allow recognition of not only individual victims and those institutions discussed in the current Rule 85, but also allow recognition of communities as victims.¹⁸⁴ The second approach would allow the

¹⁷⁷ *Id.* ¶ 30

¹⁷⁸ *Id.* ¶ 33.

¹⁷⁹ *Id.* ¶ 35.

¹⁸⁰ *Id.* ¶ 38.

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 39.

¹⁸³ *Id.* 39(1).

¹⁸⁴ *Id.*

Chambers to constitute victims into an association defined by specific criteria, and then permit the association to apply to the Registry for certification in a particular case.¹⁸⁵ The final possibility would abolish the detailed application process altogether in favor of “appointing a legal representative to represent victims in the case generally (or more than one if there is a conflict of interest between different groups of victims), and delegating it to the legal representative to define who she or he represents.”¹⁸⁶ The report acknowledged that this approach essentially mirrors the approach adopted by the Trial Chamber in the Kenya cases.¹⁸⁷

After identifying some of the ways in which a fully collective application process could be established, the ICC report considered some of the implications of such an approach on resources and legal restructuring. Importantly, the report indicated that because these options are as yet untested, it is unclear whether amendments would need to be made to Rule 85 and/or Article 68(3).¹⁸⁸ It also found the effects on resource requirements of such an approach to be unclear. While it could be expected that the resources required by the Registry, the parties, and the Chambers would be significantly reduced, some additional resources may be required by the common legal representative(s).¹⁸⁹ Next, the report cautioned that any potential impact on victims of this approach would have to be “carefully evaluated.”¹⁹⁰ In particular, it noted that where victims do not already identify themselves as part of a group or established community, they may lack confidence in the ability of a representative to adequately speak on their behalf.¹⁹¹ Concerns were also raised about the propriety of the Court being involved in the creation of grouped associations where none previously or naturally exists.¹⁹² Another issue, raised by the OPCV, was whether victims of gender crimes would be able to

¹⁸⁵ *Id.* ¶ 39(2).

¹⁸⁶ *Id.* ¶ 39(3).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* ¶ 41.

¹⁸⁹ *Id.* ¶ 42.

¹⁹⁰ *Id.* ¶ 41.

¹⁹¹ *Id.* ¶ 44.

¹⁹² *Id.*

participate in a collective process.¹⁹³ Finally, the report acknowledged that concerns over fairness to the rights of the accused could also arise where information in the collective applications is insufficient to assess victims' credibility.¹⁹⁴

Ultimately, the report concluded that a fully collective approach would require further study and examination before the net effects of its implementation could be fully understood.¹⁹⁵

d) Registry report as basis for observations and approval

The fourth option discussed in the ICC report would envision the Registry preparing and distributing to the Chamber and the parties a *prima facie* report on the victims' applications, which would serve as the basis for parties' observations as well as the decision by the Chambers.¹⁹⁶ While the VPRS has typically prepared reports on individual victims' applications pursuant to Regulation 86(5),¹⁹⁷ those reports are shared only with the Chambers, not with the parties.¹⁹⁸ Furthermore, in the scenario envisioned by the ICC report, the Registry could prepare the report in a manner that highlights borderline cases that are most likely to require adjudication.¹⁹⁹ The Registry report could also be structured in such a way as to allow parties to submit their observations more uniformly, which would assist the Chambers in assessing those observations and improve efficiency in their consideration.²⁰⁰

The report noted several advantages to this option, including cost savings for legal aid, the Prosecution, and the Chambers.²⁰¹ The

¹⁹³ *Id.* ¶ 46.

¹⁹⁴ *Id.* ¶ 47.

¹⁹⁵ *Id.* ¶ 48.

¹⁹⁶ *Id.* ¶ 50.

¹⁹⁷ See *supra* n. 29 and accompanying text.

¹⁹⁸ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, ¶ 52.

¹⁹⁹ *Id.* ¶ 50.

²⁰⁰ *Id.* ¶ 51.

²⁰¹ *Id.* ¶ 53.

Registry, however, would see no gains in efficiency, as it would continue to prepare the reports in the same manner it does under the current system.²⁰² In fact, the Registry's workload could increase if the reports require redacting.²⁰³ Additionally, the OPCD expressed concern that tasking the Registry with making assessments of applications, rather than providing a summary of the applicants' information, would raise questions regarding its neutrality.²⁰⁴

e) Eliminating party observations on victims' applications

In this option, the report envisioned Chambers ruling on victims' applications with either no or limited observations from the parties.²⁰⁵ Specifically, the report identified three possible variations on this idea: (i) parties would be provided limited information for observations, but the applications themselves would be withheld; (ii) Chambers would request parties' submissions on "relevant legal issues," but the applications would be withheld; and (iii) parties would receive no opportunity for observations at all.²⁰⁶ However, under any of the scenarios, the parties would be given the right to move to exclude individuals granted victim status by the Chamber after a decision granting such status had been issued.²⁰⁷

In evaluating this approach, the report observed that, while no real impact would be seen by victims in the application process, the Registry would see significant time savings if it no longer had to prepare redacted versions of each application.²⁰⁸ In addition, the burden on the parties would be significantly reduced, and victims themselves would presumably receive a decision on their applications in a more timely manner, as the Chambers would not need to wait for the parties to submit observations before issuing decisions on victims'

²⁰² *Id.* ¶ 55.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* ¶ 58.

²⁰⁶ *Id.*

²⁰⁷ *Id.* ¶ 54.

²⁰⁸ *Id.* ¶ 60.

status.²⁰⁹ However, the OPCD raised concerns that this option could violate the right of the accused to be heard, although the report did not elaborate on this point.²¹⁰ Another disadvantage was that this option would likely only delay the workload, assuming the parties subsequently move to exclude accepted victims, saving time at the early stages but potentially offering no real long term savings.²¹¹ Finally, the option could lead to disappointment and distress for victims, who may initially receive victim status, but then have that status revoked.²¹²

Ultimately, the report concluded that this option could be used in concert with other types of reform to the application system, but was not on its own a viable measure to increase the efficiency of the process.²¹³

f) Dealing with victims' applications solely at the pre-trial phase

The final option considered in the ICC report would establish a firm deadline in all cases for victims' applications, dictating that they must be received prior to the confirmation of charges hearing.²¹⁴ The report cited the experience of the *Bemba* case, in which the Defense repeatedly complained about the fact that several thousand applications were still being dealt with at late stages of the trial, claiming the demands of reviewing these applications negatively

²⁰⁹ *Id.*

²¹⁰ *Id.* ¶ 61 (explaining OCPD's concerns that the reform option implements no balancing safeguards typically seen in civil law jurisdictions, which could negatively impact the fairness of the proceedings); *see also* Rome Statute, *supra* n. 21, at Art. 67(1) (outlining the rights of the accused in ICC proceedings).

²¹¹ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, ¶ 62 & n. 40 (indicating the Appeals Chamber may have even less capacity to deal with the delayed workload).

²¹² *Id.* ¶ 63.

²¹³ *Id.* ¶ 64.

²¹⁴ *Id.* ¶ 65; *see also* ICC Rules, *supra* n. 22, R. 128 (authorizing the Pre-Trial Chamber to include additional or more serious charges proposed by the Prosecution in accordance with Rules 121 and 122).

impacted its time and ability to prepare its case.²¹⁵ A related but alternative idea would be to give the Pre-Trial Chamber the role of deciding on victims' status at all stages, even after the case has moved on to the trial stage or later.²¹⁶

The Court report indicated that such revisions could be made by amending Rule 89(1) of the Rules of Procedure and Evidence, and that amendments may be required to Article 68(3) of the Rome Statute.²¹⁷ Further study would be needed in order to determine whether dividing the work between Pre-Trial and Trial Chambers could be supported by various articles in the Rome Statute.²¹⁸ In terms of advantages and disadvantages, limiting the submission of applications to the confirmation stage would clearly result in significant savings in time and resources for the Trial Chambers.²¹⁹ Having a deadline in the pre-trial phase would also limit the number of applications and increase the sustainability of the system.²²⁰ Further, parties would save resources and time at trial, as they would not be required to review applications and prepare observations throughout the trial.²²¹ However, the proposed system would only function properly with significantly increased resources at the pre-trial stage, and if there was sufficient time to process applications prior to the confirmation of charges hearing.²²² If time or resources were insufficient, or if the Registry did not have adequate personnel on the ground early enough in the process to assist in disseminating information about the victim participation scheme and preparing applications, the effect would be to prevent many victims from being able to apply at all.²²³ Such concerns could potentially be alleviated by extending the pre-trial phase, or requiring the Prosecution to complete the investigation prior

²¹⁵ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, ¶ 65.

²¹⁶ *Id.* ¶ 66.

²¹⁷ *Id.* ¶ 67.

²¹⁸ *Id.* (indicating potential conflicts with Articles 39, 57, 61, and 64).

²¹⁹ *Id.* ¶ 68.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* ¶ 69.

²²³ *Id.*

to the confirmation of charges.²²⁴ However, concerns could then arise over the lengthier pre-trial phase and potential conflicts with the right of the accused to a speedy trial.²²⁵

g) Final Conclusions of the ICC report

Although it presented a wide variety of potential reforms and revisions to the victim application process, the ICC report ultimately did not endorse or encourage the adoption of any particular alteration. It did, however, indicate that simply maintaining the status quo was unsustainable, and deemed it “necessary to improve the process by which victims apply to participate in the proceedings or seek reparations.”²²⁶ Once again, the report indicated that the six possible reforms mentioned need not be mutually exclusive, but could be used in concert with one another “in different combinations.”²²⁷ Because several of the options outlined in the report have yet to be formally or substantively evaluated, the Court deemed it “premature to recommend a specific option at this stage” and instead recommended further consideration of the “legal, financial, and practical implications” of those options.²²⁸ Finally, the report stressed that other options for improving the application process not presented may also warrant consideration, and that some combination of the possible reformations may be implemented.²²⁹

2. *Other Proposals*

At about the same time that the ICC submitted its report evaluating potential alternatives to the current victim participation plan, two key organizations concerned with victims’ rights, REDRESS and the Victims’ Rights Working Group (VRWG), a network of international

²²⁴ *Id.* ¶ 60.

²²⁵ *Id.*; see also Rome Statute, *supra* n. 21, at Art. 67(1)(c) (providing the accused with the right to “be tried without undue delay”).

²²⁶ ICC, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, *supra* n. 37, ¶ 72.

²²⁷ *Id.* ¶ 73.

²²⁸ *Id.* ¶ 74.

²²⁹ *Id.* ¶ 20.

civil society groups focused on ensuring that the rights of victims are protected during ICC proceedings,²³⁰ published their own views on the various approaches available to the Court in relation to the victim application procedure.²³¹ Additionally, several months after the ICC issued its report, an Independent Panel of Experts collaborated to formulate proposals to reform the application process.²³² All three, like the ICC, highlighted both structural changes that would keep the current procedure intact, but streamline the manner in which it is applied, and more radical ones that would require a revamp of the current regime.

The Independent Panel of Experts favored streamlining the existing process rather than making any drastic changes.²³³ Specifically, it proposed that the Court adopt the short one-page form from the *Ntaganda* decision, reasoning that this approach would be less burdensome for victims and intermediaries, and noting that a shortened form would require less time and resources to process.²³⁴ However, the Independent Panel of Experts also recommended that the form be devised in such a way that victims would be able to attach any other information they wished to divulge to the Court, whether to detail their personal experiences, highlight security concerns, or express views regarding legal representation.²³⁵ While the Independent Panel of Experts acknowledged the benefits of implementing a group application procedure, stating that it would allow the Court “to see

²³⁰ Victims’ Rights Working Group, *Who We Are*, <http://www.vrwg.org/about-vrwg/who-we-are>.

²³¹ See REDRESS Trust, *supra* n. 49; Victims’ Rights Working Group, *International Criminal Court at 10: The Implementation of Victims’ Rights: Issues and Concerns Presented on the Occasion of the 11th Session of the Assembly of States Parties 14-22 November 2012, The Hague* (November 2012), available at http://www.vrwg.org/VRWG%20Documents/201114_VRWG_ASP11-ENGLISH-VERSION.pdf.

²³² Independent Panel of Experts, *Report on Victim Participation at the International Criminal Court*, ¶ 66 (July 2013), available at http://www.iccnw.org/documents/Independent_Panel_of_Experts_Report_on_Victim_Participation_at_the_ICC.pdf.

²³³ *Id.* ¶¶ 44-45.

²³⁴ *Id.* ¶ 65.

²³⁵ *Id.* ¶ 66.

more clearly the different ‘classes’ of victims participating,” it did not recommend this approach because the legal framework requires individual applications²³⁶ and because victims do not naturally fit into homogenous groups.²³⁷

REDRESS stressed that the key concern during the reform process should be developing a more efficient system that allows meaningful victim participation in the proceedings, highlighting that “[a] financially driven reform agenda is unlikely to produce the most effective results.”²³⁸ Accordingly, it proposed a number of logistical changes that would meet this goal. First, highlighting the correlation between outreach performance indicators and the level of victim participation, REDRESS proposed that the Court strengthen its outreach efforts to ensure that victims are well informed about the Court’s procedures and the manner in which they may participate.²³⁹ REDRESS also recommended increased VPRS field presence to help alleviate the problem of incomplete applications,²⁴⁰ and enhanced support to intermediaries so that they may better aid victims in completing the applications.²⁴¹ In addition to these recommendations, REDRESS analyzed the advantages and disadvantages of implementing a more collective approach.²⁴² It first acknowledged that, in reality, most victims participate collectively through a common legal representative and, as such, victims could find that a collective application process is more “consistent with the form of participation they ultimately receive.”²⁴³ However, it also warned that both the partial and the fully collective approach contain “intrinsic limitations.”²⁴⁴ Specifically, REDRESS expressed concern that the voices of victims of gendered crimes and other marginalized groups may not be properly heard or that their form of victimization would

²³⁶ *Id.* ¶ 77.

²³⁷ *Id.* ¶ 78.

²³⁸ REDRESS Trust, *supra* n. 49, at 24.

²³⁹ *Id.* at 24-26.

²⁴⁰ *Id.* at 27.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 33.

²⁴⁴ *Id.* at 40.

not be recognized under a collective process.²⁴⁵ It also reiterated the danger that those claiming to speak for the group may not be representative of all members' interests,²⁴⁶ that the members may lack the trust necessary to share their experiences with the group;²⁴⁷ and that communication among members might be difficult given various factors such as harsh terrain, poor infrastructure, lack of a common language, and the frequency of relocation.²⁴⁸ In the end, REDRESS proposed a tiered application process similar to that in the Kenya cases, particularly because it would be significantly more efficient, and would alleviate the burden on victims, intermediaries, and the Registry.²⁴⁹ However, it stressed that the tiered application procedure also presented certain challenges, and proposed that the Court consider these carefully, and consult victims, the parties, and other stakeholders, before it contemplates applying this procedure generally to all cases.²⁵⁰ In particular, REDRESS emphasized that the Court would need to ensure that the legal representative was communicating regularly with registered victims.²⁵¹ To that effect, it recommended that the Court, should it choose to implement this approach, enhance its outreach efforts and set up a "two way communication system" with the common legal representative.²⁵²

The VRWG also made observations on the partial and fully collective approaches to collecting victim applications, but did not indicate a preference for either one.²⁵³ Instead, it stressed that the Court must consider all options carefully, and decided the degree to which each promotes the goal of enhancing the application process, while at the same time ensuring that it allows meaningful participation for victims.²⁵⁴ The network also emphasized that the Court should collect

²⁴⁵ *Id.* at 36-37.

²⁴⁶ *Id.* at 37.

²⁴⁷ *Id.* at 37-38.

²⁴⁸ *Id.* at 37.

²⁴⁹ *Id.* at 40.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 39.

²⁵² *Id.*

²⁵³ Victims' Rights Working Group, *supra* n. 231, at 8.

²⁵⁴ *Id.* at 7.

and assess the views of all stakeholders, including the victims themselves, when making a determination on the proper application system to implement.²⁵⁵ Commenting on the partly collective application process, VRWG observed that in *Gbagbo*, the Registry received only six collective applications on behalf of 101 victims, and recommended that the Court evaluate the impact a partly collective approach had on victims' ability to participate in these proceedings.²⁵⁶ In relation to the two-tiered system used in the Kenya cases, VRWG recognized, like REDRESS, that it would alleviate the burden on victims, intermediaries and the Registry in collecting and processing applications.²⁵⁷ However, it observed that this system does not guarantee that the majority of victims will choose to register rather than apply, and warned that the Court may still need to be prepared to assess a large volume of applications from victims wishing to personally appear during the proceedings.²⁵⁸

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 8-9.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

IV. ANALYSIS AND RECOMMENDATIONS

A. The Victim Application Process is Unsustainable and Must be Dramatically Reformed

As outlined in Section III.B above, the process by which individuals obtain victim status for purposes of participating in proceedings before the ICC Court, as contemplated in the ICC's Rules and accompanying regulations, is unsustainable. As an initial matter, the Chambers, the parties, and the Registry simply do not have the resources to conduct timely reviews of the thousands of individual applications pouring into the Court according to the procedure established by Rule 89.²⁵⁹ The resource strain is particularly acute for defense teams, which are faced not only with the question of whether each applicant qualifies as a "victim" under the definition set forth by Rule 85, but which must also decide whether to expend valuable resources challenging what they consider false and/or damaging statements contained in the applications. In addition, five of the seven participating victims in the first two cases who actually received additional scrutiny from the Chamber, beyond the information contained in their applications, were subsequently stripped of their victim status.²⁶⁰ While this represents a very small sample, it at least raises the possibility that the review conducted by the parties and Chambers at the application stage may not be particularly meaningful. Finally, victims themselves have been frustrated with the slow pace of the process and the disparity between the difficulties involved in obtaining status and the level of participation ultimately experienced by those who are successful in that endeavor.²⁶¹

The scope of these problems suggests that the entire victim participation scheme may collapse under the strain of the individualized application process if it is not significantly reformed. Unfortunately, a majority of the reforms being contemplated by the Court – including increasing the funds dedicated to processing victim

²⁵⁹ See *supra* n. 24 and accompanying text.

²⁶⁰ See *supra* n. 72 *et seq.* and accompanying text.

²⁶¹ See *supra* n. 62 *et seq.* and accompanying text.

applications, simplifying the application form as seen in *Ntaganda*, or altering the stage at and/or process by which individual victim applications are considered – fail to resolve the fundamental problems outlined above. For instance, increasing the funds available to the Court and parties will not resolve the fact that enormous amounts of time will still need to be devoted by the Registry, Chamber, and parties to processing the applications, meaning proceedings will continue to be delayed by the process and victims will continue to wait for long periods of time before receiving recognition by the Court. Other options, such as simplifying the application form or eliminating the ability of the parties to comment on the applications will only marginally reduce the workload on the Registry and Chambers, and thus also only marginally improve the problems of timing. Only two options appear squarely address all of the problems inherent in the current system. The first is implementing a partly collective approach, as seen in *Gbagbo*, under which victims will have the option of applying for victims status either individually or as a group.²⁶² The second is adopting the bifurcated approach used in the Kenya cases,²⁶³ which essentially encompasses the fully collective approach considered by the ICC’s 2012 report by way of a simple registration process,²⁶⁴ while also allowing for the possibility that some individual victims may apply pursuant to the Rule 89 process in the event they wish to address the Chamber in person. For the reasons discussed below, this report recommends the latter option.

Of course, this is not to say that aspects of certain other proposals considered by the Court and outside parties should not be adopted in conjunction with the bifurcated approach. In particular, even with a simple registration system, it makes sense to maintain a robust VPRS presence in the field in situations where the Court is active, not only for purposes of ensuring potential victims are aware of the

²⁶² See *supra* n. 82 *et seq.* and accompanying text.

²⁶³ See *supra* n. 130 *et seq.* and accompanying text.

²⁶⁴ As noted above, the 2012 ICC report considered various ways in which a fully collective process could be implemented, but all of the options included some mass grouping of individuals, without any individualized review by the parties or Chambers, who would then be represented by a common legal representative. See *supra* n. 182 *et seq.* and accompanying text.

participation scheme, but also to conduct periodic reporting for the Chambers regarding the victims' experiences interacting with the Court. Importantly, as discussed below, the resources that will be saved by adopting a registration system for the vast majority of victims may be used to support such an increased presence by the VPRS on the ground.

B. The ICC Should Adopt the Bifurcated Approach Introduced in the Two Kenya Cases as the Process by which Individuals Obtain Victim Status for Participation in All Cases

1. The Two-Tiered Approach is the Most Efficient of the Available Options

The bifurcated application system would considerably enhance efficiency and expediency of the process by which individuals obtain victim status at the ICC, lifting a significant burden on the Registry, the parties, and the Chambers, and also increasing the likelihood that victims will be able to express their views and concerns to a legal representative early in the life of a case.

As explained above, the significant delays seen in the processing of applications arises due to the limited time and resources of the Registry, the incomplete status of the majority of applications received by the Court, and the lengthy process by which the parties submit comments on applications before the Chamber reviews and ultimately rules on them.²⁶⁵ Since the two-tiered approach does not require victims to apply to participate in proceedings as long as that participation takes place through a common legal representative – which is necessarily going to be the case unless the individual is seeking to be one of what will presumably be a handful of victims invited to address the Chamber directly²⁶⁶ – the system dispenses with the burden placed on victims and the Registry to ensure that applications are complete and all necessary documentation has been

²⁶⁵ See *supra* n. 45 *et seq.* and accompanying text.

²⁶⁶ For more on this, see *infra* n. 274 and accompanying text.

submitted. At the same time, the parties and Chambers are relieved from the requirements of reviewing all but what will likely be a few victim applications, considering only those individuals who wish to address the Court in person.²⁶⁷ While it is true that this approach deprives the Defense of the opportunity to challenge whether individuals meet the status of “victim” under Rule 85, experience has demonstrated that the review conducted by defense teams of individual applications may not necessarily be effective at weeding out unqualified applicants,²⁶⁸ likely due to the fact that most victims’ applications are heavily redacted before being transmitted to the parties for comment.²⁶⁹ Moreover, the Defense will no longer have to worry about the Chambers receiving potentially false and/or damaging information contained in victims’ applications. It is also important to remember that the Defense will still have an opportunity to respond to each of the legal submissions made on behalf of “registered” victims during the course of the proceedings – including opening and closing statements, challenges to the admissibility of evidence, *etc.* – the same way it has always had an opportunity to respond to submissions made on behalf of victims who obtained their status through the Rule 89 application process. Finally, while the bifurcated approach will almost certainly require an increase in the funds and resources allocated to common legal representatives to ensure that they are able to engage in the “process of registering and assessing the victims” they are representing,²⁷⁰ this increase in resources will be offset by the significant decrease in the resources required by the Registry, the parties, and the Chambers under the individualized application system.

While a partially collective approach may substantially reduce the strain on the Court and parties by bringing down the number of

²⁶⁷ For more on this, *see infra* n. 274 and accompanying text.

²⁶⁸ *See supra* n. 72 *et seq.* and accompanying text.

²⁶⁹ *See supra* n. 71 *et seq.* and accompanying text.

²⁷⁰ Anushka Sehmi, *New Victim Participation Regime in Kenya*, VICTIMS’ RIGHTS WORKING GROUP 6, (Spring 2013), available at <http://www.vrwg.org/downloads/130617EnglishVersion.pdf>. Indeed, common legal representatives will likely need not only additional financial resources, but also additional staff members in the field, as well as the funds to compensate those staff members.

individual applications, these actors would have to continue to devote time and resources to those individual applications that are submitted, including the time and resources involved in ensuring the applications are complete, translated, redacted, and reviewed, and a decision is ultimately rendered. Notably, in the one case in which the partly collective approach has been attempted thus far – the *Gbagbo* case – 117 out of the 210 victims who applied to participate in the confirmation proceedings applied via an individual application, suggesting that individualized review will continue to occur in significant numbers in future cases.²⁷¹ At the same time, the partly collective approach will place additional burdens on the Registry, who will need to maintain an increased presence in the field to identify potential groups of victims and assist in the completion of application forms.²⁷² Under the partly collective approach, the Registry will also have to expend resources weeding out duplicate applications in instances where an individual applies as both part of a group and individually, or seeks to participate in multiple groups. By contrast, the registration approach “effectively outsources the process of registering and assessing the victims of the cases to the legal representative’s team.”²⁷³

It should be noted that, as detailed above, the VRWG has questioned whether a bifurcated approach will in fact prove more efficient, as the possibility exists that every individual victim will seek not only to register, but also to apply to participate in person before the Chamber, which will require adherence to the application procedure currently set forth in Rule 89.²⁷⁴ While this is theoretically a possibility, in the first three trials at the ICC, only a very small proportion of the participating victims applied to the Chamber for leave to personally appear before the Court,²⁷⁵ and there is nothing inherent in the registration system

²⁷¹ See *supra* n. 128 *et seq.* and accompanying text.

²⁷² See *supra* n. 100 *et seq.* and accompanying text.

²⁷³ Sehmi, *supra* n. 270.

²⁷⁴ See *supra* n. 258 and accompanying text.

²⁷⁵ As discussed above, three victims appeared personally in the *Lubanga* case, two victims appeared personally in the *Katanga & Ngudjolo* case, and five victims appeared personally in the *Bemba* case. See *supra* n. 42 *et seq.* and accompanying text.

that suggests this number would increase just because the victims in the case registered rather than applying through the Rule 89 process. In the event that this does become an issue, or there is a reasonable basis to expect that it will, a Chamber could request that the common legal representative conduct its own review of victims wishing to participate personally to select those that best represent the views and concerns of the largest number of victims, and limit the application procedure to those victims. Notably, this occurred in the *Bemba* case, in which the legal representatives originally requested that the Chamber permit a total of seventeen victims to appear personally before the Court.²⁷⁶ Even though each of these seventeen individuals had already been approved through the Rule 89 application process, the Chamber found that it would be excessive to consider such a large number of victims for purposes of personal participation before the Chamber and it therefore limited the maximum number of victims *permitted to apply* to appear personally to eight.²⁷⁷ Ultimately, five of the eight were granted the right to personally participate in the proceedings.²⁷⁸ Again, there is nothing inherent in the registration system that would prevent a Chamber from adopting the same approach if it feels overwhelmed by the number of applications from victim wishing to participate in person under the bifurcated approach.

In light of the foregoing, the bifurcated approach is the only feasible option available to the Court that will effectively reform the application process, resulting in benefits to all interested parties.

²⁷⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2027, ¶ 10 (Trial Chamber III, 21 December 2011).

²⁷⁷ *Id.* ¶¶ 9-12.

²⁷⁸ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, ¶ 55 (Trial Chamber III, 22 February 2012); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Presentation of Views and Concerns by Victim a/0542/08, a/0394/08 and a/0511/08, ICC-01/05-01/08-2220, ¶ 7 (Trial Chamber III, 24 May 2012).

2. *The Two-Tiered Approach Will Likely Not Undermine the Meaningfulness of Victim Participation*

While, as discussed in Section IV.C below, adopting the Kenya approach will likely require changes to Rule 89 of the ICC Rules and corresponding regulations, the nature of the victim participation regime under Article 68(3) will not be undermined. As described above, with the single exception of the possibility for a handful of victims to appear before the Trial Chambers personally to give evidence or express their views and concerns – a possibility that remains unchanged under the bifurcated approach – all victim participation at the ICC takes place through common legal representatives.²⁷⁹ Hence, in practice, the “views and concerns” of victims contemplated in Article 68(3) are communicated to the Court almost exclusively through a lawyer. Whether that lawyer connects with his or her clients after they have completed a lengthy and frustrating application process requiring final approval from the Court, or after receiving their contact information upon a simple act of registration by the victims, does not change the nature of the lawyers’ representation or the manner in which the victims access the Court.²⁸⁰ If anything, the registration process *improves* the victims’ experience with the Court because it does away with the “apparent mismatch” identified by REDRESS between the application process and the victim’s ultimate mode of participation, which has led to

²⁷⁹ See *supra* n. 42 *et seq.* and accompanying text.

²⁸⁰ A recent report suggests that “the fact that no organ... is involved in determining the admissibility of victims’ requests for registration is problematic,” observing “[f]or some victims, it may be important that their stories reach the judges and that an independent determination on their victims’ status be made by the Court.” *Avocats Sans Frontières, Modes of Participation and Legal Representation*, at 7 (November 2013). However, the report goes on to note that “no study has been conducted in this regard and it is not possible to assert whether that is a factor that may influence the victims’ willingness to participate in the process and their experience of their participation.” *Id.* Furthermore, as discussed below, feedback from victims participating in the *Ruto & Sang* case indicates that they favor the bifurcated approach, and there is no indication that they are frustrated with the lack of judicial review of their applications. See *infra* n. 283 *et seq.* and accompanying text.

disappointment on the part of victims.²⁸¹ In addition, the registration process will ensure that victims are recognized by the Court at an earlier stage in proceedings, which in turn means they will have quicker access to their legal representative and information relating to the proceedings, as well as the opportunity to express their views and concerns to the Chamber at an earlier stage. As explained above, ensuring that victims are treated with respect, receive information regarding the proceedings in which they are interested, and are given the opportunity to present views and concerns to the Court are among the key goals of the ICC's victim participation scheme.²⁸²

Importantly, reporting by the VPRS to Trial Chamber V on the implementation of the bifurcated process in the *Ruto & Sang* case confirms that victims have been satisfied with the registration option thus far.²⁸³ For example, the first report highlights that, in the Eldoret region, “[t]he majority of the participants were in favor of the proposed system of participation of victims because they considered it less cumbersome than the individual application process and because they thought that it would be more reliable for the [common legal representative] to verify his clients in person.”²⁸⁴ Similarly, in the

²⁸¹ See *supra* n. 70 and accompanying text.

²⁸² See *supra* n. 10 *et seq.* and accompanying text.

²⁸³ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, ICC-01/09-01/11-566-Anx (Trial Chamber V, 23 January 2013); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Second Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, ICC-01/09-01/11-661-Anx (Trial Chamber V, 25 March 2013). Notably, although ninety-three victims recently expressed a desire to withdraw from participation in the *Ruto & Sang* case, they did not cite the bifurcated approach as a reason for their withdrawal. Instead, they complained about the likely implementation of a collective reparations process. Others expressed frustration with the pace of the proceedings, did not believe in the culpability of the accused, or were concerned about their security. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims for the Turbo Area by Letter Dated 5 June 2013, ICC-01/09-01/11-896-Corr-Red, ¶¶ 5, 12 (Trial Chamber V(A), 5 September 2013).

²⁸⁴ *Ruto & Sang*, Periodic Report on the General Situation of Victims in The

Nakuru region, “[p]articipants thought that generally the [registration] system would be easier for intermediaries and for victims than the more extensive application process used in the pre-trial proceedings,”²⁸⁵ and in Turbo/Lugari, a “majority of participants were in favour of the new system of participation because... the individual application system was viewed as complicated.”²⁸⁶ It is also notable that, despite the increased burden placed on the common legal representative to assess the victim status of both registered and non-

Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, *supra* n. 283, ¶ 11(b)(i) (Trial Chamber V, 23 January 2013).

²⁸⁵ *Id.* ¶ 11(a)(i).

²⁸⁶ *Id.* ¶ 11(c)(i). Interestingly, the periodic reports themselves have developed into an additional avenue through which participating victims are able to present their views and concerns to the Chamber, alongside any submissions made by the common legal representative. For instance, in the majority of the reports, victims expressed concerns about their security and feared reprisals after cooperating with the Court. *See, e.g., id.*, ¶¶ 11-12; *Ruto & Sang*, Second Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, *supra* n. 283, ¶¶ 4-5. Others expressed that they were suffering from poverty because they were forcibly displaced from their homes and the government was not doing anything to aid them in this matter. *See, e.g., Ruto & Sang*, Second Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, *supra* n. 283, ¶¶ 3-5; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Fourth Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, ICC-01/09-01/11-825-AnxA, ¶¶ 3-4 (Trial Chamber V, 23 July 2013); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Fifth Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, ICC-01/09-01/11-980-AnxA, ¶¶ 3-6 (Trial Chamber V, 23 September 2013). Others asked the VPRS why rape was not charged in the proceedings, and requested that it be added at a later stage if possible. *Ruto & Sang*, Second Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, *supra* n. 283, ¶¶ 3-5, 8. Of course, this is not to imply that the Chamber has the authority to address such concerns, but again, a key purpose behind the victim participation scheme is providing victims with an avenue to express their views to the Court, and the VPRS reports contribute to this goal.

registered victims, the lawyer representing victims in the *Kenyatta* case has expressed his support for the bifurcated approach.²⁸⁷

As recognized in the ICC's 2012 report on potential changes to the application process, one potential criticism of the registration process as applied in the Kenya cases, in which all victims registering in the case have been assigned to a single common legal representative, is that certain individuals, such as victims of sexual violence, may find it more difficult to voice their experiences for fear of stigmatization or retaliation.²⁸⁸ However, this is actually a criticism of the manner in which victims are grouped for purposes of common legal representation, rather than the process by which individuals obtain victim status. Indeed, in the *Katanga & Ngudjolo* case, which involved charges of sexual violence, all individuals granted victim status for purposes of participation were placed in one of two groups: one comprised of former child soldiers and the other comprised of all victims other than former child soldiers.²⁸⁹ Hence, even though the *Katanga & Ngudjolo* case followed the individualized application process laid out in Rule 89, any victims who were not child soldiers, but who suffered sexual violence, would be placed in the general group of victims of other types of harm. While this may not have been the correct approach, the issue was not the result of the application process. Along the same lines, while it happens to be the case that the Chambers determined in each of the Kenya cases that all victims could participate in a single group, there would be nothing preventing a Chamber following the bifurcated approach from appointing multiple legal representatives for victims and ordering the VPRS to establish various databases of registered victims according to the harm suffered or some other criteria. Of course, the Chambers must remain vigilant in ensuring that appointed legal representatives are carrying out their

²⁸⁷ Remarks by Fergal Gaynor presented at an event of the Twelfth Session of the Assembly of States Parties on 22 November 2013, entitled "Effective and meaningful participation of victims before the ICC: The link between application, participation and representation."

²⁸⁸ See *supra* n. 193 and accompanying text.

²⁸⁹ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-1328, ¶¶ 2-4 (Trial Chamber II, 22 July 2009).

mandate in an effective manner and that victims have been organized into the appropriate number of groups. To achieve this, we endorse REDRESS's recommendation, noted above, that the Chambers set up a "two way communication system" with common legal representatives.²⁹⁰

Another criticism of the bifurcated approach is that, because registered victims receive no judicial stamp of approval, the credibility of their views and concerns might be undermined, and this could create a hierarchy of statuses whereby the Chamber will grant more weight to the submissions of victims who participate in person.²⁹¹ Yet, it may equally be argued that the views of victims who appeared in person in the first three cases tried by the Court may have been given more weight than the views and concerns of the thousands of victims who were merely represented through a common legal representative, even though these victims obtained their status through the Rule 89 process. In other words, there is nothing to suggest this hypothetical "hierarchy" of victims results from the registration process, as opposed to the reality that only a very minute proportion of participating victims will be given the opportunity to actually address the Court in person. Regardless of the process by which individuals obtain victim status, it is up to the Chamber presiding over the case to consider the views and concerns of victims as presented by their legal representative.

Ultimately, the goal of the victim participation regime at the ICC is to ensure that victims are able to experience restorative justice by having their views and concerns considered by the Court. In practice, the ICC Chambers have implemented a system by which these views and concerns are, in the vast majority of instances, shared with the Court through common legal representatives. Whether or not these

²⁹⁰ See *supra* n. 252 *et seq.* and accompanying text.

²⁹¹ See Tatiana Batchvarova, *Comment on the Victims Decision of Trial Chamber V*, PhD Studies in Human Rights Blog (18 October 2012), available at <http://humanrightsdoctorate.blogspot.com/2012/10/comment-on-victims-decision-of-trial.html>; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Request to Present Views and Concerns of Legal Representation at the Trial Phase, ICC-01/09-01/11-469, ¶ 16(a) (Trial Chamber V, 6 November 2012); Sehmi, *supra* n. 270.

representatives learn of the views and concerns of the victims they represent, in order to transmit those views and concerns to the Court, after the victims have completed a lengthy and complicated process resulting in formal approval of their status by a Chamber, or whether the representatives gain access to the victims through a registration process should not have any impact on the overall participation scheme. By contrast, loyally adhering to a flawed application system that has forced victims in the past to wait more than two years to simply gain victim status may in many cases prevent many victims from communicating their views and concerns in a timely and meaningful manner.

C. Rule 89 and Related Regulations Should Be Amended to Provide a Legal Basis for the Bifurcated Approach

As explained above,²⁹² Trial Chamber V implemented the bifurcated approach in the Kenya cases despite the plain language of Rule 89, which specifically sets out a procedure that requires each participant to submit an application to the Registry, and provides that the parties have the right, and the Chamber is obligated, to assess the credibility of these applications before an applicant is granted victim status.²⁹³ While Trial Chamber V justified its approach by finding that Rule 89 is in conflict with Article 68(3), and the latter prevails, this reasoning disregards the plain language of Rule 89. Hence we recommend that Rule 89 be amended in a manner that would provide a legal basis for the bifurcated approach. To ensure consistency, we recommend that the related provisions of the Regulations of the Court and Regulations of the Registry cited in Section II.B above also be amended.²⁹⁴

²⁹² See *supra* n. 145 *et seq.* and accompanying text.

²⁹³ ICC Rules, *supra* n. 22, R. 89.

²⁹⁴ See *supra* n. 26 *et seq.* and accompanying text.

ORDERING INFORMATION

All our reports are available in PDF online at:

http://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm.

Inquiries about obtaining print copies of reports may be sent to:

War Crimes Research Office
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016

Tel.: 202 274-4067

Fax: 202 274-4458

E-mail: warcrimes@wcl.american.edu

Website: www.wcl.american.edu/warcrimes

OBTAINING VICTIM STATUS FOR PURPOSES OF PARTICIPATING IN PROCEEDINGS AT THE INTERNATIONAL CRIMINAL COURT

One of the most lauded features of the permanent International Criminal Court (ICC) is its victim participation scheme, which allows individuals harmed by the crimes being prosecuted by the Court to share their views and concerns in proceedings against the persons allegedly responsible. To date, more than 12,000 individuals have applied to participate in proceedings before the ICC, and well over 5,000 have successfully obtained victim status. However, the process established under the documents governing the ICC by which individuals apply for and receive permission to participate – which involves each individual victim submitting a detailed form with supporting documentation to the Court, observations on each application by the parties, and an individualized decision on the application by a Chamber of the Court – has proved inefficient for the applicants, the parties, and the Court. At the same time, the process has been frustrating for victims, as it can take more than two years for applicants to receive a decision on their status, meaning victims are often unable to share their views and concerns with the Court during key proceedings in the case. This frustration is compounded by the fact that, for the vast majority of victims, participation takes place through a common legal representative, appointed by the Court to represent significant numbers of victims together, raising the question as to why individual victims were required to endure such a lengthy and detailed application process.

Recognizing that the current system is both unsustainable and undesirable, various Chambers of the Court have been exploring alternative means by which individuals may obtain victim status in the cases before them, and the Court's Assembly of States Parties (ASP) is considering reforming the system courtwide. This report examines the different options that have been tried and/or that are under consideration by the ASP and ultimately recommends changes to the victim application system aimed at saving valuable time and resources for applicants, the Registry, the parties, and the Chambers. Importantly, the recommended changes are unlikely to undermine the meaningfulness of victim participation, and in fact will allow victims to gain recognition and the right to representation much more quickly than under the current system, meaning the recommended approach is likely to make participation more meaningful for a large number of victims.



AMERICAN UNIVERSITY

WASHINGTON, DC

WAR CRIMES RESEARCH OFFICE

Washington College of Law

4801 Massachusetts Avenue, NW

Washington, DC 20016

www.wcl.american.edu/warcrimes