Victims’ Participation in the Investigations of the International Criminal Court.pdf

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Victims' Participation in the Investigations of the International Criminal Court

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I. INTRODUCTION

On January 17, 2006, Pre-Trial Chamber I (PTC I) issued the first decision1 of the International Criminal Court (ICC) interpreting and implementing the ground-breaking provisions2 of the Rome Statute, which allow for victims to participate in the Court’s proceedings. The decision arose in the context of the “situation”3 in the Democratic Republic of Congo (DRC) and specifically involved the applications of six victims who expressed their desire to “participate in the proceedings, be it at the investigation, trial or sentencing stage.”4 Upon receiving the applications, Pre-Trial Chamber I determined that the applicants’ request raised the question of whether Article 68(3) of the Rome Statute5—which is the general provision governing

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1 Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I, Jan. 17, 2006) [hereinafter Situation in DRC, PTC I, Jan. 17, 2006].

2 See, e.g., Gilbert Bitti & Håkan Friman, Participation of Victims in the Proceedings, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF EVIDENCE 456 (Roy S. Lee ed., 2001) (“An important objective [of the Rome Statute has been] to accommodate interests of victims through their participation in the proceedings before the Court in their own right and for their own interests. This is a landmark development in that victims in previous military or ad hoc tribunals appeared primarily as witnesses and had no independent role.”); Carsten Stahn, Héctor Olásolo & Kate Gibson, Participation of Victims in Pre-Trial Proceedings of the ICC, 4 J. INT’L CRIM. JUST. 219, 219 (2006) (“The participation of victims in the proceedings of the International Criminal Court (ICC) is generally presented as a major structural achievement of the ICC system, by both academics and legal practitioners.”).

3 According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” Situation in DRC, PTC I, Jan. 17, 2006, supra note 1, ¶ 65. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’ and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” Id.

4 Id. ¶ 19.

5 As discussed in detail below, Article 68(3) provides as follows:

"Where the personal interests of victims are affected, the Court shall permit..."
victims’ participation before the Court—should apply at the investigation stage of a situation. The Office of the Prosecutor (OTP) submitted several arguments to PTC I supporting its position that Article 68(3) is only intended to apply in a “case,” i.e. after the Court identifies an individual suspect, not in a “situation.” However, in its January 17, 2006 decision, the Chamber rejected the OTP’s position, setting forth a number of counter-arguments to find that Article 68(3) applies to both “situations” and “cases.”

This article takes the position that neither the plain text of the Rome Statute nor the drafting history behind Article 68(3) demonstrates unambiguously whether or not the provision is intended to apply to the investigation phase of a “situation.” Rather, as detailed below, the drafters of the ICC victims’ participation scheme left the Court broad discretion to determine how the provisions of that scheme should be implemented to achieve an appropriate balance between the drafters’ goals and concerns. However, as a practical matter, PTC I’s decision to extend Article 68(3) to the investigation phase of a situation has failed to serve the restorative function envisaged by the drafters of the victims’ participation scheme, while also undermining the efficiency and fairness of the proceedings.

Thus, rather than afford a small number of “situation victims” with a set of theoretical “participation rights” at the investigation stage under Article 68(3), the Court should focus its resources on ensuring the effective exercise of the rights expressly available to victims, particularly at the investigation stage. This means making information about the ICC available to victims and encouraging them to communicate with the Court, notifying the broadest category of potential victims about specific rights available to them in the Rome Statute and Rules of Procedure during an investigation, and making clear to victims how they might meaningfully participate under Article 68(3) in the context of a case against an individual suspect in the future.

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7 Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, ¶¶ 13–17, 30 (Aug. 15, 2005).

II. THE GOALS AND CONCERNS UNDERLYING THE DESIGN OF THE ICC VICTIMS' PARTICIPATION SCHEME

A. ICC Victims' Participation Scheme Motivated by Desire to Achieve Restorative Justice

The unprecedented provisions of the Rome Statute governing victims' participation before the International Criminal Court are largely a product of a much broader movement in recent decades towards the achievement of restorative justice. Generally speaking, restorative justice theory holds that "justice should not only address traditional retributive justice, i.e., punishment of the guilty, but should also provide a measure of restorative justice by, inter alia, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries." While the concept of victims' "participation" is not easily defined, it has been described broadly as victims "having a say, being listened to, or being treated with dignity and respect." Advocates of victims' participation in criminal justice mechanisms believe that participation has a number of potential restorative benefits,

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9 See, e.g., Emily Haslam, Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 315 (Dominic McGoldrick et al. eds., 2004) (noting that the Rome Statute marked a "major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order," towards a "more expansive model of international criminal law that encompasses social welfare and restorative justice"); Bitti & Friman, supra note 2, at 456, 457 ("The model for victims' participation thus developed in the [Rome] Statute ... was seen as an important achievement because the Court's role should not purely be punitive but also restorative."); Fiona McKay, Legal Officer, REDRESS, Statement to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) on behalf of the Victims' Rights Working Group (June 16, 1998), available at http://www.un.org/icc/speeches/616mck.htm ("Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.").

10 International Criminal Tribunal for the Former Yugoslavia, Judges' Report, Victims' Compensation and Participation, 1, CC/P.I.S./528-E (Sept. 13, 2000), available at http://www.un.org/icty/pressreal/tolb-e.htm [hereinafter ICTY Judges' Report]. The term "restorative justice" is a broad term used in a variety of contexts, including as a shorthand reference to programs designed to facilitate victim-offender mediation outside the traditional criminal justice realm. However, we restrict our use of the term in this report to the movement within the criminal justice context that holds mechanisms created to deliver criminal justice should focus on the interests of victims, as opposed to strictly punishing wrongdoers.

11 Jonathan Doak, Victims' Rights in Criminal Trials: Prospects for Participation, 32 J.L. SOCY 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 HEIKKILA, 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 "victims' participation," we are discussing a role for victims in criminal proceedings other than as witnesses or as claimants for damages. See infra Section III.A.
including the promotion of victims' "healing and rehabilitation,"\textsuperscript{12} through a "sense of empowerment and closure"\textsuperscript{13} that is said to accompany victims' participation. Additionally, some supporters of victims' participation claim that the participation of victims may assist courts "in making a contribution to the reconciliation of a community or nation more generally."\textsuperscript{14} Finally, groups that supported a right of victims' participation before the ICC argued that victims' involvement will bring the Court's proceedings "closer to the

\begin{quote}
Participation is significant not only to protecting the rights of the victim at various stages of the proceeding, but also to advancing the process of healing from trauma and degradation. The active involvement, enhanced respect and protection afforded by participation and representation is particularly significant for victims of sexual and gender violence whose perceptions and needs are—in all cultures of the world—frequently ignored, presumed, or misunderstood.
\end{quote}

\textit{Id;} see also VICTIMS' RIGHTS WORKING GROUP, VICTIMS' RIGHTS IN THE INTERNATIONAL CRIMINAL COURT 4 (2000), available at http://www.vrwg.org/Publications/01VRWG%20flyer2000.pdf ("The possibility afforded to victims to contribute to fact-finding and truth-telling in the judicial process before the ICC may contribute to their healing after victimization and trauma.").


On an individual level, acknowledgement at least begins to heal psychic wounds. Its psychological importance is in that it vindicates the victim by, \textit{inter alia}, signifying the transfer of the responsibility to the wrongdoers. The victim is no longer the lone bearer of the awful knowledge, and the pain is shared as well. Further, the ability to participate actively in the proceedings, as is provided for in the Court's procedures, may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.

\textit{Id.;} Doak, \textit{supra} note 11, at 312 ("[M]any victims feel that procedures which even allow \textit{passive} participation in the criminal trial carry a certain symbolic importance for many victims which, in turn, can reduce feelings of exclusion and unfairness.")(emphasis in original). Cf. Diane Orentlicher, \textit{Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity}, ¶ 11, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004) (explaining that including victims in the design of policies for combating impunity "can help reconstitute the full civic membership of those who were denied the protection of the law in the past," and that victims' "participation in public deliberations may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government").

\textsuperscript{14} Stahn et al., \textit{supra} note 2, at 221.
persons who have suffered atrocities"\textsuperscript{15} and increase the likelihood that those most affected by criminal acts will be satisfied that justice has been done.\textsuperscript{16}

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 (U.N. Victims Declaration), unanimously adopted by the U.N. General Assembly in 1985.\textsuperscript{17} The Declaration marks the first formal recognition at the international level that victims are entitled “access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”\textsuperscript{18} More specifically, the

\textsuperscript{15} Bitti & Friman, \textit{supra} note 2, at 457 (“Participation of victims was . . . considered to be an essential tool for bringing the Court and its proceedings closer to the persons who have suffered atrocities.”).

\textsuperscript{16} WOMEN’S CAUCUS FOR GENDER JUSTICE, \textit{RECOMMENDATIONS AND COMMENTARY FOR THE ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE} 20 (June 2000) (“The right of victims to participate in the proceedings was included in the Rome Statute to ensure that the process is as respectful and transparent as possible so that justice can be seen to be done and to advance the healing of individuals and of society.”); VICTIMS’ RIGHTS WORKING GROUP, \textit{VICTIM PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT: A SUMMARY OF ISSUES & RECOMMENDATIONS} 2 (Nov. 2003), \textit{available at} http://www.vrwg.org/Publications/01VRWG_nov2003.pdf (“Taking into account the perspectives of victims will help to ensure that victims have a positive relationship with the Court, and that the processes will neither retraumatise them nor undermine their dignity.”); Memorandum from Human Rights Watch to the International Criminal Court 1 (Mar. 3, 2004), \textit{available at} http://hrw.org/english/docs/2004/03/12/global8114.htm [hereinafter Human Rights Watch Memorandum] (“By breaking down traditional barriers between victims and the judicial process, and by enabling victims to have more control over their interaction with the ICC, justice is more likely to be accessible and seen as responsive to those who have suffered the most.”).


\textsuperscript{18} ICTY Judges’ Report, \textit{supra} note 10, at 1.

While 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
U.N. Victims Declaration encourages states to implement measures designed
to ensure, inter alia, that victims are "treated with compassion and respect
for their dignity."¹⁹ 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 . . . .²⁰

Thus, among the rights promoted by the Victims Declaration are the
right of victims to be treated with respect, the right to receive information
regarding relevant judicial proceedings, and the right to present their views
and concerns to a court. While some national jurisdictions involve victims to
an even greater extent in criminal proceedings, these principles—being
treated with respect, receipt of information, and the opportunity to present
views and concerns—are seen as fundamental to providing victims "access to
justice."²¹

In addition to being influenced by the restorative justice movement
generally, the drafters of the ICC victims' participation scheme were
conscious of the experiences of the ad hoc criminal tribunals in the former
Yugoslavia and Rwanda, which are widely-perceived to have failed to connect
with the affected communities on whose behalf they were established.²²

and has led to a number of developments relating to victims.

Id.; see also M. Cherif Bassiouni, International Recognition of Victims' Rights, 6 HUM. RTS. L.
REV. 203, 247 (2006) (noting that the U.N. Victims Declaration was the "first international
instrument to articulate victims' right to access justice and obtain reparation for their injuries").

¹⁹ U.N. Victims' Declaration, supra note 17, ¶ 4.

²⁰ Id. ¶ 6.

²¹ HEIKKILA, supra note 11, at 141-42. Notably, paragraph 6 of the U.N. Victims Declaration
"does not require the actual presence of the victim in the courtroom, nor afford the victim an
active role in the proceedings, that is [by] granting the victim the possibility of personally
expressing the views and concerns to the court." Id. at 141 (emphasis in original). Rather, the
Declaration "establishes an expectation that victim participation is encouraged whenever
possible and a requirement that due consideration is given to the responsiveness of judicial
processes to the needs of victims." Id.

²² See, e.g., Haslam, supra note 9, at 320 ("It was the failure of [the ad hoc] Tribunals to take the
interests of victims sufficiently into account that motivated many NGOs, individuals, and some
governments to argue for a new approach that would safeguard the interests of victims at the
ICC."); David Donat-Cattin, Article 68: Protection of Victims and Witnesses and Their
Participation in the Proceedings, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT 869, 871 (Otto Triffterer ed., 1999) ("[T]he inclusion of norms on victims'
participation in the Court's proceedings . . . was the result of widespread and strong criticism
Indeed, despite the growing recognition of restorative-based justice mechanisms in the 1980s and early 1990s, a number of commentators have claimed that the U.N. Security Council "overlooked" victims' interests in the creation of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994, respectively. While the ad hoc criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right, nor can victims request compensation in proceedings before the tribunals. Furthermore, although the judges of both the ICTY and the ICTR considered the possibility that their statutes might be amended to authorize the award of reparations to victims, each tribunal ultimately rejected such an amendment. According to Judge Claude Jorda, former President of the

against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the ad hoc Tribunals.

23 See, e.g., Doak, supra note 11, at 294 (explaining that, since the mid-1980s, "the interests of victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems"); HUMAN RIGHTS WATCH, COMMENTARY TO THE SECOND PREPARATORY COMMISSION MEETING ON THE INTERNATIONAL CRIMINAL COURT 4 (July 1999), available at http://www.hrw.org/campaigns/icc/docs/precom-july99.htm ("The principle of greater victim involvement received international recognition through the [1985] Victims' Declaration, and is increasingly seen in domestic criminal systems in civil and, to a lesser degree, common law countries.").

24 Claude Jorda & Jérôme de Hemptinne, The Status and Role of the Victim, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1387 (Cassese et al. eds., 2002) ("The Statutes of the Tribunals for the former Yugoslavia and Rwanda overlook victims in two respects: victims cannot take part in a personal capacity in the criminal proceedings and are not entitled to obtain compensation for the harm they suffered."). See also Haslam, supra note 9, at 320 ("The ad hoc War Crimes Tribunals relied upon the Prosecutor to safeguard victims' welfare. However, the coupling of victims' requirements with the demands of successful prosecution had the result that the interests of victims were often overlooked.").

25 As then-President of the ICTY, Judge Claude Jorda summarized in a 2001 speech: "Nor can the International Tribunal hear the tens of thousands of victims. Only those considered useful towards the establishment of the truth are invited to testify . . . ." Judge Claude Jorda, President of the ICTY, Speech at the Conference to Establish a Truth and Reconciliation Commission in Bosnia and Herzegovina (May 17, 2001), available at http://www.un.org/icty/pressreal/p591-e.htm. See also Haslam, supra note 9, at 320.

During proceedings [before the ICTY and ICTR] a victim could only be heard as a witness for the prosecution or defence. He or she had no independent right to intervene nor was he or she entitled to refuse to give evidence . . . . Although the Tribunals could order restitution of property, they could not compensate victim-witnesses for harm suffered. This was left to national courts or to another competent body.

Id.

26 See Letter from Navanethem Pillay, President of the International Criminal Tribunal for Rwanda, to Kofi Annan, Secretary-General of United Nations, U.N. Doc. S1200011198 (Nov. 9, 2000) (in which the then-President of the ICTR, Navanethem Pillay, informs the U.N. Secretary-General that any scheme authorizing the ICTR to provide compensation to victims "would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal."); ICTY Judges' Report, supra note 10, at IV (determining that, although victims of crimes within the ICTY's jurisdiction have a legal right to seek compensation for their injuries, the judges did not believe that the tribunal was the
ICTY and recently-resigned Pre-Trial Judge at the ICC, the failure of the ad hoc tribunals to properly account for victims' interests was due to the fact that the “primary concern of the drafters of the Statutes and Rules of Procedure and Evidence” was to “punish those guilty of serious violations of international humanitarian law and to safeguard the interests of the prosecution and the rights of the accused...”

One of the specific criticisms of the ad hoc tribunals is that the failure to focus on victims' interests has led to a disconnect between the tribunals' work and the victims of the atrocities those institutions were designed to address. One commentator summarized this argument in the context of the ICTR as follows:

In the aftermath of the Rwandan genocide, victims' participation and legal representation before the [ICTR] have been identified by many observers and defendants of human rights as a necessary instrument to render that Tribunal closer to Rwandan society. Indeed, the fact that Rwandan public opinion does not understand that justice is done, because it is not seen to be done, is probably the major problem for the ICTR, which remains the first jurisdictional body in the history of human-kind to have convicted perpetrators of the crime of genocide.

Similarly, the former Assistant Secretary-General for Legal Affairs at the U.N. wrote of a “perception by victims and victim societies” in the Balkan countries that the ICTY is “too remote” and argued that there is a lack of “knowledge and appreciation of [the tribunal’s] work at the grass-roots level.”

A related complaint is that “communication [by the tribunals] back to the local communities” in the former Yugoslavia and Rwanda has been appropriate forum for handling victim compensation).

27 Jorda & de Hemptinne, supra note 24, at 1389; see also KAREN CORRIE, THE AMERICAN NON-GOVERNMENTAL ORGANIZATION COALITION FOR THE INTERNATIONAL CRIMINAL COURT, VICTIMS' PARTICIPATION AND DEFENDANTS' DUE PROCESS RIGHTS: COMPATIBLE REGIMES AT THE INTERNATIONAL CRIMINAL COURT 4 (2007), available at http://www.amicc.org/docs/Corrie%20Victims.pdf (“The ad hoc tribunals were established by the Security Council to ensure accountability for war crimes and genocide that occurred in specific conflicts after those conflicts ended. Thus, the personal interests of individual victims were not the Security Council’s primary concern.”).

28 Donat-Cattin, supra note 22, at 871. See also PAM SPEES, WOMEN’S CAUCUS FOR GENDER JUSTICE, REPORT OF PANEL DISCUSSIONS ON APPROPRIATE MEASURES FOR VICTIM PARTICIPATION AND PROTECTION IN THE ICC (1999), available at http://www.iccwomen.addr.com/reports/vwicc/ (noting that a general concern about the ICTR, located in Tanzania, was that “by not having the tribunal in the affected communities there is a danger that those communities will have no faith in the possibility of justice”).

"deficient." Indeed, the Rwandan Representative to the U.N. informed the U.N. General Assembly in 1999 that communication was so deficient that the general public doubted the commitment of the ICTR to "mete out justice on the Rwandan people's behalf." Similarly, the then-President of the ICTY stated in 1999 that the tribunal "must work harder to communicate with the peoples of the former Yugoslavia," who "often have little idea of what the [ICTY] is doing, except from what they learn via distorted news coverage and State-controlled Propaganda." The lack of victim participation in the proceedings of the ad hoc criminal tribunals also has been viewed as a missed opportunity to contribute more broadly to the restoration of peace in affected communities. In the words of Judge Claude Jorda, the ad hocs failed to "take into account the fact that, by participating in the proceedings . . . a victim may be able to regain his dignity, thereby contributing, ultimately, to the restoration of peace and security in Rwanda and the former Yugoslavia."

Significantly, the criticisms regarding the disconnect between the ad hocs and victims "underscore[d]" the importance of restorative justice in the drafting of the Rome Statute. Thus, participation of victims was "considered to be an essential tool for bringing the Court and its proceedings closer to the persons who have suffered atrocities." 


53 Jorda & de Hemptinne, supra note 24, at 1389.

54 WOMEN'S CAUCUS FOR GENDER JUSTICE, supra note 12, at 20.

The codification of victim participation in article 68(3) in the Rome Statute reflects the fact that many court systems around the world have successfully allowed victims to participate in criminal trials . . . . This reflects a growing recognition that justice requires more than putting someone in jail. Some of the negative experiences in the ad hoc [criminal] Tribunals underscore the importance of these provisions for the International Criminal Court.

Id.

55 Bitti & Friman, supra note 2, at 457. See also CORRIE, supra note 27, at 5 ("Within the context of limited participation by victims at the ICTR and the ICTY, the victims' participation regime established at the ICC shows the positive development of the rights of victims in international criminal law.").
B. Balancing the Goal of Restorative Justice with Interests in Efficiency and Fairness

Serving the interests of victims is not the sole function of the ICC. The drafters of the Rome Statute and ICC Rules of Procedure and Evidence recognized the need to achieve victims' participation "without undermining the effectiveness of the International Criminal Court, [and] without diverting it from its task of law enforcement." As a general matter, the Rome Statute and Rules require that Court proceedings are conducted in a manner that is expeditious and fair. Thus, while it is true that the "[Rome] Statute reflects the thesis that the right of the victims to participate in the trial is too fundamental to be sacrificed to mere 'logistical difficulties,'" it also was "considered necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes."

Perhaps the most significant concern of the drafters arising from the integration of victims into criminal proceedings before the Court related to the potential impact on the Court's ability to conduct proceedings efficiently, as the nature of the crimes within the ICC's jurisdiction is likely to involve large numbers of victims. One reason the ICC must safeguard the efficiency of the proceedings is that the threat of significant delays raises "questions regarding the right of an accused to a fair trial, given that questions of

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36 Haslam, supra note 9, at 323 (citing Elisabeth Guigou, French Minister of Justice, Opening Speech at the International Meeting on Access to Victims to the International Criminal Court (Apr. 27, 1999)).

37 For example, Article 64 of the Rome Statute reflects a clear concern for Court efficiency by generally requiring Trial Chambers to ensure that proceedings be conducted in "a manner that is fair and expeditious." Rome Statute, supra note 5, at arts. 64(2), 64(3)(a). See also International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), Rule 101 [hereinafter ICC Rules] ("In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims."). Article 67 covers the rights of the accused, which include the right to a fair hearing conducted impartially, to be informed of the charges against him or her, to have adequate time and facilities to prepare a defence with counsel of the accused's choosing, and to be tried without undue delay. Rome Statute, supra note 5, at art. 67(1).

38 Donat-Cattin, supra note 22, at 885.

39 Fernández de Gurmendi, supra note 17, at 429. See also Stahn et al., supra note 2, at 223 (noting that "an extensive interpretation of victims' rights could conflict with two cardinal principles which are vital to the work and functioning of the Court: the function of the Court as a judicial institution, and the imperative of impartiality").

40 Fernández de Gurmendi, supra note 17, at 429 ("Due to the nature of the crimes under [the Court's] jurisdiction, very large numbers of victims might be expected and the Court could be overwhelmed by their full participation and request for reparation."); Jorda & de Hemptinne, supra note 24, at 1389 ("[V]ictims of serious violations of humanitarian law are generally numerous, and their participation in proceedings is apt to be marked by a highly charged emotional atmosphere and by a significant political dimension.").
expediency and fairness to the accused are inextricably linked." Indeed, among the reasons that the judges of the ICTY rejected a proposal calling for victims' compensation by that tribunal was that such a change "would increase the Chambers' workload and further exacerbate the length of its proceedings, thus undermining its efforts to provide accused with fair and expeditious trials." 42

Efficient proceedings are equally in the interest of victims. As Human Rights Watch—a forceful advocate for victim participation at the ICC—has recognized, the "overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done." 43 Similarly, the International Federation for Human Rights (FIDH)—which assisted the first victims with their applications in order to participate in proceedings before the ICC 44—declared in a 2006 review of the ICC Office of the Prosecutor that "[i]n order for the victims to participate in the trial and to obtain reparations, it is necessary that those responsible for the crimes they have suffered are effectively prosecuted." 45 Thus, exceedingly long proceedings may hinder the restorative purpose of the victims' participation scheme as well as postpone efforts to address reparations.

Beyond concerns of efficiency, the drafters of the Rome Statute and Rules also carefully considered the potential effects that the intervention of victims could have on the integrity of the criminal process more broadly. Again quoting Human Rights Watch: "[t]o fail to protect the accused would be inconsistent with the Statute and would undermine the credibility and authority of the Court." 46 Judge Jorda, writing on this subject in relation to the lack of victim participation before the ad hoc criminal tribunals in the former Yugoslavia and Rwanda, noted:

It is true that to authorize a victim to intervene in the proceedings in his personal capacity, with a view to expressing his concerns and obtaining reparation, is not in itself inconsistent, in formal terms, with the International Covenant on Civil and Political Rights. However, having regard to the nature and scope of the crimes over which the ad hoc Tribunals possess jurisdiction, such a prerogative may

41 Stahn et al., supra note 2, at 223.
42 ICTY Judges' Report, supra note 10, at 12.
45 Antoine Bernard, Int'l Fed'n for Hum. Rts., Statement at Second Public Hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts (Sept. 26, 2006). See also Stahn et al., supra note 2, at 223 (noting that "an extensive interpretation of participatory rights of victims might not only place considerable administrative burdens on the respective organs of the Court, but effectively paralyze the Court's proceedings").
46 Human Rights Watch Memorandum, supra note 16, at 27.
undermine the rights of the accused if it is not strictly defined and meticulously organized.47

Thus, victims' participation could, if not appropriately managed, threaten the due process rights of the accused, particularly to the extent that the intervention of a "third party" could disrupt the "equality of arms."48 As one commentator explains, where a criminal justice system relies on a "delicate balance of power achieved through the clear delineation of roles of the prosecution and defence, the system could be perceived as appearing 'out of balance' if another party were involved in the case that could actively work against the interests of the defence."49

III. ICC VICTIMS' PARTICIPATION SCHEME

In an effort to achieve a realistic compromise between the goals of restorative justice for victims and the concerns for efficiency and fairness, the drafters of the Rome Statute and Rules sought to create a meaningful yet manageable scheme for victim participation. This system, as drafted, includes a number of restorative provisions designed to reach a broad range of victims, while leaving the Court with "inherent control over its own proceedings and the flexibility to ensure that it can discharge its mandate efficiently," as well as protect the fairness of proceedings.50

A. Victims' Participation Generally

Before turning to the specific provisions of the ICC victims' participation scheme, it is important to stress that the Rome Statute provides for the participation of victims *qua* victims, as opposed to either as witnesses or as claimants. This is a recognition by the Rome Statute's drafters that providing a voice to victims in the context of the ICC is valuable in itself.

As noted above, the "ICTY and ICTR took account of victims solely in their role as witnesses."51 While providing testimony as a witness may serve a restorative function for some,52 limiting the participation of victims to the role of witnesses renders the achievement of restorative justice generally

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47 Jorda & de Hemptinne, *supra* note 24, at 1393.
48 Doak, *supra* note 11, at 298.
49 Id.
51 Haslam, *supra* note 9, at 320.
52 See, e.g., International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Fourth Annual Report*, ¶ 192, U.N. Docs A/52/375, S/1997/729 (Sept. 18, 1997) ("[W]itnesses who have come to The Hague have commented afterwards that the opportunity to testify before a duly constituted court has brought them great relief. Justice's cathartic effects may therefore promise hope for recovery and reconciliation.").
difficult. Perhaps most obvious is the fact that victim-witnesses will only be heard in the course of proceedings if called upon to testify by either the prosecution or the defense.\textsuperscript{53} Moreover, the evidentiary needs of the party calling the victim as a witness will limit victims’ stories.\textsuperscript{54} As a practical matter, therefore, a limited number of victims will have the opportunity to share their stories with the Court, and the stories that are told may be incomplete. Furthermore, commentators have noted that the process of providing testimony may actually retard, rather than promote, a victim’s healing process, as “prosecutors generally elicit testimony in a fashion designed to suit the requirements of legal proof, not victims’ psychological health.”\textsuperscript{55}

More broadly, some consider the absence of restorative measures for the victims testifying before the ICTY and ICTR to have rendered the victim “extraneous to the conduct of the proceedings,”\textsuperscript{56} despite the fact that “international criminal proceedings could not take place without victims’ cooperation.”\textsuperscript{57} Finally, because victim-witnesses lack control over the scope and use of their testimony, participation as a witness is less likely to provide a victim with the sense of recognition and empowerment that can accompany participation as a victim.\textsuperscript{58}

\textsuperscript{53} See Haslam, supra note 9, at 320.

\textsuperscript{54} See id; see also Doak, supra note 11, at 298 (“[Victim-witnesses'] testimony must be shaped to bring out its maximum adversarial effect, and witnesses are thereby confined to answering questions within the parameters set down by the questioner. The victim is denied the opportunity to relay his or her own narrative to the court using his or her own words . . . .”); Marie-Bénédicte Dembour & Emily Haslam, Silencing Hearings? Victim-Witnesses at War Crimes Trials, 15 EUR. J. INT’L L. 151, 154 (Feb. 2004) (“In the judicial arena . . . story-telling can only take the form of giving legal evidence. It is constrained by the judicial endeavour to establish a legally authoritative account of what happened.”); SARA KENDALL & MICHELLE STAGGS, SILENCING SEXUAL VIOLENCE: RECENT DEVELOPMENTS IN THE CDF CASE AT THE SPECIAL COURT FOR SIERRA LEONE (2005) (describing the decision of the Special Court for Sierra Leone in the case against three members of the Civilian Defence Force to expunge witness testimony regarding sexual violence from the record, and to exclude the planned testimony of additional victims recounting acts of sexual violence, on the grounds that the Prosecutor had failed to allege rape and sexual violence as specific offences under the indictment).

\textsuperscript{55} The Promises of International Prosecution, supra note 30, at 324.

Victims who testify narrate a story for a particular purpose: to determine the guilt or innocence of the accused, to establish a broader historical record of atrocity, to contribute to peace and reconciliation. However their testimony is used, a tribunal is hardly ever interested in hearing their stories for their own sake. Its ability to provide therapeutic healing is, therefore, limited.

\textsuperscript{56} Jorda & de Hemptinne, supra note 24, at 1390.

\textsuperscript{57} Haslam, supra note 9, at 320.

\textsuperscript{58} See, e.g., id. at 324.

Victim-witnesses have no control over the purpose of their testimony, nor the strategic use that is made of it. They are usually prevented from dealing with matters that are considered to be irrelevant to those purposes—either
The overarching restorative purpose behind the victims' participation scheme is further evidenced by the severance of provisions allowing for victims' participation and those relating to reparations. This is a unique development, as most national jurisdictions that allow for victim participation in criminal proceedings do so for the primary purpose of consolidating the victims' claim for civil damages in a criminal action.\textsuperscript{59} Under the Rome Statute, however, victims are not required to participate in pre-trial or trial proceedings before the ICC in order to make a claim for reparations. In addition, victims may participate in proceedings without pursuing compensation before the Court.\textsuperscript{60} Thus, the Rome Statute marks "a significant departure from the mere conceptualization of victim's rights in terms of reparation."\textsuperscript{61} This change is important for two reasons. First, it recognizes that the opportunity to participate meaningfully in proceedings before the ICC is restorative in its own right, as "the criminal proceedings themselves are a form of reparation for victims."\textsuperscript{62} Studies have suggested that victims who have pursued civil compensation claims in national courts often report that the process of seeking reparation was of equal—if not greater—importance to the victims than the end result.\textsuperscript{63} Second, while the

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because resources are limited or because these parts of their stories do not interest the law.

\textit{Id. See also} sources cited \textit{supra} note 9.

\textsuperscript{59} See, e.g., ICTY Judges' Report, \textit{supra} note 10, at 6 ("[M]ost legal systems based on civil law allow for the participation of a victim as a \textit{partie civile}; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused."); Doak, \textit{supra} note 11, at 310–11 (explaining that, under the \textit{partie civile} systems commonplace in countries such as France and Belgium and the "adhesion" procedure used in Germany, the "ability to pursue civil damages in the criminal trial should, in theory, improve speed, cost, and time involved given that both civil and criminal issues are resolved in the same forum"). In fact, according to Doak, participation by victims within the French system "tends to be limited to the pursuit of the civil claim [for damages]." \textit{Id.} at 311.

\textsuperscript{60} See, e.g., ICC, VICTIM'S PARTICIPATION AND REPARATION SECTION, VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A GUIDE FOR THE PARTICIPATION OF VICTIMS IN THE PROCEEDINGS OF THE COURT (2006), 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); Press Release, Int'l Fed'n for Hum. Rts., \textit{supra} note 44, Ch. IV, at 5 ("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.").

\textsuperscript{61} Stahn et al., \textit{supra} note 2, at 219–20.

\textsuperscript{62} REDRESS, RULES OF PROCEDURE & EVIDENCE FOR THE INTERNATIONAL CRIMINAL COURT: RECOMMENDATIONS TO THE PREPARATORY COMMISSION REGARDING REPARATION AND OTHER ISSUES RELATING TO VICTIMS 1 (Mar. 2000).

\textsuperscript{63} See, e.g., REDRESS, TORTURE SURVIVORS' PERCEPTIONS OF REPARATION: PRELIMINARY SURVEY 57–58 (2001) (citing several studies in support of the proposition that victims value procedural justice—i.e., the transparency and fairness of the processes by which decisions are made—as much as the ultimate result); Doak, \textit{supra} note 11, at 308–10, 312 (discussing a number of surveys performed in countries that allow for victim participation in domestic criminal proceedings and concluding that victims who have chosen to exercise their participation rights have expressed greater satisfaction in the criminal justice system than those who chose to forego
operation and reach of the ICC reparations programs remain to be seen, there is concern that monetary payouts made to individual victims, if any, will be limited in number and amount, as well as difficult to enforce. Thus, the restorative goals of the Rome Statute cannot be achieved through a reparations program alone. This suggests that the healing effects of victims' participation may be as, if not more, important in meeting these goals.

B. Definition of "Victim" for Purposes of the ICC

All provisions in the Rome Statute that provide for victims' rights to participation, reparations, or protection apply only to those individuals that meet the definition of a victim. This definition was not included in the Rome Statute, but rather is delineated in Rule 85 of the Rules of Procedure and Evidence, which provides:

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

[There are several main areas of concern for the prospects of enforcement of reparations awards. These are: (1) enforcing an order for protective measures; (2) enforcing a final award of reparations including monetary and non-monetary awards; (3) the role of the Trust Fund as a supplementary mechanism for ensuring that awards reach victims; and (4) institutional responsibility within the ICC for monitoring the enforcement of reparations orders. Effective enforcement in all of these areas hinges on a number of factors including (a) the compatibility of domestic legislation and procedures with the Court's orders; (b) the potential involvement of non-States Parties in this process; and (c) the availability and management of funds, including the possibility of financial default by the person convicted and hence, the search for other possible sources of compensation for victims.]


Id.

ICC Rules, supra note 37, at R. 85.
The primary source of reference in drafting a definition of “victims” for purposes of the ICC was the U.N. Victims’ Declaration, which provides that “victims” refers to “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”

Notably, “the vast majority of delegations supported in principle a broad definition based on the Victims Declaration” for purposes of the ICC, and according to one participant to the drafting of the Rules, this support lasted long into the process. For example, the drafters rejected a proposal made by the Spanish delegation that “a larger group of persons along the lines of the proposed broad definition [in the U.N. Victims’ Declaration] would be regarded for purposes of protection and assistance, as well as for claiming reparations,” while a “much reduced group would be regarded as victims for the purposes of participation in the proceedings.” At the same time, however, there were a variety of “difficulties” among various delegations with respect to a number of the terms used in the U.N. Victims’ Declaration definition. In light of these difficulties, Japan “proposed to have no definition at all, or, alternatively to have a very broad one that would give ample discretion to the Court itself.” Ultimately, the Japanese proposal, which defined “victims” as “any person who suffered harm as a result of a crime under the jurisdiction of the Court,” became the basis for the final definition adopted in Rule 85(a).

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67 See supra note 37 and accompanying text.
68 U.N. Victims Declaration, supra note 17, ¶ 1.
70 See Fernández de Gurmendi, supra note 17, at 430–31 (noting that through the fifth session of the Preparatory Committee tasked with preparing the Draft Rules, which took place in June 2000, “most delegations favoured . . . a definition based on the Victims Declaration, which had been on the table of negotiations for years”).
71 Id. at 431 (explaining that the Spanish delegation’s proposal arose from a concern that the drafters would “jeopardize the ability of the Court to administer justice by prescribing a victims regime that would be too ambitious”).
72 Id. at 431–32.
73 Id. at 432.
74 Id.
75 See ICC Rules, supra note 37, at R. 85(a). Observers have noted that the ICC definition of victims is defined more broadly than in the rules of other international criminal courts. See Haslam, supra note 9, at 321 n.41 (writing that “victims” are “defined broadly” in the ICC Rules and that the ICTY defines victims “more narrowly”); Bassiouni, supra note 18, at 243 (highlighting the fact that, unlike the rules of the ad hoc criminal tribunals, Rule 85(a)
C. Article 68(3): General Victims’ Participation Scheme

Article 68(3) of the Statute constitutes the general provision for victim participation. It 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.\(^7\)

Notably, the language of Article 68(3) almost directly mirrors Paragraph 6(b) of the U.N. Victims Declaration,\(^7\) which itself was enacted for the restorative purposes of, inter alia, ensuring respect for victims and safeguarding their interests in accessing mechanisms of justice.\(^7\) Another important restorative aspect of the general victims’ participation provision is the mandatory nature of the language governing that participation. Indeed, victims who are granted the right to participate under Article 68(3) “shall” be given the opportunity to present their views and concerns and “shall” have those views and concerns “considered” by the Court.\(^7\)

At the same time, the drafters recognized that, given the nature of the crimes under the ICC’s jurisdiction, “very large numbers of victims might be expected and the Court could be overwhelmed by their full participation.”\(^8\) Consequently, the second part of Article 68(3) requires that the judges

presumably covers “all persons who have directly or indirectly suffered harm as a result of a commission of any crime within the jurisdiction of the [C]ourt”; Stahn et al., supra note 2, at 222 (“Rule 85 does not define victims in relation to proceedings against a specified individual in respect of a given conduct. It merely links the term ‘victim’ to the commission of a crime within the jurisdiction of the Court.”); Donat-Cattin, supra note 22, at 884 (“The concept of a victim in Rule 2 of the ICTY and ICTR is restricted to ‘a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.’ This definition excludes dependents of the victims and their relatives.”).

\(^7\) Rome Statute, supra note 5, at art. 68(3).

\(^7\) U.N. Victims Declaration, supra note 17, ¶ 6(b) (providing that victims should be allowed to have their views presented and considered at “appropriate stages of the proceedings where their personal interests are affected”). See also Jorda & de Hemptinne, supra note 24, at 1404 (noting that the wording of Article 68(3) “draws heavily on the terms” of the Victims Declaration).

\(^7\) See discussion supra note 5.

\(^7\) Rome Statute, supra note 5, at art. 68(3). Interestingly, the travaux preparatoires of the Rome Statute reveal that the drafters expressly chose to use the words “shall permit,” rather than “may permit,” in Article 68(3), thereby underscoring the fact that the participation of qualifying victims is not at the discretion of the court but is rather required by the Statute. See 1997 PrepCom Report, supra note 17. See also Haslam, supra note 9, at 223 (“The drafters of the Statute rejected an earlier text authorizing the Court to grant participation in favour of the mandatory expression, ‘the Court shall permit’ participation.”); Donat-Cattin, supra note 22, at 880 (noting that the drafters specifically rejected the “thesis that it was simply an interest of the victims to participate,” instead providing victims a right to participate, assuming the requirements of Article 68(3) are met).

\(^8\) Fernández de Gurmendi, supra note 17, at 429.
“ensure that victims (or representatives) make a correct use of their right to intervene”\textsuperscript{81} by restricting participation to the “appropriate” stages of proceedings and mandating that the participation be in a manner “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”\textsuperscript{82} Importantly, victims’ advocates groups involved in the drafting of the Statute and Rules fully supported the need to balance victims’ access to the ICC with concerns of efficiency and fairness. For example, the Women’s Caucus for Gender Justice stated in the commentary to the draft procedural rules that “the inclusive general definition [of ‘victim’] does not mean that all those who fall within the definition are entitled, without condition, to all the rights contained in the Statute and Rules for victims. Rather, the subsequent rules guide the Court’s discretion in applying them in the particular context.”\textsuperscript{83}

The system enshrined in the Statute for ensuring the Court would not become overwhelmed by large numbers of victims participating in proceedings was maintained in the Rules of Procedure and Evidence, which provide general rules on the modalities of victim participation, but largely leave the Court’s discretion under Article 68(3) unrestrained.\textsuperscript{84}

\textbf{D. Articles 15 and 19: Specific Provisions Allowing Victims to Participate at Stages of Investigation Critical to Victims’ Interests}

In addition to the general Article 68(3) framework for victim participation, the Rome Statute includes two provisions granting victims the right to participate in specific proceedings occurring in the investigation phase of the Court’s work.\textsuperscript{85} The first of these provisions relates to the Prosecutor’s powers under Article 15 of the Statute to “initiate investigations proprio motu \textsuperscript{86} on the basis of information on crimes within the jurisdiction of the Court,”\textsuperscript{87} which may include information received from victims.\textsuperscript{88} Specifically, Article 15(3) provides:

\begin{quote}
\textsuperscript{81} Donat-Cattin, \textit{supra} note 22, at 880.
\textsuperscript{82} Rome Statute, \textit{supra} note 5, at art. 68(3).
\textsuperscript{83} WOMEN’S CAUCUS FOR GENDER JUSTICE, RECOMMENDATIONS AND COMMENTARY FOR RULES OF PROCEDURE AND EVIDENCE 9 (July 26-Aug. 13, 1999).
\textsuperscript{84} See Bitti & Friman, \textit{supra} note 2, at 460 (“Discussion in the Paris Seminar [on Access of Victims to the International Criminal Court] and the Preparatory Commission [charged with drafting the RPE] confirmed that the statutory powers of the Court pursuant to [Article 68(3)] to determine when and in what manner the victims’ right to participation should be exercised in a particular case should also be safeguarded in the Rules.”). In addition, Rule 89, which establishes the basic procedure by which victims apply to participate under Article 68(3), provides that the Chamber shall “specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.” ICC Rules, \textit{supra} note 37, at R. 89(1).
\textsuperscript{85} See Rome Statute, \textit{supra} note 5, at arts. 15(3), 19(3).
\textsuperscript{86} Rome Statute, \textit{supra} note 5, at art. 15(1). See also id. at art. 15(2).
\textsuperscript{87} The Prosecutor shall analyse the seriousness of the information received. For
If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation \textit{[proprio motu]}, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. \textit{Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.}\textsuperscript{88}

The provision for victims’ participation in this context is, according to one commentary, a “logical corollary of the role of victims in \textit{proprio motu} investigations,” which are “typically initiated by information submitted by victims.” Therefore, it is “only natural that they should be allowed to make representations.”\textsuperscript{89} Moreover, as Human Rights Watch has explained, the “most essential of all victims’ interests is likely to be the interest in seeing that the Court is seized with the matter and that an investigation proceeds.”\textsuperscript{90} Thus, Article 15(3) ensures that, as long as an individual qualifies under the Rule 85 definition of “victim,” he or she may participate at this particular stage of an investigation, which has been identified as especially important to victims’ interests.

Rule 50(1) gives effect to Article 15(3) by requiring that, when the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation \textit{proprio motu}, the Prosecutor “shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims

\begin{quote}
\textit{Id.}
\end{quote}

\textsuperscript{87} See, e.g., Morten Bergsmo & Jelena Pejic, \textit{On Article 15, in Commentary on the Rome Statute of the International Criminal Court}, \textit{supra} note 22, at 359, 364–69 (arguing that, although there is no express right of victims to submit information to the Prosecutor, the drafters “clearly contemplated that the Prosecutor could receive information from victims pursuant to Article 15, paragraphs 1 and 2”); Allison Marston Danner, \textit{Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court}, \textit{97 Am. J. Int’l L.} \textit{510, 516} (2003) (“[T]he Prosecutor may himself trigger the ICC’s jurisdiction by commencing an investigation on the basis of information he has received; the source of the information is irrelevant. It is widely assumed that NGOs and victims’ groups will provide this kind of information to the Prosecutor.”).

\textsuperscript{88} Rome Statute, \textit{supra} note 5, at art. 15(3) (emphasis added).

\textsuperscript{89} Stahn et al., \textit{supra} note 2, at 225–26. The authors further note that “victims’ involvement in the process of obtaining the Pre-Trial Chamber’s authorization for an investigation is based on the assumption that victims are likely to be best informed about the nature and extent of the crimes that took place in the situation of crisis at hand,” and that victims “will clearly be best placed to describe the actual commission of crimes, and may be able to give a more personal perspective on the events as presented by the Prosecutor.” \textit{Id.} at 226.

\textsuperscript{90} \textit{Human Rights Watch}, \textit{supra} note 23, at 33.
and witnesses.” Following notification, victims “may make representations in writing to the Pre-Trial Chamber,” whether or not they have previously submitted communications to the Prosecutor.

The second occasion on which victims are afforded specific rights of participation as early as the investigation phase is during challenges to the admissibility or jurisdiction of a case brought under Article 19, at which point the rules authorize victims to “submit observations to the Court.” Therefore, as with Article 15(3), victims need only satisfy the Rule 85 definition to be able to participate at this specific stage of the proceedings. Rule 59 builds on Article 19, providing that notification of a challenge to jurisdiction or admissibility shall be given to “the victims who have already communicated with the Court in relation to the case, or their legal representatives.”

This broad criterion for notification of victims reflects the fact that a large number of victims have potentially been affected by the crimes committed in the situations at hand that are the subject of the investigations, and should therefore have the right to submit representations on the fundamental question of whether investigations should be initiated.

The first two sub-parts of Article 19 provide as follows:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

This broad criterion for notification of victims reflects the fact that a large number of victims have potentially been affected by the crimes committed in the situations at hand that are the subject of the investigations, and should therefore have the right to submit representations on the fundamental question of whether investigations should be initiated.

Id. See also WOMEN’S CAUCUS FOR GENDER JUSTICE, supra note 83, at 11 (noting that Rule 50 was enacted for the purpose of implementing “the general principle that notice to victims and witnesses is necessary to give effect to the right of victims to participate”).

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(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

Rome Statute, supra note 5, at arts. 19(1), 19(2).

Id. at art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”) (emphasis added). Note that Article 15(3) refers to “representations” by victims, while Article 19 refers to “observations.” The Statute does not define either term or distinguish one from the other. However, Rule 50 (providing the procedure for Article 15) and Rule 59 (providing the procedure for Article 19) both speak of a victim’s right to provide “representations,” and both require such representations to be submitted in writing. Compare ICC Rules, supra note 37, at R. 50(3) with R. 59(3). This may indicate that although these articles use different terminology, they both contemplate only written submissions on behalf of victims at these early stages of the proceedings.
representatives.”95 Once the Registrar notifies this category of victims, they may then “make representations in writing to the competent Chamber within such time limit as [the Chamber] considers appropriate.”96

Notably, in providing specific participatory rights to victims at the investigation phase of a situation, the drafters also expressly limited the scope of those rights. For example, “[c]ontrary to what is the case in . . . French and Swedish municipal systems, victims do not have the right to initiate criminal proceedings.”97 Similarly, although victims have the right to be informed of a decision by the Prosecutor to close an investigation or forgo a prosecution, victims have no express right to challenge that decision.98 The drafters also expressly rejected proposals that would have permitted victims to have far more extensive participation rights in connection with a request by the Prosecutor to proceed with an investigation under Article 15.99 Specifically, some States argued that the Court should afford victims full rights as parties during proceedings under Article 15, “including the right to request a hearing, to review communications from all parties, and to appeal a decision not to authorize an investigation.”100 As drafted, however, the right of victims at this early stage of proceedings is limited to submitting “representations,” which Rule 50 requires to be “in writing.”101

E. Additional Rules Relating to Victims’ Participation

Beyond any rights granted to victims by virtue of Articles 15(3), 19(3), and 68(3), the Rules of Procedure and Evidence guarantee that victims who have “communicated with the Court” are entitled to receive notice in certain circumstances,102 arguably regardless of whether they have been granted general participation rights under Article 68(3). As alluded to above, Rule 92(2) provides that the Court “shall notify” victims “who have communicated with the Court in respect of the situation or case in question” concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute.

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95 See ICC Rules, supra note 37, at R. 59(1).
96 See id. at R. 59(3).
97 Bitti & Friman, supra note 2, at 457.
98 See Rome Statute, supra note 5, at art. 53; ICC Rules, supra note 37, at R. 92(2). See also Jorda & de Hemptinne, supra note 24, at 1404, 1406 (noting that “in contrast to the procedure followed by the ad hoc Tribunals, the victim enjoys a limited right to be informed of progress in the criminal proceedings, [including] the right to be informed of the closure of that investigation,” and also stating that the victim “may not participate in the investigation undertaken by the Prosecutor”).
100 Id.
101 Rome Statute, supra note 5, at art. 15(3); ICC Rules, supra note 37, at R. 50.
102 Rome Statute, supra note 5, at art. 53(3).
pursuant to Article 53.103 Similarly, Rule 92(3) requires the Court to notify victims "who have communicated with the Court in respect of the case in question" regarding its decision to hold a hearing to confirm charges pursuant to Article 61.104 Finally, Rule 93 provides that a Chamber "may seek the views" of victims, including those not formally participating before the Court under Article 68(3),105 which may provide an additional method of involving victims in the work of the Court.

IV. PRE-TRIAL CHAMBERS' APPLICATION OF ARTICLE 68(3) TO INVESTIGATION STAGE

To date, three decisions have been issued granting victims a right to "participate" at the investigation phase under Article 68(3) of the Rome Statute.106 Notably, although more than 230 individuals have applied to

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103 Id.; ICC Rules, supra note 37, at R. 92(2). Article 53(3) provides as follows:

(a) At the request of the State making a referral under Article 14 or the Security Council under Article 13 paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

Rule 92(2) provides:

In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question.

One way that victims might be able to participate in an Article 53(3) review without applying under the general participation scheme is under Rule 93, which provides that a Chamber "may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate." ICC Rules, supra note 37, at, R. 93 (emphasis added). Nevertheless, in such a scenario, any participation by victims would still need to comport with the provisions of the Rome Statute and Rules guaranteeing the efficiency and fairness of the proceedings. See discussion supra note 37.

104 Id. at R. 92(3).

105 Id. at R. 93.

106 See Situation in DRC, PTC I, Jan. 17, 2006, supra note 1; Situation in Uganda in the Case of the Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶ 2 (Pre-Trial Chamber II, Aug. 10, 2007) [hereinafter Situation in Uganda, PTC II, Aug. 10, 2007]; Situation in Darfur, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02/05 (Pre-Trial Chamber I, Dec. 6, 2007) [hereinafter Situation in Darfur, PTC I, Dec. 6, 2007].
participate in proceedings before the Court in the DRC, Uganda, or Darfur situations, only twenty-two applicants have been granted the status of "victims of a situation." Thus, the vast majority of applicants have yet to receive a final decision on their applications, even though many were filed over a year ago. Moreover, despite the three decisions issued by two different Pre-Trial Chambers on the subject of victims' participation under Article 68(3) during an investigation, it remains unclear how the "situation victims" will be able to present their "views and concerns" and have those views and concerns "considered" by the Court within the meaning of Article 68(3).

A. Brief Review of Jurisprudence

Prior to Pre-Trial Chamber I's January 2006 decision, it was unclear whether Article 68(3) was intended to apply to proceedings in the context of a situation prior to the identification by the Prosecutor of any individual suspect or group of suspects. Indeed, in a 2002 article evaluating the ICC victims' participation scheme, Judge Claude Jorda, who authored the January 2006 decision, suggested that Article 68(3) would not apply prior to the case phase of proceedings. Specifically, the article states:

[I]n contrast to the procedure followed by the ad hoc Tribunals, the victim enjoys a limited right to be informed of progress in the criminal proceedings: the ICC Statute confers on him the right to "make representations to the Pre-Trial Chamber" upon examination by that Chamber of the Prosecutor's request for authorization to proceed with an investigation [citing Article 15(3)], and the right to be informed of the closure of that investigation [citing Article 53]. During the course of the trial proper, two provisions of the


108 Sudan Victim Lawyers Recount Their Experiences With the ICC So Far, VRWG BULLETIN, Summer/Autumn 2007, at 7, available at http://www.vrwg.org/Publications/04/ENG09.pdf (in which lawyers representing victims in the Sudan case explain that several have been waiting for more than one year to receive a decision on their application to participate at the investigation stage of a situation); Situation in Uganda, PTC II, Aug. 10, 2007, supra note 106, ¶ 2.

109 See, e.g., Stahn et al., supra note 2, at 221.

Despite the widespread recognition of the fundamental role victims have been afforded in ICC proceedings, little attention has been paid to the fact that the Statute and Rules fail to specify clearly if and where participatory rights are linked to 'victims of a situation' (e.g. all natural persons, organizations and institutions that have suffered harm as a result of the commission of crimes within the jurisdiction of the Court in a specific territory) or confined to 'victims of a case' (e.g. natural persons, organizations and institutions that have suffered harm as a result of the conduct of one or several identified accused or suspects).

Id.
ICC Statute govern the participation of the victim: Articles 19(3) and 68(3).\footnote{Jorda & de Hemptinne, supra note 24, at 1404 (emphasis added).}

This interpretation seems consistent with the drafting history described above, given that the drafters declined to provide victims any right to initiate investigations or particular prosecutions.\footnote{See supra text accompanying note 102.} Thus, while Judge Jorda adopted a different interpretation of the victims' participation scheme in his January 2006 decision, neither the Rome Statute nor the Rules necessarily mandate the application of Article 68(3) to the investigation stage of a situation. Furthermore, as a practical matter, both PTC I and PTC II have provided little insight into how victims who have been granted the right to participate at the situation stage will be able to exercise the rights afforded by Article 68(3).

1. Pre-Trial Chamber I's January 2006 Decision

As explained above, PTC I was the first organ of the Court to find that Article 68(3) applies at the investigation stage of a situation. Interestingly, however, the PTC was very broad in explaining the implications of its seminal decision, saying:

\begin{quote}
In the light of the core content of the right to be heard set out in Article 68(3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.\footnote{Situation in DRC, PTC I, Jan. 17, 2006, supra note 1, ¶ 71.}
\end{quote}

PTC I also held that the six victims with status to participate in the DRC situation to date will be able to request "the Pre-Trial Chamber . . . to order specific measures."\footnote{Id. ¶ 75.}

In reality, however, the victims of the DRC situation have not been granted access to non-public documents filed in the situation,\footnote{See Situation in the Democratic Republic of Congo, Decision on the Requests of the OPCV, ICC-01/04-418, ¶ 6 (Pre-Trial Chamber I, Dec. 10, 2007).} and have not actually had a significant opportunity to present their "views and concerns" to the Chamber as contemplated by Article 68(3). Indeed, since being granted "victim" status for purposes of the DRC investigation in January 2006, the extent of the initial six victims' "participation" has been limited to the following: (i) the submission of legal arguments by the victims' lawyer challenging the Prosecutor's application to appeal the January 2006 decision.
of PTC I;\textsuperscript{115} and (ii) a request that the Chamber order the Prosecutor to provide it with information and documents regarding the OTP's decision to temporarily suspend its investigation in relation to other potential charges against Thomas Lubanga Dyilo pending the close of the present proceedings against the accused.\textsuperscript{116} Notably, this request for information about the investigation of Mr. Lubanga was filed by the victims' representative in August 2006, and it was not until over one year later, on September 26, 2007, that the PTC issued a decision denying the victims' request.\textsuperscript{117}

2. Pre-Trial Chamber II's August 2007 Decision

In August 2007, Pre-Trial Chamber II issued a decision holding that two out of forty-nine applicants under review qualified to participate under Article 68(3) as victims of the situation in Uganda.\textsuperscript{118} Although the Chamber cited PTC I's January 2006 holding to support the extension of Article 68(3) to the investigation phase of a situation, PTC II set out to more precisely identify "the nature and scope of the proceedings in which victims may participate in the context of a situation."\textsuperscript{119} Interestingly, however, the majority of the potential participatory rights described in this decision as being available to victims of the Uganda situation would seemingly be available to victims even if they did not go through the detailed and lengthy process of applying for participation rights under Article 68(3). In fact, in "the process of identifying other instances" at which victims of a situation could participate, PTC II

[c]onsiders it appropriate to start by focusing attention on a number of provisions in the Rules which refer to the concept of "victims having communicated with the Court": namely, victims that, whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court.\textsuperscript{120}

For example, the Chamber discusses victims' right to make "representations to the Pre-Trial Chamber" regarding a request from the

\textsuperscript{115} Situation in DRC, Observations of the Legal Representative of VPRS 1 to VPRS 6 Following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6 (Victims' Representative, Jan. 27, 2006).

\textsuperscript{116} See Situation in DRC, Decision on the Requests of the Legal Representative for Victims VPRS1 to VPRS 6 Regarding "Prosecutor's information on further investigation," Case No. ICC-01/04-399, at 2–3 (Pre-Trial Chamber I, Sept. 26, 2007).

\textsuperscript{117} Id.

\textsuperscript{118} Situation in Uganda, PTC II, Aug. 10, 2007, supra note 106.

\textsuperscript{119} Id. ¶ 88. Judge Politi notes that "the list of proceedings" is "not intend[ed] to be necessarily exhaustive," as "[a]ll possible scenarios cannot be foreseen at this stage." Id.

\textsuperscript{120} Id. ¶ 93 (emphasis added).
Prosecution to authorize an investigation under Article 15(3),121 the right of victims to receive notice of proceedings pursuant to Article 15(3),122 and the right to notice of a decision by the Prosecutor not to prosecute pursuant to Article 53(3).123 PTC II also mentions victims' right to receive notice of a Court's decision to hold a hearing to confirm the charges against an individual suspect pursuant to Article 61.124 However, because such a hearing cannot occur until the "case" stage of proceedings, Article 68(3) need not apply to the investigation stage of a situation to allow victims to receive such notice.125 Finally, PTC II notes that the Court may "seek the views" of any victim—regardless of whether a victim has obtained participation rights under Article 68(3)—on any issue.126

Oddly, even after recognizing that victims would be entitled to these same rights without obtaining participant-status under Article 68(3), PTC II holds in its August 2007 decisions that, if victims do wish to apply under Article 68(3), the participation of "each of the victims involved" at the investigation phase of the situation will "depend not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question."127

3. Pre-Trial Chamber I's December 2007 Decision

The most recent decision granting victims "participation rights" during an investigation was issued in the context of the Darfur, Sudan situation.128 The decision contains no analysis of whether Article 68(3) was intended to apply at the situation phase of proceedings, nor does it give any indication of the form that participation might take as a practical matter. Instead, PTC I merely states that, in the event the eleven situation victims wish to actually participate in "specific proceedings taking place during the investigation of a

121 Id. ¶ 90. See also Rome Statute, supra note 5, at art. 15.
123 Id. ¶ 93.
124 Id.
125 Id.
126 Id.
127 Id.
128 Situation in Uganda, PTC II, Aug. 10, 2007, supra note 106, ¶ 89. Note that PTC II identified two additional instances, both under Article 57(3)(c), in which victims' "personal interests" may be affected at the situation stage, i.e., in proceedings initiated by the Pre-Trial Chamber relating to the protection and privacy of victims and witnesses and those relating to the preservation of evidence. Id. ¶ 97. However, as the Chamber also notes, the Court is free to "seek the views" of any victim on any issue, and therefore the Court is free to extend Article 68(3) to the investigation phase of a situation where it is not necessary to protect victims' potential rights to access the Court at these stages. Moreover, the Chamber also recognizes that victims applying for participation (which includes participation in a case) may submit their views and concerns "on protective measures to be taken by the Chamber even prior to the consideration of the merits of their application." Id. ¶ 99.
128 Situation in Darfur, PTC I, Dec. 6, 2007, supra note 106.
situation,” they will be required to submit a statement describing whether and how their “personal interests” are affected by the specific proceedings. The Chamber also makes clear that the eleven victims will not have access to any non-public documents filed in the situation.

B. Creating Unrealistic Expectations of Victims’ Role at the Investigation Phase of Situation is Inconsistent with the Restorative Justice Goal

The primary problem with the application of Article 68(3) to the investigation stage is that it may in fact undermine the restorative aims behind the victim participation scheme by creating false hope among victims in regard to their role at that stage. Surely it would be reasonable to assume that, if victims are to go through the process of filling out the lengthy application form required to participate under Article 68(3) and wait, in many cases, for over one year to receive evaluation on their applications, the award of general “victim” status at the investigation stage would involve meaningful rights. However, this has yet to occur for those that have been granted victim status at the investigation stage, a reality that is unlikely to change in the future unless the victims’ participation occurs through the exercise of rights afforded to victims at the investigation stage outside of Article 68(3). For example, pursuant to Article 15(3) and Article 19(3), those individuals that have been granted participation rights in the DRC situation will have an opportunity to submit written observations to the Court in the event that a hearing is held involving a request by the OTP for

129 Id. ¶¶ 12–13.
130 Id. ¶ 23.

131 At present, the “standard” form by which victims are to apply to participate under Article 68(3) of the Rome Statute is seventeen pages in length and requires victims to recount the details of the harm they have suffered, which is presumably a painful experience for most, if not all, applicants. See Int’l Criminal Court, Standard Application Form to Participate in Proceedings before the ICC for Individual Victims and Persons Acting On Their Behalf, available at http://www.icc-cpi.int/victimsissues/victimsparticipation/victimsparticipationForm.html.

132 Unfortunately, dashed expectations on the part of victims is a broader issue for the ICC in terms of the Court’s limited mandate—the ICC has the responsibility to investigate and prosecute only those crimes within its jurisdiction that are of “the most serious crimes of concern to the international community as a whole”—and the relatively small number of prosecutions it is likely to undertake in any given situation. See Rome Statute, supra note 5, at Preamble, ¶¶ 4, 9, art. 5(1). As one human rights lawyer from Sudan has remarked, “many of those affected by the conflict harbour unrealistic expectations of the court,” as “their initial understanding was that the court was coming to solve the whole problems and to prosecute all the perpetrators, and to bring things to where they should be.” See, e.g., Institute for War & Peace Reporting, Sudan: Few Victims Likely to Participate in International Court Trial, July 27, 2007, available at http://allafrica.com/stories/200707301151.html. While effective participation by victims will not necessarily resolve this greater issue, it is critical that as many victims as possible receive accurate information about the ICC and their role in it, which will be encouraged by the simplification of the application procedure and the provision of clear guidelines for participation.

133 See supra text accompanying note 88.
134 See discussion supra note 93 and accompanying text.
approval to continue a *proprio motu* investigation or a challenge to jurisdiction or admissibility. However, the situation-victims would have those rights even without having been afforded “victim” status under Article 68(3).

In fact, as a practical matter, the only immediately obvious manner in which victims could participate *under Article 68(3)* at the investigation stage—in other words, in which they would have an opportunity to meaningfully present their views and concerns to the Court beyond exercising rights given to victims in other parts of the Rome Statute and ICC Rules—would be if the Court were to hear evidence from victims regarding particular suspects or crimes. Yet such participation would arguably run counter to the intent of the drafters, who made clear that victims would not have the right to initiate investigations.\(^{135}\)

Notably, PTC I itself appears to recognize, at least at a certain level, that Article 68(3) cannot be applied meaningfully at the investigation stage of a situation. Specifically, the Chamber held in its January 2006 decision that Article 68(3) requires not only that applicants meet the definition of “victims” under Rule 85, but also that they demonstrate that their “personal interests” are affected by the proceedings in which they wish to participate.\(^{136}\) However, the Chamber then went on to explain that “the personal interests of victims are *affected in general* at the investigation stage,”\(^{137}\) rendering the “additional criterion” essentially meaningless at the situation stage.\(^{138}\) Moreover, the reason that PTC I determines that victims' interests are “affected in general” during an investigation is because “the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”\(^{139}\) Yet, as discussed above, the provisions of the ICC victim participation scheme are intended to allow victims to participate in a manner distinct from witnesses and from claimants.\(^{140}\) Thus, it seems that the Pre-Trial Chamber itself did not see the extension of Article 68(3) to the investigation phase of a situation as serving a restorative function for victims. It is therefore unsurprising that the Chamber, in a decision written shortly after its seminal January 2006

\(^{135}\) *See supra* text accompanying notes note 97 et seq.

\(^{136}\) *See* Situation in DRC, PTC I, Jan. 17, 2006, *supra* note 1, ¶ 62 (holding that “personal interests” in Article 68(3) “constitute[] an additional criterion to be met by victims, over and above the victim status accorded to them”).

\(^{137}\) *Id.* ¶ 63 (emphasis in original). Indeed, in its decision, Pre-Trial Chamber I also stressed that Article 15, one provision that explicitly provides victims the right to participate before a “case” has been initiated, does not explicitly require a “personal interests” analysis, but instead appears to “accord a specific right of participation” to victims who meet only the criteria found in Rule 85. *Id.* ¶ 62.

\(^{138}\) *Id.* ¶ 64.

\(^{139}\) *Id.*

\(^{140}\) *See supra* Part III.A.
holding on victim participation at the investigation stage, described the system of participation provided for in that decision as "very limited."\textsuperscript{141}

C. Application of Article 68(3) to Investigation Phase of Situation is Inconsistent with Court's Obligations to Ensure Efficiency & Fairness of Proceedings

Another problem with the Court's application of Article 68(3) to the situation stage is that it does not efficiently respond to victims' requests to participate. At the time of this writing, well over 150 victim-applicants are awaiting an initial decision from PTC I as to whether they qualify as victims in the DRC situation alone.\textsuperscript{142} At least sixty-five of these victims filed their applications on or before September 25, 2006.\textsuperscript{143} Oddly, PTC I did undertake an analysis, which included observations from the parties and the victims' representatives, as to whether these sixty-five applicants qualified under Article 68(3) to participate in the case against Lubanga.\textsuperscript{144} However, after concluding that only one of the sixty-five victims qualified for participation in the case, the Chamber ended its analysis, saying only that it would "consider their application for participation in the investigation stage" of the DRC situation in "due course."\textsuperscript{145} Similarly lengthy waiting periods have been seen in the contexts of the Darfur and Uganda situations.\textsuperscript{146} Thus, although the Court has not seen the "hundreds of thousands" of victims' applications to participate at the situation phase predicted by the Office of the Prosecutor in the wake of PTC I's January 2006 decision,\textsuperscript{147} a serious backlog already exists at the Court, which threatens to worsen as time passes and more victims of the "situations" file applications under Article 68(3).

\textsuperscript{141} Situation in the Democratic Republic of Congo, Decision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04-135, ¶ 47 (Pre-Trial Chamber I, Mar. 31, 2006).

\textsuperscript{142} Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, p. 10 (Pre-Trial Chamber I, Oct. 20, 2006).

\textsuperscript{143} Id. at 2-3 (noting that the applications under consideration in the decision were filed between July 31, 2006 and Sept. 25, 2006).

\textsuperscript{144} Id. at 10.

\textsuperscript{145} Id.

\textsuperscript{146} See Sudan Victim Lawyers Recount Their Experience With the ICC So Far, supra note 108, at 7 (explaining that a number of victims who have applied to participate in the Darfur and Uganda situations have been waiting more than one year for an initial decision on their applications).

\textsuperscript{147} See Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ¶ 5 (Jan. 23, 2006).
The Pre-Trial Chambers' application of Article 68(3) of the investigation stage of a situation also presents concerns about the fair treatment of victims by the Court. On the one hand, if particular victims—for example, the two victims granted participation rights under Article 68(3) in the Uganda situation—were permitted to provide evidence to the Court in the context of an investigation, the result could be harmful to many other groups of victims, as the crimes suffered by those non-participating victims may receive less attention by the OTP, an office with limited resources. At the same time, if all interested victims were permitted extensive participation rights in the context of an ongoing investigation, it would be virtually impossible for the ICC to realistically ensure equal access for each individual to exercise such rights.

A final concern relates to the Court's ability to safeguard the rights of future suspects at the investigation stage of a situation. In its January 2006 decision reasoning that Article 68(3) could extend to the investigation phase of a situation, PTC I recognized its duty to ensure that victims' participation "is not prejudicial to or inconsistent with the rights of the Defense." It went on to conclude that such concerns were addressed because "the Chamber decided to appoint an ad hoc counsel to represent the interests of the Defence." PTC I has also appointed ad hoc counsel in the context of the Darfur situation, and PTC II has used the tool in the Uganda situation. Notably, however, the Court has appeared to take a highly restrictive view of the ability of ad hoc counsel to act on behalf of prospective suspects. For example, after Pre-Trial Chamber I had appointed ad hoc defense counsel to represent presumptive defendants in the DRC situation, it quickly limited the parameters of defense advocacy by striking down arguments counsel had raised over the Court's jurisdiction and admissibility, on the grounds that the defense had no "procedural standing" to raise them. Because challenges to jurisdiction or admissibility could only be made "by an accused person or a person for whom a warrant of arrest . . . has been issued," defense counsel was prevented from raising arguments it would have otherwise been entitled to raise. The Court placed the same limits on ad hoc counsel in the context of the Darfur investigation. While the appropriate role of ad hoc counsel at

148 See supra notes 106-108 and accompanying text.
149 Situation in DRC, PTC I, Jan. 17, 2006, supra note 1, ¶ 70.
150 Id.
151 See Situation in Darfur, Sudan, Case No. ICC-02/05-18, Decision on the Request for an Extension of Time, 1 (Pre-Trial Chamber I, Aug. 25, 2006).
153 Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Decision Following the Consultation Held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility Filed on 31 Oct. 2005, at 4 (Nov. 9, 2005).
154 Id.
155 Situation in Darfur, Sudan, Case No. ICC-02/05-34, Décision relative aux conclusions aux fins
the investigation stage is beyond the scope of this article, it nevertheless must be noted that barring ad hoc counsel from making such fundamental challenges at this stage could affect the rights of future accused, and therefore raises questions about the Court’s ability to protect their rights, as required not only under Article 68(3), but also under the Rome Statute generally.156

V. RECOMMENDATIONS TO BETTER ACHIEVE RESTORATIVE GOALS WHILE ENSURING EFFICIENCY & FAIRNESS OF PROCEEDINGS

Given the potential concerns raised by the extension of Article 68(3) to the investigation stage of a situation, and particularly in light of the restorative purpose behind the victims’ participation scheme and considerations of efficiency and fairness, a reconsideration of PTC I’s January 2006 decision may be in order. As explained above, neither the Rome Statute nor the Rules expressly mandate an application of Article 68(3) to the investigation stage of a situation. While one may argue in favor of such application—as seen in the January 2006 decision—the above analysis suggests that this holding may be inconsistent with the broader goals and concerns underlying the victims' participation scheme itself.

Moreover, victims are not likely to lose any meaningful participation rights if the Court does not apply Article 68(3) to the investigation phase. Indeed, victims could still benefit from the majority of access and notice rights at the situation stage described by PTC II in its August 2007 decision.157 At the same time, the Court may be able to increase the number of victims able to take advantage of such rights by focusing its resources on broadly disseminating information about the Court and potential opportunities available to victims. As explained above, all victims who “communicate with the Court” are entitled to notice regarding the


On 22 November, the Court rejected Maitre Shalluf’s [ad hoc Defense Counsel] request that it declare itself incompetent in the Darfur Situation indicating that that none of the articles stated by the defense counsel allowed him to contest the admissibility of the case or the competency of Court, especially considering the fact that no indictment had been made yet. Maitre Shalluf sought to appeal this decision on 27 November but leave for appeal was denied on 12 December on the ground that the Defence Counsel’s request had no legal basis.

Id.

156 See, e.g., Rome Statute, supra note 5, at art. 67 (guaranteeing rights of the accused, including the right to a fair hearing conducted impartially, to be informed of the charges against him or her, to have adequate time and facilities to prepare a defense with counsel of the accused’s choosing, and to be tried without “undue delay”).

Prosecutor’s decisions not to proceed with an investigation or a particular prosecution.\textsuperscript{158} Communicating with the Court may require that victims do nothing more than express to the Registrar a desire to participate at some stage of the proceedings, as the Rules authorize the Registrar to keep a database of victims who have expressed such a desire.\textsuperscript{159} The Court will then have record of these victims, and in the event the Pre-Trial Chamber calls a hearing under Articles 15(3) or 19(3), the Court need only assess that those wishing to submit “observations” meet the definition of “victims” under Rule 85. Furthermore, encouraging victims to communicate with the Court during the investigation phase will increase the pool of victims upon which the Pre-Trial Chamber may draw if it chooses to seek the views of victims pursuant to Rule 93. Finally, victims will of course retain the ability to apply under Article 68(3) for any relevant cases that arise out of a situation.\textsuperscript{160}

While not taking away any meaningful rights for victims, there are several advantages to de-linking Article 68(3) from participation at the investigation phase of a situation. First, victims would have a better understanding of their rights at the investigation phase of a situation. Moreover, victims could potentially increase their level of participation over time as authorities arrest additional suspects, thereby decreasing the risk of frustration inherent in the Court’s current approach to victims’ participation at the situation stage. In addition, making clear that victims need only “communicate with the Court” to enjoy many of the same rights they are likely to enjoy if determined to have participation rights under Article 68(3) will significantly ease the burden of the current victims’ participation scheme on the Chambers and the parties. Finally, defining the participation rights of victims at the investigation stage under Articles 15(3) and 19(3), as well as the various rules ensuring notice to victims concerning a range of issues, is more likely to safeguard the efficiency, fairness, and integrity of the overall proceedings.

\textsuperscript{158} Id.

\textsuperscript{159} ICC Rules, supra note 37, at R. 16(3) (“For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.”). Note that, although Rule 16(3) refers to victims who have expressed an intention to participate “in a specific case,” the Rules were adopted well-before PTC I’s January 2006 decision distinguishing between “situation” and “case,” and therefore the use of the word “case” should not necessarily be interpreted as excluding victims who have expressed an intent to the Registrar to participate at an appropriate phase of an investigation, for example, under Article 15(3).

\textsuperscript{160} Notably, at least two recent sources have suggested that victims are primarily interested in participating at the case phase of proceedings, rather than the situation. See Sudan Victim Lawyers Recount Their Experiences with the ICC So Far, supra note 108, at 7 (“Now there are some decisions which outline the difference between participation in the situation and participation in a case . . . . Victims want to participate in cases.”); Caroline Tush, Sudan: Few Victims Likely to Participate in International Court Trial, INST. FOR WAR AND PEACE REPORTING, July 27, 2007, available at http://allafrica.com/stories/200707301151.html (quoting Marianne Goetz of REDRESS as stating that the likely participation of victims in the context of Darfur will be “quite disappointing” because while “victims of the situation [in Darfur] will be vast, victims in actual cases will be very low”).