

The Importance of Victim Participation in the Proceedings of International Criminal Court

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The Rome Statute, the founding document of the International Criminal Court, unlike the preceding special tribunals, significantly extends the rights of the victims to participate in international criminal proceedings. Prior to the adoption of the Statute, the participation of the victims in the international criminal proceedings was limited primarily to participation in the capacity of a witness or in the schemes of reparations. The Statute has introduced an innovative model of participation in the process of international criminal justice, according to which, when the issue concerns the personal interests of a victim, a possibility was created to submit his/her views and concerns at any stage of the proceedings. This novelty was a step forward to recognize the problematic experience of “invisibility” of the victims in the proceedings of the previous tribunals¹ and aimed at remedying the flawed practice. Unfortunately, the goal to meaningfully include victims in the international criminal justice process was not effectively realized in practice, and the victims are still not given the realistic opportunities to access and interact with the International Criminal Court.

Access for victims is particularly restricted to the International Criminal Court at the stage of official investigation, when the scope of the investigation is formed, specific episodes of crimes subject to investigation are being identified, and comprehensive investigative actions are carried out in order to identify the persons who bear the highest responsibility for the commission of the international crimes within the jurisdiction of the Court.

As of now, there are no clearly defined procedures for the participation of victims in the official investigation process. There are no regulations in place for the victims to receive information about the scope and progress of investigation. Without such information, victims would not be able to effectively defend their interests in the process of investigation and discern what kind of information they may submit to the investigative authorities.

The issue whether or not victims are entitled to the right to participate in the investigation and what is the scope of that right has been a subject of examination by the Pre-Trial and Appeals Chambers of the ICC. In accordance with the Article 68(3) of the Rome Statute, where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. As noted by the Appeals Chamber, the Court's case-law reveals that the victims have the right to participate under Articles 68 of the Rome Statute only at the stage of **judicial proceedings**. **As the Appeals Chamber explains, the term "proceedings" used in Article 68 of the Rome Statute denotes a "judicial cause pending before a Chamber".**² **In contrast, an investigation is not a judicial proceeding, but an inquiry**

¹ International Federation for Human Rights (FIDH), Whose Court is it?: Judicial handbook on victims' rights at the International Criminal Court, p. 12.

https://www.fidh.org/IMG/pdf/fidh_whose_court_is_it_en.pdf

² Paragraph 45, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO:

https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF

conducted by the Prosecutor into the commission of a crime³. Consequently, victims are not granted the formal right to participate at this stage.

The above-mentioned interpretation by the Appeals Chamber narrows the scope of the right of the victim to participate in the proceedings enshrined in the Article 68(3) of the Rome Statute. The instant Article allows for the possibility that victims take part in any stage of the proceedings and not only at the stage of “judicial proceedings”. The Article 68 employs the term “proceedings” and not “judicial proceedings”. **The definition of the term “proceedings” as used in the Rome Statute is not limited only to “judicial proceedings” but includes the process of investigation and prosecution as well, which is clear from the thorough reading of the whole Statute:**

For example, in accordance with Article 17 of the Rome Statute, the Court shall determine that a case is admissible provided that the State which has jurisdiction over it is unwilling or unable **to genuinely carry out investigation or prosecution**.⁴ In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following factors exist: “(a) **The proceedings were or are being undertaken** or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5; (b) **There has been an unjustified delay in the proceedings** which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) **The proceedings were not or are not being conducted independently or impartially**, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”⁵ If the concept of “proceedings” is understood only to include “judicial proceedings”, then in assessing the issue of whether the state has genuinely carried out proceedings to punish the international crimes subject to the ICC jurisdiction, the ICC must ignore the process of investigation and prosecution. Such a reading of the term of “proceedings” excludes the assessment of the lack of independence and impartiality of the investigating and prosecuting authorities, and that of the unjustified delay in the proceedings and other suspicious actions of the same authorities inconsistent with an intent to bring the person concerned to justice. **Therefore, it is clear that the drafters of the Rome Statute have not implied only “judicial proceedings” under the concept of “proceedings” and when they refer to “proceedings” in relation to the right of victims to participate, they do not mean only “judicial proceedings”. Thus, the argument of Appeals Chamber (used against the idea of victim participation in the investigation), according to which the term “proceedings” used in Article 68 of Rome Statute implies only “judicial proceedings” and that an investigation is not a “judicial proceeding”, but an inquiry, lacks sufficient reasoning⁶.**

It should be noted that the Appeals Chamber refers to one more argument against the victims’ right to participate in investigation. Specifically, in the view of the Appeals Chamber, there is “ample scope” for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally accorded “a general right to participate”. The Appeals Chamber considers that this

³ Ibid.

⁴ Article 17(1)(a) of the Rome Statute:

<https://www.supremecourt.ge/files/upload-file/pdf/aqtebi-axali2.pdf>

⁵ Article 17(2) of the Rome Statute:

<https://www.supremecourt.ge/files/upload-file/pdf/aqtebi-axali2.pdf>

⁶Paragraph 45, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO:

https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF

possibility stems from "the statutory scheme of the Statute"⁷. What does the Chamber mean by "ample scope" is not clear. The Chamber fails to elaborate on this issue in depth. **The above opinion of the Appeals Chamber is unfortunately distanced from the real picture of the process of ongoing investigations in the countries of situation where the victims do not have the real possibilities to access the Office of Prosecutor and interact with it at the stage of investigation.**

As for the judicial proceedings, victims may participate in the following proceedings, *inter alia*: hearing on the confirmation of charges⁸, trial hearing⁹, review of the decision of the Prosecutor not to initiate an investigation by Pre-Trial Chamber¹⁰. In the course¹¹ of the judicial proceedings, the victims may submit their views and concerns directly to the judges. As a rule, the views of the victims are submitted by the legal representatives of the victims in an oral or written manner¹². In certain cases, the victims may appear in the Court in person in order to share their views and concerns. However, the practice of the Court Chambers has not been consistent in this regard and only very limited numbers of victims have been allowed to appear in person before the Court to present their views on matters raised before the Chamber¹³.

Other forms of victim participation in the proceedings are: submitting representation forms to the Pre-Trial Chamber in relation to the authorization of the investigation (Article 15(3) of the Rome Statute), and submitting observations to the relevant chamber of the Court in relation to the issues of jurisdiction or admissibility (Article 19(3) of the Rome Statute)¹⁴.

In certain cases, victims may initiate proceedings themselves under the statutory provisions. For instance, victims may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy. However, in the view of the Appeals Chamber, these proceedings must be distinguished from the participation under article 68 (3) of the Statute¹⁵.

⁷ Paragraph 53, *Ibid*:

https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF

⁸ The Rules of Procedure and Evidence of the International Criminal Court, Article 92(3):

<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>

⁹ The Rules of Procedure and Evidence of the International Criminal Court, Article 89-92:

<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>

¹⁰ The Rules of Procedure and Evidence of the International Criminal Court, Article 92(2):

<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>

¹¹ VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A GUIDE FOR THE PARTICIPATION OF VICTIMS IN THE PROCEEDINGS OF THE COURT, p. 12:

<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>

¹² International Federation for Human Rights (FIDH), Whose Court is it?: Judicial handbook on victims' rights at the International Criminal Court. P. 51.

https://www.fidh.org/IIMG/pdf/fidh_whose_court_is_it_en.pdf

¹³ *Ibid*:

¹⁴ Elisabeth Baumgartner, *Aspects of victim participation in the proceedings of the International Criminal Court*, International Review of the Red Cross, p. 413:

<https://www.corteidh.or.cr/tablas/R21692.pdf>

¹⁵ Paragraph 50, **Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO:**

https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF

Further, in accordance with the Rules of Procedure and Evidence of the International Criminal Court, the Chamber may seek the views of the victims in relation to any matter arising in the course of the proceedings before it^{16,17}.

All the forms discussed above concerning the participation of victims in the proceedings are related to the issues raised before the Court Chambers meaning that they relate to the judicial proceedings. The investigations conducted in the countries of situation, including the one going on in relation to the 2008 Russia-Georgia armed conflict (hereinafter: “2008 August War”), demonstrate that the victims have an interest to participate not only in the court proceedings, but also in the investigation process beyond **the specific judicial proceeding**. For example, obtaining the information regarding the scope and progress of the investigation which may serve as a basis for submitting specific views and concerns to the investigative authorities and relevant Court Chambers. Unfortunately, for the victims, similar to the general public, information on the investigation is strictly confidential, except for the small number of victims who are the witnesses at the same time.

The Court considers that the information related to the investigation process is strictly confidential for the victims and the general public due to the security risks and the interest of effective investigation. However, in order to mitigate these threats, it should be possible to put in place appropriate safeguards to ensure protection of confidentiality, as well as distinguish as to what is shared to the large public versus what is shared to the victims. The independent experts, who recently reviewed the work of the Court and analyzed the ongoing investigations in various countries, under the mandate granted by the Assembly of the State Parties, addressed the Court with a similar recommendation.¹⁸ **Obviously, the people who have suffered atrocities shocking to all mankind must have access to information on the investigative process carried out to identify the persons who bear the highest responsibility for these crimes. Currently, this information is largely closed to the victims.**

In order to counter the fears of the Court, it should be also mentioned that the participation of victims in the investigation may facilitate an effective investigation. A good example of this is the recent application by Prosecutor Karim Khan to the Pre-Trial Chamber to issue arrest warrants regarding the crimes committed during the 2008 Russia-Georgia armed conflict.

On March 10, 2022, the Prosecutor of the International Criminal Court applied to the Pre-Trial Chamber to issue arrest warrants against three persons who were holding positions in the de facto administration of South Ossetia during the events of the 2008 August War¹⁹.

¹⁶ The Rules of Procedure and Evidence of the International Criminal Court, Article 92:

<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>

¹⁷ Paragraph 48, **Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO:**

https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_07932.PDF

¹⁸ Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, September 30, 2020, p. paragraphs 124-125, 387 and 388:

https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf

¹⁹ Prosecutor’s application to the Pre-Trial Chamber of the ICC pursuant to article 58 of the Rome Statute for warrants of arrest against Mikhail Mindzaev, Gamlet Guchmazov and David Sanakoev, March 10, 2020:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_01944.PDF

The Prosecutor's application concerns one particular episode of the 2008 August War, namely, the unlawful deprivation of liberty of 171 ethnic Georgian (or those perceived as Georgians) civilians and their placement in the preliminary detention facility in Tskhinvali where allegedly following crimes were committed against them: unlawful confinement, torture and inhuman treatment, hostage taking and unlawful transfer²⁰.

Including this grave episode into the scope of the ICC investigation was possible as a result of the participation of victims in the proceedings.

On October 13, 2015, then-Prosecutor Fatou Bensouda applied to the Pre-Trial Chamber with the request to authorize the investigation into the situation in Georgia. The Prosecutor's Office presented an extensive report on the alleged international crimes committed during the 2008 August War, which relied on the results of the preliminary examination which lasted for 7 years on this case. **This report did not mention the above episode of illegal detention of civilians²¹. This episode has been brought to the attention of the investigation and Pre-Trial Chamber by the representations of victims, submitted to the Pre-Trial Chamber through the assistance of various NGOs.** In the representation forms the victims expressed their positions whether or not they supported the opening of investigation and provided information regarding the crimes they suffered during the 2008 August War. **A considerable number of representations received from victims related to the crimes beyond the scope of the Prosecutor's proposed investigation²², including the above-described episode of unlawful deprivation of physical liberty of civilians²³.**

The Court allocated very short time for the submission of representation forms - **only 30 days** (the same concerns are raised by the Report of Independent Experts²⁴), further demonstrating the fact that the Court does not sufficiently acknowledge the importance of participation of victims in the proceedings. The victims and the NGOs advocating for their rights made great effort to submit maximally descriptive representation forms before the Pre-Trial Chamber in such a short timeframe.

After analyzing the request of the Prosecutor and the representation forms submitted by the victims, the Pre-Trial Chamber decided to authorize the opening of the investigation into the situation in Georgia. By the decision of the Chamber, the Prosecutor was given the right to expand the scope of the investigation to include any possible offense under the jurisdiction of the Court, confined only by the temporal and geographical parameters of the situation in question²⁵.

The International Criminal Court must become more aware of the importance of the participation of victims in the proceedings. The experience and lessons received in the past must be properly analyzed in order to avoid the similar mistakes in the future. The Chambers of the Court must

²⁰ Ibid.

²¹ Request by the Prosecutor to the Pre-Trial Chamber for authorisation of an investigation pursuant to Article 15: the situation in Georgia, October 13, 2015:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_19375.PDF

²² Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, December 4, 2015, p. 18:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_23215.PDF

²³ p. 17, *Ibid*.

²⁴ Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, September 30, 2020, p. 279, paragraph 857:

https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf

²⁵ Decision of the Pre-Trial Chamber I on the Prosecutor's request for authorization of an investigation, p. 25, paragraph 64:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF

develop a practice that will be in line with the spirit of the Rome Statute. The changes must be introduced in the working principles of various Organs of the Court, as well as the Court regulations in order to facilitate the establishment of a real connection between the victims and the Court. **People who are victims of crimes against humanity, genocide, war crimes and aggression must be aware as to what steps are taken to identify the persons who bear highest responsibility for the crimes committed against them and what is the progress of the investigation** **Completing the investigation process in a closed manner, without providing the victims the real possibility to connect with the investigative authorities, will not create a feeling among the victims that they are part of the justice process.**