

Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate

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Abstract

Based on interviews with 23 key figures at the International Criminal Court, this study represents an effort to go beyond the text of the Rome Statute. It tries to understand the different views or interpretations of the law regarding victim participation that exist within the organization and will ultimately shape how victims' rights are applied in the Court. Rather than being a legal study, this research is rooted in organizational psychology.

Key words

International Criminal Court; participation; victim rights; victims

The newly formed International Criminal Court (ICC) deals with some of the most serious human rights violations, including genocide, torture, rape, and slavery. One of the major innovations of the ICC is the integration of victims in the criminal justice process.¹ The Rome Statute of the ICC and the Rules of Procedure and Evidence contain specific references with respect to the role of victims, including notification, reparation, and participation. Unlike the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, where the only role of victims is that of witness for the prosecution, the ICC recognizes victims' rights to participation, reparation, protection, and legal representation.

However, the Statute and Rules of Procedure and Evidence do not specify just how these rights are to be put into practice. The exercise of the right to participation is left up to the Court to determine. There is a great deal of ambiguity regarding the mechanisms applicable to victims' participation.² According to Chung, no single legal issue at the ICC has garnered as much attention as the manner in which the ICC

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1 C. Stahn, H. Olasolo, and K. Gibson, 'Participation of Victims in Pre-trial Proceedings of the ICC', (2006) 4 *Journal of International Criminal Law* 219.

2 M. C. Bassiouni, 'International Recognition of Victims' Rights', (2006) 6 (2) *Human Rights Law Review* 203; J. Wemmers, D. Casoni, and M.-M. Cousineau, *Reparation and the International Criminal Court: Meeting the Needs of Victims* (2006).

judges have interpreted the right of victims to participate in proceedings.³ Analysing the many decisions made up to 2009 by the Court regarding victim participation, Friman concludes that the Court is still struggling with how to accommodate victims' rights.⁴ Moreover, he argues that many of the decisions tend to be based on opinions rather than on an interpretation of the law.

According to the legal sociologist Carole Smart, law derives its power from the appearance of unity and singularity.⁵ But rather than one law, Smart argues that law is refracted and that there exist many different views or interpretations of the law. The Court, like any organization, is made up of people with differing views. The people working in the court will exchange and discuss perspectives and their attitudes will affect how they interpret and apply the law. Their views will influence the discourse within the Court. Moreover, the meaning that individuals attach to things, such as victim participation, shapes their behaviour towards it.⁶ Hence, in addition to influencing perceptions, these views can influence how victims and victims' rights are treated.

The present study looks at the different perceptions that exist within the Court regarding victim rights. Without questioning the judges' authority to set the parameters of victims' rights, until litigation has fully defined victim participation, which will probably take some time, there is considerable ambiguity about its precise meaning. This study explores the opinions of those working at the ICC with respect to the victims' right to participate.

In the following section, the legal texts regarding victims' rights and the ICC will be presented. This provides the reader with a basic understanding of victims' formal rights. Next, Edwards's (2004) typology of victim participation in criminal justice procedures is presented. After presenting the methodology, the results from the interviews are considered; the findings are analysed within the framework of Edwards's typology. The paper closes with a discussion of the main findings.

I. VICTIM PARTICIPATION AND THE INTERNATIONAL CRIMINAL COURT

The Rome Statute, which is the founding document of the International Criminal Court,⁷ explicitly recognizes victims and their interest in the court. Specifically, Article 68(3) of the Rome Statute states,

where the personal interest 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

3 C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 *Northwestern Journal of International Human Rights* 459.

4 H. Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 *LJIL* 485.

5 C. Smart, *Feminism and the Power of Law* (1989).

6 H. Blumer, *Symbolic Interactionism: Perspectives and Method* (1969).

7 Rome Statute of the International Criminal Court, Adopted by the United Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 12 July 1998, UN Doc. A/CONF.183/9.

with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate in accordance with the Rules of Procedure and Evidence. (emphasis added)

While establishing victims' right to participate, Article 68 does not specify who can participate, when they can participate and how they can participate. When are victims' personal interests affected? What are appropriate stages? All these questions are left up to the Court to decide.⁸

As for the Rules of Procedure and Evidence,⁹ Rule 89 requires that victims apply to the Court in order to be able to participate in proceedings. The Chamber then decides when and how the victim can participate, which may include making opening and closing statements (Rule 89(1)). The victim's application may be rejected by the Chamber if the Chamber feels that the applicant is 'not a victim or that the criteria set out in Art 68(3) are otherwise not fulfilled' (89(2)). However, a victim whose application is rejected may file a new application later in the proceedings. An application can also be made by 'a person acting with the consent of the victim' (89(3)) or on the victim's behalf (e.g. if the victim is a child or is disabled). Where there are many applications, the Chamber can handle them together, issuing one decision. However, Rule 91(1) specifies that a Chamber may modify a previous ruling under Rule 89. This means that any victims who were allowed to participate may find their status modified by a subsequent Chamber. As of December 2009, 734 victims had been granted permission to participate in the proceedings before the Court.¹⁰ However, it is not clear how many applications were rejected, as the Registrar does not communicate that information. One of the key questions when deciding which victims can participate is how victims' personal interests are affected. In order to participate, do victims have to be a direct victim of an accused presently before the court or simply a victim of the situation before the court? The answer to this question will be of great consequence in terms of the number of victims eligible to participate.¹¹

Rule 90 of the Rules and Procedure and Evidence states that victims are free to choose a legal representative. When there are many victims, chambers may request that victims or a particular group of victims choose a common representative or representatives. To this end the Registrar will assist them by referring victims to a list of counsel that is maintained by the Registry (90(2)).

Regarding the participation of legal representatives in the proceedings, Rule 91 specifies that a legal representative of a victim is allowed to participate in the proceedings depending on the ruling of the Chamber under Rules 89 (application

⁸ See Friman, *supra* note 4, for a discussion of relevant court decisions on victim participation.

⁹ Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, First Session, New York, 3–10 September 2002, UN Doc. ICC-ASP/1/3.

¹⁰ Victim Participation and Reparation Section, International Criminal Court, 8 December 2009.

¹¹ For a discussion of ICC decisions on victim participation see Friman, *supra* note 4. In particular see, e.g., *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on Victims' Participation, ICC-01/04-01/06-1119, T.Ch.I, 18 January 2008; *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008. ICC-01/04-01/06 OA9 OA10, A.Ch., 11 July 2008.

for participation) and 90 (legal representatives). This includes participation in the hearings. But when does victim participation pose a risk to the fairness of the trial? Legal representatives may be denied direct participation in hearings if the Chamber decides that the representative's intervention should be confined to written observations or submissions. The prosecution and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims. Legal representatives of victims who have been admitted as participants by the Chamber, and who wish to question a witness, an expert, or the accused, must first make an application to the Chamber. The Chamber may require that the legal representative write down the questions, and in that case they will be shared with the prosecution and, if appropriate, with the defence, who will be allowed to make observations. The Chamber will make a ruling on the legal representative's request. However, for a hearing limited to reparations (Art. 75 of the Rome Statute), the restrictions on questioning by the legal representative shall not apply. In that case, the legal representative may, with the permission of the Chamber, question witnesses, experts, and the person accused. Taken together, the Statute and Rules allow victims' views and concerns to be presented by their legal representative provided they respect the rights of the accused. But what does this mean and how should this right be applied?

2. EDWARDS'S PARTICIPATORY ROLES FOR VICTIMS

Ambiguity about what victim participation means is not unique to the ICC. Long before its creation, victimologists identified victims as the forgotten party in criminal justice procedures and stressed the importance of their inclusion.¹² While it is clear that victims want to participate in the criminal justice system, it is less clear how they should participate.

In 1985 the General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹³ The UN Declaration inspired Article 68 of the Rome Statute. This is clear from just looking at the language that is used in both documents. For example, Article 6(b) of the Declaration states,

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

...

(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. (emphasis added)

12 E. Viano, 'Victims, Offenders and the Criminal Justice System: Is Restitution the Answer?', in B. Galaway and B. Hudson (eds.), *Offender Restitution in Theory and Action* (1978), 91; M. Bard and D. Sangry, *The Crime Victim's Book* (1979); M. Baril, 'Réactions à la victimisation' (1980) 13 *Criminologie* 94.

13 UN Doc. A/Res/40/34, 29 November 1985.

When the Declaration was adopted, it was intended to promote victims' rights in domestic courts around the world. At that time, the very idea of an international criminal court was inconceivable and no one ever guessed that the Declaration would one day serve as a basis for victims' rights in the ICC. Because the Declaration had to serve a wide variety of domestic criminal justice systems, the text was purposely left general and all-purpose so that it would not be limiting and would fit across all systems. It simply states that victims should be allowed to express their views and concerns; however, as for when they can participate and how, it merely states that victims should be allowed to participate 'at appropriate stages' and it stresses the importance of safeguarding the rights of the accused.

Domestic courts belonging to the civil or inquisitorial legal tradition had little difficulty with the notion of victim participation, as many already included provisions for victim participation such as the adhesion procedure (*partie civile*) and the subsidiary prosecutor (*Nebenklager*).¹⁴ The adhesion procedure allows victims to present civil claims in criminal proceedings. The subsidiary prosecutor allows victims to participate in penal claims, giving them extensive procedural rights (e.g. the right to question witnesses and to appeal certain decisions) without burdening them with the responsibility of prosecuting the accused.¹⁵ However, victim participation was more challenging for countries with an adversarial or common law legal tradition, where the only role of victims was that of witness.¹⁶

Most common law countries, such as the United States, Canada, and Australia, adopted the victim impact statement (VIS)¹⁷ as a means of victim participation. This is typically a written statement which is submitted to the judge at the sentencing hearing. In it the victim indicates the impact that the crime had on them personally, such as the emotional, physical, and financial consequences of their victimization. Victim impact statements have been a source of debate among legal scholars¹⁸ and researchers.¹⁹

According to Ian Edwards,²⁰ much of the debate surrounding victim participation has focused on balance and, in particular, balancing the rights of victims and the

14 M. Jousten, 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems', (1987) 34 *Wayne Law Review* 95.

15 J. Wemmers, 'Victim Policy Transfer: Learning from One Another', (2005) 11 *European Journal on Criminal Policy and Research* 121.

16 Jousten, *supra* note 14.

17 Also known in England and Wales as a victim personal statement.

18 A. Ashworth, 'Victim Impact Statements and Sentencing', (1993) *Criminal Law Review* 498. In the United States, *Payne v. Tennessee* (501 US 808 (1991)) brought victim participation to the country's Supreme Court. The Supreme Court decided to allow the inclusion of VISs in cases involving a possible death sentence, thus reversing a decision by the state of Tennessee to exclude victim input from possible capital cases. For a discussion see E. Erez, 'Victim Participation in Sentencing: And the Debate Goes On . . .' (1994) *International Review of Victimology* 17.

19 E. Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice', (1999) *Criminal Law Review* 545; A. Sanders, C. Hoyle, R. Morgan, and E. Cape, 'Victim Impact Statements: Don't Work, Can't Work', (2001) *Criminal Law Review* 447; E. Erez and J. Roberts, 'Victim Participation in the Criminal Justice System', in R. Davis, A. Lurigio, and S. Herman (eds.), *Victims of Crime* (2007), 277.

20 I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making', (2004) 44 *British Journal of Criminology* 867.

accused.²¹ This is also an important issue at the ICC.²² Critics of the VIS argued that it was punitive and allowed victims to push for harsher sentences.²³ Those in favour of the VIS argued that it had no adverse effect on sentences and promoted healing.²⁴ In an effort to move the discussion forward, Edwards presents an analysis of the notion of participation, and he identifies four different participatory roles for victims. Each role has specific implications for the victim and their relationship with the criminal justice system.

The first type of participation identified by Edwards is *control*. Victims would have control over the decision. They would have decision-making power and become the decision-maker. Criminal justice authorities would be obliged to obtain information as to the victims' preference and then follow that preference. In turn, the victim would be obliged to make his/her preference known to authorities. This is the most extreme form of participation possible according to Edwards. Sharia, or Islamic law, is an example of such a system, which under certain circumstances asks victims' preferences as to punishment and is obliged to follow the victims' wishes.²⁵

The second type of participation is *consultation*. According to Edwards, authorities would be obliged to seek and obtain information about victims' preferences; however, they would not be obliged to follow the victims' directions. Unlike control, where victim participation would be mandatory, here, victims could choose whether or not to participate. In the United States the Victims Rights and Restitution Act, passed by Congress in 1990, gives victims in federal cases the right to consult with prosecutors. Similarly, a majority of states in the United States give victims the right to consult with officials before offers of pleas or the release of defendants from custody.²⁶ Victims are free to accept or reject the prosecutor's invitation. Should they accept, the victim will have a chance to discuss any concerns or questions that he or she may have with the prosecutor.

Third, victim participation could be limited to *provision of information*. This role obliges criminal justice decision-makers to seek and consider information from victims. In turn, victims are obliged to supply information to criminal justice authorities, and have no choice but to provide the authorities with the information requested by them. This role strongly resembles the role of witness, which, of course, is the traditional role reserved for victims in criminal justice. Victims provide vital information to police, often alerting them to crimes which would otherwise go undetected.²⁷ As witnesses, victims can be subpoenaed to appear in court in order to testify and provide information that is crucial to deciding the case.

21 See P. Rock, *After Homicide: Practical and Political Responses to Bereavement* (1998); see also K. Roach, *Due Process and Victims' Rights* (1999), who describes how this debate has been fuelled by victims' groups claiming equal rights for victims.

22 Friman, *supra* note 4; Stahn, Olasolo, and Gibson, *supra* note 2.

23 Ashworth, *supra* note 18; Roach, *supra* note 21.

24 Erez, *supra* note 19.

25 M. Bassiouni, "Qesas Crimes", in Bassiouni (ed.), *The Islamic Criminal Justice System* (1982).

26 R. Davis and C. Mulford, 'Victims' Rights and New Remedies: Finally Getting Victims Their Due', (2008) 24 (2) *Journal of Contemporary Criminal Justice* 198.

27 W. Skogan and G. Antunes, 'Information, Apprehension and Deterrence: Exploring the Limits of Police Productivity', (1979) 7 (3) *Journal of Criminal Justice* 217.

The fourth type of victim participation is *expression*. Expression obliges criminal justice authorities to provide victims with an opportunity for expression but it in no way obliges the victim to act on that offer. Victims can choose whether they wish to provide information or communicate their feelings to the decision-maker. Similarly, decision-makers are not obliged to take note of victims' expressed concerns or interests. This type of participation resembles the VIS. VISs are optional: victims are not obliged to make one and while authorities may be obliged to take note of it,²⁸ they are not obliged to follow victims' wishes.

Excluded from Edwards's typology is victim notification. Notification refers to keeping victims informed of the developments in their case. Some authors consider it a passive form of participation,²⁹ arguing that it sends a message to victims that they are not forgotten and that their interest in the case is recognized by authorities. However, Edwards sees notification as non-participation. He argues that participation is necessarily active and that receiving information 'lacks the essential characteristic of a participatory act'.³⁰

Thus, according to Edwards, victim participation can mean anything from full decision-making power to incidental expression of emotions and information before the court. However, it always involves some action on the part of the victim.

3. METHOD

The study under consideration follows a qualitative method and uses semi-directive interviews with key people working at the ICC. The data do not reflect victims' views, but, rather, give an indication of how victim participation is viewed within the Court.

3.1. Data collection

In order to facilitate data collection, the researcher spent three months at the International Criminal Court as a Visiting Professional. This gave the researcher access to information about the organization, its structure, and the people working there. It is likely that the different views presented are affected by the respondents' role at the Court as well as their prior experience. Thus, when selecting informants, people from different departments within the ICC and also who represented a variety of different legal traditions (e.g. common law, civil law, and so on) were targeted. Selected informants were then invited to participate in an interview. This procedure, which had been proposed originally, was followed with the Registry; different procedures had to be used in order to recruit judges and members of the Office of the Prosecutor (OTP).

28 For example, Art. 722 of the Canadian Criminal Code obliges judges to 'consider' victim impact statements whenever they are available.

29 See J. Wemmers, *Introduction à la victimologie* (2003), for a discussion of passive and active participation by victims in the criminal justice system.

30 Edwards, *supra* note 20, at 977.

Given the high position of the judges, a letter was sent by the Registrar to all of them, introducing the researcher and the study and explaining that they could be contacted for an interview.

For the OTP a similar letter was sent by the Registrar to the Prosecutor, who then requested the Director of the Jurisdiction Complementarity and Co-operation Division to meet the researcher for an interview. All requests for further interviews with OTP staff had to pass through this person, and staff who were willing and able to do an interview contacted the researcher.

The interviews took place in two blocks. The majority of interviews (17) took place between June and August 2007, while the researcher was at the Court as a Visiting Professional. Another six interviews took place when the researcher returned to finish her term as a Visiting Fellow at the University of Tilburg.

3.2. Sample

The ICC consists of four organs: the Presidency, the Chambers, the Office of the Prosecutor, and the Registry. With the exception of the Presidency, interviews were conducted with representatives from each of these organs.

In all, 23 interviews were conducted with professionals working at the ICC. Six interviews were held with people working for the Chambers (judges and legal advisers for the judiciary). Six interviews were conducted with various members of the OTP. Another 11 interviews were held with people from various sections of the Registry, including the Victim Participation and Reparation Section, the Victim Witness Protection Unit, the Outreach Unit, and the Trust Fund for Victims. Among these interviews are two with members of the Office for Public Counsel for Victims. An interview was also organized with the head of the Office for Public Counsel for the Defence, but in the end it was not possible to carry it out. Thus while the sample covers a wide cross-section of the Court, it is a qualitative sample and not necessarily representative.

The respondents had been working at the Court for anywhere from 11 months to five years; on average they had been there for three years. Almost all of the respondents (19) had studied law and only four had a non-legal education. In addition, most of the respondents (18) came from a country with a civil legal tradition.

The interviews were conducted in English, French, and Dutch, depending on the preference of the person being interviewed.

The interviews were taped and later transcribed. However, five people, the majority of them judges, chose to have an informal interview rather than a formal (taped) interview. The interviews were analysed for patterns and common themes, and the data provided rich and textured reflections on victim participation at the Court.

4. RESULTS

When asked about victims' rights at the Court, the vast majority of respondents interviewed mentioned victim participation spontaneously (21), the remainder when prompted (2). Respondents were asked to elaborate on how they perceived victim

participation; their responses are analysed using Edwards's typology for victim participation.

None of the respondents felt that victim participation meant giving victims *control* over decisions. Indeed, not one of the respondents mentioned anything that resembled what Edwards refers to as control. The Rome Statute as well as the Rules of Procedure and Evidence clearly place decision-making power with the judges, and all the respondents felt that decision-making power should remain in the hands of criminal justice authorities.

Two respondents viewed victim participation as *consultation*. Consultation implies actively seeking and considering victim input without the obligation to follow it. As one respondent said,

[I]t should be two-way communication . . . not just receiving information but being able to put questions back and have a dialogue with the Court and with the OTP. (Respondent (R) 19)

Six respondents saw victim participation in terms of helping with the investigation by *providing information*. Victims are viewed as a key source of information for the prosecution. They enable the prosecution to know about crimes that have taken place so that he can initiate an investigation and put together a sound case. In this approach victims participate in the criminal justice process as witnesses. For example,

by sending information to the OTP, in terms, for instance, of investigating certain crimes that are related to their own situation . . . who want to basically ask for an investigation. (R14)

During the analysis of it they should be allowed to intervene by sending correspondence to whoever has the responsibility to conduct an initial analysis . . . So that right from the beginning the Court . . . is seized of as much information as possible about what transpired during the conflict. (R21)

Twelve respondents saw victim participation in terms of *expression*. This was referred to by some as giving victims a 'voice' while others spoke of allowing victims to 'tell their story' and still others emphasized that victims should be able to 'express views and concerns':

Victims often have more to say than what they are allowed to say when testifying. They may only be allowed to testify about certain facts, which to them may have been quite minor. At the same time, these people might have been horribly traumatized about other events that they are not allowed to talk about. That side of the experience was basically not talked about. Participation allows victims to tell their story, which will give a more complete picture of what occurred. (R7)

They want to tell the bigger story . . . autonomous participation . . . They [victims] bring an entirely new dimension . . . It is not that they are doing their own cases . . . But what they say in court is not the question of the Prosecutor, it is not the questions of the defence, it is their own voice. (R13)

While these 12 respondents focused on the expressive value of participation, another two respondents explicitly questioned the therapeutic effect of victim participation:

I would not advance as an argument for their involvement the healing effect that it may have. There are still discussions as to whether that is healing or what. (R21)

I am not sure if it would serve justice if the victims would speak up in the Court, within the trial . . . It is said that also for witnesses it might be cathartic to speak up and to confront the accused . . . It provokes, of course, reliving your own stories. (R17)

Like Edwards, one respondent noted that ‘participation implies an active role’ (R20). In this view, *receiving information* about possibilities, rights, and procedures is not considered to be a form of participation. Furthermore, the same respondent felt that ‘an active role is not really necessary’, and that receiving information was sufficient involvement for victims.

In contrast, however, ten respondents felt that victim participation meant that victims should receive information about their rights as well as about the procedures:

Just making sure that victims who are interested to participate know what is happening in terms of the very basics of the process . . . That as many victims as possible understand how the process works in general. (R19)

In addition to receiving information, seven respondents also specified that victims should be kept informed or *notified* of any decisions made by the Court:

There is an important difference between information and notification. Victims have the right to be informed of a possibility in the early stages of an investigation. They should receive information after they apply as participants . . . They should be notified of decisions and be informed of possibilities throughout the proceedings. (R5)

When hearings are ongoing, they have the right to be informed and updated on what is happening with the situation and the case. And if it is not possible for them to be present in the courtroom – in the public gallery following the proceedings – the Court has the obligation to facilitate, in some way, their viewing of proceedings. (R14)

As for when victims should participate in the criminal justice process, essentially two groups emerged from the interviews: 11 respondents felt that victims should be allowed to participate from the investigation phase onwards and five felt that victims should only be allowed to participate once charges had been laid.³¹ However, no one felt that victim participation at the Court should be postponed until after a conviction; all the respondents agreed that victims should be allowed to participate during the trial prior to a conviction:

There is no participation if you do not have access to justice. To have access to justice you must have access to the Court, you must have access to the judge . . . And this supposes an access to the judge at all stages: from the start – that is from the start of the investigation – even before the start of the investigation – right to the end – until conviction. (R12)

Ideally, victims, I think, should be given the opportunity at some point to tell their story . . . In any case at some time during the trial phase. (R20)

31 The remaining seven respondents did not talk about when victims should be allowed to participate and whether victim participation should be permitted before an arrest warrant has been issued.

5. DISCUSSION

It is important to consider the findings in relation to Court policy. In December 2009, the Office of the Prosecutor released a policy paper on victims' participation.³² In it, the OTP takes the position that 'participation takes on various forms'.³³ Concretely, the paper specifies five different modalities of victim participation: (i) the submission of evidence; (ii) questioning of witnesses; (iii) access to records and evidence; (iv) participation anonymously; and (v) personal intervention at hearings. In the investigation phase, the OTP is against victim participation in any of these ways. It is against victims submitting evidence at the pre-trial and trial phases. In regard to questioning witnesses, the OTP asserts that this should be strictly limited to issues directly relevant to the interests of the victim. The OTP policy denies victims access to evidence in the prosecution's possession. However, the OTP does recognize that the Statute grants victims a right to present their personal perspective or opinion on an issue at the trial phase. In terms of Edwards's typology, it is important to recognize that the OTP policy paper does not impose an obligation on authorities to seek victim input. Rather, it obliges authorities to give victims the opportunity for expression without obliging them to act on that offer. This corresponds with 'expression' in Edwards's typology. The problem with expression, according to Edwards, is that if victims see their role as more than mere expression, they may be disappointed with the OTP's position.

More recently, Trial Chamber II of the ICC published its decision on the modalities of victim participation at trial.³⁴ The Chamber decided to give victims and their representatives far-reaching procedural rights in the trial. Beyond the rights found in the Rome Statute, such as the victims' right to make opening and closing statements, the Chamber decided to grant the victims' legal representative the right to attend all hearings – including closed sessions. Victims and their legal representatives have the right to express their views and concerns throughout the trial process. Victims' legal representatives can question witnesses as well as call new witnesses and have access to records on behalf of their client. The Appeals Chamber came to a similar conclusion in its decision on the appeals of the prosecution and the defence against Trial Chamber I's decision on victim participation.³⁵ The Appeals Chamber concluded that victim participants may present evidence and challenge the admissibility of evidence. On 13 May 2008, Pre-Trial Chamber I came to a similar decision regarding general principles for victim participation, allowing victims

32 Office of the Prosecutor, Policy Paper on Victims' participation under Article 68(3) of the ICC Statute. December 2009. See also the updated version of April 2010, available at www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-DO981E4ABE02/281751/PolicyPaperonVictimsParticipationApril2010.pdf.

33 *Ibid.*, at 1.

34 *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1788, Trial Chamber II, 22 January 2010.

35 *Situation in the Democratic Republic of Congo*, ICC-01/04-01/06 OA9 OA10, Appeals Chamber. Judgment on the appeals of the prosecution and the Defence against Trial Chamber I's decision on victims' participation of 18 January 2008.

the right to make submissions, examine witnesses, and file written motions.³⁶ In other words, without being equal parties to the trial, these decisions allow victims, through their legal representatives, to play an integral role in the Court. While victims do not control the decisions of the Court, they do control the actions of their legal representative, who is obliged to represent their interests before the Court. Accordingly, victims' input can be challenged and responded to. Victims, or their legal representatives, have the option of presenting and challenging evidence and the court is obliged to provide them with an opportunity to do so. This corresponds with what Edwards identifies as 'consultation'.

However, there remains some disconcertion regarding victim participation. For example, the 22 January 2010 Decision by Trial Chamber II³⁷ specifies that victims are obliged to share information with the prosecution and the defence. This corresponds with the information-provision role described by Edwards. Similarly, the Decision by the Appeals Chamber to reverse an earlier decision by Pre-Trial Chamber I³⁸ and prohibit victim participation at the pre-trial phase corresponds with the view of victims as witnesses to a crime whose role is to provide information to the court.

But what do victims of crimes against humanity and war crimes want? A population-based survey conducted in the Democratic Republic of the Congo found that 67 per cent of respondents would like to participate in the ICC.³⁹ Similar findings were reported in Cambodia, where 52 per cent of respondents said that they wanted to participate personally in the proceedings of the Extraordinary Chambers in the Courts of Cambodia.⁴⁰ Although these findings clearly show that there is a lot of interest in participating in proceedings, it does not indicate how victims want to participate. To use Edwards's terminology, which role do victims want to play in the court? What is clear is that they do not want to be shut out and relegated to the role of a witness. In that sense, the OTP's policy to exclude victim participation in the investigation and the pre-trial stages is disappointing.

Research on victims' experiences with the International Criminal Tribunal for the former Yugoslavia (ICTY) shows that victims who participated as witnesses were generally dissatisfied with their role.⁴¹ The ad hoc tribunals did not allow victim participation. This was a major source of frustration for many victims, especially since the domestic courts in the former Yugoslavia were based on the civil legal tradition

36 *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008.

37 *Supra* note 34.

38 *Situation in the Democratic Republic of the Congo*, ICC-01/04 OA4 OA5 OA6, Appeals Chamber, 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.

39 P. Vinck, P. Pham, S. Baldo, and R. Shigekane, 'Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo', Human Rights Centre, University of Berkeley, Berkeley, 2008.

40 P. Pham, P. Vinck, M. Balthazard, S. Hean, and E. Stover, 'So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia', Human Rights Centre University of California, Berkeley, 2009.

41 E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2005).

and therefore gave victims special procedural rights in criminal proceedings.⁴² However, because victim participation is new and unique to the ICC, these studies do not address the question of how victims want to participate in the court. There is, however, a considerable body of research available on victim participation in domestic courts, and the findings may be insightful for the ICC.

The finding that victim participation is not viewed as giving victims control over decisions is encouraging. Since the 1980s, researchers such as Shapland⁴³ have argued that victims do not want the burden of control over decisions. Wemmers argues that in high-conflict settings, such as criminal cases, participants are quite willing to hand over control to a third party.⁴⁴ Moreover, legal theorists opposed to victim participation have strongly objected to the possible threat that giving decision control to victims would pose for the rights of the accused.⁴⁵ In this light, the finding that not one of the respondents sees victim participation in terms of giving victims full control over decisions is reassuring. Victims will not be burdened with taking decisions about what should happen, and this should calm concerns about threats to the rights of the accused.

The finding that many respondents see victim participation in terms of receiving information coincides with much of the available research on victims and the criminal justice system. Information and notification are highly important to victims.⁴⁶ They send a message to victims that they are not forgotten and they recognize their interest in the case.⁴⁷ However, they do not require any action on the part of the victim, and are therefore excluded from Edwards's typology. Yet many respondents, like victims of crime, view information and notification as very important in order to allow victims to feel included in criminal justice procedures. This view of participation is encouraging, because it corresponds with a key need identified by victims. Victims who are informed of their rights and notified of the developments in their case tend to be more satisfied with the justice system and feel that they were treated fairly.⁴⁸

However, the Court does not communicate directly with victims but with their legal representatives. There are many good reasons for this – not least in order to ensure the safety and protection of the victim. This means that in addition to the communication between the Court and victims' legal representatives, communication

42 V. Tochilovsky, 'Victims' Procedural Rights at Trial: The Approach of Continental Europe and the International Tribunal for the Former Yugoslavia', in J. J. M. Van Dijk, R. Van Kaam, and J. Wemmers (eds.), *Caring for Victims of Crime* (1999), 287.

43 J. Shapland, 'The Criminal Justice System and the Victim', (1985) 10 *Victimology: An International Journal* 485; see also J. Shapland, J. Willmore, and P. Duff, *Victims in the Criminal Justice System* (1985); M. Baril, S. Durand, M. M. Cousineau, and S. Gravel, *Mais nous, les témoins . . .* (1983); J. Wemmers, *Victims in the Criminal Justice System* (1996); J. Wemmers and K. Cyr, 'Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims Looking for?', (2004) 11 *International Review of Victimology* 259.

44 J. Wemmers, 'Restorative Justice: The Choice between Bilateral Decision-Making Power and Third Party Intervention', in Brian Williams (ed.), *Reparation and Victim-Focused Social Work* (2001), 34.

45 See Ashworth *supra* note 18; Roach *supra* note 21.

46 Davis and Mulford, *supra* note 26; P. Carr, K. Logio, and S. Maier, 'Keep Me Informed: What Matters for Victims as They Navigate the Juvenile Criminal Justice System in Philadelphia', (2003) 10 *International Review of Victimology* 117.

47 Wemmers, *supra* note 43.

48 Wemmers, *supra* note 43; Shapland, Willmore, and Duff, *supra* note 43; Erez, *supra* note 19.

between victims and their legal representatives is also very important and will affect how victims participate in the Court. If legal representatives fail to convey information to their clients or fail to stay regularly in communication with them, then this may leave victims feeling left out of the process. Hence an important mitigating factor is the communication between victims and their legal representatives. It is not only vital that the Court communicates regularly with victims' legal representatives but also that the lawyers, in turn, communicate regularly with their clients.

The majority of respondents see victim participation as an expressive role. The expressive function of victim participation is often associated with victim impact statements in domestic courts. Like victim impact statements, victim participation is optional and aims to allow victims' views and concerns to enter the court. UK research found that two-thirds of victims submit a VIS for expressive or therapeutic reasons.⁴⁹ Similarly, research in Canada suggests that victims make a VIS in order to communicate the effects of the crime to the court rather than because they want to influence the outcome.⁵⁰ While expression is thought to have a therapeutic impact on victims, the research is inconsistent, however.⁵¹ How victim participation is implemented will determine how it affects victims.

But, at the same time, victim participation at the ICC is very different from victim impact statements. Rather than being emotive, victim participation at the ICC centres on the expression of victims' legal interests and concerns throughout the criminal justice process. While the victim impact statement is typically limited to a description of the impact of the crime on the victim, victim participation at the ICC is much broader. By allowing victims' legal representatives to question witnesses, to present evidence with respect to harm or damages suffered, to call experts with respect to damages, and to provide written submissions, the Court provides victims with more than just an opportunity for expression. Victims' legal representatives who submit evidence or present witnesses will be questioned and cross-examined. Hence it offers victims' legal representatives a chance to participate in the dialogue.

A second difference is that while the VIS is typically presented by the victim or, if the victim is unable (e.g. is dead), a family member can present a statement on their behalf, at the ICC victims are represented by their lawyer. As a result, there is no direct contact between victim participants and the Court: all communications pass through the legal representatives. This is an important difference because it changes the content of victims' input into the court. Having a lawyer speak on their behalf changes their discourse from an emotive plea to a legal argument.

A third difference from the victim impact statement is that the latter allows victims to participate at the end of the criminal justice process. Victim impact statements can be presented in court after a conviction and before sentencing. In this way they do not interfere with the determination of guilt of the accused and are only considered at sentencing. At the ICC, however, victims are given an expressive

49 C. Hoyle, C. Cape, R. Morgan, and A. Sanders, 'Evaluation of the "One Stop Shop" and Victim Statement Pilot Projects', Home Office Research Development and Statistics Directorate, 1998.

50 Prairie Research Associates, 'Multi-site Survey of Victims of Crime and Criminal Justice Professionals across Canada', Department of Justice Canada, 2004.

51 Erez and Roberts, *supra* note 19, at 277.

role much earlier in the criminal justice process. While there is some disagreement as to when victim participation should begin – during the investigation phase or after charges have been laid – all respondents agreed that victims should be allowed to participate during the trial phase. Because they are included throughout the trial, victim participation can become an integral part of the trial process.

Edwards warns that if victims see their role as more than just expressive, for example as consultative, then they may be frustrated when their input has no actual impact on the outcome of a particular decision. The careful communication of information to victims can alleviate this problem.⁵² If in their communications with victims (via the legal representatives) the Court is careful to indicate that their concerns were heard, then victims are less likely to be frustrated and instead will be satisfied. This does not mean that victims always have to get their way. It can be as simple as a judge referring to a point raised by a victim in the explanation of their decision.

6. CONCLUSION

Victim participation is new in international criminal law and ideas about what it is and how it works are likewise new and evolving. There is no one singular view of what participation at the ICC is or should be. While there was no consensus regarding what victim participation should be, the most common view that emerged from the interviews is that victim participation has an expressive function. This is the least invasive form of participation described by Edwards. It allows victims' legal representatives to voice their clients' views and concerns in the criminal justice process. It allows the voluntary participation of victims and does not place obligations on criminal justice decision-makers, who retain control over decisions. Nor does it oblige authorities to seek victim input. It merely prevents them from refusing victims a voice. Although it is expressive, victim participation is not emotive. In this way it differs significantly from victim participation in domestic common law courts. Victim expression is a legal discourse that is carried out by victims' lawyers and brings victims' views and concerns about legal questions into the discussion. In addition, many respondents associate participation with receiving information, albeit that the victim is not active in this role. While highly valued by victims, notification is not considered to be victim participation. However, some of the Court's decisions seem to allow victims to move beyond mere expression and to give victims' legal representatives a consultative status in the trial phase, allowing them to question witnesses and to present evidence.

⁵² Edwards, *supra* note 20.