

Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice

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Abstract

Effective and meaningful victim participation in international criminal proceedings is a vital component of transitional justice. In post-conflict societies, victim participation can empower survivors, engender individual healing and social trust, and promote accountability and the rule of law. Although victim participation is well established and noncontroversial in domestic civil law jurisdictions, it cannot simply be translated into the international arena. A host of difficulties, beginning with the potentially enormous number of victims of international crimes, plague implementation of this crucial component of justice. This Article examines many of the difficulties involved in institutionalizing effective victim participation into international criminal proceedings, but it also proposes three solutions. These solutions offer a way forward for systemic development of the International Criminal Court (ICC) and future ad hoc international tribunals.

SUMMARY

INTRODUCTION	2
I. WHO IS A VICTIM?	3
II. WHAT IS VICTIM PARTICIPATION?	5
A. <i>Modalities of Participation</i>	6

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1. The ECCC	6
2. The ICC	7
3. Cambodia	8
B. <i>Benefits of Participation</i>	9
III. DIFFICULTIES IN ACCOMMODATING VICTIMS IN INTERNATIONAL PROCEEDINGS	12
A. <i>The Number of Victims</i>	13
1. Equality of Arms	15
2. Undue Delay	15
3. Diverging Interests	16
4. Risk of Fraud and Subversion	18
B. <i>Constructing the Participatory Regime</i>	19
1. A Sui Generis Scheme	19
2. Poor Structural Implementation	21
IV. POTENTIAL SOLUTIONS	23
A. <i>Reforming the Admissibility Procedure</i>	23
B. <i>Victim Groups</i>	25
1. Collective Representation	26
2. The Importance of External Actors	28
C. <i>Compensation</i>	29
1. In-House Reparations Regime	30
2. The Problem of the Indigent Perpetrator	31
3. What Form?	32
CONCLUSION	33

INTRODUCTION

“The interests of society as a whole and of justice necessarily include the general interests of victims of the alleged crimes.”¹

Permitting the victims of mass atrocity to take an active role in the criminal prosecution of the accused is a delicate issue. How can their introduction be reconciled with the fair-trial rights of the defendant? This does not appear to be a problem for domestic jurisdictions of the civil-law tradition, which have long accommodated victims as subsidiary prosecutors,² and neither should it be a problem for international tribunals. Of course, international criminal prosecutions present their own difficulties, not least of which is the number of victims petitioning for participation, but the potential benefits of meaningful participatory rights are such

1. Co-Prosecutors v. Duch, Case No. 001/18-07-2007/ECCC/TC, Decision on Civil Party Co-Lawyers' Joint Response for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, para. 20 (Oct. 9, 2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E72_3_EN.pdf [hereinafter Duch Decision on Joint Response].

2. See *id.* para. 18 (discussing the right of victims to participate in criminal proceedings within jurisdictions following the civil-party system).

that they must be pursued. Victim participation has the potential to empower survivors and engender individual healing and social trust, promoting accountability and the rule of law in post-conflict transitioning societies. As the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) succinctly notes above, the interests of society and of justice require that victims participate as something more than witnesses.³

This Article first considers the question of “who is a victim” in international law. It then examines victim participation generally, evaluating its potential benefits and the modalities of participation in three specific jurisdictions (two international and one national). Next, it moves on to explore many of the difficulties involved in institutionalizing victim participation in international criminal proceedings. It analyzes how the admissibility of victims may affect fundamental fair-trial rights, such as equality of arms and undue delay, how the sheer number of victims of international crimes exacerbates issues of fraud and subversion and the divergent interests of the prosecution and victim’s counsel, and how poor structural implementation still hinders effective victim participation. This Article also proposes three solutions to these issues. It argues that reforming the admissibility structure, collectivizing victim participation, and limiting reparations to moral and collective awards offer the best way forward for systemic development of the International Criminal Court (ICC) and future ad hoc international tribunals.

This Article is based on the Author’s work in the Pre-Trial and Supreme Court Chambers of the ECCC in 2011. During this time, the Author assisted in the determination of Civil Party admissibility on appeal in Case 001 and on application in Cases 003 and 004.⁴ The Article, therefore, focuses primarily on the experiences of the Cambodian tribunal—but examines ICC practice where appropriate—with the aim of providing lessons for practitioners and researchers. While victim participation in the ECCC has transformed into a sui generis beast that owes much to the peculiar circumstances of the Cambodian domestic code and the tribunal itself, there are many general lessons that can, and must, be gleaned from the country’s experience if victim participation is to become institutionalized in international criminal courts.

I. WHO IS A VICTIM?

The question of “who is a victim” under international criminal law *prima facie* appears both obvious and insulting. How can one witness the devastation and horror of Cambodia’s killing fields, a Nazi death camp, or an Interahamwe massacre and ask whether these people are victims? *Of course* they are victims. Indeed this intuitive response is confirmed by international law in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration of Basic Principles),⁵

3. *Id.* paras. 20, 25.

4. Case 001, Case 003, and Case 004 are three of the four cases currently before the ECCC. *Introduction to the ECCC, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA*, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited Oct. 17, 2013). The defendant in Case 001 is Kaing Guek Eav alias “Duch,” while the identities of the defendants for Case 003 and Case 004 have not yet been made public. *Id.*

5. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res.

the first international standard on the rights of victims, defining them as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States”⁶

This definition encompasses victims of mass atrocity, but it is inadequate for international courts that offer participatory rights to victims. At these courts,⁷ the inclusion of a *causal connection* between the alleged harm and the accused is an essential and important requirement of declaring who is a victim.⁸

Demonstrating a causal connection is relatively simple in domestic jurisdictions where offenses are typically direct and impact only one or a few individuals. However, difficulties arise in the prosecution of international crimes where the direct perpetrator, the child soldier or the concentration camp guard, does not bear the greatest responsibility for the offense. In these cases, international law deems the militia leader, the camp commandant, the army general, or even the political head of state as responsible. To be a victim, the suffering must be linked not to the subordinate but to the *de facto* or *de jure* commander.⁹ The difficulties that arise in defining who is a victim, therefore, stem from the difficulties in establishing the synapses within the chain of command.¹⁰

The ECCC and the ICC operate under a definition similar to that of the Declaration of Basic Principles but with the additional causal connection. At the

40/34, U.N. Doc. A/RES/40/34, at 213 (Nov. 29, 1985) [hereinafter Declaration of Basic Principles].

6. *Id.* Annex, para. 1.

7. Please note that the ECCC, the ICC, and the Special Tribunal for Lebanon (STL) are currently the only international criminal courts that offer substantive participatory rights for victims. Int’l Crim. Court [ICC], *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, para. 14, 11th Sess., ICC Doc. ICC-ASP/11/22 (Nov. 5, 2012), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf. Because the STL’s jurisdiction is much more limited than the ECCC or the ICC, and its victim participation regime is modeled on the ICC’s, the STL will not be the focus of this Article. See Marko Milanovi, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1139, 1139 (2007) (explaining that the STL “is the first international criminal court which will try persons who are accused solely of violating domestic, not international criminal law”); Matthew Gillett & Matthias Schuster, *The Special Tribunal for Lebanon Swiftly Adopts its Rules of Procedure and Evidence*, 7 J. INT’L CRIM. JUST. 885, 902–03 (2009) (outlining the similarities and differences between the STL’s approach to victim participation and the ICC’s approach to victim participation).

8. See, e.g., Rules of Procedure and Evidence, ICC-ASP/1/3, R. 85(a) [hereinafter ICC Rules] (defining victims as “natural persons who have suffered harm as a result of the commission of any crime”); see also WAR CRIMES RESEARCH OFFICE, AMERICAN UNIV. WASHINGTON COLLEGE OF LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 50 (2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf (noting that “a causal nexus [must] exist between the crime and the harm suffered” in order to satisfy the requirements of Rule 85(a) of the ICC Rules).

9. See Bakone Justice Moloto, *Command Responsibility in International Criminal Tribunals*, 3 BERKELEY J. INT’L L. PUBLICIST 12, 16 (2009)

(In cases where unidentified perpetrators are members of organized groups . . . the doctrine of command responsibility allows international criminal tribunals to hold superiors responsible for the crimes of their subordinates It is also not necessary that a formal, *de jure* subordination exist. A superior position for purposes of command responsibility can be based on *de facto* powers of control.).

10. It may be relatively easy to establish this causal connection when a photograph exists showing General X at crime site Y ordering militia Z to execute civilians, but such examples are not the norm.

ECCC, a victim is defined broadly as “a natural person or legal entity that has suffered harm as a result of the commission of any crime.”¹¹ However, to participate as a Civil Party,¹² a victim must also demonstrate a causal connection between this harm and “at least one of the crimes alleged against the Charged Person.”¹³ The ICC operates under a similar rubric, defining victims as “natural persons who have suffered harm as a result of the commission of any crime,”¹⁴ and finding that in order to participate “the harm alleged by a victim . . . must be linked with the charges confirmed against the accused.”¹⁵ As will be examined in Part IV, where victim participation is permitted, this causal connection is both necessary and valuable, as it limits the potentially enormous number of victim participants in criminal trials.

II. WHAT IS VICTIM PARTICIPATION?

Victim participation offers individual victims of crime an opportunity to play an important role within, and indeed shape, the criminal justice process. This participation is vitally important because the interests of victims differ from those of the prosecutor; consequently, victims may be left out, and their positions may be unappreciated.¹⁶ Interestingly, victim-centric dispute resolution is not a novel concept. In earlier cultures, blood feuds, banishment, and property destruction administered directly by the victim, his family, or his tribe were “the natural order for societies.”¹⁷ Today, enforcement and implementation of any judgment is

11. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 8), Glossary [hereinafter ECCC Rules (Rev. 8)], *available at* [http://www.eccc.gov.kh/sites/default/files/legaldocuments/ECCC%20Internal%20Rules%20\(Rev.8\)%20English.pdf](http://www.eccc.gov.kh/sites/default/files/legaldocuments/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf). This definition mirrors the definition of victims in the Declaration of Basic Principles. *See* Declaration of Basic Principles, *supra* note 5, at Annex, para. 1 (defining victims as “persons who, individually or collectively, have suffered harm . . . through acts or omissions that are in violation of criminal laws operative within Member States”).

12. Under the ECCC Rules (Rev. 8) Glossary, a Civil Party is defined as “a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these IRs.” ECCC Rules (Rev. 8), *supra* note 11, Glossary. Once a Civil Party, an applicant can participate in the proceedings. *See id.* R. 23(1) (“The purpose of Civil Party action before the ECCC is to [p]articipate in criminal proceedings . . .”).

13. *Id.* R. 23 *bis*(1)(b). The Pre-Trial Chamber of the ECCC has adopted an expansive interpretation of this phrase, declaring that “crimes alleged against the Charged Person” include crimes relating to policies “in areas other than those chosen to be investigated.” *Co-Prosecutors v. Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, paras. 77–78 (June 24, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdec/D411_3_6_EN.PDF [hereinafter *Sary Decision on Appeals*]. This interpretation would significantly expand the definition of “victims” at international law.

14. ICC Rules, *supra* note 8, R. 85(a). An additional sub-paragraph, rule 85(b), extends this definition. *See id.* R. 85(b) (stating that “victims may include [certain] organizations or institutions”).

15. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Reasons para. 2 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF> [hereinafter *Lubanga Judgment on Appeals*].

16. *See* Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC’Y 294, 303–06 (2005) (noting that victim participation in most common law systems remains uncertain and stymied by attempts to combine the private interests of victims with the traditionally broader interests of prosecutors acting for the public).

17. T. MARKUS FUNK, *VICTIMS’ RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL*

considered to be the role of the State,¹⁸ but in many jurisdictions, particularly those of the civil-law tradition, victims may participate in the proceedings.¹⁹ The modalities of this participation differ but can include the following rights: to lodge a complaint to initiate prosecution, to participate in the prosecution as a party equal to the prosecutor and defense counsel, and to claim civil damages within the criminal action.²⁰

A. Modalities of Participation

The modalities of victim participation differ across jurisdictions according to the reason for participation. As discussed below, the participation regimes of the ECCC and the ICC, both of which enjoy international jurisdiction, grant less extensive participatory rights to victims than domestic jurisdictions like Cambodia. This brief analysis is designed to sketch out the differing jurisdictional limits of victim participation and does not discuss reparation schemes.

1. The ECCC

At the ECCC, the purpose of Civil Party action is to “support[] the prosecution” and “[s]eek collective and moral reparations.”²¹ The rights of Civil Parties are therefore limited to merely supportive actions, although this has not always been the case.²² At the pre-trial stage, despite being able to participate individually,²³ Civil Parties may only request that the Co-Investigating Judges undertake investigative actions on their behalf.²⁴ At the trial stage, Civil Parties lose this autonomy; they are required to participate collectively as a “single, consolidated

COURT 19 (2010).

18. *See Enforcement of Judgments*, DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/law/judicial/judicial_691.html (last visited Oct. 22, 2013) (“In many foreign countries, as in most jurisdictions in the United States, the recognition and enforcement of foreign judgments is governed by local domestic law . . .”).

19. *See* M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 233 (2006) (“In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* [Civil Party] in criminal proceedings.”).

20. Doak, *supra* note 16, at 310–11.

21. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(a)–(b).

22. Under Rule 23(6)(a) of the original ECCC Rules, victims became parties to the criminal proceedings. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Original), R. 23(6)(a) [hereinafter ECCC Rules (Original)], available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IR-Eng.pdf>. Under this original scheme, victims were “endow[ed] . . . with near-equal participatory rights as the Prosecution and the Defense.” Alain Werner & Daniella Rudy, *Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?*, 8 NW. J. INT’L HUM. RTS. 301, 301 (2010). However, the sixth revision of the Internal Rules removed any reference within the rules to a victim “becoming a party to the criminal proceedings.” *See* Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 6), R. 23 [hereinafter ECCC Rules (Rev. 6)], available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv6-EN.pdf> (omitting many of the originally included provisions for “[C]ivil [P]arty actions by victims”). Civil Parties may now only “participate” in the proceedings. *Id.*; *see also* Werner & Rudy, *supra*, at 301 (discussing evolution of the victim participation scheme via changes in the ECCC Internal Rules over the course of the Duch trial).

23. ECCC Rules (Rev. 8), *supra* note 11, R. 23(3).

24. *Id.* R. 59(5).

group”²⁵ that is represented by two Civil Party Lead Co-Lawyers.²⁶ These counsels are “responsib[le] . . . for the overall advocacy, strategy and in-court presentation of the interests of the . . . Civil Parties during the trial stage and beyond.”²⁷ The Lead Co-Lawyers have the right to appear before the Trial Chamber,²⁸ to summon witnesses and experts,²⁹ to question the accused,³⁰ and to object to the hearing of testimony of any witnesses.³¹ While these Lead Co-Lawyers also have the right to make closing and rebuttal statements on behalf of the Civil Parties,³² the victims themselves have been reduced to a merely supportive role in a decidedly restrictive regime.³³

2. The ICC

The ICC regime is structured slightly different from the ECCC. Whereas an applicant deemed a Civil Party at the ECCC has a right to participate throughout all stages of the proceedings, victims at the ICC must continually reapply at each and every stage in order to participate.³⁴ The system is governed by Article 68(3): “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”³⁵

As these italicized terms are not defined in the Rome Statute or the ICC Rules of Procedure and Evidence, it has been left to the jurisprudence of the Court to develop an understanding of the modality of participation allowed.³⁶ Briefly, “appropriate proceedings” refers to judicial proceedings only and not the

25. *Id.* R. 23(3).

26. *Id.* R. 12 *ter*.

27. *Id.* R. 12 *ter*(5)(b).

28. *See id.* R. 88(1) (outlining procedures of appearance by Civil Parties before the trial chamber).

29. ECCC Rules (Rev. 8), *supra* note 11, R. 91(1). Rule 80(2) permits Civil Parties to summon witnesses and experts who do not appear on the list provided by the Co-Prosecutors. *Id.* R. 80(2).

30. *Id.* R. 90(2).

31. *Id.* R. 91(3). This right is limited to only when the Civil Party considers that “such testimony is not conducive to ascertaining the truth.” *Id.*

32. *Id.* R. 94(1)(a), 94(2).

33. Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 327 (2012) (“[W]hile the ECCC Internal Rules establish a right of victims to participate in ECCC proceedings as [C]ivil [P]arties, they also limit victim participation in ways similar to the restrictions imposed on victims at the ICC.”).

34. This requirement stems from the fact that at the ICC victims have never been considered parties to the proceedings, as they once had been at the ECCC. *See* Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT’L R. RED CROSS 409, 409 (“Victims [in the ICC] . . . are seen as nothing more than witnesses . . .”).

35. Rome Statute of the International Criminal Court art. 68(3), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (emphasis added).

36. *See* Baumgartner, *supra* note 34, at 411 (“The broad wording of the provisions on victim participation in the ICC’s constitutive documents suggests that the drafters intended to leave wide discretion to the judges in actually shaping the Court’s victim participation scheme.”).

investigatory stage;³⁷ “views and concerns” has been interpreted liberally by the Pre-Trial and Trial Chambers as granting a right, in certain circumstances, to introduce evidence;³⁸ and “personal interests” has been interpreted differently at each stage of the proceedings.³⁹

3. Cambodia

As a former French protectorate, the Cambodian legal system follows the civil law model and grants significant participatory rights to victims.⁴⁰ Cambodian law also forms the basis of ECCC law,⁴¹ and, therefore, the rights guaranteed are broadly similar to those of the ECCC.

Under the Cambodian Criminal Code, “[t]he purpose of a civil action is ‘to seek compensation for injuries to victims.’”⁴² In this regard, victim applicants are granted extensive participatory rights, including foremost the right to initiate prosecution by way of seizing an investigating judge with a criminal action through the lodging of a complaint.⁴³ Granting a victim the right to initiate prosecution is an important right, as it forces the State to investigate actions it may have chosen not to pursue and gives victims a better chance to recover damages. This crucial right has never been granted to victims in international criminal proceedings,⁴⁴ and, because of a variety of issues discussed in Part III, is unlikely ever to be.

37. See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-593, Decision on Victims’ Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, para. 9 (Apr. 11, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1053881.pdf> [hereinafter DRC Victim Participation Decision] (acknowledging that victims may not be able to participate in the investigation stage but are entitled to participate in any judicial proceeding).

38. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2032-Anx, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence During the Trial, paras. 19–20 (June 26, 2009) (recognizing the right of participating victims to “tender and examine evidence” and detailing the requirements that must be met in order to exercise this right). See also Lubanga Judgment on Appeals, *supra* note 15, para. 3 (discussing victim’s opportunity to “lead evidence”).

39. Baumgartner, *supra* note 34, at 423–24 (noting that “[t]he judges must determine whether there is sufficient personal interest for participation,” a requirement which “change[s] from one stage of the procedure to another,” and analyzing the criteria needed to show “personal interest” at different levels of a case). Unfortunately, there is simply not enough space to examine in detail the different rights of victims in the ICC, but they are broadly similar, although not as extensive, to those at the ECCC. See SáCouto, *supra* note 33, at 301 (“Although there are some significant differences in how the schemes work at the ICC and ECCC, both courts allow victims to participate in criminal proceedings independent of their role as witnesses . . .”); Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT’L L. 777, 779 n.13 (2008) (noting that the ECCC “provides more extensive participatory rights for victims than any existing international tribunal”).

40. Jennifer Holligan & Tarik Abdulhak, *Overview of the Cambodian History, Governance and Legal Sources*, HAUSER GLOBAL LAW SCHOOL PROGRAM (NYU LAW) (Apr. 2011), <http://www.nyulawglobal.org/globalex/cambodia.htm>; see also Phuong N. Pham et al., *Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia*, 3 J. HUM. RTS. PRAC. 264, 268 (2011) [hereinafter Pham et al., *Victim Participation and the Trial of Duch*] (discussing ways victims can participate in the Cambodian criminal justice system).

41. INT’L BAR ASS’N, SAFEGUARDING JUDICIAL INDEPENDENCE IN MIXED TRIBUNALS: LESSONS FROM THE ECCC AND BEST PRACTICES FOR THE FUTURE 8 (2011).

42. CODE CRIM. PROC. art. 5 (Cambodia).

43. *Id.* arts. 5, 6.

44. See SáCouto, *supra* note 33, at 325–26 (“As in the ICC context, civil parties at the ECCC do not

At the pre-trial stage, a victim may file an application to become a Civil Party.⁴⁵ Civil Parties may participate during the investigation by “request[ing] the investigating judge to question [the accused or witnesses] . . . conduct a confrontation or visit a site.”⁴⁶ At the trial stage, a Civil Party has a right to question the accused and witnesses,⁴⁷ summon witnesses to appear before the court,⁴⁸ introduce evidence,⁴⁹ object to the hearing of testimony of a particular witness if such testimony is not helpful in ascertaining the truth,⁵⁰ make a closing statement,⁵¹ appeal certain orders,⁵² and appeal the final judgment in relation to civil matters only.⁵³ These rights are broadly similar, although generally more extensive than, those for Civil Parties at the ECCC. As this Article demonstrates, the difficulties and limitations of translating victim participation at the domestic level into the international arena necessarily results in a more restrictive participatory rights regime in international jurisdictions.

B. Benefits of Participation

There is broad agreement among scholars of transitional justice that allowing victims to participate in criminal proceedings can offer significant benefits.⁵⁴ It is important to be clear, however, that these benefits are a potential consequence and

have a right to initiate an investigation without the prosecution’s consent, or to compel the [p]rosecutor to pursue any particular suspect or crime.”); Mark E. Wojcik, *False Hope: The Rights of Victims Before International Criminal Tribunals*, 28 L’OBSERVATEUR DES NATIONS UNIES 1, 4 (2010) (discussing how victims in the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda cannot force the prosecutor to commence a criminal prosecution against an individual); *The Office of the Prosecutor*, THE SPECIAL COURT OF SIERRA LEONE, <http://www.sc-sl.org/ABOUT/CourtOrganization/Prosecution/tabid/90/Default.aspx> (last visited Oct. 21, 2013) (discussing the procedure for the Special Court of Sierra Leone and how “the [p]rosecutor is responsible for initiating and conducting the investigations,” for preparing indictments, and does not “receive instructions from any Government or from any other source”); Jérôme de Hemptinne, *Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon*, 8 J. INT’L CRIM. JUST. 165, 166 (2010) (“[T]he proceedings [before the Special Tribunal for Lebanon] can only be initiated by the prosecutor and not by the victims themselves.”); United Nations Transitional Administration in East Timor [UNTAET], *On Transitional Rules of Criminal Procedure*, in *On the Amendment of UNTAET Regulation No.2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No.2000/30 on the Transitional Rules of Criminal Procedure*, § 7.1, UNTAET/REG/2001/25 (Sept. 14, 2001) (“The exclusive competence to conduct criminal investigations is vested in the Public Prosecution Service The competent [p]ublic [p]rosecutor is the only authority empowered to issue an indictment . . .”).

45. CODE CRIM. PROC. arts. 137–138 (Cambodia).

46. *Id.* art. 134.

47. *Id.* arts. 153, 325.

48. *Id.* art. 298.

49. *Id.* art. 334.

50. *Id.* art. 327.

51. CODE CRIM. PROC. arts. 335 (Cambodia).

52. *Id.* art. 268.

53. *Id.* arts. 375, 402.

54. See Susana SáCouto & Katherine Cleary, *Victims’ Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 73, 76–77 (2008) (stating that advocates of victim participation in criminal proceedings believe participation promotes victim “healing” and “empowerment” and gives victims “closure”).

not a guarantee. Simply amending procedural rules to enable victims to participate may in fact have negative consequences, particularly if appropriate support and assistance is lacking. Indeed, the experience of the ECCC so far has revealed not only some broad successes in achieving beneficial outcomes for victims but also the worrying proposition that these “generally positive attitudes . . . may not be echoed in future ECCC or ICC cases.”⁵⁵ As discussed below, achieving the benefits of participation requires a carefully constructed participatory regime, which can have both broader potential benefits and dangers.

There are three broad potential benefits. First, participation can promote individual “healing and rehabilitation”⁵⁶ by providing victims with a “sense of agency,”⁵⁷ “empowerment[,] and closure.”⁵⁸ Some empirical research suggests that where the judicial sphere values and recognizes the victims’ plight, victims may report higher overall levels of satisfaction with the criminal justice system.⁵⁹ Indeed, in providing an opportunity for a victimized individual to take a leading role in obtaining redress, victim participation has the power to make abstract and obtuse justice personal. Second, participation can contribute to reconciling a community by “promoting truth-finding in criminal proceedings.”⁶⁰ As David Sokol notes, “by virtue of their unique position,” victims are often best placed to assist in “establishing the truth of alleged crimes.”⁶¹ Any society or community seriously attempting to understand and come to terms with mass atrocity “must provide a platform for victims . . . [to] tell their stories [and publicly acknowledge] their suffering.”⁶² Although criminal law is not the only possible platform, the power of the judiciary in officially sanctioning expressions of hurt and shining a light on truth is immense.

A further potential benefit of victim participation is perhaps most important: providing a role for victims within the criminal justice system can promote knowledge, awareness, and understanding of the often oblique processes involved in, and the results obtained from, criminal proceedings. Even in more developed nations with independently functioning judiciaries, societal understanding of the criminal justice system is low,⁶³ and to a poorly or noneducated victim of mass-atrocity crime in a devastated society, this understanding is likely to be even less

55. Eric Stover et al., *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT’L REV. RED CROSS 503, 543 (2011).

56. SáCouto & Cleary, *supra* note 54, at 77 (footnote omitted) (internal quotation marks omitted).

57. Hanna Bertelman, *International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia*, 79 NORDIC J. INT’L L. 341, 366 (2010) (footnote omitted); *see also* Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT’L L.J. 295, 337 (2005) (“By fighting back [victims] may regain a sense of agency and capacity to act that the original abuse sapped.”).

58. SáCouto & Cleary, *supra* note 54, at 77 (footnote omitted) (internal quotation marks omitted).

59. Doak, *supra* note 16, at 312.

60. *Id.*

61. David S. Sokol, *Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia*, 10 WASH. U. GLOBAL STUD. L. REV. 167, 178 (2011).

62. Bertelman, *supra* note 57, at 365.

63. *See, e.g.,* Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 2 (1995) (“[A] majority of people in the United States receive much of their impressions and knowledge of the criminal justice system through . . . entertainment television viewing.”). This understanding is likely to be somewhat limited. *See id.* at 9 (suggesting that television shows depicting crime are “typically characterized by omissions or distortions on information about the legal system”).

meaningful. A significant problem, therefore, is transmitting to victims an understanding of the processes of justice, including their limitations.⁶⁴ In empowering people to understand decision making, victim participation can promote greater acceptance of the decision itself.⁶⁵

It is, however, important to be clear—these are *only* potential benefits; they may not eventuate, and, alarmingly, participation may even have *negative* consequences. Victims may, for example, feel harassed or intimidated by a zealous defense counsel, or if the judgment does not meet their expectations, they may feel that the court has undervalued their suffering.⁶⁶ The most crucial aspect in attempting to ensure that the benefits of victim participation are realized is therefore one of managing expectations. Put simply, victims cannot be given unrealistic expectations about what their participation may or will achieve. Where the participatory scheme does not effectively manage the relationship between the victims and the court, problems may occur. At the ECCC, the significantly larger number of Civil Parties admitted in Case 002⁶⁷ necessitated a revamped regime, one centered not on participation but on representation.⁶⁸ Because of this change of focus, studies have suggested that the Civil Parties in Case 002 may not encounter the same transformative experience as the Civil Parties in the Duch trial.⁶⁹ Gone is the sense of personal participation and personal justice as the victim is unable to *personally* confront the accused.⁷⁰ Unfortunately, in international criminal proceedings, representation is a necessary evil; the sheer number of victims simply means that personal participation *à la* domestic proceedings is impossible.⁷¹ The

64. Two potential areas for misunderstanding include the nature of the level of proof required to convict and issues of mitigating circumstances on sentencing. The latter is particularly important, for if a victim does not understand the reasons behind a reduced sentence, any of the benefit gained by participating in the proceedings will be destroyed. This will be examined later in Part III.B.2. with an example demonstrating the victims' lack of information about sentencing calculations in the Duch trial.

65. See John Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice System*, 73 J. CRIM. L. & CRIMINOLOGY 317, 329 (1982) (finding that "court attendance in itself seems to improve victims' evaluations of sentencing decisions"); Doak, *supra* note 16, at 312 ("[O]ffering victims some form of acknowledged and formal role at the trial should enhance their sense of satisfaction with the criminal justice system . . .").

66. For some examples of this, please see Part III.B.2.

67. Case 002 is another case currently before the ECCC. CASE 002, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/case/topic/2> (last visited May 28, 2013). The current defendants in this case are Nuon Chea and Khieu Samphan. *Id.* Two other defendants, Ieng Sary and Ieng Thirith, were also originally part of Case 002 but were later dismissed. *Id.*

68. See Stover et al., *supra* note 55, at 542 ("In early 2010, . . . in an effort to limit the number of [C]ivil [P]arty lawyers in the courtroom, the ECCC has decided that two Co-[L]ead Counsel (one international and one Cambodian) will represent all of the Civil Parties during the actual proceedings.").

69. *Id.* at 543 (discussing how Case 002 involves more defendants, a larger crime scene, and a significantly larger group of Civil Parties than the Duch trial, and "[a]s a result, what the [C]ivil [P]arties take away from their participation in Case 002 may be more formulaic and less individualized [than what the Civil Parties in the Duch trial took away], and therefore less transformative").

70. *Id.*

71. See Trumbull, *supra* note 39, at 805–06

([A]ny beneficial effect that victims receive from participation in domestic trials may be substantially reduced in international criminal proceedings The number of victims involved in trials for crimes against humanity, war crimes, and genocide . . . make it impossible for an individual victim to participate in a meaningful way Virtually all decision-making power

challenge is to implement and institutionalize an effective participatory scheme based on victim representation that still provides opportunities for victims to take an active role in the proceedings. The potential benefits of victim participation are such that this implementation should be pursued.

III. DIFFICULTIES IN ACCOMMODATING VICTIMS IN INTERNATIONAL PROCEEDINGS

For common-law lawyers, granting participatory rights to victims appears at odds with an accused's right to a fair trial. Fair-trial rights are an essential precondition to the rule of law, and the primary concern of all judges "should be [to] guarantee[] a fair and expeditious trial for the accused."⁷² Indeed, fair-trial rights are critical in ensuring that justice and the rule of law are maintained. Where they are ruptured, "the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."⁷³

The right to a fair trial is found within all major global and regional human-rights instruments and has become a fundamental pillar of international law. First acknowledged under Article 10 of the Universal Declaration of Human Rights (UDHR) as guaranteeing everyone "in full equality . . . a fair . . . hearing,"⁷⁴ this right has been further enumerated under later human-rights instruments and case law to include several minimum standards. These encompass both substantive and procedural safeguards, such as the right to be judged by an independent and impartial tribunal,⁷⁵ the right to be presumed innocent unless proven guilty,⁷⁶ the right of equality of arms,⁷⁷ the right to be tried within a reasonable time,⁷⁸ the principle of legality,⁷⁹ and the right to appeal to a higher tribunal.⁸⁰ Permitting victims to participate in international criminal proceedings will not affect all of these minimum standards but, crucially, may affect some of them.⁸¹

will necessarily be ceded to th[e] legal representative.).

72. Liesbeth Zegveld, *Victims' Reparations Claims and International Criminal Courts: Incompatible Values?*, 8 J. INT'L CRIM. JUST. 79, 108 (2010).

73. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, para. 39 (Dec. 14, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc243774.pdf>.

74. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. Doc. A/RES/217(III), at 73 (Dec. 10, 1948) [hereinafter UDHR].

75. International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

76. *Id.* art. 14(2).

77. *See id.* art. 14(3) (discussing procedural elements that facilitate a fair trial).

78. *Id.* art. 9(3).

79. *Id.* art. 15.

80. *Id.* art. 14(5).

81. International criminal proceedings may particularly affect the right to an expeditious trial and the right to equality of arms. *See* Trumbull, *supra* note 39, at 816, 823 (discussing how victim participation can "significantly prolong the proceedings" and threaten a defendant's rights by making it more difficult to rebut victims who testify in camera and to obtain truthful evidence due to the victims' lack of an ethical code or obligation to reveal exculpatory evidence).

However, there is no reason per se that granting participatory rights to victims will necessarily conflict with the accused's right to a fair and expeditious trial.⁸² National jurisdictions following the civil-law tradition have long accommodated victims as individual parties to the proceedings.⁸³ Nevertheless, victim participation in trials for mass-atrocity crimes is inherently difficult because of the sheer number of victims. Whereas in domestic criminal proceedings, an offense will generally only directly impact one or a few people, the nature of international crimes means that the victimized often number in the tens, if not hundreds, of thousands.⁸⁴ Reconciling every single victim's right to participate with fair-trial rights of the accused is complicated but by no means impossible, and the gradual institutionalization of participatory regimes offers hope that the implementation of such regimes will become more efficient and effective in future ad hoc tribunals and in a revamped ICC. This Part will present an analysis of some of the major difficulties with victim participation, which, although interconnected, can generally be classified as arising from either the sheer number of victims in international proceedings or from the difficulties in implementing an effective participatory regime.

A. *The Number of Victims*

A peculiar feature of mass-atrocity crimes is the sheer number of victims. This in itself creates considerable problems if meaningful victim participation is to be not just a goal of criminal justice but a crucial component of it. The risk of delays in the administration of justice, the issue of equality of arms, and the threat of subversion and fraud are all exacerbated when the number of individuals seeking to participate is increased.⁸⁵ As discussed in Part I, this issue has led tribunals that grant victims participatory rights to compel applicants to demonstrate a causal connection between the harm suffered and the indicted perpetrator before granting such rights. This is a necessary and reasonable response to the problem of mass victimization. One need

82. See *id.* at 824–25 (listing recommendations to balance victims' and accuseds' rights). At this point one should note that participating victims also have a right to a fair and expeditious determination of their *civil* claim, but this must not take precedence over the accused's rights. This is, of course, because of the severity of the consequences of any final criminal judgment. There is nothing more fundamental than a person's liberty, the issue that lies at the heart of a criminal trial. See Doak, *supra* note 16, at 316 (“While the determination of guilt should always be the focus of criminal trials, . . . the accused must always be at the centre of proceedings.”). For authority that international law recognizes fair-trial rights in civil claims, see ICCPR art. 14(1) and the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. Specifically, Article 6(3) of the ECHR lists minimum requirements to satisfy fair-trial rights of *criminal* and not *civil* proceedings under European law, indicating that rights during criminal proceedings are more important. *Id.* art. 6(3).

83. See Bassiouni, *supra* note 19, at 233 (“In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* [Civil Parties] in criminal proceedings.”).

84. See Trumbull, *supra* note 39, at 806 (discussing how the number of victims involved in trials for crimes against humanity, war crimes, and genocide limit an individual victim's ability to participate unlike in domestic trials, which usually involve one victim).

85. See *id.* at 808, 816 (discussing how victims participating in international criminal proceedings, as opposed to domestic criminal proceedings, can obstruct an investigation by submitting false applications, frustrate the prosecution of the defendant, “significantly prolong the proceedings,” and threaten the defendant's due process rights).

only examine the Cambodian experience to understand why. Under the period of Democratic Kampuchea, between 1.5 and 2.2 million people were killed, leaving the country devastated and the entire populace victimized.⁸⁶ A criminal court cannot accommodate an entire nation.

The ECCC is currently grappling with this problem. In Case 001, ninety-four applications for Civil Party status were received, and sixty-eight were eventually accepted by the Trial Chamber.⁸⁷ Even this relatively small number of Civil Parties proved unworkable, prompting rule changes.⁸⁸ And yet, owing to increased knowledge and awareness of the Court among Cambodians⁸⁹ and a broader criminal investigation,⁹⁰ the number of Civil Party applicants before Case 002 reached 3866.⁹¹ The challenge facing the ECCC is to effectively manage almost four thousand Civil Parties, enabling both meaningful participation and respecting the fair-trial rights of the two accused. In this Author's opinion, the only possible solution, and the one adopted by the ECCC, is to organize Civil Parties into groups with common legal representation.⁹² However, as discussed below, this solution presents its own problems.

86. Christoph Sperfeldt, Asian Int'l Justice Initiative Reg'l Program Coordinator, Address at the Regulatory Institutions Network at Australia National University: The "Soft" Side of International Criminal Justice: Outreach, Victim Participation and Reparations at the Khmer Rouge Tribunal (May 16, 2011). For a participation figure of 1.5 million see Ben Kiernan, *THE POL POT REGIME* 460 (Yale University Press 3d ed. 2008). For a participation figure of 2.2 million see Patrick Heuveline, *Approaches to Measuring Genocide: Excess Mortality During the Khmer Rouge Period*, in *ETHNOPOLITICAL WARFARE: CAUSES, CONSEQUENCES AND POSSIBLE SOLUTIONS* 93–108 (Daniel Chirot and Martin Seligman eds, 2001).

87. *Co-Prosecutors v. Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgement, paras. 637–38 (July, 26 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_EN_G_PUBLIC.pdf [hereinafter *Duch Judgement*]. On appeal, the Supreme Court Chamber reviewed the Civil Party status of the twenty-two denied applicants. *Co-Prosecutors v. Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, paras. 535–36 (Feb. 3, 2012), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf> [hereinafter *Duch Appeal Judgement*]. The Supreme Court Chamber admitted nine of the appellants as Civil Parties in the case and corrected a clerical error that omitted one party in the original judgment. *Id.* paras. 540, 544, 563, 570, 580, 590, 599, 619, 629.

88. See ADRIENNE LYLE ET AL., AUSTRALIAN RED CROSS, *THE ECCC—FROM CASE 001 TO CASE 002—FINDINGS AND THE FUTURE* 18–22 (2011), http://www.redcross.org.au/files/2011_the_eccc_from_case_001_to_case_002_findings_and_the_future.pdf (discussing innovations in the ECCC's trial management procedures that were implemented as a response to Case 001).

89. In 2010, 25% of adults reported having no knowledge at all about the ECCC, compared to 39% in 2008 Of those who lived under the Khmer Rouge regime, 22% said they had no knowledge of the ECCC in 2010 compared to 34% in 2008, and among those who did not live under the Khmer Rouge regime, the proportion with no knowledge about the ECCC was 33% in 2010, down from 50% in 2008.

PHUONG PHAM ET AL., U. OF CAL. AT BERKELEY SCHOOL OF L. HUM. RTS. CENTER, *AFTER THE FIRST TRIAL: A POPULATION-BASED SURVEY ON KNOWLEDGE AND PERCEPTION OF JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 21 (2011) [hereinafter *PHAM ET AL., POPULATION-BASED SURVEY*], available at http://www.law.berkeley.edu/files/HRC/Publications_After-the-First-Trial_06-2011.pdf.

90. Press Release, Office of the Co-Investigating Judges, Conclusion of Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ (Jan. 14, 2010), available at http://www.eccc.gov.kh/sites/default/files/media/ECCC OCIJ_PR14Jan2010-Eng.pdf.

91. *Id.* (declaring all Civil Party applications rejected by the Co-Investigating Judges admissible, thus bringing the number of Civil Parties in Case 002 up to 3866).

92. ECCC Rules (Rev. 8), *supra* note 11, Rs. 12 *ter*(5)–(6), 23(3).

1. Equality of Arms

The sheer number of victims in international proceedings creates equality of arms issues. Equality of arms is a fundamental precondition of fair-trial rights that may be impinged by victim participation in criminal proceedings.⁹³ As *Prosecutor v. Tadic* cited with approval, equality of arms dictates that “each party must have a reasonable opportunity to defend [himself or his] interests ‘under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.’”⁹⁴ The addition of multiple victims or even a single victim in a criminal trial may create an imbalance by compelling the accused to not only answer the charges of the prosecutor “but also assertions of the victim(s).”⁹⁵ Victim participation must therefore be limited. Indeed, the ECCC has agreed, reiterating that, despite the somewhat substantive participatory rights afforded to Civil Parties under the Internal Rules, the accused has the right to face one prosecutor only, and the role of Civil Parties must not be transformed to one of “additional prosecutors.”⁹⁶ Limiting victim participation so that victims do not become quasi-prosecutors does not negate meaningful participation, and there is still room within criminal trials for victims to record their suffering, enumerate their motivations for participating, and state their wishes for redress.

2. Undue Delay

The right to a fair trial necessarily entails the right to an expeditious one.⁹⁷ Allowing victims to participate meaningfully in any criminal proceeding will inevitably extend it; however, any delay should not automatically be considered undue. Problems of long delay in international tribunals are well documented,⁹⁸ but they are not unique to tribunals that offer substantive victim participation. Indeed, the Milosevic trial at the International Criminal Tribunal for the former Yugoslavia (ICTY), a tribunal that offered no participatory rights for victims,⁹⁹ was halted forty-nine months after the trial commenced¹⁰⁰ and a staggering eighty-one months after

93. See Wojcik, *supra* note 44, at 16 (“[V]ictim participation may also threaten ‘the efficiency, fairness, and costs of trials’ Victim participation may deny due process or an ‘equality of arms.’”).

94. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, para. 48 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (footnote omitted), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

95. Wojcik, *supra* note 44, at 16.

96. Duch Decision on Joint Response, *supra* note 1, para. 26.

97. See, e.g., ECHR, *supra* note 82, art. 6(1) (“[E]veryone is entitled to a fair and public hearing within a reasonable time”); ICCPR, *supra* note 75, art. 9(3) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”).

98. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323, 323–24 (2009).

99. See VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT, *supra* note 8, at 12 (stating that at the ICTY, victims could be called as witnesses, but could not otherwise intervene or “participate in their own right”).

100. See *Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Order (Int’l Crim. Trib. for the former Yugoslavia Jan. 11, 2002), http://icty.org/x/cases/slobodan_milosevic/tord/en/20111WG517096.htm (“[T]he trial of the Kosovo Indictment will commence on 12 February 2002”).

the initial indictment,¹⁰¹ when Milosevic was found dead in his cell on March 11, 2006.¹⁰² As this case highlights, victim participation is *not* always the cause of prolonged and bloated criminal proceedings, but nevertheless, it *may* cause further delays, particularly where almost four thousand people wish to participate. Where these delays are simply a consequence of participation, they should not be considered to impinge on the right of the accused,¹⁰³ but where they are a result of bad-faith participatory tactics, they *will* conflict with the paramount right to an expeditious trial and must be dealt with appropriately by the judges. While delays caused by bad-faith tactics may occur, the idea that victims would desire a protracted criminal proceeding appears illogical,¹⁰⁴ as their “overriding interest is likely to see that justice is done.”¹⁰⁵ Delaying and prolonging criminal proceedings is against the interest of victims.¹⁰⁶ Nevertheless, excessive delay is a natural consequence of multiple parties and multiple representatives, and it threatens the rights of an accused.

3. Diverging Interests

A further issue in accommodating victim participation within the criminal justice system is reconciling the different interests of victims and the prosecution. While to nonlawyers, the prosecutor and the victim may be expected to share the same desire—that is, the conviction of the accused—this is not always the case.¹⁰⁷ The role of the prosecutor is not simply to obtain a conviction at all costs but to act objectively and impartially in any investigation.¹⁰⁸ The prosecutor’s first duty is to the criminal justice system as a whole.¹⁰⁹ The victim, on the other hand, is interested first and foremost in documenting his suffering and obtaining redress.¹¹⁰ He is not

101. See *Prosecutor v. Milosevic*, Case No. IT-99-37, Indictment, paras. 90–100 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999), http://icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm (indicting Milosevic and others).

102. See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Order Terminating the Proceedings (Int’l Crim. Trib. for the Former Yugoslavia Mar. 14, 2006), http://icty.org/x/cases/slobodan_milosevic/tord/en/060314.htm (terminating the proceedings against Milosevic a few days after his death). The Milosevic trial has not been nearly the most egregious example of delays in international criminal trials. See, e.g., *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Judgement and Sentence, paras. 135–36 (June 24, 2011), http://www.unict.org/Portals/0/Case/English/Nyira/judgement/110624_judgement.pdf (discussing a case where one accused spent at least twelve years in detention and another accused spent nearly fifteen years in detention before a judgment was reached).

103. This assertion accords with the Separate Opinion of Judge Song. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, para. 27 (Separate Opinion of Judge Sang-Hyun Song) (June 13, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc286765.pdf> [hereinafter *Lubanga Joint Application Decision*] (“Th[e] delay [arising from victim participation] is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in proceedings before the Court.”).

104. Sokol, *supra* note 61, at 184.

105. SáCouto & Cleary, *supra* note 54, at 84.

106. *Id.*

107. Trumbull, *supra* note 39, at 822.

108. Eighth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Guidelines on the Role of Prosecutors*, art. 13(a)–(b), U.N. Doc. A/CONF.144/28/Rev.1, at 192.

109. *Id.* arts. 10–16.

110. Trumbull, *supra* note 39, at 802–03.

concerned with the prosecutor's case theory or the intricacies of the legal process *per se*, but with its outcome. As such, victim participation may interfere with and undermine the prosecutor's "ability to conduct a focused investigation"¹¹¹ and perhaps even result in a failure to obtain a conviction.¹¹² Particularly in international tribunals, resource and evidentiary constraints necessarily mean that every criminal offense cannot be investigated and prosecuted.¹¹³ Upon a motion by a Civil Party, the prosecution may be compelled to follow leads "unrelated to . . . or inconsistent with its overall strategy,"¹¹⁴ potentially impacting "the timely and efficient conduct of investigations."¹¹⁵ This issue arose in *Lubanga* during the confirmation-of-charges hearing when, at the urging of the victims' representative, the Pre-Trial Chamber amended the indictment to include war crimes committed during an international conflict.¹¹⁶ As Trumbull notes, the prosecutor objected because "he had not intended to prove . . . that there was an international conflict."¹¹⁷

The objectives of international criminal justice are to end impunity, promote justice, and foster reconciliation.¹¹⁸ Where victims or their representatives present credible evidence indicating that charges should be recharacterized or amended, the potential objections of the prosecution should be ignored. That victims and the prosecution will have separate interests is no reason to dismiss or subjugate the interests of the victim. Indeed, as seen in the *Lubanga* case, the very fact that the prosecution may only have evidence sufficient to support a lower charge demonstrates the importance of effective victim participation. While attempting to prove an enlarged case may place a greater burden on the prosecution, its eventual success will more fully document the extent of the accused's criminality and bring closure to additional victims. Potential concerns about extended trials are groundless in the sense that it is not a violation of the right to an expeditious trial to be tried for more than one crime.¹¹⁹ The interests of both the international community at large

111. *Id.* at 807–08.

112. *Id.* at 807–09.

113. *See id.* at 816–17 ("The ICC has limited resources, and the [p]rosecutor cannot possibly prosecute every crime that falls within the jurisdiction of the Court.").

114. *Id.* at 808.

115. Situation in Darfur, Sudan, Case No. ICC-02/05-81, Prosecution's Reply Under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, para. 22 (June 8, 2007).

116. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, paras. 9, 204, 220 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (agreeing with a victim's representative that the scope of the war crimes charge included war crimes committed during "an armed conflict of an international character," despite the fact that the prosecutor had only contended that the war crimes were committed during "an armed conflict not of an international character").

117. Trumbull, *supra* note 39, at 809.

118. *Id.* at 826.

119. *See, e.g.,* Prosecutor v. Bizimana, Case No. ICTR-98-44-T, Introduction, paras. 26, 28 (July 12, 2000), <http://www.unict.org/Portals/0/Case%5CEnglish%5CKabuga%5C120700.pdf> (finding that "the similarity of the allegations in the present indictment [charging multiple crimes, including genocide and crimes against humanity] will further judicial efficiency" and that "a joint trial of the Accused will not infringe upon the Accused's right to be tried without undue delay").

and the victims of mass-atrocity crimes must align if international criminal justice is to meet its objectives.

4. Risk of Fraud and Subversion

In international proceedings, the large number of potential victim applicants exacerbates the risk of fraudulent claims aimed at subverting or obstructing the actions of the court.¹²⁰ The possibility of persons sympathetic to the accused fabricating requests in order to frustrate the proceedings, however unlikely, is amplified by the two-tiered approach to recognizing victim status at international tribunals. Under this approach, a preliminary determination is first made on a *prima facie* basis before the Trial Chamber makes a final determination much later.¹²¹ The *prima facie* standard does not examine in detail the applicant's claims but simply assesses the plausibility of them (i.e., whether it is possible the harm alleged actually came into being).¹²² After passing this initial, very low threshold, applicants at the ECCC are afforded all the rights of Civil Parties and could potentially use these rights to frustrate the prosecution through delay.¹²³

Although there is no evidence that these risks have ever materialized at any international tribunal, concerns remain.¹²⁴ The ICC Prosecutor has suggested that this risk is "apparent,"¹²⁵ and Pre-Trial Chamber II of the ICC has also acknowledged the risk, considering that it "cannot be entirely ruled out."¹²⁶ Nevertheless, victim participation at the investigative stage of proceedings is no longer permitted at the ICC,¹²⁷ thus reducing the likelihood of obstruction at this preliminary stage. Despite the potential harm from fraudulent claimants, it appears unlikely that this issue will ever present itself.¹²⁸ In a situation where victims do not participate individually but

120. Trumbull, *supra* note 39, at 808.

121. Co-Prosecutors v. Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Ratanakiri Province, para. 9 (Aug. 26, 2010) [hereinafter Ratanakiri Province Order].

122. See *id.* paras. 7–9 (explaining that, in order to become a Civil Party, an applicant must be able to demonstrate a plausible claim and establish on *prima facie* credible grounds that he or she suffered harm as a consequence of the alleged crimes); Sary Decision on Appeals, *supra* note 13, para. 94 ("[W]hen considering the admissibility of the Civil Party application, the Pre-Trial Chamber shall be satisfied that facts alleged in support of the application are *more likely than not to be true*.").

123. See Ratanakiri Province Order, *supra* note 121, paras. 4–5 (identifying the purpose and the rights of Civil Parties in these actions); Trumbull, *supra* note 39, 807–09 (discussing ways in which victims participating in criminal proceedings can hinder prosecution).

124. See, e.g., Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-103, 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, paras. 17–18 (Jan. 23, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183444.pdf> (discussing how victim participation poses "dangers in terms of the integrity and impartiality of the investigation," including the risk of fabricated requests for participation, disclosure of confidential information, and destruction of evidence).

125. *Id.* para. 18.

126. Situation in Uganda, Case No. ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06, para. 35 (Dec. 19, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc400347.pdf>.

127. DRC Victim Participation Decision, *supra* note 37, para. 9.

128. See Ratanakiri Province Order, *supra* note 121, paras. 7–9, 13–18 (noting that Civil Party applicants must meet numerous requirements and considerations before becoming Civil Parties). While

are grouped into collectives, no one individual, however driven, will have the opportunity to impart themselves onto the proceedings to such an extent as to seriously undermine the trial.¹²⁹ Owing to the documentary difficulties of proving some Civil Party claims, particularly in Cambodia where thirty years has elapsed, all victim or Civil Party requests should be treated as presumptively admissible.¹³⁰ The potential harm from fraud and subversion is less than the potential harm from denying applicable victims their participation.

B. Constructing the Participatory Regime

One of the most pressing issues in institutionalizing an effective victim participatory regime in international proceedings is the difficulty involved in constructing and implementing such a regime. Indeed, the experiences of the Cambodian tribunal demonstrate the problems in simply transplanting participatory regimes from domestic legal systems into the international arena, but even when the scheme exists, implementation problems persist.

1. A Sui Generis Scheme

Victim participation schemes of national jurisdictions cannot simply be transplanted into proceedings dealing with international crimes; rather, a participatory regime must be carefully constructed to meet the specific demands of an international court.¹³¹ Because victim participation in international proceedings is an emerging institution, the creation of a new international scheme—both appropriate and effective for victims, the accused, and the efficiency of justice—is difficult to say the least. The ECCC has struggled with this charge. The ECCC's Internal Rules have been significantly amended a number of times over the course of its operation, evolving from a document that reflected Cambodian domestic procedure to a sui generis beast that has been built to respond to the specific circumstances at the ECCC.¹³² The ECCC's difficulties can be seen in the dramatic

these requirements only require a showing of plausibility, they nevertheless negate the potential for automatic participation and limit the risk for fraud by weeding out applicants who cannot meet these requirements.

129. See Werner & Rudy, *supra* note 22, at 306 (discussing how the revised Internal Rules “[f]urther limit[] Civil Parties’ role” by providing that “during the Trial phase, individual Civil Parties are consolidated into one group” and how “th[is] new scheme is necessarily limited in scope due to the subjugation [of the individual interests] to the collective interest”).

130. See Ratanakiri Province Order, *supra* note 121, paras. 9–12 (acknowledging the difficulties of victims in providing sufficient evidence in certain situations, such as birth and death certificates, and adopting a “flexible approach” in such situations).

131. See Trumbull, *supra* note 39, at 804, 822–24 (contending that “[t]he arguments justifying victims’ right to participate in domestic prosecutions do not support victim participation in international criminal proceedings” and recommending a balancing test to determine the optimal level of victim participation in international proceedings).

132. See Charles Jackson, *CTM Interview: Andrew Cayley, International Co-Prosecutor at the ECCC*, CAMBODIA TRIBUNAL MONITOR (Apr. 4, 2011), http://www.cambodiatribunal.org/_archived-site/blog/2011/04/ctm-interview-andrew-cayley-international-co-prosecutor-eccc (arguing that the ECCC should apply international jurisprudence to the Duch trial because “[i]f you read the UN/Cambodia Agreement,

shifts in participatory rights¹³³ but are best exemplified through the evolution of the procedural requirements of Civil Party admissibility between Case 002 and Cases 003 and 004.

The Original Internal Rules allowed Civil Party applicants to apply in writing to the Co-Investigating Judges “[a]t any time during the judicial investigation,”¹³⁴ or to the Trial Chamber “up until the opening of proceedings before [that] Chamber.”¹³⁵ This rule loosely followed the Cambodian Code of Criminal Procedure’s requirements, which allow victims of a crime to file a complaint before an investigating judge¹³⁶ or at any time at trial before the “Royal Prosecutor [has] made his final observations.”¹³⁷ The considerable time allowed for Civil Party applications under Cambodia’s domestic law and under the original ECCC Internal Rules proved too extensive for the international arena and has since been significantly restricted.¹³⁸ This process began with Revision 2, which brought forward the limitation period to “at least 10 (ten) working days before the initial trial hearing,”¹³⁹ but was dramatically curtailed by Revision 4, which further reduced the period of time in which Civil Parties could apply.¹⁴⁰ Rule 23(3) of Revision 4 required written submission “no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation.”¹⁴¹ This rule has remained and is still operative,¹⁴² meaning that victims are now unable to submit their Civil Party applications to the Trial Chamber.¹⁴³

This evolution had a clear goal: “to promote more expeditious trial proceedings.”¹⁴⁴ Indeed, in the face of four thousand Civil Parties in Case 002, a

the ECCC Law and the Internal Rules, it is clear that this court is *sui generis* with its own jurisdiction You simply cannot find the answers in domestic law”; *Internal Rules*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/document/legal/internal-rules> (last visited Nov. 3, 2013) (listing the eight revisions of the Internal Rules).

133. See *supra* Part III.A. (recounting difficulties in expanding participatory rights for victims).

134. ECCC Rules (Original), *supra* note 22, R. 23(3).

135. *Id.* R. 23(4); see also *id.* R. 82 (providing for consideration of applications at opening of trial). Rule 23(4) was later amended to allow the President, by special decision, to “extend or shorten the above-mentioned deadline.” Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 2), R. 23(4) [hereinafter ECCC Rules (Rev. 2)], available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv2-En.pdf>.

136. CODE CRIM. PROC. art. 5 (Cambodia).

137. *Id.* art. 311.

138. See *7th Plenary Session of ECCC Concludes*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Feb. 9, 2010, 12:00 AM), <http://www.eccc.gov.kh/en/articles/7th-plenary-session-eccc-concludes> (noting the problems with Cambodian criminal procedure as applied to large-scale victim participation in the ECCC, leading to the enactment of amendments “designed to ensure effective and streamlined Civil Party participation in ECCC proceedings”).

139. ECCC Rules (Rev. 2), *supra* note 135, R. 23(4).

140. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4), R. 23(3) [hereinafter ECCC Rules (Rev. 4)], available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv4-EN.pdf>.

141. *Id.*

142. See ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis*(2) (listing the same fifteen-day window for victims to submit Civil Party applications as Revision 4).

143. See *id.* R. 83 (reflecting the repeal of the provision for Trial Chamber’s consideration of victims’ applications at the opening of trial).

144. *Sixth ECCC Plenary Session Concludes*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Sept. 11, 2009, 12:00 AM), <http://www.eccc.gov.kh/en/articles/sixth-eccc-plenary-session-concludes> [hereinafter *Sixth Plenary Session*].

streamlined procedure needed to be found. But this evolution also demonstrates the problems of amending a participatory scheme on the run.¹⁴⁵ Civil Parties applying in Cases 002, 003, and 004 must operate under a substantially stricter procedural requirement, enjoying only fifteen days after notification of the judicial investigation conclusion to submit their applications.¹⁴⁶ For victims unschooled in filling out legal process, this appears an onerous task; for disabled or illiterate victims, it may be impossible.

The general tenor of the ECCC's Internal Rules amendments has been to strip away the initially extensive (domestic) participatory rights of victims in order to maintain the (international) Court's efficacy.¹⁴⁷ Amending on the run to cope with issues raised by the practice of the tribunal may sometimes be necessary, but it is not the way to construct and institute an effective and meaningful participatory regime that achieves benefits for victims. More care needs to be taken when first constructing a victim participatory scheme and when implementing it.

2. Poor Structural Implementation

That the benefits of victim participation do not always eventuate is often not the fault of the institution but of the implementation of victim participation.¹⁴⁸ As victim participation in international criminal proceedings remains very much a work in progress, teething problems are inevitable; these problems should not be used as an excuse to do away with victim participation altogether but to rectify and improve the efficacy of the system. One example of poor implementation concerns informing victims of sentencing calculations, evidenced by the widespread anger and disbelief that surrounded the sentencing of Kaing Guek Eav, alias Duch, at the ECCC.¹⁴⁹ As leader of the S-21 Security Center, Duch oversaw the brutal torture and murder of "at least 12,273 victims"¹⁵⁰ and was individually found criminally responsible for

145. See *id.* (detailing the immediate adoption of additional measures affecting Civil Party participation "to ensure that Case 002 proceeds smoothly").

146. See ECCC Rules (Rev. 4), *supra* note 140, R. 23(3) (shortening the application period for victims, effective September 11, 2009); *Sixth Plenary Session*, *supra* note 144 (stating that the change in application period was adopted immediately, thus Civil Parties in Case 002 could not, from that point forward, make applications during trial).

147. See Werner & Rudy, *supra* note 22, at 301–02 (discussing how the Trial Chamber increasingly limited victim participation that was otherwise allowed under the Cambodian Code of Criminal Procedure).

148. James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 529 (2009) ("Experience at the ECCC offers both an example of the great potential of the [C]ivil [P]arty system and a caution against embracing these principles without providing the necessary support to implement them properly.").

149. See Andrew Buncombe, *16,000 Deaths, 19 Years in Jail—Fury Greets Sentence for Pol Pot's Executioner*, THE INDEPENDENT (July 27, 2010), <http://www.independent.co.uk/news/world/asia/16000-deaths-19-years-in-jail-ndash-fury-greets-sentence-for-pol-pots-executioner-2036197.html> (surveying the reactions of shocked and outraged victims of Duch to his sentence at the ECCC).

150. Duch Judgement, *supra* note 87, para. 630. This is a conservative estimate. See *id.* para. 208 ("The Accused . . . acknowledged that the number of detainees who died or were executed was greater than the listed number (as amended) of 12,273.").

crimes against humanity and “grave breaches of the Geneva Conventions of 1949.”¹⁵¹ Despite the severity of the judgment, the Trial Chamber found that a number of mitigating circumstances “mandate[d] the imposition of a finite term of imprisonment rather than a life sentence,”¹⁵² and Duch’s jail time was reduced from thirty-five years to nineteen.¹⁵³ The Court spectacularly failed to adequately educate both Civil Parties and victims about the weight that the Trial Chamber would be likely to give to these mitigating circumstances.¹⁵⁴ As a result, Civil Parties were almost unanimous in their shock: “We are victims two times, once in the Khmer Rouge time and now once again”;¹⁵⁵ “The sentence is a sham”;¹⁵⁶ “The verdict is too light”;¹⁵⁷ “I want Duch to be in jail for life. I want him to do forced labour, like the prisoners in Tuol Sleng.”¹⁵⁸

However, as Anne Heindel, a legal adviser at the Documentation Center of Cambodia, stated prior to the sentence being handed down, any reduction in light of the mitigating circumstances would be both “appropriate” and “rather straightforward.”¹⁵⁹ Participation itself does not result in total understanding of the vagaries in criminal proceedings, and victims rely on their representation and the Court to clearly and precisely explain the process.¹⁶⁰

Attempting to strike a balance between the fair-trial rights of the accused and meaningful participation to the victimized is very much a work in progress. As such, victim participation in contemporary international criminal proceedings poses many substantive and administrative difficulties. Nevertheless, there remains an emerging trend “towards recognizing the rights of victims,”¹⁶¹ and the potential benefits of meaningful victim participation are such that this important development must be

151. *Id.* para. 516.

152. *Id.* para. 629. These mitigating circumstances included “the Accused’s cooperation with the Chamber, admission of responsibility, expressions of remorse[,] . . . the coercive environment in DK [Democratic Kampuchea] in which he operated, and his potential for rehabilitation.” *Id.*

153. Seth Mydans, *Anger in Cambodia over Khmer Rouge Sentence*, N.Y. TIMES (July 26, 2010), <http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?ref=sethmydans>.

154. See Pham et al., *Victim Participation and the Trial of Duch*, *supra* note 40, at 284 (“[M]any [C]ivil [P]arties remained uncertain and lacked understanding about key aspects of the [Duch] trials, including sentencing.”).

155. Mydans, *supra* note 153 (quoting Chum Mey’s reaction to the verdict). Chum Mey is one of seven S-21 survivors, who participated as a Civil Party in Case 001. *ECCC Launches New Outreach Program*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/articles/eccc-launches-outreach-program> (last updated Mar. 20, 2011, 6:08 AM).

156. Buncombe, *supra* note 149 (quoting Theary Seng’s reaction to the verdict). Theary Seng withdrew as a Civil Party in Case 001. Luke Hunt, *Kissinger in Cambodia*, LATITUDE BLOG (N.Y. TIMES) (Nov. 20, 2012, 6:21 AM), <http://latitude.blogs.nytimes.com/2012/11/20/protests-greet-obamas-visit-to-cambodia/>.

157. Steve Finch, *Cambodians Upset by Genocide Sentence*, ASIA TIMES (July 28, 2010), http://www.atimes.com/atimes/Southeast_Asia/LG28Ae01.html (quoting Bou Meng’s reaction to the verdict). Bou Meng is an S-21 survivor. *Id.*

158. Buncombe, *supra* note 149 (quoting Norng Chan Phal’s reaction to the verdict). Norng Chan Phal is a witness in Case 001. *Duch Judgement*, *supra* note 87, para. 251 n.22.

159. Douglas Gillison, *Sentence, Not Guilt, Is Battle at S-21 Trial*, CAMBODIA DAILY (Mar. 30, 2009), http://www.camnet.com.kh/cambodia.daily/selected_features/cd-Mar-30-2009.htm.

160. See Bair, *supra* note 148, at 529 (stating that the victims’ desire to see the accused convicted may lead to “confusion and misunderstanding” and that providing legal representation for victims may limit such occurrences).

161. *Id.* at 511; see generally Bassiouni, *supra* note 19.

pursued. The following Part offers some possible solutions for systemic development at the ICC and future ad hoc tribunals.

IV. POTENTIAL SOLUTIONS

For victim participation to be both meaningful and effective in the future, solutions to the problems identified above must be found. This Part offers three suggestions. First, it advocates the dismantling of the bifurcated victim admissibility regime that both the ECCC and the ICC have adopted. Second, it supports the collective representation approach taken by the ECCC in the Court's attempt to deal with large numbers of victim-applicants but urges greater awareness of the desires and motivations of the individuals that make up the collective. Finally, it recommends that future ad hoc tribunals and a revamped ICC contain an in-house reparations system, establish a victims' trust fund, and limit compensation to collective and moral awards only.

A. *Reforming the Admissibility Procedure*

The two major international tribunals that offer participatory rights for victims labor under a fractured and inefficient victim admissibility regime. At the ICC, Article 68(3) of the Rome Statute effectively entrenches delay.¹⁶² That victims may only participate in "stages of the proceedings determined to be appropriate by the Court"¹⁶³ compels victims to repeatedly apply and reapply for the right to participate.¹⁶⁴ This markedly increases the workload of judges and the Court, costing extensive amounts of time and money and, at times, "jamm[ing] . . . the machinery of the proceedings."¹⁶⁵ Such a system reduces not just the efficacy of the victim participation regime that the Court ostensibly upholds but also violates the rights of victims and of the accused.¹⁶⁶ Christine Chung is scathing: "The record of the ICC's early years demonstrates that thousands of pages and thousands of hours (likely representing a substantial number of euro), have been expended in delivering actual participation in proceedings on behalf of very few victims."¹⁶⁷

162. See Rome Statute, *supra* note 35, art. 68(3) (stating that "[w]here the personal interests of the victims are affected," the Court must determine the appropriate stages of the proceedings during which the victims' "views and concerns" may be presented).

163. See Lubanga Joint Application Decision, *supra* note 103, para. 22.

164. See *id.* paras. 12, 22, 27–28 (discussing whether the victims could participate in the current stage of the proceedings, which concerned a narrow procedural issue, and how the Appeals Chamber would, in the event of an appeal, decide "whether it is appropriate for [the victims] to participate [in the appeal]" on the basis of the victims' application).

165. Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. INT'L HUM. RTS. 459, 460 (2008).

166. See *id.* at 464 (discussing how the negotiators of the Rome Statute believed that participation and efficient adjudication served the victims' best interests and cautioned that, in the face of greater victim participation, breakdowns in efficient adjudication may undermine the rights of the accused).

167. *Id.* at 461.

The process at the ECCC is slightly more complicated. While the Internal Rules appear to authorize only one decision on admissibility of Civil Parties,¹⁶⁸ in Case 001, the Co-Investigating Judges issued interim or provisional affirmative decisions, some of which were later rejected in a final decision by the Trial Chamber.¹⁶⁹ By a three-two majority, the Pre-Trial Chamber accepted the Co-Investigating Judges' procedure,¹⁷⁰ which was later unanimously re-affirmed by the Trial Chamber.¹⁷¹

The Pre-Trial and Trial Chambers' decisions are curious on two accounts. First, a two-step admissibility process appears to run counter to the Court's own Internal Rules¹⁷² and, therefore, has no legal basis. Second, it heightens the risk of violations of both the victim's and the accused's right to an expeditious trial.¹⁷³ The Trial Chamber placed significant weight on the fact that issuing provisional determinations based on a *prima facie* assessment of their credibility comports "with the practice before comparable international tribunals."¹⁷⁴ However, as Judges Prak and Downing note, the Internal Rules of the ECCC "do not provide for a two part process";¹⁷⁵ comparative assessment is therefore unnecessary. Internal Rule 23(3) authorizes only one decision by the Co-Investigating Judges, after which they are *functus officio* and barred from making a further determination.¹⁷⁶ Moreover, Internal Rule 21(1) lists "legal certainty" as a fundamental principle of ECCC

168. See ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis* (2) (stating that a victim has fifteen days after receiving notification of the conclusion of the judicial investigation to submit a Civil Party application); ECCC Rules (Original), *supra* note 22, R. 23(3)–(4) (stating that a victim may apply to be a Civil Party "at any time during the judicial investigation" or "up until the opening of the proceedings before the Trial Chamber," and victims who filed a Civil Party application during the investigation are not required to file a second application before the Trial Chamber).

169. See Duch Judgement, *supra* note 87, paras. 647–49 (finding that certain individuals who had been admitted as Civil Parties did not meet the standard to be considered victims of the crimes at issue).

170. Compare Co-Prosecutors v. Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, para. 11 (Opinion of Judges Ney, Marchi-Uhel, and Huot) (Apr. 27, 2010) [hereinafter Thirith Decision on Appeals], http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D250_3_2_1_5_Redacted_EN.pdf (holding that the Co-Investigating Judges' decision to reject the Civil Party application was not inconsistent with the Internal Rules), *with id.* para. 1 (Opinion of Judges Prak and Downing) (finding that the Co-Investigating Judges made an unauthorized and thus void decision to remove the victims from the case file).

171. Duch Judgement, *supra* note 87, paras. 636–37, 639.

172. See ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis*(2) (envisioning a one-step process in which victims submit a Civil Party application, and "[t]he Co-Investigating Judges may reject [such] applications at any time until the date of the Closing Order").

173. See Duch Appeal Judgement, *supra* note 87, paras. 489, 491 (upholding the two-tier process for purposes of Case 001 and acknowledging that "there is a legal interest in having the full 'cast' in the proceedings established as much as possible before the commencement of trial").

174. Duch Judgement, *supra* note 87, para. 636.

175. Thirith Decision on Appeals, *supra* note 170, para. 8 (Opinion of Judges Prak and Downing).

176. *Id.* paras. 8–9 (Opinion of Judges Prak and Downing). In fact, in the final appeal judgment, the Supreme Court Chamber noted with approval the approach taken by Judges Prak and Downing, although they ultimately upheld the two-stage admissibility test for Case 001. See Duch Appeal Judgement, *supra* note 87, para. 491 (agreeing with Judges Prak and Downing that "[s]ubsequent decisions on the same matter by the same body should be dependent on a change of circumstances in the case, new evidence . . ." but also stating that "these conclusions do not explicitly result from the legal framework of the Internal Rules at the time," and, therefore, subsequent orders issued by the judges below should be upheld).

proceedings.¹⁷⁷ The granting of provisional admissibility that may be revoked at any time does not satisfy this principle.¹⁷⁸

More broadly, however, the two-step admissibility process in international criminal proceedings heightens the risk of violations of the right to an expeditious trial. At the ECCC, once a decision is made to grant a victim Civil Party status, the victim's legal representative is granted access to the case file and considered a party to the proceedings.¹⁷⁹ The consequences of admissibility are such that "any decision . . . cannot be taken lightly."¹⁸⁰ As discussed previously, the risk of fraudulent Civil Party applicants gaining access to the case file in order to frustrate proceedings, while unlikely, cannot be entirely discounted. The two-step admissibility procedure heightens this risk by employing an initial *prima facie* determination.¹⁸¹ Future *ad hoc* tribunals should adopt a single, determinative admissibility procedure that provides victims an automatic right of participation. Such a procedure is in line with ordinary civil claims in national jurisdictions, which do not require a *prima facie* admissibility test before a civil suit can be raised.¹⁸² Forcing victims to repeatedly seek the leave of the Court to participate or revoking a previously granted application increases the number of appeals and unduly delays proceedings, wasting precious time and money and potentially violating fair-trial rights of both the accused and the victim.

B. Victim Groups

The inherent difficulty in providing meaningful participation for victims of crime where the number of those victims reaches into the hundreds or thousands, while, at the same time, not delaying the administration of justice must be resolved if victim participation in international criminal law is to be successful. One solution is to encourage or compel individual victims to form collective groups. Indeed, this

177. ECCC Rules (Rev. 8), *supra* note 11, R. 21(1).

178. See Thirith Decision on Appeals, *supra* note 170, paras. 8–14 (Opinion of Judges Prak and Downing) (emphasizing the importance of the "right to procedural fairness," which provides "certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner," and concluding that "if a second decision is [to be] considered . . . valid[,] it would have had to be specifically authorised by the rules or governing laws, which it is not"); Duch Appeal Judgement, *supra* note 87, para. 453 ("[T]he Civil Party Appellants further complain that the Trial Chamber violated the fundamental principles of legal certainty and transparency provided for in Internal Rule 21. The application of a two-step process resulted in different groups of victim applicants being granted different rights.").

179. Thirith Decision on Appeals, *supra* note 170, para. 7 (Opinion of Judges Prak and Downing).

180. *Id.*

181. See *id.* para. 2 (showing that upon receipt of a Civil Party application form, and instructions from the Co-Investigating Judges to place the application in the case file, the applicant is considered a Civil Party participant and is granted access to confidential information in the case file even though the Co-Investigating Judges reserve the ability to "make a formal decision with respect to the admissibility" of the application).

182. See Bassiouni, *supra* note 19, at 207 (explaining that "[r]edress of wrongs is a fundamental legal principle" that is recognized in all legal systems and "applies to private claims for which the . . . State provides a forum and enforcement of the remedy").

approach has been adopted by the ICC¹⁸³ and the ECCC,¹⁸⁴ but it presents its own difficulties.

1. Collective Representation

Victims of mass-atrocity crimes are not a homogenous community whose interest in participating in the prosecution of those responsible is defined solely by its victim status.¹⁸⁵ Survivors have entirely different “extra-legal identities [and] perspectives.”¹⁸⁶ By dressing them up in a “singular legal identity,”¹⁸⁷ internationalized tribunals risk ignoring the fact that, even if victims share common experiences, “they may not share common views on appropriate punishments or remedies.”¹⁸⁸ This is particularly so in the Cambodian experience where ex-Khmer Rouge members, “base people,” and “new people”¹⁸⁹ have come forward to apply for Civil Party status. In fact, even this tripartite distinction ignores the very real motivations behind all individuals claiming victim status.¹⁹⁰

However, both the ICC and the ECCC have gone further than simply collectivizing participation; they have collectivized representation.¹⁹¹ Rather than coercing victims into groups during the trial stage, recent amendments to the Internal Rules limit all representation to two Lead Co-Lawyers.¹⁹² The move to introduce

183. See ICC Rules, *supra* note 8, R. 90(2)–(3)

(Where there are a number of victims, the Chamber may . . . request the victims or particular groups of victims . . . to choose a common legal representative or representatives If the victims are unable to choose a common legal representative . . . the Chamber may request the Registrar to choose one or more common legal representatives.).

184. See ECCC Rules (Rev. 8), *supra* note 11, R. 23(3) (“Civil Parties at the trial stage and beyond shall comprise a single, consolidated group . . .”).

185. See Werner & Rudy, *supra* note 22, at 306 (discussing the great diversity within victim groups in the context of Case 002).

186. Mahdev Mohan & Vani Sathisan, *Erasing the Non-Judicial Narrative: Victim Testimonies at the Khmer Rouge Tribunal*, 2 JINDAL GLOBAL L. REV. 37, 48 (2011).

187. *Id.*

188. Wojcik, *supra* note 44, at 12.

189. The Khmer Rouge divided civilians into two categories—base people and new people. SUCHENG CHAN, SURVIVORS: CAMBODIAN REFUGEES IN THE UNITED STATES 17 (2004). Base people were those who lived in areas under Khmer Rouge control before 1975, while new people were those who resided in the cities at the time of evacuation. *Id.* New people were believed to have been exposed to western influences and therefore were considered politically unreliable. *Id.* For more information, please see MICHAEL VICKERY, CAMBODIA: 1975–1982 81–82 (1984).

190. See NADINE STAMMEL ET AL., BERLIN CENTER FOR THE TREATMENT OF TORTURE VICTIMS, THE SURVIVORS’ VOICES: ATTITUDES ON THE ECCC, THE FORMER KHMER ROUGE AND EXPERIENCES WITH CIVIL PARTY PARTICIPATION 35 (2010) (showing breakdown of Khmer Rouge victims’ motivations to submit Civil Party applications, including justice, revenge, reparations, duty to relatives, personal coping, and finding out the truth).

191. This Part will emphasize the ECCC approach. For the ICC approach, see, e.g., Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, para. 13 (July 22, 2009) (ordering that a common legal representative shall represent all victims who have been admitted to participate in the case).

192. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 5), R. 12 *ter*(4) [hereinafter ECCC Rules (Rev. 5)], available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv5-EN.pdf>. The Lead Co-Lawyers were introduced in the fifth revision. See *id.* R. 12 *ter* (stating that the Lead Co-Lawyers provision was adopted on February 9, 2010, the same date that Revision 5 was released).

Lead Co-Lawyers demonstrates a desire to protect fair-trial rights of the accused over individual participation of victims, importantly limiting the delays caused by multiple counsels asking the same questions.¹⁹³ Nevertheless, their introduction need not further restrict effective victim representation. If the Lead Co-Lawyers remain responsive to the different motivations and interests of the diverse Civil-Party groups, victims will still benefit from their participation. Whatever problems a collectivized justice may entail, it is the only feasible way to allow participation of victims in mass-atrocity criminal proceedings.¹⁹⁴ Of course, collectivised justice can and must be organized better, with different Civil-Party groups clearly representing different motivations and desires for participation or different geographic and victimized locales.¹⁹⁵ By creating space for pluralism within collective representation, participation can still be meaningful. This is a delicate issue but one that is central to effective victim participation in international criminal proceedings.¹⁹⁶

It is, however, important not to confuse collective victim representation with a class action; the individuals involved need to be considered individually. This is true even if Civil Parties are defined into classes of victims by victimization or geographic locale. Consider a Civil-Party group based on children who have lost both parents: although they are all nominally orphans, a victim who was one month old when her parents were murdered versus a victim who was seventeen years and eleven months old will have different needs. While conceivably they have both suffered the same type of harm, the reality is that their suffering is very different and should be treated as such. Collective representation will only be effective if it does not lose sight of the individuals involved.¹⁹⁷ Just how a tribunal goes about not losing sight of the individuals is another issue entirely and involves examining the importance of external actors.

193. See Werner & Rudy, *supra* note 22, at 304, 308–09 (discussing ways to make the victim participatory scheme more efficient, such as having Civil Party lawyers consult with Lead Counsel, and how such methods help the accused obtain his right to an expeditious trial but also tend to limit victim participation in the ECCC).

194. See *id.* at 304–05 (acknowledging that consolidation poses issues but expressing doubt that other modes of representation besides consolidation are tenable in a group of over three thousand victims).

195. See *id.* at 306 (noting that the wide range of “ethnic, religious and national backgrounds” in the large Case 002 victim group necessitates that lawyers be able to voice “divergent interests and goals”).

196. See *id.* at 305

([T]he Internal Rules do not explicitly address victims’ fear that their individual interests will be subjugated in the interest of the common consolidated group during trial [This ambiguity] will form a great obstacle for the lawyer in his or her ability to carry out an effective representation on behalf of [Civil Party clients]).

Unfortunately it is too early to examine the effectiveness of the ECCC approach as Case 002 remains at the trial hearing stage. See CASE 002, *supra* note 67 (“Two former Khmer Rouge leaders are now on trial in Case 002.”).

197. See Werner & Rudy, *supra* note 22, at 306 (discussing the need to empower Civil-Party lawyers in their representation of a diverse group of victims; “otherwise, the Civil Party attorney’s role, and the Civil Party itself will become illusory”).

2. The Importance of External Actors

Collectivizing representation does not by itself negate the benefits of participation, but it does require an examination of the importance of the relationship between international courts and external partners. It should be remembered that a criminal trial is not primarily a peace-building exercise but a retributive mechanism designed to bring perpetrators to justice and justice to victims.¹⁹⁸ Where thousands of victims express a desire to participate, there is a need for external actors to assist victims with preparation for trial, manage victims' expectations during the trial, and support victims in the aftermath of the judgment.¹⁹⁹ Indeed, the changes proposed above would give more importance to the valuable work of civil-society organizations, nongovernmental organizations (NGOs), and other partners acting outside the judicial process.

There is broad agreement among scholars of transitional justice that NGOs and civil-society organizations "play a critical role in . . . rebuilding the state and establishing a firm foundation for strong democracies."²⁰⁰ In Cambodia, around ten to fifteen local NGOs have engaged with the ECCC at various times, "working primarily at the intersection of the Court and Cambodian society."²⁰¹ Their skill and focus in documenting the Khmer Rouge atrocity pre-trial,²⁰² monitoring the Court's work during trial, and engaging in extensive outreach activities to bring news of the Court and its work to all Cambodians are invaluable.²⁰³ Most significantly, without the support of NGOs, the number of Civil Parties at the ECCC would be substantially lower,²⁰⁴ and their ability to represent themselves would be questionable.²⁰⁵ The shift toward collective representation only increases the importance of the work of civil-society organizations and NGOs. Partnerships between international tribunals and civil-society organizations must aim to assist the "larger universe of survivors,"²⁰⁶ who may feel left out by this process. This can best

198. See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 637, 653 (2010) (discussing how "international criminal law's main purpose" is, in part, "to inflict retribution" and how public retribution is important to international trials "because atrocities excite the public's outrage and demand for justice").

199. See, e.g., Christoph Sperfeldt, *Cambodian Civil Society and the Khmer Rouge Tribunal*, 6 INT'L J. TRANSITIONAL JUST. 149, 156 (2012) [hereinafter Sperfeldt, *Cambodian Civil Society*].

(Outreach projects that initially were focused on providing general information about the ECCC and assisting victims to complete the Court's victim information form developed into comprehensive victim support projects involving notifying survivors about the status of their applications, facilitating their legal representation and regularly informing and supporting [C]ivil [P]arties to attend the trials and meet with their lawyers.).

200. Lucy Hovil & Moses Chrispus Okello, *Editorial Note*, 5 INT'L J. TRANSITIONAL JUST. 333, 333 (2011).

201. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 150.

202. For example, see the work of the Documentation Center of Cambodia (DC-Cam) in CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* (Praeger 2005).

203. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 150–51.

204. For example, approximately eighty-four percent of all Civil Party applications in Case 002 were submitted by or through NGOs. PHAM ET AL., *POPULATION-BASED SURVEY*, *supra* note 89, at 13.

205. The ECCC's Internal Rules did not initially include a legal aid scheme for Civil Parties, and NGOs were forced to provide pro bono representation. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 151.

206. *Id.* at 160.

be achieved by managing expectations of victims throughout the process and by providing a viable and effective compensatory mechanism.²⁰⁷

C. Compensation

A primary motivation for victim participation is to receive reparations.²⁰⁸ Collective representation will only be beneficial if it does not hinder this goal. The right to remedy is guaranteed under a wide range of international agreements including the UDHR,²⁰⁹ the International Covenant on Civil and Political Rights (ICCPR),²¹⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²¹¹ among many others.²¹² This right was reaffirmed in 2005 when the U.N. General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation,²¹³ which reminded States of their obligation to ensure victims of serious human rights violations obtain “[a]dequate, effective and prompt reparation for harm suffered.”²¹⁴ However, these noble gestures do not by themselves result in adequate, effective, and prompt reparations.²¹⁵ For compensatory mechanisms to be effective and for victim participation in international criminal proceedings to be both meaningful and worthwhile, three issues must be resolved. First, reparations claims must be conducted within the internationalized tribunal itself and not left to domestic

207. See *id.* at 152–53, 160 (discussing how a lack of ECCC outreach strategy hindered the management of victims’ expectations, among other problems, provoking the ECCC to direct more resources into outreach and victim participation, and suggesting that the “collective nature of reparations” might “create some meaning” for victims who did not participate).

208. STAMMEL ET AL., *supra* note 190, at 35. Eighty percent of respondents said it was important to provide reparations to victims of the Khmer Rouge, and 15.4% listed it as their primary motivation for application. *Id.* at 35–36. It should be noted, however, that the participation regime at the ICC is separate from the reparations scheme, meaning that victims can still receive compensation without participating in any trial. Karen Corrie, *Victims’ Participation at the ICC: Purpose, Early Developments and Lessons*, AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L CRIMINAL COURT 6, http://www.amicc.org/docs/Victims_Participation.pdf (last updated Mar. 25, 2013); see also Rome Statute, *supra* note 35, art. 75(1) (“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”).

209. UDHR, *supra* note 74, art. 8.

210. ICCPR, *supra* note 75, art. 2(3).

211. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

212. See, e.g., ECHR, *supra* note 82, art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority . . .”); Rome Statute, *supra* note 35, art. 75(1) (“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”).

213. See generally Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., Supp. No. 49, (Vol. I), U.N. Doc. A/60/49 (Vol. 1) (Mar. 21, 2006).

214. *Id.* para. 11(b).

215. See Bassiouni, *supra* note 19, at 246 (“Although the existing national, regional and international mechanisms provide some provisions regarding reparations, there are several reasons why they cannot always ensure victims’ access to reparations.”).

jurisdictions. Second, reparations need to be available even if the convicted perpetrator is indigent. Third, the precise forms of reparations must be delineated.

1. In-House Reparations Regime

The importance of reparations to effective and meaningful victim participation cannot be understated. The award and implementation of compensatory measures are, however, threatened when international tribunals leave these central components of international justice to national judiciaries.²¹⁶ Such was the case for the ICTY and the International Criminal Tribunal for Rwanda (ICTR), whose reparations mechanisms were recognized as being wholly inadequate in enabling victims to receive compensation and were restructured under both the ICC and the ECCC.²¹⁷ Rule 106, common to both ad hoc tribunals, provides for compensation to be sought not through the international tribunal itself but through an “action in national courts (or other competent body)” pursuant to national legislation.²¹⁸ This rule does not just presuppose that relevant legislation or individual access to national courts exists, but also that the national courts, judiciary, and the government itself are all capable of, and even favorable toward, granting reparation claims. As Bassiouni has noted, “[i]n post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases.”²¹⁹ This is not a surprise; countries recovering from mass-atrocity crimes do not have the benefit of a strongly independent judicial system.²²⁰ It is crucial, if personal justice is to be found, that compensatory mechanisms are handled within the tribunal.

The ECCC and the ICC both contain an in-house reparations regime.²²¹ At the ECCC, a central purpose of Civil-Party application is to seek reparations.²²² As such, the Internal Rules provide an in-house mechanism, through Rule 23 *quinqüies*, to deal with these claims.²²³ At the ICC, the in-house reparations regime is governed by Article 75 of the Rome Statute, which allows the Court to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of,

216. See *id.* (“Even binding treaties that provide for victim reparations can be limited by States’ willingness or ability to comply . . . [M]any States are unable to provide reparations to victims due to a lack of resources.”).

217. *Id.* at 241–44; see also Zegveld, *supra* note 72, at 87–89 (discussing how the ICTY and ICTR “lack jurisdiction to deal with compensation for victims,” but that the “lessons learnt from their inability to deal with victims” led the ICC to adopt a victim reparation scheme, and explaining that the ECCC allows victims to make reparation claims under certain circumstances).

218. Bassiouni, *supra* note 19, at 242.

219. *Id.* at 243.

220. See MARIE CHÊNE, U4 ANTI-CORRUPTION RES. CTR., OVERVIEW OF CORRUPTION IN CAMBODIA 3 (2009) (explaining that in Cambodia, the judiciary is considered the sector “most affected by corruption,” and “only one in six judges has a law degree”).

221. See Rome Statute, *supra* note 35, art. 75(1) (“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation . . . [T]he Court may . . . determine the scope and extent of any damage, loss and injury to, or in respect of, victims . . .”); ECCC Rules (Rev. 8), *supra* note 11, R. 23 *quinqüies*(1) (“If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties.”).

222. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(b).

223. See *id.* R. 23 *quinqüies* (stating that “[i]f an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties” and giving the Chambers the power to “decid[e] the modes of implementation of the awards”).

victims.”²²⁴ Interestingly, this order can be made “either upon request [by a victim] or on [the Court’s] own motion.”²²⁵ Thus, even where a victim fails to request compensation, the Court may decide to award it regardless.

2. The Problem of the Indigent Perpetrator

An in-house reparations regime is only useful if the court orders are capable of being implemented; thus, the presence of an indigent perpetrator poses significant, but by no means insurmountable, problems. Domestic jurisdictions throughout the world have acted by establishing “victims of crime funds” that provide compensation to individuals injured by acts of violence.²²⁶ There is no reason why international tribunals should not do the same, and indeed, the ICC has.²²⁷ Article 79 provides for the establishment of a Trust Fund amassed “through fines or forfeiture” to be paid out “for the benefit of victims of crimes . . . and of the families of such victims.”²²⁸ Under Article 75(2), the Court has the discretionary power to order that any reparations award be made through this Trust Fund.²²⁹ Victim trust funds offer the best solution for the indigent perpetrator. Awards can be implemented quickly after conviction, increasing victim satisfaction with the criminal justice process.²³⁰

The ECCC has, however, struggled with this issue. The original Internal Rules failed to anticipate, or chose to ignore, the possibility of an indigent perpetrator, stating that reparations “shall be awarded against, and be borne by convicted persons” alone.²³¹ This is an interesting oversight as some of the indicted were well known inside and outside of Cambodia to be destitute.²³² Mark Wojcik has noted this and remarks that Rule 23(11) “effectively shields the government from carrying any responsibility to the Civil Parties.”²³³ Questions of politicization aside, the Court has revamped its Internal Rules in an attempt to more effectively deal with an indigent perpetrator.²³⁴ The sixth revision of the Internal Rules added a subparagraph, giving

224. Rome Statute, *supra* note 35, art. 75(2).

225. *Id.* art. 75(1).

226. See Bassiouni, *supra* note 19, at 225 (discussing a survey of States that found that a growing number of national systems provide compensation to victims, even in the absence of compensation from the perpetrator).

227. See Rome Statute, *supra* note 35, art. 79 (“A Trust Fund shall be established by decision of the Assembly of States Parties . . .”).

228. *Id.* art. 79(1)–(2).

229. *Id.* art. 75(2).

230. See Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice*, 16 BUFF. HUM. RTS. L. REV. 1, 52 (2010) (discussing how the ICC’s Trust Fund for Victims “will provide much quicker relief, due to it being much better funded,” a framework “which will enable victims to avoid the stress of participation at the trial”).

231. ECCC Rules (Original), *supra* note 22, R. 23(11).

232. See, e.g., Final Defence Written Submissions para. 50, *Co-Prosecutors v. Duch* (Nov. 11, 2009) (Case No. 001/18-07-2007-ECCC/TC), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E159_8_EN.pdf (“[T]he Defence wishes to point out that Duch was found indigent at the time of his transfer to the ECCC.”).

233. Wojcik, *supra* note 44, at 12.

234. Compare ECCC Rules (Rev. 5), *supra* note 192, R. 23 *quinquies* (declining to provide a way to

the Chamber discretion in deciding how to implement an award.²³⁵ Thus, the Chamber may “recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.”²³⁶

Unfortunately, this new rule entirely fails to solve the problem. Instead of establishing a fund to provide victims ready access for compensation, Rule 23 *quinqies*(3)(b) requires any project to have already “secured sufficient external funding.”²³⁷ If this requirement must be met, then what is the point of the court order?

Civil-Party groups have long urged the Court to establish “a voluntary victims’ trust fund.”²³⁸ Such a fund would permit the Court to make novel orders aimed at bringing personal justice to the victims by ordering collective and moral projects that otherwise would not be funded.²³⁹ It may be too late for the ECCC to constitute this fund, but future ad hoc tribunals should take note of the ECCC’s failings and establish a trust fund, as the ICC has done.

3. What Form?

A final issue surrounding reparations at international tribunals is defining exactly what form of compensation is appropriate. Should a court make an order for monetary compensation for individual Civil Parties and not for all victims of the mass atrocity? The ICC and the ECCC have taken different approaches. Under the Rome Statute, the ICC can award participating individuals monetary restitution.²⁴⁰ The ECCC, however, limits compensation to simply “collective and moral reparations.”²⁴¹

The nature of international criminal proceedings is such that not all atrocities can be investigated and prosecuted, and participating victims can only ever be representative of the whole. A quirk of fate through prosecutorial discretion should not dictate which victims will or will not participate and possibly gain financial

implement an award when the defendant is indigent), *with* ECCC Rules (Rev. 6), *supra* note 22, R. 23 *quinqies*(3) (adding subparagraph (3), which allows the costs of an award to be borne by the convicted person or by an appropriate victim support project).

235. ECCC Rules (Rev. 6), *supra* note 22, R. 23 *quinqies*(3)(b).

236. *Id.* This rule is unchanged in Revision 8 of the Internal Rules. ECCC Rules (Rev. 8), *supra* note 11, R. 23 *quinqies*(3)(b).

237. *Id.*

238. Civil Parties’ Co-Lawyers’ Joint Submission on Reparations, paras. 4, 34–36, Co-Prosecutors v. Duch (Sept. 14, 2009) (Case No. 001/18-07-2007-ECCC/TC), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E159_3_EN.pdf.

239. *See id.* paras. 35, 39

([A]lternative sources of funding, other than through the state, should also be examined if it may not be possible for the state to assume the responsibility for reparations. One possibility is the establishment of an independent and voluntary victims’ trust fund for the purpose of implementing the collective and moral forms of reparations Clearly this Court is, at a minimum, in the unique position in which it can order the Victims Unit to set up a voluntary trust fund).

240. Rome Statute, *supra* note 35, art. 75(2).

241. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(b).

compensation; therefore, international tribunals should only award collective and moral reparations. This is not to say that reparations cannot be directed at individuals and that international tribunals should not adopt innovative measures. Indeed, they should. Collective compensation that acknowledges different levels of harm and suffering is possible and must be encouraged. In the earlier example concerning two orphaned children, collective reparations may entail the funding of schools and pathways to education in orphanages across the province for the younger child, while the older child may seek simple acknowledgement of her suffering. There is indeed a need for innovative, individualized collective and moral reparations that promote personal justice and societal reconciliation.

CONCLUSION

International justice is “justice divorced from local realities.”²⁴² The challenge is to make justice available on a personal level, where victims are given agency and encouraged to participate within the proceedings.²⁴³ International criminal law must do more than consider the survivors of mass atrocities as simply “those poor people.”²⁴⁴ If meaningful justice is its goal and “legitimacy and functional relevance are to be confirmed,”²⁴⁵ then international criminal law must make the inclusion of victims a “central priority.”²⁴⁶ As an emerging area, victim participatory regimes have many difficulties in delineating the modality and extent of such participation so that it does not conflict with the fair-trial rights of an accused. The difficulties are very real: how can an entire nation, with divergent desires and motivations, be accommodated in the process? This Article has proposed three solutions aimed at systemic development of the ICC and future ad hoc tribunals to deal with these challenges. Despite lingering issues, this Author remains hopeful. The “terms of the debate have . . . changed,” and victims have moved from the outskirts to the center of discussions of justice.²⁴⁷

242. Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT'L REV. RED CROSS 441, 455 (2008).

243. See Harry Hobbs, *The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya*, 9 EYES ON THE ICC 19, 48–51 (discussing how international criminal trials *in-situ* can assist in this endeavor).

244. See Yael Danieli, *Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1644 (2005–2006) (discussing interview with Yisrael Gutman, who noted the tepid reaction by some to the suffering of the Jewish people during the Holocaust). Gutman is a Holocaust Survivor, director of the Holocaust Research Centre at Yad Vashem, and Professor at the Institute of Contemporary Jewry Hebrew University of Jerusalem. *Id.* at 1643.

245. Mark Findlay, *Activating a Victim Constituency in International Criminal Justice*, 3 INT'L J. TRANSITIONAL JUST. 183, 189 (2009).

246. Bair, *supra* note 148, at 551.

247. Danieli, *supra* note 244, at 1648.