

# OUT OF THE SHADOWS: A COMPARATIVE ASSESSMENT OF THE ROLE OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT AND IN CANADA

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*The International Criminal Court (ICC) has emerged as a unique institution for infusing victims in all phases of its proceedings. However, it has faced challenges in doing so and is still grappling with how to achieve meaningful participation and reparations for victims in a sustainable way. Comparative analysis can be valuable in addressing shared concerns, including the role of victims in criminal proceedings. This article provides the first comparative legal analysis of an adversarial common law jurisdiction (Canada) and the ICC with respect to the role of victims. It concludes that the ICC could enhance victim reparations by considering domestic models that provide victims with compensation much earlier in the process and re-focus victim participation in areas that do not overlap with the role of the prosecutor. Countries like Canada, which have been reticent to enhance victim participation, could consider some of the measures adopted for victims at the ICC.*

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*La Cour pénale internationale (CPI) s'est révélée être une institution unique puisqu'elle encourage la participation des victimes à toutes les étapes de ses procédures. Ce faisant, la CPI a toutefois dû affronter des défis. Elle est également confrontée à la façon dont elle pourra veiller à ce que les victimes puissent toujours jouir d'une participation et d'une réparation adéquates. L'analyse comparative peut s'avérer très utile pour répondre à des préoccupations communes, notamment à l'égard du rôle des victimes dans les procédures pénales. Le présent article fournit une première analyse juridique comparative d'un ressort axé sur le système contradictoire de common law (le Canada) et la CPI, relativement au rôle de la victime. L'article conclut que la CPI pourrait rehausser les indemnités accordées aux victimes en se fondant sur des modèles nationaux qui offrent aux victimes une compensation beaucoup plus tôt dans le processus et qui réorientent le rôle de celles-ci afin qu'il*

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*ne chevauche pas celui du procureur. Pour leur part, les pays comme le Canada, qui ont manifesté certaines réticences à croître la participation des victimes, pourraient considérer certaines des mesures adoptées par la CPI à leur endroit.*

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### 1. Introduction

Victims of crime have become a major concern for criminal justice systems around the world. A comparative analysis of diverse legal systems has the potential to provide mutually beneficial insights.<sup>1</sup> Common challenges include how to reconcile victim participation with the rights of the accused and the role of the prosecutor as well as ensuring fair and efficient justice. The victimology literature has also recognized that there are common issues faced by victims in domestic and international settings concerning the role of victims in criminal justice systems.<sup>2</sup>

As a hybrid legal system, the International Criminal Court (ICC) is a novel mixture of civilian and common law systems with aspects that are different from both of these major legal traditions. Although the academic literature includes studies comparing the victim-related aspects of civilian legal systems with the ICC,<sup>3</sup> there has not been such a sustained assessment involving a common law legal system to date. In an effort to begin to address this gap, this article provides a comparative assessment of victim participation and support at the ICC and in the Canadian criminal justice system that goes beyond the existing literature.<sup>4</sup>

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<sup>1</sup> Ralph Henham, “Some Reflections on the Role of Victims in the International Criminal Trial Process” (2004) 11:2-3 *Intl Rev Victimol* 201 at 217-20.

<sup>2</sup> Sam Garkawe, “The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis” (2001) 8:3 *Intl Rev Victimol* 269 at 273.

<sup>3</sup> Christoph Safferling, “The Role of the Victim in the Criminal Process: A Paradigm Shift in National German and International Law?” (2011) 11:2 *Intl Crim L Rev* 183.

<sup>4</sup> For greater detail on the role of victims in Canada, see Joan Barrett, *Balancing Charter Interests: Victims’ Rights and Third Party Remedies*, (Toronto: Carswell, 2014) (loose-leaf); Ashley M Smith, *Victim Impact Statements: Past, Present and a Look to the Future* (Toronto: Carswell, 2012); J Scott Kenney, *Canadian Victims of Crime: Critical Insights* (Toronto: Canadian Scholars’ Press, 2010). For the ICC, see T Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford: Oxford University Press, 2010); Luke Moffett, *Justice for Victims before the International Criminal Court* (London: Routledge, 2014); Benjamin Perrin, “Victim Participation at the International Criminal Court: Examining the First Decade of Investigative and Pre-Trial Proceedings” (2015) 15:2 *Intl Crim L Rev* 298.

The ICC is an interesting jurisdiction to consider with respect to the role of victims for several reasons. First, the ICC aims to set “a worldwide benchmark for modern criminal justice”<sup>5</sup> as it seeks to “guarantee lasting respect for and the enforcement of international justice.”<sup>6</sup> Protecting victims and providing them with the ability to participate in the ICC’s proceedings have been flagged as playing a key role in this objective.<sup>7</sup> Second, the ICC is at the forefront of victim participation, as it arguably goes further than most national legal systems and international human rights norms in terms of involving victims and offering them opportunities for redress.<sup>8</sup> Third, the ICC draws on diverse national legal traditions and is composed of lawyers and judges from around the world, offering an eclectic mix of experiences and understandings of the role of victims in criminal justice proceedings. The ICC is facing challenges in implementing its victim-participation regime, however, with some commentators arguing that it is “unworkable”<sup>9</sup> and at risk of “ending as a farce.”<sup>10</sup> Others (including judges) have questioned the role of victims at the ICC.<sup>11</sup> Key players at the ICC reportedly lack consensus on the issue of victim participation, but generally agree that it has “an expressive function.”<sup>12</sup> For these reasons, it could perhaps learn from national legal systems about how to engage large numbers of victims (albeit not often in single criminal cases as occurs at the ICC).

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<sup>5</sup> Frédéric Mégret, “The International Criminal Court Statute and the Failure to Mention Symbolic Reparation” (2009) 16:2 *Intl Rev Victimol* 127; Jo-Anne Wemmers and Sarah Ménard April, “Consultations on a Bill of Rights for Victims”, brief submitted to Justice Canada (29 June 2013), online: Université de Montréal <[www.cicc.umontreal.ca/files/prod/onglet\\_files/8/memoire\\_droit\\_victimes\\_juin2013\\_version\\_anglaise.pdf](http://www.cicc.umontreal.ca/files/prod/onglet_files/8/memoire_droit_victimes_juin2013_version_anglaise.pdf)>.

<sup>6</sup> *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, preamble [*Rome Statute*].

<sup>7</sup> Silvana Arbia, “The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits” (2010) 36:3 *CW L Bull* 519 at 520.

<sup>8</sup> See *Situation in the Democratic Republic of the Congo*, ICC-01/04-84, Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp (5 August 2005) at para 54 (International Criminal Court, Pre-Trial Chamber I).

<sup>9</sup> Chris Tenove, “The International Criminal Court: Challenges of Victim Assistance, Participation and Reparations” (2013) 52 *Africa Portal Backgrounder* 1 at 1.

<sup>10</sup> Elisabeth Baumgartner, “Aspects of victim participation in the proceedings of the International Criminal Court” (2008) 90:870 *Intl Rev Red Cross* 409 at 439.

<sup>11</sup> Christine Van den Wyngaert, “Victims Before International Criminal Courts: Some Views and Concerns from an ICC Trial Judge” (2011) 44 *Case W Res J Intl L* 475.

<sup>12</sup> Jo-Anne Wemmers, “Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Right to Participate” (2010) 23:3 *Leiden J Intl L* 629.

As a common law legal system in the adversarial tradition,<sup>13</sup> Canada provides a perspective that is arguably conservative in its approach to victims who are mainly viewed as complainants and potential witnesses if charges are laid and the case proceeds to trial.<sup>14</sup> Like many common law jurisdictions (and civilian jurisdictions for that matter),<sup>15</sup> however, Canada has expanded the role of victims in criminal proceedings in recent years. Victims of crime have also called for a greater role in the criminal justice system.<sup>16</sup> Parliament has recently responded by adopting Bill C-32, the *Victims Bill of Rights Act*.<sup>17</sup> Canada and the ICC both share the distinction of having English and French as their official languages, making the legal sources of each readily accessible to the other.

This article is based on a traditional legal research methodology focusing on primary statutory materials and jurisprudence. This includes, for the ICC: the *Rome Statute* of the ICC (*Rome Statute*),<sup>18</sup> Rules of Procedure and Evidence (RPE),<sup>19</sup> and the ICC public record database of

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<sup>13</sup> Constitutional law in Canada vests exclusive legislative jurisdiction over the criminal law, including procedure, with the federal government, while provincial legislatures have exclusive jurisdiction over the administration of justice (e.g. policing, administration of courts, victim services, and victim compensation schemes); see *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, ss 91(27), 92(14). Canada also has constitutionally-entrenched rights related to criminal law as set out in the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (UK), c 11, which came into force on 17 April 1982. While Canada is a common law legal system, much of its substantive and procedural criminal law is codified in the *Criminal Code*, RSC 1985, c C-46.

<sup>14</sup> This article does not discuss “private prosecutions” of criminal cases in Canada since they are exceedingly rare and not a typical part of the criminal justice system to any extent.

<sup>15</sup> Safferling, *supra* note 3; Shigenori Matsui, “Justice for the Accused or Justice for Victims?: The Protection of Victims’ Rights in Japan” (2011) 13:1 *Asian-Pacific L & Policy J* 54.

<sup>16</sup> See e.g. Office of the Federal Ombudsman for Victims of Crime, “Recommendations to the Government”, online: Federal Ombudsman for Victims of Crime <[www.victimfirst.gc.ca/vv/rtg-rag.html](http://www.victimfirst.gc.ca/vv/rtg-rag.html)>.

<sup>17</sup> Bill C-32, *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, 2nd Sess, 41st Parl. See also Benjamin Perrin, “More Than Words: Enhancing the Proposed *Canadian Victims Bill of Rights* (Bill C-32)” (Ottawa: Macdonald-Laurier Institute for Public Policy, 2014), online: Macdonald-Laurier Institute <[www.macdonaldlaurier.ca/files/pdf/PerrinCommentary0619.pdf](http://www.macdonaldlaurier.ca/files/pdf/PerrinCommentary0619.pdf)>.

<sup>18</sup> *Rome Statute*, *supra* note 6.

<sup>19</sup> *Rules of Procedure and Evidence of the International Criminal Court*, ICC-ASP/1/3, at 10, and Corr 1 (2002), UN Doc PCNICC/2000/1/Add.1 (2000) [ICC RPE].

judgments, decisions, and orders;<sup>20</sup> and for Canada: the *Criminal Code*,<sup>21</sup> relevant provincial statutes and policies, and related case law. The role of victims at each stage of criminal proceedings is explored for the ICC and Canada, and then observations are made at an aggregate level. Since Canada is a federal system, matters falling within provincial jurisdiction are addressed in this article with reference to British Columbia (BC), as a fairly representative example. The objective of this comparative analysis is not to exhaustively address either jurisdiction, but rather to describe the defining aspects of each and identify their key points of similarity and dissimilarity.

Part 2 of this article introduces principles related to the treatment of victims in matters within the jurisdiction of the ICC and Canada. Part 3 examines the role of victims at each phase of criminal proceedings before the ICC and Canada. Part 4 is a comparative discussion and analysis that identifies the major similarities and differences between these two legal systems with respect to their treatment of victims. Finally, Part 5 offers some closing thoughts on the implications of this study.

## *2. Principles for the Treatment of Victims*

Before delving into the mechanisms for victim participation and support at the ICC and in Canada, some basic principles for the treatment of victims in these jurisdictions and introductory points are discussed.

### *A) International Criminal Court*

Victims are integrated into the ICC in a number of significant ways. First, in addition to numerous specific provisions providing expressly for victim participation,<sup>22</sup> Article 68(3) of the *Rome Statute* also recognizes a general ability of victims to participate in proceedings before the ICC:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.<sup>23</sup>

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<sup>20</sup> The ICC Legal Tools database is available online: <[www.legal-tools.org/en/search-database/](http://www.legal-tools.org/en/search-database/)>.

<sup>21</sup> *Supra* note 13.

<sup>22</sup> See e.g. ICC RPE, *supra* note 19, r 93.

<sup>23</sup> *Rome Statute*, *supra* note 6, art 68(3).

Second, the ICC has a number of organs and units dedicated to addressing the needs of victims, including the Victims and Witnesses Unit within the Registry, which is charged with providing “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”<sup>24</sup> Additionally, there is an Office of Public Counsel for Victims that provides common legal representatives who are appointed and funded by the ICC to represent victims in its proceedings.<sup>25</sup> Third, as discussed later, there is a Trust Fund for Victims (TFV) that provides programs and support for victims affected by crimes within the jurisdiction of the ICC.

Fourth, the *Rome Statute* imposes a specific obligation on the ICC to respect the needs of victims. In *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judge Ekaterina Trendafilova, sitting as a Single Judge for Pre-Trial Chamber II, found that the *Rome Statute*

places upon the Court an obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ... [T]he Chamber must balance the needs for protection of victims and witnesses on the one hand, and the fair trial rights of the suspects on the other hand.<sup>26</sup>

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<sup>24</sup> *Ibid*, art 43(6).

<sup>25</sup> See *Situation in Uganda*, ICC-02/04-191, Decision on Victim Participation in Proceedings Related to the Situation in Uganda (9 March 2012) (Pre-Trial Chamber II, International Criminal Court); *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-320, Fourth Decision on Victims’ Participation (12 December 2008) (International Criminal Court, Pre-Trial Chamber); *Situation in the Republic of Kenya*, ICC-01/09-24, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya (3 November 2010) (International Criminal Court, Pre-Trial Chamber II); *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-67, Decision Establishing Principles on the Victims’ Application Process (28 May 2013) at paras 17-25 (International Criminal Court, Pre-Trial Chamber II).

<sup>26</sup> *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-15, Decision on the Defence Requests for Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of the Suspects (4 July 2011) at para 13 (International Criminal Court, Pre-Trial Chamber II); see *Rome Statute*, *supra* note 6, arts 68(1), 57(3)(c).

## B) Canada

Based on the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,<sup>27</sup> the *Canadian Statement of Basic Principles of Justice for Victims of Crime* is a set of non-binding principles that have been agreed upon by representatives of federal, provincial, and territorial governments as follows:

1. Victims of crime should be treated with courtesy, compassion, and respect.
2. The privacy of victims should be considered and respected to the greatest extent possible.
3. All reasonable measures should be taken to minimize inconvenience to victims.
4. The safety and security of victims should be considered at all stages of the criminal justice process and appropriate measures should be taken when necessary to protect victims from intimidation and retaliation.
5. Information should be provided to victims about the criminal justice system and the victim's role and opportunities to participate in criminal justice processes.
6. Victims should be given information, in accordance with prevailing law, policies, and procedures, about the status of the investigation; the scheduling, progress and final outcome of the proceedings; and the status of the offender in the correctional system.
7. Information should be provided to victims about available victim assistance services, other programs and assistance available to them, and means of obtaining financial reparation.
8. The views, concerns and representations of victims are an important consideration in criminal justice processes and should be considered in accordance with prevailing law, policies and procedures.

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<sup>27</sup> *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGAOR, 40th Sess, Supp No 53, UN Doc A/RES/40/34 (1985).

9. The needs, concerns and diversity of victims should be considered in the development and delivery of programs and services, and in related education and training.
10. Information should be provided to victims about available options to raise their concerns when they believe that these principles have not been followed.<sup>28</sup>

As noted by Ashley Smith, “While these principles are noble and arguably beneficial to victims ... [they] lack the force of law.”<sup>29</sup> There are no rights or remedies provided in relation to the *Canadian Statement of Basic Principles of Justice for Victims of Crime*, making them “unenforceable, non-binding and essentially, symbolic in the views of some.”<sup>30</sup> Indeed, as stated by McLachlin CJC in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, “Thus far, jurisprudence has not recognized procedural rights for the alleged victims of an offence.”<sup>31</sup>

This lack of recognition notwithstanding, all of the provinces and territories have independently passed legislation, adopted policies, or put programs in place to address victims and provide them with services and assistance. These initiatives vary in scope and strength by jurisdiction. The BC *Victims of Crime Act* establishes several rights for victims of crime in the province, including a general right to be treated with courtesy and respect.<sup>32</sup> Section 8 of this provincial legislation also codifies a number of “goals” that the government is supposed to “promote”:

- (a) to develop victim services and promote equal access to victim services at all locations throughout British Columbia;
- (b) to have victims adequately protected against intimidation and retaliation;
- (c) to have property of victims obtained by offenders in the course of offences returned promptly to the victims by the police if the retention is not needed for investigation or prosecution purposes;

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<sup>28</sup> Department of Justice, “A Crime Victim’s Guide to the Criminal Justice System” (2008), online: Department of Justice < <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html>.

<sup>29</sup> Smith, *supra* note 4 at 13.

<sup>30</sup> *Ibid.*

<sup>31</sup> 2004 SCC 4 at para 6, [2004] 1 SCR 76.

<sup>32</sup> *Victims of Crime Act*, RSBC 1996, c 478, s 2

- (d) to have justice system personnel trained to respond appropriately to victims;
- (e) to give proper recognition to the need of victims for timely investigation and prosecution of offences;
- (f) to have facilities in courthouses that accommodate victims awaiting courtroom appearance separately from the accused and witnesses for the accused;
- (g) to afford victims throughout British Columbia equal access to
  - (i) courtrooms and prosecutors' offices that are designed to be used by persons with physical disabilities,
  - (ii) interpreters for speakers of any language, and
  - (iii) culturally sensitive services for aboriginal persons and members of ethno-cultural minorities.<sup>33</sup>

Victims in Canada are not generally eligible for legal aid to provide them with publicly-funded legal counsel to assist them with participating in criminal proceedings related to their alleged perpetrator. As an exception, section 3 of the BC *Victims of Crime Act* provides that "reasonable measures" must be taken to provide a victim with a lawyer if the victim requests it in the following limited circumstances:

- (a) the victim requires representation independent from that of Crown counsel in response to an application for disclosure of information, not in the possession of the police or Crown counsel, relating to the personal history of the victim, and
- (b) the victim would not otherwise receive this representation because of a lack of financial resources.<sup>34</sup>

### 3. *Role of Victims During Criminal Proceedings*

Victim participation and support at the ICC and in Canada can be assessed and compared through the chronology of a criminal proceeding, from identification as a "victim" through to investigations, commencing prosecutions and pre-trial proceedings, trials, sentencing, reparations/compensation/restitution, and appeals. Each of these stages is considered in turn.

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<sup>33</sup> *Ibid*, s 8.

<sup>34</sup> *Ibid*, s 3.

## A) Definition of “Victim”

### 1) ICC

The first step towards victim participation at the ICC is for a natural person or organization/institution to apply to the relevant Chamber, through the Registrar, to be recognized as a victim.<sup>35</sup> In most situations and cases, victim applications are then initially examined by the Victims Participation and Reparations Section (VPRS), which is based in the Registry.<sup>36</sup> The relevant Chamber will then make the final determination about whether a victim, or group of victims, meets the definition of “victim” as set out in Rule 85 of the RPE:

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

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

In *The Prosecutor v Thomas Lubanga Dyilo*, the Appeals Chamber found that a person must have suffered “personal harm”<sup>37</sup> to be recognized as a victim under this definition. The victim must have experienced hurt, injury,

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<sup>35</sup> ICC RPE, *supra* note 19, r 89.

<sup>36</sup> See e.g. *Situation in Libya*, ICC-01/11-18, Decision on Victim’s Participation in Proceedings Related to the Situation in Libya (24 January 2012) at 3, 4 (International Criminal Court, Pre-Trial Chamber I). This “framework decision” adopts the approach from *Situation in the Democratic Republic of the Congo*, ICC-01/04-593, Decision on victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo (11 April 2011) (International Criminal Court, Trial Chamber I) which itself seeks to implement direction provided in *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (19 December 2008) (International Criminal Court, Appeals Chamber). See also *Situation in Darfur*, ICC-02/05-177, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007 (2 February 2009) (International Criminal Court, Appeals Chamber).

<sup>37</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (11 July 2008) at paras 32, 35 (International Criminal Court, Appeals Chamber) [*Lubanga* July 2008].

damage, or loss<sup>38</sup> as a result of any crime within the jurisdiction of the ICC. This includes “[m]aterial, physical, and psychological harm.”<sup>39</sup> The Appeals Chamber held that victims are not limited to the “direct victim” but can also include persons who suffer personal harm due to their “close personal relationship” with a direct victim (for example, the parents of a child soldier).<sup>40</sup>

## 2) *Canada*

Prior to the recent adoption of Bill C-32, section 2 of the *Criminal Code* provided that a “‘victim’ includes the victim of an alleged offence” and likewise that a “‘complainant’ means the victim of an alleged offence.”<sup>41</sup> A more detailed definition of “victim” was provided in section 722(4) in relation to who may submit a victim impact statement (VIS) at sentencing:

For the purposes of this section and section 722.2 [relating to an inquiry by the court as to whether a victim was advised of the opportunity to provide a VIS], “victim”, in relation to an offence,

(a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and

(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.<sup>42</sup>

The jurisprudence interpreting this definition is vast. It recognizes that there can be more than one victim of an offence<sup>43</sup> and that in addition to individuals, “corporations and public agencies” may also be considered victims.<sup>44</sup> In *R v Duffus*, Stong J of the Ontario Superior Court of Justice

<sup>38</sup> *Ibid* at para 31.

<sup>39</sup> *Ibid* at para 32.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Criminal Code*, *supra* note 13, s 2.

<sup>42</sup> *Ibid*, s 722(4) [emphasis added].

<sup>43</sup> *Interpretation Act*, RSC, 1985, c I-21, s 33(2). See also *R v Gabriel* (1999), 137 CCC (3d) 1 at para 46 (Ont Sup Ct); *R v Roberts*, 2001 ABQB 520 at para 51, (2001), 289 AR 127; *R v Phillips* (1995), 26 OR (3d) 522 (Gen Div).

<sup>44</sup> *R v Menard* (2007), 73 WCB (2d) 136 at para 13 (Ont Sup Ct); sentence varied in *R v Menard*, 2008 ONCA 493, (2008), 79 WCB (2d) 48 (secret commissions victim was Service Canada). See also *R v Bogart* (2002), 61 OR (3d) 75, 167 CCC (3d) 390 (CA), leave to appeal to SCC refused, [2002] SCCA No 398, [2003] 1 SCR VI (fraud victim was the Ontario Ministry of Health); *R v Granada*, 2013 ABCA 404, (2013) 110

found that the definition of a “victim” goes beyond the “direct victim” to include “both the direct recipient of the harm and the victim who is directly affected in an emotional or physical way as a result of the criminal acts.”<sup>45</sup>

Section 2 of the *Victims Bill of Rights Act* establishes the following definition of “victim” for the *Canadian Victims Bill of Rights* (which is a key part of the Act):

“victim” means an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence.<sup>46</sup>

Section 3 of this legislation similarly amends the definition of victim in section 2 of the *Criminal Code* as follows:

“victim” means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of sections 672.5 [disposition hearings by a court or review board], 722 [victim impact statement] and 745.63 [judicial review of number of years of imprisonment without parole eligibility], a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person.<sup>47</sup>

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WCB (2d) 437 (mischief and trespass victim was a grocery store and its employees); *R v Greenhalgh*, 2011 BCSC 511 at para 33, (2011), 94 WCB (2d) 88 [*Greenhalgh*] (sexual assault and breach of trust by a Border Services Officer; in addition to the complainants subject to improper strip searches, the supervising officer of the offender and the Canada Border Services Agency were victims). However, there is some case law in Quebec where legal entities have been found not to be “victims” for the purposes of submitting a victim impact statement, as in *R c Villeneuve*, [2002] JQ no 1839 at para 28 (QL) (the Centre de recherche-action sur les relations raciales was found not to be eligible to submit a victim impact statement in a criminal harassment case).

<sup>45</sup> *R v Duffus* (2000), 40 CR (5th) 350 at paras 11, 12 (Ont Sup Ct) [*Duffus*]. Stong J also noted that individuals who were not the “direct-victim” needed to be “closely enough connected” to the direct victim in order to be able to submit a victim impact statement. However, a restrictive interpretation of this language has been rejected in other decisions; see e.g. *Greenhalgh*, *ibid* at paras 23, 24.

<sup>46</sup> *Victims Bill of Rights Act*, *supra* note 17, s 2 (enacting the *Canadian Victims Bill of Rights*, s 2 “victim”); s 45(1) (amending the *Corrections and Conditional Release Act*, SC 1992, c 20, s 2(1) “victim”).

<sup>47</sup> *Ibid*, s 3 (amending the *Criminal Code*, *supra* note 13, s 2.2).

With respect to certain proceedings, certain individuals may act on behalf of a victim who is deceased or incapable of acting on their own.<sup>48</sup> While the *Criminal Code* definition of victim continues to include both natural persons and legal persons, the definition in the *Canadian Victims Bill of Rights and Corrections and Conditional Release Act* is limited to natural persons only.<sup>49</sup>

## B) Investigations

### 1) ICC

Investigations at the ICC may commence based on a referral from a State Party, a referral from the United Nations Security Council, or on the Prosecutor's own initiative (*proprio motu*) if authorized by the Pre-Trial Chamber.<sup>50</sup> In any event, the Prosecutor is responsible for conducting both investigations and prosecutions. In this capacity, the Prosecutor is required to "respect the interests and personal circumstances of victims ... including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children."<sup>51</sup>

The Pre-Trial Chamber exercises some judicial oversight over investigative and prosecutorial activities, but is not an "investigative chamber."<sup>52</sup> While the Appeals Chamber has held that victims lack the general right to participate in investigations, they may participate at the judicial stage of proceedings related to investigations.<sup>53</sup> Notably, such victim participation can occur at the situation-level, well before an arrest warrant has been issued for any individual.

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<sup>48</sup> *Ibid*, s 3; see also *ibid*, s 45(2) (amending the *Corrections and Conditional Release Act*, *supra* note 46, s 2(3)-(4)).

<sup>49</sup> Perrin, *supra* note 17 at 6.

<sup>50</sup> *Rome Statute*, *supra* note 6, arts 13-15.

<sup>51</sup> *Ibid*, art 54(1).

<sup>52</sup> See *Situation in the Republic of Côte d'Ivoire*, ICC-02/11, Corrigendum to "Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (5 October 2011) at para 20 (International Criminal Court, Pre-Trial Chamber III).

<sup>53</sup> *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (19 December 2009) (International Criminal Court, Appeals Chamber).

In deciding whether to initiate an investigation, Article 53(1)(c) of the *Rome Statute* requires the Prosecutor to consider the interests of victims as part of his or her assessment. If the Prosecutor decides not to initiate an investigation, victims have a right to be notified of the decision.<sup>54</sup> The referring state or United Nations Security Council, as the case may be, or the Pre-Trial Chamber (in certain circumstances) may request a review of the Prosecutor's decision not to investigate.<sup>55</sup> Victims are entitled to participate in such review proceedings but cannot initiate them.<sup>56</sup>

If the Prosecutor wishes to initiate a *proprio motu* investigation, authorization from the Pre-Trial Chamber is required.<sup>57</sup> Victims are to be notified of such proceedings and have a right to make representations to the court.<sup>58</sup> In both the *Situation in the Republic of Kenya* and the *Situation in the Republic of Côte d'Ivoire*, victims actively participated in the Pre-Trial Chamber's proceedings authorizing the Prosecutor's *proprio motu* investigations and, in some instances, had some impact on the Pre-Trial Chambers' decisions to expand the scope of the authorized investigation.<sup>59</sup>

## 2) Canada

Once a victim has made a complaint, a witness has reported a crime, or the police have otherwise detected an offence, an investigation of some form may be initiated.<sup>60</sup> A criminal incident is generally considered to be "surrendered to the state"<sup>61</sup> after it has been reported. Although the police play a central role in a criminal investigation up to the laying of charges, the Supreme Court of Canada has not recognized that police owe a general

<sup>54</sup> ICC RPE, *supra* note 19, r 92(2).

<sup>55</sup> *Rome Statute*, *supra* note 6, art 53(3).

<sup>56</sup> ICC RPE, *supra* note 19, r 93.

<sup>57</sup> *Rome Statute*, *supra* note 6, art 15.

<sup>58</sup> *Ibid*, art 15(3); ICC RPE, *supra* note 19, r 50.

<sup>59</sup> *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010) (International Criminal Court, Pre-Trial Chamber III); *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (15 November 2011) (International Criminal Court, Pre-Trial Chamber III).

<sup>60</sup> See e.g. Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005) at 1, 2; Steven Penney, Vincenzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada* (Dayton, Ohio: LexisNexis, 2011) at 8.

<sup>61</sup> Patricia Clarke, "Is There a Place for the Victim in the Prosecution Process?" in RP Saunders and JA McMunagle, eds, *Criminal Law in Canada: An Introduction to the Theoretical, Social and Legal Contexts*, 4th ed (Toronto: Carswell, 2002) 265 at 266, 267.

private duty of care to victims when conducting a criminal investigation.<sup>62</sup> However, in limited circumstances, a failure of the police to protect specific victims can give rise to a claim that their rights under the *Canadian Charter of Rights and Freedoms* have been breached.<sup>63</sup>

Victims also have rights to information that must be disclosed on either a mandatory, as requested, or discretionary basis. In BC, section 5 of the *Victims of Crime Act* states that justice system personnel must offer a victim general information concerning the structure and operations of the justice system, victim services, the *Freedom of Information and Protection of Privacy Act*, the *Crime Victim Assistance Act*, and the *Victims of Crime Act*.<sup>64</sup> Section 6(1)(a) of the *Victims of Crime Act* gives victims a right to request information at the investigation stage (subject to some limitations) on the status of the police investigation.<sup>65</sup> Similarly, section 7(a) of the *Canadian Victims Bill of Rights* provides that every victim has the right, on request, to information about “the status and outcome of the investigation into the offence.”<sup>66</sup>

### C) *Commencing Prosecutions and Pre-Trial Proceedings*

#### 1) ICC

After the Prosecutor conducts an investigation, he or she must consider the interests of victims among the factors relevant to deciding whether to commence a prosecution.<sup>67</sup> As with a decision not to investigate, a decision not to prosecute may result in a review proceeding before the Pre-Trial Chamber. If this occurs, victims are entitled to notification of and participation in the proceeding, which can result in reconsideration by the Prosecutor.<sup>68</sup>

Victims have participated at several pre-trial stages at the ICC, including proceedings related to questions of jurisdiction and

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<sup>62</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 27, 130, 131, [2007] 3 SCR 129.

<sup>63</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 DLR (4th) 697 (Gen Div).

<sup>64</sup> *Victims of Crime Act*, *supra* note 32, s 5.

<sup>65</sup> *Ibid.*, s 6(1)(a).

<sup>66</sup> *Victims Bill of Rights Act*, *supra* note 17, s 7(a).

<sup>67</sup> *Rome Statute*, *supra* note 6, art 53(2).

<sup>68</sup> *Ibid.*, art 53(3); ICC RPE, *supra* note 19, rr 92(2), 93.

admissibility,<sup>69</sup> confirmation of charges hearings,<sup>70</sup> proposed amendment of charges by the Prosecutor,<sup>71</sup> and interim releases of the accused.<sup>72</sup> Victims have, however, been denied their request to participate at the initial appearances of the accused due to the “limited purpose” of this stage of proceedings.<sup>73</sup>

The *Rome Statute*<sup>74</sup> and RPE<sup>75</sup> provide numerous measures for the protection and privacy of victims, as well as protective measures for the forfeiture of assets for the benefit of victims. Victims may even remain anonymous, unless doing so would violate the “principle of prohibiting anonymous accusations.”<sup>76</sup>

## 2) Canada

Generally, the standard for charge approval in Canada requires a determination of the likelihood of conviction and a consideration of various public interest factors. In BC, the standard for charge approval

<sup>69</sup> *Rome Statute*, *supra* note 6, art 19(3), r 59. See e.g. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (25 September 2009) (International Criminal Court, Appeals Chamber).

<sup>70</sup> ICC RPE, *supra* note 19, r 92(3). See e.g. *The Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-138, Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings (4 June 2012) at paras 48-52 (International Criminal Court, Pre-Trial Chamber I).

<sup>71</sup> ICC RPE, *ibid*, rr 93, 128. See e.g. *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-614, Decision Requesting Observations on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute” (29 January 2013) (International Criminal Court, Pre-Trial Chamber II).

<sup>72</sup> *Rome Statute*, *supra* note 6, art 60; ICC RPE, *supra* note 19, r 119(3). See e.g. *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1565-Red, Public Redacted Version of the “Decision on Applications for Provisional Release” of 27 June 2011 (16 August 2011) at para 32 (International Criminal Court, Pre-Trial Chamber III).

<sup>73</sup> *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-40, Second Decision on the Motion of Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings and Article 19 Admissibility Proceedings (6 April 2011) at para 10 (International Criminal Court, Pre-Trial Chamber II).

<sup>74</sup> *Rome Statute*, *supra* note 6, art 57(3)(c), (e).

<sup>75</sup> ICC RPE, *supra* note 19, rr 76, 87, 88, 194(3).

<sup>76</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (13 May 2008) at paras 180, 181 (International Criminal Court, Pre-Trial Chamber I).

requires that Crown counsel fairly, independently, and objectively examine the available evidence in order to determine whether there is a substantial likelihood of conviction and, if so, whether a prosecution is required in the public interest.<sup>77</sup> The circumstances and views of the victim – including a victim’s desire to see a charge continued or terminated – may be factors in making the final charge approval decision, but are by no means determinative.<sup>78</sup>

Alternative measures (such as community service, an apology or compensation to victims), which may be considered at any stage of proceedings, are measures other than judicial proceedings that can be used to deal with someone over eighteen years of age who is alleged to have committed an offence.<sup>79</sup> In BC, Crown counsel are advised to consider alternative measures “for any case where the successful completion of an alternative measures program can achieve the most important objectives of a court prosecution.”<sup>80</sup> Certain conditions must be met, however, for alternative measures to be appropriate, and regard must be had to the interests of victims.<sup>81</sup>

Charges may also be dealt with at the pre-trial phase via resolution discussions between the Crown Prosecutor and defence counsel (such as plea negotiations). While there is no specific duty to make information about resolution discussions available to victims, Crown counsel are encouraged, where it is practicable, to inform the victim or the victim’s family of proposed resolutions before concluding a resolution discussion or directing a stay of proceedings. Crown counsel should also provide an opportunity for any concerns to be expressed, especially in cases involving serious injury or severe psychological harm.<sup>82</sup> Where the victim, the victim’s family, or the investigative agency expresses a desire to seek a

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<sup>77</sup> British Columbia Ministry of Justice, “Crown Counsel Policy Manual: Charge Assessment Guidelines, CHA1” (2 October 2009), online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1\\_ChargeAssessmentGuidelines.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1_ChargeAssessmentGuidelines.pdf)>. Other provinces generally require that there be a “reasonable” likelihood of conviction and that the prosecution would be in the public interest.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Criminal Code*, *supra* note 13, s 716 (“alternative measures”). Referrals for alternative measures are generally made after charge approval and before the trial.

<sup>80</sup> British Columbia Ministry of Justice, “Crown Counsel Policy Manual: Alternative Measures for Adult Offenders, ALT1” at 1 (12 October 2010), online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/ALT1-AlternativeMeasures-AdultOffenders.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/ALT1-AlternativeMeasures-AdultOffenders.pdf)>.

<sup>81</sup> *Criminal Code*, *supra* note 13, s 717(1).

<sup>82</sup> British Columbia Ministry of Justice, “Crown Counsel Policy Manual: Resolution Discussions and Stays of Proceedings, RES1” at 4 (3 February 2014), online:

review of the proposed resolution, Crown counsel are instructed not to conclude resolution discussions until further consultation with the Regional or Deputy Regional Crown Counsel has occurred.<sup>83</sup>

If the accused was arrested and held in custody, then a bail hearing (also known as a judicial interim release hearing) will occur to determine whether to release the accused before trial, and if so, under what conditions, including the possible condition that an accused is not to communicate in any way with victims or witnesses.<sup>84</sup> The *Criminal Code* provides for exceptions to the presumption that a person arrested without a warrant will be released from custody as soon as practicable, such as if a peace officer or officer in charge believes, on reasonable grounds, that it is necessary that the person be detained in custody for reasons that include to “ensure the safety and security of any victim of or witness to the offence.”<sup>85</sup>

Once a charge has been approved for prosecution, the degree of victim participation and support will vary depending on the circumstances of the case. In BC, Crown prosecutors are to provide information about the prosecution to victims and their families, and may meet with victims and their families directly prior to a trial.<sup>86</sup> Crown prosecutors are encouraged to familiarize themselves with local victim assistance programs.<sup>87</sup> In terms of victims’ rights to information, sections 6(1)(e) and (f) of the *Victims of Crime Act* impose a continuing obligation on justice system personnel to update the victim, on request, regarding court events likely to affect the final disposition, sentence or bail status of the accused, as well as the outcome of each of those matters.<sup>88</sup> Section 7(b) of the *Canadian Victims Bill of Rights* provides that every victim has the right, on request, to

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British Columbia Ministry of Justice <[www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1\\_ResolutionDiscns\\_SOPs.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1_ResolutionDiscns_SOPs.pdf)>.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Criminal Code*, *supra* note 13, s 503(3.1).

<sup>85</sup> *Ibid.*, ss 497(1.1)(a)(iv), 498(1.1)(a)(iv).

<sup>86</sup> British Columbia Ministry of Justice, “Crown Counsel Policy Manual: Victims of Crime, VIC1” at 1 (20 May 2003), online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/VIC1-VictimsOfCrime-20May2003.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/VIC1-VictimsOfCrime-20May2003.pdf)> [Crown Counsel Policy Manual: Victims of Crime].

<sup>87</sup> British Columbia Ministry of Justice, “Crown Counsel Policy Manual: Victim Assistance Programs – Providing Information to, VIC2” at 1 (18 November 2005), online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/VIC2-VictimAssistancePrograms-ProvidingInfo-18Nov2005.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/VIC2-VictimAssistancePrograms-ProvidingInfo-18Nov2005.pdf)>.

<sup>88</sup> *Victims of Crime Act*, *supra* note 32, s 6(1)(e)-(f).

information about “the location of proceedings in relation to the offence, when they will take place and their progress and outcome.”<sup>89</sup>

#### D) Trials

##### I) ICC

If an accused before the ICC decides to enter a plea of guilty to the charges, the Trial Chamber may consider the “interests of victims” in deciding whether to request the Prosecutor to present additional evidence or order that an ordinary trial proceed to ensure, in the interests of justice, that a more complete factual account is on record.<sup>90</sup>

Under the *Rome Statute*, the Trial Chamber is required to ensure that trials are conducted with “due regard for the protection of victims.”<sup>91</sup> During the course of the trial, the Trial Chamber must “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims” so long as these are not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>92</sup> In-camera proceedings can be ordered to protect a victim or witness and are required for victims of sexual violence and victims under 18 years of age.<sup>93</sup> The Court can order protective measures, such as security arrangements as well as counseling and other assistance, on advice from the Victims and Witnesses Unit.<sup>94</sup>

The ICC has interpreted the general victim participation provision in Article 68(3) of the *Rome Statute* broadly in the context of trials. Notably, in *The Prosecutor v Thomas Lubanga Dyilo*, the Appeals Chamber affirmed the Trial Chamber’s decision that victims may participate during the trial of the accused, including leading evidence and challenging the admissibility or relevance of evidence, within certain confines:

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in

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<sup>89</sup> *Victims Bill of Rights Act*, *supra* note 17, s 7(b).

<sup>90</sup> *Rome Statute*, *supra* note 6, art 65(4).

<sup>91</sup> *Ibid*, art 64(2); see also art 64(6).

<sup>92</sup> *Ibid*, art 68(1).

<sup>93</sup> *Ibid*, art 68(2).

<sup>94</sup> *Ibid*, art 68(4).

place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.<sup>95</sup>

In addition to the general provision in Article 68(3) related to victim participation, victims (or their legal representatives) who have been authorized to participate in a trial at the ICC may be asked by the Trial Chamber to express their views on a number of specific matters, including whether there should be a joint or separate trial in cases involving multiple accused persons, the Trial Chamber's decision on an admission of guilt, and whether assurances should be provided by the Court to a witness or an expert that they will not be prosecuted by the ICC.<sup>96</sup> Where the Prosecutor and the Defence agree on an alleged fact, the Trial Chamber can consider it proven "unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims".<sup>97</sup>

There are a number of additional victim-related rules for trials in the RPE. For example, Rule 88 deals with special measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person, or a victim of sexual violence.<sup>98</sup> Rule 144 provides that decisions of the Trial Chamber concerning the admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence, and reparations shall be pronounced in public and, wherever possible, in the presence of the victims, amongst other parties.<sup>99</sup>

During the trial in *Lubanga* (the ICC's first completed trial), the legal representatives of victims were prominently seated in the courtroom.<sup>100</sup> In this case, 129 victims were authorized to participate at trial and were represented in groups by two teams of legal representatives and the Office of Public Counsel for Victims, who were authorized to present submissions and, in some instances, examine witnesses, call witnesses, and introduce

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<sup>95</sup> *Lubanga* July 2008, *supra* note 37 at para 4.

<sup>96</sup> ICC RPE, *supra* note 19, r 93.

<sup>97</sup> *Ibid*, r 69.

<sup>98</sup> *Ibid*, r 88.

<sup>99</sup> *Ibid*, r 144.

<sup>100</sup> International Criminal Court, "Courtroom Layout – *The Prosecutor v. Thomas Lubanga Dyilo*", ICC-PIDS-CIS-DRC-01-003/12 (9 July 2012), online: International Criminal Court <[www.icc-cpi.int/iccdocs/PIDS/publications/LubangaCLeng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaCLeng.pdf)>.

evidence.<sup>101</sup> The trial lasted 204 days and involved 36 witnesses called by the Prosecutor, 24 called by the Defence, 4 expert witnesses called by the Trial Chamber, and 3 witnesses called by legal representatives of victims.<sup>102</sup> The Prosecutor presented 368 items of evidence, with the Defence presenting 992 items, and victims presenting 13 items of evidence during the course of the trial.

During the trial in *The Prosecutor v Germain Katanga* (the ICC's second completed trial), 366 victims were authorized to participate in the trial through a legal representative of victims who presented submissions to the court and was permitted to examine certain witnesses on specific issues on behalf of the victims.<sup>103</sup> The trial lasted 265 days and involved 25 witnesses called by the Prosecutor, 28 called by the Defence in addition to the accused, 2 expert witnesses called by the Trial Chamber, and 2 called by the legal representative for victims.<sup>104</sup>

## 2) *Canada*

In Canada, many criminal cases are settled by a guilty plea – about 90 per cent of criminal cases are resolved in this manner,<sup>105</sup> meaning that the ability of a victim to testify at trial is often foreclosed entirely. Even if a case does make it to trial, victims enjoy no presumptive right to participate at the trial or at any other court appearances, either through their own testimony or otherwise.

If a victim is called to testify as a witness, however, there are a number of legislative provisions that are intended to support victim-witnesses in the criminal justice system by accommodating the needs of particularly vulnerable individuals. For example, section 16.1 of the *Canada Evidence Act* eases the rules regarding the competency of children to give evidence,

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<sup>101</sup> International Criminal Court, “Case Information Sheet – *The Prosecutor v Thomas Lubanga Dyilo*”, ICC-PIDS-CIS-DRC-01-006/12 (12 May 2014), online: International Criminal Court <[www.icc-cpi.int/iccdocs/PIDS/publications/LubangaEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaEng.pdf)>.

<sup>102</sup> *Ibid.*

<sup>103</sup> International Criminal Court, “Case Information Sheet – *The Prosecutor v Germain Katanga*”, ICC-PIDS-CIS-DRC-03-010/14\_Eng (27 May 2014), online: International Criminal Court <[www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf)>.

<sup>104</sup> *Ibid.*

<sup>105</sup> Simon N Verdun-Jones and Adamira A Tijerino, “Victim Participation in the PLEA Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform rr2002-5e” at iii (2002), online: Victims of Crime Research Series, Policy Centre for Victim Issues, Research and Statistics Division <[www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02\\_5/rr02\\_5.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/rr02_5.pdf)>.

holding *inter alia* that a person under 14 years of age is presumed to have the capacity to testify and shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath of affirmation.<sup>106</sup> Section 486.2 of the *Criminal Code* allows a witness under 18, or a witness with a physical or mental disability, to use testimonial aids. This provision permits such witnesses to “testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.”<sup>107</sup>

Above and beyond a number of changes to the *Criminal Code* in relation to victim/witness testimony, the use of testimonial aids is also expressly provided for in section 13 of the *Canadian Victims Bill of Rights* which states that every victim has the right “to request testimonial aids when appearing as a witness in proceedings relating to the offence.”<sup>108</sup>

The *Canadian Charter of Rights and Freedoms*, which is part of the Constitution, has also been a basis for recognizing the interests of victims in criminal proceedings. For example, special procedures have been adopted for the discovery of private records of victims of sexual offences that are in the possession of third parties in order to balance the privacy and equality rights of complainants with the right of the accused to make full answer and defence.<sup>109</sup> Recently, in *R v Quesnelle*, the Supreme Court of Canada held that police occurrence reports prepared in the investigation of previous, unrelated incidents of sexual offences may be withheld from disclosure to the accused if the requirements set out in sections 278.1 to 278.91 of the *Criminal Code* are met. Karakatsanis J, writing for the Court, acknowledged that “[t]here are tangible harms associated with disclosure of personal information in the context of prosecutions for sexual offences ... Victims of sexual offences will be less likely to come forward if they know that doing so will entail disclosure of their past interactions with police to the very person who they claim has wronged them.”<sup>110</sup>

Section 486(1) of the *Criminal Code* provides an exception to the general presumption that court proceedings are open to the public, stating that a judge may exclude “any or all members of the public from the court room for all or part of the proceedings if the judge or justice is of the opinion that such an order is in the interest of public morals, the

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<sup>106</sup> *Canada Evidence Act*, RSC 1985, c C-5, s 16.1.

<sup>107</sup> *Criminal Code*, *supra* note 13, s 486.2.

<sup>108</sup> *Victims Bill of Rights Act*, *supra* note 17, s 13.

<sup>109</sup> See *R v O'Connor*, [1995] 4 SCR 411; *R v Mills*, [1999] 3 SCR 668; *Criminal Code*, *supra* note 13, ss 278.1-278.91.

<sup>110</sup> *R v Quesnelle*, 2014 SCC 46 at para 36, [2014] 2 SCR 390.

maintenance of order, or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.”<sup>111</sup> Some specific situations where exclusion orders should be enforced to protect the privacy of victims in certain cases are also enumerated.<sup>112</sup> Regardless of whether or not an exclusion order is in place, a publication ban can also serve to prohibit the public and media from broadcasting the identity of victims and witnesses in court proceedings, in order to protect their privacy.<sup>113</sup> Publication bans can be ordered upon request by a victim, witness, or Crown prosecutor in cases involving victims or witnesses under the age of 18 and all victims of sexual offences, or can be ordered by the court of its own initiative where it is deemed appropriate to do so.<sup>114</sup>

Moreover, publication bans or exclusion orders alone have been deemed to be insufficient to protect a complainant’s privacy interest in some circumstances. In the case of *R v PM*, the Ontario Court of Appeal ruled that the trial judge did not err in refusing to view a disc in open court containing images of child pornography tendered by the Crown as evidence of the commission of several of the offences the accused was charged with, due to “the sensitivity of the complainant/victim in the matter and the awareness of the Court of the nature and circumstances of what [was] in that video.”<sup>115</sup>

A number of sections in the *Canadian Victims Bill of Rights* address a victim’s right to protection. For example, section 11 provides that every victim has the right “to have their privacy considered by the appropriate authorities in the criminal justice system,”<sup>116</sup> and section 12 provides that every victim has the right “to request that their identity be protected if they are a complainant to the offence or a witness in proceedings relating to the offence.”<sup>117</sup>

While Canada has had few domestic prosecutions of international crimes to date, its courts have taken steps to protect victims when testifying in recent cases. For example, in *R c Munyaneza*, the Cour supérieure du Québec kept the names of witnesses confidential.<sup>118</sup> The Quebec Court of

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<sup>111</sup> *Criminal Code*, *supra* note 13, s 486(1).

<sup>112</sup> *Ibid*, ss 486(2)-(3).

<sup>113</sup> *Ibid*, s 486.5.

<sup>114</sup> *Ibid*, s 486.4.

<sup>115</sup> *R v PM*, 2012 ONCA 162 at para 17, (2012), 289 OAC 352.

<sup>116</sup> *Victims Bill of Rights Act*, *supra* note 17, s 11.

<sup>117</sup> *Ibid*, s 12.

<sup>118</sup> *R c Munyaneza*, 2006 QCCS 8009 at para 5, [2006] JQ no 25207 (QL); see also *R c Mungwarere*, 2013 ONSC 4594 at paras 28-30, [2013] OJ No 6123 (QL).

Appeal also noted that the trial judge crafted reasons for conviction in a manner that protects witness confidentiality:

To safeguard the identity of several of the witnesses and thus protect them from any possible reprisals, the judgment of conviction consisted of two documents: one public judgment, which is 2095 paragraphs length, and a confidential schedule of 1728 paragraphs that contains the judge's more detailed review and analysis of the testimony.<sup>119</sup>

Such an approach is exceedingly rare in typical Canadian criminal trials.

## E) Sentencing

### 1) ICC

At the ICC, the Trial Chamber sentences the accused after a determination of guilt and may take into account the evidence and submissions made at trial. It can also hold additional hearings related to the sentence to be imposed.<sup>120</sup> Victim participation at sentencing is based on the general participatory provision in Article 68(3) of the *Rome Statute*. In exceptional circumstances, the legal representatives of victims can request that such a hearing be postponed.<sup>121</sup>

The *Rome Statute* sets out applicable penalties and basic principles for determining an appropriate sentence, including the gravity of the offence and circumstances of the convicted person.<sup>122</sup> The RPE provide further direction on sentencing, including that consideration be given “to the extent of the damage caused, in particular the harm caused to the victims and their families.”<sup>123</sup> The RPE recognize as a mitigating factor “any efforts by the [convicted] person to compensate the victims.”<sup>124</sup> Aggravating factors include that the victim was particularly defenseless, the crime was particularly cruel, or involved multiple victims.<sup>125</sup> One or more aggravating factors must exist for life imprisonment to be a possible sentence.<sup>126</sup>

<sup>119</sup> *R c Munyaneza*, 2014 QCCA 906 at para 12, [2014] JQ no 3059 (QL).

<sup>120</sup> *Rome Statute*, *supra* note 6, art 76(1)-(2).

<sup>121</sup> ICC RPE, *supra* note 19, r 143.

<sup>122</sup> *Rome Statute*, *supra* note 6, arts 77-78.

<sup>123</sup> ICC RPE, *supra* note 19, r 145(1)(c).

<sup>124</sup> *Ibid*, r 145(2)(a)(ii).

<sup>125</sup> *Ibid*, r 145(2)(b)(iii)-(iv).

<sup>126</sup> *Ibid*, r 145(3).

Given that the ICC has only sentenced two individuals to date, there is limited practice to consider. In *Lubanga*, victims presented their views on the relevant evidence and sentence to be imposed on Lubanga, including making oral submissions.<sup>127</sup> Trial Chamber I noted the submissions of victims including, *inter alia*: that “considerable damage” was caused to the victims, the victims were particularly defenseless, that the crimes were discriminatory, and that the victims thought a fine should also be imposed.<sup>128</sup> The sentencing decision in this case is currently under appeal. Victims also participated in the recent sentencing proceedings in *The Prosecutor v Germain Katanga*.<sup>129</sup>

## 2) Canada

In Canada, the most notable role for victims during the criminal justice process is at sentencing. Specifically, victims are recognized in substantive sentencing law and have the ability to submit a Victim Impact Statement (VIS).

In 1996, the *Criminal Code* was amended to codify the following purpose and objectives of sentencing, including formal recognition of victims for the first time:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and

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<sup>127</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (10 July 2012) at paras 5, 11 (International Criminal Court, Trial Chamber I).

<sup>128</sup> *Ibid.*, at paras 46, 77, 79, 105.

<sup>129</sup> *The Prosecutor v Germain Katanga*, ICC-01/04-01/07-3484, Décision relative à la peine (article 76 du Statut) (23 May 2014) at para 3 (International Criminal Court, Trial Chamber II).

(f) to promote a sense of responsibility in offenders, and *acknowledgment of the harm done to victims* and to the community.<sup>130</sup>

In *R v Gladue*, the Supreme Court of Canada stated that sections 718(e) and (f) relating to victims are “new”<sup>131</sup> additions to the basic sentencing aims of Canadian criminal law that reflect an emphasis on restorative justice.<sup>132</sup> Recently, in *R v Ipeelee*, the Court affirmed that “a judge’s fundamental duty [is] to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim.”<sup>133</sup> The Supreme Court of Canada has also recognized that other sentencing principles require attention to victims. For example, the “consequences for the victim” as a result of the offender’s conduct is necessary to consider when analyzing the gravity of the offence.<sup>134</sup> Additionally, the Court has held that the principle of proportionality in sentencing “promotes justice for victims and ensures public confidence in the justice system.”<sup>135</sup>

The *Victims Bill of Rights Act* amends section 718 of the *Criminal Code* to further recognize the importance of accounting for harm to victims in sentencing, as follows :

718. The fundamental purpose of sentencing is to *protect society and to contribute*, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct *and the harm done to victims or to the community that is caused by unlawful conduct*;

...

(f) to promote a sense of responsibility in offenders, and *acknowledgment of the harm done to victims or to the community*.<sup>136</sup>

The *Criminal Code* has recognized the ability of victims to provide a VIS as part of the sentencing process since 1989. Victims are not required to

<sup>130</sup> *Criminal Code*, *supra* note 13, s 718 (emphasis added).

<sup>131</sup> [1999] 1 SCR 688 at para 43 [*Gladue*].

<sup>132</sup> *Ibid* at para 71; see also *R v Proulx*, 2000 SCC 5 at para 18, [2000] 1 SCR 61 [*Proulx*].

<sup>133</sup> *R v Ipeelee*, 2012 SCC 13 at para 69, [2012] 1 SCR 433 [*Ipeelee*]; see also *Gladue*, *supra* note 131 at para 75.

<sup>134</sup> *R v Morrissey*, 2000 SCC 39 at para 35, [2000] 2 SCR 90.

<sup>135</sup> *Ipeelee*, *supra* note 133 at para 37.

<sup>136</sup> *Victims Bill of Rights Act*, *supra* note 17, s 23 (amending *Criminal Code*, *supra* note 13, s 718 (amendments italicized)).

submit a VIS, but may choose to do so. Studies have found that while only 8 to 13 per cent of cases involve a VIS, judges generally find them to be helpful and to contain useful information.<sup>137</sup> Gorman J described the value of VISs in *R v JLM*:

Victim impact statements are designed to provide victims of crime with a genuine opportunity to have involvement in the sentencing process. It enables victims to advise judges of the real effects of criminal offences. In this regard, they are invaluable. They are cogent and often eloquent reminders that criminal offences are not committed in a vacuum. They can impact people's lives in a dramatic and sometimes in a devastating fashion. ...<sup>138</sup>

Sections 722 to 722.1 of the *Criminal Code* set out the substantive, procedural and evidentiary rules related to this mechanism for victim participation. There is a large body of jurisprudence interpreting and applying these provisions, and they have been amended several times to further enhance the ability of victims to provide such statements. The sentencing judge may also consider information about the victim that is not in a VIS.<sup>139</sup>

After a guilty verdict, the court is required to inquire whether the victim(s) have been informed of their ability to submit a VIS for sentencing purposes.<sup>140</sup> A victim may apply for an adjournment to prepare a VIS or present other evidence concerning the victim so long as it would not “interfere with the proper administration of justice.”<sup>141</sup>

To submit a VIS, a person must meet the definition of “victim” in the *Criminal Code*, as discussed earlier, and this assessment is made by the sentencing judge. If a VIS is filed in court properly (that is, in writing and using the necessary form) the sentencing judge is required to consider it in determining the sentence of the offender.<sup>142</sup> The victim has the right to read his or her VIS during the sentencing hearing or have it considered in written form.<sup>143</sup> A VIS should describe “the physical or emotional harm,

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<sup>137</sup> Julian V Roberts and Allen Edgar, “Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions: A Survey of Three Jurisdictions” (Ottawa: Department of Justice Canada Research and Statistics Divisions, 2007) at 15, 16.

<sup>138</sup> *R v JLM* (2003), 59 WCB (2d) 28 at para 32 (NL Prov Ct).

<sup>139</sup> *Criminal Code*, *supra* note 13, s 722(9).

<sup>140</sup> *Ibid*, s 722(2); see also *Victims of Crime Act*, *supra* note 32, s 4.

<sup>141</sup> *Ibid*, s 722(3).

<sup>142</sup> *Ibid*, s 722(1); see *Proulx*, *supra* note 132 at para 113.

<sup>143</sup> *Ibid*, s 722(4)-(5). See *Cook c R*, 2009 QCCA 2423 at para 61, [2009] JQ no 15641(QL) [*Cook*]: “...The obligation imposed on a court to permit a victim impact statement to be read in such circumstances is cast in mandatory terms, which suggests

property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.”<sup>144</sup> Canadian courts have tended to restrict the permissible content of VISs to statutorily defined terms. In *R v McDonough*, Durno J identified the following types of statements that should not appear in a VIS:

- criticism of the offender, which has the potential to tilt the adversary system and risks the appearance of revenge motivation
- any comments that amount to “offender bashing.” Since vengeance plays no role in sentencing, any comments directed at ‘getting the accused back’ must be excluded
- assertions as to the facts of the offence
- recommendations as to the severity of the punishment
- statements addressed to the offender. The Victim Impact Statement is not an opportunity to confront the offender and tell him or her what the victim thinks of him, her, or the crime.<sup>145</sup>

The *Victims Bill of Rights Act* strengthens VISs further. Most notably, it recognizes through the *Canadian Victims Bill of Rights* that “[e]very victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered.”<sup>146</sup> The *Victims Bill of Rights Act* amends the *Criminal Code* to: clarify the permissible content of a VIS as “describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim”; enact a standardized VIS form for victims across Canada to clearly tell victims what should and should not be included in it; and to provide that any passage in a VIS that goes beyond the scope of permissible content is to be disregarded.<sup>147</sup>

Under the newly enacted reforms, victims have several options for presenting their VIS, including submitting it in written form, reading it during the sentencing hearing (including with a support person), or reading

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that a trial judge has no discretion to refuse a victim the right to read a statement as long as it conforms to the requirements of subsection 722(2) Cr. C.”

<sup>144</sup> *Ibid*, s 722(1).

<sup>145</sup> *R v McDonough*, (2009), 209 CCC (3d) 547 at para 30 (Ont Sup Ct) (citations omitted). See also *Cook*, *supra* note 143 at para 65.

<sup>146</sup> *Victims Bill of Rights Act*, *supra* note 17, s 15.

<sup>147</sup> *Ibid*, s 25 (amending *Criminal Code*, *supra* note 13, s 722).

it behind a screen or through closed-circuit television.<sup>148</sup> Finally, section 26 of the *Victims Bill of Rights Act* creates a “community impact statement” for all offences “describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.”<sup>149</sup>

## F) Reparations, Compensation and Restitution

### 1) ICC

After an accused person is convicted, victims at the ICC can request reparations, including compensation, restitution, and rehabilitation support.<sup>150</sup> Rule 94 of the RPE provides that a victim’s request for reparations must include the following:

- (a) The identity and address of the claimant;
- (b) A description of the injury, loss or harm;
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;
- (e) Claims for compensation;
- (f) Claims for rehabilitation and other forms of remedy;
- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.<sup>151</sup>

In exceptional circumstances, victims can request that a hearing related to reparations be postponed.<sup>152</sup> Representations on behalf of victims are to be taken into account by the court with respect to reparations decisions.<sup>153</sup> At a reparations hearing, a legal representative of victims is entitled to

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, s 26.

<sup>150</sup> *Rome Statute*, *supra* note 6, art 75(1), (4); ICC RPE, *supra* note 19, r 94.

<sup>151</sup> ICC RPE, *supra* note 19, r 94.

<sup>152</sup> *Ibid.*, r 143.

<sup>153</sup> *Rome Statute*, *supra* note 6, art 75(3).

examine “witnesses, experts and the person concerned.”<sup>154</sup> The Court can award reparations on an individual or collective basis or both, based on “the scope and extent of any damage, loss or injury.”<sup>155</sup> Experts can be appointed (including at the request of victims) to assist in the assessment of reparations and victims can make representations related to such expert reports.<sup>156</sup>

Reparations may be funded by a convicted person or from the TFV (discussed in detail below).<sup>157</sup> A legal representative of victims at the ICC can appeal a reparations order.<sup>158</sup> State Parties are required to cooperate in enforcing reparations orders.<sup>159</sup> One of the factors that may result in a reduction of sentence is that the convicted person voluntarily assisted in locating assets for a reparations order for the benefit of the victims.<sup>160</sup>

In *Lubanga*, the legal representatives of victims and the OPCV participated in the ICC’s first reparations proceedings.<sup>161</sup> The representations of victims were complex because victims disagreed, in certain instances, on how reparations should be made.<sup>162</sup> Trial Chamber I recognized reparations as a “key feature”<sup>163</sup> of the ICC and made a number of foundational statements about their importance and purposes:

The Statute and the Rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.<sup>164</sup>

[...]

Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts. Furthermore, reparations can be directed at particular individuals, as well as contributing more

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<sup>154</sup> ICC RPE, *supra* note 19, r 91(4).

<sup>155</sup> *Ibid*, r 97(1).

<sup>156</sup> *Ibid*, r 97(2).

<sup>157</sup> *Rome Statute*, *supra* note 6, arts 75(2), 79.

<sup>158</sup> *Ibid*, art 82(4).

<sup>159</sup> *Ibid*, art 75(5).

<sup>160</sup> *Ibid*, art 110(4)(b).

<sup>161</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations (7 August 2012) at paras 13, 18 (International Criminal Court, Trial Chamber I).

<sup>162</sup> *Ibid* at paras 29, 41, 51, 52.

<sup>163</sup> *Ibid* at para 178.

<sup>164</sup> *Ibid* at para 177.

broadly to the communities that were affected. Reparations in the present case must – to the extent achievable – relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (without making Mr Lubanga’s participation in this process mandatory).<sup>165</sup>

The Trial Chamber ordered a “five-step” plan to implement reparations based on principles recognized in its decision.<sup>166</sup> The victims and the accused appealed this reparations decision.<sup>167</sup> On March 3, 2015, the Appeals Chamber issued its judgment on reparations in this case, amending the Trial Chamber’s ruling and made a new order for the TFV.<sup>168</sup> The Appeals Chamber held:

An order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.<sup>169</sup>

The Appeals Chamber also clarified that reparations are only to be made to victims who suffered harm as a result of the offender’s crimes. Where a reparations order is made for a community’s benefit, only those

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<sup>165</sup> *Ibid* at para 179.

<sup>166</sup> *Ibid* at para 281.

<sup>167</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2916, Decision on the Presiding Judge of the Appeals Chamber in the appeals filed by Ms Carine Bapita Buyangandu, Mr Paul Kabongo Tshibangu and the Office of Public Counsel for victims as well as by Mr Luc Walley and Mr Franck Mulenda against the decision of Trial Chamber I entitled “Decision establishing the principles and procedures to be applied to reparations” (6 September 2012) (International Criminal Court, Appeals Chamber) [*Lubanga* September 2012].

<sup>168</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (3 March 2015) (International Criminal Court, Appeals Chamber).

<sup>169</sup> *Ibid* at para 1.

community members that meet the relevant criteria are eligible for such reparations.<sup>170</sup>

The TFV has been the subject of a growing body of critical literature.<sup>171</sup> The objective here is to briefly sketch how it was established and is to function. Article 79 of the *Rome Statute* establishes the TFV as an independent institution “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”<sup>172</sup> As noted earlier, the Trial Chamber may order, where appropriate, that an order for reparations against a convicted person be made through the TFV.<sup>173</sup> Victims may apply to the Registry for reparations at any time but are not required to do so, and the ICC is empowered to order reparations to victims whether they have applied or not:

The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparation, it may order that reparation to be made through the Trust Fund for Victims and the reparation may then also be paid to an inter-governmental, international or national organization.<sup>174</sup>

The TFV also has a second mandate of providing “physical and psychosocial rehabilitation or material support to victims.”<sup>175</sup> The broad scope of the TFV to provide assistance to victims is affirmed in Rule 98(5) of the RPE, which sets out that “[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79.”<sup>176</sup> To this end, it has been observed that the TFV can act for the benefit of victims regardless of whether there is a conviction by the ICC

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<sup>170</sup> *Ibid* at para 1.

<sup>171</sup> See e.g. Heidy Rombouts and Stephan Parmentier, “The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims” (2009) 16:2 Intl Rev Victimol 149; Jo-Anne Wemmers, “Victim Reparations and the International Criminal Court” (2009) 16:2 Intl Rev Victimol 123; Moffett, *supra* note 4.

<sup>172</sup> *Rome Statute*, *supra* note 6, art 79.

<sup>173</sup> *Ibid*, art 75(2).

<sup>174</sup> International Criminal Court, “Reparations for Victims”, online: International Criminal Court <[www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx)>.

<sup>175</sup> United Nations Trust Fund for Victims, “Homepage”, online: Trust Fund for Victims <[www.trustfundforvictims.org](http://www.trustfundforvictims.org)> [TFV].

<sup>176</sup> ICC RPE, *supra* note 19, r 98(5).

and regardless of whether victims have participated in proceedings.<sup>177</sup> It may do so by advocating for victims; mobilizing individuals, institutions, or communities with resources; funding or setting up innovative projects to meet victims' physical, material, or psychological needs; or directly undertaking activities as and when requested by the Court.<sup>178</sup>

The TFV general assistance is supported by voluntary contributions from donors only, as opposed to being funded by fines or forfeiture collected from a convicted person.<sup>179</sup> This general assistance is deployed on a number of scales, from small projects tailored to meet the needs of individual victims or victims of specific crimes, to larger-scale projects aimed at helping entire communities rebuild and establish long-term reconciliation.<sup>180</sup> The TFV website states that it is currently providing a broad range of support under its assistance mandate, "including vocational training, counselling, reconciliation workshops, reconstructive surgery, and more – to an estimated 80,000 victims of crime under the ICC's jurisdiction."<sup>181</sup>

## 2) *Canada*

Victims in Canada may generally obtain financial redress through several avenues. First, most provinces offer public funds to provide compensation to victims of serious or violent crimes. Second, as part of sentencing, an offender may be ordered to provide restitution to the victim. Finally, infrequently, victims sue perpetrators in separate civil proceedings. If victims obtain compensation through more than one of these avenues, they are prevented from obtaining double-recovery. Given the relative importance of publicly funded compensation and offender-provided restitution in Canada, these topics will now be elaborated in further detail.

Recognizing that violent crime often imposes significant costs for victims and other affected parties, many jurisdictions in Canada have taken an active approach to lessening the impact, including the implementation of formal legislative victim compensation mechanisms. Claimants apply

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<sup>177</sup> Redress and Forensic Risk Alliance, "The International Criminal Court's Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims" (December 2003), online: Redress <[www.redress.org/downloads/publications/TFVReport.pdf](http://www.redress.org/downloads/publications/TFVReport.pdf)>.

<sup>178</sup> International Criminal Court, "What is the Role of the Trust Fund for Victims?", online: <[www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/27.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/27.aspx)>.

<sup>179</sup> United Nations Trust Fund for Victims, "The Two Roles of the TFV", online: Trust Fund for Victims <[www.trustfundforvictims.org/two-roles-tfv](http://www.trustfundforvictims.org/two-roles-tfv)>.

<sup>180</sup> TFV, *supra* note 175.

<sup>181</sup> *Ibid.*

directly to the program within the province in which the crime occurred. Decisions are generally made between one to five years after an application is made, with benefits generally being paid out approximately four to twenty weeks later.<sup>182</sup> As reported by Christopher Munch, “In 2009/2010, the nine provincial compensation programs, together with financial benefits programs available through other victim service providers, awarded more than [CDN]\$137 million to victims of crime.”<sup>183</sup>

In BC, the Crime Victim Assistance Program (CVAP) is administered in accordance with the *Crime Victim Assistance Act*<sup>184</sup> and its regulations.<sup>185</sup> The broad goal of compensation is to help victims offset financial loss and assist in recovery from injury.<sup>186</sup> Under this legislation, victims may be eligible for financial assistance if they are injured as a direct result of certain violent crimes committed in the province.<sup>187</sup> The immediate family member of an injured or deceased victim is also eligible for such support.<sup>188</sup> A legal representative may apply for a benefit on behalf of an affected person,<sup>189</sup> or if a person does not have a legal representative and is physically or mentally incapable of making the application, an immediate family member may apply.<sup>190</sup> Such legal representatives are not paid for by the state. In most cases, applications must be received within one year of the date that the crime occurred,<sup>191</sup> although there are some exceptions to this limitation.<sup>192</sup> Notably, a perpetrator does not have to be convicted or charged for a victim to be eligible for compensation.<sup>193</sup>

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<sup>182</sup> Canadian Resource Centre for Victims of Crime, “Financial Assistance”, online: Canadian Resource Centre for Victims of Crime <[www.crcvc.ca/for-victims/financial-assistance](http://www.crcvc.ca/for-victims/financial-assistance)> (Provincial maximums for benefits and awards generally range between CDN\$2,000 and CDN\$127,000).

<sup>183</sup> Christopher Munch, “Victim services in Canada, 2009/2010” at 9 (23 February 2012), online: Juristat, Statistics Canada <[www.statcan.gc.ca/pub/85-002-x/2012001/article/11626-eng.pdf](http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11626-eng.pdf)>.

<sup>184</sup> *Crime Victim Assistance Act*, SBC 2001, c 38.

<sup>185</sup> Specific details regarding the scope and content of non-employment benefits are established in the *Crime Victim Assistance (General) Regulation*, BC Reg 145/2013, while details regarding the scope and content of employment and vocational benefits are provided for in the *Crime Victim Assistance (Income Support and Vocational Services or Expenses Benefits) Regulation*, BC Reg 362/2012.

<sup>186</sup> VictimLinkBC, “Crime Victim Assistance Program”, online: VictimLinkBC <[www.victimlinkbc.ca/vlbc/financial/cvap.page](http://www.victimlinkbc.ca/vlbc/financial/cvap.page)>.

<sup>187</sup> *Crime Victim Assistance Act*, *supra* note 184, s 3(1)(a)(i).

<sup>188</sup> *Ibid*, s 3(1)(b).

<sup>189</sup> *Ibid*, s 3(1)(d)(i).

<sup>190</sup> *Ibid*, s 3(1)(d)(ii).

<sup>191</sup> *Ibid*, s 3(2).

<sup>192</sup> *Ibid*, s 3(3)-(5).

<sup>193</sup> *Ibid*, s 5.

The range of benefits available under the CVAP includes medical and dental expenses; protective measures; income support or lost earning capacity; counselling; and funeral expenses.<sup>194</sup> Benefits may be provided as a lump sum payment, as periodic payments, as a product or service, or by a combination of methods.<sup>195</sup> Under the CVAP, victims or families of victims may also be eligible for travel assistance to attend and participate in justice-related proceedings.<sup>196</sup> Despite the range of benefits victims may potentially claim under the CVAP, certain losses are precluded entirely; for example, the CVAP does not cover “injuries or loss sustained from motor vehicle accidents, injuries or loss sustained out of, or during the course of employment, claims for pain and suffering and/or loss of stolen personal property.”<sup>197</sup> There are also a number of grounds based on which an affected party will be rendered ineligible for compensation, including if the victim is a party to the offence.<sup>198</sup>

In addition to provincial compensation programs, victims can also obtain restitution from offenders as part of their sentence after a finding of guilt. Until recently, victims could only directly seek restitution for their losses in fraud cases, and the court is required to consider restitution in such cases.<sup>199</sup> Section 29 of the *Victims Bill of Rights Act* extends the requirement to consider restitution during sentencing to include all criminal offences.<sup>200</sup> The Act also recognizes that victims have “the right to have the court consider making a restitution order against the offender”<sup>201</sup> and such an order is enforceable in civil proceedings.<sup>202</sup> Prior to the adoption of the *Victims Bill of Rights*, however, for all crimes other than fraud, only the court on its own motion or on application by the Crown prosecutor could be the basis for an order that the offender make restitution to the victim.<sup>203</sup> Such restitution can include the replacement cost of any property damage, loss, or destruction as well as pecuniary losses that are “readily ascertainable” for bodily or psychological harm.

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<sup>194</sup> *Ibid*, s 4(1).

<sup>195</sup> *Ibid*, s 4(7).

<sup>196</sup> The two sources of travel assistance that victims or families of victims may be eligible for are the Crime Victim Assistance Program and the Victim Travel Fund.

<sup>197</sup> British Columbia Ministry of Public Safety and Solicitor General, “Crime Victim Assistance Program – Victim Application” (June 2002), online: Government of British Columbia <[www.pssg.gov.bc.ca/victimservices/shareddocs/pubs/cvap-victim-application.pdf](http://www.pssg.gov.bc.ca/victimservices/shareddocs/pubs/cvap-victim-application.pdf)>.

<sup>198</sup> *Crime Victim Assistance Act*, *supra* note 184, s 9(1).

<sup>199</sup> *Criminal Code*, *supra* note 13, s 380.3.

<sup>200</sup> *Victims Bill of Rights Act*, *supra* note 17, s 29 (amending *ibid*, s 737.1).

<sup>201</sup> *Ibid*, s 16.

<sup>202</sup> *Ibid*, s 17.

<sup>203</sup> *Criminal Code*, *supra* note 13, s 738.

Restitution orders that are not paid “without delay” can be enforced in civil proceedings.<sup>204</sup>

Additionally, the *Crimes Against Humanity and War Crimes Act* established the Crimes Against Humanity Fund to make payments to the ICC, TFV, “victims of offences under this Act or of offences within the jurisdiction of the International Criminal Court, and to the families of those victims, or otherwise as the Attorney General of Canada sees fit.”<sup>205</sup>

## G) Appeals

### 1) ICC

Only the Prosecutor or the convicted person can appeal a conviction, acquittal or sentence at the ICC.<sup>206</sup> Only parties can make appeals against other decisions.<sup>207</sup> The *Rome Statute* does, however, recognize that a legal representative of victims at the ICC can appeal a reparations order, as noted above.<sup>208</sup>

Victims may seek to participate in appeals through the general victim participation provision in Article 68(3) of the *Rome Statute*, discussed earlier. For example, in the *Situation in Uganda*, the Appeals Chamber recognized that victims may participate in interlocutory appeals if they meet the following test:

- (i) he/she is a victim in the situation; (ii) he/she has personal interests which are affected by the issue on appeal; (iii) his/her participation in the appeal is appropriate and (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.<sup>209</sup>

In *Lubanga*, the Appeals Chamber decided that victims who had been authorized to participate during the trial phase of proceedings (whose right to participate had not been withdrawn) could participate in the appeal against the judgment and sentence in this case. A total of 120 victims were granted the ability to participate in the appeal based on the general participatory provision in Article 68(3) of the *Rome Statute* “for the purpose of presenting their views and concerns in respect of their personal

<sup>204</sup> *Ibid*, s 741(1).

<sup>205</sup> *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss 30-32.

<sup>206</sup> *Rome Statute*, *supra* note 6, art 81(1)-(2).

<sup>207</sup> *Ibid*, art 82(1)-(4).

<sup>208</sup> *Ibid*, art 82(4).

<sup>209</sup> *Situation in Uganda*, ICC-02/04-164, Decision on Participation of Victims in the Appeal (27 October 2008) at para 7 (International Criminal Court, Appeals Chamber).

interests in the issues on appeal.”<sup>210</sup> Separately, the legal representatives of victims and OPCV also appealed the reparations decision of the Trial Chamber.<sup>211</sup>

## 2) *Canada*

Either the Crown prosecutor or defence counsel may appeal a conviction or acquittal, the sentence imposed, or both, but the scope of the right to appeal differs depending on which party is launching it. During an appeal, section 683(1)(b) of the *Criminal Code* empowers a court of appeal to, where it considers it in the interests of justice, order any witness who would have been a compellable witness at the trial, whether or not he or she was called at the trial, to attend and be examined before the court of appeal or to be examined in the manner provided by rules of court before a person appointed by the court of appeal for that purpose.<sup>212</sup>

Victims’ rights at the appeal stage of proceedings are limited to the right to information. The BC *Crown Counsel Policy Manual* provides that where there has been a written request by the victim for information pursuant to section 6 of the *Victims of Crime Act*, as soon as practicable after the Criminal Appeals and Special Prosecutions Office is made aware of an appeal, the victim should: be contacted to determine the extent of the victim’s interest in receiving information or attending proceedings; be notified of the date of any application for bail pending appeal to enable the victim to provide any comments relating to bail; be notified of the date of the appeal and of any appearance that is likely to result in a final disposition of the appeal or a change in the appellant’s bail status, driving privileges or obligation to adhere to the terms of a probation order; and be notified if a new trial is ordered and provided with a means of contacting a Crown counsel office in the region where the new trial will be prosecuted.<sup>213</sup>

## 4. *Discussion and Analysis*

Before directly comparing the treatment of victims at the ICC and in Canada, it bears reiterating that the differences between these two jurisdictions are vast. The most prominent to bear in mind for this article

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<sup>210</sup> *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2951, Decision on the participation of victims in the appeals against Trial Chamber I’s conviction and sentencing decisions (13 December 2012) at 3, 4 (International Criminal Court, Appeals Chamber).

<sup>211</sup> *Lubanga* September 2012, *supra* note 167.

<sup>212</sup> *Criminal Code*, *supra* note 13, s 683(1)(b).

<sup>213</sup> Crown Counsel Policy Manual: Victims of Crime, *supra* note 86 at 3, 4.

are likely the scale of the crimes (including the number of victims), the number of cases prosecuted, jurisdiction, the applicable law and procedure, and the very different investigative, prosecutorial, judicial, and administrative bodies that are involved. What the two systems have in common is that they both involve criminal proceedings against individuals and both are presently grappling with the role of victims in such proceedings.

The ICC and Canada have a similar concept of who is a “victim” related to criminal proceedings that extends beyond the “direct victim” to include so-called “indirect victims” so long as they suffered “personal harm”<sup>214</sup> or were “directly affected,”<sup>215</sup> respectively, as a result of the offence. Both jurisdictions recognize that victims can include natural persons and legal entities, but the ICC recognizes only certain types of organizations and institutions as victims.

Victims are participants, but not parties, in proceedings before the ICC. They have no similar role in Canada. The ICC recognizes that victims have a general ability to participate in proceedings where their personal interests are affected and it would not be prejudicial to the rights of the accused and the requirement that the trial be fair and impartial.<sup>216</sup> This provision has been interpreted and applied broadly to authorize victim participation during all phases of proceedings before the ICC. In contrast, Canada does not recognize a general ability of victims to participate in criminal proceedings: victims are potential witnesses at trial and may submit a VIS at sentencing (the content of which is limited). General principles related to the treatment of victims in Canada are non-binding and unenforceable.

Canada’s treatment of victims largely mirrors the highly circumscribed role of victims at modern *ad hoc* tribunals, except that Canada provides for some victim compensation and restitution in certain circumstances, as well as limited victim participation during sentencing after restitution. The ICC’s extensive victim participation during sentencing after restitution, the ICC’s extensive victim participation and reparations regime was created to respond to the criticism that these predecessor international criminal tribunals essentially “silenced” victims<sup>217</sup> and failed to provide compensation

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<sup>214</sup> *Lubanga* July 2008, *supra* note 37.

<sup>215</sup> *Duffus*, *supra* note 45 at paras 11, 12.

<sup>216</sup> *Rome Statute*, *supra* note 6, art 68(3).

<sup>217</sup> Marie-Benedicte Dembour and Emily Haslam, “Silencing Hearings? Victim-Witnesses at War Crimes Trials” (2004) 15 *Eur J of Intl L* 151; see also Antonio Cassese, *International Criminal Law*, 2d ed (Oxford, UK: Oxford University Press, 2008) at 376, 442.

to them, perpetrating an “injustice.”<sup>218</sup> The *Canadian Victims Bill of Rights* makes some improvements for victims but, notably, does not create enforceable rights.

The ICC has a general obligation to take measures to protect victims and it provides funding for their common legal representation. Measures to assist victims must not be inconsistent with the rights of suspects/accused persons. In Canada, victims are not entitled to legal aid, except in certain limited circumstances such as in proceedings related to the disclosure of third party information concerning the victim’s personal history.

Victims at the ICC may participate in judicial proceedings related to investigations, such as proceedings reviewing the Prosecutor’s decision not to initiate an investigation and authorizations of proposed *proprio motu* investigations. In contrast, victims in Canada do not have any participatory rights at the investigative stage of proceedings but may have rights to information and access to services.

Prosecutors at both the ICC and in Canada are required to consider the interests of victims among the factors to be weighed in deciding whether to pursue charges. A decision not to prosecute may be reviewed at the ICC and victims may participate in such judicial proceedings. However, decisions not to prosecute are not subject to review in Canada and victims have no ability to question the Prosecutor’s decision. Victims at the ICC can participate in a number of pre-trial proceedings, including questions of jurisdiction and admissibility, confirmation of charges hearings, proposed amendment of charges by the Prosecutor, and interim release of the accused. Victims in Canada have no standing to participate in such analogous proceedings but are to be kept informed about the prosecution, be given information about victim services and compensation, and may be informed about proposed resolutions or stays of proceedings.

During trials, victims at the ICC may participate through their legal representatives, including making opening and closing statements and, in certain circumstances, leading their own evidence and/or challenging the admissibility or relevance of evidence. Victims in Canada are generally not permitted to participate at trial unless they are called as a witness and, then, only to answer the questions that they are asked. The privacy of victims is protected both at the ICC and in Canadian criminal trials through a number of measures.

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<sup>218</sup> Mina Rauschenbach and Damien Scalia, “Victims and International Criminal Justice: A Vexed Question?” (2008) 870 *Intl Rev Red Cross* 441 at 451. See also Luc Walley, « Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole » (2002) 845 *Revue Internationale de la Croix-Rouge* 51.

Victims are recognized in the law applicable to sentencing at both the ICC and in Canada, and can participate in sentencing proceedings, albeit to a lesser extent in Canada. At the ICC, victims can make detailed submissions at sentencing, including written and oral submissions. In Canada, victims may submit a VIS that describes “the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.”<sup>219</sup> Any passages in a VIS that go beyond this description of impact, however, will be disregarded.

At the ICC, victims can request reparations and actively participate in related proceedings. Such reparations can be paid by the convicted person or through the TFV. In Canada, until very recently, victims were not able to personally request restitution (except in fraud cases) and had to hope the Crown prosecutor or judge would initiate such a process. However, most Canadian provinces provide publicly funded victim compensation programs that provide financial support for victims of serious crimes that are not conditional on a successful prosecution.

While victims at the ICC are not generally able to appeal decisions of the Pre-Trial Chamber or Trial Chamber (except for reparations orders), they may participate in interlocutory appeals on matters in which they participated at the lower court, and have been recognized as having a general ability to participate in appeals against conviction, sentence, and reparations. In Canada, victims have no ability to participate in appeals except in very rare circumstances as witnesses, but they may be kept informed of appeal proceedings and any changes to the disposition.

### 5. Conclusion

In comparison to Canada, the ICC has a dramatically and significantly enhanced role for victims in criminal proceedings. This divergence may be accounted for, in part, due to the differing mandates of the criminal justice systems in these jurisdictions. Recent literature has raised the significance of “justice for victims” at the ICC as affecting the “the very meaning of justice in international criminal justice.”<sup>220</sup> Indeed, the ICC seeks to contribute to bringing justice to entire countries and regions, but is situated far from conflict zones. Involving victims at all stages of its proceedings can be seen as proactively seeking to make its proceedings relevant to distant affected countries and communities. It is possible that the

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<sup>219</sup> *Criminal Code*, *supra* note 13, s 722(1).

<sup>220</sup> Carolyn Hoyle and Leila Ullrich, “New Court, New Justice? The Evolution of ‘Justice for Victims’ at Domestic Courts and at the International Criminal Court” (2014) 12 *J Intl Crim Justice* 681 at 702.

legitimacy of the ICC and its ability to secure cooperation in its situations and cases may be affected by the perception and views of victims. In contrast, a domestic criminal justice system in a peaceful democratic country such as Canada operates in a very different context. The interest of victims is arguably less prominent, particularly as the gravity of offences is less than those of international crimes prosecuted at the ICC. This may help explain why there is a diminished role for victims in Canada. However, even in Canada, calls for greater involvement for victims have steadily grown, resulting in legislative reforms such as the creation of victim impact statements in 1989, victim-related sentencing objectives in 1996, and the adoption of the *Victims Bill of Rights Act* in 2015. With this in mind, there are a number of observations that arise from this comparative study that may be relevant to both the ICC and Canada moving forward.

First, Canada can look to the ICC for an international example of how an enhanced role for victims can be implemented in practice at various stages of criminal proceedings. The ICC is concerned that victim participation not prejudice the rights of the accused or cause excessive delays, and is taking steps to attempt to address these issues. Canada could consider allowing victims to make representations where their personal interests are at stake in matters beyond sentencing. While greater victim participation has been proposed in the *Canadian Victims Bill of Rights*, the lack of any judicial enforceability mechanism for the rights that it creates is an impediment to victims being able to meaningfully exercise these rights in practice.

Second, the ICC could improve its financial support for victims by considering victim compensation programs, such as those in Canadian provinces, which provide more expeditious assistance to victims than the post-conviction reparations approach for individual victims at the ICC. This may be an interesting model for the TFV and the ICC to consider in responding to the long period of time that it takes for trials to be completed and reparations to be implemented. Other countries that have victim compensation programs that are not dependent on a conviction first being secured could be considered as part of a survey to identify best practices. It would also be interesting to see if such an approach of pre-conviction compensation for victims might reduce the number of requests for victim participation at the ICC in its judicial proceedings, thus relieving some pressure from mass victim participation, and distilling the participating victims to those who genuinely desire to take part in the proceedings and are not merely doing so because they believe it is necessary to participate to secure reparations that they are reasonably entitled to receive.

Third, while the ICC is seeking to enhance victim participation and support, it will undoubtedly continue to face pressures from the related resource and time demands placed upon it. The ICC may wish to rethink whether victims should be participating in aspects of proceedings that are typically within the exclusive domain of prosecutors in national legal systems, such as Canada. For example, victims leading evidence at trial and examining witnesses may be extending victim participation too far. By focusing victim participation and support on those aspects of proceedings that are most important and feasible, the ICC could develop into a more sustainable model for mass victim participation.

Victims have called for a greater role and support in criminal justice systems around the world. This has led to reforms at the national and international levels while posing new challenges. A deeper understanding of how different legal traditions address common issues related to the inclusion of victims of crime creates a potential for enhanced access to justice for victims.