

Chapter 2

The Application Process: Procedure and Players

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Abstract When a person, having suffered harm as a result of the commission of a crime falling within the jurisdiction of the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia or the Special Tribunal for Lebanon, wishes to be granted status as a victim before one of these tribunals, he or she usually has to apply to do so. This step opens the door to the so-called application process for victims, a process that may lead to the recognition of the status of victim and the granting of the rights and obligations relating to it. This chapter gives a comprehensive overview of this application process, its procedure and the players involved in it, by focusing on the major issues related to this process.

Keywords Institutional players • Submission of applications • Assistance • Time limits • Assessment • Observations by the parties • Decisions • Appeals

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2.1 Introduction

This chapter describes the procedure of application for victims who wish to participate in international criminal proceedings at the International Criminal Court (ICC), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

It first defines the players involved in the application process, and explains their roles and how they interact with each other (if at all).

Attention will then be paid to the process for the submission of applications by victims who wish to participate in the proceedings at any of the three courts mentioned above. The chapter will examine the assistance provided to these applicants, particularly by whom such assistance is undertaken, and the time frame in which such applications can be submitted.

The chapter further addresses the next steps in the application process, dealing with the receipt and processing of applications, observations that can be made in relation to the applications, protection of victims' identities and, finally, whether appeals can be lodged against decisions made on the applications.

Throughout this chapter, when describing the application process which victims of a crime within the jurisdiction of any of these courts must undergo before being granted the status of participating victims (or civil parties for the ECCC) in the proceedings, victims will be referred to as *applicants* as opposed to *participating victims* in order to reflect the different legal nature of these two statuses.

While this chapter concentrates on the application procedure, the next chapter looks at the substantive requirements to become a victim participating in the proceedings (ICC, STL) or a civil party (ECCC). The two chapters should therefore be read together.

2.2 Players

This section gives a general overview of the most important players involved in the victims' application processes of the ICC, the ECCC and the STL. Many other actors play a key role in these victims' participation systems.¹ However, as they *usually*² come into play after an applicant has been granted the status of victim participating in the proceedings (or civil party for the ECCC), they are not directly related to the subject matter of this chapter, and consequently will not be described in this section.

2.2.1 International Criminal Court

Both sections of the Registry described below are involved in the ICC's victims' application process:

- The Public Information and Outreach Section (PIOS)³: while PIOS does not assist with the applications as such, it leads the initial approach towards affected communities, through its outreach activities and as a neutral representative of the Court. In the implementation of its functions, this section is helped by intermediaries,⁴ such as NGOs who are normally based in the situation country and can help access and communicate with the affected communities in their local languages.⁵
- The Victims Participation and Reparations Section (VPRS): the VPRS plays a central role throughout the victims' application process as it acts as a focal point facilitating access to the Court for potential applicants and is the main section responsible for the collection and processing of applications for victims' participation. The VPRS receives application forms, reviews them, collects any

¹ For example, lawyers representing victims, the Office of Public Counsel for Victims (at the ICC) and the respective units entrusted with the protection of victims and witnesses.

² The roles of court-appointed lawyers and of the Office of Public Counsel for Victims (OPCV) usually come into play after an applicant has been granted victim status. However, at the ICC, victims can give powers of attorney to private lawyers of their own choosing up until the point when common legal representation is arranged, and these persons are sometimes involved in the application process. In some cases, the OPCV has been appointed as lawyer for unrepresented applicants (see Chap. 5). In this capacity, the OPCV may assist applicants to provide supplementary information, and, while in the field, might also assist other victims to apply for participation where this is requested.

³ Formerly the Public Information and Documentation Section (PIDS).

⁴ For more information on intermediaries, see Chap. 4.

⁵ For example, specific directions were given by the Chamber to (then) PIDS regarding its role and the need to coordinate with the VPRS in ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, paras 10–13.

missing documents or information, and files them with the respective chamber and to the parties, if necessary in redacted version. The VPRS also enters information from the applications into a database, performs *prima facie* analysis, and extracts reports for the chambers.⁶ Additionally, the VPRS is mandated to inform victims of their participation rights and about reparations, to assist them in obtaining legal advice and legal representation, and to provide information related to the application procedure to the Legal Representatives of Victims (LRVs).

It should be mentioned however that, while the VPRS still serves as the focal section handling the victims' application process before the ICC, the Assembly of States Parties (ASP) has mandated the Registry 'to reorganize and streamline the Registry's organizational structure' with the goals of 'eliminating duplication, increasing effectiveness and efficiency, as well as creating synergies.'⁷ A proposal made for this reorganisation included restructuring the institutional units working in the victims' participation system.⁸ The Registrar proposed establishing a single Victims Office, 'which would consolidate the functions currently performed by the Office of Public Counsel for Victims (OPCV) and the Registry's VPRS, as well as redefining some functions currently being performed by the Counsel Support Section (CSS).'⁹ However, the establishment of the proposed Victims Office would require an amendment to the Regulations of the Court and thus the approval of the judges.¹⁰ While the Registrar had hoped for consideration by the judges in 2014 so as to enable implementation in 2015,¹¹ the 4 May 2015 report on the revision project noted that any recommendations or decisions on, *inter alia*, the OPCV and the VPRS have been postponed, pending the outcome of the discussions on the possible creation of a single Victims Office and a single Defence Office.¹² To date no progress has been made on this proposed reorganisation and it is not clear whether it has any prospects of proceeding.¹³

⁶ Interview with Fiona McKay, former Head of Victims Participation and Reparations Section, ICC, 3 March 2015, (records on file with the authors).

⁷ ICC, Resolution adopted by the Assembly of States Parties, ICC-ASP/12/Res.1 2013, section H, para 3.

⁸ ICC Registry *ReVision* Project: Basic Outline of Proposals to Establish Defence and Victims Offices, 2014b, http://www.uanet.org/sites/default/files/Registry_ReVision_BasicOutline_Defence_Victims_Offices_0.pdf. Accessed 1 March 2015.

⁹ *Ibid.*, p. 2.

¹⁰ ICC, Assembly of States Parties, Report on the review of the organizational structure of the Registry, ICC-ASP/13/26, 28 October 2014a, para 19.

¹¹ *Ibid.*

¹² ICC, Assembly of State Parties, Report on the review of the organizational structure of the Registry, ICC-ASP/14/18, 4 May 2015, para 6.

¹³ ICC, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016. <https://www.icc-cpi.int/itemsDocuments/ICC-Registry-CR.pdf>. Accessed 4 November 2016, p. 12.

2.2.2 *Extraordinary Chambers in the Courts of Cambodia*

The *Victims Support Section* (VSS)—originally called the Victims Unit—established under Rule 12 of the ECCC Internal Rules¹⁴ is the central contact point between the ECCC and victims. The VSS is mandated to inform victims about their rights relating to participation and reparation and, under the supervision of the Co-Investigating Judges, assist victims in processing their civil party applications. It also assists victims in obtaining legal advice or identifying a lawyer, and supports civil party lawyers. The section maintains contact with victims and their lawyers regarding the status of their applications, and keeps them updated regarding developments in individual cases. In earlier years, lawyers, in close cooperation with NGOs, undertook these tasks until the VSS received enough funding to maintain minimum capacities.¹⁵ The VSS also facilitates visits by civil parties to attend the proceedings of the ECCC in person.¹⁶

Besides the VSS, the ECCC relies on several intermediary organisations,¹⁷ some of which are based abroad (US, France), which provide support to victims during the application process. Amongst the main intermediary organisations are the Cambodian Human Rights & Development Association (ADHOC), Documentation Center of Cambodia (DC-Cam) for *Case 001*, and the Khmer Institute of Democracy (KID) and Cambodian Defender Project (CDP).¹⁸ These organisations play a key role in facilitating the application process (including making the first contact with potential civil parties, filling in forms, and assisting with client meetings). Without their assistance, the application process would be difficult if not impossible. Notwithstanding this important role of intermediaries, practitioners should always be mindful about which intermediary they choose to work with as it can have a significant impact on their work.¹⁹

2.2.3 *Special Tribunal for Lebanon*

At the STL, the Victims' Participation Unit (VPU) has been set up within the Registry, in accordance with Rule 51 of the STL Rules of Procedure and Evidence

¹⁴ Rev. 9 (2015) (ECCC Internal Rules).

¹⁵ Written correspondence with Christoph Sperfeldt, Ph.D. Scholar, Australian National University, 20 August 2016 (records on file with the editors).

¹⁶ See further Chap. 11.

¹⁷ For more information on intermediaries, please refer to Chap. 4.

¹⁸ For a list of intermediary organisations, see <https://www.eccc.gov.kh/en/victims-support/intermediary-organizations-ios-0>. Accessed 1 March 2015.

¹⁹ Interview with Dr. Brianne McGonigle Leyh, former civil party lawyer, ECCC, 26 February 2015 (records on file with the authors). See further Chap. 4.

(STL RPE), to assist victims to participate in the proceedings. Its tasks include, but are not limited to, locating and reaching out to victims,²⁰ informing victims of their rights, receiving applications, and verifying that applications are complete and transmitting them to the Pre-Trial Judge. Furthermore, the VPU is mandated to provide logistical and administrative assistance to the LRVs ensuring that they provide a good service to their clients. Additionally, the VPU is mandated with keeping a list of highly qualified counsel, and administering the provision of legal aid funds, and monitoring the work of the LRVs.

2.3 First Step of the Procedure: Submission of an Application for Participation to the ICC, the ECCC or the STL

The submission of a written application form is the first step a victim must take in order to participate in court proceedings (Sect. 2.3.1). Assistance is generally provided to the applicant in order to reduce any burdens that may be associated with the submission of an application for participation to the ICC, the ECCC or the STL (Sect. 2.3.2). The chambers of the three courts have developed various practices regarding deadlines for the submission of victims' applications (Sect. 2.3.3).

2.3.1 Submission of Applications

At the ICC, the general principle, as set forth under Rule 89 of the ICC Rules of Procedure and Evidence (ICC RPE), is that an applicant needs to submit an individually completed written application form. A standard individual application form of 7 pages is available on the ICC website in both English and French.²¹

²⁰ In this task, the VPU has been assisted by the Registry's Outreach Unit that published press releases inviting victims to participate, and facilitated the broadcasting of a video on local and regional television channels with the same purpose. Written correspondence with Marie-Reine Sfeir, former associate liaison officer, Victims' Participation Unit, STL, 2 March 2015 (records on file with the authors).

²¹ Applicants are requested to use one of these two languages if at all possible. If an applicant is unable to submit a form in English or French, and would like to submit the application form in another language, it is recommended to first contact the Court or its Field Offices, since the Court does not have translators who can work in all languages and has limited funds for this purpose (Interview with Fiona McKay, former Head of Victims Participation and Reparations Section, ICC, 3 March 2015 (records on file with the authors)).

It is however not compulsory for an applicant to use this specific application form. What matters is the content of the application.²²

However, in some specific cases particular chambers of the Court have mandated that a modified application process be used. For instance, in *Prosecutor v. Laurent Gbagbo*, a partly collective application process was imposed by Pre-Trial Chamber III.²³ In the Kenya cases, Trial Chamber V determined that victims who did not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through common legal representation, were not required to submit written applications to participate in the trial. A simple registration by the Registry, with no judicial involvement, was in those cases sufficient in order to be granted victim status.²⁴ Additionally, in the *Ntaganda* case and in the *Ongwen* case, Pre-Trial Chamber II ordered that a simplified and shortened form be used.²⁵ A simplified form was also used for applications at the trial stage in the *Ntaganda* case, however Trial Chamber VI established a different procedure for the admission of victims to participate in that trial: the Trial Chamber required the Registry to assess individual victim applications on the basis of clear guidelines outlined by the Chamber, which retained ultimate authority over the process.²⁶

²² See for example, ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, para 102. At the time of the first six victims to ever apply for participation in ICC proceedings, the VPRS had not yet developed an application form. The forms used by the applicants were therefore forms created by the NGO Fédération Internationale des Ligues des Droits de l'Homme (FIDH) for taking testimonies during fact-finding missions. These forms contained the information required by Regulation 86(2) of the Regulations of the Court and were, therefore, accepted by the Chamber (Interview with Mariana Pena, Legal Officer, Open Society Justice Initiative, 17 November 2014 (records on file with the authors)).

²³ ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber III, Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-33, 6 February 2012. See also, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, 5 April 2012.

²⁴ ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on Victim's Representation and Participation, ICC-01/09-01/11-460, 3 October 2012, paras 48–55; *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on Victims' Representation and Participation, ICC-01/09-02/11-498, 3 October 2012, paras 47–54.

²⁵ ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, 28 May 2013, para 21; *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, paras 14.

²⁶ ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, 6 February 2015, paras 20–40.

In general terms, where a special application procedure has not been adopted, all applications must contain certain minimum information in order to be considered complete by a Chamber. This includes most importantly, but not exhaustively, the following:²⁷

- the identity of the applicant (with documentary proof attached),
- the harm suffered by the applicant,
- the location and date of the crime,
- the applicant's signature or mark showing his or her consent.

Where an application is missing required information or documents, the VPRS may request supplementary information from applicants, persons acting on their behalf, states, the Prosecution or intergovernmental or non-governmental organisations.²⁸ In practice, these requests are hardly made to such entities. If anything, requests are made by the VPRS to the victims themselves, persons acting on behalf of victims or intermediaries.²⁹

At the ECCC, one standard application form ("Victim Information Form") is used. It is 5 pages long and available on the ECCC website in English, French and Khmer. The applicant is requested to provide personal information about himself or herself, sufficient proof of identity,³⁰ details of the status as a victim, information about the alleged crime(s), and any evidence of the injury suffered or tending to show the guilt of the alleged perpetrator(s).³¹ The applicant is given the option to request to join as a civil party (Part C of the Victim Information Form). For notification purposes, the applicant must also provide an address in Cambodia.³²

Applicants must use the form provided by the Court and submit their applications in writing.³³ According to the ECCC Practice Direction on Victim Participation all civil party applications shall be submitted to the VSS.³⁴

²⁷ For further details, see Sect. 2.4.1 below and Chap. 3.

²⁸ ICC Regulations of the Court, Regulation 86(4).

²⁹ Interview with Anushka Sehmi, former legal assistant/case manager for the Legal Representative of Victims in *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, 21 February 2015 (records on file with the authors). See for example, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 27.

³⁰ Possible ways to prove identity are listed in the form: identity card (also student or employee card), voting card, letter from Local Authority, driver's license, passport, camp registration card, card from humanitarian agency (such as United Nations High Commissioner for Refugees, World Food Program).

³¹ ECCC Internal Rules, Rule 23bis(4).

³² Ibid.

³³ See Article 3.6 of the ECCC Practice Direction on Victim Participation, 02/2007/Rev.1 (2008) (ECCC Practice Direction on Victim Participation); and ECCC Internal Rules, Rule 23bis(2).

³⁴ ECCC Practice Direction on Victim Participation, Articles 3.4 and 3.7.

At the STL, a 9-page application form is used, available on the Tribunal's website in French, Arabic and English. Most importantly, applicants are asked to submit the following information:

- personal information relating to the victim,
- a brief explanation of the events as a result of which he or she became a victim (i.e. the circumstances and the damage, loss or harm),
- documentary proof relating to the victim's identity and the harm suffered.

If an application does not contain all the required information, the VPU is in charge of contacting the applicant to request such information.

The STL may produce an amended form which takes into account Rule changes and jurisprudence since the original form was developed.³⁵

2.3.2 Assistance to Applicants

At the ICC, according to Regulation 86(9) of the Regulations of the Court, a specialised unit 'shall be responsible for assisting victims and groups of victims.' This unit is the VPRS. However, because of its limited capacity and resources and also because of logistical and security challenges, the VPRS has, since the early cases, relied at least in part on intermediaries to execute this task. This practice has been recognised by Pre-Trial Chamber II in the *Ntaganda* case. Although it considered that '[the] VPRS should be directly involved in assisting the applicants to fill the simplified forms',³⁶ the Chamber, taking note of observations from the Registry, acknowledged the Court's lack of resources and field presence, while citing considerable security concerns.³⁷ Therefore, it was affirmed that the VPRS, while retaining control and responsibility for the performance of the tasks, may benefit from the assistance of intermediaries, such as community leaders, *chefs du village* or staff members of local NGOs.³⁸

Rule 12*bis* of the ECCC Internal Rules provides that, under the supervision of the Co-Investigating Judges, the VSS is in charge of assisting victims in submitting civil party applications. However, in practice, assistance to victims in collecting their stories and supporting their decisions concerning participation in the proceedings is not coordinated by the ECCC's own services, but rather is

³⁵ Written correspondence with Megan Hirst, former legal officer, Victims' Participation Unit, STL, 2 March 2015 (records on file with the authors).

³⁶ ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, 28 May 2013, para 26.

³⁷ *Ibid.*, para 27.

³⁸ *Ibid.* See also *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, paras 23–34. See also Chap. 4.

conducted through intermediary organisations. In *Case 002*, 82% of the civil party applications were filed with the assistance of intermediaries.³⁹

One challenge that has arisen in the early stages of assisting victims to complete applications for civil party status is the lack of certainty about what the scope of the case would eventually be. This was a particular problem in *Case 002*. Eventually, the Office of the Co-Investigating Judges issued a press release disclosing the scope of the investigation. However, significant work had to be done in order to re-contact applicants to collect additional information required in the light of the scope of the investigation.⁴⁰

At the STL, the VPU is the main contact for assistance in completing application forms. A Liaison Officer assists victims in filling in their applications. This Officer and other relevant staff meet victims, applicants and potential applicants. Moreover, the VPU staff contact an applicant when further information is needed in an application form.

Additionally, some applicants have been assisted by persons other than the VPU staff or Liaison Officer to complete their forms. As an example, some applicants had their own private lawyers who completed the form for them.⁴¹ In some cases, the Tribunal-designated LRVs have assisted applicants in completing the forms and submitting them to the VPU. This has happened where already-participating victims brought their relatives to the LRVs for assistance with completing application forms.⁴²

2.3.3 Time Limits in the Application Process

Except for Regulation 86(3) of the ICC's Regulations of the Court, according to which '[v]ictims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate', no guidance can be found in the ICC's legal documents regarding deadlines for submission of applications by victims to the Registry or, more precisely, to the VPRS.

The practice of the chambers has not been consistent on this issue. In *Lubanga*, no deadlines were set for the submission of victim applications to the VPRS, or for transmission by the VPRS to the Chamber. Consequently, the section received

³⁹ ECCC, *Case 002*, Office of the Co-Investigating Judges, Closing Order, Case No.002/19-09-2007-ECCC-OCIJ, 15 September 2010, para 11.

⁴⁰ Interview with Silke Studzinsky, former civil party lawyer, ECCC, 24 February 2015 (records on file with the authors).

⁴¹ Written correspondence with Megan Hirst, former legal officer, Victims' Participation Unit, STL, 24 January 2015 (records on file with the authors).

⁴² Written correspondence with Kinga Tibori-Szabó, former associate legal officer, Legal Representative of Victims, STL, 19 March 2015 (records on file with the authors).

applications on an ongoing basis, throughout the entire proceedings, including at late stages of the trial and during the subsequent appeal.⁴³

In some other cases, chambers set a deadline for the submission of victim applications to the VPRS. This deadline concerned particular phases of the proceedings, such as the confirmation of charges hearings or the trial itself.⁴⁴ In most cases, however, no deadlines have been set for the submission of applications to the VPRS; instead a deadline is often set for the VPRS to transmit these applications to the relevant chamber.⁴⁵ Such deadlines enable the chambers to decide in a timely way on issues related to victim applications, i.e. before the confirmation of the charges or the trial.

The difference between the two types of deadlines (i.e. a deadline set for the submission of application forms to the VPRS, and a deadline set for the VPRS to

⁴³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Order on the Applications by Victims to Participate and for Reparations, ICC-01/04-01/06-2838, 27 January 2012, paras 5–6; *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Decision on a/2922/11's Application to Participate in the Appeals proceedings, ICC-01/04-01/06-3052-Red, 3 October 2013.

⁴⁴ ICC, *Prosecutor v. Germain Katanga et Mathieu Ngudjolo Chui*, Trial Chamber II, Décision relative au traitement des demandes de participation, ICC-01/04-01/07-933, 26 February 2009, para 27; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision Setting a Time-Limit for the Submission of New Victims' Applications for Participation, ICC-01/05-01/08-875, 7 September 2010, para 9; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Corrigendum to the Decision on 401 Applications by Victims to Participate in the Proceedings and Setting a Final Deadline for the Submission of New Victims' Applications to the Registry, ICC-01/05-01/08-1590-Corr, 21 July 2011, para 25; *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, 5 April 2012, para 37.

⁴⁵ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Order of the Appeals Chamber on the Date of Filing of Applications for Participation and on the Time of the Filing of the Responses thereto by the OPCD and the Prosecutor, ICC-01/04-480, 29 February 2008, p. 2; ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Order of the Appeals Chamber on the Date of Filing of Applications for Participation and on the Time of the Filing of the Responses thereto by the OPCD and the Prosecutor, ICC-01/04-481, 29 February 2008, p. 2; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para 189; *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on Victim Participation, ICC-01/05-01/08-103-tEN-Corr, 12 September 2008, p. 5; *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision Concerning the Time Limit for the Submission of New Victim Applications, ICC-01/05-01/08-305, 2 December 2008, para 1; *Prosecutor v. Germain Katanga et Mathieu Ngudjolo Chui*, Trial Chamber II, Décision relative au traitement des demandes de participation, ICC-01/04-01/07-933, 26 February 2009, para 27; *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Designation of a Single Judge on Victims' Issues and on the Deadline for the Filing of Applications for Participation, ICC-02/05-02/09-55-RSC, 19 August 2009, p. 6; *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Order Setting a Deadline for the Transmission of Applications for Victims' Participation, ICC-01/04-01/10-78, 15 March 2011, p. 3; *Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-02/11-23, 30 March 2011, para 17; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-01/11-17, 30 March 2011, para 17.

transmit these applications to the judges) is significant because sometimes applications have been received by the VPRS before a deadline for transmission to the chamber, but without sufficient time to be processed and transmitted by the VPRS before the deadline.⁴⁶ This can be problematic as victims do not have certainty as to when they have to submit their applications in order for them to be processed and transmitted in time.

In the case of the ECCC, Internal Rule 23*bis*(2) makes it clear that when a victim wishes to be joined as a civil party, he or she shall submit such application in writing no later than fifteen days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation.

This deadline was inserted in the ECCC Internal Rules in September 2009,⁴⁷ and has been applied in *Cases 002, 003, and 004*. For *Case 001*, the deadline for submitting applications was ten working days before the initial hearing.⁴⁸

In *Case 001*, the Trial Chamber rejected an application submitted after the deadline, because the applicant could not demonstrate exceptional circumstances preventing him from applying within the deadline.⁴⁹

The STL legal documents do not provide a deadline for the submission of applications for victims' participation.⁵⁰

In *Ayyash et al.*, the Pre-Trial Judge considered it necessary to set a deadline during pre-trial proceedings, before which applications had to be received by the

⁴⁶ See for example, ICC, *Prosecutor v. Callixte Mbarushimana*, Registrar, Proposal on Victim Participation in the Confirmation Hearing, ICC-01/04-01/10-213, 6 June 2011, paras 1–6; and *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the “Proposal on Victim Participation in the Confirmation Hearing”, ICC-01/04-01/10-229, 10 June 2011, especially at p. 5 where the Judge noted that ‘applicants whose Applications have not been submitted by [the deadline] will not be permitted to participate in the proceedings related to the confirmation hearing’.

⁴⁷ See Rule 23(3) of the ECCC Internal Rules, Rev. 4 (2009).

⁴⁸ See Rule 23(4) of the ECCC Internal Rules, Rev. 3 (2009).

⁴⁹ ECCC, *Case 001*, Trial Chamber, Decision on Request to Extend Deadline for the Filing of Civil Party Applications, Case No.001/18-07-2007-ECCC/TC 10 March 2009. In this case, an application was filed two days late by a victim, for the reason that the victim was unaware of the filing deadline and acted as soon as he became aware of it. The Chamber considered this reason insufficient to grant an extension of the deadline to the victim, particularly in light of the efforts that had been made by the Court to inform the public of the deadline. The Chamber ruled, in particular, that ‘[a]lthough, pursuant to Rule 23(4) [revision 3 of the Internal Rules], the President may alter deadlines for the filing of civil party applications, the exercise of this discretion must be supported by cogent reasons. Further, it must ensure equal treatment of all victims and avoid the appearance of individual dispensation. Consequently, an extension of this deadline for one civil party applicant shall either result in an extended deadline for all applicants or, where requested only in relation to one particular applicant, may be granted only in exceptional circumstances.’ (para 9). See also ECCC Internal Rules, Rule 39(1) and (4).

⁵⁰ Rule 86(A) of the STL RPE specifies that the Pre-Trial Judge must have confirmed an indictment under Rule 68 before a person claiming to be a victim of a crime within the Tribunal’s jurisdiction may request the status of victim participating in the proceedings.

VPU.⁵¹ However, the Pre-Trial Judge also made it clear that applications submitted after the deadline would be considered as long as valid reasons explaining the delay could be provided.⁵² In practice the Pre-Trial Judge has accepted a variety of reasons including fear of applying to participate as a victim in the proceedings,⁵³ or a lack of awareness or misunderstanding of victims' rights at the time of the initial deadline.⁵⁴ To date no applications submitted after the deadline have been rejected for that reason.⁵⁵

2.4 Procedure Once an Application for Participation Has Been Submitted to the ICC, the ECCC or the STL

This section examines the detailed procedure that follows once an application for participation has been received by the VPRS (at the ICC), the VSS (at the ECCC) or the VPU (at the STL), and up until a decision on it is taken by the relevant chamber. An overview of this procedure will first be provided before explaining the following important related issues:

- *Parties' observations*: Are the Defence and the Prosecution entitled to make observations on the applications for participation?
- *Protection*: How is any information identifying the applicants protected if the applications are provided to the parties?
- *Appeals*: Are the Defence, the Prosecution and/or the applicants able to appeal decisions taken by a chamber on applications for participation?

2.4.1 Assessment of Victims' Applications

Once the ICC's VPRS has received applications for participation, it is then responsible for verifying the completeness of these documents.⁵⁶ This verification should be carried out within any time limit set by the relevant chamber. Where information

⁵¹ STL, *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* ('Ayyash et al. '), Pre-Trial Judge, Scheduling Order Regarding the Deadline for Filing Applications to Participate in the Proceedings as a Victim, STL-11-01/I/PTJ, 8 September 2011, para 4.

⁵² *Ibid.*, para 7.

⁵³ STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Second Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 3 September 2012, para 11.

⁵⁴ STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Fifth Decision on Victim's Participation in the Proceedings, STL-11-01/T/PTJ, 18 July 2014, para 11; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Sixth Decision on Victims' Participation in the Proceedings, STL-11-01/T/PTJ, 6 November 2014, paras 3 and 11.

⁵⁵ *Ibid.* See also, STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Second Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 3 September 2012, para 11.

⁵⁶ ICC Regulations of the Court, Regulation 86(4).

or documentation is missing, the VPRS is required to request it before the application is submitted to the relevant chamber. The practice of the chambers however differs where those requests prove to be unsuccessful within a reasonable period of time. While some chambers will still require the VPRS to present incomplete applications to them for consideration,⁵⁷ some others have instructed the VPRS not to transmit those incomplete applications to the relevant chamber at all.⁵⁸

In practice, applications are considered complete when they contain the following:⁵⁹

⁵⁷ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation and Legal Representation, ICC-01/04-374, 17 August 2007, paras 8–11; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008, para 80; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Décision relative au traitement des demandes de participation, ICC-01/04-01/07-933, 26 February 2009, paras 26–27.

⁵⁸ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on Victim Participation, ICC-01/05-01/08-103-tENG-Corr, 12 September 2008, para 8; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision Defining the Status of 54 Victims who Participated at the Pre-Trial Stage, and Inviting the Parties' Observations on Applications for Participation by 86 Applicants, ICC-01/05-01/08-699, 22 February 2010, paras 35 and 37; ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, 28 May 2013, para 29.

⁵⁹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation and Legal Representation, ICC-01/04-374, 17 August 2007, para 12; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", ICC-01/04-01/07-579, 10 June 2008, para 44; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008, para 81; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Décision relative au traitement des demandes de participation, ICC-01/04-01/07-933, 26 February 2009, para 28; ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-121, 25 September 2009, para 7; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision Defining the Status of 54 Victims who Participated at the Pre-Trial Stage, and Inviting the Parties' Observations on Applications for Participation by 86 Applicants, ICC-01/05-01/08-699, 22 February 2010, para 35; ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-01/11-17, 30 March 2011, para 19; ICC, *Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-02/11-23, 30 March 2011, para 19; ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249, 5 August 2011, para 57; ICC, *Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, 26 August 2011, para 71; ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Corrigendum to the Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-384-Corr, 6 February 2013, para 36; ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, 15 January 2014, para 60; ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 28.

- the identity of the applicant,
- the date and location of the crime(s),
- a description of the harm suffered as a result of the crime(s),
- proof of identity,
- the express consent of the victim, if the application is made by a person acting on behalf of a victim with the victim's consent,
- proof of kinship or legal guardianship, if the application is made by a person acting on behalf of a victim who is a child,
- proof of legal guardianship, in the case of a victim who is disabled,
- a signature or thumb-print of the applicant on the document.⁶⁰

Once verified as complete, the applications are sent by the VPRS, together with a report thereon, to the relevant chamber for consideration.⁶¹ The report contains an initial assessment of the requirements of Rule 85 of the ICC RPE. In addition, chambers generally ask the VPRS to include an assessment as to which applications might be accepted, rejected, or raise difficult issues, and may also request a one-paragraph summary for each victim which reflects the information contained in the application analysed in respect of each of the requirements of Rule 85.⁶² While the chamber may be guided by the VPRS's initial assessment, it remains for the chamber itself to determine whether the victim should be permitted to participate in the proceedings or not.

The VPRS also provides a copy of the applications to the Prosecution and the Defence, who are entitled to reply within a time limit to be set by the chamber (see further below Sect. 2.4.3 regarding the redaction of the applications provided to the parties).⁶³ Initially the VPRS's reports to the chambers were not provided to

⁶⁰ See Chap. 3.

⁶¹ ICC Regulations of the Court, Regulation 86(5).

⁶² ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, ICC-02/04-191, 9 March 2012, para 27; ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-01/11-17, 30 March 2011, para 21; ICC, *Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, ICC-01/09-02/11-23, 30 March 2011, para 21; ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-499, 6 February 2015, para 24; ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, paras 29–30.

⁶³ ICC RPE, Rule 89(1). For an example, see ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 31.

the parties and participants.⁶⁴ However this approach has since changed before at least some chambers.⁶⁵

Like the VPRS at the ICC, the ECCC's VSS is responsible, after having received applications for civil party status, for verifying their completeness. To be considered complete, applications must contain⁶⁶:

- details allowing verification of the applicant's status as victim, including, if available, a copy of an identity card or any other form of identification,
- a contact address in Cambodia,
- a description of the alleged criminal acts,
- any evidence of the injury suffered or tending to show the guilt of the alleged perpetrator or accomplices, and
- the signature or thumbprint of the applicant.

Once applications have been verified as complete, the VSS transmits them to the *Greffier* of the Office of the Co-Investigating Judges.⁶⁷ This is to be done within the time limit determined by the latter.⁶⁸

At the STL, once the VPU has received applications for participation, it verifies their completeness and then transmits the documents to the Pre-Trial Judge.⁶⁹

To verify whether or not an application is complete, the VPU focuses its assessment on Rule 86(B)(i) of the STL RPE, i.e. on whether the applicant has provided *prima facie* evidence that he or she is a victim as defined in Rule 2 of the STL

⁶⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, 9 November 2007, paras 21–27; ICC, *Situation In the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2007, paras 32–38; ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision on the Requests of the OPCD and the Legal Representatives of the Applicants Regarding the Transmission of the Report of the Registry under rule 89 of the Rules of Procedure and Evidence, ICC-02/05-93, 21 August 2007.

⁶⁵ ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-499, 6 February 2015, para 24 (iv); ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 31.

⁶⁶ ECCC Practice Direction on Victim Participation, Article 3.5; ECCC Internal Rules, Rule 23bis(4).

⁶⁷ ECCC Practice Direction on Victim Participation, Articles 3.4 and 3.7. Note that in *Case 001*, applications were transmitted to the Trial Chamber after the case file was submitted. However, the competence to decide on civil party admissibility is now vested only in the Co-Investigating Judges.

⁶⁸ ECCC, *Case 002*, Office of the Co-Investigating Judges, Interoffice memorandum, Deadline for Supplementary Information, Case No. 002/19-09-2007-ECCC/OCIJ, 9 April 2010; ECCC, *Case 002*, Office of the Co-Investigating Judges, Interoffice memorandum, Deadline for Filing Supplementary Information, Case No. 002/19-09-2007-ECCC/OCIJ, 29 April 2010.

⁶⁹ STL RPE, Rule 51(B)(iii).

RPE.⁷⁰ More particularly, the VPU concentrates on whether the applicant has provided: '(a) particulars of how the victim meets the definition of 'victim' in Rule 2; and (b) evidence in support of those particulars.'⁷¹ Regarding the criteria listed in Rule 86(B)(ii) to (x), the VPU does not treat them as 'issues needing to be addressed in order for an applicant to be considered complete. However, where, in the process of its review for completeness, information relevant to the latter considerations has been identified, it is brought to the attention of the Pre-Trial Judge in the relevant Application Summary.'⁷²

The VPU generally sends the application forms altogether with an executive summary of each individual application.⁷³ These documents are filed as confidential and *ex parte*. They are not provided to either the Defence or Prosecution as they contain information identifying the applicants.⁷⁴ The application forms and the executive summaries of successful applicants are however provided to the LRVs, once the status of participating victim has been granted.

Neither the STL's RPE nor its case-law gives the VPU a timeframe for transmitting new applications to the Pre-Trial Judge after they have been received. In practice, the VPU transmits such applications on a rolling basis to the Pre-Trial Judge.⁷⁵ Applications may sometimes be held for several weeks if this will facilitate the filing of a group of applications together, and applications will also be held pending attempts to gather further documentation to complete the application. Subject to these considerations, applications are transmitted as soon as possible after they have been received and processed by the VPU.⁷⁶

⁷⁰ STL, *Prosecutor v. Ayyash et al.*, Victims' Participation Unit, Transmission of Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 9 February 2012, para 14.

⁷¹ *Ibid.*, para 15.

⁷² *Ibid.*, para 9.

⁷³ In its first transmission of 9 February 2012, the VPU also submitted to the Pre-Trial Judge an overview summarising the procedures employed by the VPU in the receipt and administration of applications, as well as some features of the applicants and their applications. STL, *Prosecutor v. Ayyash et al.*, Victims' Participation Unit, Transmission of Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 9 February 2012, para 9.

⁷⁴ STL, *Prosecutor v. Ayyash et al.*, Victims' Participation Unit, Transmission of Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 9 February 2012, paras 5 and 9. See also, STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 5 April 2012.

⁷⁵ STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Transmission of Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 9 February 2012; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Sixth Transmission by the VPU pursuant to Rule 51(B)(iii), STL-11-01/T/PTJ, 27 June 2014; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Seventh Transmission by the VPU pursuant to Rule 51(B)(iii), STL-11-01/T/PTJ, 28 October 2014.

⁷⁶ Written correspondence with Megan Hirst, former legal officer, Victims Participation Unit, STL, 1 March 2015 (records on file with the authors).

2.4.2 *Observations by the Parties*

Under Rule 89(1) of the ICC RPE, the Registrar shall provide a copy of the applications to the Prosecution and to the Defence, ‘who shall be entitled to reply within a time limit set by the Chamber.’ Observations on applications for participation can then be made by the parties.⁷⁷

Such observations are frequently made by the Defence on a diverse range of issues. These have included, for example, questions such as who has the legal standing to submit applications,⁷⁸ the timing of the application,⁷⁹ the completeness of the application forms, the anonymity of the applicants,⁸⁰ the required identification documents,⁸¹ the redactions made on the applications,⁸² the harm allegedly suffered by the applicant,⁸³ and the question of a link between the harm suffered and the crimes with which the defendant is charged.⁸⁴ These observations

⁷⁷ See Sect. 2.4.3 of this chapter for details on redactions made to victim applications.

⁷⁸ For example, in the *DRC Situation*, the Defence argued that FIDH (Fédération Internationale des Ligues des Droits de l’Homme) had no standing to file any document on behalf of victims. The Pre-Trial Chamber rejected that view. ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, para 104.

⁷⁹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the “Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings”, ICC-01/05-01/08-968, 22 October 2010, paras 5–6.

⁸⁰ ICC, *Prosecutor v. Germain Katanga*, Defence, Defence Response to the Legal Representatives of Victims Requests to Participate in the Appeal Proceedings, ICC-01/04-01/07-3491, 13 June 2014, para 10.

⁸¹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the “Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings”, ICC-01/05-01/08-968, 22 October 2010, paras 25 and 28.

⁸² ICC, *Prosecutor v. Laurent Gbagbo*, Defence, Observations de la Défense du Président Gbagbo concernant les 57 demandes individuelles et les 6 demandes collectives de participation des victimes, ICC-02/11-01/11-133, 28 May 2012, para 18; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the “Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings”, ICC-01/05-01/08-968, 22 October 2010, paras 7–12.

⁸³ ICC, *Prosecutor v. Laurent Gbagbo*, Defence, Observations de la Défense du Président Gbagbo concernant les 57 demandes individuelles et les 6 demandes collectives de participation des victimes, ICC-02/11-01/11-133, 28 May 2012, paras 51–55.

⁸⁴ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the “Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings”, ICC-01/05-01/08-968, 22 October 2010, para 22.

generally tend to reflect the Defence's opposition to the victims' applications, and frequently include a request for rejection of at least some applications.⁸⁵

The Prosecution also submits observations on victim applications. Prosecution observations have focused, for example, on whether the harm suffered by the applicant resulted from a crime with which the defendant is charged.⁸⁶

Applicants are not entitled to respond to these observations.⁸⁷

Time limits to file observations are established by the relevant chamber when requesting such observations, following a transmission of applications by the Registry to the chamber.

Since addressing such observations adds a considerable amount of time to the proceedings, including the time required by the Registry to redact the application forms prior to transmission and the time required by the parties to review such applications and, if appropriate, file observations,⁸⁸ it has been suggested that parties' rights to file observations on victim applications should be limited.⁸⁹ Some of the advantages identified in adopting this approach would be: time and resource saving for the Registry, protection of victims' identities, time saving for the parties (and thus a reduction in legal aid expenditures on Defence work), expedition of decision-making on victim applications, and expedition of the judicial proceedings in general.⁹⁰ However, concerns about this approach have also been identified: the right of the Defence to be heard could be undermined, it might not represent a time saving approach in the long-term (if submissions on the victim applications

⁸⁵ For example, in the *Bemba* case, the Defence requested the rejection of 176 applicants. ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the "Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings", ICC-01/05-01/08-968, 22 October 2010, para 30.

⁸⁶ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecutor, Prosecution's Observations on the Applications for Participation in the Proceedings of 24 Applicants, ICC-01/05-01/08-206-Red, 4 November 2008, para 35.

⁸⁷ ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on the request by the Office of Public Counsel for Victims dated 21 October 2008, ICC-02/04-162, 23 October 2008; ICC, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Pre-Trial Chamber II, Decision on the request by the Office of Public Counsel for Victims dated 21 October 2008, ICC-02/04-01/05-322, 23 October 2008.

⁸⁸ Indeed, the Defence have often complained that these steps entail a great amount of time and resources. See for example: ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, ICC-01/05-01/08-945, 11 October 2010, para 5; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the "Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings", ICC-01/05-01/08-968, 22 October 2010, paras 5–6; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the "Seventh Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings", ICC-01/05-01/08-1053, 26 November 2010, para 5.

⁸⁹ ICC, Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22 2012, paras 58–63.

⁹⁰ *Ibid.*

are made at a later stage) and it could moreover be disadvantageous for victims themselves, if it meant they would lack certainty regarding their status.⁹¹

In the *Ntaganda* case, Trial Chamber IV required the Registry to group applications into three categories: those which clearly qualified, those which clearly did not qualify, and those on which the Registry was unable to make a clear determination.⁹² Only applications in the latter category were sent to the parties for their observations, following which individual determinations were made by the Chamber.⁹³ In respect of the former two categories the Chamber stated that it would ratify the Registry's assessment unless it involves a 'clear and material error.'⁹⁴ This appears to be a step forward in efficiency, as the VPRS already undertakes an assessment of the victim applications and is sufficiently trained for the task. A modified version of this system was adopted in the *Ongwen* case by the first Single Judge (Judge Ekaterina Trendafilova) of Pre-Trial Chamber II (although she required transmission to the parties for possible observations not only of applications on which a determination could not be made, but also those which the Registry considered as clearly qualifying).⁹⁵ However, before any applications had been submitted this approach was replaced by a different approach as decided by the new Single Judge (Judge Cuno Tarfusser). According to his decision, the VPRS transmitted to the Chamber and parties all applications considered by the Registry to be complete and to fall within the scope of the case, however without an applicant-by-applicant assessment.⁹⁶

At the ECCC, under Internal Rule 23*bis*, and subject to the provisions in the Internal Rules relating to the protection of victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person(s) of civil party applications. However, the ECCC Internal Rules are silent as to whether the parties may submit comments or observations.

At the STL, under Rule 86(C)(i) of the RPE, before deciding on requests for the status of a victim participating in the proceedings, the Pre-Trial Judge may seek submissions from the parties and the VPU on the relevant legal issues.⁹⁷ This enables the parties to file observations if requested by the Pre-Trial Judge. As explained in Sect. 2.4.1, in the *Ayyash et al.* case, victims' application forms were

⁹¹ Ibid.

⁹² ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on victims' participation in trial proceedings, ICC-01/04-02/06-449, 6 February 2015, paras 20–40.

⁹³ Ibid., para 24(v)–(viii).

⁹⁴ Ibid., para 24(vii).

⁹⁵ ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, paras 29–32.

⁹⁶ ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, ICC-02/04-01/15-299, 3 September 2015, paras 4–5.

⁹⁷ See STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 5 April 2012, paras 27 and 37.

not disclosed to the parties, so the observations made by the parties were in the abstract, without an opportunity to comment on particular applications.

To date, the Pre-Trial Judge has only sought observations from the parties in relation to the first batch of victim applications transmitted to him.⁹⁸ Observations were sought and filed concerning various legal issues, such as the concept of the harm suffered by the applicants, the required proximity between the direct and indirect applicants claiming victim status, and the notion of the personal interest of the victim being affected.⁹⁹

After the parties have made their observations (if permitted to do so), the Pre-Trial Judge makes a decision granting or denying the status of victim participating in the proceedings to each applicant, or occasionally defers a decision on victim status pending the collection of further documentation.¹⁰⁰

2.4.3 Protection of Victim Identities During the Application Process

As is further described in Chap. 6, before the ICC, most victims remain anonymous throughout the proceedings, meaning that their identity is not known to the parties, or at least to the Defence. While some victims will have their anonymity lifted for various reasons,¹⁰¹ the default assumption is anonymity, and for this reason, in most cases measures are imposed during the application process to protect the identity of applicants from the parties.

According to Article 43(6) of the ICC Statute, it is the responsibility of the Victims and Witnesses Section (VWS) (formerly known as the Victims and Witnesses Unit) to provide the necessary protective measures to victims who appear before the Court.¹⁰² It would nonetheless be too costly and time-consum-

⁹⁸ STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, STL-11-01/PT/PTJ, 5 April 2012, paras 2 and 57.

⁹⁹ STL, *Prosecutor v. Ayyash et al.*, Prosecutor, Prosecution's Submission in Response to the Pre-Trial Judge's Decision of 5 April 2012, STL-11-01/PT/PTJ, 23 April 2012, paras 5–16.

¹⁰⁰ For example, the Pre-Trial Judge deferred ruling on the application submitted by V079, stating that some required information was missing. STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Fifth Decision on Victim's Participation in the Proceedings, STL-11-01/T/PTJ, 18 July 2014, para 14.

¹⁰¹ See Chap. 6.

¹⁰² See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008, paras 136 and 137, in which the Chamber recalled Article 43(6) of the ICC Statute and decided that the notion of 'victims who appear before the Court' also applies to victim applicants. Therefore, once an application to participate is received by the Court, Article 43(6) of the ICC Statute is engaged and the VWS must take appropriate protective measures.

ing for a chamber to require the VWS to carry out an individual risk assessment for each of the applications received, especially knowing that some of these applications would ultimately not be deemed to meet the requirements of Rule 85(a).¹⁰³ For these reasons, ICC chambers routinely adopt redactions as an appropriate protective measure at the application stage.¹⁰⁴ Such redactions shall be made in accordance with the principle of proportionality enshrined in Article 68(1) of the ICC Statute and it is said that they shall not amount to an unnecessary restriction of the rights of the Defence.¹⁰⁵

In practice, any information that might possibly reveal the identity of the victim, if put together with other information, is redacted from the version of the

¹⁰³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision Inviting the Parties' Observations on Applications for Participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1308, 6 May 2008, para 23.

¹⁰⁴ ICC, *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation of a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, 1 February 2007, para 20; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision Inviting the Parties' Observations on Applications for Participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1308, 6 May 2008, para 24.

¹⁰⁵ ICC, *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation of a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, 1 February 2007, para 24; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision Inviting the Parties' Observations on Applications for Participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1308, 6 May 2008, para 25; ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-02/11-164, 8 July 2011, para 18; ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, 26 August 2011, para 39; ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Corrigendum to the Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-384-Corr, 6 February 2013, para 34; ICC, *Prosecutor v. Charles Blé Goudé*, Pre-Trial Chamber I, Decision on Victims' Participation in the Pre-Trial Proceedings and Related Issues, ICC-02/11-02/11-83, 11 June 2014, para 43.

application form which is transmitted to the parties. Where a crime is very specific, many of the details of the crime will be redacted, as well as many of the personal details of the applicant. Parties, particularly the Defence, have complained, as a result, that there is little useful information left unredacted in the form, thus 'compromis[ing] the receiving party's ability to investigate them and/or make meaningful submissions.'¹⁰⁶

The practice of the chambers is divided on whether the victim applications are to be provided in redacted form to both the Defence and the Prosecution, or only to the Defence (with the Prosecution receiving unredacted versions of the forms). For some chambers, the need to preserve the equality of arms between the Prosecution and the Defence requires that redacted copies of the applications be transmitted to both parties.¹⁰⁷ Other chambers ordered the Defence to be provided with applications in redacted form, while unredacted versions of the victim

¹⁰⁶ ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-499, 6 February 2015, para 28. See also: ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence, Defence Observations on the "Fourth Transmission to the Parties and Legal Representatives of Redacted Versions of Applications for Participation in the Proceedings", ICC-01/05-01/08-968, 22 October 2010, paras 7-12; ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Defence, Response on Behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the First Transmission to the Parties and Legal Representatives of Redacted Applications to Participate in the Proceedings, with Confidential Annex, ICC-01/09-01/11-102, 3 June 2011, paras 8–10; ICC, *Prosecutor v. Laurent Gbagbo*, Chambre préliminaire I, Observations de la Défense du Président Gbagbo concernant les 57 demandes individuelles et les 6 demandes collectives de participation des victimes, ICC-02/11-01/11-133, 28 May 2012, para 18; ICC, *Prosecutor v. Laurent Gbagbo*, Defence, Observations de la défense portant sur les cinquante-neuf demandes de participation de victimes transmises par le Greffe le 18 décembre 2012 en version expurgée (ICC-02/11-01/11-366), ICC-02/11-01/11-382, 5 February 2013, paras 24–26.

¹⁰⁷ ICC, *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, 1 February 2007, para 25; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision Inviting the Parties' Observations on Applications for Participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1038, 6 May 2008, para 30; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Second Decision on the Question of Victims' Participation Requesting Observations from the Parties, ICC-01/05-01/08-184, 23 October 2008, paras 12–14; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Décision relative au traitement des demandes de participation ICC-01/04-01/07-933, 26 February 2009, para 53; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision Defining the Status of 54 Victims who Participated at the Pre-Trial Stage, and Inviting the Parties' Observations on Applications for Participation by 86 Applicants, ICC-01/05-01/08-699, 22 February 2010, para 32.

applications were transmitted to the Prosecution.¹⁰⁸ Amongst the various justifications advanced for this approach was the Prosecution's obligation to respect the interests and the personal circumstances of victims,¹⁰⁹ the Prosecution's status as an organ charged with protecting victims¹¹⁰ or the fact that applications might contain exculpatory information that may be relevant for the Prosecution's investigative duties.¹¹¹ An additional difficulty can arise where the approach of sending unredacted applications to Prosecution and redacted ones to Defence occurs at pre-trial but is changed at trial. In some cases, this has created an anomalous outcome whereby the Prosecution has access to the victims' application forms that were submitted during pre-trial but not those submitted at trial.

A certain number of civil party applicants requested protective measures at the beginning of the work of the ECCC. However, their general fears dissipated as the number of applicants increased and no reprisals were experienced by them.¹¹² As a consequence, almost no requests for protective measures have been submitted to the ECCC.¹¹³

¹⁰⁸ Unredacted application forms had been transmitted to the Office of Public Counsel for Defence in the past, although this practice appears to be discontinued. See, for instance: ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2007, p. 23.

¹⁰⁹ ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision Requesting the Parties to Submit Observations on 14 Applications for Victims' Participation in the Proceedings, ICC-01/04-01/10-181, 24 May 2011, p. 5; ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Applications Process, ICC-01/04-02/06-67, 28 May 2013, para 44; ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 35.

¹¹⁰ ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision Ordering the Parties to Submit their Observations on the 52 Applications for Victims' Participation in the Proceedings, ICC-02/05-02/09-106, 16 September 2009, p. 5; ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Applications Process, ICC-01/04-02/06-67, 28 May 2013, para 44; ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 35.

¹¹¹ ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011, para 13; ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Second decision on issues related to the victims' application process, ICC-02/11-01/11-86, 5 April 2012, para 42; ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Applications Process, ICC-01/04-02/06-67, 28 May 2013, para 44; ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, ICC-02/04-01/15-205, 4 March 2015, para 35.

¹¹² Interview with Silke Studzinsky, former civil party lawyer, ECCC, 24 February 2015 (records on file with the authors).

¹¹³ *Ibid.*, For details on protective measures regarding civil parties at the ECCC, see Chap. 6.

The provision of redacted civil party applications to the Prosecution and the Defence is not provided for in any legal instruments or in the case-law of the ECCC.

Applications containing a request for protective measures are classified as strictly confidential, i.e. only accessible for the respective chamber(s) and such other persons, who require access in the discharge of their duties, expressly given access by the Court.¹¹⁴ However, the number of such applications is very low in practice.¹¹⁵

At the STL in the *Ayyash et al.* case victim applications have so far maintained their classification as confidential and *ex parte*, and as a result the need for redacted versions of those documents has not yet arisen.

2.4.4 Decisions on Victim Applications

At the ICC, after the completion of the above-mentioned steps, the relevant chamber decides whether or not each applicant is a victim according to the requirements of Rule 85 of the ICC RPE,¹¹⁶ and grants the status of victim participating in the proceedings to any successful applicants. In accordance with Regulation 86(8) of the ICC Regulations of the Court, this status shall apply throughout the proceedings in the same case, subject to modification by the chamber.¹¹⁷ The chamber's decision shall be notified to the applicant. In particular, the reasons for which an application was rejected shall be notified to the unsuccessful applicant in order to enable him or her to re-apply where appropriate.¹¹⁸

At the ECCC, from *Case 002* onwards, the Co-Investigating Judges have been required to decide on the admissibility of each of application for civil party status.¹¹⁹ The conditions of admissibility are detailed in Chap. 3. The decision of the

¹¹⁴ ECCC Practice Direction on Classification and Management of Case-Related Information, Rev. 2 (2014), Articles 2(d)(iii), 6(a) and 7.3.

¹¹⁵ Interview with Silke Studzinsky, former civil party lawyer, ECCC, 24 February 2015 (records on file with the authors).

¹¹⁶ For a comprehensive analysis of these requirements, see Chap. 3.

¹¹⁷ See Chap. 14 on the circumstances in which the status may be terminated.

¹¹⁸ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCV, ICC-01/04-418, 10 December 2007, para 17.

¹¹⁹ ECCC Practice Direction on Victim Participation, Article 3.8. The competence to decide on civil party admissibility is only vested in the Co-Investigating Judges as this power was removed from the Trial Chamber in September 2009 with Revision 4 of the ECCC Internal Rules. The Trial Chamber is therefore not competent to receive any civil party applications or to decide on their admissibility. See: ECCC, *Co-Prosecutors v. Kaing Guek Eav*, Supreme Court Chamber, Appeal Judgment, Case No. 001/18-07-2007-ECCC/SC, 3 February 2012, para 511.

Co-Investigating Judges is notified to the applicant¹²⁰ and must be duly justified, particularly when an application is rejected.¹²¹

At the STL, to decide on applications for participation, the Pre-Trial Judge considers whether the applicant satisfies the four mandatory and cumulative requirements of Rule 86(B)(i) to (iv). In addition, the Pre-Trial Judge may also take into account the six non-mandatory criteria set out in Rule 86(B)(v) to (x). These requirements are detailed in Chap. 3. In his decisions on victim status, the Pre-Trial Judge has set specific deadlines by which the VPU must notify victims of the decisions on their requests for participation.¹²²

2.4.5 Appeals Against Decisions on Victim Applications

At the ICC, an applicant has no standing to appeal (or request leave to appeal) a decision of the relevant chamber which has rejected his or her application for participation.¹²³ However, Rule 89(2) of the ICC RPE clarifies that an unsuccessful applicant may file a fresh application.

By contrast, the parties may be granted leave to appeal a decision on a victim's application, provided that the conditions of Article 82(1)(d) of the ICC Statute are fulfilled. This means that the decision of the relevant chamber must involve an issue that would significantly affect the fair and expeditious conduct of the

¹²⁰ This requirement can be deduced from Internal Rules 23bis(3) and 77bis(2).

¹²¹ ECCC, *Case 002*, Pre-Trial Chamber, Decision on Appeals against Order of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), 24 June 2011, paras 37–40.

¹²² STL RPE, Rule 51(B)(v) and 86(C)(i). See also, STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 8 May 2012, p. 42; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Second Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 3 September 2012, p. 5; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Third Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 28 November 2012, p. 5; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Fourth Decision on Victims' Participation in the Proceedings, STL-11-01/PT/PTJ, 2 May 2013, para 31; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Fifth Decision on Victims' Participation in the Proceedings, 18 July 2014, STL-11-01/T/PTJ, para 15; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Sixth Decision on Victims' Participation in the Proceedings, STL-11-01/T/PTJ, 6 November 2014, para 14.

¹²³ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCV, ICC-01/04-418, 10 December 2007, para 16.

proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹²⁴

Civil party applicants at the ECCC have a right to appeal decisions of the Co-Investigating Judges declaring their applications inadmissible.¹²⁵ This appeal shall be filed before the Pre-Trial Chamber by the applicant.¹²⁶

As required by Internal Rule 23bis(2) and (3), an appeal of this kind is an expedited one. This means that the appeal must be filed within 10 days of the decision in question and no extension of time shall be granted.¹²⁷ This may create substantial practical difficulties for lawyers representing civil parties where a large number of applications are rejected in a single decision or within a short space of time. For example, in *Case 002*, the Office of the Co-Investigating Judges issued several orders on admissibility of civil party applications within approximately three weeks during August and September 2010.¹²⁸ These orders decided upon the bulk of the nearly 4000 civil party applications and a great number of those applications

¹²⁴ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6, ICC-01/04-135-tEN, 31 March 2006; ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008; ICC, *Prosecutor v. Joseph Kony et al.*, Appeals Chamber, Judgment on the Appeals of the Defence against the Decisions Entitled "Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, ICC-02/04-01/05-371, 23 February 2009.

¹²⁵ ECCC Internal Rules, Rule 74(4)(b).

¹²⁶ *Ibid.*, Rule 23bis(2).

¹²⁷ *Ibid.*, Rule 77bis(2).

¹²⁸ The Office of the Co-Investigating Judges issued the orders of admissibility per province. See, for example: ECCC, *Case 002*, Order on Admissibility of Civil Party Applicants from Current Residents of Rattanakiri Province, 26 August 2010 (approx. 17 admissible and 16 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Mondulakiri Province, 26 August 2010 (approx. 31 admissible and 27 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Stung Treng Province, 30 August 2010 (approx. 34 admissible and 37 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Koh Kong Province, 30 August 2010 (approx. 41 admissible and 22 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Takeo Province, 31 August 2010 (approx. 60 admissible and 13 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Preah Sihanouk Province, 2 September 2010 (approx. 45 admissible and 60 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Phnom Penh, 6 September 2010 (approx. 109 admissible and 26 inadmissible applications); Order on Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province, 14 September 2010 (approx. 111 admissible and 97 inadmissible applications).

were found to be inadmissible. A large number of appeals had thus to be filed within the shortened deadline of 10 days by the lawyers representing these applicants.¹²⁹ Appeals are decided on the basis of written submissions alone.¹³⁰

Under the ECCC's Internal Rules, the right to appeal decisions of the Co-Investigating Judges on civil party applications is also open to the Co-Prosecutors¹³¹ and, when civil party status has been granted, to the charged person or the accused.¹³² Such appeals are subject to the same procedural rules as those applying to applicants' appeals on admissibility decisions.¹³³

At the STL, an unsuccessful applicant may appeal the Pre-Trial Judge's decision within seven days of receiving notification from the VPU, and may base such an appeal on questions of fact or of law.¹³⁴ The Directive on Victims' Legal Representation permits the designation of a duty counsel for this purpose.¹³⁵

The parties may also appeal a decision of the Pre-Trial Judge concerning an application for victim participation, but only after obtaining certification under Rule 126 of the STL RPE and only on the basis of an error of law.¹³⁶

To date no appeals or requests for certification have been made at the STL against decisions on victim applications.

2.5 Key Points

Institutional players

- At the ICC, the Victims Participation and Reparations Section (VPRS) plays the main role in the victims' application process.
- At the ECCC, the Victims Support Section (VSS) is the central contact point between the Extraordinary Chambers and the victims. The VSS is mandated to inform victims about their rights relating to participation and reparation and, under the supervision of the Co-Investigating Judges, assist victims in processing their civil party applications. It also assists victims in obtaining legal advice or identifying a lawyer, and supports civil party lawyers. Besides the VSS, the ECCC relies on several intermediary organisations, some of which are based abroad, which provide support to victims during the application process.

¹²⁹ Interview with Silke Studzinsky, former civil party lawyer, ECCC, 24 February 2015 (records on file with the authors).

¹³⁰ ECCC Internal Rules, Rule 77bis(1).

¹³¹ Ibid., Rule 74(2).

¹³² Ibid., Rule 74(3)(i).

¹³³ Ibid., Rule 77bis(1) and (2).

¹³⁴ STL RPE, Rule 86(C)(i).

¹³⁵ STL Directive on Victims' Legal Representation, STL-BD-2012-04-Rev.1-Corr.1, (2012), Article 18.

¹³⁶ STL RPE, Rule 86(C)(i).

- At the STL, the Victims' Participation Unit (VPU) has been set up within the Registry to assist victims to participate in the proceedings. Its tasks include locating and reaching out to victims, informing victims of their rights, receiving applications, and verifying that applications are complete and transmitting them to the Pre-Trial Judge.

The Application Process

- The submission of a written application form is the first step a victim must take in order to participate in court proceedings.
- At the ICC, a standard individual application form of 7 pages is available on the ICC website in both English and French. It is however not compulsory for an applicant to use this specific application form. What matters is the content of the application. All applications must contain certain minimum information in order to be considered complete by a chamber.
- At the ECCC, one standard application form is used. It is 5 pages long and available on the ECCC website in English, French and Khmer.
- At the STL, a 9-page application form is used, available on the Tribunal's website in French, Arabic and English.
- Assistance is generally provided to the applicant in order to reduce any burdens that may be associated with the submission of an application for participation to the ICC, the ECCC or the STL.
- The chambers of the three courts have developed various practices regarding deadlines for the submission of victims' applications.

Parties' Observations during the Application Process

- Under Rule 89(1) of the ICC RPE, the Registrar provides a copy of the applications to the Prosecution and to the Defence, who are permitted to submit observations within a time limit set by the chamber. Victims are not entitled to respond to these observations.
- At the ECCC, under Internal Rule 23*bis*, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person(s) of civil party applications. The ECCC Internal Rules are silent as to whether the parties can submit comments or observations.
- Under Rule 86(C)(i) of the STL RPE, before deciding on requests for the status of a victim participating in the proceedings, the Pre-Trial Judge may seek submissions from the parties and the VPU on relevant legal issues. In the *Ayyash et al.* case, victims' application forms were not provided to the parties, so any observations made by the parties were made in the abstract, without reference to the specific applications.

Protecting applicants during the application process

- Before the ICC, most victims remain anonymous throughout the proceedings, meaning that their identity is not known to the parties (or at least to the Defence). While some victims will have their anonymity lifted for various reasons, the default assumption is anonymity, and for this reason, ICC chambers

commonly adopt redactions as an appropriate protective measure at the initial application stage

- At the ECCC, applications containing a request for protective measures are classified as strictly confidential, i.e. only accessible for the respective chamber(s) and such other persons as are given access by the Court in order to discharge their official duties.
- At the STL, victim applications in the *Ayyash et al.* case have so far maintained their classification as confidential and *ex parte*, and as a result the need for redacted versions of those documents has not yet arisen.

Appeals against decisions on victim applications

- At the ICC, an applicant has no standing to appeal a decision of the relevant ICC chamber when his or her application for participation is rejected. However, an unsuccessful applicant may file a new application.
- At the ECCC, civil party applicants have a right to appeal decisions of the Co-Investigating Judges declaring their applications inadmissible. This appeal shall be filed before the Pre-Trial Chamber by the applicant.
- At the STL, an unsuccessful applicant may appeal the Pre-Trial Judge’s decision rejecting his or her application for participation, and may do so on a question of law or of fact.

Appendix—Steps in the Application Process

ICC

Steps	Relevant provisions	Main issues to consider
1. Submission	Rule 89 of the ICC RPE	A written application must be submitted. Standard forms are available. Applicants must satisfy the requirements of Rule 85 of the ICC RPE.
	Regulation 86(3) of the ICC Regulations of the Court	Time limit: these are set case-by-case, as per decision of the relevant chamber. In some cases no deadline has been set and applications are accepted continuously.
2. Assessment	Regulation 86(4) of the ICC Regulations of the Court	The VPRS verifies the completeness of applications and prepares an individual report on each application for the chamber.
	Regulation 86(5) of the ICC Regulations of the Court/Rule 89 of the ICC RPE	Applications are sent to the relevant chamber (with the VPRS reports).

Steps	Relevant provisions	Main issues to consider
3. Transmission to the parties	Rule 89 of the ICC RPE	The chamber sets a deadline for the VPRS to transmit the applications (usually with redactions) to the Prosecution and Defence, as well as a deadline for the parties' observations.
		The VPRS transmits copies of the applications to Defence and Prosecution (redacted if necessary). Until some recent decisions, the individual VPRS reports were not disclosed to the parties, but in some cases they are now provided.
4. Observations	Rule 89 of the ICC RPE	Observations can be made by the parties on questions of law and fact concerning the applications within a deadline set by the chamber.
5. Decision	Rule 89 of the ICC RPE	The chamber issues a decision on a case-by-case basis examining whether each applicant is permitted to participate in the proceedings.
	Rule 85 of the ICC RPE	
6. Appeal	Rule 89(2) of the ICC RPE	The applicant is not entitled to appeal the chamber's decision. However, if the application is rejected, the applicant may submit a fresh application.
	Article 82(1)(d) of the ICC Statute	The parties can request leave to appeal a decision on victims' applications within 5 days of the notification of such a decision.

ECCC

Steps	Relevant provisions	Main issues to consider
1. Submission	Rule 23 <i>bis</i> of the ECCC Internal Rules	Written application is to be made using the standard application form.
	Rule 23 <i>bis</i> (2) of the ECCC Internal Rules	Time limit: applications must be submitted no later than 15 days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation.

Steps	Relevant provisions	Main issues to consider
2. Assessment	Practice Direction on Victim Participation, Article 3.5; Rule 23bis(4) of the ECCC Internal Rules	The VSS verifies the applications and sends them to the Office of the Co-Investigating Judges.
3. Observations	–	–
4. Decision	Practice Direction on Victim Participation, Article 3.8	The Co-Investigating Judges decide on the admissibility of each of the applications.
	Rule 23bis(1) of the ECCC Internal Rules	
5. Appeal	Rules 23bis(2) and 74(4)(b) of the ECCC Internal Rules	Civil party applicants may appeal decisions of the Co-Investigating Judges declaring their applications inadmissible. Also both Prosecution and Defence can appeal. The time limit is of 10 days after notification of the decision.

STL

Steps	Relevant provisions	Main issues to consider
1. Submission	Rule 86(A) of the STL RPE	A standard written form is used.
	Rule 51(B)(iii) of the STL RPE	Time limit: deadlines may be established by the Pre-Trial Judge.
2. Assessment	Rule 51 (B) (iii) of the STL RPE	The VPU verifies the applications and then transmits them to the Pre-Trial Judge.
3. Observations	Rule 86(C)(i) of the STL RPE	Pre-Trial Judge may request submissions from the parties on legal issues.
4. Decision	Rule 86(B)(i) to (iv) of the STL RPE	The Pre-Trial Judge decides on whether to grant each application for the status of victim participating in the proceedings.
5. Appeal	Rule 86(C)(i) of the STL RPE	An unsuccessful applicant may appeal the Pre-Trial Judge's decision. Time limit: appeals must be filed within seven days of receiving notification.
		Parties may request leave to appeal the Pre-Trial Judge's decision on an application for victim participation, but only on an error of law.

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