

NATALIE HODGSON* 



VICTIMS AS AGENTS OF ACCOUNTABILITY: STRENGTHENING VICTIMS' RIGHT TO REVIEW AT THE INTERNATIONAL CRIMINAL COURT

ABSTRACT. Providing justice to victims is one of the most important justifications for international criminal justice. At the International Criminal Court, states have sought to respond to victims' justice interests in a number of ways, including by allowing victim participation in criminal proceedings. However, while victim participation in domestic criminal courts has evolved to include an accountability function enabling victims to challenge decisions not to prosecute, victims are limited in the extent to which they can perform this same accountability function in relation to decisions not to open an investigation at the International Criminal Court. Empowering victims to request review of a decision not to open an investigation not only enhances procedural justice but enables victims to contribute towards the administration of justice more broadly. This article considers how victims could be provided with a strengthened ability to request review of a decision not to open an investigation at the International Criminal Court. The article suggests amending Article 53 of the Rome Statute to enable victims to request judicial review of a decision not to open an investigation and clarifying the process through which victims can seek internal review of a decision not to open an investigation through the Office of the Prosecutor. Doing so would demonstrate the commitment of states, the Prosecutor and the Court to procedural justice for victims, as well as their support for transparent and accountable decision-making processes.

I INTRODUCTION

The need to provide justice to victims is commonly cited as one of the most important justifications for international criminal justice.¹ Ensuring that the International Criminal Court ("ICC") catered to

* * Dr Natalie Hodgson, Assistant Professor, School of Law, University of Nottingham, Nottingham, UK. E-mail: natalie.hodgson@nottingham.ac.uk

¹ Sophie Rigney, "Postcard from the ICTY" in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (OUP 2018).

the needs of victims was a key consideration during the Rome Conference and civil society strongly advocated for victims' rights to be embedded in the Rome Statute of the International Criminal Court ("Rome Statute").² The final text of the Rome Statute recognises that justice for victims extends beyond the retributive and comprises reparative and procedural dimensions.³ The Rome Statute includes multiple provisions designed to recognise the rights and respond to the needs of victims in the aftermath of mass atrocity. Among these provisions, victims have the ability to participate in legal proceedings before the Court when their personal interests are affected.⁴

At the time of its creation, the Rome Statute's approach towards victim participation was heralded as innovative.⁵ However, since 1998, understandings of the ways in which victims can participate in the criminal justice process have continued to develop. In particular, victim participation in domestic courts has evolved to include an accountability function.⁶ Domestic jurisdictions are increasingly recognising victims' right to request a review of the threshold decision not to prosecute. Empowering victims to request review of a decision not to prosecute not only enhances procedural justice but enables victims to perform an oversight role and thus contribute towards the administration of justice more broadly. In contrast, at the ICC, victims have struggled to perform an accountability role in relation to the similar threshold decision not to open an investigation. The ICC's failure to keep pace with contemporary developments has the potential to render the Court's victim participation scheme more symbolic than meaningful, undermining the Court's claim to provide justice for victims in the aftermath of mass atrocity.

This article considers how victims could be provided with a strengthened ability to request review of a decision not to open an investigation at the ICC. First, the article traces the development of

² Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 234–8.

³ Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague" (2015) 13 *JICJ* 281.

⁴ Article 68(3) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 ("ICCS").

⁵ See eg Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 427.

⁶ Marie Manikis, "Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process" (2017) 1 *PL* 63.

an accountability role for victims in domestic criminal courts and human rights law. In doing so, this article demonstrates how victims can function as agents of accountability. By situating review within literature on legitimacy, this paper argues that enabling victims to perform an accountability function not only provides procedural justice for victims, but additionally enables victims to contribute to the administration of justice as a whole. Second, the article considers the extent to which victims can perform an accountability function in relation to the decision not to open an investigation at the ICC. By analysing cases at the ICC, the article shows that victims are limited in the extent to which they can perform an accountability function in relation to one of the most significant decisions that can be made at the Court. Third, the article proposes that states and the Court could reform the Rome Statute and the ICC's procedure to strengthen opportunities for victims to perform an accountability function. The article suggests amending Article 53 of the Statute to enable victims to request judicial review of a decision not to open an investigation and clarifying the process through which victims can seek internal review of a decision not to open an investigation through the Office of the Prosecutor. Doing so would demonstrate the commitment of states, the Prosecutor and the Court to procedural justice for victims, as well as their support for effective, transparent and accountable decision-making processes more generally.

II ACCOUNTABILITY AS PARTICIPATION

In common law jurisdictions, victims historically played a central role in responding to the wrongs inflicted upon them. In countries such as the United Kingdom and the United States of America, victims were the original prosecutors; victims prosecuted the criminal offences committed against them.⁷ However, in the 16th and 17th centuries, crimes were reconceptualised as a matter of public concern, rather than a private dispute between individuals.⁸ Responsibility for prosecuting criminal offences was assumed by the state, displacing victims to a peripheral role in the criminal process. In doing so, the state effectively "appropriated" the conflict and removed the associated procedural rights from the victim:

⁷ Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 33(2) *Journal of Law and Society* 294, 299.

⁸ Manikis, *supra* note 6, 249.

[The victim] is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.⁹

While this state-centred paradigm continues to dominate in criminal justice systems today, in the 1980s, attitudes towards the victim in common law systems started to shift.¹⁰ It was increasingly recognised that sidelining victims into the role of witnesses failed to fulfil victims' needs of the criminal justice process. For the criminal justice process to serve the interests of victims, justice needed to move beyond the retributive to include restorative and procedural elements.¹¹ Accordingly, common law jurisdictions slowly began to expand the avenues in which victims could participate in the criminal justice process, restoring to victims some of the procedural rights they lost when their conflicts became the property of states.¹²

In 2004, Edwards created a typology to deconstruct the concept of "participation" and identify the different ways in which victims participate in criminal justice processes.¹³ He identified four categories of victim participation. First, victims may participate in the criminal justice process in a consultative role, by giving opinions for decision-makers to consider.¹⁴ For example, some jurisdictions require that prosecutors consult with victims prior to charging an accused.¹⁵ Second, victims may be required to participate and provide information at various stages throughout the criminal justice process, such as by acting as a witness in a criminal case.¹⁶ Third, victims may participate in an expressive manner, choosing to share information

⁹ Nils Christie, "Conflicts as Property" (1977) 17(1) *BJC* 1, 3.

¹⁰ Doak, *supra* note 7, 294.

¹¹ See Annemarie ten Boom and Karlijn F Kuijpers, "Victims Needs as Basic Human Needs" (2012) 18(2) *International Review of Victimology* 155.

¹² Christie, *supra* note 9.

¹³ Ian Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44(6) *BJC* 967.

¹⁴ *ibid* 975.

¹⁵ See, eg, Crown Prosecution Service (UK), "The Code for Crown Prosecutors" (26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> accessed 12 February 2023, para 9.5; Office of the Director of Public Prosecutions (NSW, Australia), "Prosecution Guidelines" (29 March 2021) <<https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-5#guidelineanchor305>> accessed 12 February 2023, paras 5.3, 5.6.

¹⁶ Edwards, *supra* note 13, 976.

with criminal justice actors, for example, through a victim impact statement.¹⁷ Fourth, in some legal systems, the victim can control the outcome of a particular procedure.¹⁸ For example, in some sharia law systems, victims have the power to choose between forgiveness, compensation or the imposition of punishment as the remedy for a serious offence.¹⁹

In 2017, Manikis argued that Edwards' typology should be expanded to include a fifth category.²⁰ In light of developments that emphasised victims' ability to seek review of decisions affecting their interests, Manikis argued that victim participation had evolved to include an accountability function. In this role, victims scrutinise the actions of criminal justice actors and raise their concerns about a decision if they identify a possible error.²¹ Through monitoring and oversight, victims act to ensure that prosecutorial and judicial decisions are procedurally and substantively sound.²²

One of the most common ways in which victims perform an accountability function is by seeking review of a Prosecutor's decision not to prosecute. Among common law and civil law jurisdictions, the opportunities and procedure for requesting a review of a decision not to prosecute vary greatly. For example, in Germany, a victim can contest the decision not to lay charges by lodging a complaint with the Chief Prosecutor for review.²³ If the Chief Prosecutor dismisses the complaint, the victim can apply to the Court, which can order preferment of the charges.²⁴ In Japan, victims can complain to the Prosecution Review Commission, comprised of 11 laypeople, who can compel the prosecution of a case.²⁵ In England and Wales, the

¹⁷ *ibid.* See, eg, *Canadian Victims Bill of Rights* SC 2015, c13, s 2, article 15.

¹⁸ Edwards, *supra* note 13, 974.

¹⁹ See, eg, M Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (CUP 2014) 139.

²⁰ Manikis, *supra* note 6.

²¹ *ibid.* 67.

²² *ibid.*

²³ *Code of Criminal Procedure* ("Strafprozessordnung") s 172(1). See further Ante Novokmet, "The Right of a Victim to a Review of a Decision to Not Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of Its Transposition in Germany, Italy, France and Croatia" (2016) 12 *Utrecht Law Review* 86, 92.

²⁴ *Strafprozessordnung* s 172(2). See further Novokmet, *supra* note 23, 93.

²⁵ *Prosecution Review Commission Law* ("Kensatsu Shinsakai Hō"), Law No 147 of 1948, as amended by *Law to Revise the Code of Criminal Procedure and other Laws* ("Kaiji soshōhō tō no ichibu wo kaisei suru hōritsu"), Law No 62 of 2004. See further

Victims' Right to Review scheme grants victims a right to apply for internal review within the Crown Prosecution Service of a decision not to prosecute.²⁶ Additionally, victims can seek external judicial review of a decision not to prosecute.²⁷ Judicial review is only permitted on narrow grounds, including that there was a failure to act in accordance with policy, the decision was based on an unlawful policy, or that the decision was unreasonable.²⁸ In contrast, in Australia, courts have consistently held that it would infringe the separation of powers if prosecutorial discretion was subject to judicial review.²⁹ In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse raised concerns about the absence of judicial review for a decision not to prosecute in Australia, describing it as a “gap capable of causing real injustice if a prosecutor makes a decision not to prosecute... without complying with the relevant prosecution guidelines and policies and the affected victim is left with no opportunity to seek judicial review.”³⁰

Footnote 25 continued

Carl F Goodman, “Prosecution Review Commissions, the Public Interest, and the Rights of the Accused: The Need for a ‘Grown Up’ in the Room” (2013) 22(1) *Pacific Rim Law & Policy Journal* 1.

²⁶ Crown Prosecution Service (UK), “Victims’ Right to Review Scheme” (27 May 2021) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>> accessed 12 February 2023. See further Mary Iliadis and Asher Flynn, “Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims’ Right to Review Reform” (2018) 58(3) *BJC* 550; Stephen Colman, “A Comparison of the Implementation of the Victims’ Right to Review in England and Wales, Scotland and Northern Ireland” (2018) 5 *CLR* 365.

²⁷ See, eg, *R v DPP ex parte C* [1995] 1 Cr App R 136. See further Mandy Burton, “Reviewing Crown Prosecution Service Decisions Not to Prosecute” (2001) *CLR* 374.

²⁸ *R (O’Brien) v DPP* [2013] EWHC 3741 [79].

²⁹ *Maxwell v The Queen* (1996) 184 CLR 501, 534. See further Natalie Hodgson et al, “The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines” (2020) 44(3) *Crim LJ* 155, 157–8. A similar position is adopted in Canada. See *Balderstone v R* (1983) 23 Man R (2d) 125 [28]: “If a judge should attempt to review the actions or conduct of the Attorney-General – barring flagrant impropriety – he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.”

³⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Pts III–VI <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_executive_summary_and_parts_i_to_ii.pdf> accessed 28 October 2022, 406.

The ability to review prosecutorial decision-making has been recognised as having a basis in human rights law. The European Court of Human Rights and the Inter-American Court of Human Rights have interpreted their Conventions to recognise that, as a consequence of state's positive human rights obligations, victims of crime will have a remedy when a decision not to prosecute infringes their rights.³¹ Applying the European Convention on Human Rights, in *R (Waxman) v CPS*, the UK High Court granted judicial review of a decision not to prosecute two alleged breaches of a restraining order, partly on the basis that the failure to prosecute was a violation of the state's positive obligation to guarantee the victim her right to respect for private and family life under Article 8.³² In 2012, the European Parliament and Council issued Directive 2012/29, Article 11 of which provides that "Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute." States are provided with a margin of appreciation in how they implement the Directive, meaning that both internal and external forms of review are capable of satisfying Article 11.

Victims' ability to commence judicial review is connected to both procedural and substantive justice for victims. By giving victims legal standing to perform an accountability function, courts recognise victims' status as key stakeholders and valued members of the community created by the criminal justice process.³³ Victims' perceptions of criminal justice decisions are directly linked to their perceptions of the decision-making process.³⁴ Undesirable outcomes are more likely to be accepted by victims if they are made through what is perceived to be an acceptable process.³⁵ By enabling victims to share their concerns about a decision and receive a response to those concerns, internal and external review has a legitimising effect on the decision made.

When victims provide scrutiny and oversight of prosecutorial decision-making, they contribute to the administration of justice

³¹ See, eg, *Castillo Páez v Peru (Reparations and Costs)* Case No 43 (IACtHR, 27 November 1998); *MC v Bulgaria* (2005) 40 EHRR 20.

³² [2012] EWHC 133 (Admin).

³³ E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 236.

³⁴ Tom R Tyler, "Procedural Justice" in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 435, 441.

³⁵ *ibid.*

more broadly. The existence of avenues for review contributes to the legal legitimacy (or legality) of criminal justice processes, by providing a corrective avenue to ensure that decisions are made in an impartial and proper manner.³⁶ Systems for review can encourage better decision-making processes, as decision-makers are aware that their decisions may be scrutinised and reviewed.³⁷ Further, review can contribute to the sociological legitimacy of criminal justice processes by enhancing public perceptions of the criminal justice process as fair and impartial.³⁸ Legitimacy is discursive; legitimacy requires recognising, engaging with and responding to the concerns of interested parties.³⁹ When victims disagree with a decision, review can demonstrate that the decision was legally legitimate, having been made according to law, through a proper process and following relevant procedures, therefore enhancing perceptions of the decision-making process among the victims and, potentially, the public more generally. Thus, empowering victims to act as agents of accountability has the potential to enhance the administration of justice in multiple ways.

III THE DECISION NOT TO OPEN AN INVESTIGATION AT THE ICC

At the ICC, the decision whether or not to open an investigation serves a similar threshold function to the decision not to prosecute in domestic jurisdictions.⁴⁰ A decision to open an investigation creates the potential for arrest warrants to be issued, accused persons to be

³⁶ See generally Daniel Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” (1999) 93(3) *AJIL* 596; David Luban, “Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law” in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010) 579.

³⁷ See generally Paul G Cassell and Steven Joffe, “The Crime Victim’s Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victim’s Rights Act” (2011) 105 *Northwestern University Law Review Colloquy* 164, 181.

³⁸ On sociological legitimacy generally, see Maria Varaki, “Introducing a Fairness-based Theory of Prosecutorial Legitimacy before the International Criminal Court” (2016) 27(3) *EJIL* 769.

³⁹ *ibid* 785; Sarah Williams, Hannah Woolaver and Emma Palmer, *The Amicus Curiae in International Criminal Justice* (Hart 2020) 15.

⁴⁰ On the threshold nature of the decision not to prosecute, see Hodgson et al, *supra* note 29.

prosecuted, and, if found guilty, reparations to be awarded. Additionally, a decision to open an investigation has an important expressive dimension, communicating the Prosecutor's belief that international crimes have occurred and the situation is sufficiently grave as to merit investigation and prosecution at the ICC.⁴¹ As such, victims have a significant interest in the decision to open an investigation and ensuring that it is made on a proper basis, taking into account all relevant criteria.

Due to the selectivity of international criminal justice, the Prosecutor has considerable discretion in relation to investigative and charging decisions.⁴² This discretion is important to enable the Prosecutor to balance the dictates of justice in a particular situation with the need to prioritise the Office's limited financial and personnel resources. And yet, the Court has recognised that some aspects of prosecutorial decision-making are susceptible to review. In particular, the Rome Statute provides that the Prosecutor's decision not to open an investigation can be reviewed in particular circumstances, but judicial review proceedings can only be commenced by specific actors.⁴³

When an international crime within the Court's jurisdiction has occurred, the Rome Statute contains three mechanisms through which the ICC's jurisdiction can be triggered: by a state party referral,⁴⁴ a United Nations Security Council ("UNSC") referral,⁴⁵ or by the Prosecutor acting *proprio motu* (on his or her own initiative).⁴⁶ Once the Court's jurisdiction has been triggered, the Prosecutor considers whether or not there is a reasonable basis to open an investigation through a process known as a "preliminary examina-

⁴¹ Carsten Stahn, "Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC" (2017) 15 *JICJ* 413, 416; cf Natalie Hodgson, "International Criminal Law and Civil Society Resistance to Offshore Detention" (2020) 26(3) *AJHR* 449.

⁴² Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2009).

⁴³ On the tension between prosecutorial discretion and judicial supervision during preliminary examinations and investigations more generally, see Kai Ambos, *Treatise on International Criminal Law*, vol III: International Criminal Procedure (OUP 2016) 381.

⁴⁴ Articles 13(a), 14 ICCS.

⁴⁵ Article 13(b) ICCS.

⁴⁶ Articles 13(c), 15 ICCS.

tion”.⁴⁷ Article 53(1) of the Rome Statute states the criteria for the Prosecutor to consider in deciding whether to initiate an investigation: the Prosecutor shall consider whether the information available provides a reasonable basis to believe that (a) a crime within the jurisdiction of the Court has been committed; (b) the case would be admissible; and (c) whether an investigation would or would not serve the interests of justice.⁴⁸ If the Prosecutor determines during the preliminary examination that the information available does not establish a reasonable basis to proceed with an investigation, the OTP informs relevant states, organisations and individuals, including victims, about the basis for the Prosecutor’s decision.⁴⁹ The avenues of review for this decision depend on how the situation was triggered and the basis for the decision not to open an investigation.

When the situation was triggered by a state party or UNSC referral, under Article 53(3)(a) of the Rome Statute, the referring state or the UNSC can ask the Pre-Trial Chamber to review the decision not to open an investigation and request that the Prosecutor reconsider their decision.⁵⁰ *The Situation on the Registered Vessels of the Comoros, Greece and Cambodia* indicates that a decision not to open an investigation can be reviewed on the basis of an error of law⁵¹ or an error in failing to take into account relevant factual information.⁵² The Chamber must respect the Prosecutor’s “margin of appreciation” in making its decision.⁵³

⁴⁷ Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (ICC, 1 November 2013) <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 28 October 2022, para 19.

⁴⁸ *ibid* para 34.

⁴⁹ Article 15(6) ICCS; *Policy Paper on Preliminary Examinations*, *supra* note 47, para 91.

⁵⁰ See further Morten Bergsmo and Olympia Bekou, “Article 53 Initiation of an Investigation” in Kai Ambos (ed), *Commentary on the Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th edn, Beck Nomos Hart, 2022), 1641.

⁵¹ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Judgment on the Appeal of the Prosecutor Against Pre-Trial Chamber I’s “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”) ICC-01/13-98, AC (2 September 2019) [78], [80].

⁵² *ibid* [80].

⁵³ *ibid* [81].

In addition, when the Prosecutor declines to open an investigation based on the “interests of justice”, the Pre-Trial Chamber has the power to review the decision on its own initiative under Article 53(3) (b). In such circumstances, the Prosecutor’s decision not to open an investigation will only be effective if the decision is confirmed by the Pre-Trial Chamber.⁵⁴ In contrast to Article 53(3)(a) of the Statute, which specifically applies to situations triggered by a state party or UNSC referral, Article 53(3)(b) makes no mention of any trigger mechanism, suggesting that Article 53(3)(b) might apply to decisions not to open an investigation where the Prosecutor triggered the situation *proprio motu*. However, in the *Situation in Afghanistan*, the Appeals Chamber (Judge Luz del Carmen Ibáñez Carranza disagreeing) stated that the legal framework of the Rome Statute “does not envisage judicial review” of a decision by the Prosecutor that there is not a reasonable basis to open an investigation when acting *proprio motu*,⁵⁵ as such review would be inconsistent with the discretionary nature of the power accorded to the Prosecutor.⁵⁶ Applying this reasoning, the *Situation in Afghanistan* suggests that situations triggered by the Prosecutor acting *proprio motu* are excluded from the Pre-Trial Chamber’s Article 53(3)(b) power to review a decision based on the interests of justice; the Pre-Trial Chamber can only exercise its Article 53(3)(b) powers to review a decision not to investigate based on the interests of justice for preliminary examinations triggered by a state party or UNSC referral. In the *Situation in Colombia*, Pre-Trial Chamber I applied the Appeals Chamber’s reasoning with limited elaboration or scrutiny in finding that it could not review the Prosecutor’s decision to close the preliminary examination into the *Situation in Colombia*.⁵⁷ However, as the issue before the Appeals Chamber in the *Situation in Afghanistan* was the Pre-Trial Chamber’s review of the Prosecutor’s request to authorise the opening of a preliminary examination, the Appeal Chamber’s comments in relation to the review of situations where the Prosecutor

⁵⁴ Article 53(3)(b) ICCS.

⁵⁵ *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-138, AC (5 March 2020) [30].

⁵⁶ *ibid* [31].

⁵⁷ *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the “Request for Review of the Prosecutor’s Decision of 28 October 2021 to Close the Preliminary Examination of the Situation in Colombia” and Related Requests) ICC-RoC46(3)-01/22-6, PTC I (22 July 2022) [6].

decides not to open an investigation went beyond the scope of the issues on appeal.⁵⁸ Thus, these findings should be treated with caution and subject to further judicial scrutiny.

No other actor has the power to initiate judicial review of a decision not to open a preliminary examination or investigation at the ICC. In 2013, lawyers representing the Freedom and Justice party purported to lodge an Article 12(3) declaration, accepting the Court's jurisdiction over potential crimes occurring in Egypt.⁵⁹ The Prosecutor declined to open a preliminary examination, finding that the Freedom and Justice Party did not have "full powers" to act on behalf of Egypt.⁶⁰ The Freedom and Justice Party applied to the Pre-Trial Chamber to have the decision not to open a preliminary examination reviewed.⁶¹ However, the Pre-Trial Chamber found that the Applicant did not have standing to challenge the Prosecutor's decision.⁶² This suggests that no avenues exist for reviewing a decision beyond those contained within Article 53.

Drawing on domestic developments in victims' rights and human rights jurisprudence, victims have attempted to argue that the Rome

⁵⁸ See further *Situation in the Islamic Republic of Afghanistan* (Separate Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17-138-Anx-Corr, AC (5 March 2020) [4]–[6].

⁵⁹ Office of the Prosecutor, "The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt" (International Criminal Court, 8 May 2014) <<https://www.icc-cpi.int/news/determination-office-prosecutor-communication-received-relation-egypt>> accessed 2 August 2022.

⁶⁰ *ibid.*

⁶¹ *Request under Regulation 46(3) of the Regulations of the Court* (Request for Review of the Prosecutor's Decision of 23 April 2014 Not to Open a Preliminary Examination Concerning Alleged Crimes Committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014) ICC-RoC46(3)-01/14-2-AnxA, PTC II (23 May 2014).

⁶² *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the "Request for Review of the Prosecutor's Decision of 23 April 2014 Not to Open a Preliminary Examination Concerning Alleged Crimes Committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014") ICC-RoC46(3)-01/14-3, PTC II (12 September 2014) [11]. The Freedom and Justice Party's application for reconsideration of the decision, or alternatively, request for leave to appeal the decision, was dismissed. See *Request under Regulation 46(3) of the Regulations of the Court* (Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for Review of the Prosecutor's Decision of 23 April 2014 Not to Open a Preliminary Examination Concerning Alleged Crimes Committed in the Arab Republic of Egypt'") ICC-RoC46(3)-01/14-5, PTC II (22 September 2014).

Statute should be interpreted to grant victims an enhanced ability to request review of prosecutorial decision-making. In 2015, victims in the *Situation in Kenya* argued that the Prosecutor's decision to cease an active investigation was susceptible to judicial review.⁶³ In that case, the victims argued that judicial review of prosecutorial decisions was a general principle of law under Article 21(1)(c) of the Rome Statute, referring to practice in 69 countries.⁶⁴ Further, the victims referred to Article 21(3) of the Statute, arguing that human rights jurisprudence supported victims' right to an effective remedy for a violation of their fundamental rights.⁶⁵ The Chamber found that there was no *lacuna* in the Statute that would justify recourse to the subsidiary sources of law referred to in Article 21(1)(c), but did not explicitly address the human rights argument made by the victims.⁶⁶

Unlike Article 21(1)(c) of the Statute, which is a subsidiary source of law, Article 21(3) is an interpretive principle, which provides that the interpretation and application of law at the ICC must be consistent with internationally recognised human rights. As such, Article 21(3) applies to the primary sources of law at the Court, including the interpretation and application of the Rome Statute. Significantly, Article 21(3) has been used to create new procedures that were not originally conceived by the drafters of the Rome Statute. For example, in *Lubanga*, the Appeals Chamber relied upon Article 21(3) to create a procedural remedy to stay proceedings in the event of the accused's right to a fair trial being breached, despite such a power not being explicitly contained in the Statute.⁶⁷ Given that Article 68(3) needs to be interpreted and applied consistently with internationally recognised human rights,⁶⁸ in light of domestic developments indicating that victims should have a remedy when a decision not to prosecute infringes their human rights, it is possible to imagine an

⁶³ *Situation in the Republic of Kenya* (Victims' Request for Review of Prosecution's Decision to Cease Active Investigation) ICC-01/09-154, PTC II (3 August 2015).

⁶⁴ *ibid* [129].

⁶⁵ *ibid* [139].

⁶⁶ *Situation in the Republic of Kenya* (Decision on the "Victims' Request for Review of Prosecution's Decision to Cease Active Investigation") ICC-01/09-159, PTC II (5 November 2015).

⁶⁷ *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06-772, AC (14 December 2006) [37], [39].

⁶⁸ Article 21(3) ICCS.

argument that Article 21(3) justifies interpreting Article 68(3) to create a procedure to enable victims to seek judicial review of a decision not to open an investigation.

However, in the *Situation in Afghanistan*, the victims advanced a similar argument, relying on human rights grounds to argue for enhanced procedural rights, namely, for standing to appeal the Pre-Trial Chamber's decision not to authorise an investigation. In that case, the victims argued that Article 21(3) of the Rome Statute could be used to interpret Article 82(1) to grant a right of appeal to the victims, based on the internationally recognised human right to an effective remedy in cases of human rights violations.⁶⁹ The majority of the Appeals Chamber rejected this argument, finding that the right to an effective remedy attaches to the *state* that has violated the human rights of the individual in question. It was not possible to demonstrate "that the *Court* is responsible for any of the alleged violations of human rights from which the right to an effective remedy could follow."⁷⁰ In dissent, Judge Antoine Kesia-Mbe Mindua found that victims could be considered a "party" with standing to appeal the Pre-Trial Chamber's decision, referring to human rights developments and the object and purpose of the Rome Statute to provide "victim-oriented justice" to support her interpretation.⁷¹

Therefore, while some judges have been receptive to arguments to expand the ICC's avenues for review, the current established position in relation to external review is that victims are unable to commence review of a decision not to open an investigation in their own right. At best, victims may seek to lobby state parties, the UNSC or the Pre-Trial Chamber to use their powers to commence a review. In the *Situation in Kenya*, the Pre-Trial Chamber recognised that the victims could informally communicate with the Pre-Trial Chamber,

⁶⁹ *Situation in the Islamic Republic of Afghanistan* (Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan") ICC-02/17-36, AC (10 June 2019).

⁷⁰ *Situation in the Islamic Republic of Afghanistan* (Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into the Situation in Afghanistan) ICC-02/17-137, AC (4 March 2020) [23], emphasis added.

⁷¹ *Situation in the Islamic Republic of Afghanistan*, (Decision on the Prosecutor and Victims' Requests for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua) ICC-02/17-62-Anx, AC (17 September 2019).

requesting that the Pre-Trial Chamber use its Article 53(3)(b) *proprio motu* powers to review a decision not to prosecute on the basis of the interests of justice, as a consequence of their general participation in the situation.⁷² This was also seen in the *Situation in Colombia*, where the Chamber entertained such a request from the victims following the conclusion of the preliminary examination.⁷³ Victims will likely be permitted to participate in any judicial review proceedings initiated by another actor.⁷⁴ However, they are unable to commence such proceedings themselves.

The Rome Statute recognises a limited form of internal review of a decision not to open an investigation. When a situation is triggered by the Prosecutor acting *proprio motu*, and the Prosecutor decides not to open an investigation, Article 15(6) of the Rome Statute recognises that the Prosecutor may reconsider their decision in light of “new facts or evidence.” Such a circumstance occurred in the *Situation in Iraq / UK*. After the preliminary examination was terminated due to insufficient gravity,⁷⁵ the Prosecutor received new information from the European Center for Constitutional and Human Rights and the Public Interest Lawyers demonstrating a higher number of victims and increased geographical and temporal scope of the alleged crimes.⁷⁶ On the basis of this information, the preliminary examination was reopened.⁷⁷ However, it is unclear to what extent Article 15(6) provides an avenue for victims and other actors to dispute the

⁷² *Situation in the Republic of Kenya* (Decision on the “Victims’ Request for Review of Prosecution’s Decision to Cease Active Investigation”) ICC-0109-159, PTC II (5 November 2015) [7].

⁷³ *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the “Request for Review of the Prosecutor’s Decision of 28 October 2021 to Close the Preliminary Examination of the Situation in Colombia” and Related Requests) ICC-RoC46(3)-01/22-6, PTC I (22 July 2022).

⁷⁴ Article 68(3) ICCS. See eg *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Observations on Behalf of Victims in the Proceedings for the Review of the Prosecutor’s Decision not to Initiate an Investigation) ICC-01/13-27-Red, PTC I (23 June 2015).

⁷⁵ Office of the Prosecutor, letter (ICC, 9 February 2006) <https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 2 August 2022.

⁷⁶ Office of the Prosecutor, “Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq” (ICC, 13 May 2014) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>> accessed 2 August 2022.

⁷⁷ *ibid.*

Prosecutor's *reasoning* for declining to open an investigation, rather than to simply provide "new facts or evidence." No equivalent provision exists for situations triggered by a state party or UNSC referral, but victims seeking internal review of these situations could theoretically make an Article 15 communication to request that the Prosecutor reconsider his or her decision and (re-)open a preliminary examination *proprio motu*.

Therefore, victims currently are limited in the extent to which they can perform an accountability role in relation to the decision not to open an investigation. Victims only have the ability to participate and express their concerns in an external review of a decision not to open an investigation if another actor is willing and able to commence review proceedings. While the ICC recognises that victim participation should be "meaningful" and not "symbolic",⁷⁸ the existence of a victim participation regime is effectively rendered symbolic if victims can only participate at crucial decision-making stages when proceedings are already on foot, and in the absence of existing proceedings, victims have no way to trigger such proceedings in their own right. Furthermore, it appears that the current legal position is that there is no opportunity for a decision not to open an investigation to be externally reviewed if the preliminary examination was triggered by the Prosecutor acting *proprio motu*, even if the victims provided the Prosecutor with the information on which the decision to open a preliminary examination was based.⁷⁹ While there is a possibility of victims seeking internal review of a decision not to open an investigation, it is not clear whether and how the Office of the Prosecutor responds to concerns about potential errors in its decision-making processes as compared to information about new facts or evidence. By limiting the extent to which victims can raise their concerns and seek review of this highly significant threshold decision, the existing scheme at the ICC risks diminishing the legitimacy of decisions not to open an investigation among affected communities and undermines the Court's ability to provide victims with procedural and substantive justice. Despite being one of the Rome Statute's innovations at the time of the Court's creation, the ICC's victim participation regime is now falling behind domestic practice.

⁷⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case) ICC-01/04-01/07-474, PTC I (13 May 2008) [51].

⁷⁹ See Art 15 ICCS.

IV RECOGNISING VICTIMS' RIGHT TO REVIEW AT THE INTERNATIONAL CRIMINAL COURT

Given the significance of the threshold decision to open an investigation, it is important that any decisions not to open an investigation are made by the Prosecutor on a defensible legal basis. While the weighing and determination of facts in this process falls within the margin of appreciation granted to the Prosecutor,⁸⁰ the law that is applied by the Prosecutor to those facts should be without error. Expanding the extent to which victims can perform an accountability function at this stage of the criminal justice process would serve two purposes. First, the existence of avenues of review can enhance the legal and sociological legitimacy of prosecutorial decision-making at this stage. As people with a direct interest in the opening of an investigation, victims are uniquely positioned to perform an oversight and scrutiny function in relation to prosecutorial decision-making. Second, enabling victims to perform an accountability function enhances the extent to which victim participation at the ICC is “meaningful”. Thus, strengthening the avenues through which victims can seek review at the ICC can help to ensure that the Court is responsive to victims’ procedural justice interests and furthers states’ commitments to providing justice for victims through the ICC.

One way to strengthen victims’ ability to seek external review would be for states to use their power to amend the Rome Statute to grant victims the same power as states and the UNSC to request review of a decision not to open an investigation.⁸¹ This could be achieved by adding the following words to Article 53(3)(a):

At the request of the State making a referral under article 14, the Security Council under article 13, paragraph (b), *or the victims in a situation initiated under article 13, paragraphs (a) or (b)*, the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

In addition to demonstrating states’ commitment to “meaningful” participation by victims, including victims alongside states and the

⁸⁰ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Judgment on the Appeal of the Prosecutor Against Pre-Trial Chamber I’s “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”) ICC-01/13-98, AC (2 September 2019) [80].

⁸¹ Article 121 ICCS.

UNSC as actors that can request review of a decision not to open an investigation would enable states to recognise and reaffirm victims' important status within the international community that the Court serves.

The possibility of expanding the role of victims at the ICC is likely to raise multiple concerns. Since the creation of the Rome Statute, concerns have been raised that the ICC's victim participation regime poses a risk to an accused person's fair trial rights and has the potential to disrupt the efficient administration of justice.⁸² While enabling victims to request judicial review of a decision not to open an investigation might not align with the interests or wishes of potential suspects, such a reform is unlikely to undermine an accused person's right to a fair trial. Furthermore, as Article 53(3)(a) of the Statute only applies to preliminary examinations triggered by a state party or UNSC referral,⁸³ granting victims the power to request judicial review under this provision is unlikely to open the floodgates of challenges to prosecutorial decisions. To date, only 14 of the ICC's 29 preliminary examinations were accompanied by a state party or UNSC referral.⁸⁴ The majority of these preliminary examinations resulted in investigations,⁸⁵ suggesting that the number of situations where victims would be enabled to request a review by the Pre-Trial Chamber is likely to be small. Therefore, strengthening victims' ability to request review of a decision not to open an investigation in this manner would come with limited risks and significant potential to

⁸² See eg Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court" (2007) 26(2) *Saint Louis University Public Law Review* 249; Scott T Johnson, "Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court" (2010) 16 *ILSA Journal of International & Comparative Law* 489; Bridie McAsey, "Victim Participation at the International Criminal Court and its Impact on Procedural Fairness" (2011) 18 *Australian International Law Journal* 105.

⁸³ *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-138, AC (5 March 2020) [30].

⁸⁴ These are the situations in Bolivia, Central African Republic I, Central African Republic II, the Registered Vessels of the Comoros, Darfur Sudan, Democratic Republic of the Congo, Gabon, Libya, Mali, Palestine, Uganda, Ukraine, Venezuela I and Venezuela II. These situations are an updated list based on the analysis in Sara Wharton, and Rosemary Grey, "The Full Picture: Preliminary Examinations at the International Criminal Court" (2019) 56 *Canadian Yearbook of International Law* 1.

⁸⁵ *ibid.*

improve the legitimacy of ICC processes and the procedural justice enjoyed by victims.

As identified above, situations where a preliminary examination was commenced by the Prosecutor acting *proprio motu* are largely, if not completely,⁸⁶ excluded from review under Article 53(3). From the perspective of victims, it may seem incongruous that the ability to request a review of a decision not to open an investigation exists in relation to preliminary examinations triggered by a state party and UNSC referral, but not in relation to preliminary examinations commenced *proprio motu*. Indeed, as the Prosecutor can act on information provided by victims in making the decision to open a preliminary examination,⁸⁷ victims may feel that they have a greater interest in being able to seek judicial review of these decisions. However, enabling victims to seek judicial review of decisions made in relation to preliminary examinations commenced *proprio motu* poses significant challenges. In assessing the information received in Article 15 communications, the Prosecutor applies a process that mimics the criteria in Article 53(1) of the Statute, considering jurisdiction, admissibility and the interests of justice, before determining whether or not to formally open a preliminary examination. While the OTP has referred to this assessment as a “pre-preliminary examination”,⁸⁸ in the *Situation in Bangladesh / Myanmar*, Pre-Trial Chamber I stated that the Rome Statute does not envisage a “pre-preliminary examination” stage and thus all the Prosecutor’s work in evaluating information in Article 15 communications is part of a preliminary examination, “whether formally announced or not.”⁸⁹ This suggests that a myriad of decisions during the assessment of Article 15 communications – including the early decision on whether a communication is manifestly outside the Court’s jurisdiction and

⁸⁶ See *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-138, AC (5 March 2020) [30].

⁸⁷ Article 15 ICCS.

⁸⁸ Amitis Khojasteh, “The Pre-Preliminary Examination Stage: Theory and Practice of the OTP’s Phase 1 Activities” in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1* (Torkel Opsahl Academic EPublisher 2018), 223.

⁸⁹ *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”) ICC-RoC46(3)-01/18-37, PTC I (6 September 2018) [82].

thus does not warrant further analysis⁹⁰ – could be construed as decisions not to open an investigation. Given that the OTP receives hundreds of Article 15 communications each year,⁹¹ enabling victims to seek judicial review of a decision not to open an investigation in relation to preliminary examinations commenced *proprio motu* has the potential to overwhelm the Court with requests for review.

Noting that victims' right to review can be satisfied through both external and internal forms of review, one way to enable review of prosecutorial decisions in relation to preliminary examinations commenced *proprio motu* is to clarify the procedure through which victims can request that the OTP internally reviews purported errors of law in its decision-making. At present, Article 15(6) of the Rome Statute only refers to the Prosecutor reconsidering their decision on the basis of “new facts or evidence.” To strengthen procedural justice for victims, the OTP should develop and make public a clear process through which its decisions can be internally reviewed on *legal*, and not just *factual* grounds. This might involve an individual or team not involved in the initial decision reviewing the legal findings of the Office in conjunction with the arguments made by the victim in order to determine whether any errors of law have been made. To the extent that legitimacy is dialogic,⁹² enabling victims to raise concerns about the reasoning underpinning a decision not to open an investigation and receive a response to their concerns would contribute to enhancing the OTP's and ICC's legitimacy.

For a number of years, the OTP has been operating at the limits of its capacity.⁹³ While the OTP appears to already receive communications that dispute its decisions not to open a preliminary examination or an investigation,⁹⁴ it is possible that creating an internal review process would increase the number of communications the

⁹⁰ See *Policy Paper on Preliminary Examinations*, *supra* note 47, para 78.

⁹¹ Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (ICC, 14 December 2020) <<https://www.icc-cpi.int/sites/default/files/items/Documents/2020-PE/2020-pe-report-eng.pdf>> accessed 31 October 2022, para 30.

⁹² Varaki, *supra* note 38, 785; Williams, Woolaver and Palmer, *supra* note 39, 15.

⁹³ International Criminal Court, *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report* (30 September 2020) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 31 October 2022, para 176.

⁹⁴ See Chantal Meloni, “Never Two Without Three: On the – to be Reopened – ICC Preliminary Examination in Iraq” (*OpinioJuris*, 9 July 2021) <<http://opiniojuris.org/2021/07/09/never-two-without-three-on-the-to-be-reopened-icc-preliminary-examination-in-iraq/>> accessed 2 August 2022.

OTP receives contesting its decisions and the work involved in responding to these communications. Given the importance of transparently engaging with and responding to the concerns of victims at this highly important threshold stage, the Assembly of States Parties should give consideration to a modest increase in the OTP's funding to support the development of an internal review process. Committing these resources would demonstrate states' commitment to procedural justice for victims, as well as their support for effective, transparent and accountable prosecutorial decision-making processes more generally.

V CONCLUSION

Victim participation in criminal proceedings is often discussed through the language of “balance” – the rights of the victim should be balanced with the rights of the accused.⁹⁵ While it is true that the criminal justice process needs to protect and uphold the rights of the accused, the oversimplistic metaphor of “balance” suggests that victims' participation in criminal proceedings exists in binary opposition to the rights of accused persons. Constructing victim participation as something that needs to be “balanced” against the accused diverts attention away from the value that victims can add to the criminal justice process.

When victims are empowered to act as agents of accountability, they are not only able to better advocate for their own interests through the criminal justice process, but additionally, they can contribute to enhancing the administration of justice as a whole. Enhanced avenues for review of decisions can promote better decision-making processes, as well enhancing the legal legitimacy of justice processes by ensuring that any errors that are made are able to be corrected. Providing legal avenues for victims to enter into dialogue with decision-makers serves to recognise and reinforce victims' status as important and valued actors within the international community and has the potential to enhance the sociological legitimacy of decisions.

While the ICC maintains that it is not legally responsible for ensuring victims' right to a remedy,⁹⁶ the Court is a mechanism through which victims' conflict has been “appropriated” by states for

⁹⁵ Edwards, *supra* note 13.

⁹⁶ *Situation in the Islamic Republic of Afghanistan* (Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into the Situation in Afghanistan) ICC-02/17-137, AC (4 March 2020) [23].

adjudication.⁹⁷ As such, states and the Court should give consideration to the extent to which victims' right to an effective remedy can be provided through the ICC and the ways in which victims' participatory rights can be restored to them through the ICC's processes. One of the ICC's great contributions to international criminal justice is its multifaceted approach to providing justice for victims – understood as extending beyond convictions to include reparations and procedural inclusion. To maintain its ability to provide justice to victims, the Rome Statute must remain responsive to contemporary developments and advances in knowledge concerning victim participation and victims' justice interests.

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⁹⁷ See generally Christie, *supra* note 9.