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Title: Victims and appeals at the International Criminal Court (ICC) : evaluation under international human rights standards

Year: 2021

Version: Published version

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Please cite the original version:

Perez-Leon-Acevedo, J.-P. (2021). Victims and appeals at the International Criminal Court (ICC) : evaluation under international human rights standards. *International Journal of Human Rights*, 25(9), 1598-1624. <https://doi.org/10.1080/13642987.2020.1859483>



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To cite this article: Juan-Pablo Perez-Leon-Acevedo (2021): Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards, The International Journal of Human Rights, DOI: [10.1080/13642987.2020.1859483](https://doi.org/10.1080/13642987.2020.1859483)

To link to this article: <https://doi.org/10.1080/13642987.2020.1859483>



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Published online: 26 Jan 2021.



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Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards

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ABSTRACT

Scholars have examined victim participation and reparations at the ICC. Nevertheless, no academic study focuses on victim participants and victims as parties (reparations claimants) in ICC appeals under international human rights law (IHRL) standards. This article seeks to: determine how victims' roles as victim participants and parties (reparations claimants) take place in ICC appeals; and evaluate ICC's law/practice on victims' procedural roles/rights in appeals under IHRL. Victims at the ICC exercise procedural rights to: voice their views and concerns in appeals against final and interlocutory decisions (victim participants); and appeal reparations orders (parties). ICC's law/practice on victims in appeals is generally consistent with IHRL. However, such law/practice present some important deficits under IHRL, including scope of victims' procedural rights in ICC appeals and how these rights are exercised. Such deficits should be addressed to better realise victims' procedural roles/procedural rights in ICC appeals.

ARTICLE HISTORY

Received 16 April 2020

Accepted 30 November 2020

KEYWORDS

Victims; appeals; ICC; IHRL; participation; reparations

1. Introduction

As Schabas remarked, ICC appeals are key because the right to appeal is 'a fundamental component of due process in criminal proceedings' and ICC Trial Chambers (ICC TC)'s decisions are subject to appeals.¹ Literature on ICC appeals focuses on defence rights. Yet, ICC appeals are also important to victims. The ICC Appeals Chamber (ICC AC) determined that victims participate to present 'their views and concerns in respect of their personal interests in the issues on appeal'.²

Victim participation and reparations for victims at the ICC constitute pivotal and innovative features within international criminal justice. As seen later, scholars have examined victim participation and reparations at the ICC. However, there is no academic study focused on victim participants and victims as parties (reparations claimants) in ICC appeals under IHRL standards. Thus, this article seeks to fill this important gap by addressing these research questions. First, determine how victims' procedural roles as victim participants and parties take place in ICC appeals. Second, evaluate the ICC's law and (especially) practice on victims' procedural roles and procedural rights in ICC appeals under IHRL.

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Section 2 analyses victims at the ICC and IHRL on victims in appeals. It discusses victims at the ICC and IHRL. Then, it examines IHRL standards on victims in appeals around three themes: procedural roles/standing, procedural rights, and limits. Section 3 discusses the ICC's law/practice on victims in appeals, namely victim participants in appeals against acquittals/convictions/sentences and interlocutory decisions as well as victims as parties (reparations claimants) when appealing reparations orders. Section 4 assesses the ICC's law/practice on victims in appeals under examined IHRL standards around three areas: procedural roles/standing, procedural rights and limits.

2. Victims at the ICC and IHRL on victims in appeals

2.1. Victims at the ICC and IHRL

IHRL and international criminal law are interrelated. As Shelton has stated, international crimes are gross human rights violations.³ She importantly remarked that: IHRL remedies are actions to transform law into results, deter violations and restore balance after wrongs; the obligation to provide effective remedies is an essential component of IHRL; and these remedies may include international criminal justice where victims hold procedural roles.⁴ Under Article 21(3) of the ICC Statute, the application and interpretation of the law applicable by the ICC 'must be consistent with internationally recognised human rights, and be without any adverse distinction'. Scholars such as Moffett and Ferstman have remarked that: Article 21(3) has binding effects on the ICC concerning victim issues, namely the ICC is obligated to interpret and apply its instruments under IHRL;⁵ and Article 21(3) is important in ICC's relationships with victims/other stakeholders and ICC's victim-related goals and policies.⁶ Moreover, the ICC can apply 'treaties and the principles and rules of international law' (Article 21 (1)(b)), which include IHRL. Furthermore, ICC instruments contain provisions on the accused's/convicted person's rights, which closely follow IHRL standards.

Scholars such as Moffett and Zegveld have generally remarked that the introduction of victim participation and reparations at the ICC substantially improved victims' status and rights in international criminal justice because victims were mere witnesses at previous international/hybrid criminal tribunals (ICTs).⁷ As found in literature, ICC victim participation and reparations pioneered international criminal justice and became a precedent or model on victim issues for later ICTs.⁸ Under Rule 85(a) of the ICC Rules of Procedure and Evidence (Rules), victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. Article 68(3) of the ICC Statute is the legal basis for victims' role as participants:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁹

As examined later, the ICC's jurisprudence has allowed victim participants' role and related procedural rights during appeals filed by Prosecutor and defence (parties) against conviction/acquittals/sentences and interlocutory decisions. Additionally, Article 75 constitutes the legal basis for reparations: '2. The Court may make an order directly against a convicted person specifying appropriate reparations to [...] victims, including

restitution, compensation and rehabilitation'. Articles 75 and 82(4) (appeals against reparations orders) constitute the legal basis for victims' role as parties (reparations claimants).¹⁰ As scholars¹¹ and the ICC AC¹² have correctly stated, victims are parties to post-conviction reparations proceedings. Academics have appropriately associated the nature/goals of ICC proceedings and victims' roles: victim participants in proceedings on defendant's criminal liability (trial, etc.) *vis-à-vis* victims' role as parties to post-conviction reparations proceedings.¹³ Scholars have soundly remarked that victims' roles as participants and parties at the ICC are independent from each other albeit their connections.¹⁴ Yet, literature recognises that general IHRL rights such as access to justice and fair/timely proceedings apply *mutatis mutandis* to victims' roles at the ICC.¹⁵

In concurrence with Moffett, victims' roles as participants and parties (reparations claimants) have meant that victims have passed from being 'objects of moral concern' to subjects with rights in international criminal justice, which evidences more inclusive visions of victims.¹⁶ Scholars have correctly highlighted that IHRL has been a major driving force to introduce and develop victims' roles as participants and parties (reparations claimants) and related procedural rights at the ICC.¹⁷ According to academics, procedural rights have gone beyond the accused/convicted to involve also victims at the ICC, namely certain fair trial guarantees originally conceived for (primarily) defendants have been adapted or adjusted to be applied as for victims.¹⁸ Related to this, Ferstman has persuasively highlighted that IHRL remedies mean that victims should have access to justice, be heard in fair and expeditious proceedings and claim reparations,¹⁹ which corresponds to and justifies *mutatis mutandis* victims' procedural roles and rights at the ICC.

However, scholars also have rightly criticised important aspects of the ICC's practice on victim participation and reparations. First, reparations claimants' interventions and, especially, victim participation have conflicted with and even affected defence rights.²⁰ Second, victim participation/reparations claimants regimes have been very resource-intensive and affected the ICC's procedural efficiency.²¹ Third, ICC's practices on victim participation and reparations have disappointed victims, including what Killeen and Moffett call limits on victims' legal agency to exercise their rights at the ICC.²² Zegveld powerfully remarked that even reparations claimants have been relegated to mere third parties to ICC reparations proceedings.²³ Thus, they would not have totally fulfilled their party role in these proceedings. Fourth, ICC's practices on victim participation/reparations have sometimes been inconsistent across chambers, which has caused uncertainty and, thus, affected victims.²⁴

Therefore, there are sound reasons to examine the ICC's law/practice on victims in appeals under IHRL. First, IHRL is strongly embedded in the ICC's law and practice. ICC instruments contain provisions that arguably are or work as human rights clauses. These include ICC Statute Articles 21(3), namely victims' procedural roles/rights at the ICC need to be consistent with IHRL, 21(1) (IHRL applies at the ICC), 67 (defence rights), 68(3) (victim participation), 75 (reparations), 82(4) (reparations appeals), etc. As also stated, ICC-jurisdiction crimes are serious IHL violations and IHRL influenced ICC's law on victims. In construing and developing its jurisprudence on victim participation and reparations, the ICC has continuously relied on IHRL sources such as treaties, resolutions, and case-law.²⁵ Additionally, the ICC's revised strategy on victims invokes IHRL.²⁶ As Moffett remarked, ICC's victim-related practises and policies reflect a human rights discourse at the ICC.²⁷

Second, scholars have employed IHRL standards to evaluate *inter alia* the legitimacy and effectiveness of the ICC's law/practice on victim participation and reparations.²⁸ Importantly, human rights-based assessments of victim issues at the ICC must consider the ICC's specific mandate: the ICC is not a human rights court.²⁹ Yet, academics such as Ferstman also have correctly highlighted that the ICC directly impacts victims' human rights.³⁰

2.2. Victims' procedural roles/standing in appeals under IHRL

In IHRL, victims' procedural roles/standing in appeals first involve definition of victims. As scholars highlight,³¹ the UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration)³² has been crucial to recognise victims' rights internationally, including its victim definition, namely, persons who: 'suffered harm, including physical or mental injury, emotional suffering, economic loss [...] in violation of criminal laws'.³³ This definition influenced *inter alia* the UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Principles).³⁴

IHRL treaties have traditionally focused on defendants as holders of the right to appeal in criminal proceedings. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) concerns the right to fair judicial proceedings but contains no reference to victims as holders of the right to criminal appeals. Under Article 14(5), the convicted 'shall have the right to his conviction and sentence being reviewed by a higher tribunal'. Most Article 14 provisions mention defendants rather than victims in criminal proceedings. Article 6(2)–(3) ('Right to a fair trial') of the European Convention on Human Rights (ECHR) also focuses on the accused.

As seen later, however, human rights bodies/courts and scholars have broadly interpreted these IHRL provisions. Thus, the rights to appeal and/or participate in appeals have been applied beyond defendants. Furthermore, the narrow language of these provisions must be understood in context. They concern final decisions on criminal liability (acquittals/convictions/sentences) where prosecutor and defendant are parties. This does not mean exclusion of victims' roles and rights from appeals. Indeed, more recent IHRL treaties use a broader language for holders of the right to appeal: beyond defendants. Under Article 8(2)(h) of the American Convention on Human Rights (ACHR), 'every person is entitled [...] to [...] the right to appeal'. Article 7(1)(a) of the African Charter on Human and Peoples' Rights (ACHPR) establishes that: 'Every individual shall have the right to [...] an appeal'.

Since criminal proceedings include appeals, case-law of UN treaty bodies/regional human rights courts concerning victims' general right to access to justice justify victims' procedural role(s) in appeals.³⁵ The Victims Declaration³⁶ and UN Principles³⁷ also recognise victims' right to access to justice. Due to their general nature and goals, IHRL sources do not detail whether victims should have a specific procedural role/standing in appeals. Whether victims may be participants or parties depends on the specific system where appeals take place and nature of appeals. As illustrated below, some IHRL sources however suggest victims' active procedural roles/standing (parties or participants) in appeals.

According to the ECtHR, victims as civil parties in appeals 'cannot be regarded as either the opponent or for that matter necessarily the ally of the prosecution, their

roles and objectives being clearly different'.³⁸ Civil parties' role and interests relate to civil actions within appeals.³⁹ Victim participation in appeals is 'an integral part of the whole of the proceedings that the applicant had joined as a civil party with a view to obtaining compensation'.⁴⁰ Victim participation in appeals involves a 'dispute over a civil right'.⁴¹ Victims have a right to effective access to justice.⁴² Under the EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (EU Directive), victims 'can participate actively in criminal proceedings', including appeals, in accordance with victims' roles in the respective system.⁴³ For instance, victims' right to ask reviews of prosecutorial/judicial decisions not to prosecute.⁴⁴

IACtHR's jurisprudence on victims of rights violations has established this. The right to appeal is 'an essential guarantee that must be respected as part of due process of law'.⁴⁵ Grounds for appeals admissibility and participation in appeals should allow a comprehensive review of the judgment/decision appealed, particularly contested aspects.⁴⁶ This enables analysis of factual, legal and evidentiary issues on which the impugned decision/judgment was based since fact-finding and application of law are interdependent.⁴⁷ The comprehensive review of judgments/decisions protects victims' rights.⁴⁸

2.3. *Victims' procedural rights in appeals under IHRL*

Some IHRL treaty provisions refer to defendants' rights but others use a broader language. Under ICCPR Article 14(3), 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality'. Yet, Article 14(1) states that '*All persons* shall be equal before the courts and tribunals [...] *everyone* shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal [emphasis added]'. Based on Human Rights Committee (HRC)'s case-law, which includes victims, scholars have highlighted the general application of Article 14(1) guarantees to all judicial proceedings and Article 14(1)/Article 14 mutual complementarity.⁴⁹ Thus, these are arguably bases for recognition of victims' procedural rights in criminal proceedings, including appeals. Moreover, the UN Conventions against Torture (Articles 13–14) and Enforced Disappearance (Articles 12, 24) contain provisions on victims' rights in criminal justice: complain, protection, reparations, prompt/thorough/impartial proceedings, etc.

While Article 6(2)–(3) of the ECHR focuses on the accused, Article 6(1) states that: 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal'. According to scholars, the whole Article 6 involves fair proceedings and Article 6(2)–(3) also apply to Article 6(1) because the ECtHR examines all paragraphs together in criminal cases.⁵⁰ Article 6 (particularly Article 6(1)) *mutatis mutandis* applies to victims in criminal proceedings, which ECtHR's jurisprudence evidences as seen later. Under the ACHR (Article 8(1)), 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal'. As scholars remark,⁵¹ the IACtHR has interpreted jointly ACHR Articles 8 and 25 ('Right to judicial protection') as victims' strong guarantees.⁵² Under the ACHPR (Article 7), 'Every individual shall have the right to have his cause heard', including rights to appeal, legal representation and timely/impartial proceedings.

The Victims Declaration contains no explicit provision on victims' right to appeals. However, it recognises victims' rights to access to justice and fair treatment (paragraphs

4–6), including rights to information, participation, protection, assistance, timely proceedings, and redress. For instance, Paragraph 6(b) applies to all proceedings, appeals included: ‘Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected’. The UN Principles detail victims’ rights to access to justice, information, and adequate/prompt reparations.⁵³

Practices of the HRC, Committee against Torture (CAT), Committee on Enforced Disappearance (CED), IACtHR, ECtHR, and African Court on Human and Peoples’ Rights (ACtHR) include cases on victims of atrocities in criminal proceedings. They recognise that criminal proceedings include appeals.⁵⁴ Under such case-law/jurisprudential sources, these victims’ procedural rights in criminal proceedings, including appeals, are recognised: access to proceedings conducted with due process guarantees;⁵⁵ be heard and act;⁵⁶ timely proceedings;⁵⁷ information/notification;⁵⁸ claim and receive adequate and proportional reparations to redress harm;⁵⁹ know the truth;⁶⁰ effective, impartial, prompt proceedings;⁶¹ legal representation, including free legal assistance if needed;⁶² equality before the law and equal legal protection;⁶³ fair evidence production;⁶⁴ and protection.⁶⁵ Scholars have identified similar victims’ procedural rights based on these practices.⁶⁶

IHRL sources are mainly silent on victims’ specific rights in appeals. Nevertheless, certain IHRL sources (particularly case-law) contain some specific standards. Regarding HRC’s practice, this is found. First, right to timely judicial proceedings applies ‘until the final judgement on appeal. All stages, whether in first instance or on appeal must take place “without undue delay”’.⁶⁷ This right and the need for expeditious judicial handling determine the need for public appeals hearings.⁶⁸ Second, counsels should be assigned based on the gravity of offences and ‘interest of justice’ criteria such as objective chances of success during appeals.⁶⁹ Third, appeals ‘limited to the formal or legal aspects [...] without any consideration whatsoever of the facts is not sufficient’.⁷⁰

These ECtHR’s standards are identified. First, the appeals instance should consider and effectively address appeals grounds and give sufficient reasons for its decision.⁷¹ Second, the right to appeal involves an effective judicial control over decisions.⁷² Third, ‘a right to a public hearing irrespective of the nature of the issues’ is normally required when appeals involve case review on facts and law.⁷³ Fourth, the right to be heard in person, including direct assessment of evidence given in person, and the right to public hearings must be observed when appeals involve case merits and/or regarding the seriousness of the matter.⁷⁴ Fifth, when victims can appeal case dismissals, submissions should be disclosed to them so that victims may respond to judicial reports on factual statements, appeals procedure, appeals grounds, etc., which guarantees victims’ rights in appeals.⁷⁵

The EU Directive contains these standards. First, victims’ rights to be respectfully treated and make informed decisions ‘about their participation in proceedings’,⁷⁶ which enables victims ‘to decide whether to request a review of a decision’.⁷⁷ To exercise their right to review, victims need to ‘receive sufficient information’.⁷⁸ Second, victims’ right to information/notification without unnecessary delay⁷⁹ includes ‘information about the time and place of a hearing related to an appeal’.⁸⁰ Victims ‘should receive information about any right to appeal of a decision to release the offender’.⁸¹

These IACtHR’s standards are found. First, since due process applies throughout all stages, appeals proceedings must be fair, impartial, and independent.⁸² Otherwise,

there are not real appeals remedies and appeals are mere formalities, invalid or unlawful.⁸³ The appeals instance 'has a special duty to protect the judicial guarantees and due process to which all parties to the criminal proceeding are entitled, in accordance with the principles governing that proceeding'.⁸⁴ Second, the right to appeal and/or participate in appeals must be ordinary and 'must be guaranteed before the judgment becomes *res judicata*'.⁸⁵ This protects victims' rights 'avoiding the adoption of a final decision in flawed proceedings involving errors that unduly prejudice the interests of an individual'.⁸⁶ Third, appeals remedies need to be accessible: not so complex that the right to appeal is illusory.⁸⁷ Fourth, appeals proceedings must be effective and lead to responses or results for which appeals were conceived: the formal existence of appeals is insufficient.⁸⁸ Regardless of systems/names, appeals must be appropriate to rectify judicial errors.⁸⁹ Effective appeals are necessary to ensure that individuals are 'not subject to arbitrary decisions'.⁹⁰

2.4. Limits on victims' roles/rights in appeals under IHRL

Under IHRL, there are limits on victims' procedural roles and rights during appeals, involving: respect for defendant's rights such as rights to fair appeals and appeals without undue delays; and considerations related to the specific system, procedural stage, and/or victims' roles. Victims Declaration paragraph 6(b) establishes that victims' views and concerns can be allowed 'at appropriate stages [...] where their personal interests are affected' but 'without prejudice to the accused and consistent with the relevant [...] criminal justice system'. Under UN Principles 12 and 27 respectively, remedies for victims are 'conducted in accordance with law' and victims' rights cannot derogate accused's due process rights. Pursuant to the EU Directive, victims' rights 'are without prejudice to' the offender's rights and victims' procedural role(s) in the 'justice system and whether they can participate actively in criminal proceedings vary across [...] system[s]'.⁹¹ Based on IHRL, commentators have recognised similar limits on victims' roles/rights in criminal proceedings, including appeals.⁹² The following examples further illustrate limits on victims' roles/rights in appeals under IHRL.

According to the HRC, full retrial or hearings are not required if the appeals instance can regard factual aspects of the case including consideration of evidence filed during trial;⁹³ no compensation is due before the trial judgment becomes final, namely, when the conviction is confirmed on appeal;⁹⁴ and pursuant to equality before courts and equality of arms 'the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds'.⁹⁵ Under the UN Handbook on Justice for Victims (Victims Declaration guide), although access to justice involves means for judicial review, the original decision maker or his/her judicial superior can undertake it and 'the superior may amend the decision or direct the original decision maker to reconsider it'.⁹⁶ The legal framework determines whether and before which organ victims may appeal decisions and/or participate in appeals.⁹⁷

These ECtHR's standards are found. Procedural fairness requires balancing competing defence rights, effective justice administration, and rights/interests of victims and witnesses.⁹⁸ Unlike the EU Directive, the ECtHR has not explicitly recognised victims' right to appeal decisions not to prosecute.⁹⁹ Limitations on appeals admissibility are

acceptable but these ‘must not restrict or reduce a person’s access in such a way or to such an extent that the very essence of the right is impaired’.¹⁰⁰ Limitations are incompatible with due process guarantees ‘if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought’.¹⁰¹ Whether appeals inadmissibility impairs the ‘right to a court’ depends on whether litigants could foresee the appeals procedure and whether penalties for unfollowing this procedure were proportional.¹⁰² The absence of appeals hearings may be justified if there were first instance hearings, matters in appeals ‘could be adequately resolved on the basis of the case file and the written submissions’, and it is ‘in the interests of the proper administration of justice’ (expeditious proceedings).¹⁰³

Concerning victims as civil parties in appeals, the ECtHR has specifically found this. Although everyone holds the right to fair and public hearings (including appeals),¹⁰⁴ equality of arms in appeals as for civil parties depends on the role ‘accorded to civil actions within criminal trials and to the complementary interests of civil parties’.¹⁰⁵ Civil parties are not ‘the opponent or [...] necessarily the ally of the prosecution, their roles and objectives being clearly different’.¹⁰⁶ In appeals on only legal points, the judicial duty to respond to civil parties does not necessarily include justification of this response when such justification means ‘an additional burden that is not imposed by the nature of the civil party’s request’.¹⁰⁷

Finally, these IACtHR’s standards are identified. The right to appeal and participation in appeals may be regulated; however, requirements or restrictions inimical to the very essence of this right cannot be imposed.¹⁰⁸ Formalities are necessary but these should be minimal not to block the purpose of the appeals remedy, namely examine and decide on errors invoked by appellants.¹⁰⁹ Minimum procedural guarantees must be respected in appeals to decide on ‘errors asserted by the appellant, without this entailing the need to conduct a new oral trial’.¹¹⁰

3. Victims in ICC appeals

This section discusses the ICC’s law/practice on victims’ procedural roles, procedural rights and related limits in ICC appeals. As identified in ICC’s law/practice and literature, ICC appeals are based on procedural, factual or legal errors and also (only defence) fairness/reliability grounds, and appeals may be against: final decisions (acquittals/convictions/sentences), other decisions (interlocutory decisions), and reparations orders.¹¹¹ Whereas the first two types of ICC appeals concern proceedings on defendant’s criminal liability (guilt/innocence) or extent thereof, the third involves post-conviction reparations proceedings.

As adapted to appeals, the victim participant procedural role and procedural rights existent in other ICC procedural stages also apply during ICC appeals. Thus, victims may be judicially authorised to participate in criminal liability-related appeals against final and interlocutory decisions; however, they cannot appeal criminal liability decisions. In turn, victims as reparations claimants are proper parties to post-conviction reparations proceedings. Hence, they can appeal reparations orders and exercise their procedural rights as parties to reparations appeals. As adapted to ICC appeals, Rule 85 (a) victim definition (previously quoted) applies to victims as participants/parties. In

limiting and expanding victims' rights in appeals, the ICC has mainly considered victims' roles, respect for defence rights, procedural efficiency, and specific procedural stage.

3.1. Victim participants in acquittal/conviction/sentencing appeals

Under Article 81 of the ICC Statute and Rules 150–152, only parties (ICC Prosecutor and defence) can appeal acquittals/convictions and sentences. Since victims cannot be parties to ICC proceedings on determination of defendant's guilt (investigation, pre-trial, trial), they cannot appeal these final decisions.

Yet, the ICC AC has authorised victim participation in acquittal/conviction appeals proceedings triggered by the parties. Victims who participated in trial and whose right to participate was not withdrawn 'may, through their legal representatives, participate in [...] appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal'.¹¹² Victim participants during sentencing proceedings have also been authorised to participate in sentencing appeals.¹¹³ As the ICC AC has determined, victim participation in acquittal/conviction/sentencing appeals needs to respect defence rights under Article 68(3) of the ICC Statute.¹¹⁴ The need for such balance between victim participation and defence rights is particularly important because appeals against final decisions by definition directly determine defendant's criminal liability and extent thereof.

Victim participants' lawyers may present victim participants' views and concerns on victim participants' personal interests in appealed issues by filing observations on documents in support of appeals.¹¹⁵ The ICC AC specifies victim participation modalities.¹¹⁶ Victim participants' lawyers have access to confidential documents in appeals, excepted *ex-parte* documents.¹¹⁷ The ICC AC has assessed the admissibility of victim participation applications not considered or rejected by Pre-Trial Chambers (ICC PTCs)/ICC TCs and it can grant victim participant status to those applicants.¹¹⁸ Victim participants can via their lawyers file observations on the defence's and ICC Prosecutor's appeals against the judgment and sentence.¹¹⁹

Upon ICC AC's authorisations, victim participation has mainly taken place via written observations, complemented with participation in appeals hearings; however, victim participation in appeals is conducted through victims' lawyers under common legal representation.¹²⁰ In conviction/acquittal appeals and related to parties' appeals grounds, victim participation has included submissions on: trial fairness, defence's additional evidence application, scope of charges, elements of crimes, criminal liability modes, and review standard concerning errors.¹²¹ In sentencing appeals, victim participation has included observations on prosecutor's/defence's appeal grounds concerning victim-related sentencing factors.¹²² Victim participation in all these appeals has involved the above-mentioned procedural rights, including timely notification.

Yet, as of September 2020, two of the fully completed ICC cases (appeals included) ended in acquittals, including the ICC AC's reversal of Bemba's conviction, which profoundly distressed victim participants as commentators noted.¹²³ However, victim participation itself in ICC acquittal/conviction and sentencing appeals should not be underestimated. Studies demonstrate that victim participation at the ICC is very important to victims.¹²⁴

Victim participation in appeals against acquittals/convictions/sentences is herein found reasonable because Article 68(3) is implemented across all procedural stages, including final/merits appeals beyond trial and conviction. This is consistent with a teleological interpretation of victim participation to apply it in ICC appeals against final decisions. Victim participants' procedural rights recognised in ICC's law/practice are suitable to these appeals. However, the almost exclusively written, intermediated and collectivised victim participation in ICC appeals against final decisions is overall criticised herein. Such features make victim participation in these appeals almost symbolic and, arguably, less meaningful. To some extent, the large numbers of victim participants, the need for efficient proceedings, and respect for defendants' rights may partially justify this. Yet, victim participation in these appeals should arguably be strengthened. The decisive nature of these decisions and their impact on victims' personal interests strongly support that victims are allowed to intervene more actively in these appeals regardless of the final outcomes but with due respect for defence rights. Indeed, victims put special attention to appeals against final decisions.¹²⁵

Nevertheless, the lack of victims' right to appeal final decisions is unproblematic. There is no such right in international/national criminal jurisdictions. As Cassese rightly remarked, victim participants can 'exercise some procedural rights before the Appeals Chamber' but they 'are not vested with the right to appeal against a judgment'.¹²⁶ Yet, if both parties drop their conviction/acquittal and/or sentencing appeals, there is no appeals and victim participation is impossible such as occurred in *Katanga*.

3.2. Victim participants in interlocutory appeals

Pursuant to the ICC Statute (Article 82(1)–(3)) and Rules 154–158, unlike parties (ICC Prosecutor and defence), victim participants cannot appeal interlocutory decisions (decisions other than acquittals/convictions/sentences). However, they can voice their views and concerns during interlocutory appeals triggered by the parties.

Victim participants need to file their applications before responses to the documents supporting appeals are filed.¹²⁷ Under Article 68(3) of the ICC Statute, the ICC AC examines each application. Other ICC Chambers' previous decisions on victim participation do not automatically bind the ICC AC.¹²⁸ The ICC AC determines whether: victim participants seeking participation are victims in the case; appealed issues affect their personal interests; victim participation is appropriate; and the manner of participation is not prejudicial to or inconsistent with defence rights.¹²⁹ Applicants who are not victim participants lack the right to participate in appeals.¹³⁰ The ICC AC does not determine 'the status of these victims as ordinarily, for interlocutory appeals it would not itself make first-hand determinations with respect to the status of victims'.¹³¹ Victim participation in interlocutory appeals requires real and identified personal interests to participate so that the ICC AC is not flooded with victim participants.¹³²

Article 82(1)(d) regulates an important type of interlocutory appeals: parties may appeal decisions involving 'an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings'. Victim participants are not mentioned. Nevertheless, under Regulation 65(3), victim participants can file responses to applications for leave to appeal and they can be heard when

there is a hearing on these applications. Active victim participation in Article 82(1)(d) appeals may be argued; however, the ICC instruments' drafters restricted so.¹³³ As McGonigle-Leyh remarks, this may in principle be justified to protect defence rights and ensure timely proceedings.¹³⁴

The ICC instruments left unclear whether victim participants have the right to automatically participate in interlocutory appeals once a party's request for leave to appeal is granted.¹³⁵ Until mid-July 2015, e.g. the ICC AC required victims who participated in proceedings giving rise to Article 82(1)(d) interlocutory appeals to re-apply to be allowed to present their views and concerns in these appeals.¹³⁶ The same situation applied to parties' Article 82(1)(b) appeals on the release of those investigated/prosecuted.¹³⁷ Victim participants had to apply for participation in Article 82(1)(d) appeals, namely: explain how their personal interests were affected, why their views and concerns during appeals were appropriate, and why this would not affect defence rights; and demonstrate that the appealed decision involves an issue that would significantly affect fair and expeditious proceedings or the trial outcome and requires ICC AC's immediate resolution.¹³⁸ Regarding Article 82(1)(b) appeals, victim participants had to demonstrate that their personal interests were affected and that the presentation of their views and concerns was appropriate.¹³⁹

Nonetheless, the ICC AC in late July 2015 changed its previous practice on Article 82(1)(b)/Article 82(1)(d) appeals: 'victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal'.¹⁴⁰ The ICC AC interpreted 'participant' (Regulations 64(4)–(5)) to include victims.¹⁴¹ Victim participants' right to automatically participate in Article 82(1)(b)/Article 82(1)(d) appeals is sound. The previous practice caused considerable delays and interlocutory appeals are an extension of related pre-trial/trial proceedings.¹⁴²

Nevertheless, victim participants' right to automatically participate in Article 82(1)(b)/Article 82(1)(d) appeals is found herein uncertain or relative. The ICC AC can consider that victims' personal interests 'are not affected by the issues arising in a particular appeal or that the participation of victims would be inappropriate'.¹⁴³ The ICC AC in principle respects PTC's/TC's criteria underlying victim participation (victims' status, personal interest and participatory rights) in proceedings that gave rise to appeals; however, it may overturn these criteria when there is a compelling reason.¹⁴⁴

Moreover, victim participants' right to automatic participation is limited to Article 82(1)(b)/Article 82(1)(d) appeals. The ICC AC has not extended this right to other interlocutory appeals such as: jurisdiction/admissibility decisions, ICC PTC's decisions to act *motu proprio* concerning a unique investigative opportunity, and ICC PTC's authorisation of ICC Prosecutor's investigative steps within State Parties to the ICC Statute.¹⁴⁵ Thus, victim participants depend on ICC AC's authorisations/invitations to participate in certain interlocutory appeals.¹⁴⁶

Furthermore, victim participants cannot appeal interlocutory decisions as these examples illustrate. First, the ICC instruments are silent about whether victims can appeal decisions to withdraw their victim participant status. Yet, the ICC Chambers have rejected requests from victim participants' lawyers to reconsider their judicial decisions to withdraw this status.¹⁴⁷ Second, individuals who apply for victim participation cannot appeal decisions rejecting their applications.¹⁴⁸ They need to re-apply.

Third, victim participants cannot appeal ICC's appointment of victim participants' common legal representation.¹⁴⁹ Fourth, whether victim participants should be allowed to appeal decisions on victim/witness protective measures under Article 82 (1)(d) may be questioned. This should be exceptionally authorised despite logistical problems related to numerous victim participants.¹⁵⁰

Although the ICC AC can decide without victim participants' views and concerns, victim participation in interlocutory appeals carries at least symbolic importance.¹⁵¹ Victim participation may be actually important in ICC AC's decision-making. For instance, concerning appeals on the accused's release, victims know how this impacts their security. Regarding notification rights, Rules 151–156 mention 'party'/'parties' in appeals. Nevertheless, victim participants are notified in practice. In concurrence with Brady, this is justified because the French/Spanish versions of these Rules mention participants, it is fair, and it is coherent with Rule 92 on notification to victims/victims' lawyers.¹⁵²

As examined later, victims can appeal reparations orders. However, the ICC instruments are silent on whether victims can appeal *decisions* on reparations principles/procedures. In *Lubanga*, victims' lawyers appealed the ICC TC's reparations *decision*¹⁵³ as a reparations *order*. Nevertheless, the ICC TC considered that it was an interlocutory decision not appealable by victims' lawyers.¹⁵⁴ This initially confined victims' role to victim participants in these appeals. Yet, victims' lawyers filed observations on the nature of such decision before the ICC AC which concluded that the ICC TC's reparations decision was a reparations order: appealable by victims.¹⁵⁵ Thus, victims as parties to reparations proceedings (not participants) could appeal it.

In limiting victim participants' observations in interlocutory appeals, the ICC AC has remarked the importance to ensure fair and expeditious proceedings and has required that those observations be specifically relevant to appealed issues and to the extent that victim participants' personal interests are affected.¹⁵⁶ As examined, however, victims' role during ICC interlocutory appeals has been excessively limited, which is criticised herein for two reasons.

First, victim participants should be allowed to appeal certain ICC interlocutory decisions that particularly affect victim participants' personal interests. Otherwise, the *telos* of victim participation at the ICC is seriously limited during interlocutory appeals. Indeed, the Special Tribunal for Lebanon's victim participation regime (modelled after ICC's victim participation) enables victim participants to appeal, exceptionally, interlocutory decisions that fundamentally concern their personal interests.¹⁵⁷ Via normative amendments/practice, the ICC should allow victim participants to appeal exceptionally decisions on victim participant status applications, key victim participation modalities, certain disclosure decisions, and protective measures for victim participants.

Second, the ICC AC's previous practice of rejecting victim participants' right to automatically participate in interlocutory appeals that stem from proceedings in which victims intervened severely limited victim participation in interlocutory appeals and affected the efficiency of interlocutory appeals for ten years. Although the ICC AC currently recognises the said victims' right to automatic participation, the exercise of this right is uncertain or relative (ICC AC's discretion) and is not applicable to all interlocutory appeals. Thus, victim participation in ICC interlocutory appeals still presents deficits.

Should the ICC recognise victim participants' right to appeal certain interlocutory decisions and/or expand the said victim participants' right to automatic participation to all interlocutory appeals, these rights must be balanced against other interests and handled carefully amidst the high numbers of victim participants in ICC appeals. In particular, defence rights must be respected. This is consistent with Article 68(3) of the ICC Statute, which requires that victim participation cannot affect defence rights. Indeed, interlocutory appeals concern proceedings (directly) related to defendant's criminal liability. Victim participants' rights and defence rights in ICC interlocutory appeals must be balanced, which is also consistent with Article 21(3) of the ICC Statute.

3.3. Victims as parties (Reparations claimants) to reparations appeals

Under Article 82(4) of the ICC Statute, victims can through their lawyers appeal ICC TC's reparations orders: 'A legal representative of the victims [...] adversely affected by an order under article 75 [reparations] may appeal against the order for reparations'. As scholars have highlighted, Article 82(4) confirms that victims have no general standing to appeal ICC decisions, except for reparations orders.¹⁵⁸ The ICC AC has found that victims are:

[...] parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68(3) [...], may present their views and concerns where their personal interests are affected [...] the right to appeal lies with the victims, not with the legal representatives of victims [...] article 82(4) provides that victims may only appeal with the assistance of a legal representative.¹⁵⁹

These findings are coherent with victims' procedural role as parties to post-conviction reparations proceedings. The ICC TCs can issue reparations orders for victims against the offender only if the accused is convicted. They issued reparations orders in *Lubanga*, *Katanga*, and *Al-Mahdi*. ICC TCs cannot issue reparations orders in acquittals (*Bemba*, *Ngudjolo-Chui*). Victims' status as parties (reparations claimants) corresponds to the telos of post-conviction reparations proceedings: determine harm inflicted on victims by the convicted and redress it. According to the ICC AC, only victims and the convicted (not the ICC Prosecutor) are parties to reparations proceedings, including reparations appeals.¹⁶⁰ Under Article 75, victims hold the right to seek reparations. As scholars determined, victims as reparations claimants 'are clearly "parties" and have an explicit right under article 82, paragraph 4 to appeal an order for reparations'.¹⁶¹ There are not civil parties at the ICC. Yet, Rule 150 uses 'party' to refer to those who can appeal reparations orders.

The ICC AC has identified categories of victims who hold the right to appeal reparations orders. First, individuals whose victim participant status applications during pre-trial/trial were rejected or whose right to participate the ICC TC withdrew.¹⁶² The ICC AC established that 'reparations proceedings are a distinct stage and [...] different evidentiary standards and procedural rules apply to the question of who is a victim for those proceedings'.¹⁶³ Second, victim participants in pre-trial/trial/sentencing stages and victims who 'claimed to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations' can appeal reparations orders.¹⁶⁴ Reparations requests (Rule 94) require no victim participation application or

victim participant status (Rule 89).¹⁶⁵ As scholars have correctly remarked, this reflects the mutual autonomy between victims' roles as participants and parties (reparations claimants) at the ICC albeit their connections.¹⁶⁶

Third, victims who claimed reparations through the ICC Office of the Public Counsel for Victims (OPCV) (victims' lawyer) can appeal reparations orders.¹⁶⁷ Nevertheless, it cannot appeal reparations orders on behalf of unidentified individuals who did not apply for reparations even if they may benefit from collective awards 'because at this stage [...] it is impossible to discern who would belong to this group'.¹⁶⁸ However, it can be invited to file submissions on behalf of them.¹⁶⁹ In practice, while the OPCV represents a group of victims in reparations appeals, lawyers via collectivised representation represent another group in the same appeals. Fourth, victims who participated in pre-trial/trial but did not request reparations can appeal reparations orders since: the appealed decision affected them; they participated in proceedings leading to reparations; and they did not request reparations because their lawyers could not contact them.¹⁷⁰

The ICC AC's jurisprudence reflects observations of victims' lawyers who represent reparations claimants, victims who have not requested reparations yet but who could benefit from collective awards, and victims who lost their victim participant status but who are still reparations claimants.¹⁷¹ Although the ICC Prosecutor seemingly showed some reluctance about victim participation in interlocutory appeals, she acknowledged that reparations claimants have the right to appeal reparations orders.¹⁷²

Victims' lawyers (common legal representation/OPCV) may represent the above-mentioned categories of victims simultaneously. Article 82(4) expression 'legal representative of the victims' enables to include these categories in appeals against reparations orders and these victims can intervene as parties to reparations appeals proceedings. This is consistent with the ICC Statute/Rules, namely the word 'victims' alone may imply victims in general. Therefore, all these victims may benefit from appeals against reparations orders through their lawyers. Common legal representation helps to respect defence rights and ensure efficient appeals amidst high numbers of reparations claimants at the ICC. Yet, the (almost) exclusive use of common legal representation arguably depersonalises victims' role/rights in ICC reparations appeals.

Besides the ICC Statute (Articles 82–83), Rules 149–158 regulate appeals against reparations orders. Appeals are filed once reparations claimants/their lawyers are notified of the reparations order. Once reparations claimants have via their lawyers appealed reparations orders,¹⁷³ related appeals proceedings include these victims' procedural rights exercised through their lawyers (common/collectivised representation) under the ICC's law/practice: submit documents in support of appeals against the reparations order;¹⁷⁴ present additional evidence;¹⁷⁵ submit responses to defence's documents in support of his/her appeal and TFV's observations;¹⁷⁶ and appeal certain decisions on implementation of reparations orders, particularly size of the award for which the convicted is liable, although these appeals have mainly led to unsuccessful results.¹⁷⁷

The ICC has generally triggered submissions/observations of victims' lawyers in reparations proceedings under ICC Statute Article 75(3): a Chamber 'may invite [...] representations'. Pursuant to Rule 103, which the ICC AC has applied in reparations appeals, a Chamber 'may invite or grant leave to a [...] person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate'.¹⁷⁸ Nevertheless, this is not fully consistent with victims' role as parties to reparations proceedings, including

reparations appeals. The exercise of reparations claimants' rights as proper parties to post-conviction reparations appeals should not be subject to ICC's 'invitations'. Victims as reparations claimants should exercise their rights *motu proprio*. Through normative amendments/jurisprudence, changes should be introduced to better reflect victims' role as parties to reparations proceedings, so that they can more actively exercise their procedural rights in proceedings related to appeals against reparations orders.

Under Rule 153(1), the ICC AC 'may confirm, reverse or amend' reparations orders. As scholars remark, appeals against ICC TCs' reparations orders include the scope of beneficiaries and reparations modalities (compensation, etc.).¹⁷⁹ ICC cases with appeals against reparations orders (*Lubanga*, *Katanga*, *Al-Mahdi*) show that victims' lawyers have mainly invoked legal errors. Victims' appeals have had limited success, especially in later cases (*Katanga*, *Al-Mahdi*) *vis-à-vis* *Lubanga*. Appeals grounds from victims' lawyers have decreased in number and contents in *Katanga* and *Al-Mahdi vis-à-vis* *Lubanga*. The need for appeals in *Katanga* and *Al-Mahdi* arguably dropped because the ICC clarified several novel reparations issues in *Lubanga*.

Victims' appeals, which have been generally admissible, and their outcomes in reparations orders are examined. In *Lubanga*,¹⁸⁰ victims' lawyers successfully challenged: that the ICC TC neither directed the reparations order against Lubanga nor made him liable for the award; and Lubanga's appeal on causal link. However, victims' appeals against ICC TC's delegation of reparations supervision to a new ICC TC and appeals on reparations types (individual/collective awards) and identification/eligibility criteria of reparations beneficiaries were mainly unsuccessful. Victims' appeal to exclude the ICC Prosecutor as a party to reparations appeals was moot since the ICC AC had granted it. Although victims' appeal against ICC TC's delegation of powers to non-judicial organs (Trust Fund for Victims (TFV)/Registrar) was unsuccessful, the ICC AC analysed delegated tasks.

In *Katanga*, victims' lawyers/OPCV unsuccessfully appealed the ICC TC's decisions on the lack of immediate appointment of a victims' new lawyer after termination of the former one's mandate and lack of a causal link between attacks and transgenerational psychological harm.¹⁸¹ In *Al-Mahdi*, victims' lawyers unsuccessfully challenged ICC TC's decisions to substantially limit the number of individual reparations beneficiaries and delegate judicial authority to a non-judicial entity (TFV); however, victims' lawyers successfully challenged Al-Mahdi's access to reparations claimants' identifying information as a condition to have their claims reviewed by the TFV.¹⁸²

The ICC instruments are silent on three issues concerning reparations appeals. First, whether victims' lawyers can appeal an ICC TC's decision not to issue a reparations order. In principle, victims could not appeal it.¹⁸³ The ICC Statute/Rules list who can appeal and against which decisions. Additionally, the *travaux préparatoires* of reparations Rules suggest the need for a reparations order to trigger appeals since proposals to enable the ICC AC to order new reparations hearings were refused.¹⁸⁴ Under teleological interpretations of ICC instruments provisions on reparations, however, reparations claimants should be able to appeal the non-issuance of reparations orders. As scholars remark, this would allow victims to realise their right to reparations.¹⁸⁵ The ICC AC has not clarified this matter because ICC TCs have issued reparations orders in cases ending in convictions. The ICC AC only stated that 'Whether the decision not to award reparations is appealable under article 82(4) does not have to be [...] addressed in the present decision'.¹⁸⁶

Second, whether appeals against the conviction and/or reparations order suspend reparations order effects. In the ICC's practice, victims have interestingly accepted the defence's request to suspend the effects of the impugned reparations order.¹⁸⁷ When convictions are appealed, this suspension is logical because ICC case-based reparations depend on the final determination of the convicted person's criminal responsibility on appeals. The ICC AC has stated that, despite potential delays, 'there is a clear need to suspend the enforcement of the Impugned Decision'.¹⁸⁸

Third, whether reparations claimants can only appeal reparations orders or whether they could also appeal reparations decisions related to reparations orders. The ICC's practice is criticised herein due to some contradictions. As discussed, when reparations decisions were not considered reparations *orders*, they could not be appealed (*Lubanga*). Nevertheless, as examined, reparations claimants were able to appeal certain decisions on implementation of reparations orders. Via normative amendments/jurisprudence, victims should via their lawyers be able to appeal not only reparations orders but also (key) reparations decisions related to reparations orders. This corresponds to victims' role as full-fledged parties to post-conviction reparations proceedings.

Overall, the right of victims as reparations claimants to appeal reparations orders and related procedural rights during ICC proceedings on appeals against reparations orders correspond to their procedural party role in these proceedings. Although there is no civil party status at the ICC, these features are very similar to civil parties' rights in hybrid/national criminal courts.

However, the ICC's law/practice present some important deficits or uncertainties in terms of the exercise of victims' procedural rights in reparations proceedings, including excessively intermediated, passive, written-based and collectivised interventions. This is inconsistent with both the party role held by reparations claimants at the ICC and goals of ICC reparations proceedings. Unlike guilt/innocence-related proceedings, which focus on determination of the accused's criminal liability, reparations proceedings concern redress for victims' harm. When appeals against ICC reparations orders are filed, the accused's criminal liability was already determined. This does not neglect defendants' rights as parties to reparations proceedings and the need to balance competing rights, which is consistent with Article 21(3) of the ICC Statute. The ICC AC indeed invoked the need to respect defence rights during reparations.¹⁸⁹ Moreover, appeals against ICC reparations orders and implementation thereof are subject to the accused's conviction and (potentially) the confirmation thereof during conviction/acquittal appeals.

4. ICC's law/practice on victims in appeals *vis-à-vis* IHRL

4.1. Procedural roles/standing

As stated, victim definition is a first element to determine victims who can participate in ICC appeals and/or appeal reparations orders. The Rule 85(a) victim definition, which the ICC applies in appeals, is fully consistent with IHRL that binds the ICC via ICC Statute Article 21(3). Scholars have remarked that Rule 85 drafters closely followed the Victims Declaration's victim definition.¹⁹⁰ Thus, the Victims Declaration pivotally contributed to the general victim definition at the ICC, which applies to victim participants during appeals and victims as parties (reparations claimants) who appeal reparations

orders. Moreover, Article 68(3), namely the basis for victim participants' role to express their views and concerns at the ICC, is based on Victims Declaration paragraph 6(b).

The fact that victims cannot appeal ICC acquittals/convictions and sentences is consistent with IHRL. No IHRL source indicates that victims can appeal these final decisions. When IHRL sources refer to holders of the right to appeal convictions, they only mention defendants. Unlike IHRL treaties, the ICC Statute/Rules acknowledge that the ICC Prosecutor can also appeal those final decisions but there is no reference to victims.

Nevertheless, the fact that victims as participants cannot appeal ICC interlocutory decisions, in particular decisions that fundamentally affect their personal interests, *and* the total or partial denial of victim participants' automatic participation in ICC interlocutory appeals stemming from proceedings in which they participated are arguably inconsistent with IHRL. Under IHRL sources examined, victims hold a general right to access to justice. This is unfulfilled when victim participants completely lack the standing to appeal ICC decisions that are pivotal to victim participants such as revocation of victim participant status, denial of key participation modalities, denial/modification of protective measures, and rejection of victim participant status applications. Or when victims as participants totally or partially lack(ed) the said automatic participation in ICC interlocutory appeals. Moreover, the total impossibility for victim participants to appeal ICC interlocutory decisions is inconsistent with IHRL examined, particularly case-law, which acknowledges victims' standing to appeal certain decisions. As Moffett found, the absence of victims' right to appeal ICC decisions that 'fail to consider their interests' is 'contrary to human rights law which protects victims' right to an effective procedural remedy'.¹⁹¹

In any event, the ICC's law/practice on victims' right to express their views and concerns as victim participants in ICC acquittals/convictions/sentencing appeals and interlocutory appeals are generally consistent with IHRL. Such victim participant status in ICC appeals is overall coherent with IHRL, particularly regional jurisprudence. IHRL sources examined acknowledge that victims' roles in appeals remain differentiated from parties' roles in criminal proceedings, which has been the situation of victim participants in ICC appeals. The victim participant role in ICC appeals enables victims to realise, *mutatis mutandis*, some 'civil rights' in IHRL language.

Concerning victims' procedural role as proper parties to ICC post-conviction reparations proceedings such as reparations appeals, this is overall consistent with victims' general right to claim and receive reparations recognised in IHRL sources examined. Victims' right to appeal reparations orders, which the ICC Statute/Rules recognise, enforces victims' general right to access justice under IHRL. In light of previous IHRL-related considerations, the ICC's practice of additionally allowing victims to appeal certain decisions on implementation of reparations orders is sound. Via normative amendments/jurisprudence, however, this should be extended to other key decisions related to reparations orders and the realisation of victims' role as parties should be more active and not (partially) dependant on ICC's 'invitations'. Under IHRL examined, particularly jurisprudence, victims *mutatis mutandis* exercise 'civil rights' corresponding to their party status in ICC reparations appeals. Regardless of mixed or negative outcomes in ICC reparations appeals, reparations claimants as parties have appealed reparations orders and claimed reparations in appeals proceedings. That victims and the convicted (not the ICC Prosecutor) are the only parties to ICC post-conviction reparations proceedings such as reparations appeals is consistent with IHRL, particularly case-law.

Due to their general nature, examined IHRL sources do not explicitly prescribe the exact procedural role for victims in appeals; however, they arguably consider that victims need to have some active standing in appeals. Overall, the ICC's law and practice are consistent with IHRL because victims have exercised their roles as victim participants or parties (reparations claimants) concerning legal and factual aspects of impugned decisions. At the ICC, victims' procedural roles determine the broader or narrower extent of their rights, particularly whether they have standing to appeal certain decisions. This is in principle compatible with examined IHRL standards.

4.2. Procedural rights

Examined IHRL sources, which bind the ICC under ICC Statute Article 21(3), may *mutatis mutandis* justify victims' procedural rights as participants or parties (reparations claimants) in ICC appeals. ICC Chambers have invoked and adapted IHRL sources, including case-law, when crafting victims' procedural rights as participants or parties (reparations claimants) across procedural stages.¹⁹² As scholars highlighted,¹⁹³ ICC Statute drafters followed Victims Declaration paragraph 6(b) to give contents to Article 68(3) of the ICC Statute, which is the legal basis for victim participation and related procedural rights in ICC appeals. Moreover, the UN Principles mentions Article 75 (reparations). The ICC AC's victim-related jurisprudence has continuously invoked IHRL, particularly UN Principles and regional human rights jurisprudence.¹⁹⁴

Although IHRL treaties do not explicitly recognise victims' rights in appeals, victims can arguably benefit *mutatis mutandis* from these treaty procedural guarantees/rights and victims' general rights when victims intervene in ICC appeals. As examined previously, several victims' procedural rights in criminal justice can be identified in the case-law of UN bodies and regional courts. In many cases including victims, these international organs have recognised that victims also hold fair proceedings/due process rights in their pursuit of justice and fight against impunity. These victims' procedural rights have been recognised as generally applicable across all procedural stages, including appeals. As adapted to victims' procedural roles at the ICC, this may justify the exercise of victims' procedural rights as participants or parties during appeals. Victims' procedural role as parties to post-conviction reparations proceedings includes the right to appeal ICC reparations orders.

Overall, victims' procedural rights as victim participants in and parties (reparations claimants) to ICC appeals proceedings have been generally consistent with examined IHRL. As adapted and adjusted to ICC appeals, victims' procedural rights in ICC appeals generally involve rights to access to justice, participate and be heard in fair proceedings, claim and obtain reparations, etc. recognised in IHRL sources previously analysed. As scholars such as Moffett, De-Brouwer, Heikkilä and Ferstman have generally identified, victims' procedural rights at the ICC reflect IHRL standards adapted to the ICC.¹⁹⁵ The next paragraph via examples illustrate the consistency of victims' procedural rights in ICC appeals with IHRL and/or the relationship between the former and the latter.

First, victims' procedural rights in ICC appeals have not been limited to legal or formal aspects but have involved factual and/or evidentiary matters. Second, timely appeals proceedings fit well into victim participants' personal interests at the ICC. Victims as participants/parties are arguably entitled to timely ICC appeals. Victim participants should

hence automatically participate in all ICC interlocutory appeals stemming from proceedings whether they intervened. Third, legal representation, which is a procedural right, has enabled victims to exercise other procedural rights during ICC appeals. The ICC/external organisations have facilitated/appointed victims' lawyers at no cost for victims. Thus, victims have handled legal and financial complexities related to victims' procedural rights in ICC appeals. Fourth, victims in ICC appeals have intervened before the ICC AC (another judicial chamber) which in victim matters has normally amended impugned decisions rather than ordered the original decision maker's re-consideration. Victims as parties (reparations claimants) have held procedural guarantees to appeal ICC reparations orders and intervened in related appeals, without new reparations proceedings. Fifth, the ICC has respected victims' right to timely notification of appeals decisions/proceedings since victims via their lawyers have timely exercised their procedural rights in appeals. Sixth, victims as participants and *a fortiori* parties have exercised their right to access, via their lawyers, confidential documents in ICC appeals. Therefore, these examples show the overall consistency/relationship of victims' rights in ICC appeals with IHRL.

However, the ICC's law/practice on victims' procedural rights during ICC appeals arguably present some important deficits under examined IHRL sources. Victims as participants or parties have exercised their procedural rights during ICC appeals mainly via written submissions filed by their lawyers as complemented with their lawyers' oral interventions during appeals hearings and (virtually) always through common legal representation. Such predominantly written, indirect, passive, and collectivised exercise of victims' procedural rights in ICC appeals is not fully consistent with IHRL standards, particularly procedural rights that should ensure victims' rights to effective and active participation in fair appeals proceedings and be heard in appeals. This makes victims' procedural rights in ICC appeals more symbolic and formal, even when victims as parties appeal reparations orders. Scholars such as Zegveld, Killeen and Moffett have criticised similar deficits because victims' roles/rights are depersonalised, collectivised and even objectified at the ICC.¹⁹⁶

By completely denying victim participants' right to appeal interlocutory decisions, the ICC's law/practice is inconsistent with the realisation of procedural rights recognised in IHRL. To realise fully victims' rights to effective access to criminal justice and fair proceedings recognised in IHRL, it is necessary a victim participants' exceptional right to appeal certain ICC interlocutory decisions that are pivotal to victim participants' personal interests. Moreover, victim participants' right to automatic participation in ICC interlocutory appeals that stemmed from proceedings where they participated should include all ICC interlocutory appeals in light of analysed IHRL standards. Victim participants should not be required to re-apply for participation. For years, they had to re-apply to participate in ICC interlocutory appeals, which delayed the exercise of victims' procedural rights in appeals. In ICC interlocutory appeals where the said right to automatic participation was introduced, such 'automaticity' is relative or uncertain because it depends on the ICC AC, which can discretionally restrict or block this 'automatic' feature. Thus, these practices are arguably inconsistent with IHRL.

In turn, the exercise of victims' procedural rights as parties (reparations claimants) is somehow subject to ICC AC's 'invitations' or initiatives during reparations proceedings, including appeals. In light of IHRL standards as adapted to ICC appeals, such situation is

problematic because the active and effective exercise of victims' procedural rights as proper parties to reparations proceedings is limited. Although victims' appeals against reparations orders have been generally admissible, these appeals have resulted in mixed outcomes, mainly negative ones. In turn, this is partially inconsistent with IHRL standards on rights to claim and receive reparations. In any event, the ICC AC under IHRL should explicitly and effectively continue engaging with victims' observations to ensure victims' meaningful procedural rights as parties/participants during ICC appeals.

4.3. *Limits*

Under IHRL, scholars have correctly remarked that victims' rights at the ICC are not absolute: they must be balanced with other interests¹⁹⁷ and, if needed, fundamental interests such as core defence rights may be preferred in case of direct conflict.¹⁹⁸ In the ICC's law/practice, victims' procedural roles and rights in ICC appeals have been mainly limited by the respect for defendant's rights, considerations related to appeals proceedings such as procedural efficiency, and/or nature of victims' interventions as participants/parties in appeals. Overall, these limits are consistent with IHRL standards examined. In principle, ICC's law/practice arguably have rightly balanced victims' roles/rights and defence rights/other interests in appeals, which is coherent with Article 21(3) of the ICC Statute.

Under ICC Statute Article 68(3), which also applies to victim participation in appeals, the ICC may allow victims' views and concerns 'at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. As indicated, Article 68(3) drafters largely relied on the Victims Declaration. Additionally, ICC instruments state the need to respect convicted person's rights in reparations proceedings and contextualise reparations claimants' role/rights in the specific reparations stage, including appeals.¹⁹⁹ Importantly, the ICC AC has continuously invoked these normative limits in its jurisprudence on victims in appeals.²⁰⁰ Despite these limits, however, the ICC on a case-by-case basis and where advisable/necessary should consider expanding the direct, active, oral and individualised exercise of victims' procedural rights in appeals under IHRL standards.

These examples further illustrate the consistency and/or relationship between the ICC's practice and IHRL as for limits on victims' procedural roles/rights in ICC appeals. First, as examined, victims' roles/rights have been exercised in ICC appeals without the need for new trials or new reparations proceedings and the ICC AC has generally discussed observations filed by victims' lawyers unless the Chamber considered them moot as they were already decided. This is consistent with analysed IHRL standards. Nevertheless, the importance of victim participants' submissions for appeals decisions or judgments is another matter. The mixed record of appeals against reparations orders filed by victims as parties may further cast doubts on the effectiveness of victims' roles/rights in ICC appeals. Yet, that victims intervene in ICC appeals cannot be underestimated under IHRL.

Second, in light of IHRL, limitations on both victim participation in appeals and admissibility of reparations claimants' appeals have not arguably de-naturalised

victims' procedural roles/rights in ICC appeals. Generally, victims have not experienced major admissibility issues in ICC appeals. Yet, victims' exercise of some procedural rights has been limited once they were admitted in ICC appeals. As IHRL standards examined demand, victims' roles/rights in ICC appeals have overall been limited proportionally and when necessary. For example, victims' roles as participants/parties have taken place in ICC public appeals, except for witness/victim protective measures.

Third, certain analysed IHRL standards would justify previously examined ICC's practice on suspended effects of impugned reparations orders until the conviction is final since the verdict is appealable. The ICC TC in *Lubanga* issued the reparations order after conviction but before the ICC AC confirmed it. To better guarantee defence rights and procedural efficiency, the ICC should in principle issue reparations orders only when the conviction is final (confirmed on appeal/no appeals), which occurred in *Katanga* and *Al-Mahdi*. This delays the exercise of victims' rights during reparations appeals but may avoid or reduce victims' disappointment and frustration if the ICC AC overrules the conviction.

Fourth, that the victim participant role in ICC appeals has remained differentiated from the ICC Prosecutor's mandate is consistent with IHRL standards examined. Once victim participants are allowed to participate, they can via their lawyers exercise their procedural rights to express their views and concerns, namely within the confines of their victim participant role at the ICC. Regarding appeals against ICC reparations orders filed by victims as parties, the ICC Prosecutor is not a party to post-conviction reparations proceedings.

Fifth, in conformity with IHRL standards examined, formalities related to victims' procedural roles in ICC appeals have not seemingly impeded appeals purposes. A major exception has been/was the non-automatic victim participation in several/all interlocutory appeals that stem from pre-trial/trial proceedings where they participated. Yet, lawyers represent victims at the ICC, which satisfies victims' right to legal representation and enables victims to properly meet required formalities and exercise their roles/rights during ICC appeals.

5. Conclusion

Victims of international crimes, which constitute serious human rights violations, may hold procedural roles as victim participants in or parties (reparations claimants) to ICC appeals. At the ICC, victim participants cannot appeal final or interlocutory decisions. Yet, they can present their views and concerns in these appeals and exercise procedural rights, mostly via lawyers. Victims as parties to post-conviction reparations proceedings can through their lawyers appeal reparations orders. They are endowed with procedural rights in reparations appeals. Overall, the ICC's law and practice on victims in appeals are consistent with IHRL standards. Victims' procedural rights as participants in or parties to ICC appeals enable victims of atrocities to realise their rights to access to justice, participate and be heard in fair criminal proceedings, claim/obtain reparations, etc. in ICC appeals.

Yet, the ICC's law and practice on victims in appeals present some important deficits in light of IHRL. At the ICC, victims in appeals have exercised their procedural rights largely via lawyers, collectivised/common legal representation, and written observations even when victims are parties to reparations appeals. Moreover, victim participants

cannot appeal interlocutory decisions, not even those pivotal to their personal interests. Furthermore, for many years, victim participants lacked a right to participate automatically in interlocutory appeals that stemmed from pre-trial/trial proceedings in which victims had participated. This right to automatic participation currently exists but not in all interlocutory appeals and such 'automatic' participation is uncertain or relative. Finally, victims' procedural rights in reparations appeals are relatively limited and their exercise is passive (partially subject to ICC's 'invitations') although victims are parties to these appeals. This may be connected with mixed/negative outcomes from victims' appeals against reparations orders.

Respect for defence rights, procedural efficiency, high numbers of victims, particularities of appeals and nature of victims' roles at the ICC may partially justify the above-mentioned deficits. In light of IHRL, victims' roles and rights in ICC appeals are not absolute. They must be balanced against the said interests/criteria, particularly defence rights. Nevertheless, the ICC Statute (Article 21(3)) requires the ICC to interpret and apply ICC law consistently with IHRL. Thus, victims' procedural roles/ rights in ICC appeals should arguably be enhanced under IHRL and in balanced manners that closely take into account other interests and rights. Appropriate developments of victims' roles and rights in ICC appeals may further provide teeth to IHRL standards on victims in criminal justice and strengthen the legitimacy and effectiveness of ICC appeals. Indeed, victims' roles/rights in ICC appeals evidence that victim participation and reparations claims are highly important at the ICC.

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Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This work was supported by Academy of Finland [grant number 325535].

Notes on contributor

Dr. Perez-Leon-Acevedo is a post-doctoral researcher and a lecturer at the Department of Language and Communication Studies, Faculty of Humanities and Social Sciences, University of Jyväskylä, Finland. The author thanks Academy of Finland for funding support for this article (Project No 325535). He is also grateful to University of Oslo (PluriCourts, Faculty of Law) for access to its on-line library.