CONCEPTUALIZING VICTIMIZATION AT THE INTERNATIONAL CRIMINAL COURT: UNDERSTANDING THE CAUSAL RELATIONSHIP BETWEEN CRIME AND HARM

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ABSTRACT

One of the hallmark achievements of the International Criminal Court (ICC) is to give voice to victims—making them part of the criminal process as opposed to mere observers. Yet, that unique strength has also created unique difficulties that overwhelm the Court and its various branches with the onerous task of ascertaining who should actually qualify as a "victim" accorded the myriad of accompanying participatory benefits. And while the Court has had ample opportunity to define criteria for determining qualifying "victims," as putative victims have submitted tens of thousands of applications since 2006, the Court has failed to do so. More specifically, the Court has failed to provide a clear definition of the most central aspect of what constitutes a "victim": namely, what causal relationship is required between the charged crimes and the putative victim's resulting harm.

This Article confronts the need to determinedly define "victims" under the Rome Statute, the ICC's founding treaty, by identifying two conceptual models used in the jurisprudence of the United States Crime Victims' Rights Act (CVRA). This Article utilizes the CVRA's framework because the federal law contains a causal requirement for victimhood

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substantially like that required by the ICC. The first conceptual model looks at the elements of the charged offense and evaluates whether the victim's harm is a natural and foreseeable result of those elements. The second model looks at the facts underlying the elements and whether the victim's harm was a natural and foreseeable consequence of the crime as alleged to have been committed. When examined under the CVRA's two models, the Court's jurisprudence shows conflicting and inconsistent approaches to addressing the required causation between the charged crimes and a putative victim's resulting harm. This paper illustrates that inconsistency and identifies the model it believes best comports with the ICC's Rome Statute and its principal aims.

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INTRODUCTION

Arguably, the most resource-intensive matters confronting judges and the Registry of the International Criminal Court (ICC) are those relating to victim participation in pending investigations and trials. One of the Registry's primary duties as a "neutral organ of the Court" is to support victims so they can "participate in proceedings and apply for reparations."[1] Since the Court's first proceedings in 2006, the number of individuals who have sought to participate in ICC cases and investigations as victims of the alleged crimes has grown exponentially. In 2008, the Registry reported 960 victims who had applied to participate in judicial proceedings, of which 126 were granted.[2] In 2017, that number more than quadrupled, with 4,725 victims applying for reparations, participation in pending proceedings, or both, of which 2,089 victims were granted participatory rights.[3] And just this past year, in the 2018 reporting period, "12,509 victims participated in cases before the Court. . . . The Court received a total of 384 new victim applications: 118 for reparations, 4 for participation and 262 for participation and reparations. The Court also received follow-up information for 2,412 existing applications, as well as 797 victim representation forms."[4] Figure 1 shows the substantial increase in putative victims' applications to participate in ICC proceedings or for reparations in the past five years alone.

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1. *Registry*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/about/registry [https://perma.cc/XB6X-QJ52].

2. Rep. on the Activities of the Court, Doc. ICC-ASP/7/25, ¶ 8 (ICC Assembly of States Parties Oct. 29, 2008).

3. Rep. of the ICC, U.N. Doc. A/72/349, ¶ 23 (Aug. 17, 2017).

4. Rep. of the ICC, U.N. Doc. A/73/334, ¶ 2 (Aug. 20, 2018). Previously, the ICC had projected in their proposed program budget for 2018 that "7,400 individuals will apply for participation as victims in the various ongoing judicial proceedings." Proposed Programme Budget for 2018 of the ICC, U.N. Doc. ICC-ASP/16/10, ¶ 34, (ICC Assembly of States Parties Sept. 11, 2017) [hereinafter "ICC 2018 Programme Budget"].

FIGURE 1:[5] NUMBER OF VICTIMS APPLYING FOR PARTICIPATION/REPARATION BETWEEN 2013 AND 2018

Number of victims applying for participation/ reparation	2013 Actuals	2014 Actuals	2015 Actuals	2016 Actuals	2017 Actuals	2018 Actuals	Growth 2013-2018
	4,288	2,455	3,391	4,845	4,725	12,509	192%

The increased volume in victim participation is equally apparent when comparing the number of participant victims in individual cases. In *Lubanga*,[6] the Court's first case, 129 persons were accorded victim status and attendant participatory rights, a number that pales compared to current ongoing trials and appeals.[7] In the *Bemba* trial,[8] Trial Chamber III granted 5,229 persons the status of victims and the right to participate in the proceedings.[9] Approximately 2,144 victims were granted the right to participate in the *Ntaganda* trial;[10] 4,107 in the proceedings in *Ongwen*;[11] and in the trial against

5. ICC 2018 Programme Budget*, supra* note 4, at 84 tbl.28.

6. Thomas Lubanga Dyilo was the former President of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), and was tried for "enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(iii)(a) of the [Rome Statute]." *See* Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment, ¶¶ 1, 22 (Mar. 14, 2012) [hereinafter *Lubanga*, ICC-01/04-01/06].

7. *Id*. at ¶ 15.

8. Jean-Pierre Bemba was the former President and Commander-in-chief of the *Mouvement de libération du Congo* (Movement for the Liberation of Congo) (MLC), who was charged with war crimes and crimes against humanity. *Bemba Case*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/car/bemba#17 [https://perma.cc/6ZWU-2MLM].

9. ICC 2018 Programme Budget, *supra* note 4, at 66.

10. *Id.* at ¶ 532. Bosco Ntaganda was formerly the Deputy Chief of Staff and commander of operations of the *Forces Patriotiques pour la Libération du Congo* (FPLC), and was charged with thirteen counts of war crimes and five crimes against humanity. *Ntaganda Case*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/drc/ntaganda [https://perma.cc/H3SN-PYQL].

11. ICC 2018 Programme Budget, *supra* note 4, at ¶ 533. Dominic Ongwen was formerly the Brigade Commander of the Sinia Brigade of the Lord's Resistance

Laurent Gbagbo and *Charles Blé Goudé*,[12] Pre-Trial Chamber I granted 726 persons the status of victims.[13] The Court also anticipated that "approximately 2,300 victims will potentially apply to participate in proceedings related to cases" in the second investigation into crimes allegedly committed in the Central African Republic (known as the "CAR II" investigation).[14]

These increases have created logistical challenges for the Court. The reason for this is largely procedural. In accordance with rule 89 of the ICC Rules, the Registry collects and receives all applications by putative victims seeking to participate in the proceedings.[15] The Registry then assesses those applications to identify which are complete and also fall within the scope of the relevant case. The completed applications are then transmitted, together with any supporting documents, to the Chamber with notifications to the Prosecutor and Defence. Those parties are also entitled to provide observations on the applications and even request that individual applications be rejected. The Chamber then renders a decision, which is subject to appeal.[16]

While the process is straightforward, the logistics become complicated when considering the volume of applications. For example, in the *Bemba* trial alone, the lawyers and officers in the Registry, representatives for the victims, the Office of the Prosecutor, the Defence, and Chambers had to review, evaluate, and make submissions and decisions in relation to over 5,000 individual

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Army (LRA), and was charged with seventy counts of war crimes and crimes against humanity. *Ongwen Case*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/uganda/ongwen [https://perma.cc/CPA5-BGKU].

12. Laurent Gbagbo is the former president of Côte d'Ivoire, and Charles Blé Goudé, a close ally of Gbagbo, was Minister for Youth, Professional Training and Employment in Gbagbo's government and the leader of the Young Patriots, a pro-Gbagbo militia group. *Gbagbo and Blé Goudé Case*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/cdi/gbagbo-goude [https://perma.cc/2MND-HCHY]. They were charged with four counts of crimes against humanity—murder, rape, or other inhumane acts. *Id.*

13. ICC 2018 Programme Budget, *supra* note 4, ¶ 534.

14. *Id.* at ¶ 69.

15. INT'L CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE at r. 89 (2d ed. 2013) [hereinafter ICC RP].

16. The process for victim applications are laid out in detail in the Court's Practice Manual. *See* INT'L CRIMINAL COURT, CHAMBERS PRACTICE MANUAL 25–28 (2017), https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf [https://perma.cc/HS6M-PXCB].

applications.[17] The time and resources required to address such matters amounts to likely thousands of hours for those involved.[18] Tellingly, the majority of the submissions to the ICC have been related to victim participation, as opposed to the merits of the case—i.e. the accused's guilt or innocence for the substantive charges.[19] As observed by ICC Judge Christine Van den Wyngaert,

> I hesitate to guess how significant a portion of the Chamber's time has been used for victims' issues. It is difficult to know this, because it varies a lot depending on the phase of the proceedings. For example, before the start of the hearings on the merits in the *Katanga* case, for several months, more than one third of the

17. *See* Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2401, Decision on 799 Applications by Victims to Participate in the Proceedings (Nov. 5, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2247-Red, Public Redacted Version of "Decision on the Tenth and Seventeenth Transmissions of Applications by Victims to Participate in the Proceedings" (July 19, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2219, Decision on 1400 Applications by Victims to Participate in the Proceedings (May 21, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2162, Decision on 471 Applications by Victims to Participate in the Proceedings (Mar. 9, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-1590-Corr, Corrigendum to the Decision on 401 Applications by Victims to Participate in the Proceedings and Setting a Final Deadline for the Submission of New Victims' Applications to the Registry (July 23, 2011); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-1862, Decision on 270 Applications by Victims to Participate in the Proceedings (Oct. 26, 2011); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2011, Decision on 418 Applications by Victims to Participate in the Proceedings (Dec. 15, 2011); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-807-Corr, Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings (July 12, 2010); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-1017, Decision on 772 Applications by Victims to Participate in the Proceedings (Nov. 18, 2010); Prosecutor v. Bemba Gombo, ICC-01/05-01/08-1091, Decision on 653 Applications by Victims to Participate in the Proceedings (Dec. 23, 2010).

18. *See e.g.*, EXPERT INITIATIVE, EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT 179 (2014) (proposing reforms to the cumbersome application process); CARLA FERSTMAN, REDRESS, THE PARTICIPATION OF VICTIMS IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS 16–23 (2012) (describing the strain the application review process places on victim applicants, the Registry, the parties, and Chambers).

19. *See* Scott T. Johnson, *Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to Fair Trial at the International Criminal Court*, 16 ILSA J. OF INT'L & COMP. L. 489, 495 (2010).

> Chamber's support staff was working on victims' applications.[20]

The exponential growth in the number of individuals seeking to participate at the ICC can be explained for several reasons. Overall, the Court's outreach efforts have improved over the years, and thus information about the Court reached more potential applicants.[21] In addition, the growth is a "natural consequence of the proliferation of proceedings"—more preliminary examinations, more investigations, and more cases necessarily means more potential victims.[22]

At its heart, though, the increased number of applications by putative victims evidences a growing interest from victims and affected communities to directly engage with the Court.[23] Studies repeatedly show "that victims seek recognition and want to be included in the criminal justice system."[24] That interest emerges from the potential procedural power victim status provides, but also the important rehabilitative effects participation can have.[25]

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20. Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RESERVE J. INT'L L. 475, 493 (2011).

21. See Sergey Vasilev, *Victim Participation Revisited: What the ICC Is Learning About Itself*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 1133, 1143 (Carsten Stahn ed., 2015).

22. INT'L CRIMINAL COURT, REPORT OF THE COURT ON THE REVISED STRATEGY IN RELATION TO VICTIMS: PAST, PRESENT AND FUTURE, PUB. NO. ICC-ASP/11/40 (2012).

23. *See generally* THE OFFICE OF PUB. COUNSEL FOR VICTIMS, INT'L CRIMINAL COURT, HELPING VICTIMS MAKE THEIR VOICE HEARD 8–9 (2010), https://www.icc-cpi.int/nr/rdonlyres/01a26724-f32b-4be4-8b02-a65d6151e4ad/282846/lrbookleteng.pdf [https://perma.cc/J5CE-V3ZG].

24. Jo-Anne Wemmers & Katie Cyr, *What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation*, 2 APPLIED PSYCHOL. IN CRIM. JUST. 102, 102 (2006). *See also* Micheline Baril, et al., *Document de travail no. 10: Mais nous, les témoins . . .*, *in* VICTIMES D'ACTES CRIMINELS 199 (1984); Deborah P. Kelly & Edna Erez, *Victim Participation in the criminal justice system*, *in* VICTIMS OF CRIME 233 (Robert C. Davis, et al. eds., 2d ed. 1997); JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 48, 176 (Gower Publishing, 1985); JO-ANNE M. WEMMERS ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 19–20 (Kugler Publications 1996).

25. *See generally* U.N. Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/21/46 (Aug. 9, 2012) (discussing the victim-centered approach of the mandate, which will provide recognition to victims and foster trust, ultimately contributing to victim reconciliation and strengthening the rule of law); Charles P. Trumbull IV, *The Victims of Victim Participation in International*

At the ICC, once a victim has been accepted by the judges, the victim is authorized to participate in all stages of ICC proceedings and the Court must keep them informed about developments in the proceedings.[26] More specifically, at this participatory stage, the victim is entitled to a legal representative, to make statements at the beginning and end of proceedings (open and closing statements), to give observations to the judges while the Court is still deciding whether to authorise an investigation or case, to call witnesses or experts, to have submissions made on their behalf, and to seek reparations for their harms. These rights are intended to make the victim feel included and heard. The victim also has the right to ask the Court to take all possible measures to respect their safety, well-being, dignity, and privacy during the victim's participation in proceedings—including, for example, ordering that information the victim provides to the judges not be communicated to the Prosecution or the Defence.[27]

Criminal Proceedings, 29 MICH. J. INT'L L. 777, 802–811 (2008) (summarizing the arguments in favor of victim participation, including how it contributes to the rehabilitation of the victim, provides assistance in seeking reparation, and can lead to more successful prosecutions, but finding these are not applicable to ICC trials); Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 316 (D. McGoldrick, et al. eds., 2004) (noting that commentators have expressed the notion that "victims benefit by taking advantage of the legal—and supposedly superior—platform from which to recount their stories," contributing to the re-establishment of their self-respect); FÉD'N INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME, FIVE MYTHS ABOUT VICTIM PARTICIPATION IN ICC PROCEEDINGS 16–18 (Dec. 2014), https://www.fidh.org/IMG/pdf/cpi649a.pdf [https://perma.cc/ Q752-25T5] (discussing benefits of victim participation including a "healing impact").

26. *See, e.g.*, Rome Statute of the International Criminal Court art. 68, *opened for signature* July 17, 1998, 37 I.L.M. 999, 1041, 2187 U.N.T.S. 90, 129 (entered into force July 1, 2002) [hereinafter Rome Statute] (providing law for the protection of victims and their participation in the proceedings); ICC RP, *supra* note 15, at r. 89 (following acceptance of victim participation, "the Chamber shall then specify the proceedings in the manner in which participation is considered appropriate, which may include making open and closing statements").

27. *See, e.g.*, Rome Statute, *supra* note 26, art. 68(1) (providing "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims."); Prosecutor v. Ruto et al., ICC-01/09-01/11-17, First Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ¶ 22 (Mar. 30, 2011) (observing art. 86(2) of the Rome Statute, which provides that "the application form shall contain the identity of the person or persons the victim believes to be responsible" but only "to the extent possible").

Victim participation allows victims to seek recognition and feel included in a process which, in most domestic jurisdictions around the world, often leaves victims feeling helpless and alienated from the very cases which drastically transformed their lives.[28] Empirical studies consistently show that victim participation in criminal proceedings assists those harmed by such brutal violence in rebuilding their lives.[29] As noted by Eric Stover, the Faculty Director of UC Berkeley's Human Rights Center:

> Since the mid-1970s, social psychologists have surveyed people around the world who have participated in judicial proceedings and various forms of arbitration to understand what it is about such processes that leads participants to consider them fair or unfair, and ultimately to accept or reject the outcome. Almost universally, these studies have concluded that the manner in which a trial is conducted and the extent to which participants have a 'voice' in the proceedings are major influence—though not the only ones—on satisfaction that justice was done.[30]

The contrary is equally true. For instance, the lack of victim participation at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has contributed to the perception that those tribunals are "remote" and potentially biased.[31] Research conducted in communities in the former Yugoslav federation and in Rwanda show general support for trials, but also the perception that the ad hoc international tribunals are distant institutions with very little to do

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28. *Id.*

29. *See, e.g.*, Jo-Anne Wemmers, *Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice*, 9 INT'L REV. VICTIMOLOGY 43, 45–46 (2002) (emphasizing the importance placed on victim participation in restorative programs and arguing that such programs better meet victims' needs, such as information, compensation, participation, practical, and emotional needs, rather than the conventional criminal justice responses).

30. Eric Stover et al., *Confronting* Duch*: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT'L REV. RED CROSS 503, 531 (2011).

31. *See* Y. Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 41, 69–70 (Carla Ferstman et al. eds., 2009).

with victims' lives, including strong resentment by some communities that the trials were biased against their national group.[32]

Despite these important benefits, pragmatism and fairness dictate that not everyone who is a victim of violence can be a "victim" for purposes of the ICC Statute. Not only is such a result logistically impossible for the Court—or any court—but it is also unfair to the accused who may have only been charged with a limited scope of offences, as opposed to all violence committed throughout the conflict. For instance, if the contrary were true, then the hundreds of thousands victimized by the Lord's Resistance Army (LRA) would have standing in the *Ongwen* trial. The LRA has been in operation since the 1980s and is responsible for the abduction, killing, mutilation, and displacement of thousands of civilians across Central Africa. [33] Ongwen, formerly the Brigade Commander of the Sinia Brigade of the LRA,[34] has only been charged with the commission of crimes committed between July 1, 2002 and December 31, 2005 against relatively discrete persons or during discrete attacks. [35] Indeed, Ongwen's membership in the LRA allegedly began only when he was abducted on his way to school in 1990 and forced into the organization.[36] In this situation, if there were no limit to who could reasonably qualify as a victim of Ongwen's violence, Ongwen would be held responsible for crimes committed against hundreds of thousands of individuals, including those pre-dating his own membership in the LRA or unrelated to any of his charged crimes.

For similar reasons, in all countries surveyed by the author, where individual victims have legal standing to participate in criminal proceedings, courts or tribunals require a *causal nexus* between the charged crime and the victim's injury. It is that requirement, more so than anything else, that balances the dictates of justice and recognition for victims with respect for rights accorded to an accused. Different

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32. *Id.*

33. *See* Security Council Comm. Established Pursuant to Resolution 2127 (2013) Concerning the Central African Republic, Lord's Resistance Army (Mar. 7, 2016), https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/entity/lord%E2%80%99s-resistance-army [https://perma.cc/3ZTP-NBMY].

34. *See Ongwen Case*, *supra* note 11.

35. *See* Prosecutor v. Ongwen, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges against Dominic Ongwen, ¶ 2 (Mar. 23, 2016).

36. *See* Jason Burke, *Trial of Ex-Child Soldier Dominic Ongwen to Hear Prosecution Case*, GUARDIAN, (Jan. 16, 2017), https://www.theguardian.com/law/2017/jan/16/trial-ex-child-soldier-dominic-ongwen-to-hear-prosecution-case-icc-uganda [https://perma.cc/4YVJ-7L8D].

jurisdictions have different ways of balancing these two maxims. For instance, in England and Wales, a victim for standing purposes is one whose harm "was directly caused by [the] criminal offence."[37] In Guatemala, a victim is a person who is "*afectada por la comisión del delito*" (affected by the commission of the crime).[38] In India, the harm must be "caused by reason of the act or omission for which the accused person has been charged."[39] And, in Kenya, the harm must be "as a consequence of an offence."[40] The European Union's Victims' Directive utilizes same causal approach and defines a victim as "a natural person who has suffered harm, including physical, mental, or emotional harm, or economic loss which was directly caused by a criminal offence."[41]

In this sense, every legal system that permits victim participation in criminal proceedings also limits the scope of individuals who may legally be defined as victims, and thereby enjoy the attendant participatory or substantive rights in the criminal trial. The same is true at the ICC. Rule 85(a) of the Court's Rules of Procedure and Evidence states that victims are persons "who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[42] By definition, rule 85(a) requires the existence of a causal connection between the harm suffered by the putative victim and a crime. How broad or narrow we understand this causal relationship to be impacts the scope of victims that may be eligible to participate in ICC proceedings.

Despite its significance, ICC Chambers have largely avoided clarifying this causal requirement. Most of the available literature relating to victim participation at the ICC has similarly failed to analyze the causal test prescribed by rule 85(a), instead focusing on the substantive and procedural rights afforded to victim-participants. This

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37. U.K. Ministry of Justice, Code of Practice for Victims of Crime, 2015, intro. § 4 (Eng., Wales), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF [https://perma.cc/2826-BAGC].

38. Codigo Procesal Penal, art. 117, Linro Primero: Disposiciones Generales (Guat.), https://www.oas.org/dsp/documents/trata/Guatemala/Legislacion%20Nacional/Codigo%20Procesal%20Penal%20Guatemalteco%20DECRETO%20DEL%20CONGRESO%2051-92.doc [https://perma.cc/B6EV-9YMV].

39. Code of Criminal Procedure, Amendment Act 2008, No. 2 of 1974, CODE CRIM. PROC. (1974) (India).

40. The Victim Protection Act, No. 17 (2014) KENYA GAZETTE SUPPLEMENT No. 143 § 2.

41. 2012 O.J. (L 315) 57, art. 2 § (1)(a)(i) (E.U.).

42. ICC RP, *supra* note 15, rule 85(a).

Article seeks to partially fill that gap by analyzing causation models used by federal courts in the United States in their interpretation of the Crime Victims' Rights Act of 2004 ("CVRA")—a federal statute whose definition of a "victim" largely tracks the same language as rule 85(a).

Much like the Rome Statute, the CVRA entitles "crime victims" to substantive rights, including the right to full and timely restitution, the right to be reasonably heard at any public proceeding involving release, plea, sentencing, or parole, and the right to confer with the prosecution.[43] The CVRA also allocates "crime victims" procedural rights intended to actualize those substantive rights, including the right to move as a party at the district court level and the right to be heard on appeal.[44] The CVRA limits these substantive and participatory rights to individuals designated as "crime victims," which it defines as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia"—a definition which, as alluded to above, tracks the rule 85(a) standard.[45]

The following table provides a side-by-side comparison of how the CVRA and the ICC define "victims."

COMPARISON OF CVRA AND ICC DEFINITION OF "VICTIMS"

Crime Victims' Rights Act, 18 U.S.C. § 3771(e)	**Rule 85(a) of the ICC Rules of Procedure and Evidence**
"Crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.	"Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court

As evident by their terms, both tests refer to a victim being a "person" and endorse a causal requirement between the victim's harm and the crime. The crime, for CVRA purposes, is a "[f]ederal offense or an offense in the District of Columbia," whereas for the ICC it must be "any crime within the jurisdiction of the Court." The requisite links between the putative victim's harm and the charged crime also

43. 18 U.S.C. § 3771(a)(1)–(10) (2012).
44. *Id.* § 3771(d)(3).
45. *Id.* § 3771(e).

resemble one another. The harm for both the CVRA and the ICC must arise "as a result" of the crime. The only difference in this link is that the CVRA expressly notes that the harm must be direct and proximate, whereas the ICC Rule fails to make that limitation explicit.

Nonetheless, a similar limitation exists for ICC purposes. In the context of reparation claims, in *Lubanga* the ICC Appeals Chamber held that "[t]he standard of causation is a 'but/for' relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr. Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought."[46] The same conclusion was drawn most recently by the Trial Chamber in the *Katanga* case.[47] While these decisions were rendered in the context of assessing who qualified for reparations, the standard of causation for reparations claims is the same as for determining who can participate as a victim in ICC proceedings—namely, rule 85(a). In this regard, the test for victimhood espoused by the CVRA and the ICC effectively contains the same components and demands the same showing by putative victims.

Part I of this Article identifies two analytical models used in U.S. federal courts for interpreting the causal relationship between the defendant's charged crime and the victim's harm under the CVRA and identifies the policy implications underlying each model. In Part II, this Article compares the standard used to determine "crime victims" under the CVRA with the standard of causation employed by the ICC and argues that, considering the similarity between the tests, the CVRA jurisprudence is informative in outlining how the ICC can more clearly define the limits surrounding which victims should be permitted to participate. In Part III, this Article explains how that dispute might be best resolved at the ICC, considering the Court's object and purpose, case law, and structural constraints.

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46. Prosecutor v. Lubanga, ICC-01/04-01/06-3129-AnxA, Order for Reparations, ¶ 59 (May 3, 2015).

47. Prosecutor v. Katanga, ICC-01/04-01/07-3728-tENG, Order for Reparations Pursuant to Article 75 of the Statute, ¶ 162 (Mar. 24, 2017). *See also* Prosecutor v. Katanga, ICC-01/04-01/07-3804-Red, Décision relative à la question renvoyée par la Chambre d'appel dans son arrêt du 8 mars 2018 concernant le préjudice transgénérationnel allégué par certains demandeurs en réparation, ¶ 15 (July 19, 2018) (quoting the standard of causation that they had deemed applicable in the Order for Reparations).

I. BETWEEN HARM AND CRIME: DIFFERENT MODELS OF CAUSATION FROM THE CVRA JURISPRUDENCE

The CVRA requires that the putative victim's harm be a *direct and proximate result* of the charged offense.[48] Federal courts generally agree that this requirement "encompasses the traditional 'but for' and proximate cause analyses."[49] This ostensibly creates two causal showings that must be met. First, that the harm must be a "direct" result of the charged offense is relatively straight-forward: the putative victim must demonstrate that "but for" the accused's charged crime, the victim's harm would not have occurred. In this regard, the harm is directly related to the charged crime. Second, the proximate cause analysis requires simply that the harm be a natural and foreseeable consequence of the charged offence.

Where federal courts have diverged, and where different causal models emerge, is in determining what constitutes the starting point of the causal analysis—the point from where the direct and proximate harm must arise. Specifically, different schools of thought disagree on whether the criminal conduct from which the harm is derived must arise from the elements of the offense charged by the prosecution (what we can call the "elements-based approach") or whether it is sufficient that the harm is direct and proximate to the offense in the manner it was committed by the accused (what we can call the "fact-based approach"). The difference between applying a fact-based versus an elements-based approach can have a dramatic effect on the potential outcome of a victim's ability to obtain recognition for his or her harm as a product of the defendant's crime.

This difference, and the resulting consequences in victim recognition, is apparent when juxtaposing four cases before federal trial and appellate courts in the U.S. dealing with whether individuals meet the causal threshold to be recognized as "crime victims" for the CVRA. Two cases are salient for this discussion: *In re Rendón Galvis* and *In re Zulma Natazha Chacin de Henriquez.* Both are significant because both arise out of the same factual circumstances but have diverging results for determining crime victims because of the different models employed by the differing federal courts. The factual

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48. 18 U.S.C. § 3771(e)(2)(A) (2012) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of . . . [an] offense").

49. *In re* McNulty, 597 F.3d 344, 350 (6th Cir. 2010) (citing *In re* Rendón Galvis, 564 F.3d 170, 175 (2d Cir. 2009)).

circumstances are as such: in 2008, the Colombian government extradited 14 leaders of the *Autodefensas Unidas de Colombia* ("AUC"), a Colombian paramilitary and narco-terrorist organization, including high-ranking former leaders to the United States to face drug trafficking, money laundering, and terrorist charges.[50] Those leaders included Diego Fernando Murillo-Bejarano and Hernan Giraldo-Serna. The defendants faced these charges in two federal jurisdictions: Murillo-Bejarano in the Southern District of New York, and Giraldo-Serna in the District of Columbia.

The putative victims, family members of individuals killed by the AUC, moved to be recognized as crime victims under the CVRA in the respective trials of Murillo-Bejarano and Giraldo-Serna. This would entitle the family members to all of the participatory rights afforded under the CVRA, including, importantly, the right to be heard (i.e. make submissions) at sentencing and to restitution. In both circumstances, participation in the federal proceedings was also the only remaining option for obtaining truth and retribution given that the extradition of the AUC leaders to the United States had resulted in the defendants' removal from Colombia's Peace and Justice process, a post-conflict platform through which victims held AUC leaders accountable for crimes committed during Colombia's conflict between 1997 and 2006.[51] Absent recognition as a crime victim, none of the putative victims had further recourse to justice.

The determination of whether the movants could participate as "crime victims" ostensibly came down to one central question: whether individuals killed by the defendants could be deemed "crime victims" of the defendants' drug trafficking charges, given that the elements of drug trafficking do not require the commission of any violent acts. The different appellate courts dealing with the matter issued split decisions on this legal issue, resulting in one family being permitted to participate as a "crime victim" and the other not.

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50. *See* Press Release, Dep't of Justice, 14 Members of Colombian Paramilitary Group Extradited to the United States to Face U.S. Drug Charges (May 13, 2008), https://www.justice.gov/archive/opa/pr/2008/May/08-opa-414.html [https://perma.cc/26LW-4VD9].

51. *See* INT'L HUMAN RIGHTS LAW CLINIC, BERKELEY SCH. OF LAW, TRUTH BEHIND BARS: COLOMBIAN PARAMILITARY LEADERS IN U.S. CUSTODY 4–5 (Feb. 2010), http://cja.org/downloads/Truthbehindbars.pdf [https://perma.cc/6SKH-A52L].

Two additional federal cases, *United States v. Sharp*[52] and *In re Stewart*,[53] further highlight the division in approaches and the impact adopting either approach can have in the outcome of a putative victim's request.

A. The "Elements-Based" Approach of Determining Crime Victim Status

The "elements-based" model of causation attempts to capture those circumstances where the court determines an individual's legal status as a victim by looking solely at whether the purported harm directly and proximately arises from the elements of the charged crimes—and not the actual way the crime is committed. As illustrated below in two U.S. federal cases, *In re Rendón Galvis* and *United States v. Sharp*, when applying an "elements-based" approach, the judge normally lists the underlying elements of the crime and then determines whether the putative victim's purported harm is required or anticipated in the elements.

For instance, the federal crime of arson requires that a person intentionally sets fire to a property and that the property is owned or leased by the United States or used in interstate commerce.[54] Under this approach, a judge would list out the elements for the federal crime of arson and, in the abstract, identify what types of individuals would be victims of such crimes. In that sense, the judge disregards the underlying factual circumstances and conducts a purely theoretical exercise of evaluating the ambit of harms anticipated by the elements of the charged offence. In relation to the crime of arson, a judge may thus conclude that only the property owner whose property was burned by the accused can be a victim, even if the accused murdered an individual to obtain the incendiary device used for the crime. Because neither murder nor in fact the use of force at all is an element of the offense, a victim of murder would not be a victim of the charged crime such as to be eligible to participate as a "victim."

This methodological approach, while seemingly cold and distant from the facts, may be one of the more effective ways of limiting the potential number of legal victims to only those whose harms are core to the offense. It also creates greater certainty for the accused, the judges, and the prosecution, all of whom may have legal obligations arising out of who is and is not formally recognized as a victim, such as

52. United States v. Sharp, 463 F. Supp. 2d 556 (E.D.Va. 2006).
53. *In re* Stewart, 552 F.3d 1285 (11th Cir. 2008).
54. 18 U.S.C. § 844(f)(1), (i) (2012).

obligations to protect those individuals or pay them reparations. Finally, it reduces the prospects of entertaining victims whose harms are genuinely remote from the offense itself, insofar that they have no connection with the charged crime.

1. *In re Rendón Galvis*

Prior to his arrest and later extradition to the United States, Diego Fernando Murillo-Bejarano was an AUC leader and commander of the AUC subgroup operating in Comuna 13, a neighbourhood in Medellín.[55] For his crimes in Colombia, and their consequences in the United States, Murillo-Bejarano was charged in the Southern District of New York with two offenses: conspiracy to import into the United States and to distribute with the intent it be imported, at least five kilograms of cocaine; and conspiracy to commit money laundering.[56] At the time in which putative victims sought to intervene in the criminal proceedings, Murillo-Bejarano had pled guilty to the first charge with the agreement that the government would move to dismiss the second offense at sentencing.[57]

The putative crime victim who sought to participate in Murillo-Bejarano's sentencing was Ms. Alba Inés Rendón Galvis. Ms. Rendón Galvis's son, Juan Fernando Vargas Rendón, had been killed by members of Murillo-Bejarano's organization, and his body was found in a mass grave during the AUC's takeover of Medellín, a center of Colombia's cocaine trade.[58] Ms. Rendón Galvis sought to participate in the criminal trial in order to gain the right of conferring with the Government, to be heard before sentencing, and to receive restitution.[59] Through her lawyers, she argued that she constituted a "crime victim" because the AUC had targeted Comuna 13 due to its importance as a drug-trafficking corridor and their conduct caused her son's death.[60] She argued that the AUC used disappearances and executions as tools

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55. *See In re* Rendón Galvis, 564 F.3d 170, 172 (2d Cir. 2009).
56. *Id.*
57. *Id.*
58. *Id.* at 172–73. *See also* Memorandum in Support by Alba Ines Rendón Galvis as to Diego Fernando Murillo-Bejarano, Vicente Castano-Gil, David Donado re Motion to Enforce Alba Ines Rendón Galvis' Rights to be Heard Before Sentencing and Receive Restitution, United States v. Carlos Castano-Gil et al., No. 1:02-cr-00388-ESH-2, Dkt. No. 47 (S.D.N.Y. Feb. 17, 2009) [hereinafter "Rendón Galvis Memorandum"].
59. *In re Rendón Galvis*, 564 F.3d at 172–73.
60. *Id. See also* Rendón Galvis Memorandum, *supra* note 58.

to gain control of the area, and that the AUC had financed its terrorist activities with drug proceeds.[61] She claimed that her son was a victim of such violent conduct. She argued that "but for" the defendant's drug trafficking conspiracy, her son would not have been targeted and killed, and that the murder was a foreseeable consequence of the defendant's drug-trafficking scheme, which was executed using violence.[62] Finally, Ms. Rendón Galvis argued that the CVRA should be interpreted to include the victims of any acts related to the charged conspiracy, whether or not the acts were described in the indictment or plea agreement, and to include the victims of acts of the defendant's co-conspirators.[63]

The government opposed Ms. Rendón Galvis's application. Quoting language from *Hughey v. United States*,[64] the government argued that the definition of "crime victim" was limited 'to those affected by the specific conduct that is the "basis of the offence"' of conviction.[65] Applying this standard, for the individual to be considered a victim, the act causing the harm must be conduct underlying an element of the offence of conviction.[66] Under the facts of the case, the government argued that Ms. Rendón Galvis could not qualify as a victim because her harm arose from her son's murder, which was not the offence for which Murillo-Bejarano had been charged.[67]

The Government also argued that recognizing Ms. Rendón Galvis as a crime victim had the potential of broadening the definition of victim provided for under CVRA, creating practical

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61. *In re Rendón Galvis*, 564 F.3d at 172–73. *See also* Rendón Galvis Memorandum, *supra* note 58.

62. *In re Rendón Galvis*, 564 F.3d at 172–73. *See also* Rendón Galvis Memorandum, *supra* note 58.

63. *In re Rendón Galvis*, 564 F.3d at 172–73. *See also* Rendón Galvis Memorandum, *supra* note 58.

64. Hughey v. United States, 495 U.S. 411, 413 (1990).

65. *In re* Rendón Galvis, 564 F.3d at 173; *see also* Memorandum in Opposition by Diego Fernando Murillo-Bejarano re Motion to Enforce Alba Ines Rendón Galvis' Rights to be Heard Before Sentencing and Receive Restitution, United States v. Murillo-Bejerano et al., No. 1:02-cr-01188-AKH (S.D.N.Y. Mar. 2, 2009), ECF No. 75 [hereinafter "Bejerano Opp'n to Rendón Galvis Mem."].

66. *In re* Rendón Galvis, 564 F.3d at 173; *see also* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

67. *In re* Rendón Galvis, 564 F.3d at 173; *see also* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

problems for the Government and courts.[68] In their filings before the District Court and before the Court of Appeals for the Second Circuit, the Government noted that the rights of a crime victim under the CVRA are triggered as early as the prosecution's initial presentation of a complaint.[69] If any victim of a defendant's related criminal conduct, broadly construed, could qualify as a "crime victim," the Government and the district court would be forced to determine early on the full scope of the defendant's related criminal conduct to give effect to the statute.[70] Where the precise scope of a defendant's overall conduct is unclear, this reading of the CVRA might necessitate wide-ranging investigation and litigation. Courts would effectively be required to hold mini-trials merely to determine who qualifies as a crime victim. And where the Government's charges are part of a broader, ongoing investigation, such an inquiry could jeopardize other investigations.

The Prosecutors also noted that in cases involving widespread and systematic crimes, such as those that occurred in Colombia by the AUC, a broad reading of "crime victims" could have staggering practical implications for the case.[71] As noted by the Prosecutor's office, as many as 13,000 people had registered with Colombia's Office of the Attorney General as victims of armed groups controlled by the AUC.[72] If, as Rendón contended, the CVRA applied to any acts of related conduct beyond a defendant's offense of conviction, the District Court and the Government would have to engage in a far-flung investigation to determine which of those 13,000 people (and perhaps others) were actually harmed by Murillo-Bejarano.[73] The Court would then be required to determine whether that harm was "related" to Murillo-Bejarano's offense conduct. In

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68. *In re* Rendón Galvis, 564 F.3d at 173; *see also* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

69. *See* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65. *See also* 18 U.S.C. § 3771 (a)(2) (2012) (granting victims the right to notice of any proceeding involving release of the accused); *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (finding that the prosecution should have informed victims of "the likelihood of criminal charges" against the defendant and consulted victims on the possible terms of a plea bargain).

70. *See* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

71. *See In re* Rendón Galvis, 564 F.3d at 173. *See also* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

72. *See In re* Rendón Galvis, 564 F.3d at 173. *See also* Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

73. Bejerano Opp'n to Rendón Galvis Mem., *supra* note 65.

many cases involving defendants who belonged to large criminal organizations or enterprises, such as that charged against Murillo-Bejarano, this alone would lead to extensive collateral litigation. All of that would have to be completed before the defendant could actually be punished for his crimes—a fact that would not only create exorbitant costs for the Court, but also potentially delay proceedings (implicating a defendant's right to a speedy trial) and create a backlog that would prevent the Court from efficiently and timely attending to other criminal cases.

The District Court sided with the Government, denying crime victim status to Ms. Rendón Galvis.[74] In doing so, the Court determined that it was insufficient that the death of Ms. Rendón Galvis's son occurred because of the Defendant's execution of the charged crime. Borrowing from case-law relating to victim reparations, the Court reasoned that the harm had to have arisen from the "conduct underlying the element of the offense."[75] In the Court's view, that evaluation required an objective evaluation of the harms that arise due to the elements required for the crime's proof. For instance, as an element of murder is the actual killing of an individual, the murder victim's death is a harm that arises from the conduct underlying the crime. In this instance, the Defendant, Murillo-Bejarano, had only been charged with money-laundering and distribution with the intent at least five kilograms of cocaine be imported.[76] Neither crime requires as a matter of proof the commission of violent acts.[77] Theoretically, both crimes could be proven and guilt established through entirely peaceful means and in the complete absence of any physical or mental harm. From the District Court's viewpoint, no matter how horrible, the harm suffered by Ms. Rendón Galvis could not be said to be direct and proximate to Murillo-Bejarano's charged offence. With her status as a crime victim denied, Ms. Rendón Galvis could not participate in as a "crime victim" in the proceedings.

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74. *See In re* Rendón Galvis, 564 F.3d at 173–74; *see also* Transcript of Proceedings, United States v. Carlos Castano-Gil, No. 1:02-cr-00388-ESH-2, Dkt. No. 79 (S.D.N.Y. Mar. 12, 2009).

75. *In re Rendón Galvis*, 564 F.3d at 173–74; *see also* Transcript, *Carlos Castano-Gil*, No. 1:02-cr-00388-ESH-2.

76. *In re Rendón Galvis*, 564 F.3d at 173–74; *see also* Transcript, *Carlos Castano-Gil*, No. 1:02-cr-00388-ESH-2.

77. *In re Rendón Galvis*, 564 F.3d at 173–74; *see also* Transcript, *Carlos Castano-Gil*, No. 1:02-cr-00388-ESH-2.

2. *United States v. Sharp*

In *United States v. Sharp*, the putative crime victim, Elizabeth Nowicki, sought to present a victim impact statement at the defendant's forthcoming sentencing hearing after the defendant had pled guilty to the offense of conspiring to possess with the intent to distribute marijuana.[78] Nowicki argued that her former boyfriend was one of the defendant's marijuana customers and would "physically, mentally, and emotionally abus[e]" her while he was under the influence of drugs.[79] Nowicki, a law professor at several prestigious institutions, argued that her "academic research over the past several months" led her to conclude that her former boyfriend's "abuse, erratic behavior, and violence" were attributable to the marijuana.[80]

In determining that Ms. Nowicki did not constitute a "crime victim," the District Court for the Eastern District of Virginia began with the premise that "the CVRA only applies to Nowicki if she was 'directly and proximately harmed' as a result of the commission of the defendant's federal offense."[81] Drawing upon case-law applying to two other victim rights statutes containing similar causal requirements,[82] the District Court reasoned that for a person to be "directly and proximately harmed as a result of the commission of a Federal offense", the harm must result "from conduct underlying an element of the offense of conviction."[83]

The District Court noted that the elements for conspiracy to possess with the intent to distribute marijuana constituted: (1) an agreement to possess marijuana with intent to distribute existing between two or more persons; (2) the defendant's knowledge of the illegal conspiracy; and (3) that the defendant knowingly and voluntarily became part of this conspiracy.[84] The District Court reasoned that "the specific conduct underlying the elements of conspiracy to possess with intent to distribute marijuana that were the basis for the defendant's offense of conviction does not include assault and battery, or any other violent conduct."[85] The District Court also observed that the abuse inflicted on Nowicki "neither assisted the

78. United States v. Sharp, 463 F. Supp. 2d 556, 557 (E.D. Va. 2006).
79. *Id.* at 558–59.
80. *Id.* at 559.
81. *Id.* at 560–61.
82. *Id.* at 561–63.
83. *Id.* at 563.
84. *Id.* at 564.
85. *Id.* at 564.

Defendant in the commission of his federal offense, nor was it an essential element necessary for the accomplishment of his criminal acts."[86] From this analysis, the Court concluded that "Nowicki's alleged injuries were not caused by the Defendant's offense of conviction" and she could not constitute a "crime victim."[87]

Besides rejecting Nowicki's application as a "crime victim" under the elements-based approach, the District Court also rejected it under a more holistic analysis. The District Court noted there was conflicting evidence that "the Defendant's marijuana, when sold to and used by the former boyfriend, was known to cause aggressive behavior or violence in its users."[88] It suggested that Nowicki's abuse was "too attenuated either temporally or factually, to confer 'victim status'" and that "[n]o consistent, well-accepted scientific evidence has been proffered to demonstrate that marijuana *necessarily* causes a person to become violent."[89] Most important, the Court noted that "there is no evidence in the record as to whether the former boyfriend's marijuana use was the catalyst for his subsequent abuse of Nowicki."[90]

B. The "Facts-Based" Approach of Determining Crime Victim Status

In contrast to the "elements based" approach, some U.S. courts evaluate the causal relationship between harm and crime by looking specifically at how the charged offense is alleged to have been committed.[91] This more case-specific inquiry goes beyond a generic evaluation of the crime's elements into the underlying facts alleged by the Government supporting those elements.

If judges applying the elements-based approach look at the harm from the charged crime, judges applying a more holistic, fact-based approach would look at the harm through the facts underlying the charged crime. In doing so, judges applying a facts-based approach move away from approaching the putative victim's crimes through the prism of theory, but adopt a more holistic understanding of the charged crime by evaluating how it was factually committed (or alleged to have been factually committed). These judges then ascertain whether the victim's harms are direct and proximate from that more holistic

86. *Id.* at 564.
87. *Id.* at 564.
88. *Id.* at 565.
89. *Id.* at 566.
90. *Id.* at 567.
91. *See* In re de Henriquez, No. 15-3054, 2015 WL 10692637 (D.C. Cir. Oct. 16, 2015); In re Stewart, 552 F.3d 1285 (11th Cir. 2008).

understanding of the offence. Two cases help illustrate this approach: *In re Zulma Natazha Chacin de Henriquez* and *In re Stewart*.

As discussed above, *In re Zulma Natazha Chacin de Henriquez* follows the same factual background as *In re Rendón Galvis* but results in a different outcome as to whether the putative victims qualified under the CVRA. The difference in that conclusion is the analytical approach at causation undertaken by the court. *In re Stewart*, a decision by the Eleventh Circuit Court of Appeals, is also illustrative as it shows how the "facts-based" approach can enlarge the potential pool of victims in complex criminal cases, like most international crimes.

1. *In re Zulma Natazha Chacin de Henriquez*

Hernan Giraldo-Serna was another AUC leader extradited to the U.S. and extracted from Colombia's Justice and Peace Process.[92] Like his counterpart, Murillo-Bejarano, Giraldo-Serna was the head of a subdivision within the AUC, the Self-Defence Forces of the Campesinos of Magdalena and Guajira ("ACMG"), which controlled virtually all aspects of drug trafficking on Colombia's northern coast.[93] This included overseeing the manufacture and transportation of cocaine by one cocaine organization, "Los Mellos," based in and around the city of Santa Marta, location in Magdalena Department on Colombia's Northern Coast.[94] In doing so, Giraldo-Serna required local farmers in the area to grow coca, the primary ingredient for cocaine, and to sell their coca to his organization under penalty of death. [95] Like Murillo-Bejarano, Giraldo-Serna faced charges for conspiracy to manufacture and distribute five or more kilograms of

92. *See* United States v. Giraldo-Serna, 118 F. Supp. 3d 377, 381 (D.D.C. 2015); *See also* Mot. to Enforce Rights under the Crime Victims' Rights Act by Zulma Natazha Chacin de Henriquez, Nadiezhda Natazha Henriquez Chacin and Bela Henriquez Chacin, at 1, United States v. Giraldo-Serna, 118 F. Supp. 3d 377 (D.D.C. 2015) (No. 1:04-cr-00114-RBW, Dkt. No. 213) [hereinafter Mot. to Enforce Rights under Crime Victims' Rights Act by Zulma Natazha Chacin de Henriquez] (describing Defendant's role in the AUC).

93. United States v. Giraldo-Serna, 118 F. Supp. 3d 377, 380 (D.D.C. 2015).

94. *See* Mot. to Enforce Rights under the Crime Victims' Rights Act by Zulma Natazha Chacin de Henriquez, at 2.

95. *Id*.

cocaine and aiding and abetting that offence, ultimately pleading to the one count of the former.[96]

The putative victims were the spouse and daughters of Julio Eustacio Henriquez Santamaria, a farmer who owned the *El Picacho* farm, located close to the city of Santa Marta.[97] Mr. Henriquez, in open defiance of Giraldo-Serna's orders, uprooted and burned coca or marijuana found on his farm, and founded an environmental organization known as *Madre Tierra* that publicly opposed coca cultivation on Colombia's northern coast and encouraged local farmers not to grow coca.[98] Through his organization, Mr. Henriquez also offered training and access to government funding for the purchase of substitute crops such as cacao and fruit trees.[99] Because of these activities, Giraldo-Serna ordered his men to abduct Mr. Henriquez and violently force him into a car.[100] Following his abduction, Mr. Henriquez was never seen alive again and is presumed dead.[101]

Through their lawyers, Mr. Henriquez's family argued that they were "crime victims" of Giraldo-Serna's drug trafficking charge. They argued that, factually, Giraldo-Serna's drug-trafficking scheme included threatening local farmers under penalty of death, and that after killing Mr. Henriquez, Giraldo-Serna's men even used his farm for growing coca.[102] In these regards, Giraldo-Serna was responsible for directly and proximately causing Mr. Henriquez's abduction and murder as part of the charged drug conspiracy.[103]

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96. *See Giraldo-Serna*, 118 F. Supp. 3d at 381; *see also* Mot. to Enforce Rights under the Crime Victims' Rights Act by Zulma Natazha Chacin de Henriquez, at 1–2 (detailing Giraldo-Serna's extradition to the United States and the charges filed against him).

97. *See generally* Mot. to Enforce Rights under the Crime Victims' Rights Act by Zulma Natazha Chacin de Henriquez (arguing that the movants should be considered crime victims under the CVRA).

98. *Id.* at 2–3.

99. *Id.* at 3.

100. *Id.*

101. *Id.*

102. *Id.* at 11.

103. *Id.* at 10–12.

Like in *Rendón Galvis*, the Government opposed Giraldo-Serna's motion to be recognized as "crime victims."[104] In *simpliciter*, they argued that murder was not conduct prohibited by the offense of conspiring to manufacture and distribute cocaine destined for importation into the United States, nor were *any* acts of violence or force.[105] Also like in *Rendón Galvis*, the Government emphasized the practical considerations justifying a limited definition of "crime victim." As averred by the Government:

> By acknowledging the movants as statutory victims of the limited United States drug importation charge, the District Court would essentially throw open the doors of United States courts to any individual in any country tangentially harmed by any conduct connected to a United States offense. In this case, when the putative victim is one of possibly thousands or tens of thousands of victims of an ongoing decades-long, civil war in a foreign country, many of whom can tie their victimization to the domestic Colombian drug trafficking trade, expanding current interpretation of a victim under the CVRA in this case may have the effect of overwhelming United States courts in certain cases involving extraterritorial crime, while at the same time duplicating and undermining efforts by the government of Colombia to ensure victims' rights and remedies.[106]

In determining whether Henriquez's family merited victim status, the District Court, as in *Rendón Galvis*, limited its evaluation to the indictment and the statement of facts submitted by Giraldo-Serna as part of his negotiated plea agreement, neither of which mentioned violence of any kind.[107] Also similarly to *Rendón Galvis*, the District Court limited its evaluation to the elements of the charged offence, without going beyond to look at the way the offence was carried out.[108]

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104. *See* Response to CVRA Submission in Connection with Status Conference, United States v. Giraldo-Serna, 118 F. Supp. 3d 377 (D.D.C. 2015) (No. 1:04-cr-00114-RBW, Dkt. No. 465).

105. *Id.* at 6–12.

106. *Id.* at 12.

107. United States v. Giraldo-Serna, 118 F. Supp. 3d 377, 383 (D.D.C. 2015).

108. *Id.* at 383–87.

On appeal, however, the United States Court of Appeals for the District Court of Columbia rejected this limited approach.[109] The Appeals Chamber reasoned that "[b]ecause victim status can be argued for even prior to the filing of an indictment, it is clear that Congress intended courts to look beyond the four corners of an indictment or plea agreement."[110] It noted that even though neither document mentioned violence, that "logic allows for the inference—and Colombian court materials support—that Giraldo-Serna's paramilitary organization—which relied on 'war taxes' to fund its operations and troops to control the region's coca growth—employed violence and force as part of its method of operation." [111] In these regards, the causation determination of whether someone is a victim of an offense is a fact-specific one.

The Appeals Chamber was also convinced that the definition of "crime victim" under the CVRA was intentionally broad, given Congress' indication that it intended the statute to apply in an expansive manner to "correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[112] The CVRA definition of crime victim had to, therefore, be inclusive.

2. *In re Stewart*

In *In re Stewart*, the petitioners were a group of home buyers who paid an excessive mortgage fee, part of which was used illegally by the defendant, the vice president of a bank, for his own personal use. The defendant later signed a plea agreement by which he admitted to the crime of conspiracy to deprive his bank of honest services.[113] At the district court level, the petitioners were denied "crime victim" status on the reasoning that the bank—not the homebuyers—were the victims of the pled-to offense.[114] A divided Court of Appeals, however, overturned that finding, agreeing that the homebuyers were "crime victims."[115]

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109. *See In re* de Henriquez, No. 15-3054, 2015 WL 10692637 (D.C. Cir. Oct. 16, 2015).
110. *Id.* at 1.
111. *Id.*
112. 150 Cong. Rec. S4260, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).
113. *In re* Stewart, 552 F.3d 1285, 1287 (11th Cir. 2008).
114. *Id.*
115. *Id.* at 1289.

The Court of Appeals adopted a much more nuanced understanding of how the relationship between the crime and the alleged harm should be understood. The court reasoned that "[t]he CVRA . . . does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document".[116] As a result, "a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission."[117] The court reasoned that to determine whether the party constitutes a "crime victim," it must "first . . . identify the behavior constituting "commission of a Federal offense" and "[s]econd . . . identify the direct and proximate effects of that behavior on parties other than the United States."[118] If the criminal behaviour directly and proximately causes a party harm, the party is a victim under the CVRA.[119] From this analysis, the court then found that homeowners who were not the target of a dishonest services charge or mentioned in the Indictment were nonetheless directly and proximately harmed by the defendant's conduct and, therefore, qualified as "crime victim[s]."[120]

II. CAUSAL REQUIREMENTS FOR VICTIMHOOD AT THE INTERNATIONAL CRIMINAL COURT

Rule 85(a) establishes the standard for defining crime victims before the ICC: "'Victims' means natural persons who have ***suffered harm as a result of the commission of any crime*** within the jurisdiction of the Court." The plain language of the Rules would suggest application of a more holistic model of determining victimhood, in contrast to some CVRA jurisprudence, in part because the Rule's "as a result" of language likens a traditional "but for" test but does not require proximity. Early on, ICC Chambers avoided providing clarity as to the standard of causation to be employed. For instance, despite acknowledging that "the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law", Pre-Trial Chamber II explicitly "refrain[ed] from analysing the various theories on causality," instead

116. *Id.*
117. *Id.* at 1289.
118. *Id.* at 1288.
119. *Id.*
120. *Id.* at 1289.

"adopt[ing] a pragmatic, strictly factual approach."[121] In similar respects, despite noting that rule 85(a) requires a "causal link . . . between a crime falling within the jurisdiction of the Court and the harm suffered by the Applicants," Pre-Trial Chamber I determined that "it is not necessary to determine in any great detail . . . the precise nature of the causal link."[122]

In the limited jurisprudence on the subject, the Appeals Chamber has taken a more cautious approach. In *Lubanga*, the Appeals Chamber concluded that "whilst the ordinary meaning of rule 85 does not *per se* limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that participation of victims in trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges."[123] The tone and tenor of the Chamber's reasoning would suggest that it was mindful of the potential breadth of article 68(3) and the potential need to limit its ambit. The Chamber appears to endorse a process which closely ties the putative victim's harm with the charged offense—the "elements-based" approach—as opposed to the facts underlying the offense. The Chamber distinctly emphasizes that the harm must be "linked to the *charges*," as opposed to the crimes.[124]

In application, the *Lubanga* Trial Chamber equally appears to have applied a restrictive "elements-based" understanding of victimhood. Trial Chamber I developed two classifications of victims: direct and indirect victims. The Chamber explained that "'direct victims' [are] those whose harm is the 'result of the commission of a crime within the jurisdiction of the Court.'"[125] "Indirect victims" are "those who suffer harm as a result of the harm suffered by direct

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121. Prosecutor v. Kony, ICC-02/04-01/05-252, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶ 14 (Aug. 10 2007), https://www.icc-cpi.int/CourtRecords/CR2007_03669.PDF [https://perma.cc/A7UZ-FC52].

122. ICC-01/04-101-tEN-Corr, Public Redacted Version of the Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 94 (Jan. 17 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF [https://perma.cc/JH6F-WML9].

123. Prosecutor v. Lubanga, ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 58 (Jul. 11 2008), https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF [https://perma.cc/8ZB4-LNPK].

124. *Id.* at ¶ 47 (emphasis added).

125. Prosecutor v. Lubanga, ICC-01/04-1/06-1813, Redacted version of "Decision on 'indirect victims,'" ¶ 44, (Apr. 8, 2009).

victims."[126] In analysing what victims constitute "direct" or "indirect" victims, the Chamber limited itself to only those individuals whose harms could be classified as emerging from the elements of the offense. For instance, the Trial Chamber reasoned that the "direct victims" of Lubanga's crimes were "the children below fifteen years of age who were allegedly conscripted, enlisted or used actively to participate in hostilities by the militias under the control of the accused within the time period confirmed by the Pre-Trial Chamber."[127] The Chamber reasoned:

> The offences with which the accused is charged (*viz.* conscripting, enlisting and using children under the age of 15 to actively participate in hostilities) were clearly framed to protect the interests of children in this age group, against the backcloth of Article 77(2) of Additional Protocol I to the Geneva Conventions, entitled "Protection of children" and Article 38 of the Convention on the Rights of the Child, which are each directed at the protection of children.[128]

Notably, the Chamber excluded as victims "those who suffered harm as a result of the (later) **conduct** of direct victims."[129] The Chamber reasoned that "only victims '*of the crimes charged*' . . . may participate in trial proceedings."[130] The Chamber noted that "[a]lthough a factual overlap may exist between the use of the child activity to participate in hostilities and an attack by the child on another, the person attacked by a child soldier is not an indirect victim . . . because his or her loss is not linked to the *harm* inflicted on the child when the offence was committed."[131]

However, there is sufficient ambiguity in the Appeals Chamber's language such as to open the possibility of pleading a "facts-based" approach, due to the Chamber's requirement there be a "link" between the putative victim's harm and the charged offence without clarifying what that "link" entails. Subsequent Chambers have harnessed that ambiguity for precisely that purpose. In *Gbagbo*, Trial Chamber I determined that it was "sufficient that an applicant

126. *Id.*
127. *Id.* at ¶ 47.
128. *Id.* at ¶ 48.
129. *Id.* at ¶ 52.
130. *Id.* (emphasis added).
131. *Id.*

demonstrate . . . that the alleged crimes could have objectively contributed to the harm suffered" and that the "crimes charged do not have to be the only cause of the harm suffered by the applicant."[132] This approach was also adopted by Trial Chamber VIII in the *al Mahdi* case[133] and by Trial Chamber VI in *Ntaganda*.[134] Similarly, in *Bemba*, the Single Judge of Pre-Trial Chamber III applied a broad test, noting that, in that case, "the circumstances surrounding the crime(s) . . . must be appropriate to bring about the harm alleged and [were] not entirely outside the range of expectation or probability, as viewed *ex post* by an objective observer."[135]

In these cases, the judges explicitly permitted victims to participate in the proceedings even though the harms may relate to uncharged offences which nonetheless arose from the facts. These Chambers of the Court moved away from an "elements-based" approach towards a factual approach ensuring a more holistic understanding of which individuals were victims of the charged crimes.

However, some Chambers have denied establishing a causal nexus altogether. In the Uganda situation, the Single Judge of Pre-Trial Chamber II ignored any determination on causation.[136] The Judge determined that while a determination on the specific nature of a link between the alleged crime and putative victim's harm "may be required for the purposes of a reparation order, it does not seem required when the determination to permit an applicant to present 'views and concerns' within the meaning of article 68, paragraph 3 of the Statute is at stake."[137] The Single Judge considered that "there is

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132. Prosecutor v. Gbagbo, ICC-02/11-01/11, Decision on victim participation, ¶ 36 (Mar. 6, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_04330.PDF [https://perma.cc/E68J-NUUP].

133. *See* Prosecutor v. al Mahdi, ICC-01/12-01/15, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representatives of Victims', ¶ 26 (June 8, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04163.PDF [https://perma.cc/N58A-HS8G].

134. *See* Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on victims' participation in trial proceedings, ¶ 50 (Feb. 6, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_00759.PDF [https://perma.cc/UT59-FQAS].

135. Prosecutor v. Gombo, No. ICC-01/05-01/08, Fourth Decision on Victims' Participation with Confidential Annex, ¶¶ 76–77 (Dec. 12, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_07861.PDF [https://perma.cc/9ZRV-KUDJ].

136. Prosecutor v. Kony, et al., No. ICC-02/04-01/05, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶ 14 (Aug. 10, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_03679.PDF [https://perma.cc/3FYH-ST3M].

137. *Id.*

no reference to causality as such in rule 85, which simply refers to the harm having been suffered 'as a result of' the alleged crime."[138] The Single Judge determined to:

> refrain from analysing the various theories on causality and . . . instead adopt a pragmatic, strictly factual approach, whereby the alleged harm will be held as 'resulting from' the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.[139]

Despite the Single Judge's express denunciation of causation, his analysis is somewhat contradictory. The Single Judge did not permit all individuals claiming to be victims to have participatory rights. Instead, it limited standing to those whose harms arose in the same spatial and temporal circumstances alleged. The Single Judge did adopt a causal requirement, albeit a broad one, and one clearly fact-based and not elements-based.

All-in-all, when viewing the ICC's jurisprudence through the different models identified above, the court has been inconsistent in its understanding of what causal relationship is required between the putative victim's harm and the charged crimes. However, the different causal models provide some ways we can understand the court's methodology in approaching questions regarding victim participation. In this sense, Chambers of the Court, particularly most recent ones, have chosen a broader, fact-based approach, as opposed to a narrower analysis that looks at harm strictly arising from the elements.

III. APPLYING CVRA CAUSAL MODELS AT THE INTERNATIONAL CRIMINAL COURT

The cases summarized above, particularly a comparison of *In re Rendón Galvis* with *In re Zulma Natazha Chacin de Henriquez,* show a significant difference in whether an individual will be recognized as a victim, depending on whether a judge applies an "elements-based" versus "facts-based" analysis. This is particularly so in cases involving the widespread commission of international crimes.

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138. *Id.*
139. *Id.*

In such circumstances, applying an "elements-based" approach may deny victim status to persons who clearly deserve recognition.

Take, for example, a case in which the accused is the general of an army with plans to forcibly remove a minority ethnic population from a neighbouring town to take control of it. The General issues orders to his subordinates to remove the ethnic minorities using force and violence, including through acts of murder, sexual violence, and the destruction of homes and properties. Although the General could have been charged with additional crimes, he is only charged with forcible transfer and/or deportation as a crime against humanity and not the attendant crimes, largely because the Prosecution believes it has insufficient proof demonstrating that the General intended to commit those crimes. Family members of those who were killed, those who were the subject of sexual violence, and individuals whose homes and properties were destroyed request recognition and to participate claiming they were victims of the accused's charged offense.

When viewed from the facts, the harm suffered by the putative victims is direct and proximate to the charged crime of forcible transfer or deportation. But for the General's plans to forcibly displace them from their town, the victims' homes and properties would not have been destroyed and their family members would not have been killed or sexually assaulted. The crimes are also sufficiently proximate to the charged crimes, as the destructions, murders, and acts of sexual violence were methods used by the accused to actualise the population's forced displacement. They were the coercive means through which the population believed it had no genuine choice but to flee.

However, when viewing the crime strictly from the elements of the offense, the proximate harm suffered by the victims becomes far less clear. The charged offense—forcible transfer or deportation—neither requires, nor has an element requiring, the use of murder, sexual violence, the destruction of property, or any act of force or violence. The crime can be committed using coercive means, but coercion does not necessitate violence. Strictly based on its elements, it is possible for an individual to be forcibly transferred or deported with no one being killed, raped, or having their property destroyed. Thus, viewed strictly from the elements of the charged offense, the putative victims may not be eligible to participate as victims. The outer boundaries of victimhood would be limited only to those who were displaced and not those who suffered from the charged acts causing that displacement.

These limitations mean that, under an elements-based approach, the definition of a crime victim has less to do with the crime and more to do with how the Prosecution may strategically charge the case, or how the Pre-Trial Chamber may limit the charges to allow for a more efficient and expeditious trial. This is particularly so at institutions, like the ICC, responsible for dealing with criminal events across a wide temporal and spatial spectrum. Prosecutors dealing with widespread international crimes can never bring charges for all crimes that come to their attention after investigating a situation. Prosecutors must be selective, which inevitably means that only relatively few victims can participate and receive reparations.

Unlike most domestic investigations, international prosecutors deal with crimes that are exponentially larger both in terms of time and space. In terms of time, the crimes often take place over the course of months, if not years. In space, the crimes occur over a vast territorial swath. The Syrian conflict is emblematic of this fact. That conflict has been waging since at least 2011 and across the entirety of the Syrian territory, a space roughly the size of Washington.[140] Particularly given the ICC's limited resources, it would be impossible for international investigators and prosecutors to investigate or prosecute every crime occurring during that conflict, or every perpetrator thereof. In these regards, prosecutors are forced to be selective in the charges they bring and intend to pursue.

Even in circumstances where the investigation or charges brought are more wholesome, efficiency considerations may require charges to become more limited. For example, in *Prosecutor v. Ratko Mladić*, upon pressure from the Pre-Trial and Trial Chamber, the Prosecution limited its presentation of evidence to a selection of 106 crimes in 15 municipalities, instead of the initial 196 scheduled crimes in 23 municipalities.[141] The remaining charges provided a reasonable representation of the crimes charged in the operative Indictment while also ensuring that the interests of a fair and expeditious trial are protected. Under an elements-based approach, the likely consequence

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140. Syria is approximately 185,180 km^2 while Washington State is approximately 172,119 km^2. *See The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html [https://perma.cc/DZS3-KL8P]; *QuickFacts Washington*, U.S. CENSUS BUREAU (July 1, 2018), https://www.census.gov/quickfacts/wa [https://perma.cc/GL8F-G83J].

141. Prosecutor v. Mladić, No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, ¶ 3 (Dec. 11, 2011), http://www.icty.org/x/cases/mladic/ind/en/111216.pdf [https://perma.cc/NX9U-YNYT].

of such limitation is that those harmed from the 90 excluded incidents and eight excluded municipalities would not be eligible for victim status such as to participate in or be eligible for reparations.

From a victims-rights standpoint, these outcomes can be problematic. From the viewpoint of the victims, this means that only victims who have been victimized in the locations that are the subject of the charges may participate. Some have argued that limiting a victim's right to participate denies victims a right to an effective remedy and potentially puts norms of international criminal justice at odds with international human rights law.[142] Specifically, participation provides an important avenue for victims to exercise the right to access justice for violations—an internationally recognised human right.[143] In addition, limiting the number of victims in any proceeding based on what might be perceived as arbitrary decisions on the scope and nature of the charges risks further marginalizing and creating trauma for individuals who were the subject of inhumane acts. One can see and appreciate the injustice the victim of rape or murder might feel in a decision which precludes their participation in a trial but permits the participation of the displaced person, even though the former enabled the latter. And explaining such nuanced distinctions to a pool of victims is more likely to cause their distrust in the legal process and their ability to obtain justice through it.

While these are legitimate issues, there are also two reasons why the "elements-based" approach is likely the most compatible with the Rome Statute. First, an "elements-based" approach is more consistent with the ICC Statute when read as a whole. A victim's right to participate in a proceeding is not absolute.[144] Article 68(3) of the

142. Cécile Aptel, *Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap*, 10 J. INT'L CRIM. JUST. 1357, 1368–69 (2012).

143. G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); G.A. Res. 60/147, 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 (Dec. 16, 2005).

144. *See* Prosecutor v. Garda, ICC-02/05-02/09, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, ¶¶ 2, 6 (Oct. 6, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_07147.PDF [https://perma.cc/ZYB2-AXAV]; Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006, at 3 (Aug. 17, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_03965.PDF [https://perma.cc/3UZZ-XK4X] (declining to authorize certain victims

Statute provides that the Court shall permit a victim to participate in the proceedings "at stages of the proceedings determined to be appropriate by the Court" and, importantly, "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." As noted by Trial Chamber I in *Gbagbo*, "[a]rticle 68(3) of the Statute hence requires the Chamber to balance the personal interests of affected victims, including their desire to present any views or concerns, against the rights of the accused to a fair and impartial trial."[145]

The participatory rights of victims are circumscribed by two adjoining considerations that function to limit the right: "the rights of the accused and a fair and impartial trial."[146] A "fact-based" approach has the consequence of potentially elongating the trial proceeding and creating greater uncertainty on the scope of individuals who may deemed to be victims. In doing so, the approach implicates an accused's right "[t]o be tried without undue delay" (provided for under article 67(1)(c)).[147] As observed by one former judge of the ICC and ICTY, Judge Van den Wyngaert, "[w]hen I compare my experience as an ICC judge with my experience as an ICTY judge, a huge amount of time is spent on victims-related issues, which, obviously, has an impact on the

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to participate in an upcoming status conference); Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 790–791, 800 (2008); Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 261 (2007).

145. Prosecutor v. Gbagbo, No. ICC-02/11-01/11, Decision on victim participation, ¶ 26 (Mar. 6, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_04330.PDF [https://perma.cc/E68J-NUUP]; *see also* Situation in Darfur, No. ICC-02/05, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, ¶¶ 49–52, 59 (June 18, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_03515.PDF [https://perma.cc/JVW5-GWJ2]; Prosecutor v. Bemba, No. ICC-01/05-01/08, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, ¶¶ 5–7 (Dec. 16, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_07868.PDF [https://perma.cc/N63E-5KHS].

146. Rome Statute, *supra* note 26, art. 68(1).

147. *See id.*, art. 67(1)(c). *See also* Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1316-Red, Public Redacted Version of 'Defence Response to "Prosecution's Request to Introduce Prior Recorded Testimony of Seven Defence Witnesses under Rule 68(2)(b),"' ¶ 26 (Trial Chamber IX July 30, 2018) (defense counsel arguing that the defendant has "[t]he right to be tried without undue delay" under Article 67 of the Rome Statute).

length of proceedings."[148] A "fact-based" approach may also implicate the general right that the accused be treated fairly by subjecting him or her to potential reparatory responsibilities towards an unlimited and ambiguous array of potential victims.[149]

Second, an "elements-based" approach is more consistent with rule 85(a)'s legislative history. Despite the major and distinctive role contemplated for victims, the commission responsible for drafting rule 85 never specifically discussed during the negotiations *who* should be regarded as victims.[150] However, there is some guidance that can be drawn from the Statute's legislative history that would caution for a more restrictive approach.

When the ICC Statute was in its early stages of drafting, non-governmental organizations, with the support of some State delegations, "expressed the view that victims had to be defined in the broadest possible way" and drew attention to the definition of victims provided for in the 1985 UN Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power ("1985 UN Declaration").[151] Due to insufficient State support, however, a proposal to include this definition was omitted from the draft text of the statute submitted to the Rome Conference, where the ICC Statute was ultimately promulgated.[152]

Participants in a 1999 seminar in Paris convening government delegates, non-governmental organizations, and other experts on victims' access to the ICC resumed discussions of how to define victims. During the seminar, a definition of victims based on the 1985 UN Declaration was again proposed.[153] Once again, however, States were reluctant to adopt such a broad proposal. As a result, "a footnote to the text indicated that conflicting views existed and some considered that the proposed definition might be too broad."[154] Despite conflicting views and concerns, "it was recognized by all that the access of victims to ICC proceedings would necessarily entail logistic[al] constraints" as,

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148. Van den Wyngaert, *supra* note 20, at 494.

149. *See* Rome Statute, *supra* note 26, art. 64(2).

150. *See* Silvia A. Fernandez de Gurmendi, *Definition of Victims and General Principle*, *in* THE INTERNATIONAL CRIMINAL COURT – ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 428 (Roy S. Lee et al. eds., 2001) [hereinafter *Victims and General Principle*].

151. *Id.* at 428.

152. *Id.* at 429.

153. *Id.* at 429.

154. *Id.* at 429.

"[d]ue to the nature of the crimes under [the Court's] jurisdiction, very large numbers of victims might be expected and the Court could be overwhelmed by their full participation and request for reparation."[155] As a result, "[i]t was considered absolutely necessary to devise a realistic system that could give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes."[156]

This debate continued into 2000. During sessions of the Preparatory Commission for the ICC, NGOs and some State delegates again pushed for a broad definition of victims, while other State delegates expressed their concern that such breadth might "jeopardize the ability of the Court to administer justice by prescribing a victims regime that would be too ambitious" and too broad.[157] Notably, some delegates tried to counter this fear by pointing out that the logistical problems arising from the possibility of too many victims could be resolved by making the "modalities" through which victims could participate flexible rather than restricting the scope of those who would be entitled to participate.[158]

In light of these and other difficulties surrounding how broad or narrow the term "victim" should be, State delegates ultimately abandoned attempts to impose the definition of victims from the 1985 UN Declaration.[159] Instead, delegates from Japan and those from a group of Arab States proposed substantially similar definitions that would give significant discretion to the Court itself to identify the scope and limitations of who a victim should be, effectively delegating that decision to the judges who would eventually face any associated problems arising from a broad definition.[160] Consequently, the first half (paragraph (a)) of the proposal by the group of Arab States was adopted.[161] The following chart compares the three proposals discussed above: the 1985 UN Declaration definition of victims, and the ones proposed by delegates from Japan and the Group of Arab States.

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155. *Id.* at 429.
156. *Id.* at 429.
157. *Id.* at 430–31.
158. *Id.* at 431.
159. *Id.* at 432.
160. *Id.* at 432.
161. *Id.* at 432–33.

PROPOSED DEFINITIONS OF "VICTIM"

1985 UN Declaration	**Proposal from Japan**	**Proposal from Group of Arab States**
"[P]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."[162] "The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."[163]	No definition or, alternatively, "'Victim' means any person who has suffered harm as a result of a crime under the jurisdiction of the Court."[164]	"For the purposes of the State and the Rules of Procedure and Evidence: (a) Victim shall mean any natural person or persons who suffer harm as a result of any crime within the jurisdiction of the Court (b) The Court may, where necessary, regard as victims legal entities which suffer direct material damage."[165]

162. G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, at ¶ 1 (Nov. 29, 1985).

163. *Id.* at ¶ 2.

164. According to Fernández de Gurmendi, this proposal was made by Japan during the Working Group Meeting of 26 March 2000. *Victims and General Principle*, *supra* note 150, at 432.

165. Proposal submitted by Bahrain, Jordan, Kuwait, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, concerning rules of procedure and evidence related to Part II of the Rome Statute of the International Criminal Court, on Jurisdiction, Admissibility and Applicable Law, U.N. Doc PCNICC/2000/WGRPE(2)/DP.4 (Jun. 13, 2000).

From the above history, the following conclusions can be drawn. Importantly, the final text of rule 85(a) was a clear compromise pushed by those delegates that deliberately sought to get away from the broader and more ambitious definition of victim provided by the 1985 UN Declaration. This was principally out of fear that the Court's core activity of ensuring a fair and expeditious trial could be unduly hindered by an avalanche of victim applications that could potentially overwhelm the Court or otherwise delay proceedings. At the same time, it is clear that the ultimate determination as to how much to limit or broaden who could be a victim was left for the Court to decide since the delegates themselves could not agree on which approach was more appropriate—i.e., a broad or narrow one. This discretion was likely left to the Court with the thought that the Court would be best placed to determine whether a broad definition of victim could be accommodated, or whether operational needs required a more limiting definition. Either way, the direction of negotiations appears to point toward a more limiting definition, one closer to the "elements-based" approach, as opposed to the broader definition of victim provided by the "fact-based" approached.

In addition to the above, the "elements-based" approach is likely to be the most apt in light of the Court's current practical concerns. After twenty years in operation, the increasingly common opinion of judges within the Court is that the victim participation scheme is sustainable only so long as it is efficient and in line with the prudent allocation of resources.[166] As noted by one commentator, past experience has shown that "despite the clear prioritization of rights of the accused in Article 68(3), the victim participation practice has been deemed to put a strain on fair trial principles" in that it "has raised suspicion of undermining the judges' ability to focus on the delivery of a fair and expeditious trial for defendants."[167]

166. *See* Sir Adrian Fulford, *The Reflections of a Trial Judge*, 22 CRIM. L. F. 215, 222 (2011); Van den Wyngaert, *supra* note 20, at 493.

167. Sergey Vasiliev, *Victim Participation Revisited—What the ICC Is Learning about Itself*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 1133–1201, 1140 (Carsten Stahn ed., 2015).

CONCLUSION

There are good reasons a Chamber may adopt either an "elements-based" or "facts-based" approach and rule 85(a), as it stands, provides sufficient flexibility for a Chamber to adopt either. The strict language of rule 85(a) mandates no causal approach, and the split experience of U.S. federal courts interpreting similar causal requirements shows that such divergence is reasonable. The ICC Appeals Chamber has in fact been careful not to mandate a specific approach. Other provisions of the Rome Statute also enable a Chamber to balance out the potential deleterious impacts of one approach with safeguards, including the general discretion the Court has to take any "appropriate measure[]" to protect the dignity of victims [168] and provisions on the awarding of reparations.[169]

For instance, even if a Chamber, like in *Lubanga*, limits the ambit of victims by adopting an "elements-based" approach, the Chamber can adopt a broader reparation order to help the general community of victims affected by the underlying violence. In *Katanga*, this amounted to awarding individual victims a "symbolic" compensation of $250 per victim and "collective reparations designed to benefit each victim, in the form of support for housing, support for an income-generating activity, support for education and psychological support."[170] Conversely, a Chamber choosing a "facts-based" approach can balance the potential impacts on an accused's right to a fair and expeditious trial by requiring the Registry and victim representatives to group victim applications together by similar classes of harm or by the time and place in which those harms arose, much in the same way that groups for class action lawsuits are formulated.

The Chamber can also impose strict deadlines and cut-offs for such applications to be made and otherwise place other limitations to ensure that an expeditious trial is not compromised. For instance, the "Chambers Practice Manual" for the ICC—a document identifying "best practices" agreed to by Judges of the Court—prescribes that a strict deadline on victim applications be imposed in advance of the commence of the confirmation of charges and that short windows for

168. Rome Statute, *supra* note 26, art. 68(1).

169. *Id*., art. 75.

170. Prosecutor v. Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, § 306 (Trial Chamber II, Mar. 24, 2007).

further applications be opened once charges are confirmed.[171] It also prescribes that the "Trial Chamber sets a final time limit, sufficiently before the commencement of the trial, for the transmission of any further application by victims of the crimes charges."[172] While this remedy may sound ideal and reflect best practices, it is also not without problems. The ICC's Victims' Participation and Reparations Section (VPRS), whose responsibility it is to process applications by putative victims and file them in a timely manner in accordance with the Court's instructions, has repeatedly found it difficult to comply with the deadlines imposed by the Court due to a combination of budget constraints and the volume of applications.[173]

The reality is that each approach has costs and benefits that might affect the rights of the accused, the interests of victims, and the efficient functioning of Court proceedings. Given the balance of these rights and responsibilities, however, this paper would suggest that the most prudent approach is to view causality and victimhood using the "elements-based" approach. In addition to befitting the Statute's language and legislative history most, as well as the Court's operational concerns, it is the approach that provides the greatest clarity and certainty with regards to who is and who is not a victim. Such certainty works to the benefit of the Court, which must service victims and efficiently make bright-line determinations as to who is or is not a victim. Such certainty also benefits the accused, who might owe reparations to victims or need to respond to their views and concerns,

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171. INT'L CRIMINAL COURT, CHAMBERS PRACTICE MANUAL 27–28 (May 2017), https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf [https://perma.cc/HS6M-PXCB]; *see also* Prosecutor v. Mbarushimana ICC-01/04-01/10-78, Order setting a deadline for the transmission of applications for victims' participation (Pre-Trial Chamber I, Mar. 15, 2011) https://www.icc-cpi.int/CourtRecords/CR2011_02709.PDF [https://perma.cc/CN6Y-GJ5P]; Mélissa Fardel & Nuria Vehils Olarra, *The Application Process: Procedure and Players*, *in* VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL JUSTICE: PRACTITIONERS' GUIDE 11, 21 (Kinga Tibori-Szabó & Megan Hirst eds., 2017) [hereinafter Fardel & Olarra, *The Application Process*].

172. Fardel & Olarra, *The Application Process*, *supra* note 170, at 28; *see also* Prosecutor v. Bemba Gombo, ICC-01/05-01/08-1590-Corr, Corrigendum to the Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry, (Trial Chamber III, July 21, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_10827.PDF [https://perma.cc/477F-4W4D].

173. *See, e.g.*, Int'l Criminal Court, Report of the Court on the review of the system for victims to apply to participate in proceedings, ¶ 12, U.N. Doc. ICC-ASP/11/22 (Nov. 5, 2012).

and to the victims themselves, who benefit from certainty rather than ambiguity.

With that said, even if the Court never focuses on one model of causation—a fact permitted by rule 85(a)—conceptualizing and understanding different models of causation is still useful to advocates and judges. They provide conceptual models to understand the varied approaches the Court can take in determining which class of individuals should be accorded victim status and the pros and cons of adopting that approach. It also enables the Court to proactively undertake steps to remedy the negative consequences that may arise from adopting one approach or another, or otherwise facilitate creative problem-solving techniques to best actualize the Court's goal of providing justice while respecting the rights of accused persons and the interests of victims.