

VICTIM PARTICIPATION AT THE CASE STAGE OF PROCEEDINGS



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
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COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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EXECUTIVE SUMMARY

Article 68(3) of the Rome Statute creating the International Criminal Court (ICC) constitutes the foundational provision for victim participation before the Court. It states:

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

Thus, while Article 68(3) does guarantee victims the right to present their views and concerns to the Court, it leaves a great deal of discretion to the Chambers to determine how and when victims will be permitted to exercise that right. Not surprisingly, therefore, the victim participation scheme envisioned in the Rome Statute has been the subject of considerable deliberation, both in the work of the Court and in commentary from observers. Nevertheless, more than three years after Pre-Trial Chamber I's first decision addressing the scope of victim participation, confusion remains as to the purpose of the scheme and how it should operate. Only a fraction of the victims who have applied to participate in proceedings before the ICC have received a response to their requests, and many of those who have had their applications evaluated have had to wait many months or years to learn whether their applications were granted or denied. At the same time, the participation rights granted to victims remain largely *potential* participation rights, as the Chambers have for the most part held that any victim wishing to exercise any particular form of participation must apply to the Chamber for permission and that such applications will be evaluated on a "case-by-case" basis. Finally, judges of the Court have adopted differing approaches toward the implementation of the scheme, resulting in victims in some cases having less extensive rights than victims in other cases.

In light of how little guidance is provided in the Statute and the ICC Rules of Procedure and Evidence regarding the implementation of the victim participation scheme, we appreciate the difficulties faced by the Court in bringing to life the victim participation scheme, as envisioned by the drafters of the Rome Statute. Nevertheless, we believe that

some of the Court's decisions to date interpreting Article 68(3) may not represent the best way to actualize the drafters' intent. Thus, the aim of this report¹ is to identify certain aspects of the scheme as implemented thus far that might benefit from review and to offer recommendations that might better reflect the intent of the drafters.

The Purpose of the Victim Participation Scheme in the Context of the International Criminal Court

Object and Purpose of ICC Victim Participation Scheme

Although the Chambers of the ICC have recognized that the provisions of a treaty must be interpreted in context and in light of the law's object and purpose, none of the decisions regarding victim participation at the ICC to date include an in-depth exploration of the scheme's purpose. Rather, the decisions have at times included statements regarding the victims' "interests" that seem to actually conflict with the purpose of the Rome Statute's unique approach to victim participation. For example, the Chambers often refer to victims' interests in compensation in decisions determining their participatory rights. Yet unlike many national jurisdictions that allow for victim participation in criminal proceedings, the ICC victim participation scheme is not designed as an efficient means of combining the victims' claims for civil damages with a criminal action. Nor, as has been suggested in some of the Court's opinions, was the ICC victims' participation scheme designed to aid the Court in its pursuit of "clarifying the facts" or in its assessment of whether to "punish[] the perpetrators of crimes." Indeed, one of the frequent criticisms of domestic and international justice systems, from the point of view of victims, has been that these systems have regarded victims as merely "sources of information." Finally, while judges have stated that victims have a right to participate in issues affecting guilt or

¹ This is the War Crimes Research Office's second report on the subject of victim participation at the ICC. The first was primarily directed at the question of victim participation during the investigation stage of the Court's proceedings. See War Crimes Research Office, *Victim Participation Before the International Criminal Court*, (December 2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1. This report reviews the jurisprudence of the Court since the release of the first report over a year ago, with a particular emphasis on decisions pertaining to victim participation at the case stage.

innocence because victims have an interest in “the truth,” the human rights jurisprudence cited in favor of this proposition instead stands for the notion that victims, like the larger international community, have an interest in the Court reaching a correct determination on the guilt or innocence of the accused. Thus, the victims’ interest in the truth does not necessarily translate into a particular set of procedural rights before the ICC.

Of course, this leaves open the question of what the purpose of the ICC victim participation scheme is and how it should be implemented. Broadly speaking, the primary motivation behind the creation of a victim participation scheme within the ICC context was a desire to achieve restorative – as opposed to strictly retributive – justice. Yet this desire does not necessarily inform what victim participation at the ICC should look like, as there is no consensus as to what restorative justice requires. Indeed, although the drafters of the ICC’s victim participation scheme were heavily influenced by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, nations have implemented the Basic Principles in their domestic systems through a number of different models. Other common statements regarding the purpose of the ICC victim participation scheme – such as giving victims “a voice” and providing a link between victims and the work of the Court – may similarly be put into practice any number of ways. Furthermore, research conducted over the past several decades in various domestic systems demonstrates that active participation throughout a trial is not necessarily the ideal form of participation for all victims. The point here is not to discredit systems that involve victims as parties to criminal proceedings, but rather to stress that treating ICC victims as closely as possible to “*parties civiles*” may not, in fact, be the best way to serve restorative justice goals. The drafting history of the ICC victim participation scheme would suggest, instead, that these goals might be better served by considering those factors consistently described as important to victims of crimes and devising a way to bring such benefits to the largest number of victims possible. While it is of course difficult to define “victims’ interests” across cultures and even within and among similarly-situated communities, a review of the vast amount of literature produced on this subject suggests some common themes.

Among the most important rights of victims in the context of their interactions with a criminal justice system – beyond the right to

compensation or restoration, which is not addressed here because, as described above, compensation is available to victims irrespective of whether they participate before the ICC – is the right to receive information regarding their case. In addition, victims value information and clarity with respect to their role in criminal proceedings. Another critical interest of victims in relation to their interaction with the criminal justice system is to be treated with respect and to sense that the system is being responsive to their inquiries and concerns. Finally, it is commonly understood that victims are more likely to experience satisfaction with the criminal justice system if they perceive that their voice has been heard. Importantly, however, this does not mean that victims necessarily want a role in the prosecution of a case. Rather, according to many restorative justice experts, victims simply seek an opportunity to present their views to someone involved with the case.

The Unique Context of the International Criminal Court

Although the Chambers do not always look to domestic systems to determine the scope of victim participation at the ICC, two of the more expansive interpretations of victims' participatory rights under Article 68(3) have been grounded, in part, on the fact that similar rights have been given to victims in certain domestic jurisdictions. To the extent the ICC is relying on how victim participation schemes are implemented at the domestic level, its approach may not take adequate account of two critical differences between proceedings at the ICC and those taking place in a domestic system. The first is that, given the types of crimes falling within the Court's jurisdiction, each case will involve potentially thousands of victims. To date, problems relating to the application process and the backlog at the Court in processing applications that are submitted have meant that the number of victims has remained relatively low, which may explain why the Chambers have been willing – at least theoretically – to offer such broad participation rights. It is much easier to contemplate four victims presenting and challenging evidence during a trial than it is to envision four hundred victims doing so. But, even in cases that are ongoing, and particularly in future cases, the numbers will likely increase. The second difference between the ICC and national jurisdictions that permit broad victim participation is that the ICC does not follow any one system of criminal procedure; thus, borrowing from any single domestic system without taking careful account of the differences between that system and the ICC as a whole may prove unwarranted.

Recommendations

Recommendations Relating to the Process of Achieving Victim Status before the ICC

Simplify Application Form

To qualify as a “victim” under the ICC Rules of Procedure and Evidence, an individual must submit a written application demonstrating that he or she has suffered harm as a result of the commission of a crime within the jurisdiction of the Court. While not required, it is recommended that victims use the Court’s “standard” application form, which is seventeen pages in length and reportedly so complex that victims need legal support to accurately complete it. One solution to this is to provide legal aid to victims at the application stage. Yet given the finite resources of the ICC and the fact that in many cases victims are living in areas of ongoing conflict in which it may be difficult for them to meet with a lawyer regarding their case, a better solution may be for the Court to simplify the application. While it is important for the Court to ensure that victims are providing the necessary information to determine whether they qualify as “victims” under the ICC Rules, it seems reasonable to prescribe a way of getting such information without the “high-level lawyering” that is reportedly required under current circumstances. If this were the case, the Court would need to assess applications bearing in mind that they had not been prepared with legal expertise, meaning it would have to read victim’s stories with the appropriate flexibility.

Reconsider Decision Refusing Access to Registrar’s Report

Upon receiving victims’ applications to participate, the Registrar transfers them, together with a report prepared by the Registrar, to the relevant Chamber. Copies of the applications must also be transmitted to the Prosecution and the Defense, but the Court has held that the Registrar’s report should not be shared with the parties. While there is no provision requiring that this report be transmitted to the Prosecution and the Defense, nothing in the Statute or Rules prohibits the Registrar from doing so, and distribution of the report to the parties could significantly expedite the process of evaluating applications and ease the burden on parties, participants, and the Chambers alike. According to Trial Chamber I, the Registrar’s report is to include the following information: (i) summaries of the matters contained in the original applications, including the use of a grid or a series of boxes dealing

with formal matters; (ii) a grouping of applications when there are links founded on such matters as time, circumstance or issue; (iii) any information that may be relevant to the chamber's decision on the application; and (iv) any other assistance the Victims Participation and Reparations Section is able to give to assist the Chamber in its task of assessing the merits of the applications, while being careful to avoid expressing any views on the merits. If the parties and the Chambers were both working from this same summary information in evaluating the applications, one can imagine a much more efficient process. For instance, parties might find that they are able to limit their comments to disagreements with the Registrar's report, saving each side from having to individually comment on each application. Any risk to the victims could be mitigated by redacting their names and other identifying information from the Registrar's report, as is already done to the applications, where necessary, prior to transfer to the Prosecution and Defense.

Recommendations Relating to the Extent of Victim Participation

Consider the Interests of All Potential Victims in the Context of the International Criminal Court

Although there is no perfect model for involving victims in criminal proceedings, research conducted over the past four decades in domestic jurisdictions suggests that victims generally place a high value on: information regarding their case, clarity concerning their role in the judicial process, being treated with respect, and confidence that their voice has been heard. Furthermore, finding the ideal level of victim participation within any given system will require taking account of the realities of that situation which, in the context of the ICC, include the prosecution of complex and lengthy trials, likely involving hundreds or thousands of victims, in a location far from where the relevant crimes have occurred.

As a general matter, we recommend that the Court take these factors into account when making determinations regarding victim participation in any given instance. While we cannot envision how these factors will influence the Court in every circumstance, broadly speaking, the Chambers, the parties, and the victims would each benefit from greater clarity at the beginning of a case as to victims' role in proceedings, rather than a description of potential rights that may be granted to them on a case-by-case basis, as the Court has often

done. The latter approach not only conflicts with the understandable desire of victims for a clear sense of what part they will play in a case, but also risks heightening victims' expectations and promises to be extremely inefficient. We also recommend that the Court seek to achieve consistency in the rights available to victims across cases. This will require developing a role for victims that is not based on the number of victims that happen to be participating in a case at a given point in time, but rather that takes into account the fact that large numbers of victims may be participating in each case before the Court. Furthermore, as reflected in our more specific recommendations regarding the scope of participation discussed directly below, we do not necessarily believe that permitting a handful of victims, through their legal representatives, to make submissions on technical legal and evidentiary issues is the most effective way to bring restorative benefits to the multitude of victims affected by those crimes being tried by the ICC. Rather, in elaborating the appropriate scope of victim participation, the Court should be cognizant of the importance to victims of telling *their* stories. This suggests that the emphasis should be on participation in proceedings where victims are able to communicate points of view that may not otherwise be available to the Court. Finally, the procedural framework of the Rome Statute and Rules and the rights afforded to accused coming before the Court suggest it may be appropriate to reconsider certain rights provisionally granted to victims by the ICC to date, in favor of facilitating meaningful participation of a far greater number of victims.

Reconsider Decision Permitting Victims to Submit and Challenge Evidence

As explained in detail below, the Trial Chamber determined that victims, among other rights that they could potentially exercise during the course of the *Lubanga* trial, could, upon prior approval of the Chamber, introduce evidence and challenge the admissibility of evidence introduced by the parties. The holding was subsequently sustained by a majority of the Appeals Chamber, which stressed that the right was merely potential and that the right to lead and challenge evidence remained primarily with the parties. In upholding the Trial Chamber's decision, the Appeals Chamber found that, although the provisions governing the disclosure and submission of evidence in ICC proceedings only referred to "the parties," there was also a provision in the Rome Statute allowing the Trial Chamber to request any additional evidence it believes necessary for the determination of

the truth. However, the Appeals Chamber failed to respond to three additional arguments raised by the parties against granting these rights to victims, unrelated to the plain language of the Statute, that together seem to weigh heavily against granting victims the right to submit and challenge evidence during trial proceedings.

The first of these arguments is that the drafters of the Rome Statute expressly considered, and then rejected, giving victims the right to present evidence at trial. Second, the manner in which the Chamber envisions victims exercising their rights in relation to evidence – namely, by a written application that will be decided on a case-by-case basis, presumably during the course of the trial – raises serious questions about the Defense’s right to the disclosure of all relevant evidence *prior to* the commencement of trial. As the Chamber itself recognized, neither the Rome Statute nor the Rules prescribe the manner in which evidence in the possession of victims is to be shared with the accused, and it remains an open question how the Chamber will be able to reconcile the disclosure obligations imposed on the Prosecution and the Defense, which are aimed at ensuring a fair trial, with the *ad hoc* presentation of additional evidence by victims’ legal representatives. A related question is, if the victims share the right of the Prosecutor to submit incriminating evidence during the trial, do they also share the obligation imposed upon the Prosecution by the Rome Statute to disclose to the accused any exculpatory evidence in the victims’ possession? Finally, authorizing victims to submit and challenge evidence essentially forces the defense to confront more than one accuser, which may threaten the principle of equality of arms. In light of these unresolved questions, the Court may wish to revisit its decision granting victims the right to lead and challenge evidence at trial and, at the very least, ensure that the additional issues raised by the parties, discussed immediately above, are fully addressed.

Consider Adopting a Standard that Permits Legal Arguments by Victims’ Legal Representatives Where Victims Establish Their Interests are Not Sufficiently Advanced by the Prosecutor

In June 2007, the Appeals Chamber held, in relation to participation, that “an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.” To date, however, no decision of a Pre-Trial or Trial Chamber has expressly made such an assessment. Significantly, in its

June 2007 decision, the Appeals Chamber found that victims' personal interests were not implicated in the Chamber's analysis of whether an appeal by the Defense was admissible under the language of the relevant provision of the Rome Statute. Thus, as explained in more detail below, we recommend that in the future the Chambers at all levels give consideration to the Appeals Chamber's language and consider applying a rebuttable presumption that the Prosecutor's interests overlap with those of the victims on purely legal questions. Allowing victims' legal representatives to submit legal arguments where the issue has not been adequately advanced by the Prosecutor will not only significantly expedite proceedings and avoid placing the Defense in a position where it is facing two (or more) Prosecutors, but it may encourage the Court as a whole to focus on more meaningful ways to incorporate victims into the proceedings of the ICC, such as creating a better system of evaluating applicants.

I. INTRODUCTION

Of all of the novel aspects of the International Criminal Court (ICC), perhaps none has been so widely commented upon as the Court's unique and innovative victim participation scheme. At the same time, the Court itself has been consistently occupied with submissions and decisions regarding various issues relating to the victim participation scheme. Yet for all that has been written on the issue of victim participation – both inside the Court and out – there is little clarity as to the purpose of the scheme or how it should operate. As a result, in the words of former senior trial attorney in the ICC Office of the Prosecutor, Christine Chung, “The record of the ICC's early years demonstrates that thousands of pages and thousands of hours (likely representing a substantial number of euro), have been expended in delivering actual participation in proceedings on behalf of very few victims.”² Furthermore, the “actual participation” rights granted to victims at all stages of proceedings remain largely *potential* participation rights, as the Chambers have for the most part held that any victim wishing to exercise any particular form of participation must apply to the Chamber for permission, and that such applications will be evaluated on a “case-by-case” basis. Finally, judges of the Court have adopted differing approaches toward the implementation of the scheme, resulting in victims in some cases having less extensive rights than victims in other cases.

In part, the lack of clarity stems from the fact that Article 68(3) of the Rome Statute, which constitutes the foundational provision for victim participation before the Court, leaves a great deal of discretion to the Chambers to determine how and when victims will be permitted to exercise their right to present their views and concerns to the Court. Indeed, while it guarantees victims a right to participate, Article 68(3) leaves it to the Court to determine “[w]here the personal interests of victims are affected” and at what “stages of the proceedings” and in what manner it would be appropriate for victims to participate.³ In

² Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 Nw. J. Int'l Hum. Rts. 459, 461 (Spring 2008).

³ Rome Statute of the International Criminal Court, *adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an*

light of how little guidance is provided in the Statute and the ICC Rules of Procedure and Evidence regarding the implementation of the victim participation scheme, we appreciate the difficulties faced by the Court in implementing the victim participation scheme, as envisioned by the drafters of the Rome Statute. Nevertheless, we believe that some of the Court's decisions to date interpreting Article 68(3) may not represent the best way to actualize the drafters' intent. Thus, the aim of this report is to identify certain aspects of the scheme as implemented thus far that might benefit from review and to offer recommendations that might better reflect the intent of the drafters.

This is the War Crimes Research Office's second report on the subject of victim participation at the ICC. The first was primarily directed at the question of victim participation during the investigation stage of the Court's proceedings, but it included a lengthy analysis of the drafting history of the overall victim participation scheme.⁴ Rather than repeating our findings with regard to that history here, we will present only those aspects of the drafting history relevant to the matters addressed in this report, and refer the reader to our prior work for a more detailed review of the broader *travaux préparatoires*.

International Criminal Court, *entered into force* 1 July 2002, Art. 68(3), U.N. Doc. A/CONF.183/9 (1998).

⁴ See War Crimes Research Office, *Victim Participation Before the International Criminal Court*, *supra* n. 1.

II. VICTIM PARTICIPATION AT THE ICC TO DATE

The Rome Statute governing the ICC entered into force in July 2002 and the Office of the Prosecutor opened its first investigation in June 2004. Since then, judges from the Pre-Trial, Trial, and Appeals Chambers of the ICC have issued a number of decisions regarding: (i) who is entitled to become a “victim” for purposes of participating in ICC proceedings; and (ii) the scope of participation available to those granted the status of victim.

A. DELAY CONTINUES TO PLAGUE THE COURT’S PROCESSING OF VICTIMS’ APPLICATIONS TO PARTICIPATE

The definition of “victim” for the purposes of proceedings before the ICC is contained in Rule 85 of the ICC Rules of Procedure and Evidence (“ICC Rules”), which provides:

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

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.⁵

Victims wishing to participate in proceedings are required to submit a written application to the Court’s Registrar.⁶ While not required, it is recommended that victims use the Court’s “standard” application form, which is seventeen pages in length and presently only available in English and French.⁷ However, it has been reported that the forms

⁵ International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 85.

⁶ *Id.* R. 89(1).

⁷ Int’l Criminal Court, *Standard Application Form to Participate in Proceedings before the International Criminal Court for Individual Victims and Persons Acting On Their Behalf*, available at <http://www.icc-cpi.int/victimissues/>

are so complex that victims need legal support to accurately complete them.⁸ Indeed, one lawyer representing victims in the context of the Darfur situation has said that “[t]here is an enormous amount of high-level lawyering that goes into filling out applications, and no lay person is capable of doing it.”⁹

Upon receiving victims’ applications, the Registrar transfers them, together with a report prepared by the Registrar, to the relevant Chamber.¹⁰ Copies of the applications must also be transmitted to the Prosecution and the Defense, who are given the opportunity to comment on the applicants’ eligibility within a period of time prescribed by the Chamber.¹¹

As explained in our first report on victim participation, the drafting history of Rule 85 suggests that the drafters hoped – or at least anticipated – that large numbers of victims would qualify for participation under this definition.¹² However, the number of participating victims has to date remained small relative to the expectations, in large part due to a severe backlog in the processing of applications. The following summary, issued by a victims’ rights advocacy group in November 2008, illustrates the point:

To date, the Court has received 960 applications by victims to participate in ICC proceedings from all situations. Of these, about 190 have been admitted in total. Of these 168 victims are admitted to participate in the DRC situation, 9 in the Uganda situation and 11 in Darfur; as to the cases presently before the ICC, 4 victims have been admitted to participate in the

victimsparticipation/victimsparticipationForm.html.

⁸ Katy Glassborow, *Victim Participation in ICC Cases Jeopardised*, Institute for War & Peace Reporting, AR No. 148, 20 December 2007, available at http://www.iwpr.net/?p=acr&s=f&o=341564&apc_state=henh.

⁹ *Id.* (quoting American lawyer Raymond Brown).

¹⁰ ICC Rules, *supra* n. 5, R. 89(1); Regulations of the Court, ICC-BD/01-01-04, adopted 26 May 2004, Reg. 86(5).

¹¹ ICC Rules, *supra* n. 5, R. 89(1).

¹² War Crimes Research Office, *Victim Participation before the International Criminal Court*, *supra* n. 1, at 22-23.

Lubanga case while 57 are now participating in the Katanga/Chui case, and 14 in the *Kony et al.* case. **770 applications** (out of 960 received), *i.e.* **more than 80 %**, are awaiting decisions, some since mid-2006. Out of the hundreds of ex-child soldiers who applied to participate in the *Lubanga* case, **only 4** have been admitted so far, while the warrant of arrest against the accused was made public on 17 March 2006, more than two years ago.¹³

While these numbers have improved slightly since November 2008,¹⁴ the situation remains problematic. Understandably, such delays represent a significant source of frustration amongst victims.¹⁵

B. THE EXTENT OF PARTICIPATION FOR INDIVIDUALS GRANTED “VICTIM” STATUS REMAINS UNCLEAR

As mentioned above, Article 68(3) of the Statute constitutes the foundational provision for victim participation before the Court. It states:

Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a

¹³ REDRESS, *Victims and the ICC: Still Room for Improvement*, at 3 (Paper prepared for the 7th Assembly of States Parties, The Hague, 14-22 November, 2008) (emphasis in original).

¹⁴ See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications by Victims to Participate in the Proceedings, ICC-01/04-01/06-1556, ¶ 137 (Trial Chamber I, 15 December 2008) (granting an additional ninety-one victims participation rights in the *Lubanga* case).

¹⁵ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, § VII.D.2.b.ii (10 July 2008) (“One important source of frustration that Human Rights Watch researchers documented is the delay between the filling in of forms and decisions on applications by Chambers. In some instances in the DRC, intermediaries told us that one-and-a-half or two years had elapsed since they first sent in application forms.... Keeping intermediaries-and therefore victims-informed can help temper disappointment and frustration that can justifiably emerge in light of the lengthy delays in processing applications for participation.”).

manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁶

Thus, as Pre-Trial Judge Sylvia Steiner has observed, Article 68(3) “does not pre-establish a set of procedural rights (i.e. modalities of participation) that those granted the procedural status of victim at the pre-trial stage of a case may exercise, but rather leaves their determination to the discretion of the Chamber.”¹⁷ As noted above, victims have been accepted to participate under Article 68(3) in both the situation and the case stage of proceedings. However, in December 2008, the Appeals Chamber of the ICC overruled the decision, first made by Pre-Trial Chamber I in January 2006, that victims could be granted participation rights under Article 68(3) at the investigation stage of proceedings.¹⁸ Hence, we will only address the scope of participation by those granted victim status in one of the three cases currently being tried by the Court: the *Lubanga* case, the *Katanga & Ngudjolo* case, and the *Bemba* case.

1. Participation in the Lubanga Case

Thomas Lubanga Dyilo was the first suspect to be arrested by the Court, and his case was the first to go to trial at the ICC. As of the time of this writing, it is the only case that has extensively addressed the issue of victim participation both at the confirmation of charges stage, which is handled by a Pre-Trial Chamber, and at the trial stage, over which a Trial Chamber presides. Several victim-related issues

¹⁶ Rome Statute, *supra* n. 3, Art. 68(3).

¹⁷ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, ¶ 45(iv) (Pre-Trial Chamber I, 13 May 2008).

¹⁸ *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556 (Appeals Chamber, 19 December 2008). *See also* War Crimes Research Office, *Victim Participation before the International Criminal Court*, *supra* n. 1, (recommending that the Court reconsider the Pre-Trial Chambers’ decisions granting victims participation status under Article 68(3) at the situation stage of proceedings).

arising out of the *Lubanga* case have also reached the Appeals Chamber.

a) Confirmation of Charges Stage of Proceedings

Until December 2008, only four victims had been granted participation rights in the *Lubanga* case. The first three received the status of victims in the case in July 2006.¹⁹ Shortly thereafter, Pre-Trial Chamber I issued a decision regarding the scope of the three victims' participation for purposes of Mr. Lubanga's confirmation hearing.²⁰ The Chamber began by determining, without reference to any source, that victims "may participate in the confirmation hearing by presenting their views and concerns *in order to help contribute to the prosecution of the crimes...* and to, where relevant, subsequently be able to *obtain reparations for the harm suffered.*"²¹ The Chamber then noted that each of the three victims had chosen to remain anonymous during the proceedings and that therefore it would "determine which arrangements for participation are compatible with the anonymity of [the] victims."²² In light of these observations, the Pre-Trial Chamber decided that the victims' legal representatives would enjoy the following rights: (i) notification of and access to the public documents contained in the record of the case; (ii) attendance at public status conferences; (iii) making opening and closing statements at the confirmation hearing; and (iv) requesting "leave to intervene during the public sessions of the confirmation hearing," with the Chamber ruling on each request on a "case-by-case" basis.²³ In addition, the Chamber held that these rights could be extended in light of

¹⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, at 16 (Pre-Trial Chamber I, 28 July 2006).

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462 (Pre-Trial Chamber I, 22 September 2006).

²¹ *Id.* at 5 (emphasis added).

²² *Id.* at 6.

²³ *Id.* at 6-7.

“exceptional circumstances,” without defining what those circumstances might be or how the rights might be expanded.²⁴

The fourth victim to participate in the *Lubanga* case thus far joined the case in October 2006, acceding to the same rights as described in the Pre-Trial Chamber’s decision issued the month before.²⁵ Over the course of the confirmation proceedings, the four victims, through their attorneys, submitted observations on a number of issues, including Mr. Lubanga’s challenge to the Court’s jurisdiction, which was based on the alleged illegal detention of the accused by DRC authorities and alleged irregularities in his subsequent arrest and transfer to the ICC.²⁶ The legal representatives also submitted their clients’ views and concerns with respect to Mr. Lubanga’s request for provisional release, in which the victims argued, *inter alia*, that the accused would be dangerous as he could continue to direct the UPC which still exists on the ground, notably in the Bunia District, where the victims are located.²⁷ Lastly, during the confirmation hearing itself, the victims’ lawyers presented opening and closing statements on behalf of their clients.²⁸

On 29 January 2007, Pre-Trial Chamber I confirmed the charges against Mr. Lubanga.²⁹ In response, the Defense filed for automatic interlocutory review of the Chamber’s decision by bringing an appeal

²⁴ *Id.* at 6.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601 (Pre-Trial Chamber I, 20 October 2006).

²⁶ See Victims’ Rights Working Group, *Victims’ Rights Legal Update*, at 4 (11 September 2006) (victims’ observations available in French only).

²⁷ See *The Prosecutor v. Thomas Lubanga Dyilo*, Observations of Victims a/0001/06, a/0002/06 and a/0003/06 in respect of the Application for Release filed by the Defence, ICC-01/04-01/06-530 (Victims’ Legal Representative, 29 September 2006).

²⁸ See *The Prosecutor v. Thomas Lubanga Dyilo*, Confirmation of Charges Hearing, ICC-01/04-01/06-T-30 (Transcript, 9 November 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Confirmation of Charges Hearing, ICC-01/04-01/06-T-47 (Transcript, 28 November 2006).

²⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803 (Pre-Trial Chamber I, 29 January 2007).

under Article 82(1)(b) of the Rome Statute, which permits immediate appeal of a “decision granting or denying release of the person being investigated or prosecuted.”³⁰ The Appeals Chamber responded by ruling that it was necessary, as an initial matter, to decide whether the appeal was allowable under Article 82(1)(b), and it requested that the Prosecution and Defense provide submissions on that limited subject.³¹ The next day, the four victims participating in the *Lubanga* case filed a joint application requesting permission to file their own observations regarding the admissibility of the Defense’s appeal.³² Both the Prosecution and the Defense were then granted leave to make submissions on whether or not the Chamber should grant the victims’ request.³³

Nearly five months later, the Appeals Chamber issued its decision – consisting of three separate opinions – on the limited question of whether victims had the right to submit observations on the admissibility of the Defense’s appeal.³⁴ The majority opinion held that, despite the victims’ claims to the contrary, their “personal interests” were not affected by the issue of whether the appeal was admissible because the decision of the Appeals Chamber on the matter would “neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation.”³⁵ The majority decision went on to discuss the “personal interests” requirement of Article 68(3) more generally, saying:

Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations. More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do

³⁰ Rome Statute, *supra* n. 3, Art. 82(1)(b).

³¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, ¶ 4 (Appeals Chamber, 13 June 2007).

³² *Id.* ¶¶ 5, 25.

³³ *Id.* ¶ 6.

³⁴ *Id.* ¶ 26.

³⁵ *Id.* ¶¶ 24-26.

not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.³⁶

In his separate opinion, Judge Georghios Pikis wrote that the “issue raised is a purely legal one” and similarly concluded that the victims’ personal interests were not affected.³⁷ Finally, Judge Sang-Hyun Song wrote a separate opinion holding that the victims’ personal interests were in fact affected by the decision under consideration, as the admission of the appeal could ultimately lead to a reversal of the decision confirming the charges or at the very least delay the trial, but that victims’ participation would be “inappropriate” in light of considerations of “procedural economy.”³⁸

Ultimately, the Appeals Chamber determined that Mr. Lubanga could not bring his appeal of the decision confirming the charges under Article 82(1)(b), and the *Lubanga* case was transferred to Trial Chamber I for trial on the confirmed charges.

b) Trial Stage of Proceedings

The first decision regarding the scope of victims’ participation at the trial stage of ICC proceedings was issued on 18 January 2008.³⁹ The extensive decision included a number of significant rulings, the most controversial of which was a holding by the majority of Trial Chamber I that victims need not have suffered harm as a result of the charges confirmed against Mr. Lubanga in order to participate in the *Lubanga* case.⁴⁰ Rather, an applicant would only need to establish either: (i) an evidentiary link between the victim and the evidence that would be presented in the course of the *Lubanga* trial; or (ii) that the victim was “affected by an issue” arising during the trial “because his or her

³⁶ *Id.* ¶ 28.

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-925, ¶ 22 (Appeals Chamber, 13 June 2007).

³⁸ *Id.* ¶¶ 18-22.

³⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim’s Participation, ICC-01/04-01/06-1119, 18 January 2008.

⁴⁰ *Id.* ¶ 95.

personal interests [were] in a real sense engaged by it.”⁴¹ Judge René Blattmann dissented, holding that the Chamber’s competence is determined by the charges confirmed against Mr. Lubanga and that, by exceeding this competence, the majority’s decision risked upsetting the balance between the interests of victims and the rights of the accused to a fair and expeditious trial.⁴²

The Trial Chamber also held, unanimously, that victims could apply at any stage of the proceedings for leave to: access confidential filings in the record of the case,⁴³ introduce evidence and challenge the admissibility and relevance of evidence introduced by the parties,⁴⁴ file written submissions,⁴⁵ and participate in hearings and status conferences.⁴⁶ Significantly, however, none of the rights discussed by the Trial Chamber in its 18 January decision would be automatically available to victims. Rather, “in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim [would] be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek.”⁴⁷ As far as establishing that one’s interests are affected, the Trial Chamber explained, a “general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient.”⁴⁸ Finally, the Chamber noted that each application to participate at a given stage of proceedings would “necessarily be examined on a case-by-case basis,

⁴¹ *Id.*

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim’s Participation, Separate and Dissenting Opinion of Judge René Blattmann, ICC-01/04-01/06-1119 (Trial Chamber I, 18 January 2008).

⁴³ *Lubanga*, Decision on Victim’s Participation, *supra* n. 39, ¶¶ 105-07.

⁴⁴ *Id.* ¶¶ 108-09.

⁴⁵ *Id.* ¶¶ 112-18.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 96.

⁴⁸ *Id.*

since the question of whether the ‘personal interests’ are affected is necessarily fact-dependent.”⁴⁹

Both the Prosecution and the Defense were granted leave to obtain interlocutory appeal of the Trial Chamber’s 18 January 2008 decision.⁵⁰ Among the issues submitted for review by the Appeals Chamber were: (i) whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Rome Statute must be linked with the charges against the accused; and (ii) whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility of evidence.⁵¹ The Appeals Chamber issued its decision on 13 July 2008, reversing the Trial Chamber’s holding that the harm suffered by victims need not be linked to the charges confirmed against the accused, but upholding the decision insofar as it left open the possibility that victims could submit evidence and challenge the admissibility of evidence submitted by the Prosecution or Defense.⁵²

In relation to the first issue, the Chamber reasoned that, because “the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged,” it follows that “only victims of [the charged] crimes will be able to demonstrate that the trial, as such, affects their personal interests.”⁵³ With regard to the second issue, the Appeals Chamber recognized that the Rome Statute provides that “*the parties* may submit evidence relevant to the case,” stressing that the Statute does not say the “parties and victims may” submit evidence.⁵⁴ The Chamber further acknowledged that the Rome

⁴⁹ *Id.*

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ participation of 18 January 2008, ICC-01/04-01/06-1191 (Trial Chamber I, 26 February 2008).

⁵¹ *Id.* ¶ 54.

⁵² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432 (Appeals Chamber, 11 July 2008).

⁵³ *Id.* ¶ 62.

⁵⁴ *Id.* ¶ 93 (emphasis added). Although neither the Rome Statute nor the ICC Rules defines the term “party,” it is well-recognized that, unlike in some Romano-Germanic jurisdictions, victims participating in ICC proceedings are not “parties.”

Statute framework “clearly envisions that evidence presented during the trial would be presented by the parties”⁵⁵ and that the “regime for disclosure” set forth in the ICC Rules is “directed towards the parties and not victims.”⁵⁶ Finally, the Chamber noted that the Statute contains “numerous provisions” that support the notion that the Prosecution bears the burden of establishing the guilt of the accused and determining what evidence should be brought in relation to the charges.⁵⁷ Nevertheless, the Appeals Chamber, following the reasoning of the Trial Chamber, found that despite these provisions, it could permit victims to lead evidence “where requested” by the Chamber because the Rome Statute also empowers the Court to “request the submission of all evidence that it considers necessary for the determination of the truth.”⁵⁸ Thus, while agreeing with the parties

See, e.g., Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1405 (Cassese, *et al.* eds., 2002) (explaining that, in the context of the ICC, “a victim does not become a true party to the trial.”); Karen Corrie, *Victims’ Participation and Defendants’ Due Process Rights: Compatible Regimes at the International Criminal Court*, American Non-Governmental Organization Coalition for the ICC, 10 January 2007, at 17-18, *available at* <http://www.amicc.org/docs/Corrie%20Victims.pdf> at 17-18 (“Unlike those domestic judicial systems in which participating victims actually become third parties to the case, victims before the ICC do not gain the status of fully participating third parties at any phase of the investigation or proceedings.”); Human Rights Watch, *Courting History*, *supra* n. 15, § VII.A (“The provision in the Rome Statute allowing for victims’ participation reflects the influence of civil law criminal systems, which generally allow victims to play an active and central role in prosecutions. However, the ICC’s legal structure is a hybrid of common and civil law criminal justice systems, which means that the role of victims and the rights afforded to them in ICC proceedings are more modest. Indeed, unlike in many civil law jurisdictions, victims are not parties in ICC proceedings.”); Greco, *Int’l Criminal Law Review*, at 535 (explaining that, under the Rome Statute, “victims enjoy rights as a consequence of their status as participants rather than full, or third parties.”); Chung, *Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, *supra* n. 2, at 465 (“The right of participation granted in the Rome Statute... was both unprecedented yet consciously bounded. Victims obtained the status of ‘participants,’ but not ‘parties.’”).

⁵⁵ *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* n. 52, ¶ 93.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* ¶¶ 86-88 (referring to Article 69(3) of the Rome Statute).

that “the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties,” the Chamber held that the possibility is left open for “victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.”⁵⁹ The Appeals Chamber also stressed that the right to lead or challenge evidence was not “unfettered,” but rather would be permitted on a “case-by-case basis.”⁶⁰ However, the Appeals Chamber gave no indication as to how the victims’ right to present evidence on an *ad hoc* basis at trial could be squared with the Defense’s right to receive disclosure of all evidence to be presented at trial, as well as all exculpatory evidence, *prior to* the commencement of the trial.⁶¹

Judge Pikis dissented on the issue of whether victims’ legal representatives should have the right to introduce and challenge evidence at trial.⁶² Judge Pikis explained his position relating to victims’ right to lead evidence in part by citing to the fact that the Rome Statute “does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused” and vests “exclusive responsibility” in the Prosecutor to investigate a case and prove the charges at trial.⁶³ He also stressed the fact that the Statute guarantees the accused a fair and expeditious trial, which may be jeopardized by the presentation of evidence not disclosed to the Defense prior to trial and by the fact that, with victims presenting

⁵⁹ *Id.* ¶¶ 93, 97.

⁶⁰ *Id.* ¶ 4.

⁶¹ *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, ¶ 16 (Trial Chamber I, 9 November 2007) (“[F]ull disclosure is... necessary in order to gain a thorough understanding of the time required by the parties and participants in order to prepare for trial. Although some significant preparatory work has been possible for a considerable period of time, there is further preparation that the defence... must engage in and which can only be completed once there has been full disclosure on the part of the prosecution.”).

⁶² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Partly Dissenting Opinion of Judge G.M. Pikis, ICC-01/04-01/06-1432 (Appeals Chamber, 11 July 2008).

⁶³ *Id.* ¶¶ 6-12.

evidence relating to the guilt or innocence of the accused, the charged person is essentially facing multiple accusers.⁶⁴ Finally, the judge repeated his understanding of the scope of participation as defined by Article 68(3), first set forth in his Separate Opinion delivered on 13 June 2007,⁶⁵ in which he had said the following:

It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their ‘views and concerns’... It is not the victims’ domain either to reinforce the prosecution or dispute the defence.⁶⁶

With regard to the majority’s finding that victims have the right to challenge the admissibility of evidence at trial, Judge Pikis reasoned that, because victims have “no say” in the “proof or disproof of the charges” being tried, the submission and reception of evidence at trial is “not the victims’ concern.”⁶⁷

2. *Participation in the Katanga & Ngudjolo Confirmation of Charges Stage of Proceedings*

Single Judge Sylvia Steiner, who presided over many of the issues arising in the case against Germain Katanga and Mathieu Ngudjolo Chui prior to their hearing on the confirmation of the charges, issued the first decision regarding the scope of victim participation in that case on 13 May 2008.⁶⁸ At the time of the decision, only five individuals had been granted victim status in the context of the

⁶⁴ *Id.* ¶¶ 13-14.

⁶⁵ See *Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-925, *supra* n. 37.

⁶⁶ *Id.* ¶ 15.

⁶⁷ *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Partly Dissenting Opinion of Judge G.M. Pikis, *supra* n. 62, ¶ 19.

⁶⁸ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17.

Katanga & Ngudjolo case.⁶⁹ Interestingly, despite the approach taken by the Trial Chamber in *Lubanga* – namely, that the victims participating in that case would only have *potential* rights and would be required to apply each and every time they wished to exercise some form of participation⁷⁰ – the judge began her discussion by emphatically rejecting the proposition set forth by both the Prosecution and the Defense that the Chamber adopt a “casuistic” approach to victim participation under which “every decision [would be] taken upon request by the victims’ representatives on a case-by-case basis and in light of certain specific victims’ interests.”⁷¹ Instead, Judge Steiner “embrace[d] a systematic approach, which consists of a clear determination of the set of procedural rights that those granted the procedural status of victims in the pre-trial stage of the... case may exercise,”⁷² noting that this is the approach “followed by those national jurisdictions in which victims are granted a procedural status at the pre-trial stage of a case.”⁷³

Judge Steiner also rejected the proposition, put forth by both the Prosecution and the Defense, that victims’ representatives should not be given the right to discuss evidence or to question a witness “in relation to matters that pertain to the guilt or innocence of the suspects.”⁷⁴ Specifically, she found that “the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimized them is to have a declaration of the truth by the competent body.”⁷⁵ Thus, the “guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of

⁶⁹ *Id.* at 4.

⁷⁰ *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* n. 52.

⁷¹ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 48.

⁷² *Id.* ¶ 49.

⁷³ *Id.* ¶ 50.

⁷⁴ *Id.* ¶¶ 30-31.

⁷⁵ *Id.* ¶¶ 30-31.

victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth.”⁷⁶

Unlike the victims participating in the *Lubanga* confirmation proceedings, four of the five *Katanga & Ngudjolo* victims were willing to disclose their identities to the defense, meaning that Judge Steiner set forth two sets of participation rights: one consisting of those rights available to the non-anonymous victims, and one consisting of the rights available to the victim wishing to remain anonymous.⁷⁷ To determine the rights of the former, Judge Steiner began with a study of those procedural rights that: “(i) for a long time have been attached to the procedural status of victim in the pre-trial stage of a case in national systems of criminal justice of the Romano-Germanic tradition; and (ii) have never been found to constitute a violation of internationally recognised human rights standards concerning the right of the accused and a fair and impartial trial.”⁷⁸ With this background, the judge granted non-anonymous victims the right to: (i) access the case record, including confidential documents and filings, but not those labeled “*ex parte*”; (ii) make submissions “on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing and examine such evidence at the hearing”; (iii) examine witnesses; (iv) attend all public and closed session hearings convened in the proceedings leading to and part of the confirmation hearing, except those conducted on an *ex parte* basis; (v) participate by way of oral motions, responses, and submissions in relation to “all matters other than those in which their intervention has been excluded by the Statute and the Rules”; and (vi) file written motions, responses, and replies in relation to all matters other than those in which the victims’ intervention has been excluded by the Statute or the Rules.⁷⁹ Notably, however, Judge Steiner declined victims’ request to present “additional evidence on which neither the Prosecution nor the Defence intend to rely.”⁸⁰ She stressed that the confirmation hearing was intended to be limited in scope and that the

⁷⁶ *Id.* ¶ 35.

⁷⁷ *Id.* at 4-5.

⁷⁸ *Id.* ¶ 61.

⁷⁹ *Id.* ¶¶ 124-42.

⁸⁰ *Id.* ¶ 101.

submission of additional evidence would “inevitably delay” the hearing, which must be held within a “reasonable time” after the suspect is taken into the custody of the Court.⁸¹ The victim who did not wish to disclose his or her identity to the Defense, by contrast, was limited to the set of procedural rights afforded the anonymous victims during the confirmation stage of the *Lubanga* case, namely: (i) notification of and access to the public documents contained in the record of the case; (ii) attendance at public status conferences; (iii) making opening and closing statements at the confirmation hearing; and (iv) requesting “leave to intervene, in which case the Chamber would rule on a case by case basis.”⁸²

Following the Single Judge’s May 2008 decision regarding the scope of victims’ participation rights, an additional fourteen non-anonymous and thirty-six anonymous victims were granted the right to participate in the *Katanga & Ngudjolo* case.⁸³ Five lawyers participated in the confirmation of charges hearing on behalf of the victims, making opening and closing arguments and making various oral submissions on matters such as the admissibility of evidence, whether Germain Katanga should be permitted to waive his right to attend the confirmation hearing, and how the evidence presented by the Prosecution should be interpreted by the Chamber.⁸⁴ Following the close of the confirmation hearing, legal representatives of the participating victims submitted observations on a variety of subjects, including: the alleged lack of co-participation/co-perpetration as regards the acts of the two accused;⁸⁵ the Defense’s challenge to the

⁸¹ *Id.*

⁸² *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 182.

⁸³ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-579 (Pre-Trial Chamber I, 10 June 2008).

⁸⁴ *See, e.g., The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Confirmation of Charges, ICC-01/04-01/07-T-38, 41:12-66:17 (Transcript, 27 June 2008); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Confirmation of Charges, ICC-01/04-01/07-T-41, 40:9-46:15 (Transcript, 2 July 2008); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Confirmation of Charges, ICC-01/04-01/07-T-44, 4:11-39:17 (Transcript, 7 July 2008); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Confirmation of Charges, ICC-01/04-01/07-T-46, 17:1-21:11 (Transcript, 11 July 2008).

⁸⁵ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, FINAL

probative value of the Prosecution's evidence and to the concept of dual victim-witness status,⁸⁶ and the fact that the Prosecution's evidence established a *prima facie* case against the accused.⁸⁷

The majority of the charges brought by the Prosecutor against Germain Katanga and Mathieu Ngudjolo were confirmed by the Pre-Trial Chamber on 26 September 2008⁸⁸ and the case has been sent to Trial Chamber II. At the time of this writing, however, no significant decisions have been made regarding victim participation in the *Katanga & Ngudjolo* case.

3. *Participation in the Bemba Confirmation of Charges Stage of Proceedings*

The most recent decision regarding the scope of victim participation before the ICC was issued by Single Judge Hans-Peter Kaul of Pre-Trial Chamber III, the Chamber presiding over the confirmation phase of the case against Jean-Pierre Bemba Gombo.⁸⁹ At the time of this writing, some fifty-four victims have been granted the right to

SUBMISSIONS OF THE LEGAL REPRESENTATIVE OF VICTIMS a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 and a/0109/08, ICC-01/04-01/07-691, ¶ 7 (Victims' Legal Representative, 22 July 2008).

⁸⁶ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Written Submissions from the Legal Representative of Victims a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 on the Issues Raised at the Confirmation Hearing, ICC-01/04-01/07-690 (Victims' Legal Representative, 22 July 2008).

⁸⁷ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Written Submissions of Victims a/0333/07 and a/0110/08, ICC-01/04-01/07-693 (Victims' Legal Representative, 22 July 2008).

⁸⁸ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ICC-01/04-01/07-611 (Pre-Trial Chamber I, 1 October 2008) (note that although the charges were confirmed on 26 September 2008, the decision was not publicly released until 1 October 2008).

⁸⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320 (Pre-Trial Chamber III, 12 December 2008).

participate in the *Bemba* proceedings.⁹⁰ Judge Kaul began his discussion regarding the scope of participation by expressing his views on the interests of victims. Specifically, he wrote that, in “the opinion of the Single Judge, the personal interests of victims stem from at least two motivations, namely the right to reparations and the right to justice.”⁹¹ He then parted with previous decisions on the subject of victim participation by holding that “no differentiation is made between victims whose identity is known to the Defence and those for whom anonymity has been granted by the Chamber,” as a “differentiation in participatory rights should not be to the detriment of those requiring protective measures.”⁹² He then went on to potentially limit the rights of all victims – including non-anonymous victims – to the rights other Chambers had given to those victims unwilling to disclose their identities to the Defense, namely, the right to have their legal representatives: access public documents, attend public hearings, make opening and closing statements at the confirmation hearing, and, with the leave of the Chamber only, to make written submissions or otherwise intervene in the hearing.⁹³ While the judge left open the possibility that the victims’ legal representatives would be able to attend confidential hearings, the representatives would need to apply for such rights on a case-by-case basis.⁹⁴ Finally, the judge made clear that, unlike non-anonymous victims in the *Katanga & Ngudjolo* case, victims and their legal representatives would *not* be permitted to access confidential decisions, documents, or evidence.⁹⁵

⁹⁰ *Id.* at 36-37.

⁹¹ *Id.* ¶ 90.

⁹² *Id.* ¶ 99.

⁹³ *Id.* ¶¶ 101-10.

⁹⁴ *Id.* ¶ 101.

⁹⁵ *Id.* ¶¶ 103-04.

III. THE PURPOSE OF THE VICTIM PARTICIPATION SCHEME IN THE CONTEXT OF THE INTERNATIONAL CRIMINAL COURT

As the Chambers of the ICC have repeatedly recognized, the provisions of a treaty must be interpreted in context and in light of the instrument's object and purpose.⁹⁶ Yet, none of the many decisions regarding victim participation by the ICC include an in-depth exploration of the scheme's purpose. Rather, those decisions often contain statements regarding the victims' "interests" that at times seem to actually conflict with the purpose of the Rome Statute's unique approach to victim participation. At the same time, some of the decisions approving certain modes of participation seem to be influenced by the fact that victims in Romano-Germanic domestic jurisdictions have been permitted to exercise those same rights. However, this approach may take inadequate account of significant differences between the ICC and domestic courts – not only in terms of the types of cases being tried by the ICC, but also because the Court is itself a mix of various approaches to criminal law, and thus borrowing from any single domestic system without taking careful account of the differences between that system and the ICC as a whole may prove unwarranted.

A. OBJECT AND PURPOSE OF ICC VICTIM PARTICIPATION SCHEME

As described above, the Chambers of the ICC have often prefaced their decisions on the appropriate scope of victims' rights with a discussion of victims' interests. However, these discussions do not rely upon, and in fact often conflict with, the drafting history of the Rome Statute. Thus, for example, the Chambers often refer to victims' interests in *compensation* in decisions determining their *participatory*

⁹⁶ See, e.g., *Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-925, *supra* n. 37, ¶ 12; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-108, ¶ 7 (Pre-Trial Chamber I, 19 May 2006).

rights.⁹⁷ Yet unlike many national jurisdictions that allow for victim participation in criminal proceedings,⁹⁸ the ICC victim participation scheme is not designed as an efficient means of combining the victims' claims for civil damages with a criminal action.⁹⁹ Indeed, in first proposing that victims be granted a role in the proceedings before the ICC, France submitted draft language which included the right of victims to request the Trial Chamber to "establish principles relating to civil compensation."¹⁰⁰ However, this language linking participation to compensation was never included in the draft text of the Statute, and as finally adopted, the Statute does not require victims to participate in

⁹⁷ See, e.g., *Lubanga*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* n. 20, at 5; *Bemba*, Fourth Decision on Victims' Participation, *supra* n. 89, ¶ 90.

⁹⁸ See, e.g., M.E.I. Brienen & E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, at 317, University of Tilburg (2000), available at <http://rechten.uvt.nl/victimology/Brienenhoegen/BH.html> (explaining that the purpose of the French *partie civile* system is "to remedy the harm caused by the offence by awarding compensation, by restitution and by ordering the offender to pay legal costs, such as the fees of the victim's lawyer and experts.") (internal citations omitted); Sonja Snacken, *Penal Policy and Practice In Belgium*, 36 *Crime & Just.* 127, 136 (2007) (explaining that, in Belgium, "victims are party to the criminal procedure only as witnesses and as recipients of civil compensation for damages suffered").

⁹⁹ See, e.g., Judges' Report, *Victims Compensation and Participation, Int'l Criminal Tribunal for the Former Yugoslavia*, CC/P.I.S./528-E, 13 September 2000, at 6, available at <http://www.un.org/icty/pressreal/tolb-e.htm> ("[M]ost legal systems based on civil law allow for the participation of a victim as a *partie civile*; this procedure allows a victim to participate in criminal proceedings as a civil complainant and to claim damage from an accused."); Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 *J. Law & Society* 294, 310-11 (2005) (explaining that, under the *partie civile* systems commonplace in countries such as France and Belgium and the "adhesion" procedure used in Germany, the "ability to pursue civil damages in the criminal trial should, in theory, improve speed, cost, and time involved given that both civil and criminal issues are resolved in the same forum."). In fact, according to Doak, participation by victims within the French system "tends to be limited to the pursuit of the civil claim [for damages]." *Id.* at 311.

¹⁰⁰ U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/L.3 (1996), Art 126 ("...victims may, through defenders whose number shall be chosen by the Trial Chamber, request the latter to establish principles relating to civil compensation for the damage caused to them by the crimes of which the chamber has been seized.").

pre-trial or trial proceedings before the Court in order to make a claim for reparations.¹⁰¹ Indeed, as Judge Pikis noted in his dissenting opinion of 11 July 2008, “[p]articipation of a victim at the trial... is not a prerequisite for claiming reparations.”¹⁰² At the same time, victims may participate in proceedings without pursuing compensation before the Court.¹⁰³ Thus, the Rome Statute marks “a significant departure from the mere conceptualization of victim’s rights in terms of reparation.”¹⁰⁴

Nor was the ICC victims’ participation scheme designed, as has been suggested in some of the Court’s opinions, to aid the Court in its pursuit of “clarifying the facts”¹⁰⁵ or in its assessment of whether to “punish[] the perpetrators of crimes.”¹⁰⁶ Indeed, one of the frequent criticisms of domestic and international justice systems, from the point of view of victims, has been that the actors in these systems – be it the police, the prosecution, or judges – have regarded victims as merely “sources of information.”¹⁰⁷ It is therefore unsurprising that one of the

¹⁰¹ See Rome Statute, *supra* n. 3, Art. 68(3) (governing victim participation); *id.* Art. 75 (governing victim reparations). See also Victims’ Participation and Reparation Section Booklet, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, Int’l Criminal Court, available at http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf (describing the different roles of victims before the ICC and distinguishing between participation and seeking an order of reparations from the Court); La Fédération Internationale des Droits de l’Homme, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter 4: Participation, p. 5, April 2007, available at http://www.fidh.org/article.php3?id_article=4208 (“It is important to note that the procedure for requesting reparations is an independent procedure. Victims do not have to participate in pre-trial or trial proceedings in order to make a claim for reparations.”).

¹⁰² *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Partly Dissenting Opinion of Judge G.M. Pikis, *supra* n. 62, ¶ 18.

¹⁰³ Rome Statute, *supra* n. 3, Art. 68(3); *id.* Art. 75

¹⁰⁴ Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. Int’l Crim. Just. 219, 219-20 (2006).

¹⁰⁵ *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 63 (Pre-Trial Chamber I, 17 January 2006).

¹⁰⁶ *Id.*

¹⁰⁷ HELSINKI INSTITUTE FOR CRIME PREVENTION AND CONTROL, *AD HOC EXPERT*

reasons that the inclusion of a victim participation scheme in the Rome Statute has been viewed as victory for the rights of victims is because “[t]hey are no longer viewed as mere instruments in the search for the truth.”¹⁰⁸ Thus, while some victims may, in fact, wish to serve as witnesses, their role as information providers was apparently not a significant concern in the drafting of the victim participation scheme.

Finally, while Pre-Trial Chamber I has stated that victims have a right to participate in the determination of issues affecting the guilt or innocence of an accused because victims have an interest in “the truth,”¹⁰⁹ it is clear that victims were not intended to be parties to ICC

GROUP MEETING, CHANGING VICTIM POLICY: THE UNITED NATIONS VICTIM DECLARATION AND RECENT DEVELOPMENTS IN EUROPE 8-10 (1989) (explaining that police have long “regard[ed] the victim solely as a source of information; once the information is obtained, or if the police consider the victim to be a ‘poor’ witness, the victim may well be ignored.”); United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, at 57 (1999) (“[I]n... Australia, Canada, France, the United Kingdom and the United States,” observes the U.N. Office for Drug Control and Crime Prevention, “attention has been given to the first point of contact of the criminal justice system with the victim, and to the concept of [‘]psychological first aid[’] according to which the victim is to be treated as a human being, not merely as a possible source of evidence.”); Marieke L. Wierda, *What Lessons Can Be Learned From the ad hoc Criminal Tribunals?*, 9 U.C. Davis J. Int’l L. & Pol’y 13, 20 (2002) (“Essentially, international criminal trials are perpetrator-focused, and victims are often left feeling very unsatisfied. For instance, victims who come before the [*ad hoc* criminal] Tribunals [for the former Yugoslavia and Rwanda] – of course only if they are required as witnesses – are often told to curtail their answers to matters which are relevant in the particular case before the Tribunal, and this has left many victims feeling frustrated.”).

¹⁰⁸ Wilhelmina Thomassen, *Victims’ Rights and the Rights of the Accused*, The Hague, 3 July 2008, available at <http://www.netherlandsmission.org/article.asp?articleref=AR00000388EN>. Indeed, shifting the focus away from the needs of the victims, towards the needs of the Court, would be akin to the phenomenon seen in some domestic jurisdictions in which “victims’ rights” movements have been co-opted by the conservative “law and order” movement, which has used victims’ participation as a means to press for stricter sentencing and other “‘get-tough’ criminal policies.” Ezzat A. Fattah, *Prologue: On Some Visible and Hidden Dangers of Victim Movements*, in *FROM CRIME POLICY TO VICTIM POLICY* 1, 2 (Ezzat A. Fattah, ed. 1996) (warning against the danger that “[v]ictims movement might turn into offender-bashing campaigns” due to the fact that “[g]et-tough criminal policies have combined nicely with an apparent concern for the victim.”).

¹⁰⁹ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to

proceedings with rights equal to those of the Prosecution and the Defense.¹¹⁰ Rather, the Rome Statute and Rules “attempt to strike a delicate balance between the views of those who wished victims and witnesses to be able to play a very active role similar to that of a *partie civile* and those who were concerned that the court might be overwhelmed by a large number of victims, possibly limiting the effectiveness of the prosecution or defense.”¹¹¹ Thus, while it is undeniable that the victims of crimes being prosecuted before the ICC – like the larger international community – have an interest in the Court reaching a correct determination on the guilt or innocence of the accused, this does not necessarily mean that victims were intended to have participation rights equal to those of the parties, particularly with respect to participating in the deliberation of issues affecting the guilt or innocence of an accused.

Of course, this leaves open the question of what the purpose of the ICC victim participation scheme is and how it should be implemented. As we discuss in detail in our first report on victim participation, the primary motivation behind the creation of a victim participation scheme within the ICC context was a desire to achieve restorative – as opposed to strictly retributive – justice.¹¹² Yet this does not necessarily inform what victim participation at the ICC should look like, as restorative justice “subsumes a number of different notions and

Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 35.

¹¹⁰ See *supra* n. 54 and accompanying text.

¹¹¹ Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 Am. J. Int'l L. 773, at 783 (October 2000).

¹¹² See, e.g., 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, 315 (Dominic McGoldrick, *et al.* eds., 2004) (noting that the Rome Statute marked a “major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order,” towards a “more expansive model of international criminal law that encompasses social welfare and restorative justice.”); Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 2001) (“The model for victims’ participation thus developed in the [Rome] Statute... was seen as an important achievement because the Court’s role should not purely be punitive but also restorative.”).

there is not necessarily consensus about its definition.”¹¹³ Indeed, although the drafters of the ICC’s victim participation scheme were heavily influenced by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹¹⁴ nations have implemented the Basic Principles through a “variety of models,” meaning there is no single way to implement victims’ rights. Moreover, none of these models is considered “inherently just or correct.”¹¹⁵ Thus, as the United Nations’ “Policy Guide” regarding the

¹¹³ Michael Wenzel, *et al.*, *Retributive and Restorative Justice*, 32 *Law & Hum. Behav.* 375, 377 (October 2008).

¹¹⁴ See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34 (1985). See also E.S.C. Res. 1996/14, U.N. ESCOR, 1996 Sess., Supp. No. 1, 45th plenary mtg., at 38, ¶ 6, U.N. Doc. E/1996/96 (1997) (requesting that the Secretary-General “bring to the attention of the Preparatory Committee for the Establishment of an International Criminal Court the potential applicability of the basic principles contained in the Declaration.”); Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 427, 428 (Roy S. Lee ed., 2001) (noting that the UN Declaration was distributed to delegations attending the Preparatory Committee pursuant to the request by the Economic and Social Council). See also Preparatory Committee on the Establishment of an International Criminal Court, *Proceedings of the Preparatory Committee during March-April and August 1996*, U.N. GAOR 51st Sess., Supp. No. 22, vol. 1, ¶ 280, U.N. Doc. A/51/22 (1996) (noting that “attention was drawn” to the Victims Declaration as a basis of “further elaborat[ion] and more precisely formulat[ing]” draft Article 43 addressing victims). In 1997, the Preparatory Committee proposed language providing that “[t]he rules of procedure shall include provisions giving effect to the [Victims Declaration].” Preparatory Committee on the Establishment of an International Criminal Court, *Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, Art. 43(7), U.N. Doc. A/AC.249/1997/L.8/Rev.1 (14 August 1997).

¹¹⁵ Matti Joutsen, *Listening to the Victim: The Victim’s Role in European Criminal Justice Systems*, 34 *Wayne L. Rev.* 95, 122 (1987-88). See also Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 *Hum. Rts. Quarterly* 605, 656 (2004) (“Subsequent publications regarding implementation of the Victims’ Declaration... reveal that some states have interpreted the Victims’ Declaration as codifying victims’ right to direct participation in the criminal process. Victims’ right to access justice, for example, has been interpreted as requiring states to accord victims a review mechanism for challenging state decisions in criminal investigations and trials. To comply, some states have implemented legal procedures to ensure victims’ review of decisions that adversely affect their interest in prosecutions, such as when the state has decided there is no public interest in prosecuting a suspect or that there is insufficient evidence to do so. Not every state

implementation of the Basic Principles explains, different domestic jurisdictions have adopted the following models for implementing the requirement – also reflected in Article 68(3) of the Rome Statute¹¹⁶ – that victims be given the opportunity to present their “views and concerns”:

[Some jurisdictions] allow[] the views and concerns of the victim to be presented and considered [through] the presentation of written or oral “victim impact statements” or “victim statements of opinion” to the authority in question. Some jurisdictions grant the victim a right to serve as a “subsidiary prosecutor”. In this capacity victims may submit evidence, suggest questions that may be asked of the defendant or of witnesses, and comment on statements and evidence submitted to the court. In addition, granting the victim the right to present civil claims in connection with criminal proceedings provides some scope for ensuring that the views and concerns of the victim are to be presented and considered.¹¹⁷

Other common statements regarding the purpose of the ICC victim participation scheme – such as giving victims “a voice”¹¹⁸ and

has adopted the same review procedures. Some have opted to establish an ombudsman office to intervene and ensure accountability. Other states allow victims to request review directly of the decision not to prosecute to a superior prosecutor or a judge. Some states have even allowed the victims to prosecute directly. Moreover, in a few jurisdictions, neglect by the prosecutor or the court to consider victims' right to claim redress in criminal proceedings may lead to administrative sanctions.”).

¹¹⁶ See Rome Statute, *supra* n. 3, Art. 68(3).

¹¹⁷ United Nations Office for Drug Control and Crime Prevention, *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, at 20-21 (1999).

¹¹⁸ Human Rights Watch, *Courting History*, *supra* n. 15, § VII.A (describing the “underlying purpose of the victims’ participation regime” at the ICC as “giving victims a voice in criminal proceedings”); Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 *Int’l Review of the Red Cross* 409, 410 (June 2008) (stating that the ICC victim participation scheme is “widely considered as an instrument to give victims of gross violations of human rights and international humanitarian law a voice and to promote reconciliation.”);

providing a link between victims and the work of the Court¹¹⁹ – may similarly be put into practice any number of ways. Hence, it is not clear that active participation throughout a trial is ideal for all victims. Indeed, according to the initial results of a study currently being conducted at the University of Geneva – which focuses on “the point of view of the victims, their experience of the criminal justice system, their needs and their expectations”¹²⁰ – victims who actively participated in criminal proceedings in a variety of European jurisdictions nevertheless “spoke[] of disillusionment and the gap between their expectations and their actual experience of criminal proceedings.”¹²¹ At the same time, studies in the Netherlands, the United States, and Britain have suggested that, under the right circumstances, victims have positive experiences with the criminal justice system despite playing a more “passive” role.¹²² The point here

¹¹⁹ Human Rights Watch, *Courting History*, *supra* n. 15, § VII.A (“By engaging victims in a more proactive role in proceedings, the ICC has the potential to provide a ‘link’ between proceedings in The Hague and members of affected communities on the ground and, thus, to make the court’s proceedings more relevant to them.”); Glassborow, *Victim Participation in ICC Cases Jeopardised*, *supra* n. 8 (“For the first time in international law, people affected by war crimes and crimes against humanity can apply to participate in investigations and cases at the ICC, after its founding members decided it was important to make justice relevant to victims living thousands of kilometres away from the Hague-based court.”); Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 112, at 457 (arguing that victims’ involvement will bring the Court’s proceedings “closer to the persons who have suffered atrocities”).

¹²⁰ Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 Int’l Review of the Red Cross 441, 446 (June 2008).

¹²¹ *Id.* at 446-47. The authors also note the following: “Research carried out within European legal systems shows that the majority of victims are not satisfied with their experience of the criminal justice system and feel that their needs are not met... Increased victim participation in the case concerning them does not always improve their experience of the criminal justice system and does not appear to bring them the emotional, psychological and financial benefits desired.” *Id.* at 444-45.

¹²² *See, e.g.*, Leslie Sebba, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 200 (1996) (“A recent Dutch study attributed generally positive results to the passive involvement of victims in the system, insofar as this took place.”); Edna Erez, *Victim Voice, Impact Statements and Sentence: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 No. 5 Crim. Law Bulletin 3 (September 2004) (note that publication page references are not available for the document) (demonstrating that victim impact statements, which are used in the sentencing phases of criminal trials in the United States and the United Kingdom, “can well serve victims by recognizing their victim status” and that to victims, the impact statement “is not merely a protocol or procedure to follow but

is not to discredit systems that involve victims as parties to criminal proceedings, but rather to stress that it should not simply be assumed that treating ICC victims as closely as possible to “*parties civiles*” should be the goal. The drafting history of the ICC victim participation scheme suggests, instead, that the goal should be to consider the factors that have been consistently described as important to victims of crimes and devise a way to serve the interests of the largest number of victims possible.¹²³ While it is of course difficult to define “victims’ interests” across cultures and even within and among similarly-situated communities, a review of the vast amount of literature produced on this subject since the early 1970s¹²⁴ suggests some common themes. Indeed, as Joanna Shapland, Executive Editor of the *International Review of Victimology*, has observed: “The similarity of victim attitudes over offences and in different systems is extraordinary.”¹²⁵

Among the most important rights of victims in the context of their interactions with a criminal justice system – beyond the right to compensation or restoration, which is not addressed here because, as described above, compensation is available to victims irrespective of whether they participate before the ICC – is the right to receive information regarding their case.¹²⁶ In fact, victims “repeatedly say

rather a measure that fulfills a need for expression.”).

¹²³ See War Crimes Research Office, *Victim Participation before the International Criminal Court*, *supra* n. 1, at 21-23 (explaining that the drafters wanted to define “victims” broadly in order to ensure widespread participation); *id.* at 26-28 (discussing the drafters’ concerns that the victim participation scheme be designed in such a way as to ensure the efficiency of proceedings, despite the anticipated large number of participants).

¹²⁴ Although the “victim” is often referred to as a “forgotten person” in modern criminal justice systems, since the 1970s, a movement has emerged, “first at grass root levels among practitioners disenchanted by the existing criminal justice system, then taken up by academics,” that has “challenged the assumption underlying the existing criminal justice system that punishment of the offender is sufficient, or even necessary, to restore justice after criminal offenses.” Wenzel, *et al.*, *Retributive and Restorative Justice*, *supra* n. 113, at 376. See also Fattah, *Prologue: On Some Visible and Hidden Dangers of Victim Movements*, *supra* n. 108, at 1 (“At present, every aspect of criminal victimization is being studied and analyzed. Every facet of the plight of the victim is being debated and scrutinized.”).

¹²⁵ Joanna Shapland, *Victims and the Criminal Justice System*, in FROM CRIME POLICY TO VICTIM POLICY 210, 216 (Ezzat A. Fattah, ed. 1996).

¹²⁶ Marijke Malsch & Raphaëla Carrière, *Victims’ Wishes for Compensation: The*

that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities about developments in their cases,” and “some victims have said that is all they want from the justice system and would be satisfied simply to achieve that goal.”¹²⁷ Furthermore, research on “victim notification indicates that victims who are kept informed by authorities feel that they had an opportunity to express their wishes, that their wishes were taken into consideration by the authorities and that they had some degree of influence over the outcome of the case.”¹²⁸

In addition to information regarding the status of their case, victims value information and clarity concerning their role in the criminal proceedings. As one review of victim participation schemes throughout Europe explains, it is “essential” that victims “are informed at an early stage of what to expect” from the process itself and their involvement within it.¹²⁹ Unsurprisingly, respect for victims’ interests “implies an obligation not to create erroneous hopes and expectations that cannot be fulfilled” or that “will leave victims frustrated.”¹³⁰ The value of clarity may be particularly important in the context of the ICC, given the fact that the inclusion of the victim participation

Immaterial Aspect, 27 J. Crim. Just. 239, 240 (1999) (“Victims of crime wish to receive information concerning the case at all stages of the process... Victims are more likely to feel that they were treated fairly by the criminal justice system when they are kept informed of the developments in their cases.”); Rauschenbach and Scalia, at 444 (“As regards criminal proceedings, victims seem more satisfied when they are kept informed of developments or when they have the opportunity to play an active part, for example by giving their opinion on the proceedings.”); Shapland, *Victims and the Criminal Justice System*, *supra* n. 125, at 213 (describing results from a study of 278 crime victims in England and noting that the “major reason for dissatisfaction was lack of information”); Jo-anne M. Wemmers, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 19 (1996) (“The informational needs of victims are often identified as the most common need of all victims.”).

¹²⁷ Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 20 (2003).

¹²⁸ United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims*, *supra* n. 107, at 38.

¹²⁹ Brienens & Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, *supra* n. 98, at 995.

¹³⁰ Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, *supra* n. 118, at 440.

scheme in the Rome Statute has been so celebrated. As one commentator wrote with respect to the victims' rights movement generally:

The publicity currently being given to victim services is apt to create or heighten expectations among crime victims. Such expectations, if not met, can only lead to various levels of dissatisfaction [*sic*] and frustration with the criminal justice system and with the greater society.¹³¹

Another critical interest of victims in relation to their interaction with the criminal justice system is respect.¹³² As criminology professor Jo-Anne Wemmers explains:

Unsympathetic reactions from the police and the courts heighten the suffering of the victim. This is commonly referred to as "secondary victimization." For the crime victim who is already having problems with fear and anxiety, depression, or self-esteem, the criminal justice proceedings can be quite confusing and demoralizing. The victims may be very sensitive to behaviour they perceive as callous or uncaring and may take the perceived unresponsiveness of the system very personally.¹³³

Finally, it is commonly understood that victims are more likely to feel satisfied with the criminal justice system if they feel as though their voice has been heard.¹³⁴ Importantly, however, this does not mean that victims necessarily want "a role in the adjudication of their cases."¹³⁵

¹³¹ Fattah, *Prologue: On Some Visible and Hidden Dangers of Victim Movements*, *supra* n. 108, at 11.

¹³² Malsch & Carriere, *Victims' Wishes for Compensation: The Immaterial Aspect*, *supra* n. 126, at 240 ("In general, victims appear to value a considerate and friendly treatment, which expresses respect and a recognition of their dignity.").

¹³³ Jo-Anne M. Wemmers, *VICTIMS IN THE CRIMINAL JUSTICE SYSTEM* 20 (1996).

¹³⁴ *See, e.g.*, Malsch & Carriere, *Victims' Wishes for Compensation: The Immaterial Aspect*, *supra* n. 126, at 240 ("Allowing people to voice their opinions within a procedure increases victim satisfaction with justice.").

¹³⁵ Strang & Sherman, *Repairing the Harm: Victims and Restorative Justice*, *supra* n. 127, at 24. *See also* Shapland, *Victims and the Criminal Justice System*, *supra* n.

Rather, according to restorative justice experts Heather Strang and Lawrence Sherman, victims merely “seek the chance to present their views on the case to someone, and not necessarily a key decisionmaker.”¹³⁶ It is the “chance to be heard at all” that is “usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.”¹³⁷

B. THE UNIQUE CONTEXT OF THE INTERNATIONAL CRIMINAL COURT

Although the Chambers do not always look to domestic systems to determine the scope of victim participation at the ICC, two of the more expansive interpretations of victims’ participatory rights under Article 68(3) have been grounded, in part, on the fact that similar rights have been given to victims in certain domestic jurisdictions.¹³⁸ To the extent the ICC is relying on how victim participation schemes are implemented at the domestic level, its approach may not take adequate account of two critical differences between proceedings at the ICC and those taking place in a domestic system.

The first important distinction between the ICC and national jurisdictions is that, given the types of crimes falling within the Court’s jurisdiction, each case before the ICC may involve potentially thousands of victims. To date, problems relating to the application process and the backlog at the Court in processing applications that are submitted have meant that the number of victims has remained relatively low, which may explain why the Chambers have been willing – at least theoretically – to offer such broad participation rights. It is much easier to contemplate four victims presenting and

125, at 211-12 (“[T]he victims in our study [involving 278 crime victims in England] were not expressing a desire to take over the criminal justice system. They did not want decision-making power – they were happy that the decisions to charge, to prosecute, to sentence, should be left with those who are taking them today.”).

¹³⁶ Strang & Sherman, *Repairing the Harm: Victims and Restorative Justice*, *supra* n. 127, at 24.

¹³⁷ *Id.*

¹³⁸ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 61; *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-Corr (Pre-Trial Chamber I, 17 January 2006).

challenging evidence during a trial than it is to envision four hundred victims doing so. But, even in cases that are ongoing, and particularly in future cases, the numbers will likely increase. As the victims' rights organizations REDRESS has observed, "[t]he nature of the crimes within the jurisdiction of the ICC makes clear that large numbers of victims are impacted," meaning that "[l]arge numbers must... be the inevitable starting point of strategies and systems for victim participation devised and implemented by the Court."¹³⁹ If this is the case, it is important to shape early decisions on victim participation in light of the fact that the number of participating victims is likely to expand. This is not only important in terms of respecting the accused's fundamental right to a speedy trial, but also to respect the interests of victims themselves in efficient and effective justice.¹⁴⁰

The second difference between the ICC and national jurisdictions that permit broad victim participation is that the ICC does not follow any single system of criminal procedure; thus, borrowing from any single domestic system without taking careful account of the differences between that system and the ICC as a whole may prove unwarranted. Indeed, former ICC Pre-Trial Judge Claude Jorda described the procedure of the Court as "essentially accusatorial" and, prior to being appointed to the Court, expressed concern over the fact that the Rome Statute "does not explain how in concrete terms [victim participation] can be reconciled" with a system in which "the trial is conceived as a duel between two adversaries – the prosecution and the defence – leaving little room for a third protagonist."¹⁴¹ Judge Jorda continued:

In this respect, [the Rome Statute] does not indicate how the intervention of the victim in the proceedings

¹³⁹ REDRESS, *Victims and the ICC: Still Room for Improvement*, *supra* n. 13, at 3.

¹⁴⁰ Malsch & Carriere, *Victims' Wishes for Compensation: The Immaterial Aspect*, *supra* n. 126, at 240 (explaining that victims expect the criminal justice system to function efficiently and process their case quickly).

¹⁴¹ Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 54, at 1388. Judge Steiner has echoed this sentiment. See *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 80 ("[T]he criminal procedural endorsed by the [Rome] Statute is an accusatorial system of criminal procedure – in the sense that it is the Prosecution who exercises the penal action – which is not a purely adversarial system because it includes a mixture of procedural features from the Romano-Germanic and common-law traditions.").

can be accommodated with the right of the accused to be tried fairly, impartially and expeditiously. Nor does it specify how the right of the victim can be squared with the Prosecution's duty to uphold the essential moral and social interests of the international community.¹⁴²

Thus, as Judge Pikis of the ICC Appeals Chamber has observed: "[t]he right of victims to participate enunciated by article 68(3) has no immediate parallel to or association with the participation of victims in criminal proceedings in either the common law system of justice as evolved in English and Wales..., or the Romano-Germanic system of justice, where victims in the role of civil parties or auxiliary prosecutors have a wide ranging right to participate in criminal proceedings."¹⁴³

¹⁴² Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 54, at 1388-89.

¹⁴³ *Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-925, *supra* n. 37, ¶ 11.

IV. RECOMMENDATIONS

A. RECOMMENDATIONS RELATING TO THE PROCESS OF ACHIEVING VICTIM STATUS BEFORE THE ICC

1. Simplify Application Form

As noted above, the “standard” form recommended for victims wishing to participate before the Court is lengthy and complicated.¹⁴⁴ One solution that has been suggested is to reverse the decisions of Pre-Trial Chambers I and II holding that victims are not entitled to Court-sponsored legal aid at the application stage of proceedings.¹⁴⁵ Yet given the previous findings of the Court, the finite resources of the ICC, and the fact that in many cases victims are living in areas of ongoing conflict in which it may be difficult for them to meet with a lawyer regarding their case,¹⁴⁶ a better solution may be for the Court to simplify the application. This solution seems particularly appropriate in light of the evidence discussed above showing that it is important for victims to have the opportunity to tell their story and the fact that the application is in practice the first chance victims will have to share their account with the Court. While it is important for the Court to ensure that victims are providing the necessary information to

¹⁴⁴ See *supra* n. 7 *et seq.* and accompanying text.

¹⁴⁵ See Glassborow, *Victim Participation in ICC Cases Jeopardised*, *supra* n. 8. Note that applicants to participate as victims before the Court may currently receive “assistance” with their applications from the Office of Public Counsel for Victims and, if granted the right to participate, victims are entitled to a legal representative once their applications are accepted. See *The Prosecutor v. Joseph Kony, et al.*, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134 (Pre-Trial Chamber II, 1 February 2007); *Situation in the Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374 (Pre-Trial Chamber I, 17 August 2007).

¹⁴⁶ See Glassborow, *Victim Participation in ICC Cases Jeopardised*, *supra* n. 8 (quoting Fiona McKay, current head of the ICC's Victims Participation and Reparations Section, as saying that the Court lacks the resources to provide legal aid for every applicant).

determine whether they qualify as “victims” under Rule 85, it seems reasonable to prescribe a way of getting such information without the “enormous amount of high-level lawyering” currently required.¹⁴⁷ For example, while the standard form contains seven separate questions under the heading “Information about the Alleged Crimes,”¹⁴⁸ thus asking the applicant to divide his or her story into different parts, the Court could simply request that the applicant narrate his or her story, being as specific as possible. In addition, the application form requests information about the “injury, harm, or loss suffered,” including questions about medical treatment and records of the harm, but such detailed information regarding the injury is likely only necessary for the reparations portion of proceedings, which is a separate proceeding altogether.¹⁴⁹ In fact, a victim is required to complete a separate application form to receive reparations. Hence, these questions could be removed from the application to participate altogether, thereby simplifying the process.

Of course, if the Court maintains its position that victims are not entitled to legal aid for purposes of completing applications for participation, the Court will need to assess victims’ applications bearing in mind that they have not been prepared with legal expertise, meaning it would have to read victim’s stories with the appropriate flexibility. For example, one source in favor of supplying legal aid to applicants explained her position that lawyers are necessary because applicants do not “underst[and] the questions in the way a lawyer would,” noting that “[c]hildren who were recruited by militias describe the crime they suffered as abduction, which is not a prosecutable crime – the crime is recruiting or conscripting children under 15 to fight in hostilities.”¹⁵⁰ Ideally, however, the judges evaluating such

¹⁴⁷ *Id.*

¹⁴⁸ Int’l Criminal Court, *Standard Application Form to Participate in Proceedings before the International Criminal Court for Individual Victims and Persons Acting On Their Behalf*, *supra* n. 7, Part D.

¹⁴⁹ *See supra* n. 101 *et seq.* and accompanying text.

¹⁵⁰ *Id.* (quoting Mariana Goetz from REDRESS). Note that there is no publicly available evidence that any victim has been rejected on the ground that he or she did not use appropriate legal terminology. Rather, those victims whose applications have been rejected have been disqualified on such grounds as lacking proof of identity, submitting an application on behalf of a deceased person, and having suffered harm unrelated to the charges being tried, *i.e.*, during a period of time that falls outside the time of the alleged crimes charged against the accused. *See, e.g.*,

applications would not require the victims to use the correct legal terminology to qualify as a victim.

2. *Reconsider Decision Refusing Access to Registrar's Report*

One option that is likely to accelerate the Court's processing of victims' applications for participation is for the Court to allow the Prosecution and the Defense access to the ICC Registrar's report on victims' applications. Such a report is mandated under Court Regulation 86(5), which requires that the Registrar transmit all victims' applications for participation to the relevant Chamber and include a report on those applications.¹⁵¹ Furthermore, the Registrar "shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims."¹⁵² Presumably, the Chamber uses this report to facilitate its decisions regarding victims' eligibility for participation in a certain situation or case. While there is no provision requiring that this report be transmitted to the Prosecution and the Defense, a report was submitted to the Prosecution in the past, and, in July 2007, Judge Steiner ordered that the Prosecutor and the Office of Public Counsel for the Defence

The Prosecutor v. Joseph Kony, et al., 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, ICC-02/04-01/05-252 (Pre-Trial Chamber II, 10 August 2007); *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, ICC-01/04-01/07-579 (Pre-Trial Chamber I, 10 June 2008); *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, ICC-01/04-545 (Pre-Trial Chamber I, 4 November 2008); *Situation in the Democratic Republic of Congo*, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, ICC-01/04-505 (Pre-Trial Chamber I, 3 July 2008). However, in some instances, the Chamber has given its reasons for granting or denying applications of victims in a confidential annex, meaning that it is possible that the Court has adopted a strict interpretation of the victims' description of their harm. See, e.g., *Bemba*, Fourth Decision on Victims' Participation, *supra* n. 89.

¹⁵¹ Regulations of the Court, *supra* n. 10, Reg. 86(5).

¹⁵² *Id.* Reg. 86(5).

(OPCD), which had been appointed to represent the interests of future accused,¹⁵³ receive copies of a report regarding a series of applications from victims seeking to participate in the DRC situation.¹⁵⁴ Shortly after the decision, and before the report was ever transmitted, the legal representative of the relevant victims requested that the judge reconsider her decision regarding the transmission of the report, or to at least modify her order to allow the Registrar to transfer a redacted version of the report to the Prosecution and the OPCD.¹⁵⁵ The OPCD responded that “if the Chamber is of the view that it is either necessary or useful for it to utilise the Report of the Registry in formulating its decision, it follows that it would also be necessary or useful to the parties to access this information.”¹⁵⁶ It further argued that “in the interest of expeditiousness of the proceedings, if there are inaccuracies or ambiguities which are resolved in the Report, the OPCD should not be forced to dedicate its limited time to dealing with inaccuracies or ambiguities which may have already been resolved.”¹⁵⁷ Similarly, the Prosecution submitted that “receiving the Report would benefit the Prosecution, since it has provided clarifications on essential data in the Applications.”¹⁵⁸ Nevertheless, Judge Steiner ultimately determined that, because there is “no express provision in the Statute or the Rules requiring the Chamber to transmit the Report to the participants” and “the function of the Report is to assist *the Chamber* in issuing only one

¹⁵³ *Situation in the Democratic Republic of Congo*, Decision authorising the filing of observations on applications for participation in the proceedings, ICC-01/04-358 (Pre-Trial Chamber I, 17 July 2007).

¹⁵⁴ *Id.*

¹⁵⁵ *Situation in the DRC*, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *supra* n 145, ¶ 32. Note that the legal representative's observations were filed confidentially, but are reviewed by Judge Steiner in her 17 August 2007 decision.

¹⁵⁶ *Situation in the DRC*, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *supra* n 145, ¶ 33. Note that the OPCD's observations were filed confidentially, but are reviewed by the Single Judge in her 17 August 2007 decision.

¹⁵⁷ *Id.* Note that the Prosecution's observations were filed confidentially, but are reviewed by the Single Judge in her 17 August 2007 decision.

¹⁵⁸ *Id.* ¶ 34.

decision on a number of Applications,” she would not order the Registrar to transfer the report to the participants in any form.¹⁵⁹

The issue regarding whether the Registrar’s Regulation 86(5) report should be shared with the parties arose again in the context of the *Lubanga* case. Specifically, during a hearing held before the Trial Chamber in October 2007, the Prosecution, Defense, and the legal representatives of the Victims who had already been granted participation rights in the case requested that the Chamber order the Registrar to share future reports regarding victims’ applications to participate in the case with all parties and participants.¹⁶⁰ The Prosecution argued that, “[g]iven the way the reports have been structured in the past, they contain essential data (most particularly summaries of information) which has been of assistance to the Prosecutor.”¹⁶¹ The Defense similarly argued that disclosure of the reports would “facilitate its work.”¹⁶² On behalf of the participating victims, the legal representatives explained that receipt of the reports would be helpful in regard to such issues as common legal representation and conflicts of interest amongst victims, as well as for purposes of checking the “accuracy” of the reports.¹⁶³ Despite these arguments, the Trial Chamber determined that it was not “necessary” to disclose the reports, as the applications themselves – which are disclosed to the parties and the participants – are the primary sources of information, whereas the reports prepared by the Registrar are “essentially secondary documents.”¹⁶⁴

Although both Pre-Trial Chamber I and Trial Chamber I are correct that the Court Regulations do not require that the Registrar’s report be shared with the parties or the victims’ legal representatives, nothing in the Statute or the Rules prohibits the Registrar from doing so, and

¹⁵⁹ *Id.* ¶ 38 (emphasis in original).

¹⁶⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, ¶ 3 (Trial Chamber I, 9 November 2007).

¹⁶¹ *Id.* ¶ 4.

¹⁶² *Id.* ¶ 6.

¹⁶³ *Id.* ¶¶ 7-8.

¹⁶⁴ *Id.* ¶¶ 23-24.

distribution of the report to the parties could significantly expedite the process of evaluating applications and ease the burden on parties, participants, and the Chambers alike. According to Trial Chamber I, the Registrar's report is to include the following information: (i) summaries of the matters contained in the original applications, including the use of a "grid or a series of boxes dealing with formal matters"; (ii) a grouping of applications when there are links founded on such matters as time, circumstance or issue; (iii) any information that may be "relevant to the chamber's decision on the application"; and (iv) any other assistance the Victims Participation and Reparations Section is able "to give to assist the Chamber in its task of assessing the merits of the applications, whilst carefully avoiding expressing any views on the merits."¹⁶⁵ If the parties and the Chambers were both working from this same summary information in evaluating the applications, one can imagine a much more efficient process. For instance, parties might find that they are able to limit their comments to disagreements with the Registrar's report, saving each side from having to individually comment on each application.

B. RECOMMENDATIONS RELATING TO THE EXTENT OF VICTIM PARTICIPATION

1. Consider the Interests of All Potential Victims in the Context of the International Criminal Court

As we discussed earlier, "there is no ideal system for involving the victim in [the criminal justice] process,"¹⁶⁶ but research conducted over the past four decades in domestic jurisdictions suggests that victims generally place a high value on: information regarding their case, clarity with respect to their role in the judicial process, being treated with respect, and a sense that their voice has been heard. Furthermore, finding the ideal level of victim participation within any given system will require taking account of the realities of that situation which, in the context of the ICC, include the prosecution of complex and lengthy trials, likely involving hundreds or thousands of victims, in a location far from where the relevant crimes have occurred.

¹⁶⁵ *Id.* ¶ 19.

¹⁶⁶ Joutsen, *Listening to the Victim*, *supra* n. 115, at 95.

As a general matter, we recommend that the Court take these factors into account when making determinations regarding victim participation in any given instance. While we cannot envision how these factors will influence the Court in every circumstance, broadly speaking, the Chambers, the parties, and the victims would each benefit from greater clarity as to victims' role in proceedings from the beginning of a case, as opposed to a description of a panoply of potential rights that will only be granted to victims on a case-by-case basis, as has often been the case.¹⁶⁷ While there may be good reason to preserve a certain degree of flexibility, particularly in the early years of the Court's operations as it refines the contours of the victim participation scheme, the latter approach not only conflicts with the understandable desire of victims for a clear sense of what part they will play in a case, but also promises to be extremely inefficient. Thus, we recommend that the Court be as clear as possible regarding victims' participation rights from the outset of the case. We also recommend that the Court seek to achieve consistency in the rights available to victims across cases. This will require developing a role for victims that is not based on the number of victims that happen to be participating in a case at a given point in time, but rather takes into account the fact that large numbers of victims may participate in any given case before the Court.

Furthermore, as reflected in our more specific recommendations regarding the scope of participation discussed directly below, we question whether permitting a handful of victims, through their legal representatives, to make submissions on technical legal and evidentiary issues is the most effective way to bring restorative benefits to the multitude of victims affected by those crimes being tried by the ICC. Rather, in elaborating the appropriate scope of victim participation, the Court should be cognizant of the importance to victims of telling *their* stories. This suggests that the emphasis should be on participation in proceedings where victims are able to communicate points of view that may not otherwise be available to the Court. The delivery of opening statements by victims' legal representatives is a prime example of such participation because, as Human Rights Watch has observed, the statements serve to "ground[] the proceedings in the real experiences of victims of ICC crimes and in the suffering that they must endure in their daily lives because of these

¹⁶⁷ See *supra* n. 23 *et seq.* and accompanying text.

crimes.”¹⁶⁸ Closing statements by victims’ representatives serve a similar purpose. Finally, the procedural framework of the Rome Statute and Rules and the rights afforded to accused coming before the Court suggest it may be appropriate to reconsider certain rights provisionally granted to victims by the ICC to date, in favor of facilitating meaningful participation of a far greater number of victims.

2. *Reconsider Decision Permitting Victims to Submit and Challenge Evidence*

As explained above, the Appeals Chamber upheld the potential right of victims to submit and challenge evidence in the *Lubanga* trial.¹⁶⁹ In doing so, the Appeals Chamber reconciled the fact that a number of provisions in the Rome Statute and ICC Rules relating to evidence refer only to “the parties,” namely by referring to the provision of the Statute that permits the Court to “request the submission of all evidence that it considers necessary for the determination of the truth.”¹⁷⁰ However, the Chamber failed to respond to three additional arguments against granting these rights to victims, unrelated to the plain language of the Statute, raised by the parties on appeal.

The first of these arguments is that the drafters of the Rome Statute expressly considered, and then rejected, giving victims the right to present evidence at trial.¹⁷¹ Specifically, an early draft of the Statute included a provision giving the legal representatives of victims of crimes “the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.”¹⁷² This provision, however, did not make it into the

¹⁶⁸ Human Rights Watch, *Courting History*, *supra* n. 15, § VII.D.

¹⁶⁹ *See supra* n. 52 *et seq.* and accompanying text.

¹⁷⁰ *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* n. 52, ¶¶ 95-99.

¹⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, ICC-01/04-01/06-1219, ¶ 37 (Office of the Prosecutor, 10 March 2008).

¹⁷² U.N. Committee of the Whole, *Report of the Working Group on Procedural Matters*, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/ADD.6, Art. 68 (11 July 1998).

final draft. Second, the manner in which the Chamber envisions victims exercising their rights in relation to evidence – namely, by a written application that will be decided on a case-by-case basis, presumably during the course of the trial – raises serious questions about the Defense’s right to the disclosure of all relevant evidence *prior to* the commencement of trial. As the Chamber itself recognized, neither the Rome Statute nor the Rules prescribe the manner in which evidence in the possession of victims is to be shared with the accused, and it is an open question how the Chamber will be able to reconcile the disclosure obligations imposed on the Prosecution and the Defense, which are aimed at ensuring a fair trial, with the *ad hoc* presentation of additional evidence by victims’ legal representatives. A related question is, if the victims share the right of the Prosecutor to submit incriminating evidence during the trial, do they also share the obligation imposed upon the Prosecution by the Rome Statute to disclose to the accused any exculpatory evidence in the victims’ possession? Finally, as counsel for Lubanga argued on appeal, “[a]uthorising victims to submit evidence or to express their opinion on the evidence would mean forcing the defendant to confront more than one accuser, which would violate the principle of equality of arms, one of the necessary elements of a fair trial.”¹⁷³ In light of these unresolved questions, the Court may need to revisit its decision granting victims the right to lead and challenge evidence at trial, at the very least to ensure that these additional issues raised by the parties are fully addressed.

3. *Consider Adopting a Standard that Permits Legal Arguments by Victims’ Legal Representatives Where Victims Establish Their Interests are Not Sufficiently Advanced by the Prosecutor*

Given all of the ICC jurisprudence on the issue of victim participation since July 2007, it is interesting that no decision of a Pre-Trial Chamber or Trial Chamber has given any consideration to the Appeals

¹⁷³ *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* n. 52, ¶ 78 (quoting from the Defense’s submission, which is currently unavailable in English). See also Human Rights Watch, *Courting History*, *supra* n. 15, § VII.B.2.b.ii (“There is a danger that in submitting evidence to the court, which could include evidence relating to the accused’s guilt or innocence, victims could, in essence, become ‘second prosecutors.’”).

Chamber's decision of that month which held, in relation to participation, that "an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor."¹⁷⁴ To the contrary, Judge Steiner seemed to base her decision granting broad rights to non-anonymous victims in the *Katanga & Ngudjolo* case on the proposition that "the interests of victims do not always correlate with those of the Prosecution."¹⁷⁵ Interestingly, however, the only two cases that the judge cited in support of this proposition uphold actions by a domestic court limiting the rights of victims. First, in *Berger v. France*, the European Court of Human Rights upheld France's law limiting the instances in which a civil party may appeal the dismissal of a criminal action where the Prosecutor chooses not to lodge such an appeal.¹⁷⁶ Notably, the court in *Berger* based its decision in part on the "complementary interests" of civil parties and the prosecution in criminal cases.¹⁷⁷ Similarly, in *Perez v. France*, the judge's only other support for the notion that the interests of victims cannot be assumed to be aligned with those of the Prosecutor, the European Court dismissed a claim from a civil party that her appeal of a domestic case had been improperly rejected, as the Court found that the appellate chamber had given due consideration to the victim's arguments.¹⁷⁸ In sum, neither of these cases stands for the proposition that, to make participation meaningful, victims must be given the opportunity, through a legal representative, to submit observations on every legal issue arising during a trial, regardless of the similarity of positions taken by the Prosecution and the legal representatives on the issue.

¹⁷⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, ¶ 4 (Appeals Chamber, 13 June 2007).

¹⁷⁵ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 155.

¹⁷⁶ European Court H.R., *Berger v. France* (Application No. 48221/99), Judgment, 3 December 2002.

¹⁷⁷ *Id.* ¶ 38 (emphasis added).

¹⁷⁸ European Court H.R., Grand Chamber, *Perez v. France* (Application No. 47287/99), Judgment, 12 February 2004.

At the same time, while Judge Steiner stresses in her 13 May 2008 decision in the *Katanga & Ngudjolo* case that victims have a right to “the truth,” none of the human rights jurisprudence cited in that decision stand for the proposition that an interest in the truth translates to a right of victims to exercise particular participatory rights.¹⁷⁹ Rather, the cases stand for the proposition that, in the case of human rights violations, victims have the right “to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through the investigation and prosecution” of those acts.¹⁸⁰ Finally, when outside commentators speak of the divergence of interests between victims and a prosecutor, they typically cite to issues such as a decision by the prosecutor to forego prosecution altogether or to enter into a plea bargain with the accused,¹⁸¹ rather than pointing

¹⁷⁹ *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶¶ 31-32.

¹⁸⁰ Inter-American Court H.R., *Case of Almonacid-Arellano et al. v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of September 26, 2006, Series C No. 154, ¶ 148. *See also* Inter-American Court H.R., *Case of Bámaca-Velásquez v. Guatemala* (Merits), Judgment of November 25, 2000, Series C No. 70, ¶ 197; Inter-American Court H.R., *Case of the Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), Judgment of September 15, 2005, Series C No. 134, ¶ 297; Inter-American Court H.R., *Case of Barrios Altos v. Peru* (Merits), Judgment, March 14, 2001, Series C No. 75, ¶ 48. Note that the decision also cites a decision from the European Court of Human Rights, but this decision in fact does not discuss a victims’ right to the truth, except to the extent that it includes a reference to the “Minnesota Protocol” – the Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions – which notes that “the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim.” European Court H.R., *Case of Hugh Jordan v. The United Kingdom* (Application no. 24746/94) Judgment, 4 May 2001.

¹⁸¹ *See, e.g.* Jorda & de Hemptinne, *The Status and Role of the Victim*, *supra* n. 54, at 1394-97; William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System"*, 1999 Utah L. Rev. 349, 352 (1999). It is important to note in this context that the drafters of the Rome Statute determined that victims should not have the right to initiate an investigation or prosecution initiate an investigation, or to compel the Prosecutor to pursue any particular suspect or crime. *See, e.g.*, Bitti & Friman, *Participation of Victims in the Proceedings*, *supra* n. 112, at 457 (noting that, “[c]ontrary to what is the case in, for example, French and Swedish municipal systems, victims do not have the right to initiate criminal proceedings.”); Jérôme de Hemptinne & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, J. Int’l Crim. Just., 342, 347-48 (April 2006) (“Indeed, the Statute requires that the investigation be carried out in

to divergent views as to the admissibility of a piece of evidence or the statutory interpretation of a procedural rule.

This is not to say that the parties will *never* have divergent views on a matter of law, but it may be reasonable to apply a rebuttable presumption that the Prosecutor's interests overlap with those of the victims on purely legal questions. Indeed, as Pre-Trial Chamber I has held, "the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimized them is to have a declaration of the truth by the competent body."¹⁸² At the same time, the Prosecutor of the ICC is obligated by Statute to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility" for the very purpose of "establish[ing] the truth."¹⁸³ Allowing legal arguments by victims' representatives where victims interests are not sufficiently advanced by the Prosecutor will not only significantly expedite proceedings and avoid placing the Defense in a position where it is facing two (or more) Prosecutors, but it may encourage the Court as a whole to focus on more meaningful ways to incorporate victims into the proceedings of the ICC, such as creating a better system of evaluating applicants.

an independent and objective manner, with equal care given to incriminating and exonerating circumstances... Furthermore, it should be noted that, in conducting the investigations, the Prosecutor, in addition to the interests of victims, has to take into account several other factors (such as the gravity of the crimes, complementarity and other interests, e.g. reconciliation, excessive workload of the Court, *etc.*)). Thus, as Judge Steiner recognizes in her 13 May 2008 decision on victim participation, "if those granted the procedural status of victim find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake such steps." *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 83. It is also worth noting that under the Rome Statute, the Trial Chamber has the authority to reject a guilty plea and order the trial of an accused "[w]here the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims." Rome Statute, *supra* n. 3, Art. 65(4).

¹⁸² *Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* n. 17, ¶ 31.

¹⁸³ Rome Statute, *supra* n. 3, Art. 54(1)(a).

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