

The Role of Victims in the First Trial of the International Criminal Court*

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The Rome Statute (RS) of the International Criminal Court (ICC) is a milestone for the role it accords to victims in international criminal proceedings. The provisions on victims' participation in the RS system have been applied for the first time in the case of Mr Thomas Lubanga Dylio. This paper takes the view that a number of significant interlocutory pronouncements on victims' participation have already been made by the ICC Pre-Trial, Trial and Appeals Chambers which, as such, deserve further analysis. The paper will firstly provide a brief overview of developments with regard to victims' participation in the area of international criminal justice. It will proceed by considering the impact of the alleged crimes on victims as emerges from the ongoing witness testimonies and victim applications. The paper subsequently explores the definition of "victim" under the RS system before considering the functions of particular offices and sections within the Court especially responsible to facilitate victims' participation at the ICC. Certain aspects of victims' participation as emerging from the Lubanga trial are examined next, followed by a brief consideration of the provisions for reparations. The next section counterpoises the rights of victims with those of the accused, and the paper concludes by highlighting two episodes in which the rights of victims were brought particularly to the fore in the Lubanga trial, namely, the abuse of process imputable to the Office of the Prosecutor on two occasions, and the near release of the accused, and the request for the modification of the legal characterisation of the facts.

Introduction

1. The Rome Statute (RS) of the International Criminal Court (ICC)¹ is a milestone for the role it accords to victims in international criminal proceedings. The provisions of the RS system have been described as unique. They represent a completely new concept for an international criminal court.
2. The provisions on victims' participation have been applied for the first time in the case of Mr Thomas Lubanga Dylio. This case is significant both for the fact that it is the first test case for formal victims' participation before the ICC,² and for the

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¹ ICC, Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998. The RS, together with all other relevant rules and regulations, will be referred to collectively in this paper as the "RS system".

² See Coalition for the International Criminal Court, Lubanga Case, in which it is observed: "The trial marks a turning point for the Rome Statute, the ICC's founding treaty, which entered into force only

role it could play in helping to bring accountability to the Democratic Republic of the Congo (DRC). It “will also help to shape practices before the ICC...that could influence how [the Court] handles future trials.”³

3. This paper takes the view that a number of significant interlocutory pronouncements on victims’ participation have already been made by the ICC Pre-Trial, Trial and Appeals Chambers which, as such, deserve further analysis. However, it should be borne in mind that these pronouncements have not yet reached the stage of *res judicata*, as the Lubanga trial is still, at the time of writing,⁴ *sub judice* at the ICC Trial Chamber I.
4. The paper will firstly provide a brief overview of developments with regard to victims’ participation in the area of international criminal justice. It will proceed by considering the impact of the alleged crimes on victims as emerges from the ongoing witness testimonies and victim applications. The paper subsequently explores the definition of “victim” under the RS system before considering the functions of particular offices and sections within the Court especially responsible to facilitate victims’ participation at the ICC. Certain aspects of victims’ participation as emerging from the Lubanga trial are examined next, followed by a brief consideration of the provisions for reparations. The next section counterpoises the rights of victims with those of the accused, and the paper concludes by highlighting two episodes in which the rights of victims were brought particularly to the fore in the Lubanga trial, namely, the abuse of process imputable to the Office of the Prosecutor on two occasions, and the near release of the accused, and the request for the modification of the legal characterisation of the facts.

Overview of Developments

5. At the international criminal trials in Nuremberg, adopting the adversarial model, the prosecution was overwhelmingly based on documentary evidence.⁵ The Nazis had left a meticulous inventory of their crimes on which indictments could be put forward. As a result, victims – and witnesses – played a largely marginal role in these trials.⁶

six years ago. The Lubanga proceedings will be the first test of formal victim participation in an international criminal trial...”, www.iccnw.org

³ Human Rights Watch, *The International Criminal Court Trial of Thomas Lubanga*, 23 January 2009, http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_Why_is_the

⁴ December 2009.

⁵ Danieli, Y. *Reappraising The Nuremberg Trials And Their Legacy: The Role Of Victims In International Law*, in 2006 *Cardozo L. Rev. de novo* 27, 1633-1649.

⁶ The Single Judge in the Germain Katanga and Mathieu Ngudjolo Chui case noted: “The Judgment delivered by the International Military Tribunal in Nuremberg on 1 October 1946 stated that “Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied Armies in German army headquarters. Government buildings, and elsewhere [..] The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.” See ICC, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, Doc. ICC-01/04-01/07-428-Corr, 25 April 2008, p33.

6. In 1985, the General Assembly (GA) of the United Nations (UN) adopted without a vote resolution 40/30 – “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.” In this resolution, the GA noted that millions of people throughout the world suffered harm as a result of crime and the rights of these victims have not been adequately recognised. The GA affirmed the necessity of adopting national and international measures to secure the universal and effective recognition of, and respect for, the rights of victims of crime.
7. At the national level, many major legal systems have incorporated measures to protect victims of crime and promote their participation in criminal proceedings. For instance, in Spain the victim may appear as a civil claimant or as a private prosecutor in criminal proceedings. The German legal system allows the victim to participate as an auxiliary prosecutor or Nebenklager and also as a civil claimant in some cases, and the French criminal system allows the victim to participate as a civil claimant or *partie civile*. Within the Latin-American jurisdictions several criminal justice systems allow the victim to participate, usually as a private prosecutor and/or as a civil claimant, including Argentina, Bolivia, Peru, and Chile. In Ireland victims may act as private prosecutors of summary offences, commonly known as 'common informers' and in Canada, a victim may participate in some stages of the proceedings, for example providing victim impact statements.⁷
8. At the international level, the position of victims in criminal proceedings began to improve significantly with the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the early 1990s.⁸
9. Courts in UN transitionally-administered areas, including UNTAET⁹ in East Timor and UNMIK¹⁰ in Kosovo, have also allowed a limited right for victims of gross human rights violations to participate in proceedings, such as by attaching a civil claim for property damage to the criminal proceedings.¹¹ However, possibly on account of the limited scope of these rights or lack of awareness, victim participation in these Courts was never fully accomplished.
10. It was with the entry into force of the RS of the ICC in 2002, that victims acquired a more meaningful and central role in international criminal proceedings. The provisions of the Statute, read in conjunction with the Rules of Procedure and Evidence (RPE),¹² make for “the most progressive provisions for victims in any international court, in fact, in international law.”¹³
11. The Court itself is fully cognisant of the significance of these provisions. The ICC Appeals Chamber stated that “the Statute...establishes the right for victim

⁷ See ICC, Decision on victims' participation, Doc. ICC-01/04-01/06-1119, 18 January 2008, p58.

⁸ Khan, K. and Dixon, R. *Archbold: International Criminal Courts Practice, Procedure and Evidence*, 3rd Ed., Sweet & Maxwell (London - 2009), p1124.

⁹ United Nations Transitional Administration in East Timor.

¹⁰ United Nations Interim Administration in Kosovo.

¹¹ *Ibid.*

¹² ICC, Rules of Procedure and Evidence, ICC-ASP/1/3, 10 September 2002.

¹³ Danieli, Y. *op. cit.*

participation, for the first time, in international criminal proceedings.”¹⁴ Indeed, it has been held that this right has no immediate parallel to or association with the participation of victims in criminal proceedings in either the common law system of justice or the Romano-Germanic system of justice.¹⁵

12. These provisions are “unique”¹⁶ and represent a “completely new concept for an international criminal court.”¹⁷ In his separate and dissenting opinion, Judge René Blattmann observed moreover that “the issues pertaining to victims’ participation have not been extensively examined through international jurisprudence and the implications of our decisions on the issues are largely untested. In this regard,...we have a great responsibility to the field of international criminal law to provide jurisprudence on victims’ participation which will move us forward in this important new element of this field.”¹⁸
13. The RS is distinctive in the importance it affords to victims, both in terms of participation¹⁹ and reparations in international criminal proceedings. The standard it set has continued to be strengthened, as is evidenced by the provisions for victims’ participation in the Extraordinary Chambers in the Courts of Cambodia (where victims may participate as full parties and may claim moral and collective reparations) and the Special Tribunal for Lebanon (whose provisions for victim participation are broadly based on the RS).²⁰
14. The provisions on victims’ participation and reparations in the RS have moreover been acknowledged in the Preamble to the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” which was adopted by the UNGA in 2006.²¹

Impact of Alleged Crimes on Victims

15. While it may appear self-evident, as international criminal justice transitions towards a more restorative and victim-centred approach, that victims of “the most serious crimes of concern to the international community as a whole”²² should

¹⁴ ICC, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Doc. ICC-01/04-01/06-1432, 11 July 2008, p32.

¹⁵ See Separate Opinion of Judge Georgios M. Pikis in ICC, 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, Doc. ICC-01/04-01/06-925, 13 June 2007, p16.

¹⁶ ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Doc. ICC-01/04-01/06-1049, 30 November 2007, p20.

¹⁷ ICC, Decision on victims’ participation, Doc. ICC-01/04-01/06-1119, *op. cit.*, p59.

¹⁸ ICC, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, Doc. ICC-01/04-01/06-1191, 26 February 2008, p26.

¹⁹ ICC, Decision on the Arrangement for Participation of Victims a/0001/06, a0002/06 and a/0003/06 at the Confirmation Hearing, Doc. ICC-01/04-01/06-462-tEN, 22 September 2006, p6.

²⁰ Khan, K. and Dixon, R., *op. cit.* However, for notable differences between the ICC and the STL, refer to Gillet, M. and Schuster, M., The Special Tribunal for Lebanon Kicks Off, *Journal of International Criminal Justice*, ICJ 7 5 (885).

²¹ Resolution adopted by the General Assembly of the UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Doc. A/RES/60/147, 21 March 2006.

²² Preamble of the RS.

have a role at the ICC, proponents of a more contained, retributive approach to international criminal justice point out that the introduction of other expectations of the process may jeopardise its limited success.²³ Indeed, it has been questioned whether the credibility of the process risks being undermined by overstating its likely consequences.²⁴

16. In spite of the dangers in creating an ‘expectations gap,’ it has been argued that international criminal justice has no choice but to move towards incorporating an increased role for victims, if its legitimacy and functional relevance is to be confirmed.²⁵
17. In this light, it may be instructive to firstly provide an overview of some of the alleged crimes, as have been described in victims’ applications and witness testimonies in the course of the Lubanga trial.
18. At the hearing of 2 February 2006, held prior to the issuance of the arrest warrant for Lubanga, the Prosecutor claimed that from his investigations it resulted that the alleged crimes were carried out as part of a policy to recruit and to use children under the age of fifteen to participate actively in hostilities. Many hundreds, if not thousands, of children were the victims of that policy, designed by the Union of Congolese Patriots (UPC) and implemented into practice by the Forces Patriotiques Pour La Libération Du Congo (FPLC). The impact was described as “devastating,” not only on the children’s lives but also on the society they lived in.²⁶ In issuing the arrest warrant, the ICC Pre-Trial Chamber I stated that: “there are reasonable grounds to believe that such policy/practice took place; that as a result of such policy/practice hundreds of children under the age of fifteen were enlisted or conscripted into the FPLC, and/or used by the FPLC to participate actively in hostilities from July 2002 to December 2003.”²⁷
19. The Annex to the ICC Trial Chamber I’s order of 8 May 2009 sets out some of the claims to victim status and provides insights into the continuing effects of the alleged crimes on victims, including destitution, displacement, trauma, contraction of sexually transmitted diseases, and death wishes.²⁸
20. In the second preambular paragraph to the RS, States Parties acknowledged that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” It is

²³ Findlay, M. *Activating a Victim Constituency in International Criminal Justice*, *The International Journal of Transitional Justice*, Vol. 3, 2009, DOI: 10.1093/ijtj/ijp008, p184.

²⁴ This question has been posed in relation to victim participation at the Extraordinary Chambers in the Courts of Cambodia. See Mohan, M., *The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal*, in *International Criminal Law Review*, Vol. 9, No. 5 (2009), pp 733 – 775.

²⁵ Findlay, M. *op. cit.*, p189.

²⁶ ICC, Redacted version of the transcripts of the hearing held on 2 February 2006 and certain materials presented during that hearing, Doc. ICC-01/04-01/06-48, 22 March 2006, p18.

²⁷ ICC, Decision Concerning ICC Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents Into the Record of the Case against Mr Thomas Lubanga Dylio, Doc. ICC-01/04-01/06-8-US-Corr, 24 February 2006, p33.

²⁸ ICC, Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008 - Analysis Of Victims Applications Sorted By Groups, Doc. ICC-01/04-01/06-1861-AnxA1, 8 May 2009.

submitted that the magnitude of such atrocities serves to legitimise an increased role for victims in modern international criminal justice.

21. The ICC Trial Chamber I found that “the crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature. Against that background the Chamber will ensure that victims are provided appropriate access to justice within the context of the focus of the trial process, and it will bear in mind the wide-ranging particular needs and interests of individual victims and groups of victims.”²⁹ The legitimate rights and expectations of victims must be carefully and sensitively balanced with the Court’s duty to manage proceedings and to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses” (Article 64(2) RS).

Definition of “Victims”

22. While the term “victims” is not defined in the RS,³⁰ a definition is to be found in Rule 85 RPE, which provides:

For the purposes of the Statute and the Rules of Procedure and Evidence:

(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.

23. Moreover, Article 68(3) RS states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

24. A survey of the negotiations reveals that paragraph 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the GA of the UN in November 1985, formed the prototype for the configuration of Article 68(3).³¹

25. The provisions of the RS and RPE have been applied by a number of ICC Pre-Trial, Trial and Appeals Chamber pronouncements in the Lubanga trial. The leading decisions in this respect are those of 18 January 2008 (Victims’

²⁹ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p33.

³⁰ ICC, 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, Doc. ICC-01/04-01/06-925, 13 June 2007, p18.

³¹ *Ibid.*, p15.

Participation Decision),³² in which the ICC Trial Chamber I established which criteria it would apply to applications by victims to participate, the modalities of participation of victims, how common legal representatives for victims would be used, and which protective and special measures might be taken in respect of victims, as well as the appeals judgement of 11 July 2008 (Victims' Participation Appeals Judgement).³³

26. For natural persons to be granted the procedural status of victims, the following four criteria must be satisfied:

- i. the applicant must be a natural person;
- ii. the applicant must have suffered harm;
- iii. the crime from which the harm resulted must fall within the jurisdiction of the Court and must be the subject of "a warrant of arrest or summons to appear, and, subsequently, a charging document (crimes encompassed by the relevant case);" and
- iv. there must be a causal link between the crime and the harm.³⁴

27. For legal persons (i.e. organisations or institutions) to be granted the procedural status of victims, the following four criteria must be satisfied:

- i. the victim must be an organisation or institution which has some property dedicated to religion, education, art or science or charitable purposes, a historical monument, hospital or other place or object for humanitarian purposes;
- ii. the organisation or institution must have sustained [direct] harm in such property;
- iii. the crime from which the harm arises must fall within the jurisdiction of the Court; and
- iv. there must be a direct causal link between the crime and the harm.³⁵

Natural and Legal Persons

28. Rule 85 RPE provides that victims may be "natural" or "legal" persons. Importantly, the Court has held that "natural person" does not include a deceased person. In this respect, the ICC Pre-Trial Chamber held that "no provision permits the submission of an application for participation on behalf of a deceased person." In line with this reasoning, neither would applications on behalf of missing/disappeared persons be permitted.³⁶

³² ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*

³³ ICC, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Doc. ICC-01/04-01/06-1432, 11 July 2008.

³⁴ ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *op. cit.*, p26.

³⁵ *Ibid.*, p42.

³⁶ ICC, Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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," Doc. ICC-01/04-423-Corr-tENG, 31 January

29. In case of the latter, these must be 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. For instance, one of the applicants granted victim status at the trial was a school principal who was granted leave to participate both as a "natural" person and as the representative of a school.³⁷ Conversely, in the Katanga and Ngudjolo Chui case, an organisation whose administrative buildings allegedly suffered direct harm was not granted status, as it did not provide evidence establishing *prima facie* that its buildings were dedicated to religion, education, art or science or charitable purposes, historical monuments, hospitals or other places or objects for humanitarian purposes.³⁸

Personal Harm

30. The Victims' Participation Decision, in considering the concept of "harm" under Rule 85 RPE, provided that once the ICC Trial Chamber I had established that an applicant for victim participation was a natural or legal person it would consider whether the applicant had suffered *any* harm as a result of the commission of a crime within the jurisdiction of the Court.
31. The ICC Appeals Chamber amended the Victims' Participation Decision on this point in that it found that the harm suffered under Rule 85 RPE must necessarily be *personal* harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim.

Direct / Indirect Victims

32. It was found, in the Victims' Participation Decision, that "people can be the direct or indirect victims of a crime within the jurisdiction of the Court."³⁹ This finding was confirmed in the Victims' Participation Appeals Judgement, which stated that the harm suffered by natural victims does not necessarily have to be direct. However, on this point, Judge Pikis entered a dissenting opinion, holding that

2008, p23. The Single Judge reached this conclusion through the following line of reasoning: "Rule 89(3) authorises the submission of an application for participation on a person's behalf provided the person consents. The Single Judge notes that such consent cannot be given by a deceased person. She is therefore of the opinion that deceased persons cannot be considered to be natural persons within the meaning of rule 85(a). However, close relations of *deceased* and *disappeared persons* may be considered to be victims [in their own right] under the Statute, the Rules, and the Regulations of the Court provided they fulfil the necessary criteria." (emphasis supplied). See also ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", op. cit., p25. This reasoning reflects a very narrow reading of Rule 89(3) RPE, which only allows an application for participation by a person acting on behalf of the victim concerned with the victim's consent, or on the victim's behalf in the case of a child or a disabled person. The danger here is that a large number of victims who have been killed or kidnapped will not be able to participate, with the attending risk that they will be simply overlooked by the Court.

³⁷ ICC, Doc. ICC-01/04-01/06-1861-AnxA1, *op. cit.*, p232.

³⁸ ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", op. cit., p44.

³⁹ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p30.

“there must be a *direct* nexus between the crime and the harm, in the sense of cause and effect.”⁴⁰

33. In April 2009, the ICC Trial Chamber I delivered a decision on “indirect victims” which held that: “two categories of victims can participate. First, “direct” victims: those whose harm is the “result of the commission of a crime within the jurisdiction of the Court”. Second, “indirect victims”: those who suffer harm as a result of the harm suffered by direct victims.”⁴¹ However, it is only natural persons, as opposed to legal persons, who may claim indirect harm.

Victims of the Case

34. In the Victims’ Participation Decision, the Majority of ICC Trial Chamber I defined “victims” broadly. Underpinning their approach was the understanding that “proceedings before the Court are *sui generis* and the Court must develop trial procedures that meet the particular exigencies of the international cases that it will have to decide, applying the RS framework.”⁴²
35. The Majority took the view that Rule 85 RPE does not have the effect of restricting the participation of victims to the crimes contained in the charges. They held that “it is therefore clear that a victim of any crime falling within the jurisdiction of the Court can potentially participate.”⁴³ The Majority acknowledged that this category was “very wide.”⁴⁴ Their position seems to have been influenced by the view of Judge Pikis who, in an earlier, separate opinion, had held that “The definition of “victims”...[in Rule 85 RPE] embraces *all* persons who are victims of crimes within the jurisdiction of the Court.”⁴⁵ (emphasis supplied)
36. Judge Blattmann, however, did not agree with this broad definition. In his separate and dissenting opinion, he held in strong terms that: “I completely disagree with the assertion of the Majority that the Statute does not limit the Chamber’s jurisdiction to the crimes attributed to the accused...With such a definition, it becomes very difficult to know who is actually a victim of the alleged crimes attributed to the Accused.”⁴⁶ Judge Blattmann’s view was that the ICC Trial Chamber I had the competency to determine whether a person is a victim only when linked to the facts and circumstances found within the charges presented by the prosecution and confirmed by the Pre-Trial Chamber I, and had to stay within this framework in its consideration of victims.
37. This view was the one favoured by the ICC Appeals Chamber which, while acknowledging that Rule 85 RPE did not expressly restrict the participation of victims to the crimes charged, held that this provision had to be read in context

⁴⁰ ICC, Doc. ICC-01/04-01/06-1432, *op. cit.*, p38.

⁴¹ ICC, Redacted version of "Decision on 'indirect victims'", Doc. ICC-01/04-01/06-1813, 8 April 2009, p18.

⁴² ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p28.

⁴³ *Ibid.*, p32.

⁴⁴ *Ibid.*

⁴⁵ ICC, Doc. ICC-01/04-01/06-925, *op. cit.*, p18.

⁴⁶ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p53.

and in accordance with its object and purpose. The ICC Appeals Chamber stated that the harm alleged by a victim must be linked with the charges confirmed against the accused. If an applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate for his or her views and concerns to be presented at the trial.⁴⁷

Dual-Status Victims

38. The ICC Trial Chamber I identified a category of individuals who have the dual status of witness and victim. The Chamber rejected the view that victims appearing before the Court in person should be treated automatically as witnesses. Instead, the Chamber held that “Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings.”⁴⁸ It was also held that the fact that an individual had dual status did not grant him or her rights in addition to those of someone who is only a victim or only a witness.⁴⁹

Applications for Victim Status

39. In order for an application for victim status to be complete, the following information has to be furnished:
- i. the identity of the applicant;
 - ii. the date of the crime(s);
 - iii. the location of the crime(s);
 - iv. a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;
 - v. proof of identity;
 - vi. if the application is made by a person acting with the consent of the victim, the express consent of that victim;
 - vii. if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;
 - viii. a signature or thumb-print of the applicant on the document, at the very least, on the last page of the application.⁵⁰
40. With regards to the supporting documents necessary for the application, in particular, proof of identity, the ICC Trial Chamber I laid down the following:⁵¹

...the Trial Chamber will seek to achieve a balance between the need to establish an applicant's identity with certainty, on the one hand, and the

⁴⁷ ICC, Doc. ICC-01/04-01/06-1432, *op. cit.*, p22.

⁴⁸ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p45.

⁴⁹ ICC, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, Doc. ICC-01/04-01/06-1379, 5 June 2008, p20.

⁵⁰ ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *op. cit.*, p19.

⁵¹ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p28.

applicant's personal circumstances, on the other. Bearing in mind the current situation in the Democratic Republic of Congo and the difficulties that applicants may often have in obtaining or producing copies of official identity documents, and the need in consequence of ensuring that victims are not unfairly deprived of an opportunity to participate for reasons beyond their control, the Trial Chamber will consider, inter alia, the following range of documents by which a "natural person" may establish proof of his or her identity...

41. The documents referred to by the Chamber are: (i) Official documents (such as passports); (ii) Non-official documents (such as voting cards) and (iii) Other documents (such school or church documents).
42. In those instances where it is not possible for an applicant to produce these documents, the Chamber would consider a statement signed by two credible witnesses, who provide proof of identity, attesting to the identity of the applicant and including, where relevant, the relationship between the victim and the person acting on his or her behalf.
43. In assessing applications for victim status, the Chamber has therefore been sensitive to the fact that official documentation to attest the identity of victims - a method commonly used in Western courts - may be difficult to obtain in the relevant areas of the DRC, or simply may not exist, and that this should not serve to unfairly deprive victims of an opportunity to participate. Indeed, notable cultural differences in the use and registration of names emerged from the expert testimony on names and other social conventions in the DRC.⁵² A UN child protection specialist, moreover, observed that there was no absolute way to verify the age of children in Ituri, because few people had identity cards or birth certificates.⁵³
44. When faced with a similar question, the ICC Pre-Trial Chamber I had earlier acknowledged that in some countries, civil status records, such as attestations of birth, marriage certificates or death certificates may not be available. It noted that international jurisprudence reflected the approach that while birth certificates issued by the competent authorities in accordance with domestic legislation are the best means of proving a person's age, they do not constitute the sole means of providing such proof. This flexible approach was the only approach which was consistent with the requirement to fully respect the specificities of the cultures and customs of the world's different people.⁵⁴
45. This flexible approach does, however, have its limits and applications have been rejected on the grounds of incompleteness, material inconsistencies, defect of form, or insufficient supporting information.⁵⁵ This naturally does not preclude a victim re-applying should any such defect be rectified. Moreover, applicants

⁵² ICC, Instructions to the Court's expert on names and other social conventions in the Democratic Republic of Congo, Doc. ICC-01/04-01/06-1934, 5 June 2009.

⁵³ Easterday, J. The Case Against Lubanga So Far, Legal Analysis, The Lubanga Trial Website, 17 August 2009, www.lubangatrial.org.

⁵⁴ ICC, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, p41.

⁵⁵ See ICC, ICC-01/04-01/06-1861-AnxA1, p234.

whose applications were rejected by the ICC Pre-Trial Chamber I could re-apply for victim status to the ICC Trial Chamber I should any defects in their applications be rectified.⁵⁶

46. Moreover, it would be important to underscore that such a flexible approach is open to abuse, such as through “identity theft,” as was alleged by the Defence.⁵⁷
47. In cases where the applicant was an organisation or institution, the Chamber would consider any document constituting it, in accordance with the law of the relevant country, and any credible document that establishes it has sustained direct harm to any of its property.
48. In respect of both natural and legal persons, the Chamber’s determination as to whether there is evidence that the applicant suffered any harm as a result of the commission of a crime with which the accused is charged would necessarily be a *prima facie* determination, since any final determination on this point could infringe on the presumption of innocence of the accused enshrined in Article 66 RS.⁵⁸
49. Finally, for the purposes of approving victim status, the ICC Trial Chamber I had to satisfy itself that the personal interests of the applicant were affected in accordance with Article 68(3) RS and Rule 85 RPE.⁵⁹ Following an initial, general determination of “personal interest”, the victim would have to demonstrate how his or her “personal interests” were affected specifically in order to participate at any given stage of the proceedings.
50. The analysis of whether victims’ personal interests are affected under article 68(3) RS is conducted in relation to “stages of the proceedings”, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings.⁶⁰ These stages include the “investigation of a situation”, the “pre-trial”, the “confirmation of the charges before trial”, the “trial” and the “appeals” stage. Moreover, each interlocutory appeal gives rise to a distinct and separate procedure whereby, for participation to be granted, the personal interests of victims would have to be demonstrated.⁶¹

⁵⁶ *Ibid.*, p19.

⁵⁷ Lubanga’s defence alleged that, inter alia, that the identity of two former UPC child soldiers – Defence Witness 32 and 33 – was stolen by another individual, who may also have signed victim applications in their name. See Lubanga Chronicle #77, Pieces of a puzzle, 3 May 2010, www.aegitrust.org/Lubanga-Chronicles/ (accessed 1 August 2010).

⁵⁸ ICC, Doc. ICC-01/04-01/06-1191, *op. cit.*, p11.

⁵⁹ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p31.

⁶⁰ ICC, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, Doc. ICC-02/05-121, 6 February 2008, p6. See also ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", Doc. ICC-01/04-01/07-579, 10 June 2008, p14.

⁶¹ *Ibid.* 1. Victims do not have an automatic right to participate in interlocutory appeals brought under Article 82 RS. Those seeking leave to participate in an appeal must firstly file an application for leave to that effect. However, Judge Song entered a dissenting opinion on this point, arguing that participants who took part in the proceedings that gave rise to the appeal ought not be required to seek leave of the ICC Appeals Chamber to participate in the appeal. See ICC, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of ICC Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", Doc. ICC-01/04-01/06-824, 13 February 2007,

Victim sub-groups

51. However, it must be borne in mind that the victims are not a homogenous group and there is an ever-present risk that their wide-ranging interests, as well as possible conflicts of interests, could diffuse, and potentially derail, the judicial process. Victims' interests have been identified by the ICC Trial Chamber I to include: receiving reparations, being allowed to express their views and concerns, verifying particular facts and establishing the truth, protecting their dignity during the trial and ensuring their safety, as well as being recognised as victims in the case, among others.⁶²

Protection of Victims under the Rome Statute

52. Article 68(1) RS states:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender... and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

53. This Article is complemented by Rule 86 RPE which, *inter alia*, provides that organs of the Court in performing their functions under the Statute or the Rules shall take into account the needs of all victims, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.
54. While the duty to take into account the needs of victims rests with all organs of the Court, the RS and RPE provide for particular structures which are especially responsible for the support and protection of victims. Within the Registry, these include: the Victims and Witnesses Unit (VWU) and the Victims Participation and Reparations Section (VPRS). In this context, it will also be useful to look into the structures of the Office of Public Counsel for Victims (OPCV) and Legal Representatives of Victims (LRV).

The Registry

55. Article 43 RS and Rule 16 RPE set out general responsibilities of the Registrar relating to victims and witnesses. These are supplemented by Chapter 3 of the Regulations of the Registry.⁶³

p2; and ICC, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", Doc. ICC-01/04-01/06-1335, 16 May 2008, p18.

⁶² ICC, Decision on victims' participation, Doc. ICC-01/04-01/06-1119, 18 January 2008, p33.

⁶³ ICC, Regulations of the Registry, ICC-BD/03-01-06-Rev.1, 25 September 2006 (Revised).

Victims and Witnesses Unit

56. Article 43(6) RS provides that:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

57. The functions, responsibilities and expertise of the VWU are elaborated in Section III(2) RPE. The VWU is responsible for, amongst others, providing victims who appear before the Court with adequate protective and security measures and assisting them in obtaining medical, psychological and other appropriate assistance.

58. In the Victims' Participation Decision, the ICC Trial Chamber I held that the VWU's responsibility towards victims commences from the moment they "appear before the Court." An "appearance" occurred as soon as a completed application to participate was received by the Court. In arriving at this interpretation, the Chamber noted that while it "readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit."⁶⁴

59. Indeed, when subsequently faced with a high number of victim applications, the ICC Trial Chamber I adopted a decidedly more 'realistic' approach with respect to protective measures for victim applicants. While the Chamber acknowledged "potential high levels of insecurity in relevant parts of the Democratic Republic of Congo," it admitted that assessing the appropriate protective measures for each individual applicant would entail considerable "cost and time" on the part of the VWU.

60. Invoking the 'principle of proportionality,'⁶⁵ the Chamber concluded that, at that stage of proceedings, the adoption of any protective measures for victim applicants other than redactions (in particular, measures in the field of relocation)

⁶⁴ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p46.

⁶⁵ ICC, Judgment on the prosecutor's appeal against the decision of ICC Pre-Trial Chamber I entitled "Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", Doc. ICC-01/04-01/06-568, 13 October 2006; and ICC, Public Document Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, Doc. ICC-01/04-01/06-1308, 6 May 2008, p9.

“would exceed the scope of the present proceedings and would therefore be unjustified.”⁶⁶

61. The VWU also has important responsibilities towards individuals who hold the dual status of victims and witnesses.⁶⁷

Victims Participation and Reparations Section

62. The VPRS is a special section within the Registry tasked with facilitating the participation and reparations of victims, as specified in Chapter 3, Section 2 of the Regulations of the Registrar.

63. The functions of the VPRS include, amongst others, the preparation, upon receipt of a victim application, of an assessment whether the disclosure to the prosecutor, the defence and/or other participants of any information contained in such an application may jeopardise the safety and security of the victim concerned;⁶⁸ the preparation of reports on victim applications for consideration by the Court;⁶⁹ and certain duties with regard to individuals who have dual status.⁷⁰

Office of Public Counsel for Victims

64. The OPCV was established after the RS and RPE had been adopted.⁷¹ It was created by the Regulations of the Court, with a mandate to provide support and assistance to the legal representatives and the victims. Neither the RS nor the RPE provide for the participation of the OPCV in the proceedings. As such, in its early stages, the OPCV was occupied with defining its proper role in the overall RS system.⁷²

65. Regulation 81 of the Regulations of the Court⁷³ provides that:

1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.

⁶⁶ ICC, Doc. ICC-01/04-01/06-1308, *op. cit.*, p8.

⁶⁷ ICC, Doc. ICC-01/04-01/06-1379, *op. cit.*, p20.

⁶⁸ ICC, Decision on the request of the OPCV and on the prosecution's filing which concern the Trial Chamber's decision inviting the parties' observations on applications for participation of victims issued on 6 May 2008, Doc. ICC-01/04-01/06-1333, 16 May 2008, p6.

⁶⁹ ICC, 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), Doc. ICC-01/04-01/06-1022, 9 November 2007, p7.

⁷⁰ ICC, Doc. ICC-01/04-01/06-1379, *op. cit.*, p28.

⁷¹ ICC, Redacted version of "Decision on 'indirect victims'", Doc. ICC-01/04-01/06-1813, 8 April 2009, p17.

⁷² See ICC, Order on the Office of Public Counsel for Victims' request filed on 21 November 2007, Doc. ICC-01/04-01/06-1046, 27 November 2007, p3, where, in response to the request of the OPCV to make submissions, the Trial Chamber noted that “the request generally raises the issue of the role of the Office of Public Counsel for Victims in its capacity as legal representative of victim applicants and as an independent body established to “provide support and assistance to the legal representatives for victims and to victims”.

⁷³ ICC, Regulations Of The Court, ICC-BD/01-02-07, 18 December 2007 (Revised).

2. *The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.*

3. *The Office of Public Counsel for victims may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.*

4. *The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate:*

(a) Legal research and advice; and

(b) Appearing before a Chamber in respect of specific issues.

66. The relevant provisions of the RS system envisage that the OPCV may fulfil a wide variety of functions during the trial stage. The ICC Trial Chamber I stressed, however, that in critical respects, it was for the ICC Trial Chamber I - and not the OPCV - to determine the precise nature of the role of the OPCV in a particular case.⁷⁴

67. The ICC Trial Chamber I held that it is necessary that the power to determine the role of the OPCV was vested in the Chamber, in particular because of the latter's responsibility to manage the proceedings and to ensure the fair and expeditious conduct of the trial. Significant problems could emerge if the Chamber was not able to prevent conflicts of interest or other events that may result in a damaging diminution of the OPCV's core role, which was to provide support and assistance to the legal representatives of victims and to the victims.⁷⁵

68. During the early stages of the Court's existence, the ICC Trial Chamber I determined that it was critical that the OPCV concentrated its limited resources on its core functions to provide support and assistance to the legal representatives of victims and to victims who had applied to participate, rather than representing individual victims before the Court.

69. When, however, the OPCV had to represent victims before the Court, such as victims whose application was still pending⁷⁶, the ICC Trial Chamber I determined that this should not have the consequence of diminishing the rights of the defence. The RS system therefore had to be applied as if the OPCV was an "ordinary" legal representative and its observations had to be treated as if they were made by a legal representative of victims.⁷⁷

Legal Representatives of Victims

⁷⁴ ICC, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, Doc. ICC-01/04-01/06-1211, 6 March 2008, p13.

⁷⁵ *Ibid.*

⁷⁶ See, for instance, ICC, Request of the OPCV Acting as Legal Representative of the Applicants in the Situation in the Democratic Republic of the Congo for Participation in the Interlocutory Appeals Against Trial Chamber I's Decision dated 18 January 2008, Doc. ICC-01/04-01/06-1228, 18 March 2008.

⁷⁷ ICC, Doc. ICC-01/04-01/06-1813, p17.

70. Chapter 4(3)(3) RPE concerns participation of victims in the proceedings and Rules 90 and 91 thereof relate specifically to the appointment and participation of LRVs.

Rule 90(2) RPE states:

Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

Rule 91(2) RPE moreover provides that:

A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

Furthermore, Regulation 79(2) of the Regulations of the Court states:

When choosing a common legal representative for victims in accordance with rule 90, subrule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

71. As many of the victims participating in the Lubanga trial are children, the ICC Trial Chamber I had to resolve the question as to whether minors could be represented by persons who were not their relatives or legal guardians.
72. The ICC Trial Chamber I was categorical on this point. It noted that: "The RS system is clear on this issue. There are no provisions establishing categories of people who alone are allowed to act for victims, whether the latter are adults or children....It follows that the person acting on behalf of a victim does *not* have to be a relative or a legal guardian because, within the Rules, the "person acting" is undefined and unrestricted... In support of this approach, the inevitable experience of most, if not all, children who were recruited in the circumstances alleged in this trial, is that they will have been separated from their parents and other adult relatives at a relatively young age. Many of them have been living, to put it at its lowest, disjointed and very unsettled lives for a number of years. Some children have still not been reunited with their families and they do not have legal guardians. To the extent that they have managed to find representation at all, they

are often assisted by people such as schoolteachers and other similar community figures” (emphasis supplied).⁷⁸

73. The ICC Trial Chamber I also had to decide on the question of applicants who were children when the application was originally filed, but who were now adults (or were close thereto). The Court determined that such applicants were not required to furnish the Court with fresh documents authorising the person who had represented them hitherto to remain in that role. If such a requirement were to be imposed, it would be “onerous [on the victims] and against the interests of justice.”⁷⁹
74. Another question which the ICC Trial Chamber I had to determine was whether it was a precondition for applicants who were still under 18 that their application was made by an LRV. The ICC Trial Chamber I observed that: “Rule 89(3) of the Rules is a permissive rather than a mandatory provision: an application in the case of a victim who is an adult may be made by person on his or her behalf with their consent, and for a child an application may also be made by a person acting on his or her behalf. In the judgment of the Chamber, the wording of Rule 89(3) of the Rules, coupled with the absence of any provision denying children the opportunity of applying to participate without an intermediary, creates, at the very least, the opportunity for a child to apply on his or her own behalf to participate in the proceedings, depending always on their individual circumstances (viz. the age and the apparent maturity of the child) and the interests of justice overall.”⁸⁰
75. In the Katanga and Ngudjolo Chui case, the Court held that, on account of the continuing instability obtaining in the relevant parts of the DRC,⁸¹ only the LRVs of non-anonymous victims⁸² had the rights to access the confidential part of the record of that case and to attend closed session hearings. The victims themselves had no such right. The LRVs were moreover precluded from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session.⁸³

Participation of Victims in the Lubanga Trial

⁷⁸ ICC, Decision on the applications by victims to participate in the proceedings, Doc. ICC-01/04-01/06-1556-Corr-Anx1, 15 December 2008, p21.

⁷⁹ ICC, Doc. ICC-01/04-01/06-1556-Corr-Anx1, *op. cit.*, p24.

⁸⁰ *Ibid.*, p28.

⁸¹ In this regard, refer to a string of UN Security Council resolutions on the continuing instability particularly in North and South Kivu, Ituri and the Orientale Province of the DRC. See UNSCR 1896 (2009) and 1807(2008).

⁸² In respect of victims whose request for anonymity has been upheld by the Chamber, on the grounds, *inter alia*, of security concerns, their participation rights are more limited in order to safeguard the fundamental principle prohibiting anonymous accusations. For instance, at the pre-trial stage of proceedings, anonymous victims “could not add any point of fact or any evidence, nor could they question witnesses...” See ICC, Decision on the Arrangement for Participation of Victims a/0001/06, a0002/06 and a/0003/06 at the Confirmation Hearing, *op. cit.*, p7; and ICC, Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case, Doc. ICC-01/04-01/06-462-tEN, 23 June 2008, p8.

⁸³ ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *op. cit.*, p48.

76. The unique provisions on victims' participation under the RS system constitute, to some extent, uncharted territory in the area of international criminal justice. This, coupled with the fact that the Lubanga trial is the first trial to come before the ICC has required the Court, the parties and the participants to engage in "the detailed and complex process of establishing the proper modalities of participation by victims."⁸⁴ Indeed, as the trial progressed, several components of victim participation remained 'under construction,' such as the legal assistance scheme for victims.⁸⁵
77. Section III(3) of Chapter 4 RPE covers the modalities for the participation of victims in the proceedings, which may include making opening and closing statements (Rule 89(1) RPE). At the time of writing,⁸⁶ around a hundred victims had been granted status to participate in the Lubanga Trial, mainly through LRVs.⁸⁷
78. Where the personal interests of victims are affected, they are entitled to express their views and concerns through, inter alia, statements, examination of witnesses or by filing written submissions.
79. Considering this right in his separate opinion, Judge Pikis observed:⁸⁸

Participation is confined to the expression of the victims' "views and concerns". 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". The term "views" in the context of article 68 (3) of the Statute signifies "opinion", in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68 (3) of the Statute the word "opinion" is used. "[C]oncerns" signify matters of interest to a person; matters that preoccupy him/her. "[P]réoccupations" is precisely the word used in the French text of the Statute. A combination of the two, "views", "concerns" joined by the conjunctive "and" signifies that victims can express themselves about both, their preoccupations and their opinion.

⁸⁴ ICC, Doc. ICC-01/04-01/06-1211, *op. cit.*, p14.

⁸⁵ See ICC, Reasons for the Decision on the "Request for Review of the Registrar's Decision of 28 March 2008 on the Application for Legal Assistance Paid by the Court Filed by Mr Keta on behalf of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 under Regulation 85(3) of the Regulations of the Court", Doc. ICC-01/04-559, 18 February 2009, p13. Here, the Presidency noted: "the scheme on the determination of indigence of, and legal assistance paid by the Court to, victims has yet to be finalised and that the Registry is still in the process of consulting partners thereon."

⁸⁶ December 2009.

⁸⁷ ICC, Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008, Doc. ICC-01/04-01/06-1861, 8 May 2009, p3, and ICC, Decision on the applications by 7 victims to participate in the proceedings, Doc. ICC-01/04-01/06-2035, 10 July 2009, p11. It is of interest to note that since its creation, the Court has received over 2,000 victim applications for leave to participate, of which, more than 700 have been authorised to participate. See Address of the ICC Registrar to the Meeting of Registrars of Final/Appellate, Regional and International Courts, Ottawa, Canada, April 2010.

⁸⁸ *Ibid.*, p19.

80. Generally, the specific procedural rights attached to victims' participation can be divided into the following six groups:⁸⁹

- a. The first group is comprised of the right to have access to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defence pursuant to Rule 121 RPE.⁹⁰
- b. The second group is comprised of the rights: (i) to 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; and (ii) to examine such evidence.
- c. The third group relates to the examination of witnesses.⁹¹
- d. The fourth group is comprised of the right to attend all public and closed session hearings convened in the proceedings, as well as in all public and closed sessions. However, it does not include the right to attend those

⁸⁹ See ICC, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *op. cit.*, p46.

⁹⁰ This first group includes the right to have access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as "ex parte" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof. This first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified "ex parte" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof. Furthermore, the right to have access to the transcripts of hearings contained in the record of the case regardless of whether such hearings were held in public or in closed session also falls within this first group. The same cannot be stated, however, for the right to access the transcripts of those hearings held on an ex parte basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof. Moreover, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all proceedings before the Court, including public and closed session hearings (including those held ex parte) and any postponements thereof, and the date of delivery of decisions. Furthermore, the right to have access to the evidence proposed by the Prosecution and the Defence and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the data required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it. Finally, the right to have access to non-public filings and decisions included in the Registry's record of the situation to which the relevant case is related falls outside this first group of rights. In this regard, such non-public filings and decisions concern the Prosecution investigation of other aspects of the relevant situation, and that a copy of all those materials included in the record of a situation which are relevant for a given case are incorporated into the record of such a case when it arises.

⁹¹ This third group includes the right to examine any witness proposed by the Prosecution and the Defence. In this respect, the examination of witnesses by those granted the procedural status of victim should take place after their examination by the Prosecution and within the amount of time allocated by the Chamber. Moreover, those granted the procedural status of victim, like the Prosecution and the Defence, should not have to file the list of questions that they intend to pose to the relevant witnesses prior to the examination of the witnesses. In this regard, the Prosecution, the Defence and those granted the procedural status of victim can always, after a question is posed and before it is answered by the witness, make an oral motion requesting the Chamber not to admit the relevant question or to request the examining party to reformulate it. Finally, the examination of witnesses by those granted the procedural status of victim should take place subject to any other direction that the Chamber may give prior to, or during, the said examination.

hearings held on an *ex parte* basis with the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

- e. The fifth group includes the right to participate by way of oral motions, responses and submissions in: (i) all those hearings in which those granted the procedural status of victim have the right to attend; and (ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and the Rules.⁹²
- f. The sixth and last group is comprised of the right to file written motions, responses and replies. This includes making opening and closing statements.⁹³

81. These rights had to be interpreted in an appropriately broad sense, as they are central to effective victims' participation under the RS system.

82. In order to participate at stages of the proceedings, victims or LRVs would have to file a discrete application demonstrating how their "personal interests" were affected and the nature and extent of the participation sought. While a decision on participation would be made on a case-by-case basis, a general interest in the outcome of the case, or in the issues or evidence under consideration by the Chamber at that point in time, was not likely to be sufficient.⁹⁴

83. However, considering this point in a separate opinion, Judge Song held that victims had two principal interests: (i) seeking reparations; and (ii) seeing that justice is done. According to Judge Song, both these interests qualified as 'personal interests' in the meaning of Article 68(1) RS.⁹⁵ This is a rather broad interpretation, and it is submitted that a general interest in "seeing that justice is done" is not too dissimilar from an interest "in the outcome of the case," which was not considered with favour in the Victims' Participation Decision.

Reparations

84. Research carried out in victim communities affected by mass atrocities clearly establishes that victims are not satisfied solely by *retributive* justice. This is not a

⁹² For instance, matters relating to the *inter partes* disclosure process or any discussion of the evidence which aims at extending the factual basis contained in the Prosecution [Amended] Charging Document.

⁹³ In accordance with Regulation 24 of the Regulations of the Court, such motions, responses and replies may be filed in relation to all matters other than those in which the victim's intervention has been excluded by the Statute and the Rules. The fifth and the sixth groups of rights also include the right to (i) file, in accordance with Rule 121(7) RPE, written submissions on evidentiary and legal issues; (ii) make opening and closing statements Rule 89(1) RPE; and (iii) raise objections or make observations concerning issues related to the proper conduct of the proceedings in accordance with Rule 122(3) RPE.

Nevertheless, the right to resort to certain procedural remedies that, according to the Statute and the Rules, can only be exercised by Prosecution, Defence and/or other participants, falls outside of these last two groups of rights. This is the case, *inter alia*, for the right to make challenges to, or raise issues relating to, the jurisdiction of the Court or the admissibility of a case pursuant to Article 19(2) and (3) RS and Rule 122(2) of the Rules. Furthermore, any procedural rights attached to the procedural status of victim at the pre-trial stage of the case cannot be exercised retroactively.

⁹⁴ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p33.

⁹⁵ ICC, Doc. ICC-01/04-01/06-925, *op. cit.*, p26.

denial that retributive justice is on the list of victims' expectations. Nor can it be said that retribution should be marginalized. However, if retribution is not accompanied by *restitutive* justice, the potential for victims to justify and legitimate international criminal justice may be squandered.⁹⁶

85. In this respect, the power conferred on the ICC to grant reparations to victims is one of the most distinctive features of the Court. It is a key feature, intended to alleviate, as much as possible, the negative consequences of victimisation.⁹⁷ This power has been held to be so important, that the ICC Pre-Trial Chamber I noted that: "the success of the Court is, to some extent, linked to the success of its reparations system."⁹⁸

86. Article 75(1) and (2) RS state:

(1) The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

(2) The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

87. Article 75 RS is supplemented by Chapter 4, Section III(4) RPE. Furthermore, Regulation 56 of the Regulations of the Court provides:

The ICC Trial Chamber I may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.

88. The Defence had put forward the contention that Regulation 56 of the Regulations of the Court undermined the rights of the accused and the presumption of innocence. However, the ICC Trial Chamber I found that the objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This would enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. The Chamber held that it would be able, without difficulty, to separate the evidence that related to the charges from the evidence that solely related to reparations, and to ignore the latter until the reparations stage (if the accused was convicted).⁹⁹

Freezing of assets

⁹⁶ Findlay, M. *op. cit.*, p189.

⁹⁷ ICC, Doc. ICC-01/04-01/06-8-US-Corr, *op. cit.*, p59.

⁹⁸ *Ibid.*, p60.

⁹⁹ ICC, Doc. ICC-01/04-01/06-1119, *op. cit.*, p40.

89. The ICC Pre-Trial Chamber I acknowledged that, for the success of the reparations scheme, the early tracing, identification and freezing or seizure of the property and assets of the person against whom a case was launched was a necessary tool to ensure that, if that person was finally convicted, individual or collective reparation awards ordered in favour of victims would be enforced.¹⁰⁰
90. In the Chamber's view, existing technology made it possible for a person to place most of his assets and moveable property beyond the Court's reach in only a few days. Therefore if assets or property were not seized or frozen at the time of the execution of a cooperation request for arrest and surrender, or very soon thereafter, it was likely that subsequent efforts of the Court, the Prosecution or the victims participating in the case would be fruitless.¹⁰¹
91. The request to States Parties to identify, trace and freeze or seize the property and assets of Mr Thomas Lubanga Dyilo - which allegedly included property in Goma, a Toyota Land Cruiser, and shares in a local airline¹⁰² - was issued, inter alia, on the basis of Article 57(3)(e) RS, which provides for the ICC Pre-Trial Chamber's right to seek the cooperation of States Parties to take protective measures for the purpose of forfeiture; and Article 93(1)(k) RS, which provides for the cooperation of States Parties with regard to requests for the freezing of assets.
92. The ICC Pre-Trial Chamber I also noted that Mr Thomas Lubanga Dyilo was already on the sanctions list of the UN Security Council Sanctions Committee, by virtue of UN Security Council resolutions 1533 (2004) and 1596 (2005). In this respect, it may be of interest to underscore that, while the sanctions imposed by the UN Security Council resolutions applied to all states, they only provided for a qualified freezing of funds and other assets. Conversely, while the request of the ICC Pre-Trial Chamber I applied solely to States Parties to the RS, it was broader and required freezing and seizing of all the property and assets of Mr Thomas Lubanga Dyilo on their territory, including his movable and immovable property, bank accounts or shares.¹⁰³

Victims Trust Fund

93. Article 79 RS provides:

- 1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.*
- 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.*

¹⁰⁰ ICC, Doc. ICC-01/04-01/06-8-US-Corr, *op. cit.*, p60.

¹⁰¹ *Ibid.*

¹⁰² ICC, Redacted version of the transcripts of the hearing held on 2 February 2006 and certain materials presented during that Hearing, Doc. ICC-01/04-01/06-48, 22 March 2006, p86.

¹⁰³ ICC, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo, Doc. ICC-01/04-01/06-62-tEN, 31 March 2006.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

94. As a result, at the 3rd Plenary Meeting of the Assembly of States Parties to the RS, a resolution providing for the establishment of a Victims Trust Fund was adopted by consensus on 9 September 2002.¹⁰⁴ The Victims Trust Fund was created for the benefit of victims and their families. It is funded by, inter alia, voluntary contributions from Governments, international organizations, individuals, corporations and other entities; and fines or forfeiture transferred to the Trust Fund pursuant to Article 79 RS or other resources collected pursuant to Rule 98 RPE. The Fund is managed by a Board of Directors, the members of which serve in an individual capacity on a *pro bono* basis.
95. In his statement to the 8th plenary meeting of the Assembly of States Parties to the RS, the Chair of the Victims Trust Fund, H.E. Mr. Bulgaa Altangerel, informed that by November 2009, the Fund had raised 4.5 million Euros in voluntary contributions. Out of these, approximately 2.3 million Euros were committed for activities in the DRC and Northern Uganda. Another 600,000.00 Euros were allocated for activities in the Central African Republic, which were set to start in 2010. The Fund also held a reserve of one million Euros to complement any potential Court orders for reparations.
96. As of November 2009, the Fund had 34 approved projects under its mandate to provide general, non-Court ordered assistance to victims of crimes under the ICC's jurisdiction in the DRC and Northern Uganda. Of these, 29 projects were active and included support services, such as counselling, community reconciliation workshops, education grants, reconstructive surgery, and start up grants for income-generating activities.¹⁰⁵
97. While the objectives of the Victims Trust Fund are laudable, its added value still hangs in the balance. It was observed that, while the Fund championed huge numbers of victims, with a small secretariat, the bulk of its projects would necessarily have to be executed through intermediaries, such as non-governmental or religious organisations. Questions still remain therefore on the added value and functioning of the Fund, not least how its projects fit in the general reparations scheme of the Court, and whether its mandate overlaps with, or even duplicates, the work of other international or local NGOs.¹⁰⁶

Victims' Participation and the Rights of the Accused

98. Article 68(3) RS provides that the Court shall permit the views and concerns of victims to be presented and considered at appropriate stages of the proceedings, in

¹⁰⁴ ICC, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Doc. ICC-ASP/1/Res.6, 9 September 2002.

¹⁰⁵ ICC-ASP, Statement by Bulgaa Altangerel, the Chair of the Trust Fund for Victims, 18 November 2009.

¹⁰⁶ Stuart, H. V., The ICC Trust Fund for Victims: Beyond the Realm of the ICC, Radio Netherland Worldwide and International Justice Tribune, 4 February 2009, <http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/commentary/090204-ICC-TFV-redirected>

a manner which is “not prejudicial to or inconsistent with the rights of the accused.”

99. In view of the extensive role played by victims in proceedings, it has been contended by the Defence that the accused may effectively be facing two prosecutors, and that it was only “up to the Prosecution to prosecute the charges, not the victims.”¹⁰⁷ However, this contention was not accepted by the Court, which held that the RS system called on the Chamber to ensure that the manner of victims’ participation was not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁰⁸
100. The Court operates aspects of an adversarial hearing, which casts the Prosecution and the Defence in opposition, confronting one another in a process designed to determine whether the burden of the Prosecution to prove the guilt of the accused is discharged at the end of the day.¹⁰⁹ However, while the onus of proving the guilt of the accused lies with the Prosecution, it was acknowledged, in the Victims’ Participation Appeals Judgement, that victims had the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.¹¹⁰ In a separate opinion, Judge Song further observed that the jurisprudence of the European Court for Human Rights did not require that the criminal process should be a bipolar procedure between the defence and the prosecution, with no or only very restricted involvement of victims.¹¹¹
101. The Victims’ Participation Appeals Judgement accepted, therefore, that victims’ participation did not violate the rights of the accused and the principle of “equality of arms” so long as it was carried out in accordance with the established procedures and within confined limitations.¹¹²
102. However, of note in this context, is the partly dissenting opinion of Judge Pikis, who held that: “Victims can neither adduce evidence on the guilt or innocence of the accused nor challenge the admissibility or relevance of evidence.”¹¹³ In the view of Judge Pikis, responsibility for this rested squarely with the parties, namely the Prosecution and the Defence.

Abuse of Process

103. To date, the release from detention of Lubanga has been ordered by the Trial Chamber I on two separate instances, with the similarity that both were occasions due to an abuse of process imputable to the Office of the Prosecutor.

¹⁰⁷ ICC, Doc. ICC-01/04-01/06-925, *op. cit.*, p7.

¹⁰⁸ ICC, Doc. Doc. ICC-01/04-01/06-824, *op. cit.*, p16. It should be borne in mind, moreover, that the interests of victims may be counterpoised with those of the Prosecutor, as when they requested a modification of the legal characterisation of the facts. Below.

¹⁰⁹ ICC, Doc. ICC-01/04-01/06-1432, *op. cit.*, p41.

¹¹⁰ *Ibid.*, p4.

¹¹¹ ICC, Doc. ICC-01/04-01/06-925, *op. cit.*, p31.

¹¹² ICC, Doc. ICC-01/04-01/06-1432, *op. cit.*, p4.

¹¹³ *Ibid.*, p38.

104. On 13 June 2008, the ICC Trial Chamber I ordered a stay of proceedings because of a procedural irregularity relating to the non-disclosure of certain documents by the Prosecutor, which made a fair trial impossible.¹¹⁴ The Chamber maintained that:

Although the Chamber has no doubt that this stay of proceedings is necessary, it has nonetheless imposed it with great reluctance, not least because it means the Court will not make a decision on issues which are of significance to the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself. When crimes, particularly of a grave nature, are alleged it is necessary for justice that, whenever possible, a final determination is made as to the guilt or innocence of the accused. The judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges brought against an individual. One consequence is that the victims will be denied an opportunity to participate in a public forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected. The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice.

105. As a result, on 2 July 2008, the ICC Trial Chamber I dramatically ordered the release of Mr. Lubanga Dyilo, which was subject to a 5-day time-limit and, thereafter, to the suspensive effect of an appeal. The Chamber maintained that, in reaching this conclusion, it had given “full weight to the fears of, and the possible consequences to, the victims as a result of a decision to release the accused.”¹¹⁵ It is noteworthy to recall in this respect, that on previous occasions, requests for the interim release of Lubanga had been refused on account of the great risk that he would abscond the jurisdiction of the Court, and that his release would lead to the “grave endangerment of the security of victims and witnesses.”¹¹⁶

106. While Lubanga’s release was ultimately averted, firstly on account of an urgent ICC Appeals Chamber decision suspending the release order,¹¹⁷ and

¹¹⁴ ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Doc. ICC-01/04-01/06-1401, 13 June 2008, p42.

¹¹⁵ ICC, Decision on the release of Thomas Lubanga Dyilo, Doc. ICC-01/04-01/06-1418, 2 July 2008, p16.

¹¹⁶ ICC, Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", Doc. ICC-01/04-01/06-924, 11 June 2007, p5. See also ICC, Decision on the Application for the interim release of Thomas Lubanga Dyilo, Doc. ICCICC-01/04-01/06-586-tEN, 18 October 2006, p6.

¹¹⁷ ICC, Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo", Doc. ICC-01/04-01/06-1444, 22 July 2008. The Appeals Chamber noted that: “In the present case, the Appeals Chamber came to the conclusion that the granting of suspensive effect was appropriate. The Appeals Chamber noted the various decisions of ICC Pre-Trial Chamber I and of Trial Chamber I, finding that the detention of Mr. Lubanga Dyilo was necessary to ensure his presence at trial (article 58 (1) (b) (i) of the Statute). This finding was confirmed most recently by Trial Chamber I at paragraph 14 of the "Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)" of 29 May 2008 (ICC-01/04-01/06-1359), where the Trial Chamber stated "that the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial."

subsequently, in October 2008, on account of the fact that the Prosecutor managed to secure complete and unfettered access to the relevant documents for the Court,¹¹⁸ this close brush brought to the fore, in the minds of victims, the fragility of international criminal proceedings.¹¹⁹

107. Procedurally, the Court was upholding the integrity of the trial and the rights of the accused – receiving the approval of observers, such as the International Bar Association, in so doing.¹²⁰ The Court had earlier held that, where the constituent elements of a fair trial are ruptured, “the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is *outweighed* by the need to sustain the efficacy of the judicial process as the potent agent of justice.”¹²¹ (emphasis supplied)
108. To victims, the Court was sending very mixed messages. On the one hand, it was supposed to “put an end to impunity” and to “contribute to the prevention of [grave] crimes.”¹²² At the hearing prior to the issuance of the arrest warrant, the Prosecutor had moreover alleged that child soldier recruitment was ongoing in the DRC¹²³ and that, by focusing on the leadership of an armed group which allegedly undertook such recruitment, “a *very strong message* can be sent out to leaders of other armed groups... [dissuading] leaders of armed groups to recruit children and to indicate the consequences if they do not.”¹²⁴ (emphasis supplied)
109. On the other hand, however, the Court was on the verge of releasing the accused for a serious, but nevertheless procedural, breach, in spite of the danger to

¹¹⁸ ICC, Order for further information regarding potentially exculpatory documents and for expedited defence response, Doc. ICC-01/04-01/06-1480, 15 October 2008, p4. The Chamber noted that “In the Application, the prosecution sets out that all of the relevant potentially exculpatory documents (228) will be available to the Chamber in non-redacted form for the duration of the trial and confirmed that the Appeals Chamber will be able to subject any Trial Chamber decision on disclosure to ‘full appellate review’.” See also ICC, Reasons for Oral Decision lifting the stay of proceedings, Doc. ICC-01/04-01/06-1644, 23 January 2009, p10.

¹¹⁹ In the same period, the Single Judge in the case of Germain Katanga and Mathieu Ngudjolo Chui, moreover, did not fail to observe that “the Prosecution, far from acting with due care in accepting documents under article 54(3)(e) of the Statute, *routinely* resorted to a practice of extensively gathering documents [subject to article 54(3)(e) confidentiality agreements].” See ICC, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, Doc. ICC-01/04-01/07-621, 20 June 2008, p22. Indeed, in that case, while the judge found that the severity of the non-disclosure had not reached the level of severity as the Lubanga case, it had nevertheless led to “a very complex situation.”

¹²⁰ International Bar Association, Trial Chamber’s decision to stay proceedings in Lubanga case is indication of ICC commitment to uphold fair trial rights, 18/06/2008, <http://www.ibanet.org/>

¹²¹ ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Doc. ICC-01/04-01/06-772, 14 December 2006, p20.

¹²² Fifth preambular paragraph of the RS. In discussing the gravity threshold, the ICC Pre-Trial Chamber I also noted: “the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention.” See ICC, 01/04-01/06-8-US-Corr, *op. cit.*, p27.

¹²³ In this respect, the exercise of the jurisdiction of the ICC may be distinguished from that of other ad hoc criminal tribunals in that the Court has jurisdiction over ongoing conflict. See, for instance, ICC, Decision on the Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006, p10; where the Court acknowledges the ‘ongoing’ security situation in some parts of the DRC.

¹²⁴ ICC, Doc. ICC-01/04-01/06-48, *op. cit.*, p19.

victims and the risk that he would abscond.¹²⁵ In this respect, it was submitted by victims participating in the trial that: “if the accused were released and returned to the Democratic Republic of the Congo, the sense of the people of the country that the perpetrators of grave crimes, more so the ones who were recruiting child soldiers, for which the accused was charged, are not immune from punishment, will be undermined or destroyed; sequentially it will cultivate a sense of impunity on the part of the perpetrators of grave crimes.”¹²⁶

110. Roughly two years later, on 15 July 2010, the Trial Chamber I again ordered the release of the accused, subject to a similar five-day limit for the Prosecutor to file an appeal and pending the judgment of the Appeals Chamber, following an unconditional stay of proceedings occasioned by an “abuse of process of the Court because of the material non-compliance [of the Prosecutor] with the Chamber’s orders...”¹²⁷ This instance may be viewed as institutional “arm wrestling” between the Prosecutor and the Chamber, with the Prosecution declaring that it is “sensitive to its obligations to comply with the Chamber’s instructions. However, it also has an independent statutory obligation to protect persons at risk on account of the Prosecution’s actions.”¹²⁸ And the Chamber retorting that the Prosecutor’s position constituted a “profound, unacceptable and unjustified intrusion into the role of the judiciary...[and] While these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done...”¹²⁹

111. At the time of writing, the Prosecutor’s request to appeal the oral decision of the Trial Chamber I, ordering Lubanga’s release, had been granted and a date for the hearing of the appeal had yet to be fixed.

112. Naturally, this matter gives rise to several questions and, from a detached academic perspective, may be viewed as but an instance of institutional arm wrestling.

113. And, while on account of the relative weakness of international criminal procedure, I would hazard a prediction that, even on this occasion, Lubanga will not be released, despite his having been held in detention for well over four years now,¹³⁰ from a victim perspective, victims have once again to face the dreadful prospect of Lubanga’s potential release.

114. While they would have been informed of the possible consequences participation as a victim in the Lubanga trial could entail at the moment of making their application, it is not clear whether victims would have been adequately

¹²⁵ ICC, Doc. ICC-01/04-01/06-924, op.cit., p5.

¹²⁶ ICC, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”, Doc. ICC-01/04-01/06-1487, 21 October 2008, p21.

¹²⁷ ICC, Redacted Decision on the Prosecutor’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Doc. ICC-01/04-01/06-2517-Red, 8 July 2010, p22.

¹²⁸ ICC, Doc. ICC-01/04-01/06-2517-Red, op. cit., p12.

¹²⁹ ICC, Doc. ICC-01/04-01/06-2517-Red,, op. cit. pp21-22.

¹³⁰ My current Ph.D. research will delve deeper into the question of the relative weakness of international criminal procedure and how it affects, inter alia, the presumption of innocence of the accused. Lubanga has been in custody since 17 March 2006.

prepared to cope with the strain and mental anguish the uncertainty over Lubanga's possible release, occasioned by such institutional arm wrestling, would entail.

Modifications of the Legal Characterisation of the Facts

115. In May 2009, 27 victims participating in the trial requested the ICC Trial Chamber I to trigger the procedure for a modification of the legal characterisation of the facts under Regulation 55 of the Regulations of the Court, in order to include the crimes of sexual slavery and inhumane or cruel treatment.¹³¹

116. Regulation 55 of the Regulations of the Court provides:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

117. There was disagreement at the ICC Trial Chamber I as to whether the crimes of sexual slavery and inhumane or cruel treatment, which were not included either in the arrest warrant¹³² or in the confirmations hearing,¹³³ could now be introduced and, indeed, whether this procedure could be triggered by victim participants.

118. The Majority of the ICC Trial Chamber I, supported by victim participants, took the view that Regulation 55(1) and (2) of the Regulations of the Court contained two separable procedures for the modification of legal characterisation of facts. They held this Regulation "is a unique device... [which] allows for the incorporation of additional facts and circumstances ...Those "additional facts"

¹³¹ ICC, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", Doc. ICC-01/04-01/06-2205, 8 December 2009, p4.

¹³² ICC, Warrant of Arrest, Doc. ICC-01/04-01/06-2-tEN, 10 February 2006.

¹³³ ICC, Doc. ICC-01/04-01/06-803, *op. cit.*

must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.”¹³⁴

119. The Minority of the ICC Trial Chamber I, supported by the parties, took the view that the additional crimes of sexual slavery and inhumane or cruel treatment “involve changes to the Document containing the charges of such a wide-ranging and fundamental nature that they constitute additional charges... [They are] founded on a new form of criminal responsibility. These proposals - if endorsed - would involve additional, and arguably more serious, offences being levied against the accused...”¹³⁵
120. The ICC Appeals Chamber determined that Regulation 55 of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto and reversed the Majority decision, finding that the Majority of the ICC Trial Chamber I erred in law when finding that Regulation 55 contained two separate procedures and that it was permissible to include additional facts and circumstances that are not described in the charges.¹³⁶
121. While this finding is consistent with the dictates of a fair trial and legal certainty – in that the accused should not have to face new or additional charges midway through the proceedings – it leaves open, from a victim perspective, the question as to why the crimes of sexual slavery and inhumane or cruel treatment were not included in the original charges.¹³⁷
122. At the hearing prior to the issuance of the arrest warrant, the Senior Trial Lawyer for the Prosecution, Mr Ekkehard Withopf, was questioned specifically on the choice of charges and whether the decision not to prosecute Lubanga for other crimes was a “policy choice.” He replied that while there was evidence of other crimes, it had not yet reached the required threshold.¹³⁸
123. The decision not to include charges for other crimes may have been motivated by prosecutorial strategy - keeping the indictment focused, in order to increase the chances of a straightforward and expeditious first trial.¹³⁹ The news of Lubanga’s

¹³⁴ ICC, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", Doc. ICC-01/04-01/06-2093, 27 August 2009, p6.

¹³⁵ ICC, Corrigendum to "Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009," ICC-01/04-01/06-2061-Anx, 21 July 2009, p22.

¹³⁶ ICC, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", Doc. ICC-01/04-01/06-2205, 8 December 2009, p3.

¹³⁷ In this respect, it is of note that the crimes of sexual slavery and rape, inhuman treatment and outrages upon personal dignity were included in the confirmations hearing in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008.

¹³⁸ ICC, Doc. ICC-01/04-01/06-48, *op. cit.*, p55.

¹³⁹ See interview with ICC Prosecutor Mr. Luis Moreno-Ocampo, in the short film/documentary “The Reckoning” by Skylight Pictures, 2006.

alleged imminent release from DRC pre-trial detention would also have had a bearing.¹⁴⁰ Indeed, in an interview with the ICC Deputy Prosecutor, Ms Fatou Bensouda observed that: “At that time, the opportunity of arresting Lubanga presented itself and the evidence we were very confident about was enlisting and conscripting children.”¹⁴¹

124. An additional significant factor for not requesting the crimes of sexual slavery and inhumane or cruel treatment may have been the fact that the DRC authorities had previously already issued two arrest warrants in respect of Mr Thomas Lubanga Dyilo, and had charged him, firstly, with genocide and crimes against humanity, and secondly, with murder, illegal detention and torture.

125. The Prosecution was quick to point out that its investigations did not focus on the crimes covered by the DRC arrest warrants, but related to separate crimes under the RS.¹⁴² This was significant as the complementarity mechanism under Article 17 RS may otherwise have been invoked.¹⁴³

126. Indeed, in its decision on the Prosecutor’s application for a warrant of arrest against Lubanga, the ICC Pre-Trial Chamber I made it a point to underscore that: “the warrants of arrest issued by the competent DRC authorities against Mr Thomas Lubanga Dyilo *contain no reference* to his alleged criminal responsibility for the alleged UPC/FPLC’s policy/practice of enlisting into FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003.”¹⁴⁴ Similarly, the Appeals Chamber emphasised that it “is worth reminding that the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority were *separate* and *distinct* from those which led to the issuance of the [ICC] warrant for his arrest.”¹⁴⁵ (emphasis supplied)

127. It is submitted that, had the Prosecutor included crimes, such as genocide and crimes against humanity, for which Lubanga had already been charged by the DRC authorities, the ICC Pre-Trial Chamber I, on account of the principle of complementarity under Article 17 RS, may have found it harder to issue the ICC arrest warrant against him.

128. After the issuance of the arrest warrant and prior to the confirmation hearing, Article 61(4) RS provides the Prosecutor with the possibility of amending the

¹⁴⁰ ICC, Doc. ICC-01/04-01/06-48, *op. cit.*, p35.

¹⁴¹ Irwin, R., Interview with Fatou Bensouda, ICC Deputy Prosecutor, Trial Reports of the Lubanga Trial Website, 31 July 2009, www.lubangatrial.org. In the same interview, Ms. Bensouda states that “[The Prosecution’s] position has always been that, if the accused is convicted on the existing charges of enlisting and conscripting child soldiers, the Chamber, in determining the sentence, would at least take [sexual slavery and cruel and inhumane treatment] into consideration as an aggravated circumstance.”

¹⁴² *Ibid.*, p12.

¹⁴³ In this respect, the ICC Pre-Trial Chamber I found that the Prosecution’s general statement that the DRC’s national judicial system is “unable” genuinely to carry out the investigation or prosecution for the purposes of Article 17(1)(a) RS did not wholly correspond with reality. See ICC, Doc. ICC-01/04-01/06-8-US-Corr, p22.

¹⁴⁴ ICC, Doc. ICC-01/04-01/06-8-US-Corr, p23.

¹⁴⁵ ICC, *op. cit.*, Doc. ICC-01/04-01/06-772, p22.

charges. Moreover, after the charges have been confirmed and before the trial has begun, the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber and after notice to the accused (Article 61(9) RS).¹⁴⁶

129. At no stage, therefore, in the period prior to the commencement of the trial, did the Prosecution invoke his right to amend the charges to include the crimes of sexual slavery and inhumane or cruel treatment against Lubanga. The request pursuant to Rule 103(3) RPE – relating to participation as *amicus curiae* – by the Women’s Initiatives for Gender Justice is instructive in this regard. It was submitted prior to the confirmation hearing and highlighted the “absence of charges for gender crimes against Thomas Lubanga Dyilo.”¹⁴⁷

130. The absence of these charges from the Lubanga trial appears, therefore, to have been a calculated choice on the part of the Prosecutor. The indirect effect of which, however, is to exclude victims of the ‘omitted’ charges from participating in the case against Lubanga and possibly, from being awarded direct reparations by the Court.¹⁴⁸

Conclusion

131. Commenting on the achievements and problems of the ICC, Judge Rene Blattmann observed that: “The possibility created by the legal framework of the ICC for victims to participate in proceedings before an international court is a *breakthrough innovation* and a first in international justice.”¹⁴⁹ (emphasis supplied)

132. It remains to be seen whether this ‘breakthrough innovation,’ truly benefits victims or whether a more critical and thorough analysis of its impact on victims and affected communities is required.

133. Mohan, writing in connection with victim participation at the Khmer Rouge Tribunal, provides an important insight in this regard: “Affiliates, jurists and scholars of international justice tend to have vaunted ambitions. They argue that internationalised courts deter future crimes, establish an official historiographic record, foster the rule of law, promote reconciliation within post-conflict societies and achieve restorative justice by helping victims regain their autonomy and

¹⁴⁶ ICC, Judgment

on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Doc. ICC-01/04-01/06-568, 13 October 2006, p20.

¹⁴⁷ ICC, Decision on Request pursuant to Rule 103 (1) of the Statute, Doc. ICC-01/04-01/06-480, 26 September 2006, p3.

¹⁴⁸ From a gender perspective, the victims directly affected by the charges of “enlistment”, “conscripted” and/or “use” in hostilities would largely be male, while those affected by the charges that have been ‘omitted,’ such as charges for rape, sexual slavery, enforced prostitution, and forced pregnancy, would mainly be female. In this regard, it has been observed that the situation for women and girls in the DRC conflict has been particularly desperate. See Gordon, G., An African Marshall Plan: Changing U.S. Policy to Promote the Rule of Law and Prevent Mass Atrocity in the Democratic Republic of Congo, paper presented at a round table on the DRC, International Peace Research Association, 2008.

¹⁴⁹ Blattmann, R., and Bowman, K., Achievements and Problems of the International Criminal Court, in *Journal of International Criminal Justice*, 1 September 2008, ICJ 6 4 (711).

dignity.” Each of these arguments, he claimed, is largely unproven by empirical research, and his own research revealed a very different picture - a picture of victims largely disillusioned and/or frustrated with the avenues of their participation at the ECCC.¹⁵⁰

134. The question is, to what extent is this picture applicable to RS system?

¹⁵⁰ Mohan, *op. cit.*, p734.