

# Victim Participation at the International Criminal Court

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## Abstract

This article discusses the system of victim participation established by the *Rome Statute*, the accompanying regulatory materials, and the judicial pronouncements of the International Criminal Court. It focuses primarily on the recent decisions of the Trial Chamber and the Appeals Chamber in the *Lubanga* case, which established broad parameters for victim participation. In examining the contentious issues addressed in those decisions, two themes emerge: first, the importance of shifting victims away from their previous position as ‘passive objects’ of international criminal law to a more active engagement in the process; and second, the necessity of ensuring a fair and efficient trial. This analysis sets out recommendations designed to reconcile these sometimes countervailing demands. The purpose of the analysis and recommendations is to encourage victim participation, while at the same time ensuring efficient and manageable trials that uphold the fundamental rights of the accused.

## Introduction

One of the most progressive facets of the system established under the *Rome Statute of the International Criminal Court* (*‘Rome Statute’*)<sup>1</sup> is the involvement of victims. This involvement takes the form of participation in legal proceedings and compensation through the Trust Fund for Victims. Such provision goes far beyond the provision made for victims in proceedings before the Tribunals for the former Yugoslavia (*‘ICTY’*) and Rwanda (*‘ICTR’*).<sup>2</sup> Nevertheless, the drafters of the *Rome Statute* were justifiably concerned to avoid jeopardising the fair trial rights of the defence or impeding the conduct of efficient proceedings.<sup>3</sup> Consequently, the International Criminal Court (*‘ICC’*) judiciary must trace a careful path in order to facilitate victims’ participation in trials, while at the same time ensuring fair and efficient proceedings to determine culpability for genocide, war crimes, and crimes against humanity, and, at some point after 1 January 2017, aggression.

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<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>2</sup> Claude Jorda and Jerome de Hemptinne, ‘The Status and Role of the Victim’ in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP: 2002), 1387–88.

<sup>3</sup> War Crimes Research Office, *Victim Participation before the International Criminal Court* (November 2007) (*‘WCRO Report’*) 26.

Although long-established in civil jurisdictions, the active participatory role of victims in trials before the ICC is unprecedented in international criminal law. Unsurprisingly, it provokes a raft of questions. This article addresses two of the most important issues: first, the definition of victims eligible to participate in trials; and second, the manner and extent to which victims should be allowed to participate in trials. Recent decisions of Trial Chamber I and the Appeals Chamber in the *Lubanga* case have clarified the Court's approach to the quandary facing chambers seeking to deliver on the promise of victim participation signalled in the *Rome Statute*.<sup>4</sup> This article sets out the relevant regulatory framework governing victim participation at the ICC, the approach taken by the Trial Chamber and the Appeals Chamber in *Lubanga*, and the resulting legal position facing victims wishing to participate in trials at the ICC.<sup>5</sup> During the discussion, a number of recommendations are suggested for the meaningful realisation of victim participation in ICC proceedings without compromising the Court's primary function of investigating and prosecuting the most serious crimes known to the international community through fair and proper judicial processes.

## I. The regulatory framework and prior decisions of the ICC

The Statute that finally emerged from the Rome Conference for the ICC (the *Rome Statute*), and the *Rules of Procedure and Evidence* ('*ICC Rules*'),<sup>6</sup> set forth a number of provisions referring to aspects of victim participation in the Court's processes.<sup>7</sup> However, these instruments do not contain an exhaustive codification of the modalities of victim participation. Consequently, judges have had to fill the lacunae, using the following provisions as a basis.

Central to the regime regulating victims' participation in proceedings before the ICC is article 68(3) of the *Rome Statute*. The parameters of article 68(3) are somewhat vague, simply stating that if the personal interests of victims are affected, the Court shall allow them to express their views at a stage of the proceedings that it considers appropriate.<sup>8</sup> However,

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<sup>4</sup> *Prosecutor v Lubanga (Decision on Victims' Participation)* (Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [13] (Judge Blattmann) ('*Lubanga* Trial Chamber decision'). Jorda refers to the provision made for the participation and compensation of victims in the *Rome Statute* as the promise of a 'new step forward' in victims' rights: Jorda and de Hemptinne, above n 2, 1388. Kofi Annan, then United Nations ('UN') Secretary General, stated at the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998 that 'the overriding interest must be that of the victims, and of the international community as a whole... It must be an instrument of justice, not expediency. It must be able to protect the weak from the strong': United Nations, 'UN Secretary General Declares Overriding Interest of International Criminal Court Conference Must be that of Victims and World Community as a Whole' (Press Release, 15 June 1998) <<http://www.un.org/icc/pressrel/lrom6r1.htm>>. See also *Prosecutor v Lubanga (Judgment on Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008)* (Appeals Chamber, Case No ICC-01/04-01/06-1432, 11 July 2008) ('*Lubanga* Appeals Chamber decision').

<sup>5</sup> The article does not address the procedure for victims seeking to obtain reparations, nor does it discuss in any detail victims' participation in proceedings prior to the trial of an accused.

<sup>6</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) ('*ICC Rules*').

<sup>7</sup> The *Rome Statute* and supporting materials such as the *ICC Rules* are sometimes referred to as the 'Rome System', a term that is used occasionally in this article.

<sup>8</sup> *Rome Statute* art 68(3) closely follows art 6(b) of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 4034, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, Annex, UN Doc A/Res/40/34

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article 68(3) carries with it two important qualifications. First, the manner in which victims are allowed to present their views should not be prejudicial to the rights of the accused, and a fair and impartial trial. Second, the participation of victims, where allowed by the Court, must be carried out in accordance with the *ICC Rules*.

The *ICC Rules* provide further guidance concerning victims' participation.<sup>9</sup> Rule 85(a) states that victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. Rule 85(b) adds that victims may also include organisations or institutions that have sustained direct harm to their property, and which are dedicated to, inter alia, religious, educational, cultural, charitable, or historic purposes. Rule 86 requires the Chambers and other organs of the Court to take into account the interests of victims and witnesses in carrying out their functions.<sup>10</sup>

Rules 89 and 91 relate to the manner in which victims may participate in proceedings. Under rule 89, victims wanting to participate in proceedings are directed to apply to the Registry, which then passes on the applications to the relevant chamber. Notably, this rule explicitly mentions the possibility of victims making opening and closing statements. Rule 91(2) provides that legal representatives of victims may participate in proceedings and adds that the Prosecution and Defence shall be allowed to reply to any written or oral observation by a victims' representative. Rule 91(3)(a) specifies that legal representatives of victims may apply to put questions to a witness, the accused, or an expert witness.<sup>11</sup>

Like article 68(3), the *ICC Rules* provide limited examples of the modalities of victims' participation, but do not exhaustively determine these modalities, indicating that they are representative, rather than exhaustive, of victims' participatory rights.<sup>12</sup>

Having traversed these provisions, it is clear that the Rome System left the specifics of victims' participation incomplete, allowing these issues to be shaped by ICC judges in the context of actual proceedings.<sup>13</sup> This position resulted partly because many delegates at the negotiations for the *Rome Statute* feared that too strong a role for victims would make legal

(29 November 1985), which was motivated by the need to ensure victims access to justice mechanisms. See WCRO Report, above n 3, 19, 22.

<sup>9</sup> See also International Criminal Court, *Regulations of the Court* (as amended on 14 June and 14 November 2007), Doc No ICC-BD/01-02-07 (entered into force 26 May 2005, amendments entered into force 18 December 2007) ('*ICC Regulations*'), which makes reference to victims, but adds little to the provisions of the *Rome Statute* and the *ICC Rules*. See, for example, reg 24(2) (allowing victims to submit responses to any document in proceedings in which they are able to participate) and reg 87 (requiring the Prosecutor to inform the Registrar of decisions not to prosecute pursuant to art 53 in order for victims to be provided with this information).

<sup>10</sup> See also *ICC Rules* r 93, which confirms that the Court may seek the views of victims on any issue.

<sup>11</sup> Rule 91 distinguishes between victims' participation in general court hearings, which includes pre-trial hearings as well as the trial itself, and victims' participation in reparations hearings under art 75 of the *Rome Statute*, which will occur upon a conviction being entered against an accused. This distinction is significant in signaling that the drafters of the *ICC Rules* envisioned a role for victims during general court hearings separate and distinct from their role in reparations proceedings.

<sup>12</sup> For example, rule 91(3)(a) of the *ICC Rules* refers to victims' participation, 'including questioning under rules 67 and 68', but does not list other forms of participation, indicating that it is representative rather than exhaustive of victims' participatory rights.

<sup>13</sup> See also WCRO Report, above n 3, 3; Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing: 2004) 315.

proceedings cumbersome and unfeasible, and partly because delegates were divided by their differing civil law and common law backgrounds.<sup>14</sup> Whereas many civil jurisdictions envisage a significant role for victims in legal proceedings, common law systems have traditionally treated victims as ‘passive objects’ of criminal processes, and made little provision for their participation in legal proceedings *qua* victims.<sup>15</sup> As a consequence, a number of lacunae are apparent in the regulatory framework. Filling these procedural gaps with meaningful mechanisms has been no easy task, as shown by the various positions reached in the decisions of Trial Chambers and the Appeals Chamber on the issues surrounding victim participation before the ICC.

By way of context, victims have no right of participation in proceedings before the ICTY and ICTR, independent of testifying as witnesses called by the Prosecution, and, in rare circumstances, the Defence.<sup>16</sup> At the ICC, the desire to uphold the interests of victims and involve them in proceedings was an important motivation for the formation of the Court.<sup>17</sup> The preamble to the *Rome Statute* states that ‘during this century millions of children, women and men have been the victims of unimaginable atrocities that deeply shock the conscience of humanity’ and contains provisions explicitly providing for victims’ participation in legal proceedings, as described above.<sup>18</sup> In the *Lubanga* Trial Chamber decision, Judge Blattmann (in a dissenting opinion) stated that victims’ participation is a ‘right’ provided by the *Rome Statute*, signalled by article 68(3).<sup>19</sup> In the *Lubanga* Appeals Chamber decision, Judge Song (in a separate opinion) opined that victims’ interests fell under two heads — their interests in reparations and their interests in justice.<sup>20</sup> Similarly, the Pre-Trial Chamber overseeing the situation in the Democratic Republic of the Congo has stated:

With regard to article 68(3), the Chamber considers that it imposes an obligation on the Court vis-à-vis victims... [T]he victims’ guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.<sup>21</sup>

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<sup>14</sup> Gilbert Bitti and Håkan Friman, ‘Participation of Victims in the Proceedings’ in Roy Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers: 2001) 456, 457.

<sup>15</sup> Jorda and de Hempinne, above n 2, 1394–95.

<sup>16</sup> Ibid 1389. See also WCRO Report, above n 3, 2, 8; Sam Garkawe, ‘Victims and the International Criminal Court: Three Major Issues’ (2003) 4 *International Criminal Law Review* 345–46.

<sup>17</sup> Theo van Boven, ‘The Position of the Victim in the Statute of the International Criminal Court’ in Herman A M von Hebel, Johan G Lammers and Jolien Schukking (eds) *Reflections on the International Criminal Court* (Cambridge University Press: 1999) 77.

<sup>18</sup> See also Elisabeth Baumgartner, ‘Aspects of Victim Participation in the Proceedings of the International Criminal Court’ (2008) 90 *International Review of the Red Cross* 436.

<sup>19</sup> *Lubanga* Trial Chamber decision, [13] (Judge Blattmann).

<sup>20</sup> *Lubanga* Appeals Chamber decision, [39] (Judge Song).

<sup>21</sup> *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6)* (Pre-Trial Chamber I, Situation No ICC-01/04-101-tEN-Corr, 17 January 2006), [71] (‘DRC Decision on the Applications for Participation in the Proceedings’).

Early decisions of the ICC provided broad indications of the manner in which victims would be permitted to participate in proceedings.<sup>22</sup> The Chambers had decided that victims could participate in proceedings during the investigation phase (prior to a legal case being commenced against a specific individual or individuals) on the basis that this was consistent with the object and purpose of the regime for victims' participation established by the *Rome Statute* drafters. Such participation would include having facts verified, having perpetrators prosecuted, and having recourse to 'specific measures'.<sup>23</sup>

Significantly, previous decisions by pre-trial chambers of the ICC had held that, in order to participate in a case against a specific accused, victims would have to demonstrate a sufficient causal link between the harm they had suffered and the crimes for which the Court had issued an arrest warrant against that accused.<sup>24</sup> However, in the *Lubanga* Trial Chamber decision of January 2008, the Court took a significantly different approach to victim participation, as is discussed below.

## 2. The Trial Chamber and the Appeals Chamber decisions in the *Lubanga* proceedings

The Trial Chamber rendered its decision on victim participation in the *Lubanga* trial on 18 January 2008. With Judge Fulford presiding, the importance of this decision was heralded by the receipt of motions from the Prosecution, Defence, legal representatives of victims, the Office of the Public Counsel for Victims, and even the Registry (Victims and Witnesses Unit).<sup>25</sup> Subsequently, the Appeals Chamber delivered its decision on the Defence and Prosecution appeals against the Trial Chamber decision on 11 July 2008.

### A. Definition of victims wanting to participate in trials at the ICC

The first question addressed by the Trial Chamber was the basic definition of the term 'victim'. As stated above, the *ICC Rules* define victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>26</sup> The

<sup>22</sup> See for example *DRC Decision on the Applications for Participation in the Proceedings, Situation in Uganda (Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 60 1/0104/06 and a/0111/06 to a/0127/06)* (Pre-Trial Chamber II, Situation No ICC-02/04-101, 10 August 2007) ('*Uganda Decision on Victims' Applications for Participation*'); *Situation in Darfur, Sudan (Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor)* (Pre-Trial Chamber I, Situation No ICC-02/05-110, 3 December 2007).

<sup>23</sup> *DRC Decision on the Applications for Participation in the Proceedings*, [50]; *Uganda Decision on Victims' Applications for Participation*, [7].

<sup>24</sup> Cf *Uganda Decision on Victims' Applications for Participation and Lubanga (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6)* (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-tEN, 29 June 2006), 6. In relation to investigations, the Pre-Trial Chamber overseeing the investigation stage of the DRC situation held that allowing victims' participation would not, per se, compromise the appearance of integrity and objectivity of the investigation and was not inconsistent with basic considerations of efficiency and security; see *DRC Decision on the Applications for Participation in the Proceedings*, [57].

<sup>25</sup> *Lubanga* Trial Chamber decision, [4]–[6].

<sup>26</sup> *ICC Rules* r 85(a). See also *Situation in the Democratic Republic of the Congo (Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06,*

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Trial Chamber looked at two aspects of this definition: first, the type of harm that is encompassed; and second, the necessary link between the harm and the crime alleged. As each of these issues raises different implications, the approaches taken by both the Trial and Appeals Chambers to the definition of victims is discussed below, before addressing the link between the victim and the crimes charged.

### (i) Definition of the term ‘victim’

The Trial Chamber took a broad view of the definition of victims. Looking to the type of harm that is encompassed by the Rome System, the Trial Chamber referred to the *United Nations 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*.<sup>27</sup> It found that ‘a victim may suffer, either individually or collectively, from harm in a variety of different ways, such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights’.<sup>28</sup> The Trial Chamber then noted that whereas rule 85 required organisations and institutions (legal persons) to have suffered direct harm to qualify as victims, no such restriction was imposed on natural persons. Consequently, it held that natural persons ‘can be the direct or indirect victims of a crime within the jurisdiction of the Court’.<sup>29</sup>

On appeal by the Prosecution and Defence, the Appeals Chamber largely adhered to the Trial Chamber’s approach to the definition of victims.<sup>30</sup> The Appeals Chamber held that where the victim is a natural person, that victim must personally suffer ‘harm’. This may include material, physical, and psychological harm.<sup>31</sup> So long as the harm is suffered personally by the victim, they may be either a direct victim, for example a child soldier, or an indirect victim, such as the parents of a child soldier. Additionally, the Appeals Chamber stated that the collective nature of the harm is immaterial to the question of victim

*a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06* (Pre-Trial Chamber I, Situation No ICC-01/04-423, 24 December 2007), [15] (allowing victims to prove identity by means other than official governmental authorities).

<sup>27</sup> *United Nations 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*, A/RES/60/147 (16 December 2005) (‘UN Basic Principles’).

<sup>28</sup> *Lubanga* Trial Chamber decision, [92]. In his dissent, which is discussed below in this article, Judge Blattmann objected to the Trial Chamber reliance on this instrument. As indications of the state of international law, there is nothing wrong with referring to the UN *Basic Principles*. However, they do not have status as international law, per se. Article 38 of the *Statute of the International Court of Justice* directs that treaties and customary law are the pre-eminent sources of international law. UN General Assembly statements qualify as neither of these. They can however provide evidence of State’s *opinio juris* and, arguably, state practice. On appeal, it was held that the Trial Chamber committed no error in referring to the UN *Basic Principles* as guidance: *Lubanga* Appeals Chamber decision, [33].

<sup>29</sup> *Lubanga* Trial Chamber decision, [90]–[91]. See also [16], [20], where Judge Blattmann, in his dissent, adhered to the majority opinion in this respect.

<sup>30</sup> The opinion of the majority was signed by then presiding Judge Navanethem Pillay of South Africa on 11 July 2008. This was her last major decision at the ICC, as she has since resigned to take up the position of Commissioner of Human Rights at the United Nations.

<sup>31</sup> *Lubanga* Appeals Chamber decision, [32].

participation; the decisive factors are the personal suffering of harm by the victim and the type of harm suffered.<sup>32</sup>

A comparison of the tests arrived at by the Trial Chamber and the Appeals Chamber shows that the latter chose to simplify the test in two respects. First, it required that the harm be suffered personally by the applicant. This clarification deals with the potential ambiguity that the Trial Chamber created by referring to ‘indirect victims’ and to suffering ‘collectively’. Together, these two terms could have created the impression that no personal suffering on the part of the applicant was required so long as they were related or linked to a person who had suffered harm. By clarifying the lack of significance of the term ‘collective’, the Appeals Chamber has avoided the potential expansion of the ambit of ‘victims’ beyond workable limits.<sup>33</sup>

Second, the Appeals Chamber simplified the references to the various types of harm mentioned by the Trial Chamber, which included the overlapping categories of physical or mental injury, emotional suffering, economic loss or substantial impairment of rights. However, in omitting any reference to suffering due to the substantial impairment of rights, the Appeals Chamber may have excluded a form of harm that is important in a democratic society, but which may not necessarily fit within the other categories of harm. For example, a person denied their right to vote may not suffer physically or mentally, but may nonetheless be considered to have suffered a serious harm.<sup>34</sup> The Appeals Chamber’s narrow approach to the definition of victims may bind future trial chambers to an overly restrictive standard.

The decision of the Appeals Chamber on this issue provides a pithy test for future Chambers grappling with applicants claiming victim status: has the applicant personally suffered harm of a material, physical or psychological nature? However, as with most concise formulations, the apparent simplicity belies complex questions for marginal cases. It will be difficult to provide exact parameters for the determination of when someone has personally suffered harm.

There is precedent in international courts for encompassing direct and indirect victims within the definition of victims.<sup>35</sup> For example, the Special Court for Sierra Leone has held

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<sup>32</sup> Ibid [35].

<sup>33</sup> It is notable that the definition is still considerably broader than that at the ICTY, where a victim is defined as ‘a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed’: International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, Doc No IT/32/Rev 44 (10 December 2009), r 2(A). It is also broader than the definition at the Special Tribunal for Lebanon, where the definition applied to victims seeking to participate in proceedings expressly excludes indirect victims: Special Tribunal for Lebanon, *Rules of Procedure and Evidence*, Doc No STL/BD/2009/01/Rev 1 (10 June 2009), r 2(A).

<sup>34</sup> By analogy, the ICTY has found that breaches of socio-economic rights may constitute the crime of persecution. It has held that the denial of the rights to employment, free movement, proper judicial processes, and proper medical care in the context of a campaign of ethnic cleansing amounted to a breach of fundamental rights of sufficient gravity to constitute persecution as a crime against humanity: *Prosecutor v Brđjanin (Trial Judgment)* (ICTY, Trial Chamber II, Case No IT-99-36-T, 1 September 2004), [1049].

<sup>35</sup> The European Court of Human Rights can accept claims from individuals who are direct victims or indirect victims (relatives of the principle victim): *McCann v United Kingdom* (1995) 324 Eur Court HR (ser A). It can even accept claims from potential victims of human rights violations (those facing a significant risk of being directly affected): *Marckx v Belgium* (1975) 31 Eur Court HR (ser A). Article 12 of the *UN Basic Principles* provides that perpetrators should provide compensation to victims and their families or dependents, and if this is not possible,

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that victims could include third parties who suffer serious injury to mental health by witnessing acts committed against others, particularly family and friends. The Special Court added the qualification that an accused could only be held responsible for the injuries to those third parties if they were reasonably foreseeable to him.<sup>36</sup> In recent years, the jurisprudence defining victims in a number of common law jurisdictions has advanced rapidly, providing a valuable point of comparison for the development of the definition outlined by the Appeals Chamber.<sup>37</sup> Future trial chambers seeking to determine whether individuals have personally suffered harm, including in the *Lubanga* case, would be well-advised to utilise this developed jurisprudence as a reference point to flesh out the vague standard provided by the Appeals Chamber.

### (ii) Victims of a situation or a case

A crucial aspect of the Trial Chamber's decision was the question of whether victims would have to demonstrate a connection to the specific charges facing the accused in order to participate in their trial. As noted above, previous ICC decisions had found that, in order to participate in a case against the accused, victims would have to demonstrate a sufficient causal link between the harm they had suffered and the crimes for which the Court had issued an arrest warrant against the accused.<sup>38</sup>

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States should provide compensation to victims suffering significant physical injury or impairment of mental health, and to the families or dependents of victims who have been killed or physically or mentally incapacitated.

<sup>36</sup> *Prosecutor v Sesay, Kallon, and Gbao (Judgment)* (Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009), [171]. See also *Prosecutor v Kayishema and Ruzindana (Judgment)* (Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999), [153].

<sup>37</sup> For example, in New Zealand, a victim, for the purposes of reparation under the *Sentencing Act 2002* (NZ), is defined as the target of the offence, or a person who suffers through or by means of the offence physical injury or loss of or damage to property, and also the parent of a young person fitting into those first two categories. Additionally, immediate family members are included if the primary victim dies or is rendered incapable: *Sentencing Act 2002* (NZ) s 4. Other common law jurisdictions take a similar approach, generally encompassing direct victims, along with indirect victims where they are closely related to a direct victim who has suffered a serious injury or death. In New South Wales, Australia, a victim of crime is defined in the *Victims Support and Rehabilitation Act 1996* (NSW) as an 'aggrieved person', or someone who suffers injury, or, in the case of injury causing death, an immediate family member. In Victoria, Australia, the *Victims of Crime Assistance Act 1996* (Vic) provides that a 'primary victim' is someone who suffers injury as a direct result of an 'act of violence'. A 'secondary victim' is a person who suffers injury as a result of witnessing the act of violence, or is a parent or guardian of the primary victim who is injured as a result of subsequently becoming aware of it. A 'related victim' is an immediate family member or dependent of a victim who has died as a result of the act of violence. The United Kingdom (UK) *Powers of the Criminal Court (Sentencing) Act 2000* (UK) provides that compensation can be ordered for any victim suffering injury, loss, or damage as a result of the offence, or for funeral expenses in relation to any deaths caused by the offence. The UK Criminal Injuries Compensation Scheme is relatively restrictive, allowing compensation to be claimed by a victim who suffers 'criminal injury' (including physical or mental injury), or death caused by an act of violence. See generally New Zealand Law Commission, *Compensating Crime Victims*, Report No 11 (2008). It should be noted that many of these provisions refer to the definition of victims for the purposes of compensation. That context raises slightly different considerations from the context at the ICC, which encompasses victims' interest in compensation as well as the involvement of victims in the determination of the guilt or innocence of an accused at trial, as discussed in this article.

<sup>38</sup> *Lubanga (Decision on the Applications for Participation in the Proceedings)* (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-tEN, 29 June 2006), 6; *Uganda Decision on Victims' Applications for Participation* [ 9], [30], [39], [49], [59], [66], [75].



The majority of the Trial Chamber took a liberal and purposive approach to victims' participatory rights in proceedings before the Court. It rejected the requirement that victims are restricted to those linked to the charges that have been confirmed in the specific case. Instead, it held that the test was whether a real evidential link existed between the victim and the evidence that would be led in the case.<sup>39</sup> In effect, this means that at 'any particular stage of the case', the victim would have to apply and show the real evidential link between the harm they suffered and the evidence to be led on a specific issue.<sup>40</sup>

Judge Blattmann, then Vice-President of the ICC, appended a dissenting opinion to the decision, highlighting a number of problematic implications of the majority's broad approach. His Honour stated that the majority's test, particularly the lack of a requirement to link the victim to the charges against the Accused, breached 'fundamental principles of criminal law'. He warned that this approach would both undermine victims' rights to participate in proceedings and prejudice the rights of an accused to a fair trial.<sup>41</sup> For these reasons, he supported a stricter test, whereby victims would have to demonstrate that they had suffered harm related to the specific charges in the indictment that had been confirmed, in order to participate in the trial of an accused.<sup>42</sup>

Seized with the matter, the Appeals Chamber preferred Judge Blattmann's approach to that of the Trial Chamber majority. The Appeals Chamber found that article 68(3) of the *Rome Statute* governs the matter, through the means of the procedure set out in rule 89(1) of the *ICC Rules*, which allows for the participation of victims *in the trial*. As these provisions apply to the trial to prove the guilt or innocence of an accused for the crimes charged, the Appeals Chamber held that it logically flowed that only victims suffering from those specific crimes charged could participate in proceedings.<sup>43</sup> Consequently, the resulting test for future trial chambers will be to ascertain whether the applicant has personally suffered harm arising from the crimes charged against the accused.

The approach taken by Judge Blattmann and the Appeals Chamber on this issue has a number of attractive implications. First, it is internally coherent. In ascertaining which victims can participate in a case against an accused, trial chambers will look at the same set of alleged crimes that they will look at in determining the guilt or innocence of the accused. Conversely, the proposed test of the Trial Chamber, which referred to a 'real evidential link' to the evidence in the case, was vague to the point of being meaningless. Second, because of this coherence, the process of assessing the validity of victims' claims will be a simpler one. It has already been noted that dealing with victims' applications is a time and resource intensive process, which slows down the trial.<sup>44</sup> By setting down a more restrictive and streamlined test

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<sup>39</sup> *Lubanga* Trial Chamber decision, [95].

<sup>40</sup> *Ibid* [96].

<sup>41</sup> *Lubanga* Trial Chamber decision, [6], [10]–[11] (Judge Blattmann).

<sup>42</sup> *Ibid* [7].

<sup>43</sup> The Appeals Chamber stated that 'once the charges in a case against an accused have been confirmed in accordance with art 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged': *Lubanga* Appeals Chamber decision, [62].

<sup>44</sup> Christine Chung, 'Victims' participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 *Northwestern Journal of International Human Rights* 517; WCRO Report, above n 3, 5, 59–60; Redress, *Victims and the ICC: Still Room for Improvement*, (November 2008) 3 <<http://www.redress.org/reports.html>>.

for the participation of victims, the Appeals Chamber has reduced the possibility of unfairly raising the hopes of individuals hoping to attain the status of victims with participatory rights.<sup>45</sup> This is important given the huge numbers of potential victims affected by the crimes subject to prosecution before the ICC.<sup>46</sup>

However, the Appeals Chamber's decision that only victims of crimes confirmed against an accused can participate in legal proceedings relating to that accused entails a potential shortcoming. The strict approach will result in the Prosecution effectively deciding on the range of victims able to participate in these legal proceedings. If the Prosecution chooses to present a narrow, streamlined selection of charges against an accused (a choice that may be made for a variety of reasons, including tactical, political and even practical considerations concerning the availability of proof) many victims' rights to participate will effectively be curtailed.<sup>47</sup> Despite the progressive approach signalled in the *Rome Statute*,<sup>48</sup> whereby victims would be able to participate in proceedings at an appropriate stage of proceedings, the Appeals Chamber has been unable to avoid making victims' rights entirely dependent on the Prosecution and, thus, has maintained an element of the 'victim as passive object' approach that Claude Jorda warned about in the Court's opening days.<sup>49</sup>

A means to mitigate this restriction placed on the victims' right to participate in proceedings would be to provide victims with enhanced rights to request a review of a prosecutor's decision to choose certain charges to prosecute, and omit others. Currently, victims that provide information to the Office of the Prosecutor in relation to alleged crimes have the right to be told if the Prosecutor decides that there is no basis to proceed with an investigation.<sup>50</sup> Conversely, States that refer cases to the ICC have the right to apply to a pre-trial chamber for review of the decision of the Prosecutor not to proceed with a

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<sup>45</sup> See WCRO Report, above n 3, 6.

<sup>46</sup> For a description of the slow processing of victims' applications to participate in proceedings, see *ibid* 4, 26–7.

<sup>47</sup> This is not merely a hypothetical possibility. Already the OTP has chosen to take a restrictive approach to charging in the *Lubanga* case, preferring to focus on the recruiting child soldiers charges, rather than attempting to prove the various other crimes that other organisations have documented during the conflict. See for example Human Rights Watch, *Covered in Blood: UPC Crimes in Ituri* (November 2006) <<http://www.hrw.org/en/reports/2006/11/08/upc-crimes-ituri-2002-2003>>, describing murders and rapes committed by forces of the Union des Patriotes Congolais who were headed by Thomas Lubanga. During the pre-trial phase of proceedings, the counsel for Lubanga noted that a number of victims had applied to participate in proceedings, recounting accusations of crimes (murder, rape, torture) outside of those charged by the Prosecution: *Lubanga (Defence Submissions Regarding the Applications for Participation in the Proceedings of Applicants a/0004/06 to a/0052/06)* (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-tEN, 4 September 2006), 1–4.

<sup>48</sup> As stated above, Jorda refers to the promise of a 'new step forward' in victims' rights: Jorda and de Hemptinne, above n 2, 1388.

<sup>49</sup> Jorda recognises that the interests of the Prosecution and victims are not co-terminous and often diverge, *ibid* 1394. See also WCRO Report, above n 3, 2, 16–18.

<sup>50</sup> *Rome Statute* art 15(6). See also art 15(3) allowing victims to make submissions to a Pre-Trial Chamber where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation; art 19(3), giving victims the right to make representations during challenges to the jurisdiction or the admissibility of a case before the ICC; *ICC Rules* r 92(2), giving victims the right to be informed of the discontinuance or non-initiation or an investigation or prosecution; and r 93, allowing Chambers to seek the views of victims 'on any issue'. Rule 92 contains duties of the court to notify the victims on miscellaneous issues, including certain proceedings, dates of hearings, decisions on proceedings, and of the Prosecution's decision not to initiate an investigation or not to prosecute under art 53 of the *Rome Statute*. Another important right of the victims to information is contained in r 131(2), which grants the victims access to the records of proceedings.

prosecution.<sup>51</sup> Under rules 92 and 93 of the *ICC Rules*, victims can participate in such review proceedings. However, they have no independent power to call for a review of the Prosecutor's decision not to initiate an investigation or a prosecution, or to exclude certain crimes or crime sites from investigation and prosecution.

Given that the right of victims to participate in trials against accused will be dependent on the Prosecutor's decision to proceed with a prosecution and will be limited by the Prosecutor's decision of which crimes to charge, it would be advisable for the Assembly of State Parties to consider an amendment to the *Rome Statute* or the *ICC Rules*, providing victims with the same or a similar right as States enjoy to request review of the Prosecutor's decision.<sup>52</sup> Such a power would correspond to the obligation on the part of the Prosecutor to consider victims' interests in reaching a decision on whether an investigation would serve the interests of justice under articles 53(1) and (2). This power would also be consistent with the recommendations of the Council of Europe in its recommendation 85(11), on the Position of the Victim in the Framework of Criminal Law and Procedure (adopted on 28 June 1985). The Council recommended that its Member States ensure that their prosecuting authorities pay due attention to the impact on the availability of compensation for victims in deciding whether to prosecute an offender. It added that victims should be provided with a right to review decisions not to proceed with prosecutions.<sup>53</sup> In many European jurisdictions, victims have either a right to review the decision of a prosecutor not to prosecute for certain acts, or a right to undertake a private prosecution if the prosecutor discontinues proceedings, or both.<sup>54</sup> An amendment to the *Rome Statute* or the *ICC Rules* to this effect would bring the ICC approach to victims' rights in line with those of the European Union, while maintaining the role of Chambers as the guardians of the judicial processes of the Court.

## **B. Scope of victims' participation**

A related controversy raised by the majority decision of the Trial Chamber centres on the scope of the victims' participation within the trial. The key question is whether victims should be able to introduce or comment on evidence indicating the guilt or innocence of an accused.

The Trial Chamber Decision in *Lubanga* held that the right to produce evidence relating to the question of guilt or innocence is not limited to the parties. The Chamber primarily based this statement on the general right of the Court to request the presentation of all evidence necessary for the determination of the truth, under article 69(3) of the *Rome Statute*.<sup>55</sup>

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<sup>51</sup> *Rome Statute* arts 53(2)(c), 53(3)(a). An interesting question that has not been addressed yet in the jurisprudence of the Court is whether the decision of the Prosecutor to indict an accused on certain charges but not others could be reviewed under these same provisions. Note that the United Nations Security Council also has the power to request review if it has referred a case to the ICC.

<sup>52</sup> Such a proposal for amendment could be made by any State Party for consideration by the Assembly of State Parties under art 121 of the *Rome Statute*.

<sup>53</sup> Council of Europe, recommendation 85(11), on the Position of the Victim in the Framework of Criminal Law and Procedure (28 June 1985), B.5 – B.7 in Marion Brienen and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers: 2000).

<sup>54</sup> *Ibid.* See the specific European jurisdictions discussed below in this article.

<sup>55</sup> *Lubanga* Trial Chamber decision, [108].

Although the first sentence of that provision only states that the ‘parties’ to proceedings have the right to submit evidence, the second sentence provides the Court with the broader power to ‘request the submission of all evidence that it considers necessary for the determination of the truth’.<sup>56</sup>

In draft versions of the *Rome Statute*, victims were given the explicit right to present additional evidence showing the criminal responsibility of an accused, which would have served as a foundation for the victims’ compensatory rights.<sup>57</sup> The fact that this provision was ultimately left out of the final *Rome Statute* is argued by some to militate against the right of victims to present evidence relating to the guilt or innocence of the Accused.<sup>58</sup> However, the reference in article 68(3) to victim participation ‘at stages of the proceedings determined to be appropriate by the Court’ suggests that rather than excluding any specific modes of participation, the State Parties preferred to leave this issue to the ICC judges to decide in the context of actual proceedings.<sup>59</sup>

In sum, the Trial Chamber’s approach was expansive. It held that victims could participate not only in relation to reparations, but also that they could express views, examine witnesses and make submissions ‘whenever necessary’.<sup>60</sup> The Trial Chamber held that it would be able to separate reparations submissions from issues relating to the guilt or innocence of the Accused.<sup>61</sup> Despite the Trial Chamber’s reassurances, the pertinent issue is not so much whether the Chamber will be able to separate evidence relating to reparations from that relating to guilt or innocence, but rather whether allowing such a procedure will interfere with the fair trial rights of the accused and the strategy of the Office of the Prosecutor. In granting leave to appeal, the Trial Chamber acknowledged that its decision could have the effect of repositioning the burden of proof to a certain degree, as it would potentially allow victims to introduce evidence that would otherwise not be introduced into proceedings, touching upon the guilt or innocence of the Accused.<sup>62</sup>

The appeal briefs filed in the wake of this decision demonstrate that the approach of allowing victims’ to participate with respect to the guilt or innocence of an accused runs counter to the engrained assumptions of an adversarial process held by the traditional parties to criminal proceedings. The Prosecution argued, *inter alia*, that only parties are imbued with rights under the *Rome Statute* to collect evidence, along with the corresponding disclosure obligations, and thus it would be dangerous to allow victims to introduce evidence, as this may prejudice the Defence.<sup>63</sup> In relation to the scope of

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<sup>56</sup> *Rome Statute* art 69(3).

<sup>57</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Report to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 109, UN Doc A/CONF.183/2/Add.1 (1998).

<sup>58</sup> Chung, above n 44, 517.

<sup>59</sup> Haslam, above n 13.

<sup>60</sup> *Lubanga* Trial Chamber decision, [98].

<sup>61</sup> *Ibid* [121].

<sup>62</sup> As this could encroach on the guarantees of a fair trial under art 67(1) of the *Rome Statute*, the Trial Chamber granted leave to appeal the issue: *Lubanga (Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008)* (Trial Chamber I, Case No ICC-01/04-01/06-1191, 26 February 2008).

<sup>63</sup> See *Prosecution Submissions on Appeal against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008* (Case No ICC-01/04-01/06-1233, 19 March 2008), [30], [37], [47], [61], [67].

victims' participation, the Defence stated that granting victims the same rights as the traditional parties would create an imbalance, breaching the principle of equality of arms and prejudicing the rights of the accused.<sup>64</sup> The Defence had previously indicated that the necessity of responding to victims' applications to participate in proceedings was hindering their ability to prepare Lubanga's defence.<sup>65</sup> Contrastingly, victims' representatives argued that, as a general rule, victims should be allowed to participate on all matters,<sup>66</sup> as they will be directly affected by the issue of the guilt or innocence of the Accused. They argued that this participation should include: examination of witnesses, including experts; initiating *ex parte* motions; opening and closing addresses; and legal submissions on the admissibility of evidence.<sup>67</sup>

Addressing the parties' appeals submissions in the *Lubanga* case, the Appeals Chamber found that the Trial Chamber's decision was unclear as to whether victims' rights to introduce evidence included the right to lead evidence as to the guilt or innocence of the accused.<sup>68</sup> Noting the language of various provisions of the *Rome Statute* and the *ICC Rules*, the disclosure regime established under the Rome framework, and the onus of proving the guilt of the Accused (which rests with the Prosecutor), the Appeals Chamber first emphasised that this right was primarily one held by the parties and that victims are not parties as such in proceedings before the ICC.<sup>69</sup> Nonetheless, the Appeals Chamber referred to the residual right of the Court to request all evidence it considers necessary for the determination of the truth. It held that the Prosecution's onus of proving the charges does not exclude the Court requesting other evidence. Recalling that article 68(3) *Rome Statute* is the first provision in international criminal law providing victims with the right to participate in proceedings, the Appeals Chamber stated that the input of victims' should not be rendered meaningless. It held that, so long as a fair and impartial trial was ensured, victims could contribute evidence going to the guilt or innocence of the Accused.<sup>70</sup> Examples would include where a victim demonstrates that their interests would be negatively affected by a certain witness not being called or a piece of evidence being declared inadmissible.<sup>71</sup>

The Appeals Chamber sought to mitigate any potential imbalances created by victim participation in trial proceedings through the confirmation of a list of parameters.<sup>72</sup> The requirements for victims' participation are:

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<sup>64</sup> *Defence Submissions on Appeal against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (Case No ICC-01/04-01/06-1220-tENG, 10 March 2008), [51]–[52].

<sup>65</sup> *Lubanga (Defence Submissions regarding the Applications for Participation in the Proceedings of Applicants a/0004/06 to a/0052/06)* (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-tEN, 4 September 2006), 1–4, [25]–[26].

<sup>66</sup> *Victims' Observations on Appeal against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (Case No ICC-01/04-01/06-1345-tENG, 21 May 2008), [41].

<sup>67</sup> *Lubanga* Appeals Chamber decision, [80]–[82].

<sup>68</sup> *Ibid* [93].

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* [96].

<sup>71</sup> *Ibid* [99].

<sup>72</sup> *Ibid* [4], [104].

1. a discrete application;
2. notice to the parties;
3. a demonstration of personal interests that are affected by the specific proceedings;
4. compliance with disclosure obligations and protection orders;
5. determination of appropriateness; and
6. consistency with the rights of the accused and a fair trial.

The Appeals Chamber considered that as long as these parameters are adhered to, the granting of participatory rights to victims, including in relation to the guilt or innocence of the accused, would not be inconsistent with the onus of proof being on the prosecution, nor would it, per se, infringe on the rights of the Accused.<sup>73</sup>

In his partly dissenting opinion, Judge Pikiš departed from the reasoning of the majority of the Appeals Chamber with regards to victims introducing evidence going to the guilt or innocence of an accused. He opined that the opportunity for victims to introduce such evidence would upset the framework of criminal trials, where ‘two sides are cast in the position of adversaries’.<sup>74</sup> He stated that the ‘defendant cannot have more than one accuser’ and implied that allowing victims to participate would effectively reverse the burden of proof and force defendants to prove their innocence.<sup>75</sup> He also stated that: ‘the judicial process should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process’.<sup>76</sup>

However, the introduction of victims into proceedings before the Court does not, per se, undermine the accused’s fair trial rights. The current President of the ICC, Judge Song has noted that there has never been a case where the participation of victims in a criminal trial had been found to constitute, in and of itself, a violation of an accused’s fair trial rights.<sup>77</sup> The European Court of Human Rights (‘ECHR’) decisions relied on by Judge Pikiš to support his position do not show that victim participation automatically violates an accused’s rights.<sup>78</sup> Given that the Defence (and the Prosecution) has the right to respond to any submissions made by victims,<sup>79</sup> the ICC approach is not inherently inconsistent with the ECHR cases cited by Judge Pikiš.<sup>80</sup>

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<sup>73</sup> Ibid [4].

<sup>74</sup> *Lubanga* Appeals Chamber decision, [14] (Judge Pikiš).

<sup>75</sup> *Lubanga* Appeals Chamber decision, [14] (Judge Pikiš).

<sup>76</sup> *Lubanga* Appeals Chamber decision, [15] (Judge Pikiš).

<sup>77</sup> Sang Hyun Song, ‘Participation of Victims at the International Criminal Court’ (Speech delivered at the Criminal Law Lecture Series, United Nations Office of Legal Affairs, 8 October 2008) <[http://untreaty.un.org/cod/avl/l/s/Song\\_CLP.html](http://untreaty.un.org/cod/avl/l/s/Song_CLP.html)>

<sup>78</sup> *Lubanga* Appeals Chamber decision, [14] (Judge Pikiš). See also Jorda and de Hemptinne, above n 2, 1393.

<sup>79</sup> *ICC Rules* rr 89(1), 91(2).

<sup>80</sup> In *Brandstetter v Austria* (1991), the ECHR clarified that ‘[t]he right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party’: *Brandstetter v Austria* (1991) 211 Eur Court HR (ser A), [66].

Moreover, a brief survey of a number of jurisdictions in Europe supports the position taken by the Appeals Chamber majority. In many European countries, victims are able to participate in criminal proceedings, either in the role of auxiliary prosecutors, through private prosecutions, or as subsidiary prosecutors. Thus, in Austria,<sup>81</sup> Germany,<sup>82</sup> Liechtenstein,<sup>83</sup> the Scandinavian jurisdictions,<sup>84</sup> and Portugal,<sup>85</sup> among other countries, victims have the following rights:

1. to be present during proceedings;
2. to claim compensation;
3. to contest the imposition of a judge or an expert witness;
4. to put questions to witnesses;
5. to contest the permissibility of questions to witnesses;
6. to introduce evidence during proceedings
7. to object to decisions of the presiding judge; and
8. to make statements.

While the burden of proof rests with the public prosecutor, the victim stands beside the prosecutor and is usually given a turn to speak after the prosecutor. Other civil systems also provide victims with participatory rights in various forms, supporting the feasibility of their active involvement in criminal processes.<sup>86</sup>

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<sup>81</sup> In Austria, if the victim joins proceedings as a civil claimant, they may, inter alia: present evidence that can be relied upon to determine the guilt or innocence of the accused; put questions to the accused and other witnesses; make remarks during the proceedings; and, at the close of evidence, put forward arguments relating to the main verdict. They may take over prosecutorial proceedings if the public prosecutor decides not to proceed with the prosecution. If the victim's claim for civil damages in the criminal trial is referred to the civil courts they may appeal that there was sufficient evidence to decide the civil claim. For certain offences, victims may also launch private prosecutions, examples being medical treatment without permission and privacy offences. See Brien and Hoegen, above n 53, 73–4, 76–7.

<sup>82</sup> In Germany, a victim may join a procedure as a civil claimant and, for certain serious offences, may act as an auxiliary prosecutor wherein they may, inter alia: present evidence that can be relied upon to determine the guilt or innocence of the accused; put questions to the accused and other witnesses; and make remarks during the proceedings. The auxiliary prosecutor has the right to legal aid and may appeal against a judgment. For certain less serious crimes, the victim may initiate a private prosecution if the public prosecutor declines to do so. Ibid 363–64.

<sup>83</sup> In Liechtenstein, a victim may join proceedings as a civil claimant. In that case, the victim may present evidence and make statements, but not as to the ultimate guilt or innocence of the accused. A victim may act as a subsidiary prosecutor if the public prosecutor discontinues the case. Ibid 558–59.

<sup>84</sup> It should be noted that, although victims can act as auxiliary prosecutors in Denmark, they receive no participatory rights in proceedings: *ibid* 217. In Norway, the victim's role as a party to the case is limited to their civil claim, except for where private prosecutions are undertaken or in rare cases of acting as an auxiliary prosecutor: *ibid* 732.

<sup>85</sup> Victims have extensive powers as auxiliary prosecutors in Portugal: *ibid* 777–78.

<sup>86</sup> For example, in France a victim as *partie civile* will have rights to be informed about the evidence gathered and to address the Court regarding the facts of the case, as well as on the issue of sentencing: *Code de procédure pénale* [Code of Criminal Procedure] (France), arts 2–9. Article 2 reads: 'l'action civile en réparation du dommage causé par un crime, un délit, ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction'.

In a number of international jurisdictions, victims possess broad rights to participate in proceedings.<sup>87</sup> For example, the Extraordinary Chambers in the Courts of Cambodia, according to its current Regulations, would allow victims to participate as witnesses, complainants, or as *parties civiles*. Under this framework, victims may have access to the evidence of the case.<sup>88</sup> Victims are also able to participate in proceedings before the Special Tribunal for Lebanon.<sup>89</sup> The President of the Lebanon Tribunal has stated that the consideration of victims' views is one of the three key objectives behind the *Rules of Procedure and Evidence* (along with safeguarding the fair trial rights of the accused and ensuring an expeditious trial).<sup>90</sup> These systems do not appear to have derailed the judicial process from its 'ordained course'.

In the majority of those proceedings, victims' participatory rights are complementary to those of the Prosecution. Victims offer input to the proceedings after the Prosecution and only have a more active role in proceedings where the Prosecution's role leaves open issues for determination. Consistent with this approach, the ICC Appeals Chamber had held — in a decision pre-dating the one discussed in this article — that victims, when applying for participation in legal proceedings against *Lubanga*, would have to show that the interests that they assert were not those of a nature belonging to the role assigned to the Prosecutor.<sup>91</sup>

<sup>87</sup> See Fédération Internationale des Droits de l'Homme, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter IV: Participation (April 2007) <[http://www.fidh.org/IMG/pdf/7-CH-IV\\_Participation.pdf](http://www.fidh.org/IMG/pdf/7-CH-IV_Participation.pdf)>. Before the European Court of Human Rights — which is not a criminal court, but still deals with victims on a regular basis in its jurisprudence — victims can present evidence of the violation of their rights in question, and gain access to all documents deposited with the Court's registry. However, in that context, the burden of proving the violation lies with the victim. Before the Inter-American Court of Human Rights, the Rules of Procedure have recently been adapted and now allow individual victims to submit requests, arguments and evidence throughout the proceedings: *Rules of Procedure of the Inter-American Court of Human Rights* (28 November 2009) r 23(1) <<http://www.cidh.org/Basicos/English/RulesIACourtNov2009.pdf>>. The Court has held that allowing the victims to present their views in an independent capacity — alongside the Inter-American Commission for Human Rights, which usually brings the claims — does not negatively affect the rights of the accused State: *Masacre v Venezuela* [1996] Inter-Am Court HR (ser C) 28, [24]–[28].

<sup>88</sup> Under the draft Cambodian Code of Criminal Procedures, victims would have rights to initiate proceedings as *parties civiles*. Victims would even have the right to appeal decisions of the Trial Chamber. The Provisional Criminal Procedure Code for Kosovo sets out the rights of victims at all stages of the criminal proceedings before the domestic courts in Kosovo dealing with the criminal activity that occurred there in 1998 and 1999, including the right to call attention to facts and to call evidence which has a bearing on the guilt or innocence of the accused. Victims can also claim damages and, thus, introduce evidence in relation to this. During trial proceedings, victims can introduce evidence, put questions to the defendant and witnesses, make submissions, present clarifications, and have access to the evidential record. See Fédération Internationale des Droits de l'Homme, above n 87, 18.

<sup>89</sup> *Statute of the Special Tribunal for Lebanon*, annexed to Resolution 1757, UN SCOR, 62<sup>nd</sup> sess, 5685<sup>th</sup> mtg, 4, UN Doc S/Res/1757 (30 May 2007), which is essentially a verbatim reproduction of art 68(3) of the *Rome Statute*.

<sup>90</sup> President of the Special Tribunal for Lebanon, *Rules of Procedure and Evidence: Explanatory Memorandum* (10 June 2009) [2] <[http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory\\_memorandum\\_En.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory_memorandum_En.pdf)>. In certain respects, the scope of victim participation in proceedings at the Lebanon Tribunal is more restricted than it is at the ICC. Victims are limited to direct victims, as discussed above, and there is no provision for victim compensation: art 25. Furthermore, the Rules expressly allow a pre-trial judge to take into account any possible delay or inefficiency when deciding on a victim's application to participate in proceedings. However, victims are given a broad scope for participation under the Rules, including submitting final briefs (rr 86–87, 147): [15].

<sup>91</sup> *Lubanga (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007)* (Appeals Chamber, Case No ICC-01/04-01/06-925, 13 June 2007), [28]–[29].



That qualification should be read into the decision discussed in this article. The resulting position would limit victims' participatory rights to issues not adequately covered by the Prosecution, which acts as the primary party proving the charges against an accused. Duplicative submissions would thus be avoided. The potential imbalances created by having multiple accusers would be limited to areas where victims' interests had not been sufficiently represented by the prosecution.

In addressing the possible implications of victim participation in trials, it is useful to note that the limited examples of victims' participation in proceedings before the ICC have already demonstrated some positive results. In the *Lubanga* confirmation hearing in November 2006, the victims' opening and closing interventions were described as eloquent and not perceived to have compromised the fairness of proceedings.<sup>92</sup> Following its decision on the general right of victims to participate in proceedings, the Appeals Chamber specifically granted the right to four victims in relation to the appeal against the ordered release of Lubanga.<sup>93</sup> The four victims had previously been accepted as victims of the case, and the Appeals Chamber considered that their interests were affected by the Trial Chamber's decision to release the Accused. It, thus, allowed them to provide written submissions on the issue. Subsequently, the four victims filed their observations on the matter, which were taken into account by the Appeals Chamber.<sup>94</sup> This demonstrates that victims can participate in trials before the ICC in a meaningful way without, per se, compromising the fairness of proceedings.

## Conclusion

In 2008, Trial Chamber I and then the Appeals Chamber of the ICC issued decisions in the *Lubanga* case that will be highly significant in shaping victim participation in future trials before the Court. These decisions, although differing in some respects, have heralded a liberal approach to the range of rights provided to victims under the statute of the world's first permanent criminal court. A victim is clearly defined as an applicant who has personally suffered harm of a material, physical, or psychological nature. This harm must be a consequence of the crimes charged against the accused in whose proceedings the victim desires to participate. Where these criteria are satisfied, a victim will have the right to participate in proceedings, including through the introduction of evidence pertaining to the culpability of the accused.

The system of victim participation established by the Rome System follows a global trend of the last few decades to strengthen the role of the victims in criminal proceedings.<sup>95</sup> The *Rome Statute* and the pronouncements of Pre-Trial, Trial, and Appeals Chambers on victims' participation confirm that the provision made for victim participation in the *Rome Statute* is

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<sup>92</sup> Chung, above n 44, 512.

<sup>93</sup> *Lubanga (Decision on the Participation of Victims in the Appeal)* (Appeals Chamber, Case No ICC-01/04-01/06-1452, 6 August 2008). See also *Lubanga (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')* (Appeals Chamber, Case No ICC-01/04-01/06-1335, 16 May 2008).

<sup>94</sup> *Lubanga (Judgment on appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo')*, (Appeals Chamber, Case No ICC-01/04-01/06-1487, 21 October 2008), [5], [27].

<sup>95</sup> Bitti and Friman, above n 14, 457.

not supposed to be empty-letter law. The inclusion of victims in the process is meant to substantively empower them and shift them away from their previous role of 'passive objects' of international criminal law. Such a development is important, as victims' rights groups have documented that negative experiences in the criminal justice system cause victims to be disillusioned. This impacts upon victims reporting crimes, cooperating with legal authorities, and leads to a possible reduced respect for the law.<sup>96</sup> Furthermore, victims have an interest in the outcome of legal proceedings against an accused; the result of the case is 'of decisive importance for obtaining reparations for the harm suffered'.<sup>97</sup>

Victim participation in ICC trials necessarily impacts upon those proceedings.<sup>98</sup> Consequently, victim participation must always be tempered with the necessary constraint of ensuring a fair and efficient trial. The approach taken by the ICC has, unsurprisingly, raised fears that the delicate balance between the parties to adversarial court proceedings will be upset. A just equilibrium may be achieved with the addition of the recommendations referred to in this article, including the suggestion for victims to be able to review decisions of the Prosecutor on the scope of charges and the limiting of victim input to issues not adequately covered by the Prosecution. As such, the Court would both recognise and realize the unique role of victims in proceedings before the ICC, while at the same time providing for efficient and manageable trials that uphold the fundamental rights of the accused.

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<sup>96</sup> Louise Ellison, *The Adversarial Process and Vulnerable Witnesses* (OUP: 2001) 4. See also WCRO Report, above n 3, 17–18.

<sup>97</sup> *DRC Decision on the Applications for Participation in the Proceedings*, [50]–[53], [63]. Although Judge Jorda was referring to the right to participate in proceedings relating to situation, his comments are equally, or indeed more applicable once a legal case against a specific accused begins.

<sup>98</sup> See WCRO Report, above n 3, 16–18.