

Victim Participation at the International Criminal Court and its Impact on Procedural Fairness

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Abstract

The victim participation regime in operation at the International Criminal Court marks a departure from the minimal role that victims have played in international criminal law proceedings in the past. This article examines the practice of the International Criminal Court thus far in dealing with victim participation issues, with a view to assessing its impact on the rights of accused and procedural fairness generally. The article outlines the legal basis of the victim participation regime and provides an overview of the International Criminal Court's jurisprudence on victim participation, before discussing specific practical issues, as well as overarching issues. The author concludes that victim participation has a clearly discernible negative impact on procedural fairness, most prominently in its potential to cause delay.

I Introduction

Victim participation is one of the most innovative and notable features of the International Criminal Court ('ICC').¹ Much time was devoted at the Rome Conference to its development and place in the *Rome Statute*,² and much time has been devoted to victims' issues before the Court. At least 100 decisions relating to victim participation have been handed down³ and a special single judge to deal with victims' issues has been appointed in multiple 'situations'.⁴ The victim participation model at the ICC does not go

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¹ See, eg, Robert Heinsch, 'How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is It Time for a More Judge-Dominated Approach' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 479, 494; René Blattmann and Kirsten Bowman, 'Achievements and Problems of the International Criminal Court: A View From Within' (2008) 6 *Journal of International Criminal Justice* 711, 728.

² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'); 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, 321; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 823–5.

³ Christine H Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6(3) *Northwestern Journal of International Human Rights* 459, 506; International Criminal Court, *Summaries of Public ICC Decisions on Victims* <<http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/Summaries+of+public+ICC+Decisions+on+Victims>>.

⁴ See, eg, *Prosecutor v Kony (Decision Designating a Single Judge on Victims' Issues)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 22 November 2006). Regarding 'situation' as it is used in this article, it is 'situations' rather than individuals that are referred to the ICC (eg, Thomas Lubanga Dyilo is being tried as a result of the referral of the *Congo* situation).

as far as that in place at other international criminal tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’), where victims can apply to become ‘*parties civiles*’ (civil parties) and, if accepted as such, they gain significant rights and are formally a *party* to the proceedings, rather than a *participant*,⁵ but the ICC model, nonetheless, clearly represents a new era in victim participation in international criminal law. The Special Tribunal for Lebanon (‘STL’) is the most recent tribunal to adopt a victim participation regime and, while there has been much criticism of the ICC model, the STL has still been influenced by it.⁶

Previous tribunals such as the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) offered virtually no role for victims — except as witnesses,⁷ and this has been criticised, even from within. Patrick Robinson, the former President of the ICTY, stated in a speech to the United Nations (‘UN’) General Assembly that ‘I fear that failure by the international community to address the needs of victims of the conflicts that occurred in the former Yugoslavia will undermine the Tribunal’s efforts to contribute to long-term peace and stability in the region’.⁸ This perceived failure of earlier tribunals is widely recognised as having influenced the development of the victim participation regime at the ICC.⁹ The focus of this article will be the ICC, but the article will, at times, canvass (to a limited extent and for comparative purposes only) victim participation at other tribunals, such as the ECCC.

The spectrum of views and comment on victim participation is extremely broad. Consider, for example, the recent comments of ICC Registrar Silvana Arbia at a panel discussion on victim participation:

It is a way by which they honour those relatives, friends and community members lost or injured in the atrocities under investigation. Furthermore, they feel that they are best placed to explain the historical and cultural background to the events and, in this sense, they feel they can contribute to the establishment of the truth.¹⁰

Compare this with the comments of former employee of the ICC’s Office of the Prosecutor (‘OTP’) Christine Chung:

The decisions of the Chambers regarding victim participation have failed seriously to abide [the] directive to safeguard defense rights. The Chambers have embraced the notion that fairness to the defense should be considered only when the victim seeks

⁵ Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Rev 8)* (adopted 12 August 2011) (*Internal Rules*) r 23.

⁶ As evidenced by the similarities between the STL model and the ICC model, which can be described generally as models that allow for victim participation, but with victims having a vaguely defined status. See Jérôme de Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’ (2010) 8 *Journal of International Criminal Justice* 165, 165–6.

⁷ Haslam, above n 2, 320.

⁸ President Patrick Robinson, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, UN GAOR, 64th sess, 16th plen mtg, Agenda Items 73 and 74, UN Doc A/64/PV.16 (8 October 2009) 7.

⁹ Haslam, above n 2, 318.

¹⁰ International Criminal Court, ‘ICC Registrar Participates in Panel on Impact of the *Rome Statute* System on Victims and Affected Communities’ (Press Release, ICC-CPI-20100602-PR535, 2 June 2010) <<http://www.icc-cpi.int/menus/asp/reviewconference/pressreleaserc>>.

to participate in a specific proceeding, based on reasoning that conferring the “status of victim” does not per se prejudice defense interests. This methodology is infirm.¹¹

Obviously there is some disconnect between these comments as they have entirely different focus, but this, in itself, is illustrative, in that they represent two very diverging views on truth-seeking¹² and the role that victims can play. They are somewhat typical of the debate on victim participation. One comment is focused entirely on that truth-seeking role, the other on the procedural difficulties that it gives rise to.

As could be expected in its infancy, victim participation at the ICC has faced hurdles, created confusion and has been criticised by many.¹³ Far from sitting comfortably alongside the Prosecutor in a support role, victims and their legal counsel have faced opposition from the Prosecutor in their applications before the Court (in addition to the expected opposition from the accused). Part of the position taken in this article is that while there are clear issues to be addressed concerning how victim participation is operating, some leeway should be afforded given the sparse and vague provisions in the constitutional documents of the Court and the fact that the Court is only (relatively) recently operational.

The Court faces difficulties in many areas, many of which can be said to result from the Court ‘finding its feet’. Although it was not within the sphere of victim participation, an illustrative example of this occurred within the first week of the trial of Thomas Lubanga Dyilo¹⁴ when a witness dramatically reversed his evidence on the stand. Urgent local law advice had to be obtained in relation to possible prosecution of the witness in the Congo, applications for the witness to continue, on the one hand, and to be taken off the stand, on the other, had to be immediately determined and, in general, chaos ensued.¹⁵ On one view, this could be mismanagement and a failure of foresight (with the same applying to problems with victim participation); on another view, it is simply impossible to provide for or foresee every eventuality, particularly when foundation documents are negotiated in a forum displaying such diverse views and positions as the Rome Conference did.¹⁶ In terms of victim participation specifically, added to this are the difficulties created when importing an essentially civil law concept into a predominantly (but not entirely) common law structure.

This article attempts to evaluate the impact of victim participation on procedural fairness and, in doing so, will first give an outline of victim participation at the ICC,

¹¹ Chung, above n 3, 519.

¹² Although it is outside the scope of this article, an interesting issue arises as to whether, in adversarial process such as that at the ICC, anything other than a ‘juridical truth’ can emerge, being one where the only truth is that which can withstand the legal process and is, therefore, not really truth at all (see Haslam, above n 2, 328).

¹³ See, eg, Scott T Johnson, ‘Neither Victims Nor Executioners: The Dilemma of Victim Participation and the Defendant’s Right to a Fair Trial at the International Criminal Court’ (2010) 16 *ILSA Journal of International & Comparative Law* 489.

¹⁴ *Prosecutor v Lubanga* (International Criminal Court, Case No ICC-01/04-01/06).

¹⁵ Author’s personal observations in attendance at the trial of Thomas Lubanga (January 2009, The Hague); Rachel Irwin, *Lubanga Trial, Week 1: Prosecutors Stumble out of the Gate* (30 January 2009) *The Lubanga Trial at the International Criminal Court* <<http://www.lubangatrial.org/2009/01/30/lubanga-trial-week-1-prosecutors-stumble-out-of-the-gate>>; *Prosecutor v Lubanga (Public Redacted Decision on Intermediaries)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 31 May 2010) [7].

¹⁶ See generally Schabas, above n 2; Blattman and Bowman, above n 1, 724.

including key provisions in the *Rome Statute* and the *Rules of Procedure and Evidence*,¹⁷ as well as some key decisions made by the pre-trial chambers, the trial chambers and the Appeals Chamber on issues relating to victim participation (Part III). Specific issues and aspects of victim participation will then be dealt with in turn (Part III), such as the impact of victims questioning witnesses and exercising other procedural rights, and the impact of victim participation on the presumption of innocence. ‘Aspects’ and ‘issues’ are dealt with separately as some analysis is usefully framed by discussing a particular right exercised by victims or a victim participation in a particular instance (an *aspect* of victim participation), whereas other analysis pertains to overarching *issues* that arise in the context of a number of aspects of victim participation (such as the pervasiveness of victim-centric culture).

II Jurisprudence

Victim participation at the ICC has two facets: participation in the proceedings itself (founded in article 68 of the *Rome Statute*), aimed at providing access to the proceedings, providing a forum for victims to tell their stories, facilitating healing, obtaining closure and justice¹⁸ and recognising victims as ‘actors, rather than as passive subjects of the law’;¹⁹ and reparations (founded in article 75 of the *Rome Statute*) aimed at financial or other compensation. It is the former facet that is the focus of this article.²⁰

Kofi Annan is said to have described victims’ rights as the overriding interest that should drive the Rome Conference,²¹ and the provisions below do bear this out, to an extent. Reports on the process of the Preparatory Committee show the steady progress of victim participation in the draft Statute, from the inclusion of limited provisions relating to protection of victims in 1994 (with no provisions for participation), to the fully-fledged participation regime ultimately set out in the *Rome Statute* (in 1997, in the final stages of the Preparatory Committee’s work, a consolidated text resembling the current text of the Statute was included).²²

A Key provisions

The most important provision in the *Rome Statute* providing for victim participation is undoubtedly article 68.²³ Article 68(3) states that:

¹⁷ International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) (*ICC Rules*).

¹⁸ These aims are not explicitly stated in the *Rome Statute* or *ICC Rules*, but are examples of some of the common aims of victim participation. See, eg, Mugambi Jouet, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’ (2007) 26 *St Louis University Public Law Review* 249, 250.

¹⁹ Reinhold Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings before It and Its Exercise in the Trial of *Thomas Lubanga Dyilo*’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 501, 510.

²⁰ Although reparations are an important facet of victim participation, it has not yet been dealt with by the Court, as it is dependant upon an accused having been convicted. One important linkage between reparations and participation via art 68, however, is the argument that victims should be able to argue for and submit evidence pertaining to guilt in proceedings as their right to reparations hinges upon the guilt of the accused.

²¹ UN, ‘UN Diplomatic Conference to Establish International Criminal Court Begins Five-Week Session in Rome’ (Press Release, L/ROM/2, 15 June 2009) <<http://www.un.org/icc/pressrel/lrom2.htm>>.

²² Schabas, above n 2, 823.

²³ T Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 85.

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.

Somewhat confusingly, although this provision uses the broad ‘stages of the proceedings’ terminology, it appears in part 6 of the Statute, headed ‘The Trial’. This has been the subject of some debate in applications before the Court focused on the stage at which victims may exercise the article 68(3) right, with Pre-Trial Chamber I ruling on 17 January 2006 (with many other decisions following it)²⁴ that this provision allows victims to participate in the investigation stage.²⁵

Article 68 also provides for protection of victims, as do articles 57(3), 64(2) and 65(4). Articles 75, 79 and 82(4) are concerned with reparations.

Within the *ICC Rules*,²⁶ key provisions are:

- rule 85, which defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court’;
- rule 59, which requires the Registrar to inform victims who have communicated with the Court regarding certain issues (the Rules also contain further and more specific notification requirements);
- rule 89, which provides for the mechanics of victims’ applications to the Court and provides the relevant Chamber with the jurisdiction to rule on how victims shall participate;
- rules 69, 93, 119(3), 145, 221 and 224, which all provide for victim participation on specific issues (eg rule 221 allows victims to express their views on the disposition of the assets of accused);
- rule 50, which requires the Prosecutor to notify victims of his intent to initiate an investigation; and
- rules 90, 96, 97, 121(10), 131(2), 87, 88, 43 and 81, which variously deal with the set up of the Victims and Witnesses Unit, confidentiality, access to the record of proceedings, and reparations.

As with article 68(3), the Court’s interpretation of rule 85 has caused great controversy, in particular the decision of the Trial Chamber that used the breadth of this provision to

²⁴ See, eg, *Situation in Uganda (Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04, 10 August 2007); *Situation in Darfur, Sudan (Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-111-Corr, 14 December 2007).

²⁵ *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)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-101, 17 January 2006). This decision was ultimately overruled on this point by the Appeals Chamber: *Prosecutor v Lubanga (Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-556, 19 December 2008) (*‘Appeals Chamber Investigation Phase Decision’*).

²⁶ The Rules are subordinate to the *Rome Statute* and provided for under the *Rome Statute* art 51.

allow potential victims to apply to participate in a case when they were not victims of the particular crimes charged, but rather of, as the rule says, ‘any crime within the jurisdiction of the court’.²⁷ Importantly however, this did not lead the Trial Chamber to conclude that victims in such a broad category *should* be allowed to participate, as they would be filtered out by the requirement that their ‘personal interests be affected’, as required by article 68(3).

B Key decisions

One of the criticisms of victim participation and the way it has been dealt with by the ICC has been the inconsistency in approach by different chambers and the Court’s sometimes unexpected interpretations of the provisions in the *ICC Rules* and *Rome Statute* provisions on victim participation.²⁸ The following summaries of decisions have been selected as they deal with important issues in victim participation and are intended to give a snapshot of decisions made by the various chambers as foundation for later discussion wherein the issues outlined below in these decisions will be dealt with in greater detail. As mentioned earlier, there have been at least 100 decisions on victim participation, so the summaries that follow are obviously not an exhaustive collection.

On 17 January 2006, Pre-Trial Chamber I ruled that victims were able to participate in proceedings at the investigation stage.²⁹ The Chamber said that this was consistent with the way that victim participation had been provided for under the *Rome Statute* and the objects and purpose of victim participation. Interestingly, the Prosecutor requested leave to appeal this decision and was refused on the grounds that there was no detriment to the Prosecutor or the prosecution resulting from it.

On 22 September 2006, Pre-Trial Chamber I ruled that victims would be able to participate in the Confirmation of Charges Hearing for Thomas Lubanga Dyilo, including making opening and closing statements.³⁰ Importantly however, the Chamber ruled that because the victims were participating anonymously, they would not be able to add any points or facts of evidence, nor question witnesses.

On 18 January 2008, Trial Chamber I handed down a decision ‘intended to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings’.³¹ The decision is much-criticised for the test that it laid out for assessing victim participation in proceedings, whereby a victim of any crime within the jurisdiction of the Court would be allowed to participate, with this seemingly unworkable and unfair construction (based on rule 85) being moderated by the ‘personal interests’ test in article 68(3). Judge Blattman gave a dissenting decision, saying that:

²⁷ *Prosecutor v Lubanga (Decision on Victims’ Participation)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) (‘18 January 2008 Trial Chamber I Decision’).

²⁸ See, eg, *ibid* — an example of a surprising interpretation, where the Chamber determined that victims of crimes other than those charged (so long as they were crimes which were within the jurisdiction of the Court) could be accepted to proceedings; see also below n 99 and the accompanying text regarding the comments of ICC Deputy Prosecutor Fatou Bensouda.

²⁹ *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)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-101, 17 January 2006).

³⁰ *Prosecutor v Lubanga (Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 22 September 2006) (‘Confirmation Hearing Decision’).

³¹ *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [84].

I believe that the rights of the Accused are endangered by an over inclusive and imprecise definition of victims, such as the one suggested by the Majority'.³² The decision also held that victim participants could lead evidence.³³

On 11 July 2008, the Appeals Chamber handed down a decision on an appeal brought by the defence against the 18 January decision described above.³⁴ The Appeals Chamber reversed the Trial Chamber on the first arm of the test for victim participation, clarifying that it was only victims of the situation or case before the Chamber, rather than victims of any crime within the jurisdiction of the Court, who could apply to participate. The Appeals Chamber upheld the decision to allow victim participants to lead evidence, albeit with dissenting opinions from Judge Kirsch and Judge Pikiš on this issue. Judge Kirsch pointed out, among other things, that there was no disclosure obligation on victims and this meant that they could not lead evidence before the Court.³⁵ Judge Pikiš stated that '[t]he Statute does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused'.³⁶ By contrast, the Appeals Chamber looked to article 69³⁷ to found the right for victims to adduce evidence, indicating that it would be at the request of the Chamber that they would be permitted to do so.

On 19 December 2008, the Appeals Chamber overruled the earlier decisions of 7 and 24 December 2007 by Pre-Trial Chamber I,³⁸ which had affirmed the position that victims were able to participate at the investigation stage.³⁹ The Appeals Chamber indicated that there was already ample opportunity for victims to convey information to the Prosecutor during this stage and that, therefore, victim participation in 'proceedings' relating to the investigation was not necessary.

On 14 July 2009, following an application by the victims' legal representative, Trial Chamber I in the *Lubanga* case issued a decision notifying the parties that the legal

³² Ibid [10] (Judge Blattman).

³³ Ibid [108].

³⁴ *Prosecutor v Lubanga (Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) ('11 July 2008 Appeals Chamber Decision').

³⁵ *Prosecutor v Lubanga (Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008: Partly Dissenting Opinion of Judge Philippe Kirsch)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 23 July 2008) [14]–[16].

³⁶ *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [6] (Judge Pikiš).

³⁷ Art 69(3) provides that '[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'.

³⁸ *Appeals Chamber Investigation Phase Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-556, 19 December 2008).

³⁹ As had many other decisions, see, eg, *Situation in Uganda (Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04, 10 August 2007); *Situation in Darfur, Sudan (Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-111-Corr, 14 December 2007).

characterisation of the facts may be changed in accordance with rule 55 of the *ICC Rules*.⁴⁰ This decision was ultimately overruled by the Appeals Chamber on 8 December 2009.⁴¹

On 16 September 2009,⁴² the Trial Chamber in the *Lubanga* case ruled, following objections filed by defence counsel, that victim's legal representatives were not to ask leading questions of witnesses and that if legal representatives wanted to depart from the 'neutral style' of questioning,⁴³ then they should apply to the bench.

On 20 January 2010,⁴⁴ in relation to victims' legal representatives questioning defence witnesses, Trial Chamber I ruled that defence counsel being present in the Chamber when witnesses who were under protection were called was not a threat to these witnesses as the legal representatives were bound by the Code of Professional Conduct for Counsel⁴⁵ not to reveal the identity of protected witnesses, and this would prevent them from doing so to their clients. The Chamber were not persuaded by the defence submissions that allowing victims' legal representatives to question their witnesses would create unfairness because the witness would potentially face multiple 'accusers'. The Chamber ruled that the personal interests test was enough to filter questions and the putting of questions by victims' legal representatives, rejecting the defence submissions that the personal interests test should be altered for these purposes and legal representatives only allowed to question defence witnesses where their client had a direct interest in the evidence that the witness was giving.

III Specific issues and aspects of victim participation

A Victim participation at the investigation stage

One of the most controversial aspects of victim participation has been the approach of several chambers in allowing victims to participate at the investigation stage of proceedings. While the ICC process is not an inquisitorial or civil law process, there is a greater role for the pre-trial chambers at the investigation stage than there would normally be in a common law court. Where the Prosecutor has exercised the '*proprio motu*' [of one's own motion] power to initiate an investigation, article 15(3) of the *Rome Statute*, for example, requires the Prosecutor, once he or she has concluded that there is a reasonable basis to proceed with an investigation, to submit a request to the Pre-Trial Chamber for authorisation of an investigation. This provision specifically authorises victims to 'make representations'. However, in investigations not initiated under the *proprio motu* power there

⁴⁰ *Prosecutor v Lubanga (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)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 July 2009).

⁴¹ *Prosecutor v Lubanga (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')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 8 December 2009).

⁴² *Prosecutor v Lubanga (Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 16 September 2009).

⁴³ A neutral and non-leading style of questioning had been stipulated by the Trial Chamber in an earlier decision (of 16 January 2009, referred to in the decision at *ibid*) directing the parties, but not victims on the manner of questioning.

⁴⁴ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Modalities of Victim Participation at Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/07, 20 January 2010).

⁴⁵ International Criminal Court, *Code of Professional Conduct for Counsel*, Doc No ICC-ASP/4/Res.1 (adopted 2 December 2005) art 8(4).

is no specific provision authorising victim participation or representations (save for specific instances such as that laid out in rule 59 of the *ICC Rules*). Pre-Trial Chamber I was the first to make a determination on this issue,⁴⁶ ruling on 16 January 2006, as briefly mentioned above, that victims could participate at the investigation stage.⁴⁷ Pre-Trial Chamber I noted that victim participation did not affect the impartiality or fairness of an investigation and used a teleological analysis (*inter alia*) to interpret article 68(3) to this end.

It is worth noting that the argument surrounding victim participation at this stage is somewhat moot given later Appeals Chamber decisions overruling victim participation in different chambers.⁴⁸ However, it is not outside the realm of possibility that this issue may arise again, given that strictly speaking, the relevant Appeals Chamber decisions only have impact upon the parties involved in the appellate decision and only apply to the situation or case in relation to which they were made.⁴⁹ It could be argued that any impact on procedural fairness and the rights of the accused is mitigated by the fact that there is no accused at this phase, given that no arrest warrant or summons have been issued. Against that is the view that the Prosecutor's investigation is tainted by victim participation at this stage, which will impact on the as yet unidentified accused. It is argued by some that the Prosecutor may be unduly pressured by victims, leading him to conclude his investigation early,⁵⁰ to misconstrue the evidence and to breach his statutory duty of impartiality⁵¹ (and more specifically, to leave unfulfilled his duty to investigate exonerating circumstances), leading to an unbalanced and, therefore, unfair prosecution.

On balance however, it does not appear that this aspect would have great potential to impact upon the rights of the accused. The chambers that have ruled in favour of victim participation at the investigation stage have indicated an intention to restrict and heavily supervise that participation.⁵² Zappalà advocates that victim participation is perhaps best dealt with at the investigation stage by a coherent system of communication with the OTP,⁵³ mandated by the *ICC Rules* and/or *Rome Statute*. However, this would seem to be even more likely to impact on the impartiality of the Prosecutor as it would, presumably,

⁴⁶ *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)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-101, 17 January 2006).

⁴⁷ 'Investigation stage' or 'investigation phase' here meaning before an arrest warrant or summons is issued.

⁴⁸ See, eg, *Appeals Chamber Investigation Phase Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-556, 19 December 2008).

⁴⁹ Art 21(2) says that the ICC may apply its own case law, but is not bound to. Practice has varied, with many chambers following previous decisions of other chambers, but in wildly varying fashion, with some chambers not distinguishing between or attributing any hierarchy to the jurisprudence of the Trial Chamber and the Appeals Chamber (see Gilbert Bitti, 'Article 21 of the *Statute of the International Criminal Court* and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 285, 292). Indeed, in the *Appeals Chamber Investigation Phase Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-556, 19 December 2008) [57], the Chamber seems to suggest that their decision may not be binding, pointing out that in the absence of specific facts, it was not in a position to advise the Pre-Trial Chamber on how to deal with future applications for participation in judicial proceedings at the investigation stage and saying that it is for the Pre-Trial Chamber to determine how best to rule upon applications for participation.

⁵⁰ Jérôme de Hemptinne and Francesco Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings' (2006) 4 *Journal of International Criminal Justice* 342.

⁵¹ *Rome Statute* art 54; *ICC Rules* r 5.

⁵² Hemptinne and Rindi, above n 50, 346.

⁵³ Salvatore Zappalà, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 153.

occur largely without judicial supervision. The benefit of allowing victim participation at the investigation phase is that it is regulated and supervised by a Pre-Trial Chamber and any undue pressure being exerted by victims on the Prosecutor would be visible, and the accused would have an immediate forum to complain of it in.

However, although there are potential advantages for procedural fairness, this aspect is also tied to the issue of delay, which is dealt with in more detail below and which is a distinct disadvantage in terms of procedural fairness. There is a risk of delay because the crimes at the investigative stages are relatively undefined, and, thus, the number of potential victims is far greater than it would be once an accused is charged with specific crimes. In this regard however, the lack of an accused does mitigate any unfairness — there is no accused to be subjected to the delay.

B ‘Modalities’ of participation

The term ‘modalities’ has been used by the Court to describe the method and logistics of victim participation.⁵⁴ Here the focus will be on two areas — victims leading evidence and victims’ legal representatives questioning witnesses.

1 Victims leading evidence

Two decisions have affirmed the right of victims to lead evidence.⁵⁵ What emerges from these decisions is that this right is by no means unfettered and its exercise will very much occur under controlled circumstances, with victims in effect requiring an invitation from the Chamber to lead any evidence. As mentioned above, the Appeals Chamber (affirming the approach of the Trial Chamber before it) has indicated that to lead evidence, victims (via their legal representatives), must make an application to the Chamber for it to exercise the authority granted to it under article 69(3) of the *Rome Statute*, which reads in pertinent part that ‘[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth’.⁵⁶ As with most aspects of victim participation, there are no specific provisions relating to victims leading evidence⁵⁷ and it has been opposed by Prosecutor and defence teams.

Potential impact on procedural fairness here is acute: there are no disclosure obligations imposed upon victims by the *Rome Statute* or *ICC Rules* (as opposed to the extensive disclosure obligations of the Prosecution and defence under, for example, Section II of the Rules) and allowing victims to lead evidence casts them as a second prosecutor, potentially to the detriment of the principle of equality of arms.

The *18 January 2008 Trial Chamber I Decision* (affirmed by the *11 July 2008 Appeals Chamber Decision*), appears, on its face, to deal with the disclosure issue appropriately in light of the concerns mentioned above. The Chamber there made it clear that a disclosure regime will be ordered when the Chamber requests evidence from victims under

⁵⁴ See, eg, *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [101]–[122].

⁵⁵ *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008); *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008).

⁵⁶ *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008).

⁵⁷ Schabas, above n 2, 832.

article 69(3). However, although it would seem unlikely — given the fundamental nature of disclosure and the approach of other tribunals⁵⁸ — that another Chamber would not take the same approach, this decision is not necessarily binding on other chambers facing the same issue.⁵⁹ Disclosure is also arguably an issue of such significance that it should be enshrined in the Statute or Rules whenever it is required. Judge Kirsch in his dissent to the Appeals Chamber decision of 11 July 2008 in fact uses the absence of disclosure obligations on victims as an indicator that their participation was never envisaged to include leading evidence.⁶⁰ Finally, from a logistical point of view, it would seem that allowing victims to lead evidence has the potential to significantly delay proceedings if the Trial Chamber's method based on article 69(3) were in operation. This is particularly so as, presumably, once an application was made by victims to lead evidence, the trial would have to be adjourned after the application was granted so that the victims could comply with disclosure obligations ordered by the Chamber. In order to uphold the accused's right to adequate time and facilities⁶¹, this adjournment would potentially need to be of some length.

The potential impact on equality of arms is not as easily addressed. Judge Kirsch's dissenting judgment propounds the view that the accused must face only one Prosecutor. Clearly, this is eroded to some extent when victims may lead evidence, whether or not they can be classified as 'second prosecutors'. Judge Pikis also gave a dissenting judgment expressing similar sentiments, stating that: '[t]he Statute does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused'.⁶² Defence teams have limited resources and face difficulties responding to the Prosecutor's case as it is.⁶³ For them to have to face what could effectively be a second prosecutor, and to have to do so with possibly less effective disclosure of the evidence being put by the second prosecutor, would almost certainly be a further strain on their limited resources.⁶⁴

It seems that the only comfort that defence lawyers and accused can take from this situation is that the decisions on victims leading evidence have tended to indicate that the chambers should limit and heavily supervise such participation. Should a truly unbalanced situation arise where the accused and his or her defence team would be overwhelmed by additional evidence submitted by victims, hopefully the Chamber would limit participation vigorously. It would be unsurprising, though, if an accused saw this as cold comfort, given

⁵⁸ See Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22(3) *Leiden Journal of International Law* 485, 495, citing ICTY jurisprudence.

⁵⁹ See above n 49.

⁶⁰ *Prosecutor v Lubanga (Judgment on the appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008: Partly Dissenting Opinion of Judge Philippe Kirsch)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 23 July 2008) [15]; Friman, above n 58, 495.

⁶¹ *Rome Statute* art 67(1)(b).

⁶² *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [6] (Judge Pikis).

⁶³ See International Bar Association's Human Rights Institute, 'Balancing Rights: The International Criminal Court at a Procedural Crossroads' (May 2008) <http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx>.

⁶⁴ This aspect also potentially prejudices the accused simply by having an overwhelming case run in the courtroom against them (by virtue of the multiple accusers, the proceedings become one-sided and it is more difficult for a judge to make an impartial adjudication of the facts). This is discussed in more detail under the heading 'Pervasive victim-centric culture' below.

that it rests entirely on the exercise of judicial discretion.⁶⁵ This comfort is even more limited when one considers that many hold the view that the ICC's jurisprudence on victim participation thus far displays a definite victim-centric approach.⁶⁶ Friman, for example, has highlighted this, commenting that:⁶⁷

One discernible feature of many of the decisions is that the conclusions tend ultimately to be based upon opinions rather than on an interpretation of the law – opinions that go towards the rationales of the participatory right and how best to meet these objectives. In part, this may go back to the understanding of the main purpose behind the entire enterprise of international criminal prosecutions. Of course, combating impunity by prosecuting the atrocities is a purpose in itself, and one clearly laid down in the Preamble of the ICC Statute, but, at least for some, redress for the victims, and thereby a foundation for a more lasting peace, may be an even more important objective. With the latter approach, which is also reflected in the Preamble, the active involvement of the victims comes to the forefront.⁶⁸

2 Questioning of witnesses

Helpfully, the *ICC Rules* are silent on questioning of witnesses. Rule 91(3)(a) provides that:

When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

⁶⁵ See the comments of the Appeals Chamber in its decision in *Prosecutor v 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)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 13 June 2007), where it affirmed that victims leading evidence is the status quo, rejecting the defence's arguments that they were facing two prosecutors and stating that it was for the relevant Chamber to ensure the manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.

⁶⁶ See, eg, *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)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 17 January 2006); *Confirmation Hearing Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 22 September 2006). Although cf *Prosecutor v Lubanga (Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 17 August 2006) where victims were refused participation in a status conference.

⁶⁷ Other concerns in this regard may arise when one considers the composition of the judiciary at the ICC. While, of course, there are many highly qualified jurists sitting at the ICC, some criticisms have been leveled at judges who are less qualified and have not practised as members of a judiciary before. See, eg, the comment of the Convenor of the Coalition for the International Criminal Court, William Pace: "To elect a person to the ICC who doesn't even have a law degree for example, is a most unfortunate precedent to have set" in Afua Hirsch, "System for appointing judges "undermining international courts"", *The Guardian* (online), 8 September 2010 <<http://www.guardian.co.uk/law/2010/sep/08/law-international-court-justice-legal>>. Further, because of the method of election of judges (and the very fact that their appointment occurs via election) and the qualifications requirements (see *Rome Statute* art 36(3)), it is possible that judges may not have had any experience in criminal procedure or in criminal matters before (eg, if they are a 'List B' judge with the qualifications provided for under art 36(3)(b)(ii)).

⁶⁸ Friman, above n 58, 499–500.

Rule 91(3)(b) goes on to stipulate that the relevant Chamber must then issue a ruling on such a request taking into account several imperatives (including the rights of the accused).

As the procedure and possibility for victims' legal representatives questioning witnesses is clear in the *Rome Statute*, jurisprudence has focused on the nuances of this questioning. The decisions of 16 September 2009 and 20 January 2010 (referred to above in Part II) illustrate this. The issue of leading questions was resolved in favour of the accused and, in any event, would seem to present a lesser danger to the accused. The issue of defence witnesses being questioned by 'multiple accusers', however, bears most of the same features as those discussed above relating to victims leading evidence, and was not resolved in favour of the accused. Although, again, victim questioning is limited by the fact that the Chamber has the authority to refuse legal representatives this right (and hopefully they would do so where a decision to the contrary would render the proceedings unbalanced), the practices of the Court have not evidenced a strong stance being taken on this.⁶⁹ This leads to the very real possibility that the procedural balance is affected to the detriment of the accused.⁷⁰

In the *18 January 2008 Trial Chamber I Decision* on victim participation generally, the Chamber stressed that they would not limit the scope of victims' questions to witnesses and would 'allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration'.⁷¹ This is a broad construction and does not evidence a limiting approach. In submissions made prior to that decision, the Prosecutor had argued that victims' questions, when allowed, should be limited to issues related to reparations. The Chamber also rejected this approach.⁷² The experience of the ECCC provides a stark example of how a broad approach to victims putting questions can go wrong, not just from a procedural fairness perspective, but generally. In the trial of Duch at the ECCC,⁷³ civil party lawyers were infrequently restricted in this regard and this typically resulted in the same questions being put to a witness by each of the legal representatives,⁷⁴ which led to great frustration and delay.⁷⁵

⁶⁹ The Court has, however, drawn the line at anonymous victims questioning witnesses in confirmation hearings: see *Confirmation Hearing Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 22 September 2006).

⁷⁰ Jarinde Temminck Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser Press, 2009).

⁷¹ *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [108].

⁷² Ibid. Other chambers have also upheld the right of victims to question witnesses on issues relative to guilt or innocence. See, eg, *Prosecutor v Katanga (Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 13 May 2008) [30]–[31], where the Chamber said, in affirming this right, that the guilt or innocence of the accused 'affect[s] the very core interests of those granted the procedural status of victim'.

⁷³ *Prosecutor v Kaing* (Extraordinary Chambers in the Courts of Cambodia, Case No 001/18-07-2007/ECCC/TC).

⁷⁴ The number of civil party lawyers present in court varied, but typically would number six to eight (see Extraordinary Chambers of the Courts of Cambodia, Daily Summaries of Proceedings (Court Record), <<http://www.eccc.gov.kh/en/case/topic/1>>).

⁷⁵ Author's personal observations while working at the ECCC (October 2009 to March 2010); see also Kate Gibson and Daniella Rudy, 'A New Model of International Criminal Procedure? The Progress of the *Duch* Trial at the ECCC' (2009) 7 *Journal of International Criminal Justice* 1005, 1015.

C Overarching issues

1 *The presumption of innocence*⁷⁶

It is perhaps axiomatic to say that admitting a ‘victim’ to legal proceedings where guilt is not yet proven is problematic because the term ‘victim’ presupposes that a crime has occurred.⁷⁷ This may not be a problem where the occurrence of the crime is accepted, but the identity of the perpetrator is disputed, however in all other cases the danger of prejudice is present. Even in a scenario where the identity of the perpetrator only is in question, arguably the acceptance of victims and, therefore, the occurrence of the crime, may still adversely affect the perception of the accused and by extension, their right to a fair trial. There are varying views as to the magnitude of this problem, with some saying that it will merely necessitate judicial caution (‘[j]udges will thus have to be extremely careful to include in their judgment specific reasoning showing that they did not take the factual basis of the crimes for granted’)⁷⁸, and others saying that victims need to be clearly portrayed as *alleged* victims or ‘private accusers’ or that the victim standing rules need to be modified to rectify this problem.⁷⁹

The procedure (such as it is) for admitting victims as participants involves a two-stage process whereby victims are first required to show generally that their personal interests are affected and that they meet the requirements of rule 85 of the *ICC Rules*.⁸⁰ This first step results in the victim being granted ‘procedural status’ as a victim. Victims must then make submissions to the Chamber on the modalities of their participation and, in effect, again satisfy the personal interests test.⁸¹ There has been debate over the correct interpretation of ‘harm’ as it appears in rule 85, with the Appeals Chamber eventually ruling that the harm must be personal to the victim, but need not be direct and may still be personal even if indirect.⁸² Harm in this context is relevant because it is followed by the most problematic aspect of rule 85, defining victims as those who have ‘suffered harm as a result of the commission of any crime within the jurisdiction of the Court’.

⁷⁶ Though it is not discussed here, it has also been pointed out that victim participation has the potential to affect the presumption of innocence enshrined in art 66(3) of the *Rome Statute*, via submissions aimed at shifting the Prosecutor’s burden of proof. In the arguments surrounding the Prosecutor’s obligation to disclose exculpatory evidence, victims made submissions regarding what they alleged to be the duty of the defence to gather its own exculpatory material (see Johnson, above n 13, 492). As this is a specific submission, rather than a symptom of victim participation, it is not covered here.

⁷⁷ Zappalà, above n 53, 146.

⁷⁸ *Ibid* 147.

⁷⁹ Jouet, above n 18, 269.

⁸⁰ See, eg, *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008). This process has been criticised by members of the judiciary in dissenting opinions, see, eg, the dissenting opinion of Judge Blattman in the *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [22]:

As well, the Majority appears to be requiring two applications of victims. First, an application to be recognized by the Trial Chamber as a victim who may generally participate in the proceedings, and a second application to indicate at what specific stage in the proceedings they may participate as victims. This, I believe, places too large a burden on victims.

⁸¹ This process has the potential to cause delay, which is discussed later in this article.

⁸² *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) 3.

The various chambers' assessment of whether victims have suffered harm has been somewhat cursory.⁸³ Similarly, the standard of proof applied to the crime that has allegedly been committed (as a precursor to determining if there has been a victim of that crime) is a lower standard than that of proof beyond reasonable doubt (as required by article 66 for a conviction).⁸⁴ Potentially, this lesser standard could be helpful in addressing the impact of victim participation on the presumption of innocence. A more thorough examination of whether or not harm was suffered (and how) would possibly involve a more thorough examination of the crimes from which that harm was alleged to result. If this were the case, and this examination occurred as a precursor to the actual trial, the accused may not be able to properly defend him or herself⁸⁵ and importantly, the judiciary may be influenced in their view of the accused before the trial has begun (as they would be giving in-depth consideration to the commission of the crime, thereby potentially prejudicing them). More importantly though, the lower the standard of proof of the crime, the 'less guilty' the accused is deemed to be, which may help with potential bias.⁸⁶ Another factor that reduces the impact of victim participation on the presumption of innocence is the fact that the ICC does not try by jury. The judiciary at the ICC are obviously much more able to resist taking into account the acceptance of a victim as a participant in a finding of guilt or innocence.⁸⁷

⁸³ See, eg, *Situation in Democratic Republic of the Congo (Corrigendum à la «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 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, 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 à 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 et a/0241/06 à a/0250/06»)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-423, 31 January 2008) where the Single Judge appears to rely only on an alignment of the dates when the victim alleges crimes were committed with those when the Prosecution alleges they were committed. The overall test that was applied by the Chamber requires a victim's harm to have been shown to be a result of a crime and the level of proof required for the crime is only a 'reasonable ground' for the belief that it was committed; Gioia Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7 *International Criminal Law Review* 531, 538; Chung, above n 3, 519.

⁸⁴ For example, because the identity of the victim is not disclosed — see the discussion below under 'Disclosure'. At the application stage, victims' identities and other information are almost never disclosed: see, eg, *Prosecutor v Lubanga (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/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)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 6 May 2008).

⁸⁵ That is, because the trial is only at the Pre-Trial phase and, therefore, not conducive to a full defence being mounted. Also, as Chung, above n 3, 519 says:

Lubanga's defence team has also posed, for example, the fair question of how a Chamber can render rulings that crimes within the Court's jurisdiction are likely to have been committed, based almost exclusively on first-hand accounts by victims, rather than on evidence presented by the Prosecution and subject to disclosure obligations, without creating an appearance of bias against the defense.

⁸⁶ Unfortunately, the corollary of this is that more victims are likely to be admitted, which has other detrimental effects on the rights of the accused (eg, via delays), although there is some jurisprudence that shows signs of limiting the number of victims to be admitted: see, eg, *Prosecutor v Lubanga (Decision on Indirect Victims)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 8 April 2009), where the Chamber ruled that victims who had suffered *indirect* harm as a result of enlisted child soldiers could not participate and that only victims who had suffered *direct* harm could participate. See also the discussion in Valentina Spiga, 'Indirect Victims' Participation in the *Lubanga* Trial' (2010) 8 *Journal of International Criminal Justice* 183.

⁸⁷ Although, see above n 67.

2 Disclosure

The fundamental right for the accused to have the case and evidence against him or her disclosed is contained in article 67(1)(a) of the *Rome Statute* and in much more detail in Section II of the *ICC Rules*. In the context of victim participation, disclosure issues can arise in many different ways. The focus here will be on the impact of victims who have availed themselves of protective measures or who retain some degree of anonymity. Disclosure of material that victims themselves wish to lead has been discussed earlier in the section on ‘Victims leading evidence’.

Many victims have maintained anonymity in their participation at the ICC. As can be seen from earlier discussion in this article, despite debate over to what degree this is true, participating victims are, it seems, functioning at times as quasi or second prosecutors. As such, it is arguably a breach of the accused right to a fair trial if this ‘accuser’s’ identity were unknown to the accused.⁸⁸ Certainly, there is some evidence that the Court does not intend this to be the case. As mentioned previously, the Court has ruled with respect to confirmation hearings that anonymous victims could participate, but could not lead evidence or question witnesses because of their anonymity.⁸⁹ Nonetheless, the right of victims to maintain anonymity, even from the defence, has been affirmed on many occasions and, in the aforementioned decision regarding participation at a confirmation hearing, anonymous victims *were* permitted to make opening and closing statements. Arguably, the ability to make an opening and closing statement, while perhaps not as damaging as adducing evidence while anonymous, is still very detrimental to the rights of the accused. Other aspects remain also — it seems that the Court would be unlikely to order that a victim could lead evidence or question a witness while anonymous, but they may still be able to present ‘views and concerns’, in line with the decision allowing opening and closing statements.

Also concerning is the practice of redacting applications to participate that have been filed by victims. Rule 89(1) of the *ICC Rules* requires the relevant Chamber to provide a copy of an application to the Prosecutor and the defence so that they may respond to it. There are several decisions where the ICC has ordered only redacted versions of these applications be provided to the defence.⁹⁰ It is difficult to see how the defence can be expected to meaningfully respond to such an application when the identity of the victim has been redacted. The Court has attempted to give effect to the right of reply under rule 89(1), stating that redactions must only be those that are strictly necessary in the light of the applicant’s security situation and must allow for a meaningful exercise for the parties right to reply under rule 89(1),⁹¹ but again, if a victim’s identity and other potentially crucial

⁸⁸ Particularly the rights encompassed by art 67(1)(b) of the *Rome Statute*, and potentially those contained in art 67(1)(e).

⁸⁹ *Confirmation Hearing Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 22 September 2006).

⁹⁰ See, eg, *Prosecutor v Kony (Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 1 February 2007).

⁹¹ *Prosecutor v Lubanga (Decision Establishing a Deadline for the Prosecution and the Defence to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 18 May 2006).

information — such as what region they are from (which would enable some comparison of what the victim alleges against alleged crimes) — are redacted, it is difficult to see how this assists.

The Court has repeatedly stated that it does not consider the redaction of victims' information in applications to be a breach of the rights of the accused or fair trial rights and that it entails no prejudice.⁹² The Court has also stated that the application process is distinct from that where guilt or innocence is in question (and that, therefore, the defence has no interest in it).⁹³ This point of view ignores completely the interest that the accused has in limiting the number of victim participants in the trial, for a myriad of reasons including preserving equality of arms, avoiding delay and ruling out the need to respond to additional evidence and additional questioning. Just as victims have an interest in the guilt or innocence of the accused (as opposed to the restrictive view of their participation, which would be limited to reparations-related issues), so the defence and the accused have a legitimate interest in limiting victim participation. By not being able to effectively participate in the process whereby victims are granted 'procedural status', the rights of the accused are prejudiced.

3 *Legal certainty*

Victim participation under the *ICC Rules* and *Rome Statute*, while somewhat circumscribed, is largely left to the chambers to decide. This has created great uncertainty,⁹⁴ evidenced by the chambers actually taking different approaches to issues⁹⁵ and rendering decisions that do not spell out specific procedural rights.⁹⁶ While it is possible that this uncertainty will be addressed as the Court establishes itself and more cases come before it, the current state of affairs has been labelled unsatisfactory by many commentators. Speaking of Trial Chamber I's directions regarding victims giving evidence before the Chamber, the International Bar Association, who have been heavily involved in monitoring the operation of the ICC, have stated that:

This in our view does not provide sufficient certainty for the defence. It is unclear what rights if any the defendant has to question victims who choose to present their views and concerns following their testimony. It is also unclear whether the defence will be allowed to ask additional questions in the event that some aspects of the victims' views and concerns are potentially exculpatory. In sum, an unfair burden is placed on the defence to adjust its case strategy during the trial.⁹⁷

⁹² See, eg, *Prosecutor v Kony (Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 1 February 2007) [21]–[22].

⁹³ *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)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-110, 3 December 2007).

⁹⁴ Haslam, above n 2, 323; Zappalà, above n 53, 139.

⁹⁵ Mariana Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2010) 16 *ILSA Journal of International and Comparative Law* 497, 504.

⁹⁶ Hemptinne and Rindi, above n 50, 347.

⁹⁷ International Bar Association's Human Rights Institute, 'Sustaining the International Criminal Court: Issues for Consideration at the 2010 Review Conference and Beyond' (November 2009), 41 <http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx>.

Similarly, Deputy Prosecutor Fatou Bensouda said at a conference of international prosecutors that '[r]egarding victims participation, the challenge for the Court was to address all issues in a consistent manner'.⁹⁸ This view has been formalised in submissions before the Chamber: 'the challenge to the Court at this early stage is to apply this innovative framework in each case in a consistent manner, avoiding such varying criteria so as to create a general uncertainty for the victims and other participants'.⁹⁹

While, on its own, the potential breach of the principle of legal certainty embodied in the vagaries of victim participation before the ICC may not be enough to cause real detriment or procedural unfairness, its 'knock on' effects, such as delay, do so. It must also have some impact on the right to adequate time and facilities,¹⁰⁰ by virtue of the fact that as the jurisprudence develops and rulings are made on victim participation, the defence must constantly adapt its arguments and strategy.

4 Delay

Delay caused or relating to victim participation is pervasive and presents a real risk of breach of the right of the accused to be tried without undue delay.¹⁰¹ In this article, several instances have already been identified. Delay begins before a victim's application even reaches the relevant Chamber, with the processing of applications prior to submission to the Chamber being described as 'glacial' and taking up to two years.¹⁰² Once proceedings reach the relevant Chamber, there are multiple opportunities for delay, beginning with the current process that requires victims to first obtain 'procedural status', followed by potentially numerous applications for participation in specific instances, with each instance requiring proof of 'personal interests'.¹⁰³ Other areas of delay are the very fact of having multiple counsel putting forward views and participating by leading evidence and questioning witnesses; the number of accused; the potential for victims and their legal representatives to misunderstand the Prosecutor's strategy (this is possible as they do not have access to OTP materials);¹⁰⁴ victims and their legal representatives disagreeing amongst themselves;¹⁰⁵ the time taken for the Chamber to deal with protective measures; and the flourishing 'side litigation' regarding the application process, to name a few.

The issue of delay is a particularly important one, for it is difficult to see how it could ever be eradicated completely. Certainly there are efforts to curtail it, such as the provision for the relevant Chamber to order common legal representation, but this would only

⁹⁸ Pena, above n 95, 510 n 51.

⁹⁹ See *Prosecutor v Lubanga (Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation)* (International Criminal Court, Case No ICC-01/04-01/06, Trial Chamber I, 28 January 2008) 2.

¹⁰⁰ See *Rome Statute* art 67(1)(b).

¹⁰¹ See *Rome Statute* art 67(1)(c).

¹⁰² Chung, above n 3, 460.

¹⁰³ See, eg, *11 July 2008 Appeals Chamber Decision* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008). As noted at above n 78, this process was criticised in Judge Blattman's dissenting decision. See also James P Bair who, in critiquing the ICC model (despite the title of his article), points out that this process also 'may prevent victims from feeling a sense of continuity and connection to the proceedings': James P Bair, 'From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia' (2009) 31 *University of Hawai'i Law Review* 507, 514.

¹⁰⁴ Jouet, above n 18, 273.

¹⁰⁵ Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Journal of International Law* 777, 806. This has also been problematic and caused delays at the ECCC (see Gibson and Rudy, above n 75, 1112).

reduce, and not remove entirely, the issue of delay.¹⁰⁶ This means that the discussion about delay and its impact is one going to the very heart of victim participation and whether it is tenable given its impact on procedural fairness. Because the discussion regarding whether or not victim participation causes delay very quickly reaches an impasse (it is difficult to argue that it does not),¹⁰⁷ it then moves to broader discussion about whether delay can be or is justifiable. David Boyle, a former legal practitioner at the ECCC, points out that delay is par for the course in such proceedings, commenting that '[i]t would appear illogical, to say the least, to exclude the victims of the most serious mass crimes simply because there are too many of them'.¹⁰⁸ Alex Whiting has written that delays and long trials in the prosecution of mass atrocities can actually be beneficial¹⁰⁹ and that several factors inherent to war crimes trials and crimes against humanity will mean that delays are always present and that this must simply be accepted.

It is important to note in this discussion that victim participation has been given an extremely prominent place in the *Rome Statute* and in the structure of the Court. It seems clear that for some, perhaps even many, redress for victims is just as important a function of the Court as the fight against impunity and guilty verdicts.¹¹⁰ It is unlikely that victim participation, as one of the key features of the ICC, would ever be removed. Further, because of the prominence of victim participation in the Statute, arguably to say that victim participation causes delay and, therefore, is a breach of article 67(1)(c) is tantamount to saying (as Pre-Trial Chamber I has said in a different context) that 'the procedural framework provided for in the Statute and the Rules is considered an infringement *per se* of the presumption of innocence of [the accused]',¹¹¹ reasoning which has been rejected by the Court.¹¹² The best solution that can be hoped for is that the chambers will become more expeditious in addressing issues related to victim participation and that proceedings generally will become more efficient.¹¹³

¹⁰⁶ An extension of this which may be considered is the model recently adopted at the ECCC as a result of potentially thousands of civil parties participating in its next trial whereby two 'Civil Party Lead Co-Lawyers' have been appointed to speak as one voice in court for all civil parties. This drastic measure was considered necessary to address the potential delay caused by having so many civil parties: see *Internal Rules* rule 12 *ter*.

¹⁰⁷ Although, note the view put forward by Victoria Schwartz where it is said that victim participation *does not* cause delay: Victoria Schwartz, 'The Victim's Rights Amendment' (2005) 42 *Harvard Journal on Legislation* 525, 535. This comment, however, is made in the context of domestic criminal litigation.

¹⁰⁸ David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation?' (2006) 4 *Journal of International Criminal Justice* 307, 309. This comment was made in the context of examining delay and the participation of civil parties at the ECCC, but is applicable here.

¹⁰⁹ Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50 *Harvard International Law Journal* 323, 335.

¹¹⁰ Friman, above n 58, 499–500.

¹¹¹ *Prosecutor v Lubanga (Decision on Second Defence Motion for Leave to Appeal)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 28 September 2006) 10 (emphasis in original).

¹¹² *Ibid.*

¹¹³ *18 January 2008 Trial Chamber I Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) is possibly an example of an attempt at streamlining, as it attempted to outline victim participation and its modalities for the upcoming trial of Thomas Lubanga in one omnibus decision (as opposed to the piecemeal determination of victims issues throughout the trial).

5 *Primacy of rights*

There is debate over the hierarchy of rights of victims and accused at the ICC.¹¹⁴ This debate is somewhat ancillary to the topic of this article as it informs and shapes the outcomes of the discussion regarding the impact of victim participation on procedural fairness, rather than being part of the content of the discussion. Some commentators are unequivocal that the rights of the accused trump the rights of victims,¹¹⁵ and, certainly, if this were an incontrovertible fact then many of the issues discussed in this article could be resolved (if it were absolute that the rights of the accused *always* prevailed, then the presence of delay resulting from victim participation would be resolved by removing victim participation, for example). Some of the wording of the *Rome Statute* arguably supports this hierarchy of rights, such as article 64(2), which provides that ‘the Trial Chamber shall 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’ (emphasis added; *full respect* is almost certainly a higher standard than *due regard*). Other commentators, and possibly Trial Chamber I, put forward the view that a better characterisation of rights under the Statute and *ICC Rules* is that they entail a ‘balancing of rights’, rather than a primacy of rights.¹¹⁶ It is not yet certain which of these characterisations will apply, and this is likely to be a continuing issue. A continued approach of ‘balancing’ rights leaves unending potential for the rights of the accused to be impacted as it leaves much to the discretion of the ICC judiciary. On the other hand, an absolute view that the rights of the accused having primacy may leave victim participation in its entirety untenable.

6 *Pervasive victim-centric culture*

A former international criminal law practitioner has commented that ‘[r]espect for the rights of the defendants requires a neutral, dispassionate setting in which relatively neutral, dispassionate actors go about their business’.¹¹⁷ It seems clear that the ICC at times considers the interests of victims paramount. The danger that the comment above refers to is that members of the judiciary will be overwhelmed by, in an emotional sense, the presence of those who have been ‘brutalized, disfigured, and dispossessed’,¹¹⁸ thereby affecting their impartiality and the rights of the accused. At the ICC, victims, usually because of protective measures and presumably logistics, do not sit in the body of the Court as the accused does. However, the lawyers who represent them do and are often, for linguistic and pragmatic reasons, from the country that the victims are from.¹¹⁹ Therefore, these legal representatives, as people also with strong connections to the atrocities that are the subject matter of the proceedings, cannot be characterised as completely dispassionate actors and there is some danger that they will behave in a way that may influence judges in

¹¹⁴ International Bar Association’s Human Rights Institute, above n 97; Zappalà, above n 53, 149.

¹¹⁵ Zappalà, above n 53; William Schabas, ‘Article 67: Rights of the Accused’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 1999) 845, 867; Cristian DeFrancia, ‘Due Process in International Criminal Courts: Why Procedure Matters’ (2001) 87 *Virginia Law Review* 1381, 1437.

¹¹⁶ International Bar Association’s Human Rights Institute, above n 63, 25–7.

¹¹⁷ Gregory S Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’ (2007) 45 *Columbia Journal of Transnational Law* 635, 698.

¹¹⁸ *Ibid.*

¹¹⁹ This is not exclusively the case. For example, Luc Walley, a Belgian lawyer, has represented 22 of the 103 victims participating in the *Lubanga* case: Wairagala Wakabi, *Q&A with Luc Walley, Lawyer for Victims in Lubanga’s Trial* (13 January 2010) The *Lubanga Trial* at the International Criminal Court <<http://www.lubangatrial.org/category/commentary/>>.

the manner described above. It also remains possible that victims will appear in the Court in person as witnesses.

Ultimately, this is a difficult problem to assess and it would only be if a judge were behaving in such an obviously victim-biased way that the effects of a victim-centric culture would come to the fore. What is more concerning is the potentially imperceptible and insidious impact that the strong focus on victims, their presence in the courtroom via their legal representatives and the horrors that they have suffered will have on the judiciary. Of some comfort perhaps, in this regard, is the high level of scrutiny that the ICC, as the first permanent international criminal court, is subject to. However, the danger remains that victim participation exposes the Court to public pressure and could substitute the Court's objective approach for the victim's subjective approach.¹²⁰

IV Conclusion

As this article has hopefully shown, there are some significant issues arising out of the victim participation regime at the ICC and it can have a very real impact on procedural fairness. What is most concerning is that the most serious of these problems are those where it is not easy to see a solution. Chief among these is delay, as well as the potential impact of a pervasive victim-centric culture and the impact on equality of arms. In other areas, it seems that victim participation may be unduly criticised. One reason that victim participation is possibly over-criticised (or at least easily criticised) is that it falls neatly into procedural fairness arguments (and rightly so in many regards), which are often a key area of focus for defence teams, if not the only area they focus on, in light of often overwhelming and difficult to refute substantive evidence. As such, while this article takes the view that there are real concerns for the rights of the accused resulting from victim participation's impact on procedural fairness, often there are also much lesser concerns being argued for, which creates a false perception of victim participation impacting on procedural fairness in its every detail. It would be more useful for the larger issues to be the focus.

Overall, it is difficult to come to a definitive conclusion about victim participation. True it is that it impacts upon procedural fairness, but it is also one of the core features of the ICC. The preamble of the *Rome Statute* reminds us that 'during this century millions of children, women and men have been *victims* of unimaginable atrocities that deeply shock the conscience of humanity';¹²¹ the victim participation regime is there to serve those victims. It is surely their need that demanded a regime like this and this cannot be discounted in assessing whether the seemingly intractable problems that victim participation presents for procedural fairness (such as delay) should be overridden by the needs of victims to participate in ICC proceedings. What makes this hard to assess is that it is difficult to tell at this stage whether victim participation is as useful for victims as it should be. If it is, and it brings healing, peace and the best kind of restorative justice, then perhaps it is worth a delayed trial, if it is not, then a serious overhaul of victim participation will need to be considered. This, perhaps, will not become evident for some time yet.

¹²⁰ Schwartz, above n 107, 537.

¹²¹ *Rome Statute* Preamble para 2 (emphasis added).

