

April 2009

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Brianne N. McGonigle

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BRIDGING THE DIVIDES IN INTERNATIONAL CRIMINAL PROCEEDINGS: AN EXAMINATION INTO THE VICTIM PARTICIPATION ENDEAVOR OF THE INTERNATIONAL CRIMINAL COURT

*Brianne N. McGonigle**

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The position of victims in international criminal proceedings has evolved considerably since the creation of the *ad hoc* tribunals in the early 1990s. No longer relegated to the role of witnesses, victims before the International Criminal Court (ICC) may actively participate in Court proceedings provided that their participation does not infringe upon the rights of the accused. This Article seeks to examine how the victim participation endeavor is transforming international criminal procedures at the ICC and what effect this transformation has on the rights and roles of parties and participants. Accordingly, it explores two great divides facing the Court: one between traditional and modern criminal justice theories and another between adversarial and inquisitorial procedural traditions, and then examines the current status of victim participation both in theory and in practice during the pre-trial and trial stage. Subsequently, the Article analyzes how the Court has attempted to reconcile these two

divides by highlighting the benefits of victim participation and the number of challenges it poses for the Court. It shows that the victim participation endeavor has transformed court proceedings and created new tensions between the parties and participants. The Article draws the conclusion that the Court needs to clarify the goals of trial generally as well as the goals and purpose of victim participation specifically because the primary and ancillary goals of a Court should to a large extent determine the procedural framework applied. Finally, the Article concludes by proposing modest recommendations for how the Court can better deal with victim concerns in a meaningful and substantive way.

[I]n Anglo-American criminal procedure . . . the victim has few ancillary rights because important stages of common-law prosecution are structured as a contest of two sides, so that introduction of a third actor into bipolar litigation can adversely affect the incentives required to sustain it. It is thus precisely because Continental criminal procedure is not a bipolar contest . . . that the voice of the victim can easily be accommodated. His action does not obstruct the smooth progression of criminal prosecution¹

[P]unishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.²

I. INTRODUCTION

Throughout the past fifteen years, international criminal tribunals have had the problematic task of deciding what procedural rules they should apply. In making this decision they have attempted to reconcile two divides: (1) one between classical retributive and modern restorative goals of criminal justice and (2) another between adversarial and inquisitorial procedural traditions. This Article will examine the International Criminal Court's (hereinafter ICC or the Court) attempts at reconciling these great divides with regards to its victim participation scheme. It will explore how

1. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 201 (Yale University Press 1986).

2. Fiona McKay, Victims Rights Working Group, Address at the Rome Conference, Redress on Behalf of the Victims Rights Working Group (June 16, 1998), available at <http://www.un.org/icc/speeches/616mck.htm>.

the victim participation endeavor is transforming international criminal procedures at the ICC and what effect this transformation has on the rights and roles of parties and participants.

Conventionally, the focus of international criminal courts has centered on the accused individual rather than, and often times at the expense of, the large number of victims.³ This focus on the accused is due, in part, to the fact that the primary role and function of international criminal tribunals is to investigate and prosecute individuals for the most serious crimes of concern to the international community, namely genocide, war crimes and crimes against humanity, in fair and effective proceedings.⁴ Therefore, traditional criminal justice concerns have, up until recently, usually subverted victims' interests. However, the focus is beginning to change. In recognition of the plight of victims, the Preamble of the Rome Statute of the ICC provides that States Parties are "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."⁵ In furtherance of this recognition the ICC, in a significant departure from previous tribunal practice, became the first international criminal tribunal to endorse active victim participation.⁶ This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice.⁷

3. See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203, 203-79 (2006).

4. Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearing? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 152 (2004); Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21, 21 (2000).

5. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, pmbl. ¶ 2, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

6. At the international level, prior to the creation of the ICC, victims could participate only as witnesses. Many NGOs viewed the limited participation of victims as a negative aspect of previous tribunal practice because the tribunals failed to fully recognize the contribution victims could make in criminal proceedings and their right to claim reparations. See ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (University of Pennsylvania Press 2005).

7. The phrase "restorative justice" is used in a variety of contexts at both the national and international level. This Article refers to restorative justice within the international criminal context. Namely, restorative justice calls on international courts to focus attention on the interests of victims rather than strictly on the prosecution and punishment of the accused. Similarly, reparative justice calls on international courts to offer restitution, redress, compensation, and involvement in the process. This Article will use the term "restorative justice" to refer to all restorative, reparative, and victim-centered initiatives. See Elmar Weitekamp, *Reparative Justice: Towards a Victim Oriented System*, 1 EUR. J. CRIM. POL'Y RES. 70-93 (1993).

The other great divide facing the Court has to do with what procedural model(s) the Court applies. Generally, international courts have employed either the largely adversarial, Anglo-American legal traditions or the largely inquisitorial, continental traditions of criminal procedure.⁸ These two judicial traditions differ in a number of respects—most notably in their focus on the roles and rights provided for the prosecutors, judges, defense, and victims. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) became the prototypes for creating international tribunals forged from both the adversarial and inquisitorial traditions.⁹ Their struggles shed light on the difficulties of “melding civil law and common law rules and international human rights standards into a truly ‘international’ body of procedural and substantive criminal law.”¹⁰ The obvious differences that exist between these two legal systems have greatly affected the development of the rules of procedure of international courts.¹¹ The stark differences between the two theories of criminal procedure are no less apparent at the ICC, which provides a mix of both theories of legal

8. As an introductory note, by using the term “Anglo-American” or “common law” this Article does not mean to imply that the criminal procedures found in Great Britain and the United States are the same. Clearly, there is a great deal of variation between the two countries and within their respective jurisdictions. Likewise, European civil law jurisdictions, often referred to as continental systems, differ remarkably from one another. Additionally, this Article uses the terms “adversarial” and “inquisitorial” in a general manner to describe the common law and civil law divide. In other words, along the lines of a party-driven approach found in adversarial systems (prosecution and defense) versus a judge-dominated approach found in inquisitorial systems (state agency responsible for finding the truth). See Kai Ambos, *International Criminal Procedure: “Adversarial,” “Inquisitorial” or Mixed?*, 3 INT’L CRIM. L. REV. 1, 1-5 (2003) (explaining the terms “adversarial” and “inquisitorial” are only used in a general sense to reflect the still existing common law—civil law divide). See also DAMAŠKA, *supra* note 1, at 16-17 (constructing a theory which reflects the notion that continental legal systems employ the traditional judicial apparatus while the British system employs a more coordinate apparatus).

9. U.N. Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; U.N. Security Council, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), adopted Nov. 8, 1994 by the, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. See Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials*, 5 J. INT’L CRIM. JUST. 394, 394-95 (2007) (providing that liberal rules of evidence originate from the inquisitorial system whereas the rules pertaining to investigation and disclosure still largely reflect practice in adversarial systems).

10. Faiza Patel King & Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*, 8 EUR. J. INT’L L. 123, 125 (1997).

11. SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 15 (2003).

adjudication.¹² One of the principal areas where clear tensions have arisen is in the ICC's effort to increase the role of victims in its mixed proceedings in a meaningful and substantive way.

One of the reasons why it is important to examine criminal procedures is because recent research indicates that those involved in criminal justice are "primarily concerned with the procedure by which the outcome was derived and not with the outcome itself."¹³ Researchers refer to this conclusion as procedural justice. Procedural justice ranks as more important than distributive justice when evaluating a system or organization.¹⁴ Further, an important element of procedural justice includes participation. International rules of procedure are open to varying interpretations due to the fact that they base themselves on traditional and modern theories of criminal justice and include a mix of the two major legal traditions.¹⁵ The fundamental differences in the conceptualization and importance of the trial process have significant repercussions for understanding how the Court has and will interpret victim participation in the future.¹⁶

12. See VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDERS GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (VOL. 1) 177 (Transnational Publishers 1995) (explaining that the ICTY employed principles of proceedings mostly from common-law jurisdictions due, in large part, to the fact that the United States submitted by far the most comprehensive set of proposed rules with commentary at the drafting sessions for the ICTY). See also Gallant, *supra* note 4, at 21 (stating that the procedure is also strongly influenced by human rights-based philosophy).

13. Laura Klamming & Ivo Giesen, *Access to Justice: The Quality of the Procedure* 7 (TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, Working Paper No. 002/2008, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091105#PaperDownload (citing E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 767-80 (1988); see also JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (Erlbaum 1975)).

14. *Id.* (citing Lind et al., *supra* note 13; K. Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOC. PSYCHOL. 1493, 1493-1503 (1998); Tom R. Tyler, *What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 103-35 (1988), Jo-Anne Wemmers et al., *What is Procedural Justice: Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures*, 8 SOC. JUST. RES. 329-50 (1995); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press 2006).

15. See Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT'L CRIM. JUST. 402, 405 (2007).

16. Ralph Henham & Grazia Mannozi, *Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis*, 11 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 278, 280 (2003).

After briefly examining the traditional and modern theories of criminal justice which have influenced the Court and discussing the characteristics of adversarial and inquisitorial procedural traditions, this Article will explore the current status of victim participation both in theory and in practice during the pre-trial and trial stage of cases and situations before the court with particular attention on the *Lubanga* case in the situation of the Democratic Republic of the Congo (hereinafter DRC situation).¹⁷ Subsequently, the Article will analyze how the Court has attempted to reconcile these two divides by highlighting the benefits of victim participation and the number of challenges it poses for the Court. It will show that the victim participation endeavor has transformed court proceedings and created new tensions between the parties and participants. The Article will draw the conclusion that the Court needs to clarify the goals of trial generally as well as the goals and purpose of victim participation specifically because the primary and ancillary goals of a Court should, to a large extent, determine the procedural framework applied. Finally, the Article will conclude by proposing modest recommendations for how the Court can better deal with victim concerns in a meaningful and substantive way.

17. In a departure from previous tribunal practice, the ICC divides its work into situations and cases. Situations, which are “generally defined in terms of temporal, territorial and in some cases personal parameters,” are investigated to see whether specific criminal investigations should arise and whether individuals should be charged with a criminal offense under the jurisdiction of a Court. Cases, on the other hand, are comprised of specific incidents falling under the jurisdiction of a Court and include proceedings that follow the issuance of an arrest warrant or a summons to appear. A Court may deal with a number of situations at any given time and within these situations may try a number of cases and accused. *See* Situation in Democratic Republic of Congo, ICC-01/04-101_Corr (Pre-Trial Chamber I), Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 65 (Jan. 17, 2006) [hereinafter DRC Situation]. At present there are four situations at a Court: (1) Situation in Democratic Republic of Congo; (2) Situation in Uganda; (3) Situation in Central African Republic; and (4) Situation in Darfur, Sudan. Within the situation in Democratic Republic of Congo there are three cases, one against Thomas Lubanga Dyilo, one against Germain Katanga and one against Mathieu Ngudjolo Chui; within the situation in Uganda the Court has issued arrest warrants for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen; and, within the situation in Sudan the Court has issued arrest warrants for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman.

II. THE DIVIDE BETWEEN TRADITIONAL THEORIES OF CRIMINAL JUSTICE AND INCREASED INTEGRATION OF RESTORATIVE JUSTICE PRINCIPLES

“[T]he place of the victim within criminal justice raises wider questions about the role and purpose of criminal justice;” therefore, there are likely significant implications for introducing the victim into the delicate balance between the institution of a court and the accused.¹⁸ Traditional forms of criminal justice, most notably those based on retributive theories, dominate Western notions of the role and purpose of criminal justice as well as international criminal justice.¹⁹ Retribution conveys a society’s condemnation of the criminal act in question and of the guilty perpetrator.²⁰ Retributive justice places an emphasis on the rights of the accused in order to avoid convicting an innocent person.²¹ In retributive criminal justice systems, courts base their punishments on an assessment of the seriousness of the crime and the mental state of the offender. An important aspect of retributive justice is that the degree of guilt should not vary depending on the identity of the victim; therefore, the victim does not play a role in the assessment of guilt or punishment.²² Retributive justice can be seen as both victim-friendly as well as contrary to the interests of victims.²³ It is victim-friendly in the sense that punishment expresses society’s “solidarity with the victim.”²⁴ However, because retributive justice is a response to a *wrong* inflicted on a victim rather than a response to the *harm* experienced by the victim, many view it as less than victim-friendly.²⁵

Essentially, retributive justice does not provide a central role for victims in criminal proceedings. In fact, a central role could undermine the

18. INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE 1 (Adam Crawford & Jo Goody eds., Ashgate 2000).

19. To some extent utilitarian theories are also evident, such as in the goal of deterrence, but these theories are far overshadowed by retributive theories. But like retributive theories, utilitarian theories focus on the accused and on society rather than on the interests of victims. See MIKAELA HEIKKILÄ, INTERNATIONAL CRIMINAL TRIBUNALS AND VICTIMS OF CRIME 29-32 (2004).

20. Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 185 (Mar. 24, 2000).

21. Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 284 (1977) (“The slow, ponderous nature of our system of justice is largely due to a fear of an unjust infliction of punishment on the innocent (or even the guilty).”).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 26-27.

rights of an accused individual because the focus would be on the harm experienced by the victim rather than on the alleged wrong that took place. This classical form of criminal justice therefore focuses on the accused and on society in criminal proceedings, rather than on the victim's suffering, and to some extent this form of justice explains why criminal justice systems marginalize victims in criminal proceedings.²⁶

There are two related, yet distinctively separate, developments within criminological theory that have challenged the classical criminal justice model and influenced the role recently given to victims in criminal proceedings.²⁷ The first relates to a victim-orientated agenda.²⁸ The second relates to a restorative justice agenda.²⁹ The victims' rights movement came about in the 1970s through a combination of different factors.³⁰ Michaela Heikkilä, one of the first academics to study victims at international criminal courts, divides the victims' movement into different branches,³¹ one of which aims at improving the status of victims before

26. *Id.* at 33 (noting that these theories of criminal justice are not the only reasons why justice systems marginalize victims because historical and societal developments also play a role).

27. See Bassiouni, *supra* note 3, at 206-07 (contending that victims have historically played an active role in criminal proceedings). See generally Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 298 (2005).

28. In national jurisdictions, victims rights groups have campaigned successfully for greater recognition of victims' interests and increased participation within proceedings. Likewise, a number of European initiatives have focused on the position of victims in criminal law and procedure. Beginning in the early 1980s the United Nations has undertaken a number of programs that highlight the rights and needs of victims at the international level. The most notable being the *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, adopted by the U.N. General Assembly in 1985. These developments seem to demonstrate a general consensus of support to make criminal procedures, both at the national and international level, more victim-centered. See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); see also EZZAT A. FATTAH & STEPHAN PARMENTIER, *VICTIM POLICIES AND CRIMINAL JUSTICE ON THE ROAD TO RESTORATIVE JUSTICE* 175-76 (2001) (citing a number of European initiatives meant to bolster the position of victims in legal proceedings); Doak, *supra* note 27, at 294-95.

29. See JAMES DIGNAN, *UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE* 1 (2005) (pointing out that there have been few attempts to examine the relationship and tensions between these two developments, much to the detriment of victimology and criminology).

30. *Id.* at 14-16 (noting the factors contributing to the victims' rights movement include the penal reform movement, high public profile for victims, the increased media attention on victims, the women's movement, the increased use of crime and victims' surveys, and the attention paid to victims by academics).

31. HEIKKILÄ, *supra* note 19, at 35 (clarifying that one branch strives for the improvement of victims' situations without impinging on the functioning of criminal courts, a second branch aims at improving the status of victims within criminal proceedings and a third branch wants to replace or supplement criminal court proceedings with victim-friendly out-of-court options).

criminal courts by granting them procedural rights.³² She further divides this branch into non-punitive and punitive sub-branches.³³ Advocates in the punitive sub-branch aim at making the system less soft on criminals, whereas advocates for the non-punitive sub-branch aim to improve the standing of victims without encroaching on the rights of the accused.³⁴ This would include participation in the form of victim impact statements like those found in common law systems and the *partie civile* scheme found in civil law systems.³⁵ Importantly, the victims' rights movement's argument that justice should not only punish the offender but should also provide to the offended resonated with later restorative justice advocates.³⁶

The phrase "restorative justice" encompasses, to a large extent, the victims' rights aims as well as additional aims such as reconciliation and reparation.³⁷ Three key features of 'restorative justice' (or reparative justice) are: (1) restoring the victim by way of reparation, compensation or apology; (2) restoring the wider community by way of reparation, compensation or apology; and (3) participation of the victim in the process (whether legal or non-legal).³⁸ Randy E. Barnett was one of the first authors to evoke restorative justice ideas.³⁹ He submitted that the traditional criminal justice paradigm, focusing on punishment of an accused, conceived a crime as an offense against the state (or society) rather than against an individual.⁴⁰ He instead argued that a crime is an offense by an individual against the rights of another individual and that the restitution of the victim should be the main objective of the criminal justice system rather than punishment.⁴¹ Subsequently, a number of restorative justice models developed, including models focusing on reconciliation and non-legal alternatives.⁴²

32. *Id.* (dividing the second branch into non-punitive and punitive sub-branches and explaining that advocates in the punitive sub-branch aim at making the system less soft on criminals whereas advocates for the non-punitive sub-branch aim to improve the standing of victims without encroaching on the rights of accused). This Article will focus only on the non-punitive sub-branch.

33. *Id.*

34. *Id.*

35. *Id.* at 36.

36. *Id.* (victims rights resonating with restorative justice).

37. HEIKKILÄ, *supra* note 19, at 90.

38. Andrew Ashworth, *Victims' Rights, Defendants' Rights and Criminal Procedure*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE, *supra* note 18, at 185, 193.

39. Barnett, *supra* note 21, at 287.

40. *Id.* at 279.

41. *Id.* at 287-91.

42. See HEIKKILÄ, *supra* note 19, at 37 (citing HOWARD ZEHR, CHANGING LENSES (Herald Press 1990) and noting a popular restorative justice model, often referred to as the victim-offender reparation model, which focuses on the reconciliation between victim and offender); *id.* at 38

The concept of restorative justice is far ranging and it is not the intention of this Article to formulate a concrete definition of restorative justice within international criminal law. However, this Article does recognize the importance of the philosophy of both the restorative justice and victims' rights movement and its influence on ICC procedures. Autonomous participation in proceedings offers a tangible avenue for expressing emotional suffering and therefore the Court can see the full extent of a victims' harm and not just the harm related to the specific charges against an accused. But it is important to "take care to distinguish between procedural rights for victims and systems of restorative justice."⁴³ Although procedural rights and restorative justice principles may coincide it is equally possible that they may not. In other words, it is possible to grant extensive procedural rights to victims within the framework of a traditional punitive system without necessarily converting that system into a restorative one.⁴⁴

III. ADVERSARIAL AND INQUISITORIAL SYSTEMS: A FUNDAMENTAL DIVIDE CONCERNING THE ROLE AND RIGHTS OF PARTIES, PARTICIPANTS AND THE COURT

It is no secret that there are fundamental differences between Anglo-American, or common law, systems employing "adversarial" procedures and continental, or civil law, systems employing "inquisitorial" procedures, especially in regards to the roles and rights of parties and participants.⁴⁵ This divide is due, in part, to the differences in the focus on the primary and ancillary goals of the two systems, but more importantly to the differences in the methods employed in reaching those goals. Examples of primary goals include the search for truth and the establishment of either the guilt or innocence of the accused in a fair trial. An example of an important ancillary goal includes greater participation of victims in proceedings.

Damaška, a leading comparative law professor, would categorize the above mentioned goals as either goals of a conflict-solving nature or goals

(citing James Dignan & Michael Cavadino, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from the Victim's Perspective*, 4 INT'L R. VICTIMOLOGY 153, 169 (1996) and what they refer to as the communitarian model of restorative justice because it emphasizes the role of community in finding a resolution to conflicts without neglecting the individual interests).

43. Ashworth, *supra* note 38, at 192.

44. *Id.*

45. See generally Ambos, *supra* note 8; see also DAMAŠKA, *supra* note 1.

of a policy-implementing nature.⁴⁶ He contends that a trial process structured as a contest between parties best serves reactive states having criminal justice systems with goals of a conflict-solving nature, like those found in the adversarial tradition.⁴⁷ In contrast, a trial process structured as an official inquiry best serves activist states having criminal justice systems with goals related to the implementation of policies, like those found in the inquisitorial tradition.⁴⁸ Naturally, both adversarial and inquisitorial systems share the primary goals of pursuing the truth and the establishment of the guilt or innocence of an accused.⁴⁹ However, the method by which the systems arrive at these goals differs and it is this method that highlights whether the goals are conflict-solving or policy implementing.⁵⁰

Damaška offers a useful summary of the methods employed by the two systems. He provides that “the adversarial mode of proceedings takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict,” where as the “non-adversarial mode is structured as an official inquiry.”⁵¹ In adversarial systems the two competing parties bear the burden of evidence collection.⁵² The court plays a passive role and the entire trial depends primarily upon the parties and the decisions they make.⁵³ In contrast, the prosecutor initiates inquisitorial procedures “*ex officio*” with the court having the duty to collect and present the evidence and thus having an active role both in evidence collection and examination.⁵⁴ Both systems provide the defense with fair trial, or due process, rights. However, in adversarial systems because the defense engages in “combat” against the prosecutor the defense frequently carries out its own investigations, evidence gathering, and witness preparation. In inquisitorial systems, this is usually not the case, at least not to the same extent, because the investigating judge and/or public prosecutor have the duty to investigate both exculpatory as well as

46. DAMAŠKA, *supra* note 1, at 88-96.

47. *Id.* at 97-146.

48. *Id.* at 147-80.

49. There is a widely held misconception that inquisitorial systems seek truth while adversarial systems seek to protect the rights of an accused. In fact both systems share these aims. See generally Ambos, *supra* note 8.

50. *Id.* at 21.

51. DAMAŠKA, *supra* note 1, at 3.

52. Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 275 (2001).

53. *Id.*

54. *Id.*

inculpatory evidence. Clearly, no two countries have chosen to adopt the exact same procedural framework for criminal justice; therefore no prototypical inquisitorial or adversarial system exists. However, distinctions are useful in the sense that inquisitorial or civil law systems can largely be viewed as non-adversarial in the sense that they place little emphasis on party control.⁵⁵ Instead, the emphasis is on judicial control. Therefore the methods adopted, either party driven or judicially driven, are a means to accomplish the primary and ancillary goals of the criminal justice system.

The role and rights of the victim differ greatly between the adversarial and inquisitorial legal systems.⁵⁶ Crude simplifications are not only necessary but also justified because, to a large extent, it appears that legal traditions have a correlation with the role provided to victims in proceedings.⁵⁷ Although continental legal systems differ (Germanic, Nordic, Romanic or mixed), they all provide victims participatory rights under the concept of *partie civile*.⁵⁸

In countries drawing on inquisitorial procedures victims may often appear both as a source of information for a court (as a witness) and as an individual who has suffered a harm (as a victim).⁵⁹ The most recognizable role of a victim in these systems is that of a civil claimant, which allows the victim to attach her civil claim for compensation to the state's criminal proceedings.⁶⁰ In addition, in some continental systems victims may either appeal decisions by the prosecutor to not go through with a prosecution or

55. Doak, *supra* note 27, at 308.

56. See Bassiouni, *supra* note 3, at 206-11 (examining the evolution of victims' rights in international law).

57. HEIKKILÄ, *supra* note 19, at 43.

58. Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 253-54 (2007) (citing WILLEM BOURDON & EMMANUELLE DUVERGER, *LA COUR PÉNALE INTERNATIONALE: LE STATUT DE ROME (Commentary on the Rome Statute)* 203 (Olivier Duhamel ed., 2000)).

59. Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the ad hoc Tribunals*, 2 World Justice Information Network, The Rule of Law Series 1, 7 (July 10, 2000), available at <http://www.wjin.net>. See generally MARION E. BRIENEN & ERNESTINE H. HOEGEN, *VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS* (2000). Amongst other countries such as France, Belgium, and Luxembourg, the disadvantage of being a civil claimant is the fact that a civil claimant cannot be heard as a witness in the case. The rationale behind this is that the civil claimant will have access to the case file and may have something to gain by the conviction of the accused. However, in most circumstances, the victims first act as witnesses and only after they testify do they join the proceeding as civil claimants.

60. BRIENEN & HOEGEN, *supra* note 59, at 129, 320 & 55.

may initiate criminal proceedings themselves, thereby acting as private prosecutors.⁶¹

As opposed to the broad victims' participatory rights-based approach, Anglo-American legal systems typically do not afford victims the right to participate in criminal proceedings other than as witnesses or at the sentencing phase following the conviction of the accused.⁶² Because victims are not formal parties to a case, they may only participate as witnesses for either the prosecution or defense.⁶³ Their main role is to provide accurate information to the parties.⁶⁴

However, Anglo-American systems provide for victims' rights in other ways. For example, England has created one of the strongest state compensation schemes and victim support services in all of Europe.⁶⁵ Moreover, many jurisdictions have begun to use "victim impact statements" following the conviction of an accused, allowing victims the opportunity to convey the harm they have suffered to the court.⁶⁶

It is through the process of victim participation in criminal proceedings that courts can recognize and value the plight of victims. In this sense, many view the adversarial system as a barrier to effective victim participation.⁶⁷ They argue that highly competitive trial environments are ill-equipped to address emotional trauma.⁶⁸ Moreover, victims have been

61. *See id.* at 28, 857-58 (explaining that Spain has one of the most far-reaching laws concerning private prosecutions due to the fact that Spain allows virtually any person (including non-victims or non-citizens) to pursue a prosecution so long as the government has declined to prosecute the case). The most prominent case brought by victims in Spain was against General Augusto Pinochet in 1996.

62. *But see* Jouet, *supra* note 58, at 256 (citing John R. Spencer, *The English System, in EUROPEAN CRIMINAL PROCEDURES* 142, 152-53 (Mireille Delmas-Marty & J.R. Spencer eds., Cambridge University Press 2000) and noting in England a citizen may privately prosecute a case).

63. Vladimir Tochilovsky, *Victims' Procedural Rights at Trial: Approach of Continental Europe and the International Tribunal for the Former Yugoslavia, in CARING FOR CRIME VICTIMS: SELECTED PROCEEDINGS OF THE 9TH INTERNATIONAL SYMPOSIUM ON VICTIMOLOGY*, 287-91 (Jan J.M. van Dijk et al. eds., Criminal Justice Press 1999).

64. *Id.*

65. BRIENEN & HOEGEN, *supra* note 59, at 285.

66. *See generally* Edna Erez, *Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE*, *supra* note 18, at 165-84.

67. Doak, *supra* note 27, at 297. *See* Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Antonio Cassese et al. eds., Oxford 2002).

68. Doak, *supra* note 27, at 297.

less able to participate in adversarial systems due to structural and normative constraints.⁶⁹

IV. THE INTERNATIONAL CRIMINAL COURT: TRANSFORMING INTERNATIONAL CRIMINAL PROCEDURE

How then do these seemingly separate yet undoubtedly interconnected divides come together at the ICC? In July 1998, the U.N. Diplomatic Conference in Rome voted to adopt the Statute of the International Criminal Court.⁷⁰ Shortly thereafter the States Parties went to work on drafting the Rules of Procedure and Evidence and Regulations of the Court.⁷¹ All three documents are the products of compromise because the drafters combined retributive and restorative theories of criminal justice and relied on structural elements from both “adversarial” and “inquisitorial” systems to forge a mixed procedure. And while these compromises helped facilitate the drafting and adoption of the Statute, Rules and Regulations they also created a number of difficulties in terms of interpretation of rights afforded to parties and participants at the Court.

In combining retributive and restorative justice principles the Court has maintained the primary goal of seeking to establish the truth as it pertains to the guilt or innocence of an accused through efficient and fair proceedings.⁷² Yet it has also expanded its mandate by incorporating ancillary goals pertaining to, *inter alia*, victim participation in proceedings. To this end, the Court has mainly adopted what Heikkilä refers to as the non-punitive sub branch of the victims’ rights movement. In other words, in addition to the right to claim reparations and access to greater protections, the Statute and Rules aim to improve the status of victims in proceeding without encroaching on the rights of the accused. As argued by Damaška this model of victim participation works well in national jurisdictions based on inquisitorial traditions because inquisitorial systems are policy driven and employ methods of judicial control. Although Damaška’s theories are not directly applicable to the international level, they do help explain by way of analogy many of the challenges facing the Court. The ICC combines elements from both the inquisitorial and adversarial traditions, meaning that proceedings are both

69. *Id.* at 294. DAMAŠKA, *supra* note 1, at 201.

70. *See generally* Rome Statute, *supra* note 5.

71. International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3 (Sept 9, 2002) [hereinafter ICC Rules]. International Criminal Court Regulations of the Court, *adopted* May 26, 2004, ICC-BD/01-01-04 (May 26, 2004) [hereinafter ICC Regulations].

72. Rome Statute, *supra* note 5, arts. 64 & 67. *See also* ICC Rules, *supra* note 71, Rule 101.

Judge controlled as well as party driven. The ICC's innovative procedure creates a new dynamic wherein the Court must balance traditional, punitive justice, largely based on the adversarial framework with restorative justice principles born out a combination of the victims' movement and an increased reliance on an inquisitorial framework.⁷³ The following sections will explore the mixed procedures and jurisprudence of the young Court.

A. *The Role and Rights of Victims Pertaining to Victim Participation*

Examples of how the drafters combined adversarial and inquisitorial elements can be seen in the roles provided to both the Prosecutor and the Judges. Article 66(2) of the Statute provides that the onus is on the Prosecutor to prove the guilt of the accused beyond a reasonable doubt.⁷⁴ It is the Prosecutor who initially decides when and against whom to bring charges, which the Court may later authorize or deny.⁷⁵ It is the Office of the Prosecutor (OTP) that collects evidence and conducts investigations.⁷⁶ The Prosecutor's role, therefore, largely resembles one found in adversarial systems. However, under Article 54(1) the Prosecutor is responsible for investigating incriminating and exonerating evidence, which is a product of inquisitorial systems.⁷⁷ Moreover, the Judges at the

73. Gerard Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 20 (2005). See THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, lxiv (Roy S. Lee et al. eds., Transnational Publishers 2001).

[T]his new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice. Under this system reparations will be made to victims, and victims will also be able to take part in proceedings, with rights to privacy, representations, and to security of person. The newly finalized Rules protect and promote these rights and interests, and establish a procedural framework to give meaning and effect to these important provisions, without in any way infringing upon the rights of the accused.

Id.

74. Rome Statute, *supra* note 5, art. 66(2). This Article will refer interchangeably to both the "Prosecutor" as well as to the "Office of the Prosecutor" (OTP) to reflect the collective nature of the position.

75. *Id.* art. 15.

76. *Id.* art. 54.

77. *Id.*

ICC have the *option* of exercising a dominant role in the proceedings.⁷⁸ They may choose to take an active part, which is more reflective of traditional inquisitorial systems, or they may choose to let the parties dominate the proceedings.⁷⁹ The Judges are also responsible for the protection and well-being of victims.⁸⁰

The ICC Statute and Rules provide a number of fair trial and due process rights to the accused, including, *inter alia*, the right to a public hearing; the right to a fair and impartial hearing; the right to be informed promptly and in detail of the nature of any charges; adequate time and facilities to prepare a defense; the right to communicate freely with counsel of choice; the right to be tried without undue delay; the right to be presumed innocent and to not be compelled to testify; the right to not have any reversal of the burden of proof.⁸¹ The Statute and Rules seem to recognize the adversarial role of defense in proceedings. Accused individuals have the right to have adequate time and facilities to prepare their defense,⁸² to question witnesses testifying against them,⁸³ to require the attendance of witnesses for their benefit,⁸⁴ and to present evidence and put forward defenses.⁸⁵ Notably, the clash between common law and civil law beliefs was so deeply felt that terms easily identifiable with either system, like common law cross-examination were completely avoided in the texts of the Statute and Rules in the hopes of creating a truly international criminal procedure.⁸⁶ Nevertheless, it is clear that the Court applies a mixed approach combining civil law and common law elements. The rights of victims before the ICC, however, undoubtedly derive from civil law traditions.⁸⁷

78. Ambos, *supra* note 8, at 19-20.

79. See Rome Statute, *supra* note 5, arts. 64, 64(6)(b),(d) (providing that Judges may require the production of evidence); *id.* art. 64(8)(b) (providing that the presiding Judge directs the proceedings). See Sylvia A. Fernández de Gurmendi, *The Process of Negotiation*, in *THE ICC: THE MAKING OF THE ROME STATUTE* 217, 252 (Roy S. Lee ed., Kluwer Law International 1999) (noting that in regards to the increasingly dominant role of the judges, drafters from common law systems clashed with drafters from civil law systems).

80. Rome Statute, *supra* note 5, art. 68(1).

81. *Id.* art. 67.

82. *Id.* art. 67(1)(b).

83. *Id.* art. 67(1)(e).

84. *Id.* art. 67(1)(e).

85. Rome Statute, *supra* note 5, art. 67(1)(e).

86. Ambos, *supra* note 8, at 20 (citing Claus Kress, *Witnesses in Proceedings before the ICC*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 309, 352 (Horst Fischer et al. eds., Berlin Verlag Arno Spitz 2001)).

87. Mekjian & Varughese, *supra* note 73, at 16.

B. Basic Principles of Victim Participation – Applicable Law

Essentially, the ICC Statute, Rules of Procedure and Evidence (Rules) and Regulations of the Court (Regulations), award victims the right to participate other than as witnesses in the Court proceedings providing their participation does not infringe upon the rights of the accused.⁸⁸ Under this new framework, victims have the right to counsel, and, at present, victims' participation extends to issues over reparation claims,⁸⁹ jurisdiction,⁹⁰ investigations,⁹¹ indictments, amendments,⁹² interim release,⁹³ disclosure,⁹⁴ questioning of witnesses, and admissibility and relevancy of evidence,⁹⁵ sentencing, and other decisions of the Court.⁹⁶ Throughout the process, victims will not only have the opportunity to voice their views and concerns in relation to issues that personally affect them, but, more importantly, they will also be able to present legal arguments separate from those presented by the prosecution or defense. Apart from testifying as witnesses, victims, most likely through their legal representatives, will have the opportunity to act as participants by submitting observations and submissions, making representations,⁹⁷ attending⁹⁸ and participating in hearings,⁹⁹ and consulting the Court's record.

Legal representatives will aid victims in understanding Court procedures, advise victims of their rights and represent their interests in the proceedings. Donat-Cattin, director of the International Law and

88. Rome Statute, *supra* note 5, art. 68(3).

89. *Id.* art. 75(3).

90. *Id.* art. 19(3).

91. *Id.* art. 15(3).

92. ICC Rules, *supra* note 71, R. S 93, 128.

93. *Id.* R. 119(3).

94. *Id.* R. 121(10).

95. *Id.* R. 72.

96. *See* ICC Rules, *supra* note 71 Rules 143 & 145.

97. Rome Statute, *supra* note 5, art. 15(3).

98. ICC Rules, *supra* note 71, Rule 91(2).

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

Id.

99. *Id.* R. 91(3)(a).

Human Rights Program and Development Advisor of Parliamentarians for Global Action, comments that “there is no effective access to justice without skilful and responsible legal representation.”¹⁰⁰ He notes that continental-law jurisdictions clearly stress the importance of empowering victims through legal counsel.¹⁰¹

Along the same lines, others find the right to legal representation to be the “most important and most procedurally challenging aspect to apply within the ICC.”¹⁰² As a correlation to participation, victims will have the right to confidentiality (anonymity),¹⁰³ right to notification,¹⁰⁴ access to Court documents and information,¹⁰⁵ and the right to appeal reparation orders.¹⁰⁶ Despite all of the rights afforded to victims, there is still a great deal of ambiguity in the mechanisms applicable to victims’ participation.¹⁰⁷

In addition to being the first international criminal tribunal to allow victims to participate other than as witnesses, the ICC is also the first international tribunal to have a formal Pre-Trial Chamber, which deals with procedural issues arising prior to the start of trial. The Pre-Trial Chamber at the ICC, unlike in previous tribunals, has, under certain circumstances, the power to authorize an investigation,¹⁰⁸ the power to review the Prosecutor’s decision not to proceed with an investigation,¹⁰⁹ the power to deal with issues of admissibility,¹¹⁰ the power to take

100. David Donat-Cattin, *Article 68*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1275, 1291 (Otto Triffterer ed., Nomos Verlagsgesellschaft 2008). See *id.* at 1280-81 (expounding upon the development of the drafting of Article 68, and where he writes that the current drafting stemmed from Article 43 of the International Law Commission Draft Statute of 1994 dealing with the Protection of the accused, victims and witnesses. This draft contained similar provisions to Article 22 of the ICTY Statute and Article 21 of the ICTR Statute. Later, in 1997 an important discussion took place during the U.N. ICC Preparatory Committee, the result of which included the addition of nine paragraphs dealing with victims to draft Article 43. Those nine paragraphs were re-elaborated on in the so-called Zutphen text of January 1998 (then Article 61). A second draft with minor modifications then became Article 68 of the Draft Statute transmitted by the Preparatory Commission to the Diplomatic Conference in 1998).

101. *Id.* at 1291.

102. Mekjian & Varughese, *supra* note 73, at 22.

103. See Rome Statute, *supra* note 5, art. 54. See also ICC Rules, *supra* note 71, R. 16(2)(b), R. 43 & R. 81.

104. ICC Rules, *supra* note 71, R. 92.

105. *Id.* R. 121(10) & R. 131.

106. Rome Statute, *supra* note 5, art. 82(4).

107. Bassiouni, *supra* note 3, at 245.

108. Rome Statute, *supra* note 5, art. 15(4).

109. *Id.* art. 53(3).

110. *Id.* art. 17-18.

testimony from witnesses or examine, collect or test evidence for the purpose of trial under its “unique investigative opportunity” and most importantly for this paper,¹¹¹ the power to shape early victim participation. It is still debatable whether a Pre-Trial Chamber speeds up the trial process generally but it has provided a forum for fleshing out the new procedures for victim participation.

C. Definition of Victims

The concept and status of the term “victim” is highly problematic.¹¹² Once you provide victims with procedural rights of participation or the right to claim reparations then it becomes important to clarify who qualifies for these legal rights. ICC Rule 85 defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” and goes on further to state that “victims may include organizations or institutions that have sustained direct harm to any of their property” so long as that property is dedicated to “religion, education, art or science or charitable purposes,” historic monuments, hospitals and other places and objects that deal with humanitarian purposes.¹¹³ This definition is radically broader than those used at previous tribunals. Rather than adopt the definition of a victim found in the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence, the drafters of the ICC Rules opted to create a new, more expansive definition.

Rule 2 of both the ICTY and ICTR’s Rules of Procedure and Evidence defines a victim as “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”¹¹⁴ During ICC drafting negotiations, victims’ rights groups and others argued that this definition was too narrow in that it defines victims in the singular and it

111. *Id.* art. 56.

112. Adam Crawford, *Salient Themes Towards a Victim Perspective and the Limitations of Restorative Justice: Some Concluding Comments*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE, *supra* note 18, at 285.

113. See Sylvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *supra* note 73, at 427-33 (providing a detailed description of the development of the drafting of a “victim” definition).

114. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 2, U.N. Doc. IT/32/Rev.7 (Mar. 14, 1994). International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 2, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

does not include family members or institutions.¹¹⁵ The ICC definition not only defines victims in the plural, but it also identifies a greater number of victims which includes family members.¹¹⁶ Also notable is the deletion of the wording “allegedly been committed.”¹¹⁷ Debatably, this wording promotes the presumption of innocence for the accused; however, it was problematic for the drafters of the ICC Rules because it linked the status of victims with specific actions of the accused.¹¹⁸ In contrast to the ICTY and ICTR definition, Rule 85 links the status of victims to the commission of a crime within the Court’s jurisdiction rather than defining victims in relation to proceedings against a specific individual with respect to specific conduct.¹¹⁹ The differences are subtle yet important. Because the drafters refrained from linking the definition of victims in the ICC Rules with the specific actions of an accused in a case, the definition of victims applies both before and after the naming of a suspect.

D. Overarching Rights of Victim Participation

Foremost among the enumerated participatory rights for victims is Article 68(3) of the Rome Statute, entitled “Protection of the victims and witnesses and their participation in the proceedings.” Essentially, Article 68(3) is a result of the criticism against the lack of similar rights for victims at the *ad hoc* Tribunals,¹²⁰ and it reads:

Where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.¹²¹

115. Fernández de Gurmendi, *supra* note 113, at 428.

116. See THE ICC: THE MAKING OF THE ROME STATUTE, *supra* note 79, at 269-70 (citing the Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L2/Add.7, 13 July 1998); see also HEIKKILÄ, *supra* note 19, at 16-18.

117. HEIKKILÄ, *supra* note 19, at 16-18.

118. *Id.* (linking status of the victims with specific actions of the accused).

119. Carsten Stahn et al., *Participation of Victims in the Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 222 (2006).

120. Donat-Cattin, *supra* note 100, at 871.

121. Rome Statute, *supra* note 5, art. 68(3) (emphasis added).

Article 68(3) reproduces text found in Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration),¹²² and is the result of lobbying during the drafting process by a number of victims' rights organizations. Article 68(3) is the result of intense discussions between drafters that were split between the adversarial and inquisitorial divide.¹²³ The delegates from the French government were particularly intent on granting victims broad participatory rights.¹²⁴ Consequently, the rule upon which broad victim participation rests is drawn from continental legal systems.

Article 68(3) requires the Court to provide qualified victims with some form of participation in the proceedings.¹²⁵ While the judges have the discretion to limit the manner and appropriateness of the participation they do not have the discretion to prohibit participation *per se*.¹²⁶ The term "personal interest" used in the provision is notable for the mere fact that nowhere do the Statute or Rules define the term. Therefore, individual Judges in each situation and case must determine whether a victim's personal interests have been affected.¹²⁷

With the exception of specific instances in which the statute provides for victim participation, namely Article 15(3) and 19(3) proceedings, in

122. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Access to justice and fair treatment, U.N. Doc. A/RES/40/34/Access to justice and fair treatment (Nov. 29, 1985), available at <http://www.un.org/documents/ga/res/40/a40-034.htm>. Article 6(b) states the following:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by . . . Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system. . . .

Id.; see Donat-Cattin, *supra* note 100, at 879-80.

123. Jouet, *supra* note 58, at 253.

124. Jorda & de Hemptinne, *supra* note 67, at 1400.

125. See *supra* note 122.

126. See *supra* note 122.

127. For decisions where the Court has had to interpret what "personal interests" entail, see generally Situation in Uganda, ICC-02/04-01/05-252 (Pre-Trial Chamber II, (Single Judge)), 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 (Aug. 10, 2007); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-474 (Pre-Trial Chamber I (Single Judge)) Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (May 13, 2008); Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432 (Appeals Chamber) Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008 (July 11, 2008).

order to exercise their rights under Article 68(3) victims will need to apply to participate pursuant to Rules 89 to 91 of the Rules of Procedure and evidence. If a victim-applicant indicates in his written application that he would like to participate in both the situation and the case, the Chamber will automatically take this request into account when a case comes into existence. Therefore there is no need for victims to reapply once a case arises out of a situation.¹²⁸

V. ICC PROCEDURE AND PRACTICE

A. *Victim Participation in the Investigation Phase of the Pre-Trial Stage*

The investigation phase of the pre-trial stage starts with the initiation or authorization of an investigation into a particular situation. This phase does not end when the prosecution phase of a case begins. To the contrary, the investigation phase into a situation may continue for an unlimited number of years. For example, the investigation into the DRC situation will likely continue even after the conclusion of the Lubanga, Katanga and Ngudjolo Chui cases.

The central question arising at this point of the proceedings is whether victims have a right to participate during the investigation of a situation prior to the naming of a suspect, request for warrant of arrest or summons to appear. In 2006 in the DRC situation, the Pre-Trial Chamber I answered a resounding *yes*, despite the fact that investigations were ongoing and the OTP had yet to make a decision regarding the charges to pursue any individual.¹²⁹

Following the referral of the situation into the DRC, the Prosecutor officially announced his decision to open the first investigation of the

128. See DRC Situation, ICC-01/04-101-Corr (Pre-Trial Chamber I) Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 67 (Jan. 17, 2006); see also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172 (Pre-Trial Chamber I) Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, at 6 (June 29, 2006).

129. DRC Situation, ICC-01/04-101_Corr (Pre-Trial Chamber I), Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6 (Jan. 17, 2006).

Court.¹³⁰ Shortly thereafter, the President of the International Federation for Human Rights (FIDH) submitted applications for participation of victims designated VPRS 1-6 and authorized Emmanuel Daoud to represent them.¹³¹ In August 2005 the *ad hoc* defense counsel, representing the interests of defense generally since the OTP had yet to name a suspect, filed a response to the victim applications.¹³² Notably, the *ad hoc* defense counsel did not challenge the applicability of Article 68(3) to the investigation of a situation or the participation of victims in this early phase.¹³³ That same month the Prosecutor filed a motion strongly opposing the victim applications, arguing that the Statute did not envision victim participation at such an early stage.¹³⁴ The Prosecutor further argued that early victim participation, other than in Article 15(3) proceedings, placed the objectivity of the proceedings in jeopardy, as well as the integrity of the Prosecutor's office, if the Court were to allow a third party to intervene so early in the process.¹³⁵

In addressing the arguments in a terminological, contextual and teleological approach, Pre-Trial Chamber I looked at a number of different issues before coming to the conclusion that victims have the right to participate before the naming of a suspect. First, the Judges examined whether the Statute, Rules and Regulations of the Court allow for early victim participation. The Court first looked to Rule 68(3) and determined that although Article 68(3) is located in the "Trial" section of the Statute, because it does not specifically stipulate a stage of the proceedings for

130. DRC Situation, ICC-OTP-20040419-50 (OTP Press Release), Prosecutor receives referral of the situation in the Democratic Republic of the Congo (Apr. 19, 2004); DRC Situation, ICC-OTP-20040623-59 (OTP Press Release), Office of the Prosecutor of the International Criminal Court opens its first investigation (June 23, 2004).

131. DRC Situation, ICC-01/04-24-Conf-Exp, Letter from Mr. Sidiki Kaba, President of the International Federation for Human Rights (FIDH), submitting the applications for participation of victims designated VPRS 1-6 and authorizing Emmanuel Daoud to represent them (Jun. 14, 2005).

132. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note 17 (citing DRC Situation, ICC-01/04-81-Conf (Pre-Trial Chamber I), Defense Response to the Applications for Participation of Victims in the Proceedings (Aug. 11, 2005)).

133. *Id.* ¶ 24. "In his memorandum, *ad hoc* Defense counsel does not challenge either the applicability of article 68(3) of the Statute to this stage of the investigation or the possibility in legal terms of participation by the victims at this stage of the proceedings." *Id.* (citing Defense Response to the Applications for Participation of Victims in the Proceedings, *supra* note 132, at 6-9 & 14-15).

134. DRC Situation, ICC-01/04-84-Conf, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp (Aug. 15, 2005).

135. Jérôme de Hemptinne & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 J. INT'L CRIM. JUST. 342, 343 (2006).

victim involvement, the Court decided participation can take place during the pre-trial stage before the identification of a suspect.¹³⁶ Despite the fact that the Prosecution argued that there is a clear distinction between Court proceedings—as referred to in Article 68(3)—and the investigation stage of the process, the Judges disagreed. In looking at the overall objectives of the Court, the Judges concluded that early victim participation was a laudable goal of the drafters as evidenced by the Statute and Rules.¹³⁷ Relying upon human rights case law, the Judges used jurisprudence from the European Court of Human Rights and the Inter-American Court of Human Rights to bolster their decision allowing victims participatory rights prior to the naming of a suspect.¹³⁸

B. Criteria for Determining Victim Status

The January 17, 2006 decision also examined whether a Court should grant victim status to the specific victim-applicants. To this end, the Judges found that “the participation of victims during the stage of investigation of a situation does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security.”¹³⁹ Instead, the Judges found that the extent of participation, may impact the investigation but not participation generally. Essentially, the Court used the definition of victims found in Rule 85, together with Article 68(3), as the criteria for determining victim status.¹⁴⁰ During the investigative stage of the pre-trial phase, the Judges will ask (i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) whether such harm appears to have arise “as a result” of the event constituting a crime within the jurisdiction of the Court for situations.¹⁴¹ In addition, victims will have to show how their personal

136. Rome Statute, *supra* note 5, art. 15(3); ICC Regulations, *supra* note 71, Rules 50(1), 50(3), 92(2) & 107(5).

137. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note 17, ¶ 50.

138. See DRC Situation, *supra* note 17.

139. See *id.* ¶ 57.

140. See *id.* ¶¶ 94, 97-100. This approach was followed and further developed by Pre-Trial Chamber II, see Situation in Uganda, ICC-02/04-101 (Pre-Trial Chamber II (Single Judge)), 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, ¶ 12 (Aug. 10, 2007).

141. *Id.* ¶ 68.

interest are affected and the Court must determine that participation is appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The fourth criterion concerning the causal link differs slightly when the Chamber assesses participation for a case at the pre-trial stage. Accordingly, Pre-Trial Chamber I determined that victim applicants “must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe” the suspect “bears criminal responsibility and for which the Chamber has issued an arrest warrant.”¹⁴²

The first question the Court must address before conferring victim status on a victim-applicant is whether the identity of the applicant as a natural person appears duly established. As a result, proof of identity, kinship, guardianship and legal guardianship must be included with application materials. However, the Court has noted that “in areas of recent conflict where communication and travel may be difficult it would be inappropriate to expect applicants to be able to provide proof of identity of the same types of difficulties.” Therefore, the Court now accepts a wide variety of documents in order to provide proof of identity.¹⁴³

The second question the Court must address before conferring victim status is whether the events described by each victim-applicant constitute a crime within the jurisdiction of the Court. In order for a crime to fall within the jurisdiction of the Court it must: be included in the crimes enumerated in Article 5 of the Statute; satisfy the requirements of Article 11 of the Statute; and finally, meet one of the two conditions set out in Article 12 of the Statute.¹⁴⁴

The third question the Court must address before conferring victim status is whether the victim-applicant claims to have suffered harm. Due

142. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172 (Pre-Trial Chamber I), Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case Prosecutor v. Thomas Lubanga Dyilo, at 6 (June 29, 2006).

143. See *id.* ¶ 15; see also Prosecutor v. Joseph Kony, ICC-02/04-125 (Pre-Trial Chamber II (Single Judge)), Decision on victim’s application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0101/06, a/0102/06 to a/0104/06, a/0111/06, 1/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, ¶ 6 (Mar. 14, 2008).

144. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *supra* note 17 ¶ 89-93; see also DRC Situation, ICC-01/04-177 (Pre-Trial Chamber I). Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06, and a/0003/06 in the case of Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, at 14 (July 31, 2006); Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation, *supra* note 144, ¶ 5.

to the fact that the term “harm” is not defined either in the Statute or in the Rules it was left to the Pre-Trial Chambers to provide guidance. Pre-Trial Chamber I found that “a single instance of harm suffered is sufficient” to establish the status of victim.¹⁴⁵ Furthermore, the Single Judge in the Darfur situation found that “harm” includes economic loss, physical suffering, and emotional suffering.¹⁴⁶

The fourth question the Court must address before conferring victim status on a victim-applicant at the investigative phase of the pre-trial stage is whether such harm appears to have arisen “as a result” of the event constituting a crime within the jurisdiction of the Court. Similarly, after a case arises in the pre-trial stage, the victim applicants “must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe” the suspect “bears criminal responsibility and for which the Chamber has issued an arrest warrant.”¹⁴⁷

Finally, the requirement found in Article 68(3), namely that victims’ personal interests be affected, is an additional criterion that victim-applicants must meet in order to be allowed to participate in proceedings. The Pre-Trial Chamber has determined that assessments of whether a victim’s personal interests are affected are to be conducted in relation to stages of the proceedings rather than in relation to each specific procedural activity or piece of evidence dealt with at any given stage of the proceedings. Moreover, the personal interests of victims are affected *in general* at the investigation stage, prior to the naming of a suspect, since the Court found that the participation of victims during this phase can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered (emphasis added).¹⁴⁸ Following

145. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note 17, ¶ 81-82.

146. Situation in Darfur, ICC-02/05-111-Corr (Pre-Trial Chamber I (Single Judge)). Decision on the Applications for Participation I 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, ¶ 30, 38-50 (Dec. 14, 2007).

147. Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, *supra* note 142, at 6-8; *see also* Decision on victims’ application for participation a/0010/06, a/0064/06 to a/0070/06 to a/0104/06 and a/0111/06 to a/127/06, *supra* note 143, ¶ 14-15; *see also* DRC Situation, ICC-01/04-423-Corr (Pre-Trial Chamber I (Single Judge)), 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/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 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, ¶ 38 (Jan. 31, 2008).

148. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note 17, ¶ 63.

the issuance of an arrest warrant or summons to appear, the requirement that the personal interests of the victims have to be affected is generally met whenever the proceedings relate to the very crime the victim was allegedly involved.¹⁴⁹ More specifically, the Court has found that victims' interests may be affected by a range of issues, including reparation issues, security issues, determinations of the truth and sentencing of a convicted defendant.

C. Manner and Scope of Participation

Because the Statute and Rules do not provide for specific procedural rights, apart from the general right to file requests with the competent Chamber, the Judges have broad discretion in determining the modalities of participation. Therefore, once the court determined the criteria for conferring victim status on victim-applicants they still had to determine the extent of the participation in such a way that it would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial as laid down in Article 68(3) of the Statute.

In the January 17, 2006 Decision Pre-Trial Chamber I determined what form of participation would be appropriate at the investigation stage of the DRC situation. The Court authorized victims to address the Chamber in order to present their views and concerns, to file documents pertaining to the relevant situation, to request the Pre-Trial Chamber to order special proceedings and to have notification rights.¹⁵⁰ The Court limited the participatory rights of the victims by not giving them access ("for the time being") to any non-public document contained in the record of the situation in the DRC and not allowing them to attend confidential proceedings unless decided otherwise.¹⁵¹ The Prosecutor sought leave to appeal the decision.¹⁵² In reaction, the legal representative for the victims asked the Pre-Trial Chamber to reject the Prosecutor's application to

149. 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, *supra* note 143, ¶¶ 9, 10 and 12; *see also* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui [hereinafter Katanga et al.]; ICC-01/04-01/07-474 (pre-Trial Chamber I (Single Judge)). Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (May 13, 2008).

150. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note 17, ¶¶ 71, 75.

151. *Id.* ¶ 76.

152. *See* DRC Situation, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 Mar. 2006 Decision Denying Leave to Appeal (July 13, 2006) (dismissing the Prosecutor's extraordinary request for review from the Appeals Chamber on procedural grounds because the Statute does not permit interlocutory appeals in this instance).

appeal—which, to the detriment of the Court, it did.¹⁵³ However, later decisions pertaining to the manner and scope of victim participation in the investigation stage were permitted to be heard on appeal.¹⁵⁴

Recently, the Appeals Chamber made clear that although victims may have victim status during the investigative stage this does not grant them a general participatory right. In reversing an earlier decision by the Pre-Trial Chamber, which had concluded that victim participants would be authorized, notwithstanding any specific proceedings, to be heard by the Chamber in order to present their reviews and concerns and to file documents pertaining to the current investigation of the situation, the Appeals Chamber now determined that under Article 68(3) “participation can take place only within the context of judicial proceedings.”¹⁵⁵ They further added that proceedings stand in contrast to investigations, which are inquiries conducted by the Prosecutor into the commission of crimes.¹⁵⁶ Importantly, the Appeals Chamber stressed that “authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.”¹⁵⁷ Therefore, although victims will continue to have a

153. *Id.* In August 2007, Pre-Trial Chamber II, in the situation in Uganda, handed down a similar decision as that of Pre-Trial Chamber I, albeit with a slightly different approach. *See* 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 (Aug. 10, 2007) (interpreting the criteria to be met under Rule 85 as (i) whether the victim applicant can duly establish their identity; (ii) whether the events described by the victim applicant constitute a crime within the Court’s jurisdiction; (iii) “whether the [victim] applicant claims to have suffered harm;” and (iv) whether the harm appears to have arisen “as a result” of the event reconstituting a crime within the Court’s jurisdiction). Like Pre-Trial Chamber I, on December 20 the Single Judge of Pre-Trial Chamber II rejected the OTP’s request for leave to appeal. *See* Situation in Uganda, ICC-02/04-112, Decision on the Prosecution’s Application for Leave to Appeal the 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 (Dec. 20, 2007).

154. *See* Situation in Darfur, Sudan, ICC-02/05-110 (Pre-Trial Chamber I), 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 (Dec. 3, 2007); Situation in the DRC, ICC-01/04-417 (Pre-Trial Chamber I), 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, Public (Dec. 7, 2007).

155. *See* DRC Situation, ICC-01/04-556 (Appeals Chamber), Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 Dec. 2007, ¶ 45 (Dec. 19, 2008).

156. *See id.*

157. *See id.*

right to participate in proceedings during the investigative phase they no longer have a general right of participation unrelated to a specific proceeding.

D. *The Prosecution Phase of the Pre-Trial Stage*

Up until this point in the process, the prosecution phase of the pre-trial stage provides the most comprehensive procedural rights for victim participation. This comes as no surprise since the prosecution phase of the pre-trial stage envisions the naming of a suspect. The prosecution phase begins with the warrant of arrest or the summons to appear and ends only after the confirmation of charges, subsequent hearings and the setting of a trial date.

1. Warrant of Arrest and Summons to Appear

Warrants of arrest and summonses to appear before a Court are the two formal ways in which to inform a suspect of the pending charges against him. An arrest warrant issued on behalf of a Court authorizes the arrest and detention of an individual while a judicial summons is addressed to an individual suspected of crimes requesting his presence and surrender before a Court. At any time after the initiation of an investigation, the Prosecutor may initiate a prosecution by applying to the Pre-Trial Chamber for the issuance of an arrest warrant for an individual.¹⁵⁸ Before issuing the arrest warrant, the Court must find that there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court and that arresting the person appears necessary.¹⁵⁹ Necessity may stem from the assurance that the person will appear at trial, the assurance that the person will not obstruct or endanger the investigation or the prevention of the continuation of crimes by that individual.¹⁶⁰ As an alternative to an arrest warrant, the Prosecutor may also apply for the issuance of a summons to appear.¹⁶¹ As with the arrest warrant, the Pre-Trial Chamber must conclude that there are reasonable

158. Rome Statute, *supra* note 5, art. 58(2). In accordance with Article 58(2), the application for the arrest warrant must contain the name of the person, specific reference to the crimes under the Court's jurisdiction and a concise statement of the facts which are alleged to constitute the crimes, a summary of evidence and the reasons why the Prosecutor believes that an arrest is necessary.

159. *Id.* art. 58(1).

160. *Id.*

161. *Id.* art. 58(7).

grounds to believe the person committed the crime(s) alleged and that a summons will sufficiently ensure the person's appearance.¹⁶²

The arrest warrant issued for Thomas Lubanga Dyilo made no reference to the victims being heard in relation to the Prosecutor's application for the arrest warrant and because the Court issued the arrest warrant under seal it is unlikely that any victims participated in any hearing on the issue.¹⁶³ Subsequently, when victims groups learned of the narrow charges found in the arrest warrant, which only related to the recruitment of child soldiers, they expressed outrage that they did not have the opportunity to influence this aspect of the proceedings.¹⁶⁴ As a consequence of not participating in the arrest warrant proceedings, the Court deprived all six of the victims, who were previously granted participatory rights in the DRC situation, of the opportunity to raise any concerns surrounding the arrest warrant. Moreover, the Court deprived some of those victims of the chance to raise these concerns in future hearings because the Pre-Trial Chamber determined that some victims were unable to establish a sufficient causal link between the harm suffered by the victim participants of the situation and the crimes specified in the arrest warrant.¹⁶⁵ Therefore, at a critical stage in the proceedings, the victims had no meaningful chance to participate in order to influence the initial charges brought against the suspect.

2. Pre-Trial Detention and the Interim Release of an Accused

During or just after the initial pre-trial proceedings the Statute and Rules entitle a suspect to request interim release.¹⁶⁶ While this is not common in many civil law systems, it is a fair trial right found in a number of human rights instruments and the Statute of the ICC.¹⁶⁷ In line with the fundamental rights to individual liberty and the presumption of innocence, pre-trial detention should generally be the exception rather than the rule.

162. *Id.*

163. *See* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2-tEN (Pre-Trial Chamber I), Warrant of Arrest (Feb. 10, 2006) [hereinafter Warrant of Arrest] (Pursuant to decision ICC-01/04-01/06-37 the Warrant of Arrest was reclassified as public on Mar. 17, 2006).

164. INTERNATIONAL JUSTICE TRIBUNE, ICC IN 2006: YEAR ONE 34 (2007).

165. *Lubanga*, ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo 8 (Jun. 29 2006).

166. Rome Statute, *supra* note 5, art. 60; *see also* ICC Rules, *supra* note 71, Rule 118(1).

167. *See* International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 16, 1966, [hereinafter ICCPR]; European Convention on Human Rights art. 5, *adopted* Nov. 4, 1950, 213 U.N.T.S. 222.

However, if the criteria found in Article 58(1) are satisfied then detention may continue.¹⁶⁸ These criteria include (i) concluding that there are reasonable grounds to believe that the person has committed a crime under the Court's jurisdiction; (ii) ensuring the person's appearance at trial; (iii) ensuring that the person does not obstruct or endanger the investigation or proceedings; and (iv) preventing the person from continuing with the commission of that crime or a related crime falling within the jurisdiction of the Court.¹⁶⁹ While recognizing the seriousness of the alleged crimes of a suspect, a Court must also recognize the suspected individual's right to a presumption of innocence, and therefore the right to freedom from detention prior to trial. If the Pre-Trial Chamber finds that the criteria of Article 58(1) are not satisfied then it may grant interim release, with or without conditions attached.¹⁷⁰ When deciding on the interim release of an individual, Rule 119(3) specifically requires the Pre-Trial Chamber to seek the views of victims that have communicated with the Court on a particular case and with whom the Chamber considers at risk as a result of conditional release.¹⁷¹ Conditional release is of particular importance both to the victims and to suspects claiming their innocence.

As pertaining to *Lubanga*, the Pre-Trial Chamber did an excellent job of following the procedures laid out in the Statute and Rules. On February 10, 2006 Pre-Trial Chamber I issued the warrant of arrest for Thomas Lubanga Dyilo.¹⁷² He was already in custody in the DRC for over a year, therefore it was relatively easy to have him transferred to The Hague shortly after the issuance of the arrest warrant.¹⁷³ In September 2006 the defense filed a motion requesting the interim release of Lubanga.¹⁷⁴ In response, the legal representatives for a/0001/06, a/0002/06 and a/0003/06 asked the Chamber to dismiss the defense request.¹⁷⁵ Likewise, the

168. See Rome Statute, *supra* note 5, art. 58(1).

169. *Id.*

170. *Id.* art. 60(2); ICC Rules, *supra* note 71, R. 119.

171. ICC Rules, *supra* note 71, R. 119.

172. See Warrant of Arrest, *supra* note 163.

173. See Katy Glassborow, *Lubanga Defense Hits out at ICC* (Nov. 9, 2006), available at <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=52568>.

174. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-452, Request for Further Information Regarding the Confirmation Hearing and for Appropriate Relief to Safeguard the Rights of the Defense of Thomas Lubanga Dyilo 13 (Sept. 20, 2006).

175. *Lubanga*, ICC-01/04-01/06-530, Observations of victims a/0001/06, a/0002/06 et a/0003/06 in respect of the application for release filed by the Defense, 6-7 (Oct. 9, 2006).

Prosecution did the same.¹⁷⁶ Subsequently, the Pre-Trial Chamber rejected the defense request for interim release, which the Appeals Chamber later confirmed on appeal.¹⁷⁷ It is almost certain that the Court would have ruled the same way even without the observations put forward by the victims, but symbolically, and potentially substantively, the victims' observations may have influenced the Court to deny Lubanga's request for interim release. In the least, it allowed the victims the opportunity to express their views and concerns on the topic, which the Court would not have heard otherwise.

3. Confirmation of Charges Hearing

The purpose of a confirmation of charges hearing is to establish whether there is enough evidence to believe that a suspect committed the crimes found in the indictment.¹⁷⁸ In many civil law systems, the confirmation of charges is an established procedure to oversee the investigating magistrate or prosecutor. Essentially, the confirmation of charges hearing protects the rights of the defendant against wrongful or

176. *Lubanga*, ICC-01/04-01/06-531, Prosecution's Response to the Defense Request for Interim Release 20 (Oct. 9, 2006).

177. See *Lubanga*, ICC-01/04-01/06-586-tEN, Decision on the Application for the interim release of Thomas Lubanga Dyilo 8 (Oct. 18, 2006); *Lubanga*, ICC-01/04-01/06-594, Defence Appeal Against Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo (Decision on the request for interim release) (Oct. 20, 2006); *Lubanga*, ICC-01/04-01/06-824, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' (Feb. 13, 2007). The Chamber also reviewed the conditions under which victims may participate in Appeal proceedings. This falls outside the scope of this Article, however, it is important to note that this Appeals Chamber decision found that victims do not have an automatic right to participate in Appeal proceedings and therefore must file an application explaining how their personal interests are affected. Interestingly, the dissenting opinion of judge Sang Hyun Song argues that victims should not need to file an application to participate in Appeals because such a right is granted to all participants, including victims.

178. See International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 47, U.N. Doc. IT/32/Rev.42, entered into force Mar. 14, 1994, as amended Nov. 4, 2008; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence for the ICTR, Rule 47, U.N. Doc. ITR/3/REV.17, entered into force June 29, 1995, as amended Mar. 14, 2008. The confirmation of charges at the ICTY and ICTR differed greatly from ICC practice. At the ICTY and ICTR, once the prosecutor determined that sufficient evidence existed to indict a suspect, he would prepare an indictment and forward it to the Registry for confirmation by a judge. Once the indictment was confirmed, it was made public unless ordered by the judge to remain sealed. The indictment was then served on the suspect at the time of arrest. Notably, the confirmation of charges was, for the most part, an immaterial aspect of the proceedings. This has significantly changed at the ICC.

wholly unfounded allegations.¹⁷⁹ The Court may make one of several decisions following the confirmation of charges hearing: (1) confirm the charges and send the case to trial; (2) refuse to confirm the charges, to which the Prosecutor may submit new charges based on additional evidence; (3) adjourn the hearing and request the Prosecutor to provide additional evidence or conduct further investigations; or (4) adjourn the hearing and request the Prosecutor to amend a charge to better reflect the evidence.¹⁸⁰ While a confirmation of charges hearing differs from other pre-trial hearings and the trial itself, victims will almost always have an interest in participating.¹⁸¹ Although the Statute does not explicitly state that victims have a right to participate in these types of hearings, other Rules support the argument in favor of participation.¹⁸²

Lubanga illustrates the numerous issues surrounding victim participation and the confirmation of charges process. This process caused a great deal of conflict between the interests of all Court actors, including once again, between the Judges and the Prosecution. Prior to the confirmation of charges hearing, there were numerous filings by the Prosecution, defense and victims' representatives concerning which victims could participate (if at all) and the arrangements for participation. Ultimately, the Pre-Trial Chamber determined that four victims could participate.¹⁸³

179. *Lubanga*, Transcription No. ICC-01/04-01/06-T-48-EN (Jan. 29, 2007).

180. Rome Statute, *supra* note 5, art. 61(7).

181. See generally Stahn et al., *supra* note 119. See also Gilbert Bitti & Håken Friman, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *supra* note 73, at 470 (noting also that victims may be interested in requesting measures for the purpose of forfeiture pursuant to Article 57(3)(e)).

182. Because Rules 89 to 91 apply to Article 61 proceedings, the Court has found a presumption in favor of participation and the manner and scope of participation is left to the Judges' discretion. Additionally, under Rule 92(3) the Court has the obligation to notify victims of confirmation hearings so that they can submit applications for participation in accordance with Rule 89. Stahn et al., *supra* note 119, at 235.

183. The first victim participant was a woman whose one son was killed by another militia and her other son and nephew enlisted into the Union of Congolese Patriots (UPC). The son and nephew were 10 and 11 years-old respectively. Both boys are still alive. The second victim participant was a father whose son was abducted with several of his classmates when still in the fourth year of primary school. The father took him out of the training camp and his son is still alive. The third victim participant was also a father whose son was abducted by the UPC at the age of 12. A short while later his son's body, riddled with bullets, was found lying in front of his home. The fourth and final victim participant was recruited and used as a child soldier in the Ugandan People's Defense Force (UPDF) and later in the UPC. See *Lubanga*, ICC-01/04-01/06-462-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Sept. 22, 2006).

The Chamber held that the victims would have the opportunity to make opening and closing statements, pursuant to Rule 89(1) and that the victims' representatives would be able to request leave to intervene in the proceedings. However, the Court limited their participation to the charges brought against Lubanga.¹⁸⁴ The Court also limited the victims' participation by allowing (i) access to only the public documents in the record of the case against Lubanga (and not in the DRC situation) and (ii) presence at only the public hearings due to the fact that the victims wanted to participate anonymously (including status hearings and the confirmation of charges hearing).¹⁸⁵ The Court found that it would violate the fundamental principle prohibiting anonymous accusations if it permitted victims to add any point of fact or evidence to the Prosecution's case file.¹⁸⁶ To this end, the Court neither permitted the victims to question witnesses pursuant to Rule 91(3) nor were the victims eligible to give evidence or call witnesses.¹⁸⁷ However, the legal representative for victims a/0001/06 to a/0003/06 requested that the Court put one question to the sole Prosecution witness, which the Court granted.¹⁸⁸ The Court noted that only if the victims agreed to disclose their identities to the defense would the Chamber consider broadening their participatory rights in the case against Lubanga.¹⁸⁹

The confirmation hearing itself was extensive. The proceedings, a first in international criminal law, took two weeks to complete.¹⁹⁰ The topics argued over covered diverse issues ranging from disclosure obligations, evidentiary concerns, fair trial rights and, most importantly, the alleged individual criminal responsibility of Lubanga.¹⁹¹ On January 29, 2007, Pre-Trial Chamber I confirmed the charges against Lubanga, finding sufficient

184. See *Lubanga*, ICC-01/04-01/06-172-tEN, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the case the Prosecutor v. Thomas Lubanga Dyilo (Jun. 29, 2006) (granting Victims a/0001/06, a/0002/06 and a/0003/06 permission to participate). See also *Lubanga*, ICC-01/04-01/06-601-tEN, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo (Oct. 20, 2006) (granting victim-applicant a/0105/06 the right to participate in the confirmation hearing on the same terms as those granted to the three previous victim-applicants).

185. *Lubanga*, ICC-01/04-01/06-462-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Sept. 22, 2006).

186. *Id.*

187. *Id.*

188. *Lubanga*, Transcription No. ICC-01/04-01/06-T-39-ENG at 95 and 141 (Nov. 21, 2006).

189. *Id.*

190. See Daily transcripts of the confirmation of charges hearing from Nov. 9, 2006-Nov. 28, 2006, ICC-01/04-01/06-T30 to ICC-01/04-01/06-T-47 (Pre-Trial Chamber I).

191. *Id.*

evidence to establish substantial grounds to believe he was criminally responsible as a co-perpetrator for all three charges brought against him.¹⁹²

On February 5, 2007, the Prosecutor sought leave to appeal the confirmation of charges decision on the basis that the Pre-Trial Chamber had substituted charges in the charging document.¹⁹³ The defense also sought leave to appeal. The representative for victims filed observations in response to both the Prosecution and defense applications seeking leave to appeal, asking the Court to reject both of them.¹⁹⁴ In their response to the parties' requests for leave to appeal, the victims recognized that the issues raised by the defense did not directly concern victims' participation. Nonetheless, the victims argued that the requests for leave to appeal slowed down the proceedings, thereby prejudicing victims' interests that justice be done.¹⁹⁵ In accordance with the wishes of the victims' representatives, on May 24, 2006, Pre-Trial Chamber I rejected both the Prosecutor and defense's requests to appeal the confirmation of charges.¹⁹⁶

Despite the fact that the Chamber could have allowed for an appeal, the Chamber remarked that the Statute intentionally excluded a direct right to appeal decisions confirming charges.¹⁹⁷ Additionally, the Chamber found that authorization of such an appeal would cause avoidable delay and affect the rights of the accused.¹⁹⁸ With the requests for leave to appeal rejected, the Pre-Trial Chamber referred *Lubanga* to the Trial Chamber.¹⁹⁹

192. *Lubanga*, ICC-01/04-01/06-803 (Pre-Trial Chamber I), Decision on the confirmation of charges, ¶ 410 (Jan. 29, 2007).

193. See *Lubanga*, ICC-01/04-01/06-806, Application for leave to Appeal Pre-Trial Chamber I's 29 Jan. 2007 'Décision sur la confirmation des charges' (Feb. 5, 2007) (substituting "internal armed conflict" war crimes under Article 8(2)(e)(vii) with "international armed conflict" war crimes under Article 8(2)(b)(xxvii)).

194. See *Lubanga*, ICC-01/04-01/06-839, Réponse à la demande de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 (Response to the request by the Defense to appeal the Pre-Trial Chambers's Decision from 29 Jan. 2007) (Feb. 26, 2007).

195. *Lubanga*, ICC-01/04-01/06-839, Réponse à la demande de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 (Response to the request by the Defense to appeal the Pre-Trial Chambers's Decision from Jan. 29, 2007) (Feb. 26, 2007).

196. *Lubanga*, ICC-01/04-01/06-915 (Pre-Trial Chamber I), Decision on the Prosecution and Defense applications for leave to appeal the Decision on the confirmation of charges, at 21 (May 24, 2007).

197. *Id.* ¶ 19.

198. *Id.* ¶ 30.

199. See *Lubanga*, ICC-01/04-01/06-925, 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 Decisions of the Appeals Chamber" (Feb. 2, 2007) (dismissing the application of four victims to participate in the determination of the preliminary issue of admissibility of the appeal against the

Subsequently, the Single Judge from Pre-Trial Chamber I embraced a systematic approach, including a clear determination of victims' procedural rights so that their participation could be meaningful and not merely symbolic.²⁰⁰ Accordingly, for participation in the pre-trial stage, including the confirmation of charges hearing, the Single Judge divided the specific procedural rights for victim participants into six groups.²⁰¹ Importantly, the set of procedural rights outlined by the Single Judge may "be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules – such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations."²⁰² Furthermore, for the purpose of granting procedural rights, the Single Judge differentiated between anonymous and non-anonymous victims. This distinction is important, because it recognizes the dangers of anonymity during criminal proceedings.

The first group of procedural rights at the pre-trial stage of a case includes the right to have access to, prior to and during the confirmation hearing, the record of the case kept by the Registry. However, only the legal representatives of non-anonymous victims are granted access to the confidential part of the record of the case and to attend closed session hearings and they are prohibited from transmitting to their clients copies of any document or evidence including the confidential part of the case record, as well as any transcript of hearings held in closed session.²⁰³ The first group of rights further includes the right to be notified in the same way as the Prosecution and the Defense of all decisions, requests, motions, responses, and other procedural documents which are filed in the record of the case and are not classified "ex parte."²⁰⁴ However, victims who have requested that their identities remain confidential at the confirmation of charges hearing will only receive notification of the public documents contained in the record of the case and public sessions of the hearing so as not to violate the principle of prohibiting anonymous accusations.²⁰⁵

Decision on the confirmation of charges because the majority found that the victim applicants' personal interests were not affected by the issue).

200. Katanga, ICC-01/04-01/07-474 (Pre-Trial Chamber I (Single Judge)), Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ¶¶ 49 & 51 (May 13, 2008).

201. *Id.* ¶ 127.

202. *Id.* ¶¶ 147-48.

203. *Id.* at 12-13.

204. *Id.* ¶ 129.

205. See *Lubanga*, ICC-01/-01/06-462 (Pre-Trial Chamber I). Decision on the Arrangements

The second group of rights includes the right (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.²⁰⁶ The third group of rights has to do with the examination of witnesses, and so long as a victim-participant is not an anonymous victim, the victim will have the right to examine (with leave of the Court) any witness called by the Prosecution or Defense at the confirmation hearing.²⁰⁷ The fourth group of procedural rights comprises the right to attend all public and closed session hearings leading up to and during the confirmation of charges hearing. However, this right does not include the right to attend *ex parte* hearings.²⁰⁸ The fifth group of rights includes the right to participate by way of oral motions, responses, and submissions. Victims may orally participate in: (i) all hearings in which those granted the procedural status of victim have the right to attend; and (ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and Rules. This exclusion may include, for example, matters relating to inter-party disclosure or any discussion of the evidence which aims at extending the factual basis contained in the prosecution Charging Document.²⁰⁹ The sixth and final group of procedural rights includes the right to file written motions, responses, and replies concerning all matters other than those in which the victim's representative has been excluded by the Statute and Rules. This group of rights includes the right to file written submissions on evidentiary and legal issues to be discussed at the confirmation of charges hearing and to raise objections or make observations in regards to issues related to the proper conduct of the proceedings prior to the confirmation hearing.²¹⁰

Although the above discussed decisions by the Pre-Trial Chambers helped to clarify victim participation in the pre-trial stage, additional issues have arisen concerning the proper role of victims in the proceedings, including the dual role of victim/witnesses, protection concerns, and procedures concerning disclosure obligations (which do not pertain to victims). Presently, the Court is still grappling with these issues.

for Participation of Victims a/0001/06, a/0002/06, and a/0003/06 at the Confirmation Hearing, at 7-8 (Sept. 22, 2006).

206. Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* note 200, ¶ 134.

207. *Id.* ¶¶ 135, 137-38.

208. *Id.* ¶ 140.

209. *Id.* ¶ 141.

210. *Id.* ¶¶ 141-44.

E. Trial Stage: Victims' Participation Revisited

It was obvious from the outset of *Lubanga* that the Trial Chamber would need to address the growing questions surrounding the victim participation endeavor, particularly because the procedural rulings of the Pre-Trial Chamber are not binding on the Trial Chamber.²¹¹ On January 18, 2008 Trial Chamber I issued its first major decision on victims.²¹² The decision deals with criteria for victim participation at the trial stage as well as the modalities of participation in *Lubanga*.²¹³ The Trial Chamber decision was a split decision with two judges in the majority and one judge, Judge Blattmann, dissenting.²¹⁴ Parts of this decision were appealed and the July 11, 2008 Appeals Chamber judgment on victim participation further clarified victim participation at the trial stage.

F. Criteria for Determining Victim Status

Adopting the same criteria used by the Pre-Trial Chambers in assessing victim applications, the Trial Chamber looked at proof of identity issues, the harm suffered, jurisdiction of the Court, the causal link and the personal interests of the victim-applicants. In establishing the proof of identity for a victim-applicant, the Trial Chamber noted that it will "seek to achieve a balance between the need to establish an applicant's identity with certainty on the one hand, and the applicant's personal circumstances, on the other."²¹⁵ Therefore, it will accept a wide variety of documents attempting to establish the proof of identity of a victim-applicant, including official and non-official documentation. Moreover, if a victim-applicant is unable to provide any documentation, it will also accept signed statements from two credible witnesses attesting to the identity of the victim applicant.²¹⁶ More recently, the Trial Chamber went even further and appeared to accept that some victim-applicants would simply be

211. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1084 (Trial Chamber I), Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ¶ 43 (Dec. 13, 2007).

212. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims' participation (Jan. 18, 2008).

213. *Id.*

214. *Id.* (Judge Blattmann, Dissenting Opinion).

215. *Id.* ¶ 87.

216. *Id.* ¶ 88.

unable to offer documented proof of their identities.²¹⁷ If this is the case, the Trial Chamber determined that a lack of documentation, proving an individual's identity, may in fact be justified for applicants who are or have been confronted with particular difficulties.²¹⁸ These victim-applicants must now provide an explanation for the absences of any identifying documents to support the victim application.²¹⁹

In addressing the second and third criteria, once the Trial Chamber has determined that the applicant is a natural or legal person, it then has to consider if there is evidence that the victim-applicant suffered harm as a result of the commission of a crime within the jurisdiction of the Court. In line with Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) the Trial Chamber determined that victims may suffer harm individually or collectively, and the term harm includes physical, mental, emotional, and economic harm or may consist in a substantial impairment of his or her fundamental rights.²²⁰ The Appeals Chamber agreed and further added that the harm suffered must be personal harm. In other words, the victim must have personally suffered the harm.²²¹ As a result, the victim may be a direct or indirect victim in the sense that the harm suffered by one victim as a result of a crime falling under the Court's jurisdiction can give rise to harm suffered by other victims.²²²

Perhaps most surprisingly, the Trial Chamber decision found that victims do not need to submit evidence of harm suffered as a result of the charges against the defendant. The Trial Chamber concluded that Rule 85 does not explicitly restrict participation to the crimes contained in the Charging Document and that doing so would introduce a limitation not found in the Statute or Rules. Rather, the Trial Chamber determined that it is only necessary that the harm was suffered as a result of a crime within

217. See *Lubanga*, ICC-01/04-01/06-1556 (Trial Chamber I) Decision on the applicants by victims to participate in the proceedings, ¶ 113 (Dec. 15, 2008).

218. See *id.*

219. See *id.*

220. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I). Decision on victims' participation, ¶ 87 (Jan. 18, 2008). ¶¶ 91-92.

221. *Lubanga*, ICC-01/04-01/06-1432 (Appeals Chamber) Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of Jan. 18, 2008, ¶ 107 (July 11, 2008), *supra* note 127.

222. *Id.* ¶ 32.

the jurisdiction of the Court.²²³ However, the Appeals Chamber disagreed and found that “[f]or the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute must be linked with the charges confirmed against the accused.²²⁴ Therefore only victims who can show a causal link between their harm suffered and the charges against the accused will be able to participate in the trial proceedings.

In examining the final criterion for victim participation, the Trial Chamber turned to the issue of personal interests. The Trial Chamber determined that when assessing whether a victim’s personal interests are affected they will ask (i) whether there is a real evidential link between the victim and the evidence which the Court will be considering during [. . .] trial, leading to the conclusion that the victim’s personal interests are affected or (ii) whether the victim is affected by an issue arising during [. . .] trial because his or her personal interests are in a real sense engaged by it.²²⁵ However, as with the harm suffered by the victim, the Appeals Chamber clarified that the personal interests of a victim must be linked with the charges against the accused.²²⁶ Finally, following an initial determination that a victim shall be allowed to participate in the proceedings, the Trial Chamber found that a victim must show, in a discrete written application, why his or her interests are affected by the evidence or issue arising in the case and the nature and extent of the participation they seek. Moreover, a general interest in the outcome of the case or in the issues or evidence the Chamber will be considering is likely to be insufficient.²²⁷ Nonetheless, the Trial Chamber made clear that the participation of victims in the proceedings is not limited to an interest in receiving reparations.²²⁸ Therefore, the Court will not restrict questioning by victims during the proceedings to reparation issues, but will allow a variety of questions when appropriate.²²⁹

223. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I) Decision on victims’ participation, ¶¶ 93-94 (Jan. 18, 2008).

224. Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, *supra* note 127, ¶¶ 2 & 64.

225. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims’ participation, ¶¶ 95 & 102 (Jan. 18, 2008).

226. Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, *supra* note 127, ¶¶ 2 & 64.

227. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims’ participation, ¶ 96 (Jan. 18, 2008).

228. *Id.* ¶ 98.

229. *Id.* ¶¶ 98, 108.

It is interesting how heavily the majority decision relied upon the *Basic Principles* despite its non-binding character and the limited consideration paid to it by the drafters of the Statute and Rules. Indeed, “[r]ather than creating new substantive international or domestic legal obligations . . . ,” the *Basic Principles* are a “victim-based perspective” document that provides guidance to policymakers on procedures and modalities for increased recognition of the role and rights of victims in international human rights law and international humanitarian law.²³⁰ Its goal was to maximize positive outcomes for victims and not to create legal obligations.²³¹ Nonetheless, the aspects of the decision which relied upon this document were either not directly appealed to or refuted by the Appeals Chamber.

G. Manner and Scope of Participation

Once victim status is conferred upon a victim-applicant, the Court must then decide upon the manner and scope of participation. In an attempt to meaningfully implement Article 68(3), the Trial Chamber found that upon request by the legal representatives of the victims the Prosecution must provide them any materials within their possession. However, victims requesting such materials must have previously been granted the right to participate in the proceedings, the material requested must be relevant to their personal interests, and the victims must have identified with precision and in writing (discrete written application) the materials requested.²³² In addition, with leave of the Court, victims may question witnesses, including experts and the accused.²³³ Moreover, at its discretion, the Court may also allow victims to attend and participate in closed and *ex parte* hearings and make confidential or *ex parte* written submissions.²³⁴ Finally, victims may also speak at the various hearing taking part during the trial, including making opening and closing statements.²³⁵

The most controversial ruling in regards to the modalities of participation concerned the victims’ right to lead and challenge evidence, including the right to challenge the relevance and admissibility of evidence. The Trial Chamber found, and the Appeals Chamber affirmed, that although the right to present and challenge evidence pertaining to the

230. Bassiouni, *supra* note 3, at 251.

231. *Id.*

232. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims’ participation, ¶ 111 (Jan. 18, 2008).

233. *Id.* ¶ 108.

234. *Id.* ¶¶ 113, 114 & 118.

235. *Id.* ¶ 117.

guilt or innocence of the accused lies primarily with the Prosecution and Defense, victims may also lead and challenge evidence if doing so will assist it in the determination of the truth, and if in this sense the Court has “requested” the evidence.²³⁶ However, the Trial Chamber “did not create an unfettered right for victims to lead or challenge evidence,” and a number of safeguards have been set up by the Chamber.²³⁷ The safeguards include (i) a discrete application by the victims; (ii) notice to the parties; (iii) a demonstration of personal interests that are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection orders; (v) determination by the Chamber of appropriateness; and (vi) consistency with the rights of the accused and a fair trial.

Finally, the January 18th decision is also remarkable for the fact that it recognizes the possibility of victims remaining anonymous and exercising their participatory rights at the same time. However, in qualifying this possibility, the Chamber held that, “[t]he greater the extent and the significance of the proposed participation, the more likely it will be that Chamber will require the victim to identify himself or herself.”²³⁸ It is clear from both the Trial Chamber decision and the Appeals chamber judgment that victims will have a prominent position in court proceedings. However, a number of issues remain to be addressed.

VI. RECOGNIZING THE POTENTIAL AND THE CHALLENGES OF THE VICTIM PARTICIPATION ENDEAVOR

A. Accomplishments of Victim Participation

At both the national and international level, the position of victims in criminal proceedings has evolved considerably within the past few decades. The transformation of international criminal proceedings at the ICC in allowing active victim participation is a significant achievement in international criminal law and procedure. From the standpoint of the victim, the victim participation endeavor at the ICC has already accomplished a number of goals.

236. *Id.* ¶ 108; see also Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victim’s Participation of 18 Jan. 2008, *supra* note 127, ¶ 97.

237. Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, *supra* note 127, ¶¶ 3-4.

238. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims’ participation, ¶ 131 (Jan. 18, 2008).

For the first time, victims will be able to voice their views and concerns to an international criminal court other than in the limited role of witness even when they decline to bring a reparation claim. Moreover, despite the fact that the Statute and Rules do not explicitly allow victims to participate in the Prosecutor's investigation, access evidence gathered by the parties, or file appeals other than appealing reparation orders, the Court has found that these rights logically flow from the general provisions found in the Statute and Rules.

Second, the broad definition of victims under Rule 85 makes clear that both direct and indirect victims will have the opportunity to present their views and concerns to the Court. As mentioned above, this is a significant departure from previous tribunal practice, yet it is in line with the *Basic Principles*.

Third, victims have the opportunity to substantively influence the outcome of a number of early Court proceedings, including the interim release of a suspect or accused individual.

Finally, although it is too early to tell whether victim participation at the ICC has influenced the outcome of other decisions, victims have the symbolic opportunity to participate in proceedings. Many argue that even when participation is purely symbolic there is still an intrinsic value in participation for its own sake.²³⁹ One example of this is when victims' counsel made opening and closing statements at the pre-trial confirmation of charges hearing. Nonetheless, despite these accomplishments the participation of victims has come at a cost, most notably to the Prosecution, defense and Court operations. Moreover, there is a real fear that increased victim participation may create unrealistic expectations on the part of victims due to the fact that the Court has limited resources and it is still uncertain whether it can fulfill its unprecedented mandate.²⁴⁰

B. Prosecution and Court Concerns

At trial there is an expectation that there will be a great deal of confrontation between the Prosecution and the defense. This tension between the parties is inherent in adversarial and mixed proceedings. However, because the ICC employs a number of important civil law elements in its proceedings like the participation of victims and the

239. See Leslie Sebba, *The Individualization of the Victim: From Positivism to Postmoderism*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE, *supra* note 18, at 67.

240. See Adam Crawford, *Salient Themes Towards a Victim Perspective and the Limitations of Restorative Justice: Some Concluding Comments*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE, *supra* note 18, at 305 (noting that the same is true for national systems).

increased oversight of judges, new tensions are arising. The formal pre-trial proceedings, themselves a product of civil law jurisdictions, have highlighted the tension between the Prosecution, Judges, victim-applicants and participants.

It appears that the ICC Prosecutor is “torn between his theoretical position as the impartial seeker of truth, and his practical position as a party to the legal contest.”²⁴¹ Although recognizing the right of victims to participate at appropriate stages of trial proceedings, the Prosecution has shown continued reluctance in yielding to victim participation in a situation. The Prosecution has continually argued that early victim participation (i.e. prior to the naming of a suspect) undermines prosecutorial discretion and may also interfere with the Prosecutors’ strategic decisions.²⁴² The OTP’s argument is that victims do not have access to the same information and evidence as the OTP, and therefore victims should not be able to request that the Court require additional charges against a suspect that the OTP must prove beyond a reasonable doubt. As of yet, it does not appear that victims will be able to substantively influence the charges brought by the Prosecution at an early stage if they do not participate in warrant of arrest proceedings. However, because victims have the opportunity to participate at the confirmation of charges hearing they may still be able to influence the Court by requesting that the Prosecution add or modify charges brought against a suspect.

In addition, there are issues that might arise at trial due to the victims’ lack of a formal right to have access to the Prosecutor’s evidence.²⁴³ It is not hard to contemplate a scenario where the Prosecutor may wish to withhold sensitive evidence, such as evidence relating to national security issues, from victims’ counsel. If the Court does not grant victims access to the Prosecutor’s evidence then victims will lack the necessary information to help them fully understand the Prosecutor’s theories and strategies. Accordingly, they may inadvertently undermine the Prosecutor’s theory of a case or strategy for direct or cross examination. And if the Court orders the Prosecutor to share all of its evidence with victims’ counsel, the notions of fairness might require the same disclosure to the defense.²⁴⁴

An important challenge facing the Court is the lack of consistency in decisions handed down by the various Pre-Trial and Trial Chambers. The fact remains: different judges, from different backgrounds, must rule in

241. See de Hemptinne, *supra* note 15, at 410.

242. Jouet, *supra* note 58, at 251.

243. Jorda & de Hemptinne, *supra* note 67, at 1412.

244. See Jouet, *supra* note 58, at 277.

different cases and situations on similar issues concerning victim involvement. It is inevitable that decisions will vary, but the Court should take care to minimize the differences wherever possible. Consistency and predictability in proceedings are important to parties and participants. The best way to ensure a clear framework for victim participation that is understood and acceptable to all participants is to allow more novel decisions concerning victim participation to reach the Appeals Chamber. The Appeals Chamber, arguably, is in a better position to ensure consistent decisions on major issues affecting victim participation. Thankfully, in contrast to early Court practice, more recently decisions regarding victim participation have reached the Appeals Chamber, thereby providing better guidance to the Court.

Yet another major issue facing the Court, the elephant in the room, is the increasing number of potential victim applicants and participants. Logistically, the Court is ill equipped to handle increasing number of victims despite having the responsibility to reach out to as many victim communities as possible.²⁴⁵ In addition to this challenge, as the number of victim-applicants increases, so too will the individual versus group tensions between victims. Restorative justice principles focus on the individualization of the victim, but because of the uniqueness of international crimes and the sheer number of anticipated victims there will always be an inherent collective aspect to participation.

Unlike in national jurisdictions where a perpetrator usually commits a crime against one, or maybe a handful, of victims, at the ICC the crimes allegedly committed by the accused involve an almost immeasurable number of victims and victim communities. It will likely be impossible for most victims to participate individually in Court proceedings, although in theory it is possible to do so.

Despite the fact that Rule 90(1) says that a victim is free to choose legal counsel, in order to ensure the effectiveness of the proceedings, the Chamber may request that groups of victims choose a common legal representative(s).²⁴⁶ If victims are unable to agree upon a common legal representative the Chamber may request that the Registrar choose one or more legal representatives to represent the group.²⁴⁷ However, problems arise when groups of victims have incompatible or conflicting interests.

For example, there may be some victims whose property was destroyed while other victims were tortured or physically abused. The two sets of

245. Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, ¶¶ 13, 22, & 52 (Sept. 29, 2006).

246. ICC Rules, *supra* note 71, Rule 90(2).

247. *Id.* Rule 90(3).

victims will not have the same interests. Moreover, in complex cases, a Court will have to deal with victims affected in a variety of different, and at times, competing ways. Rule 90(4) requires both the Chamber and the Registrar to avoid and minimize conflicts of interests,²⁴⁸ but it is unclear exactly how they will be able to do this if a large number of victims participate in a complex case involving a wide range of charges. Practically speaking, however, the number of victim Representatives will likely need to remain feasible to work with.

The insertion of victims into an already complex process will require a number of important changes. Even Judge Jorda, an outspoken proponent of victim participation, recognized that the drafters of the Statute risked complicating the proceedings and seriously compromising Court efficiency.²⁴⁹ A pre-trial stage lasting almost one and a half years and numerous decisions dedicated to the issue in the cases before the Court shed light on how victim issues have already slowed down Court proceedings. Perhaps the strongest opposition to one of the victim participation decisions came from Judge Blattmann who drafted the dissent in the Jan. 18, 2006 Trial Chamber decision.²⁵⁰ In his dissenting opinion, Judge Blattmann submitted that it is his strong belief that the “[t]rial Chamber is not competent to make any assessments, including those regarding victim status, which step outside the strict mandate of the charges brought against [the accused] which have already been through the process of judicial scrutiny.”²⁵¹ He argued that the principle of legality limits the overstepping of judicial functions because the judges should not be in a position to make determinations based on evidence falling outside the scope of the charges against the accused.²⁵² To be sure, this dissenting opinion highlights the wide range of opinions on this very important issue.

248. *Id.* Rule 90(4).

249. *See* Jorda & de Hemptinne, *supra* note 67, at 1414-15.

250. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1119, Decision on victims’ participation (Jan. 18, 2006) (J. Blattmann, Dissenting, ¶ 11).

251. *Id.*

252. *See id.* (arguing instead that he would first determine which victim-applicants meet the definition of victim (and they must have suffered harm as a result of the commission of a crime related to the charges against the accused), next he would determine whether their personal interests are affected in the particular case, and if this element is met, the Trial Chamber should then assess whether the participation is appropriate at the particular time and stage of proceedings. Finally, if all of these elements are met the Trial Chamber must then determine whether the manner of participation would prejudice the rights of the accused to a fair, impartial, and efficient proceeding).

C. Defense Objections to Victim Participation

A fundamental principle of international criminal law is that every defendant has the right to a fair trial.²⁵³ This right to a fair trial, which exists at the national level in both adversarial and inquisitorial jurisdictions, is not *per se* compromised when victims participate to varying degrees in national jurisdictions. Nonetheless, because international criminal proceedings are inherently more complex, the increased participation of victims may endanger the rights of suspects and the accused despite steps taken by the Chambers to protect defendants' rights.²⁵⁴ One example of how an accused's fair trial rights may be violated is that his right to a speedy trial, which is recognized by all major human rights instruments may be negatively affected.²⁵⁵ In accordance with this right, Article 67(1)(c) requires that a Court try an accused without undue delay.²⁵⁶ The introduction of a large number of victims into proceedings will almost definitely prolong proceedings. The Chamber must either grant or deny victim status on every victim-applicant. The Prosecution and defense file motions in relation to all victim applications as well as to Court decisions granting victim status and outlining the modalities of victim participation. All of these motions and proceedings contribute to large delays in proceedings, where an accused's right to a speedy trial could arguably be violated.

In its response to victims' applications to participate in the appeal against the confirmation of charges in *Lubanga*, duty counsel, Patricia Annick Mongo, outlined a number of defense concerns.²⁵⁷ She expressed real concern about the overly general nature of the requests to participate at all stages of proceedings.²⁵⁸ She also cautioned against the Chambers

253. See ICCPR, *supra* note 167, art. 9; Universal Declaration of Human Rights, arts. 9-11, entered into force Dec. 10, 1948, U.N. Doc. A/810; ICTY Statute, *supra* note 9, Article 21; ICTR Statute, *supra* note 9, art. 20; Statute of the Special Court for Sierra Leone, art. 17, entered in force Aug. 14, 2000, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2004).

254. See Jouet, *supra* note 58, at 265. See also Göran Sluiter, *Victims in International Criminal Proceedings: A Plea for a Cautious Approach*, Special Symposium Edition of Merkourios, UTRECHT J. INT'L EUR. L. 31, 31-39.

255. CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 285-86, 308, 371, 375 (Oxford ed. 2001).

256. Rome Statute, *supra* note 5, art. 67.

257. See *Lubanga*, ICC-01/04-01/06-901-Corr-tEN, Response to the application by victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorization to participate in the appeal proceedings relating to the decision on the confirmation of charges (May 11, 2006).

258. *Id.* (arguing further that since victims' interests only centered on reparations, and reparation issues only arise during the trial stage, victims' participation should not take place in the Pre-Trial stage and certainly not in an appeal at the Pre-Trial stage).

allowing victims to intervene as third parties in the proceedings—a status not granted under the Statute.²⁵⁹ Mongo further argued that the Court should limit victims’ participation to issues related to reparations and she emphasized the fact that victim participation delayed proceedings and placed an additional burden on an understaffed and under-supported defense.²⁶⁰

In addition to the usual budgetary concerns defense teams at the ICC must spend time and resources on observations of victim applications, preparation for victims’ participation during proceedings, and responses to every observation submitted by victim participants. Moreover, as mentioned, the number of participants is growing.

As a result, one of the most problematic issues facing the defense at the prosecution phase is the lack of resources to conduct a proper defense. The ICC Registrar, Bruno Cathala, once stated “without a quality defense there will not be quality justice at the international court.”²⁶¹ Yet, the Registrar in *Lubanga* continuously opposed an increase in funding for defense counsel and the ICC Statute does not provide a clear right to funding for investigation of facts.²⁶²

Although quality counsel and funding are not synonymous, defense counsel must receive adequate funding in order to put on an adequate defense, both against the Prosecution as well as against victims. The situation became so strained that in May 2007 the International Criminal Bar requested leave from Pre-Trial Chamber I to intervene as amicus curiae on behalf of defense issues.²⁶³ As the defense struggles to find time, resources, and staff to deal with victim issues they must also prepare for the actual work of mounting a defense in an international criminal court.

Thus far in the proceedings, all of the Chambers of the Court, pursuant both to Articles 68 and 67, attempt to provide equitable justice for parties and participants, but whether the Court can (or should) achieve such equity is still uncertain. Many commentators argue that the Court must strike a

259. *See id.*

260. *See id.*

261. INTERNATIONAL JUSTICE TRIBUNE, *supra* note 164, at 66.

262. Arguably, this lack of a clear right to funding for investigations is because Article 54(1)(a) requires the Prosecutor to investigate both incriminating as well as exonerating evidence, again a product of civil law systems. *See Gallant, supra* note 4, at 36.

263. *See Lubanga*, ICC-01/04-01/06-918-Anx, Proposed Brief by the International Criminal Bar as Amicus Curiae in relation to the Pro Se request for review of a Registry decision by Thomas Lubanga Dyilo (June 4, 2007) (arguing that the Registrar must allocate sufficient resources to the defense to ensure a fair trial). *But see Lubanga*, ICC-01/04-01/06-938, Motion to withdraw request for leave and proposed Amicus Brief on behalf of the International Criminal Bar (July 25, 2007) (withdrawing their request once the Registrar and Defense resolved the situation).

balance between a number of legitimate objectives.²⁶⁴ Those legitimate objectives include the fair trial rights of the accused, the right of victims to participate in proceedings, the fair trial rights of the Prosecutor and a workable Court procedure.²⁶⁵ The “Holistic Balancing Test,” as referred to by Mekjian and Varghese, requires the Trial Chamber to take into account (1) the stage of the proceedings; (2) the rights of the accused; (3) the interests of witnesses; and (4) the need for a fair, impartial and expeditious trial as stated under Article 68(3).²⁶⁶ However, the wording of Article 68(3) implies that victims’ rights can not come at the expense of defense rights.²⁶⁷ Therefore, the Holistic Balancing Test needs, instead, to be a tiered evaluation, where the rights of the accused should always take precedence.²⁶⁸

VII. BRIDGING THE DIVIDES: CLARIFICATION NEEDED AND RECOMMENDATIONS FOR THE COURT

International criminal trials are inherently more complex and often take longer than domestic criminal trials. Therefore, the creation of international courts requires difficult choices concerning the structure and function of those courts to meet the unique needs of international criminal adjudication. Although it is an overstatement to assert that the ICC has overcome traditional adversarial and inquisitorial divides,²⁶⁹ it is apparent that, because the ICC faces situations that do not exist at the national level, particularly in relation to victims, it is both necessary and practical to opt for procedural solutions that are truly *sui generis*. Indeed, the Court has maintained that it must develop its own pre-trial and “trial procedures that meet the particular exigencies of the international cases that it will have to decide, applying the Rome Statute framework.”²⁷⁰ However, in order to adopt a *sui generis* procedural framework reflective of the international criminal order, which combines elements from the civil law and common law traditions and bases itself on both traditional as well as modern theories of criminal justice, it becomes necessary to clarify the goals and

264. See Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT’L CRIM. L. REV. 345, 359 (2003); see also Mekjian & Varghese, *supra* note 73, at 31.

265. Garkawe, *supra* note 264.

266. Mekjian & Varghese, *supra* note 73, at 29.

267. Rome Statute, *supra* note 5, art. 68.

268. For similar arguments, see Jouet, *supra* note 58, at 250.

269. Ambos, *supra* note 8, at 34.

270. *Lubanga*, ICC-01/04-01/06-1119 (Trial Chamber I), Decision on victims’ participation, ¶ 85 (Jan. 18, 2008).

purpose of the Court and victim participations specifically. In addition, the Court should consider internal changes as well as external alternatives in its quest to meaningfully deal with the victim participation issue. Finally, the Court should be weary of simply picking and choosing procedural norms found in domestic systems without recognizing that these procedural rules do not exist in a vacuum. There is a real danger in applying procedural rules haphazardly without taking into account the context from which they come and the developed systems of justice in which they function.

A. The Need for Clarification of the Goals and Purpose of the Trial and the Goals and Purpose of Victim Participation

Concerning the notion of expanding the mandate of criminal tribunals, Hannah Arendt, in her book *Eichmann in Jerusalem: A Report on the Banality of Evil*, argued that “those prosecuting Eichmann failed to concentrate on the [primary] purpose of the trial, “namely the individual criminal responsibility of the accused.”²⁷¹ Instead, she found that the Court allowed victims to recount events not directly related to the indictment.²⁷² Witnesses appeared to produce stories that were “calculated to shock the heart.”²⁷³ These narratives would serve not so much to decide the individual criminal responsibility of the accused, but rather to serve the interests of victims, both individually and collectively. In the context of *Eichmann*, the trial had less to do with the accused and more to do with the collectivity of the victims.²⁷⁴ Nevertheless, in the end, she approved of the judgment because the Israeli court resisted the temptation to broaden the scope of the trial.²⁷⁵ But will the same be true at the ICC which, unlike at the *Eichmann* trial, actually mandates a broadening of the functions of the trial to deal with victims’ emotional harm? In light of Damaška’s theory, what then are the primary and ancillary goals of the ICC and should this suggest what form of procedure to apply in its proceedings? Moreover, when incorporating elements from both the adversarial and inquisitorial

271. See Dembour & Haslam, *supra* note 4.

272. Emily Haslam, *Victim Participation at the ICC*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 316 n.11 (Dominic McGoldrick et al.eds., 2004) (citing HANNAH ARENDT, *EICHMANN IN JERUSALEM—A REPORT ON THE BANALITY OF EVIL* (1994)).

273. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 15-16 (Transaction Publishers 2000) (citing TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 388 (Holt Paperbacks 1993)).

274. Dembour & Haslam, *supra* note 4, at 169; see also OSIEL, *supra* note 273, at 15-17.

275. Dembour & Haslam, *supra* note 4, at 152 (citing HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (Penguin Books 1963)).

system into a *sui generis* system, is there a risk of creating a mixed system that produces outcomes that are less satisfactory than when adopted in their pure form?²⁷⁶

Clarification of a Court's primary and ancillary goals and purposes is important when examining the victim participation endeavor. International courts try to both solve conflicts and implement policies. Articulated goals of the Court include holding individual perpetrators criminally responsible for international crimes, the maintenance of international peace and security, deterrence of international crimes, and most important for this Article, the inclusion of victims in the criminal process.²⁷⁷ Although serving the interests of victims is both a laudable goal and obligation of the Court, it is not the primary function. Rather, the Court's primary purpose is to establish the truth as it pertains to the guilt or innocence of an accused through efficient and fair proceedings.²⁷⁸ Indeed, it is the public interest of punishing the guilty individual rather than the private interests of the individual victim that dominates international adjudications.

It appears that conflict-solving and adversarial proceedings, policy-making and inquisitorial proceedings, or preferably a mix of these two traditions can effectively serve the primary goal of the ICC. However, the particular goal of victim participation has such strong policy-implementing characteristics that it is most likely better served through "pure" inquisitorial procedures.²⁷⁹ As a result, there is an indisputable tension between the primary goal on the one hand and the ancillary goal on the other. This suggests that when combining the primary goal of the Court with one of its more idiosyncratic goals, a legal process that combines elements from the adversarial and inquisitorial traditions is desirable. Procedures employing inquisitorial traditions may take the shape of an official inquiry without necessarily undercutting the role of the Prosecutor and defense and overly bolstering the role of the judge. It all depends on how the parties and participants treat each individual proceeding. Flexibility and adoptability, coupled with clear instructions from the Judges, are of paramount importance, but predictability must not be compromised.

Just as it is important to clarify the Court's primary and ancillary goals and purposes, it is equally important to articulate the goals and purpose of victim participation. Presently, neither the Statute nor the Rules clarify the

276. See Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 265 & 292 (2004).

277. Rome Statute, *supra* note 5, pmb1.

278. *Id.* arts. 64 & 67; ICC Rules, *supra* note 71, Rule 101.

279. See generally DAMAŠKA, *supra* note 1, at 147-80.

purpose of victim participation at the ICC.²⁸⁰ This lack of clarification is one reason why so many disputes have arisen in regards to victim participation. Is the purpose of victim participation to help meet the needs of victims, or is it to aid the Court in the determination of guilt or both? As Jouet aptly points out, “[w]ithout knowing why victims have standing, it becomes equally uncertain what victims will do in court and when they will do so.”²⁸¹ If the purpose of participation is to have them act as quasi-private prosecutors, then they should be able to argue about the guilt of the defendant as well as on sentencing. The Court should not necessarily limit their participation to only cover discussions of the harm they have suffered. The lack of clarification of the purpose of victim participation has also contributed to the debate over what qualifies as victims’ “personal interests” under Article 68(3).

B. Recommendations for the Court

“The key question relate[d] to victim participation is not how to avoid conflicts between competing interests, ‘because these will naturally occur, but rather,’ how to manage them effectively.”²⁸² This Article does not argue that a Court should abolish victims’ participatory rights. Indeed, victims have the statutory right to participate in international criminal proceedings in some meaningful capacity, and it is a major achievement of a Court to attempt to recognize victims’ interests and concerns. Nevertheless, a Court must realize that internal changes and external alternatives are viable options.

1. Internal Recommendations: Increased Judicial Control, Increased Reliance on the Registrar, Increased Defense Budget

Certainly, international criminal proceedings take too long and are too costly.²⁸³ This is especially true at the ICC where “[i]f the victims were able to exercise [their] rights freely without any control by a judge, the proceedings could last indefinitely, infringing [upon] the rights of the

280. Compare Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules, as revised 1 Feb. 2008, R. 23(1), available at http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf.

281. Jouet, *supra* note 58, at 268.

282. Doak, *supra* note 27, at 315 (citing Daniel W. Van Ness, *A Reply to Andrew Ashworth*, 4 CRIM. LAW FORUM 301, 304 (1993)).

283. See generally Higgins, *supra* note 9; see also Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 545 (2004); de Hemptinne, *supra* note 15, at 404.

accused.”²⁸⁴ In addressing this issue, and also in order to deal efficiently and effectively with victims’ issues, drafters decided that both the Registrar and the relevant Chamber would play a large role in the process. In fact, the judges, with the aid of the Registrar, are responsible for the efficient operation of the Court.²⁸⁵ One recommendation in addressing the growing delays is to encourage judicial control over victim issues in order to reduce the length of proceedings and increase the effectiveness of trials.²⁸⁶ Two ways for the Court to exert judicial control and deal with increased victim participation are: (i) to restrict the number of victim participants; and (ii) to place limits on the degree or scope of participation. To date, the judges have recognized the need for this control. They have done an excellent job of limiting the actual number of victim participants, taking care that victims’ involvement does not disrupt the proceedings.²⁸⁷ For example, Pre-Trial Chamber I twice rejected the victims’ applications to participate in status conferences during the prosecution phase of the pre-trial stage despite the fact that both the prosecution and defense attended.²⁸⁸ This form of tight control needs to continue. However, this control does not need to take away from certain party driven proceedings and investigations.

De Hemptinne and Rindi argue that a Court could curtail many drawbacks of early victim participation if the Statute and Rules vested the Pre-Trial Chamber with effective investigative powers such as those found

284. de Hemptinne, *supra* note 15, at 412.

285. See Jorda & de Hemptinne, *supra* note 67, at 1413.

286. Higgins, *supra* note 9, at 394. Interestingly, two of the shortest trials at the ICTY were the Prosecutor v. Limij et al. (IT-03-66) which commenced on Nov. 15, 2004 and heard closing arguments on Aug. 29, 2005 and Prosecutor v. Haradinaj et al. (IT-04-84) which commenced on Mar. 5, 2007 and heard closing arguments Jan. 21, 2008. In the *Limij* case the Prosecutor, defense teams, and presiding Judge came from common law countries. In the *Haradinaj* case, the Prosecutor and defense teams came from common law countries. See Limaj et al. Case Information Sheet, available at http://www.icty.org/x/cases/limaj/cis/en/cis_limaj_et_al.pdf; see also Haradinaj et al. Case Information Sheet, available at http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf and the final judgment on Nov. 15, 2004.

287. See Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432 (Appeals Chamber) Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, ¶¶ 2, 64 (July 11, 2008) (limiting victim participation at trial to those who can show a causal link between their harm suffered and the charges against the accused).

288. See *Lubanga*, ICC-01/04-01/06-335, Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of Aug. 24, 2006 (Aug. 17, 2006); see also *Lubanga*, ICC-01/04-01/06-380, Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 5 Sept. 5, 2006 (Sept. 4, 2006).

in most civil law jurisdictions.²⁸⁹ They correctly note that “the question of victims’ participation in the investigation stage is intrinsically intertwined with the powers of the Pre-Trial Chamber vis-à-vis those of the Prosecutor,” and argue that if the investigative powers of the Pre-Trial Chamber were to increase, the participation of victims would become more easily controllable.²⁹⁰ They assert that when the judges collect the evidence themselves they automatically become better suited to “knowingly assess the relevance of the victims’ participation.”²⁹¹ This line of reasoning, however, only highlights a number of problems. First, it suggests that the Prosecutor’s representations to a Court are at the least unreliable, and at the most untrustworthy—and that only judges can truly be independent. Second, it places far too much control in the hands of international judges and overlooks the basic notion of the “balance” of power between the judges and the Prosecutor at the Court.

Another more realistic possibility concerning the growing delays in proceedings is to have the Registrar play a larger role in the early determinations of victim status.²⁹² The Statute, Rules and Appeals’ jurisprudence clarifying the procedure can help the Registrar process and evaluate victims’ applications.²⁹³ This initial evaluation by the Registrar would free up time spent by the parties and Judges on initial determinations.

As noted in a recent report on victim participation before the ICC, relying on the Registrar to make initial determinations of victim status is both efficient and practical.²⁹⁴ The Registrar is the organ of a Court in the best position to make early determinations because sections of the Registrar receive and process victim applications as well as provide protection and legal counsel to victims.²⁹⁵ In fact, Regulation 86(6) requires the Registrar to review each victim application and present findings to the Chamber in a report.²⁹⁶

289. De Hemptinne & Rindi, *supra* note 135, at 349.

290. *Id.*

291. *Id.*

292. American University, Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, Victim Participation Before the International Criminal Court, 62-72 (Nov. 2007) [hereinafter WCL WCRO Report].

293. ICC Rules, *supra* note 71, R. 16; ICC Regulations, *supra* note 71, Regulations 86(4) & 86(6).

294. WCL WCRO Report, *supra* note 292, at 65.

295. *Id.*

296. ICC Regulations, *supra* note 71, Regulation 86(6).

Regulation 86(6) does not stipulate what form the report should take.²⁹⁷ Therefore, it is conceivable that the report can act as an initial determination of victim status.²⁹⁸ The report on victims mentioned above also highlights the fact that administrative evaluations of *prima facie* recommendations concerning victims' applications is consistent with the practice of a number of other international tribunals such as the U.N. Claims Commission and the Iran-U.S. Claims Tribunal, both of which had to process and evaluate a large number of victim applications and reparation claims.²⁹⁹ Similarly, the Inter-American Commission, European Court of Human Rights, and the African Commission on Human and People's Rights all make use of initial screening procedures by administrative organs.³⁰⁰ However, streamlining this process will only work if the Appeals' Chamber clarifies the procedures the Court and Registrar must apply.

Although it will not be easy, it is also advisable for a Court to increase the budget allocated to defense teams to cover the extra time and money necessary to deal with victims' applications. This is going to be difficult to implement for a number of reasons. First, increasing the budget of defense teams has never been a high priority for international criminal courts.³⁰¹ Second, because the Prosecutor is responsible for investigating inculpatory as well as exculpatory evidence, a product of civil law systems, some argue that there is less of a need for defense teams to have increased budgets for investigations.³⁰² As Kenneth Gallant has noted, "investigative funding is tied to the continuing discussion regarding the relationship between civil and common law criminal procedure[s]. . . ."³⁰³ Nonetheless, it seems unrealistic for defense teams to fully rely on either the prosecution to conduct full investigations on their behalf, or on

297. *Id.*

298. *But see* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ¶ 20 (Nov. 9, 2007) (holding that reports prepared by the Registrar "should not contain any comment or expression of views on the overall merits of the application to participate"). Nonetheless, until the Appeals Chamber clarifies the issue this decision is not binding on other Trial Chambers who may wish to adopt another approach.

299. Notably, these two institutions differ significantly in their mandates and procedures. Nevertheless, it is helpful to examine their best practices for dealing with mass numbers of victim applications. *See* WCL WCRO Report, *supra* note 292, at 66.

300. *Id.* at 66-67.

301. Gallant, *supra* note 4, at 36.

302. Rome Statute, *supra* note 5, art. 54(1).

303. Gallant, *supra* note 4, at 37.

effective judicial control over the process. Therefore, the Court should look into increasing the budgets allocated to defense.

2. External Recommendations: Alternative Avenues for Addressing Victim Concerns

The institutional framework adopting victim-based reforms impacts the form they take, in that “[t]he philosophical underpinning of the international criminal tribunals can thus explain why it in certain situations is so difficult to adopt certain victim-oriented measures.”³⁰⁴ Courts cannot always reconcile the principles of retributive justice and restorative justice; therefore attempts to create a space for victims within legal proceedings may be misguided.³⁰⁵ Indeed, Judge Pillay, when at the ICTR, forewarned that that tribunal was “neither designed nor in a position to act as a public forum or claims commission for thousands of individual communications from victims of each situation.”³⁰⁶ Similarly, Dembour and Haslam examined transcripts from the *Krstic* case at the ICTY and concluded that criminal trials are not the ideal place for victims to tell their stories.³⁰⁷

Although the ICC addresses a number of the concerns raised in the Dembour and Haslam article, as well as those concerns raised by Judge Pillay, the ICC participation regime has yet to contradict one of their fundamental conclusions that trials view “facts” restrictively, whereas other non-legal forum embrace all types of “facts” including victim narratives.³⁰⁸ If the objective of victim participation is to empower the individual victim, then surely this can be better achieved in a non-legal or quasi-legal institution rather than in a criminal trial.³⁰⁹ For these reasons, it is advisable that the ICC operates together with other non-criminal institutions such as truth commissions, claims commissions, trauma management organizations, documentary projects, and art and education

304. HEIKKILÄ, *supra* note 19, at 41.

305. Dembour & Haslam, *supra* note 4, at 175.

306. Stahn et al., *supra* note 119, at 223; *see also* on this issue a letter from the then President of the ICTR, Judge Navanethem Pillay, to the U.N. Secretary General addressing the issue of whether the task of processing and determining claims concerning the compensation of victims should not be left to international tribunals, where she stated “that any such proposal would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal” (annex to a letter of the U.N. Secretary General to the Security Council dated Dec. 14, 2000, U.N. doc. S/2000/1198).

307. *See generally* Dembour & Haslam, *supra* note 4.

308. *Id.* at 163.

309. Sebba, *supra* note 239, at 70.

projects.³¹⁰ Truth and reconciliation commissions, in particular, are a viable alternative for broad victim participation.³¹¹ They are a generally effective way to discover the “truth” about patterns of gross human rights violations.³¹² Trauma management services are another undervalued tool in post-conflict and conflict-ridden societies. Where trials are ill-equipped to effectively deal with emotional trauma, trauma management services can better serve victim communities.

VIII. CONCLUSION

Many commentators hail the establishment of the ICC in 1998 and its coming into operation in 2002 as a watershed event—particularly in regards to victims’ rights.³¹³ The Statutes, Rules and Regulations of a Court attempt to overcome the auxiliary role of victims, common in adversarial systems, with a more prominent role for victims, often found in inquisitorial systems.³¹⁴ Victims’ rights groups, largely responsible for the changes, welcomed the decisions by the drafters of the Rome Statute and Rules to allow victims a central role throughout the criminal trial process.³¹⁵ The hope is that the changes will mark a positive step towards restorative justice. However, it is still uncertain whether the structural transformations presented by active participation will benefit the victims, infringe upon the rights of accused, jeopardize prosecutorial discretion, or hamper the functioning of a Court.

This Article recognizes the importance and complexity of implementing victim participation at the ICC, yet it is crucial that assessments are made. In terms of bottom-line results, the victim participation endeavor has been both a success—albeit a qualified one, and a headache—although not a disaster. In reviewing the increasing number of motions and decisions dealing with victim participation, a number of

310. Dembour & Haslam, *supra* note 4, at 171; see also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 47-48 (Beacon Press 1998).

311. Jouet, *supra* note 58, at 300.

312. *Id.* at 301.

313. See Stahn et al., *supra* note 119, at 219; see also Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT’L L. 667, 668 (2002).

314. See generally Fernández de Gurmendi, *supra* note 113, at 256.

315. See website of the Victims’ Rights Working Group, available at <http://www.vrwg.org/Participation.html> (stating that “[o]ne of the major innovations of the ICC statute is the ability of victims to participate in proceedings”) and website of REDRESS, available at <http://www.redress.org/> (calling the ICC procedures pertaining to victims “groundbreaking”).

things have become clear: (1) victims have the right to participate in all stages of proceedings, including during the investigative phase of a situation; (2) for the time being, the Prosecution will continue to argue against victim participation during the investigation phase of a situation and fight to retain prosecutorial discretion; (3) the judges want to keep tight control over the proceedings; (4) despite an early reluctance to allow novel decisions on victim participation to reach the Appeals Chamber, much to the detriment of the development of international law, the judges are now more willing to let this happen;³¹⁶ and (5) the defense will struggle, even more than in previous tribunals, to devote enough resources to respond to victim participants.

In addition to those five points, the pre-trial and trial proceedings indicate that victims' rights found in the Statute and Rules have a variety of potential interpretations creating increased tensions between all participants. A Court's jurisprudence suggests that it has approached the victim participation endeavor with a combination of enthusiasm and caution. It is critical that a Court continues to respect the rights of victims to present their views and concerns at appropriate stages of the proceedings and in a manner that does not infringe upon the fair trial rights of the parties. Procedural rules only provide a Court with a framework from which to work. The successful functioning of a Court depends on the parties, participants, judges and administrators ignoring their traditional biases for a particular legal tradition and embracing the concept of a *sui generis* system.

316. See Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-338, Decision on Defense Motion for Leave to Appeal (Aug. 18, 2006) (rejecting the Defense application for leave to appeal the Pre-Trial Chamber's decision granting victims a/0001/06, a/0002/06 and a/0003/06 the right to participate in the *Lubanga* case and DRC situation despite the fact that the Prosecution supported the defense application to appeal).

