

# Aspects of victim participation in the proceedings of the International Criminal Court

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## Abstract

*The participation of victims in criminal proceedings is generally a rather new phenomenon. While there is a certain tradition of victim participation as “partie civile” in the criminal proceedings of some national jurisdictions, it is a novelty in international criminal trials. The drafters of the International Criminal Court (ICC) Statute chose to design a rather broad victim participation scheme. Although it is hailed as an important and effective instrument for giving victims of gross violations of human rights and international humanitarian law a voice, the procedural and substantive details are far from being settled. Some of the most significant issues are discussed in this article, including the question whether and how victim participation may influence sentencing and punishment.*

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The participation of victims in criminal proceedings is generally a rather new phenomenon – and is still far from being fully accepted.<sup>1</sup> Victims have played and continue to play a marginal role in the precedents of the International Criminal Court (ICC);<sup>2</sup> they are seen as nothing more than witnesses, and in those precedents neither participation nor compensation schemes exists.<sup>3</sup> Influenced by a strong tendency in national and international law to acknowledge victims’ views

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in criminal proceedings, which was supported by a number of non-governmental organizations (NGOs) and states, a relatively broad victim participation scheme was finally drafted for the Rome Statute of the International Criminal Court (the Statute).<sup>4</sup> It is today widely considered as an instrument to give victims of gross violations of human rights and international humanitarian law a voice and to promote reconciliation.<sup>5</sup> Yet, serious concerns exist as to whether victims should be allowed to participate in such an extensive manner, and whether such participation is in the interests of justice, a fair and efficient trial and finally the victims themselves. However, this article will not explore the purpose of victim participation in criminal proceedings as such. Nor will it cover the broad issue of its impact on the individual or the society as a whole, for instance whether victim participation as it now stands in the ICC procedure is generally of any legal, economic and psychological benefit for the victims, although such considerations are obviously the motivation and underlying reason for it. These issues are largely covered in the article by Mina Rauschenbach and Damien Scalia.<sup>6</sup> The aim here is instead to analyse the procedural aspects of the ICC's victim participation scheme, its implementation by the organs of the Court and its possible influence on the concept of punishment and sentencing in international criminal law, and to point out certain difficulties in the interpretation of the relevant provisions.

- 1 *Handbook on Justice for Victims: On the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, New York, 1999, pp. 1 ff.; Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors affecting this Status*, Institute for Human Rights, Åbo Akademi University, Turku, 2004, pp. 15 ff.; Gioia Greco, "Victims' rights overview under the ICC legal framework: a jurisprudential analysis", *International Criminal Law Review*, Vol. 7 (2007), pp. 531 ff.; Rafaëlle Maison, "La place de la victime", in Hervé Ascensio et al. (eds.), *Droit international pénal*, Pedone, Paris, 2000; Jan Philipp Reemtsma, *Das Recht des Opfers auf die Bestrafung des Täters – als Problem*, Beck'sche Verlagsbuchhandlung, Munich, 1999, p. 13.
- 2 Sam Garkawe, "Victims and the International Criminal Court: three major issues", *International Criminal Law Review*, Vol. 4 (2003), pp. 345 ff., pp. 346f.
- 3 E.g. Susanne Malmström, "Restitution of property and compensation to victims", in Richard May et al. (eds.) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague, 2001, p. 373; Beat Dold and Lisa Yarwood, "Victim participation at the ICC: valid potentiality or vanguard pandering?", *African Yearbook of International Law*, Vol. 13 (2006), pp. 159 ff., p. 161.
- 4 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc A/CONF.183/9, as corrected, reprinted in 37 ILM (1998) 999. See David Donat-Cattin, "Comment to Articles 68 and 75", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verlag, Baden-Baden, 1999, pp. 869 ff., 871 f.; David Donat-Cattin, "The role of victims in ICC proceedings", in Flavia Lattanzi et al. (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, Editrice Il Sirente, Ripa Fagnano Alto, 1999, pp. 251 ff., 253 f.
- 5 Claude Jorda and Jérôme de Hemptinne, "The status and role of the victim", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, Oxford University Press, Oxford, 2002, pp. 1387 ff., 1397; Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner: Pour une justice internationale*, Éditions Odile Jacob, Paris, 2002, pp. 161 ff.
- 6 Mina Rauschenbach and Damien Scalia, "Victims and international criminal justice: a vexed question?", in this issue. See also Uwe Ewald, "Victimization in the context of war: some aspects of a macro-victimological research project", *European Journal of Crime, Criminal Law and Criminal Justice*, Vols. 2/3 (2002), pp. 90 ff., 95.

## Outline of the ICC victim participation framework

The broad wording of the provisions on victim participation in the ICC's constitutive documents suggests that the drafters intended to leave wide discretion to the judges in actually shaping the Court's victim participation scheme.<sup>7</sup> However, that broad and at times not entirely consistent drafting raises a multitude of complex legal issues, with both substantive and procedural implications. The first decisions rendered by the ICC Pre-Trial Chambers<sup>8</sup> on victim issues give an initial idea of the subject's complexity. Article 68 of the Statute – the core provision on victim issues – lays down the basic rule on victim participation in the proceedings in its paragraph 3, which 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”. Such participation should, however, not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The views and concerns of victims “may be presented by [their] legal representatives ... where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”. It is complemented by a whole set of provisions that shed light on what is meant by “shall permit their views and concerns to be presented and considered”. They are partly contained in the Statute itself, but mostly in the ICC Rules of Procedure and Evidence (the Rules),<sup>9</sup> and relate to victim definition, participation, legal representation, notification and other central procedural issues. Some of the issues were decided by Pre-Trial, Trial Chamber and Appeals Chamber judges after the first important victim-related decision of 17 January 2006 (the 17 January 2006 decision).<sup>10</sup> Almost exactly two years later, on 18 January 2008, Trial Chamber I rendered another “landmark decision” on the issue of victim participation<sup>11</sup> (the 18 January 2008 decision). Prior to the decision, Trial Chamber I invited all parties and participants to make submissions on the “role of victims in the proceedings leading up to, and during,

7 Emily Haslam, “Victim participation at the International Criminal Court: a triumph of hope over experience?” in Dominic McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 315 ff., 324.

8 The abbreviation PTC I is used below to refer to Pre-Trial Chamber I, and PTC II for Pre-Trial Chamber II.

9 ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), ICC-ASP/1/3, 09.

10 17.01.2006, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version – 22.03.2006), ICC-01/04-101-Corr. Pre-Trial Chamber I had admitted a group of applicants to participate as victims in the investigation proceedings when examining the situation of the Democratic Republic of Congo. The Prosecutor referred to this group of victims as “situation victims”, as opposed to “case victims”; e.g. in 25.06.2007 Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, ICC-01/04-346, pp. 11 f. For comments see Jérôme de Hemptinne and Francesco Rindi, “ICC Pre-Trial Chamber allows victims to participate in the investigation phase of proceedings”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 342 ff.

11 18.01.2008 Trial Chamber I Decision on Victims' Participation, ICC-01/04-01/06-1119. This decision formed part of the preparation of the trial proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter the *Lubanga* case).

the trial”.<sup>12</sup> Based on these submissions and prior pronouncements by the different chambers, the said decision was intended “to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings”.<sup>13</sup> Nonetheless, many questions concerning victim participation remain controversial and are still pending: one of the three judges dissented<sup>14</sup> and both parties<sup>15</sup> filed an application for leave to appeal, which was finally granted by Trial Chamber I.<sup>16</sup> Undefined legal terms need to be clarified, such as “personal interests”, “presentation of views and concerns” and “appropriate” stages of the proceedings, as do the requirements for such presentations, the content of the participation right and issues of standard of proof. The issue of victim participation at the investigation stage and its implications for the balance of interests, as well as the general problems linked to prejudice and inconsistency with the rights of the accused and with principles of fair trial, still have to be resolved. Furthermore, practical issues such as identification of the applicants, the legal representation of victims, collective participation of large victim groups and the form and modalities of presentations need to be assessed. Since leave to appeal has been granted, some of those issues will be settled by the Appeals Chamber.<sup>17</sup>

## Various participation regimes

The structure of the Statute and Rules, mainly outlined in Rule 92(1), suggests that the drafters created various victim participation schemes. At least two are easy to

12 On 5 September 2007, Trial Chamber I issued the “Order setting out schedule for submissions and hearings regarding the subjects that require early determination” (ICC-01/04-01/06-947). Subsequently, submissions were made by the Prosecution (Prosecution’s submissions of the role of victims in the proceedings leading up to, and during, the trial (re-filed publicly on 23 October 2007, ICC-01/04-01/06-996); the Defence (Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, ICC-01/04-01/06-99); the legal representatives of the victims participating in the *Lubanga* case (Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès, ICC- 01/04-01/06-964); the Office of Public Counsel for Victims (OTPC)(Observations du Bureau du conseil public suite à l’invitation de la Chambre de première instance, ICC-01/04- 01/06-1020); the Registry and its Victims Participation and Reparations Section (Confidential Joint Report: Proposed mechanisms for exchange of information on individuals enjoying dual status, ICC-01/04-01/06-1117-Conf. 18); and the Victims and Witnesses Unit (Report on security issues relating to the dual status of witnesses and victims, ICC- 01/04-01/06-1026-Conf.).

13 18.01.2008 Trial Chamber I Decision, above note 11, para. 84.

14 “Separate and Dissenting Opinion of Judge René Blattmann”, in 18.01.2008 Trial Chamber I Decision, above note 11, pp. 49 ff.

15 28.01.2008 Defense Requête de la Défense sollicitant l’autorisation d’interjeter appel de la “Decision on Victims’ Participation” rendue le 18 janvier 2008, ICC-01/04-01/06-1135; and 28.01.2008 Prosecution Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, ICC-1/04-01/06-1136.

16 26.02.2008 Trial Chamber I Public Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1191, with Judge Blattmann dissenting.

17 Ibid. At the time of going to press of this article, the Appeal Chamber decisions were not yet rendered.

identify: the submission of “representations” and “observations”, and participation *stricto sensu*.<sup>18</sup>

The first participation scheme, specifically provided for in Articles 15(3) (authorization of investigations initiated by the Prosecutor *ex proprio motu*) and 19(3) of the Statute (challenges to the jurisdiction of the Court or the admissibility of a case), takes effect at an early and crucial stage, when the initiation or continuation of the proceedings is at stake. In Article 15 of the Statute, victim participation appears as the logical consequence of the Prosecutor’s *proprio motu* investigation, for which victims constitute an important source of information.<sup>19</sup> With regard to Article 19(3) of the Statute, observations submitted by victims are essential to assess challenges to jurisdiction or admissibility by states or by the defendant, as they provide for a more objective point of view that is linked neither to political nor to individual interests, since it is not directly linked to the reparation regime. No formal application procedure seems to be necessary for these forms of participation, which consist of “submitting observations” and “making representations”.<sup>20</sup> Nevertheless, the question remains as to how the victims will be chosen, how their credibility is assessed and how the information obtained is used and corroborated.

The more complex, second participation scheme, under Article 68(3) of the Statute and Rules 89 *et seq.*, entails an application procedure pursuant to the Rules of Procedure and Evidence and the Rules of the Court<sup>21</sup> and provides for broader participation.

Finally, a specific victim participation scheme has been established with regard to the reparation procedure in Article 75 of the Statute. The inclusion of a possibility of obtaining reparation for victims, similar to “adhesive procedures”

18 Regulated generally by Article 68(3) of the Statute and Rule 89 of the Rules of Procedure and Evidence (RPE). See Carsten Stahn, Héctor Olásolo and Kate Gibson, “Participation of victims in pre-trial proceedings of the ICC”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 219 ff., 224 f. The authors suggest that there are three participation regimes, differentiating between the scheme under Article 53(3) and (61) of the Statute and the “seeking the views of victims” by a chamber pursuant to Rule 93 of the RPE. However, it is questionable whether the latter really constitutes an extra participation scheme, or instead indicates where the Court should seek the views of the victims admitted in accordance with Article 68(3) of the Statute and Rules 85 to 93 of the RPE. Similarly, Gilbert Bitti and Hakan Friman, “Participation of victims in the proceedings”, in Lee Roy et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, New York, 2001, pp. 456 ff., 459.

19 Morten Bergsmo and Jelena Pejić, “Article 15: Prosecutor”, in Triffterer, above note 4, p. 369, para. 24.

20 Birte Timm, “The legal position of victims in the Rules of Procedure and Evidence”, in Horst Fischer et al. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz Verlag, Berlin, 2001, pp. 289 ff., 293 f. Participation might be reserved for victim organizations or groups of victims.

21 The application procedure will not be discussed in this article. Rule 89 of the RPE describes the application procedure by written application to the Registrar, who then provides a copy of the application to the prosecution and the defence. They are then entitled to reply within a time limit set by the chamber in charge. The chamber can either accept the application and specify the appropriate proceedings and manner of participation, or reject the application if it considers that the person is not a victim or that the criteria set forth in Article 68(3) of the Statute are not fulfilled in any other form. If an application has been rejected, there is no remedy against the decision, but he or she can file a new application later in the proceedings.

known in civil law systems,<sup>22</sup> is considered as revolutionary in international criminal law.<sup>23</sup> Although integrated in the course of the regular procedure, it forms a kind of extra “civil action” procedure that is reflected in the separate procedural regime.<sup>24</sup>

### Victims of a situation and victims of a case

A controversy between the Pre-Trial Chambers and the Prosecutor developed around the question of whether victims should be allowed to participate as early as the investigation stage of a situation – as reflected in the position of Pre-Trial Chamber I in its 17 January 2006 decision (and subsequent rulings), or only at a later stage of the proceedings – as maintained by the Prosecutor.<sup>25</sup>

The differentiation between “situation” and “case” level, although not explicitly mentioned in the ICC’s constitutive documents, emanates from the structure of the Statute.<sup>26</sup> Whereas a “situation” is broadly defined in terms of temporal and territorial parameters and may include a large number of incidents, supposed perpetrators and thus potential indictments, “case” refers to a concrete incident with one or more specific suspects occurring within a situation under investigation,<sup>27</sup> entailing proceedings following the issuance of a warrant of arrest or a summons to appear.<sup>28</sup>

The Pre-Trial Chamber maintained that victim participation at the situation level was not excluded and would “not per se jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent

- 22 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 361. E.g. Article 25 para. 3 of the new Swiss federal law on the assistance to victims of criminal offence reads as follows: “Si la victime ou ses proches ont fait valoir des prétentions civiles dans une procédure pénale avant l’échéance du délai prévu aux al. 1 et 2, ils peuvent introduire leur demande d’indemnisation ou de réparation morale dans le délai d’un an à compter du moment où la décision relative aux conclusions civiles ou le classement sont définitifs. See <http://www.bj.admin.ch/bj/fr/home/themen/gesellschaft/gesetzgebung/opferhilfegesetz.html>
- 23 Carla Ferstman, “The reparation regime of the International Criminal Court: practical considerations”, *Leiden Journal of International Law*, Vol. 3 (2002), pp. 667ff.; see also Garkawe, above note 2, p. 349. Reparations in the ICC system embrace restitution, compensation and rehabilitation.
- 24 Establishing a distinct “reparation procedure” to be discussed below, mainly stipulated in Sub-Section 4 of Section III of the RPE; also in Articles 76(2) and 82(4) of the Statute and, *inter alia*, in Rules 91(4), and 53 of the RPE.
- 25 30.11.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 ICC-01/04-315, pp. 6ff.; also Prosecution’s Reply under Rule 89(1) of 25.06.2007, above note 10, pp. 9 ff.
- 26 E.g. Article 13 of the Statute, defining the trigger mechanisms for the exercise of ICC jurisdiction, mentions referrals of a situation, in which one or more of the crimes defined in Article 5 appears to have been committed. The Statute’s Article 14 on the referral of a situation by a State Party mentions “a situation in which one or more crimes ... have been committed”. In Article 15 no mention of “situation” but only of “case” can be found, although the use of the term “case” in relation to the authorization of *proprio motu* investigations under Article 15 seems misleading; see Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, M. Nijhoff Publishers, Leiden, 2005, p. 67. Articles 17, 19 and 53 of the Statute refer to “case” too.
- 27 Héctor Olásolo, “The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?”, *International Criminal Law Review*, Vol. 3 (2003), pp. 87 ff., 100; Christopher Keith Hall, “On Article 19”, in Triffterer, above note 4, para. 3.
- 28 17.01.2006 PTC I Decision, above note 10, para. 65.



with basic considerations of efficiency and security”.<sup>29</sup> The Prosecutor on the other hand insisted that the elements defining a victim pursuant to Rule 85 must be read together with Article 68(3) of the Statute in order to qualify a person as victim. He claimed that permitting general victim participation at the situation level had no basis in the Statute.<sup>30</sup> To support this argument, the Prosecutor pursued a two-step test, starting with the general victim qualification of Rule 85, followed by an assessment of whether the personal interests of the victim were directly affected by the proceedings in which he or she wished to participate.<sup>31</sup> Such personal interests must be judicially recognizable<sup>32</sup> and directly related to a specific matter within the proceedings.<sup>33</sup>

The 17 January 2006 decision does raise a number of questions and problems. First, early victim participation at the investigation stage might adversely affect the rights of the suspect/accused, the impartiality and independence of the investigation and, most importantly, the expeditiousness of the proceedings as a whole.<sup>34</sup> Second, the Pre-Trial Chamber did not precisely define the procedural rights provided to victims at such an early stage of the proceedings. Further, early involvement of victims under the Article 68 regime is most probably not even in the victims’ interest. It is submitted that the separate form of victim involvement in the early stage of the proceedings,<sup>35</sup> outside the general framework of Article 68(3) of the Statute, covers victims’ interests adequately. In connection with other trigger mechanisms such as state or Security Council referral, the control mechanism provided for in Article 53 of the Statute<sup>36</sup> incorporates victim participation through Rules 92(2)<sup>37</sup> and 89, and the Pre-Trial Chamber did not reveal why formal victim participation according to the Article 68 regime was necessary prior to these procedures. It is questionable whether the

29 Ibid., paras. 23ff.; specific citation: para. 57; Hemptinne and Rindi, above note 10, pp. 346 ff.

30 22.08.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0046/06 ICC-01/04-01/06-345, para. 10.

31 Ibid., paras. 7ff.

32 Haslam, above note 7, p. 326.

33 This is – according to the Prosecutor – generally not the case at the investigation stage of a situation. The Pre-Trial Chamber, however, considered that personal interests of victims *were* generally affected at the investigation stage, since their participation could serve to clarify the facts, to punish the perpetrators of crimes and finally to request reparations for the harm suffered. PTC I 17.01.2006 decision, above note 10, 16ff.

34 Hemptinne and Rindi, above note 10, 347.

35 If the Court’s jurisdiction is triggered by the Prosecutor *proprio motu*, victim participation thus takes place through Article 15(3) of the Statute, at the crucial moment of authorization of an investigation.

36 Contrary to Article 15, Article 53 applies to all trigger mechanisms, meaning that not only jurisdiction and admissibility of a case must be assessed, but also whether an investigation/prosecution would serve the interests of justice, including its impact on the interests of victims. The notion “interest of justice” remains vague; situations are conceivable in which an investigation would place victims and witnesses cooperating with investigators in extreme danger. However, this scenario is likely to occur in any investigation conducted by the ICC. The Office of the Prosecutor (OTP) was therefore obliged to carry out most of the investigations related to the situation in Darfur outside Sudan. See Prosecutor’s 27.02.2007 Application under Article 58 (7), ICC-02/05-56 27-02-2007 EO PT, p. 27; Matthew R. Brubacher, “Prosecutorial discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), pp. 71 ff., 80 f.

37 Which reads as follows: “In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.”

potential advantages, such as the counterbalancing of too broad prosecutorial discretion and enhancing the fairness of the investigation,<sup>38</sup> can become effective at all outside the Pre-Trial Chamber scrutiny provided for in Articles 15 and 53 of the Statute. On the contrary, as the Prosecutor contended correctly, premature victim participation entails an unnecessary waste of the Court's resources that could be better used for more meaningful victim participation once proceedings in a case begin.<sup>39</sup> Furthermore, the majority of the so-called "situation victims" will most probably not be accepted in a case before the ICC, because the specific incident in which they were victimized is either not investigated at all or will never be the subject of a specific case. Those individuals are then left with unfulfilled hopes and expectations, and might in addition be in serious danger themselves.<sup>40</sup> In addition, the impediment to the objectivity and independence of the investigation<sup>41</sup> and the risk of an imbalance between the interests of the victims and the accused seem important, since prior to the existence of any case no purposeful defence is possible.

The Appeals Chamber<sup>42</sup> unfortunately rejected the Prosecutor's application for extraordinary review of the Pre-Trial Chamber's decision to deny leave to appeal against the 17 January 2006 decision,<sup>43</sup> on the basis of procedural grounds. However, the Appeals Chamber will now have the possibility of rendering a comprehensive ruling regarding the more recent decision.<sup>44</sup>

38 E.g. by putting pressure on the Prosecutor to proceed with or start a prosecution case. Hemptinne and Rindi, above note 10, 346.

39 The handling of applications proved to be very time- and resource-consuming, as shown clearly by a small calculation made with regard to PTC decisions rendered in the *Lubanga* case: out of a total of 45 decisions rendered by Pre-Trial Chamber I from the issuing of the warrant of arrest in February 2006 to the referral of the case to the Trial Chamber in September 2007, 20 decisions (13 per cent of all decisions) were directly related to victim participation (not counting decisions on victim protection issues).

40 Prosecution's Reply under Rule 89(1) of 25.06.2007, above note 10, paras. 21 ff. Ironically, this had happened to the group of victims admitted for participation by the 17 January 2006 decision: they did not qualify as victims for the *Lubanga* case: see 29.06.2006 PTC 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, ICC-01/04-01/06-172.

41 Especially because of the risk of instrumentalization of victims for political means and attempts to manipulate investigations. Hemptinne and Rindi, above note 10, 348.

42 13.07.2006 Appeals Chamber Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168.

43 25.04.2006 Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141.

44 Trial Chamber I granted partial leave to appeal against its 18.01.2008 Decision: 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, para. 54. The Trial Chamber limited the issues of the appeal to the following questions: (i) "Whether the notion of victim necessarily implies the existence of personal and direct harm"; (ii) "Whether the harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused"; and (iii) "Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence". Judge Blattmann, in his dissent, opposed this restriction of issues to be considered in the appeal. See Dissenting Opinion of Judge Blattmann, above note 16, para. 3. Unfortunately, no leave to appeal was granted for important questions, such as the modalities of identification of an individual applying to participate as a victim, the *prima facie* admissibility of applications, the question whether the notion of victim necessarily implies the existence of a personal and direct harm, and whether anonymous victims should be allowed to participate in the proceedings. See 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, paras. 22, 25, 37 and 50.



## Victim definition and qualification

The starting point for victim definition and subsequent admission for participation in the ICC proceedings is the question of who qualifies as “victim”.<sup>45</sup> In addition, applicants must show their “personal interest”.<sup>46</sup> The definition of victims in Rule 85 is largely based on existing victim definitions in international law, mainly those contained in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>47</sup> and in 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.<sup>48</sup> Although not legally binding, these texts are considered as core documents on victim issues at international level,<sup>49</sup> as they take into account the existing international norms with regard to victims’ rights.<sup>50</sup>

Since no compromise was found for a definition of the term “victim” during the drafting and negotiation of the Rome Statute,<sup>51</sup> it was placed in the Rules. Accordingly, “victims” are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”, and

Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art, or

45 RPE, Rule 89(2).

46 Statute, Article 68(3).

47 Adopted on 29 November 1985 (A/Res/40/34, Annex).

48 Adopted on 16 December 2005 (UNGA Res. A/60/147) (hereinafter “the Basic Principles”).

49 Jan Van Dijk and Jo Goodey, “Benchmarking legislation on crime victims: the UN Declaration of 1985”, in Bundesamt für Justiz (ed.), *Opferhilfe in der Schweiz: Erfahrungen und Perspektiven*, Haupt Verlag, Bern, 2004, pp. 311 ff.; Gael M. Kerrigan, “Historical development of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, in Cherif M. Bassiouni (ed.), *International Protection of Victims*, International Association of Penal Law, Erès, 1988, pp. 91 ff.

50 Principle 8 of the Basic Principles defines victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” And Principle 9 further clarifies that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim”. A number of other existing victim definitions could also serve the ICC for interpretation purposes, mainly those elaborated in the European context: The Council of Europe (CoE) created a number of victim-related instruments and documents within the framework of its human rights policy, e.g. the 1985 Council of Europe Recommendation 85 (11) on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985, at the 387th meeting of the Ministers’ Deputies; CoE Recommendation No. R (87) 21 on Assistance to Victims and the Prevention of Victimisation, adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers’ Deputies; 1977 CoE Resolution (77) 27 on the Compensation of Victims of Crime, adopted by the Committee of Ministers on 28 September 1977, Document I 15 957; 1983 European Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, Strasbourg, 24.11.1983.

51 Silvia Fernández de Gurmendi and Hakan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, *Yearbook of International Humanitarian Law*, Vol. 3, (2000), pp. 157 ff, 181.

science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.<sup>52</sup>

To qualify as a victim, the applicant must therefore be a natural or a legal person and prove that he, she or it suffered harm resulting from a crime that falls within the ICC’s jurisdiction, and that a causal link between the crime and the harm suffered exists.<sup>53</sup> Since the definition is drafted in a rather open way, further interpretation of its elements appears necessary,<sup>54</sup> although contrary to other elements such as the “personal interest” in and “appropriateness” of the stage of the proceedings, it may not vary much from one stage to another.<sup>55</sup>

### Natural person

So far, the Pre-Trial Chamber decisions do not contain much reflection on the definition of the term “natural person”. Both the Pre-Trial Chamber and Trial Chamber I focused strongly on the issue of victim identification, so the actual interpretation was basically limited to the rather banal conclusion that “A natural person is thus any person who is not a legal person”.<sup>56</sup> Some subsequent decisions assessed how the identity of the applicant could best be established.<sup>57</sup> Nevertheless, even with regard to this purely procedural requirement, no general approach was discernible in the various pre-trial findings<sup>58</sup> until the 18 January 2008 decision

52 Rule 85.

53 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 87–94; 17.01.2006 PTC I Decision, above note 10, para. 79; also PTC II 10.08.2007 Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-101 (the identical decision is filed twice: under the Uganda situation and in the case of *The Prosecutor v. Joseph Kony (et al.)*, the former under ICC-02/04-101, the latter under ICC-02-04-01-05-252, with a review of existing decisions on the issue in paras. 12f.).

54 Christoph Safferling, “Das Opfer völkerrechtlicher Verbrechen”, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 115 (2003), pp. 352 ff., 369.

55 The victim participation must be appropriate to the relevant stage of proceedings, pursuant to Article 68(3) of the Statute. See 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 93 f. See also 06.06.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, CC-01/04-01/06-140, para. 8.

56 17.01.2006 PTC I Decision, above note 10, para. 80. Little more enlightenment was provided by the case-by-case examination with regard to the individual applicants, rendered in the Pre-Trial Chamber decisions on victim applications so far. These usually simply stated that an applicant was a natural person, without giving any further explanation, e.g. 31.07.2006 PTC 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 *The Prosecutor v. Thomas Lubanga Dyilo* at the investigation stage of the situation (para. 22) in the Democratic Republic of the Congo, ICC-01/04-177, p. 7. See also 20.10.2006 PTC I Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601, p. 9.

57 10.08.2007 PTC II Decision on Victims’ Applications, above note 53, paras. 23, 33–34. A consideration, which is, however, of rather procedural and not substantive interest. See *ibid.*, paras. 26, 35, 55, etc.

58 E.g. 17.08.2007 PTC I Decision on the requests of the legal representatives of applicants on application process for victims participation and legal representation, ICC-01/04-374, compared to the 10.08.2007 PTC II Decision on Victims’ Applications, above note 53. In the Uganda situation, respectively in the *Kony et al.* case, the single PTC II judge mentioned the difficulties of duly establishing an applicant’s identity in a situation of on-going conflict, on the one hand, and the need for appropriate proof, “given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings”, PTC II 10.08.2007 Decision on Victims’ Applications, above note 53, paras.

that tried to unify the varying approaches taken by the Pre-Trial Chambers.<sup>59</sup> It seems that some more theoretical analysis of the notion would do no harm, even if it is by far not the most complex part of the victim definition. Questions related to legal (in)capacity in general, and especially the legal capacity of conducting proceedings in one's own name,<sup>60</sup> are particularly likely to occur in the future and will require more thorough consideration.<sup>61</sup> Furthermore, the issue of representation of minors by their parents or other family members is of a certain importance, especially if the charges contain the war crime of recruiting and enlisting children under the age of fifteen and using them in hostilities, as in the *Lubanga* case.<sup>62</sup> In addition, a problem may arise regarding victims who are simultaneously perpetrators, as the example of the *Lubanga* case shows.<sup>63</sup> Child soldiers are typically victims and perpetrators at the same time.<sup>64</sup>

12 and 43. A voting card was considered as sufficient proof of identification, but not a "proof of identity" statement by an individual belonging to a local authority, simply declaring that a given applicant "is a victim". Ibid., paras. 17 and 18.

- 59 It defined the range of documents or other means by which an applicant may establish proof of his or her identity. 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, paras. 87f. Interestingly, no leave to appeal was granted on this issue, although it involves essential questions, as Judge Blattmann pointed out correctly. 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, para. 22, and Judge Blattmann's Dissenting Opinion thereto, paras. 15ff.
- 60 Judge Blattmann in his dissent found that both, fairness and expeditiousness, are affected and that "a resolution from the Appeals Chamber on this issue will materially advance the proceedings, in that certainty will be provided and the important work of the court to identify victims will move forward in a progressive manner" (ibid., para. 17).
- 61 None of the decisions mentions this requirement, which also entails a person's capacity to appoint a legal representative or to act as the legal representative for another person. As the notion of "legal capacity to act" differs from one legal system to another, it might be necessary to develop an autonomous interpretation for international criminal proceedings. Some of the issues related to questions of representation of minor victims by other victims (e.g. parents, guardians) were discussed by the relevant Pre-Trial Chamber in connection with procedural aspects of the proceedings prior to the substantive assessment of the application. E.g. 17.01.2006 PTC I Decision, above note 10, para. 102: with regard to formal requirements for the applications, such as the kind of forms used, the identity of the applicants, the signatures and the authorization of an NGO to file documents on behalf of the victims.
- 62 The issue has not been discussed so far, except in the PTC II 10.08.2007 Decision on Victims' Applications, above note 53, para. 20, where the judge requested the Victims Participation and Reparations Section (VPRS) to submit a report indicating from what age the Ugandan legal system allows documents meeting the ICC conditions to be issued to individuals, and to provide information about the existence and obtainability of documents establishing the link between a child and a member of his or her family, such as birth certificates or other types of documents. Another delicate problem to assess is whether applicants sign applications knowingly and willingly, in particular with full knowledge of the consequences of such an application and the potential security risks involved. In order to monitor the kind of circumstances under which such applications are filed and whether the applicants were fully informed, the Court might envisage accepting only applications prepared or supported by accredited NGOs.
- 63 29.01.2007 PTC I Decision on the Confirmation of Charges, ICC-01/04-01/06-803, translation of the French original, available at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf), accessed 16.09.07.
- 64 This is at least the perception of other victims and the civilian population in general. Bukeni T. Waruzi Beck, Director of the Congolese NGO AJEDI-Ka, had described this situation in his article "Child soldiers and the ICC: challenges and strategies, DRC case", in Victims' Rights Working Group Bulletin Access of July 2006, No. 6, p. 2.

## Organizations or institutions as victims

The ICC system does not only allow organizations to represent natural persons; under specific circumstances they can qualify as victims themselves. Organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes fall under Rule 85(b). This controversial broadening of the traditional understanding of “victim” is based on the idea that legal entities are often the target of certain war crimes.<sup>65</sup> Delegations opposed to the inclusion of legal persons feared a diversion of the Court’s resources, better used for individual victims, and potential misuse of the participation scheme by multinational companies.<sup>66</sup> The compromise as laid down in the provision should, however, exclude such applications. Yet, undefined notions such as “direct harm” and “dedication to religion, education, art or science or charitable purposes” or “places and objects for humanitarian purposes” call for interpretation.<sup>67</sup> Hitherto no application by an organization or institution has been filed and thus the Court has not yet addressed any of the above questions.<sup>68</sup>

## The notion of harm

The notion of harm, defined neither in the Statute nor in the Rules, has been interpreted by the Pre-Trial Chamber on a case-by-case basis in the light of existing international human rights standards,<sup>69</sup> such as the above-mentioned UN documents<sup>70</sup> and the case law of the Inter-American Court of

65 As defined in Article 8(2)(b)(ix) and (e)(iv) of the Statute.

66 Silvia A. Fernández de Gurmendi, “Definition of victims and general principle”, in Roy, above note 18, pp. 427 ff., 433. The concerns about compensation requests of powerful companies were not completely unfounded, in view of the experiences of the United Nations Compensation Commission (UNCC), established by the Security Council to process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait: 5,800 claims of corporations, other private legal entities and public sector enterprises (e.g. for construction or other contract losses, losses from non-payment for goods or services, etc.) were handed in, seeking a total of approximately US\$80 billion in compensation. See UNCC website [http://www2.unog.ch/uncc/claims/e\\_claims.htm](http://www2.unog.ch/uncc/claims/e_claims.htm), accessed 8.10.07.

67 An important aspect to consider might be that charitable institutions might be used or misused by parties to a conflict for propaganda and military purposes, or that they play an important role on their own initiative in conflicts, as the example of the Rwandan churches shows. Helena Nygren Krug, “Genocide in Rwanda: lessons learned and future challenges to the UN human rights system”, *Nordic Journal of International Law*, Vol. 67 (1998), pp. 165, 171; Tharcisse Gatwa, *The Churches and Ethnic Ideology in the Rwandan Crises 1900–1994*, Regnum/Paternoster, 2006.

68 Trial Chamber I simply stated that the Court will “consider any document constituting it [the organization] in accordance with the law of the relevant country, and any credible document that establishes it has sustained’ direct harm as defined in Rule 85(b) of the Rules. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 89.

69 Statute, Article 21(3): “[t]he application and interpretation of law ... must be consistent with internationally recognized human rights”. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 35.

70 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, UNGA Res. A/60/147, adopted 21 March 2006; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UNGA Resolution 40/34 of 29 November 1985 (A/Res/40/34, Annex). 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 35.

Human Rights<sup>71</sup> and the European Court of Human Rights.<sup>72</sup> Both the Pre-Trial Chambers and the Trial Chamber have concluded that not only physical injury but also economic loss and emotional suffering constitute harm within the meaning of Rule 85.<sup>73</sup> The judges considered that the following incidents were likely to cause harm: abduction and enslavement; carrying heavy loads for some 500 kilometres without eating or drinking; and torture and unlawful detention resulting in physical and mental suffering.<sup>74</sup> The loss of family members after being forced to see them tortured was deemed to cause serious emotional and mental suffering, and the looting and burning of houses and other property was characterized as economic loss.<sup>75</sup> Physical injuries and psychological trauma as a result of exposure to fire and random shooting, severe burns and witnessing events of an exceedingly violent and shocking nature, as well as the enlistment of children, was considered to cause physical and emotional harm.<sup>76</sup> According to Pre-Trial Chamber I, no definitive determination of the harm suffered by the victims could be rendered at this early stage, especially when referring to “situation victims”.<sup>77</sup> This consideration is relevant with regard to the principle of presumption of innocence, the application of which could be impeded if the determination of harm goes too far.

### Crimes within the jurisdiction of the Court

Acts such as those described above must qualify as crimes falling under the ICC’s jurisdiction *ratione materiae, loci, personae* and *temporis*. Again, the assessment depends on the stage of the proceedings to which the application for participation refers, although Trial Chamber I opined that “Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework”.<sup>78</sup> Judge Blattmann correctly disagreed with this assertion,<sup>79</sup> which

71 Citing the case *Velásquez Rodríguez v. Honduras*, IACtHR Judgement, 29 July 1988, Series C No. 4, where prolonged detention in specific circumstances was considered as detrimental to physical and moral integrity, and hence constituting a form of harm; see paras. 156, 175 and 187.

72 Citing the judgement *Keenan v. the United Kingdom*, ECtHR Judgment, 3 April 2001, appl. no. 27229/95, para. 138.

73 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 92.

74 17.01.2006 PTC I Decision, above note 10, para. 172, referring to the ECtHR case *Selmouni v. France*, ECtHR Judgement 28 July 1999, appl. no. 25803/94, where the ECtHR considered that, “having regard to the extreme seriousness of the violations of the Convention of which Mr Selmouni was a victim, the Court considers that he suffered personal injury and non-pecuniary damage”, see para. 123.

75 *Ibid.*, para. 160, with regard to VPRS 4, para. 181, for the accounts of VPRS 6, para. 146.

76 PTC II 10.08.2007 Decision on Victims’ Applications, above note 53, paras. 31 and 40. On the enlisting of children by militia troops, see 20.10.2006 PTC I Decision on Applications for Participation in Proceedings, above note 56, pp. 9f.

77 17.01.2006 PTC I Decision, above note 10, paras. 81f.; 10.08.2007 PTC II Decision, above note 53, para. 13.

78 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 93.

79 “Separate and Dissenting Opinion of Judge René Blattmann”, *ibid.*, para. 7, where he states, “I completely disagree with the assertion of the Majority that the Statute does not limit the Chamber’s jurisdiction to the crimes attributed to the accused. In truth, the drafters of the Rome Statute have been careful to address issues of jurisdiction through the guise of the case brought before the Court. Furthermore, it is symptomatic that the Statute restricts the parties’ presentation of evidence to that which is relevant to the case before the Chamber” (footnotes omitted).

also diverges from earlier holdings of the Pre-Trial Chambers.<sup>80</sup> The scope of the referral therefore defines *prima facie* the situation (e.g. northern Uganda for the Ugandan referral, Darfur for the Security Council referral), although nothing in the Statute hinders the Prosecutor, subject to Pre-Trial Chamber authorization, from expanding the scope of the investigations *ex proprio motu*, at least in relation to state referrals.<sup>81</sup> The scope of a situation emanating from investigations initiated by the Prosecutor<sup>82</sup> would probably be defined by the Pre-Trial Chamber authorization.<sup>83</sup> Therefore applicants who were allegedly victims of crimes committed within such a situation defined *ratione temporis*<sup>84</sup> and *ratione loci*<sup>85</sup> and where the alleged acts fell within the Court's jurisdiction *ratione materiae*<sup>86</sup> would qualify as "situation victims". "Case victims" have to show that they have suffered harm directly linked to a crime set forth in a warrant of arrest, summons or charges. The Court automatically re-examines whether a person already admitted as a victim of a specific situation still qualifies as a victim of a case.<sup>87</sup>

### Nexus between the harm suffered and crimes under ICC jurisdiction

The causal link or nexus, reflected in Rule 85 in the words "as a result of", is established if the applicants credibly demonstrate that the harm they have suffered is a direct result of the commission of crimes falling within the ICC's jurisdiction. With regard to "situation victims", the Pre-Trial Chamber considered that it was not "necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes" and that "a determination of the specific nature of such a link goes beyond the purposes of a determination made under rule 89 of the Rules whether in the

80 For instance, was it considered as sufficient for "situation victims" to show that such acts had been committed in a situation referred to the Court either by the Security Council or by a state, e.g. the Democratic Republic of Congo situation, referred to the ICC by the government of the DRC in accordance with Articles 13(a) and 14 of the Statute?

81 Antonio Marchesi, "On Article 14", in Triffterer, above note 4, pp. 353 ff., 358, para. 12.

82 Pursuant to Article 15 of the Statute.

83 So far, no such *proprio motu* investigation has been initiated and none of the Pre-Trial Chambers has had to pronounce on this issue. Note that the use of the term "case" in Article 15(4) of the Statute is probably misleading and most likely does not exclude investigations into a situation. Olásolo, above note 26, p. 67.

84 Pursuant to Article 11, 17.01.2006 PTC I Decision, above note 10, paras. 87 ff.

85 Pursuant to Articles 12 and 13 of the Statute, *ibid.* paras. 91 ff. PTC I noted that in cases referred to in Article 12(2) in connection with Article 13(a) or (c) of the Statute, ICC jurisdiction exists if (a) the state on the territory of which the conduct in question occurred, or (b) the state of which the person accused of the crime is a national, is a State Party to the Statute. According to the applicants' statements, all alleged acts were committed in the region of Ituri, in the Oriental Province of the Democratic Republic of Congo (DRC) and in North Kivu, also located in the DRC. As the crimes were committed in the territory of the DRC the Court may exercise its jurisdiction.

86 Pursuant to Articles 5–8 of the Statute. In order to determine whether the alleged acts fell within the ICC's jurisdiction, the Pre-Trial Chamber analysed the statements of each applicant and took a summary preliminary decision as to whether the aforesaid conditions were fulfilled.

87 As mentioned above, such re-qualification might have an adverse impact on the victims concerned. See 29.06.2006 PTC I Decision, above note 40, p. 6, and 17.01.2006 PTC I Decision, above note 10, paras. 66ff.



context of a situation or of a case”.<sup>88</sup> It was sufficient to prove that “the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent”.<sup>89</sup> This consideration is probably correct, as any further assessment of the causal link could lead to a violation of the presumption of innocence.<sup>90</sup> Once proceedings in a case are initiated, the causal link to be proved is much narrower and limited to the harm suffered in relation to the specific crimes for which the accused is presumed criminally responsible.<sup>91</sup> Contrary to the opinion of Trial Chamber I, victim applications at a case level should be considered with regard to the crimes charged, and the right of victims to participate is not “principally dependent on whether their personal interests are affected in accordance with Article 68(3) of the Statute”.<sup>92</sup>

### Conditions for participation in Article 68(3) of the Statute

Once an applicant has cleared the first hurdle of the victim qualification pursuant to Rule 85 of the Rules, the Court must at the relevant point in the procedure take the second step of assessing whether the three requirements for participation stipulated in Article 68(3) of the Statute exist in relation to the stage of the proceedings in which the applicant wants to participate. The judges must determine whether there is sufficient personal interest for participation, whether such participation is appropriate at the procedural stage in question and whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. These three requirements obviously change from one stage of the procedure to another and must therefore be re-evaluated by the chamber in charge at the relevant moment. As yet it is not very clear whether such re-examination is automatic, as suggested by Pre-Trial Chamber I for the step from situation to case level,<sup>93</sup> or is upon request by the applicant, as stipulated by the

88 17.01.2006 PTC I Decision, above note 10, paras. 94 ff.

89 10.08.2007 PTC II Decision on Victims' Applications, above note 53, para. 14. See, for case-by-case assessments, 17.01.2006 PTC I Decision, above note 10, paras. 125, 135, 153, 167, 176 and 186; 31.07.2006 PTC I Decision, above note 56, p. 15.

90 It is obvious that a sound re-examination of the causal link is indispensable when deciding reparation issues. See Article 75 of the Statute.

91 31.07.2006 PTC I Decision, above note 56, p. 9. The PTC refers in footnotes 23 and 24 to relevant human rights law documents and case law.

92 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 93.

93 17.01.2006 PTC I Decision, above note 10, paras. 64 and 67: “...where any natural or legal person applying for the status of victim in respect of a situation requests to be accorded the status of victim in any case ensuing from the investigation of such a situation, the Chamber automatically takes this second request into account as soon as such a case exists, so that it is unnecessary to file a second application.” In the DRC situation, PTC I actually reviewed the initial victim application for participation in the investigation of the situation of the first six “situation victims” when the first case, that of *Thomas Lubanga*, came up: 29.06.2006 PTC I Decision, above note 40, para. 6f., where the PTC considered that the applicants had not demonstrated any causal link between the harm they suffered and the crimes contained in the arrest warrant against Thomas Lubanga Dyilo.

Appeals Chamber with regard to participation in an interlocutory appeal proceeding.<sup>94</sup>

The applicant's personal interest in participating at the situation level is considered equivalent to the interest of identifying the potential perpetrators in an investigation as the "first step towards their indictment", especially in view of the impact investigations have on future orders for reparations.<sup>95</sup> With regard to the case level, the personal interest of the applicant must relate specifically to the concrete proceedings against a particular person. The decisions rendered so far were not clear about when this criterion was met, apparently suggesting that being affected by a crime was sufficient to establish such a personal interest.<sup>96</sup> The 18 January 2008 decision, however, introduced a new criterion: the critical question was whether the contents of the victim application must either establish that "there is a real evidential link between the victim and the evidence which the Court will be considering during [the] trial, leading to the conclusion that the victim's personal interests are affected" or determine whether the victim was "affected by an issue arising during [the] trial because his or her personal interests are in a real sense engaged by it".<sup>97</sup> For an interlocutory appeal, the Appeals Chamber held that personal interest in the issues raised on appeal must exist, and that these issues do not belong instead to the role assigned to the Prosecutor.<sup>98</sup>

94 In its judgment on Lubanga's appeal against the PTC decision refusing his provisional release, the Appeals Chamber ruled that even those victims who are generally admitted to participate at a specific stage of the proceedings (*in casu* in the intermediate pre-trial phase between the issuing of a warrant of arrest and the confirmation of charges hearing) must, in order to participate in an interlocutory appeal within this specific procedural phase, first apply for leave to participate in the appeals proceeding in the Appeals Chamber: 13.02.2007 Appeals Chamber Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-trial I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, Key Finding No. 1, p. 3, with detailed explanation in para. 38 ff.

95 Article 75 of the Statute, 17.01.2006 PTC I Decision, above note 10, para. 72.

96 E.g. for a mother whose children were recruited by Lubanga's Union of Congolese Patriots (UPC), denied for the murder of her son "by a member of the APC who was not under the command or control of Thomas Lubanga Dyilo": 28.07.2006, Decision on the Applications for Participation in the Proceedings a/0001/06, a/0002/06 and /0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo ICC-01/04-01/06-228, p. 3 (the APC – Armée du Peuple Congolais – is another rebel group which was not under Lubanga's control when the alleged crimes were committed, see ICC document ICC-01/04-01/06-39-AnxD10, "Key Events and Military Engagements for Groups RCD-ML/APC and FNI/FRPI (July 2002 to December 2003)", dated 18.03.2006, available on [www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxD10\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxD10_English.pdf) (last visited 2 July 2008)).

97 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 95.

98 The Appeals Chamber was of the opinion that this was the case, following by and large the arguments put forward by the victims that an interim release would place them at considerable risk, as Lubanga could "establish their identities and thus potentially pressure them into withdrawing their requests to participate, or even seek revenge", and that he might "reassume the leadership of the UPC movement" and "launch new recruitment campaigns, likewise targeting children under the age of fifteen, which would directly endanger demobilized former child soldiers in transit camps or in locations still under UPC control". See the 15.12.2006 Submissions by Victims a/0001/06, a/0002/06 and a/0003/06 further to the Appeals Chamber's Decision of 12 December 2006 ICC-01/04-01/06-778, paras. 4 ff.; also 13.02.2007 Appeals Chamber Judgement, above note 94, para. 54. Not so in the 13.06.2007 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 ICC-01/04-01/06-925, where the Appeals Chamber found that the victims' interests were not affected by the preliminary consideration of whether the appeal was correctly brought, a decision on a preliminary issue neither resulting in the termination of the prosecution nor precluding the victims from later seeking compensation; see paras. 24ff.

As regards the appropriateness of the participation and its consistency with fair trial standards and the rights of the accused, instead of completely rejecting victim participation the judges tend to rely more on defining certain modalities of participation that allow those interests to be safeguarded, based on the idea that it was more the mode of participation that could be prejudicial than the actual participation as such.<sup>99</sup> For the situation level, the Pre-Trial Chamber considered it sufficient to appoint an *ad hoc* counsel to defend the interests and rights of a potential future defendant.<sup>100</sup> Furthermore, only public and not confidential documents were accessible to victims. For participation at later stages it was considered as adequate protection of the defendant's rights that he be allowed, in accordance with Rule 91(2) of the Rules, to respond to the victims' views and concerns. Additionally, both in the confirmation of charges hearing<sup>101</sup> and in the interlocutory appeal,<sup>102</sup> the interests of the defendant were taken into account by restricting the modalities of participation.

### Victim participation at different stages of the ICC proceedings

Neither the Statute nor the Rules give details about the substance and content of victim participation and their impact on the proceedings. It is, however, quite obvious that, as already discussed above, such participation differs considerably depending on the stage of the proceedings at which it takes place. Flexibility is the main characteristic of the provisions on victim participation. The modalities of participation are fully within the discretion of the chamber in charge and may be adapted by judges to the specific circumstances of the stage of the proceedings.<sup>103</sup> They are limited only by the requirement that victim participation must be appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair, impartial and expeditious trial.<sup>104</sup>

99 17.01.2006 PTC I Decision, above note 10, para. 58: "...the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim's participation and not his or her participation as such."

100 *Ibid.*, para. 70.

101 The legal representatives of the victims were only allowed to make opening and closing statements, limited to points of law, including the legal characterization of the modes of liability in the charges, without enlarging upon the evidence or facts in the case. 07.11.2006 PTC I Decision on the Schedule and Conduct of the Confirmation Hearing, ICC-01/04-01/06-678, p. 4.

102 13.02.2007 Appeals Chamber Judgement, above note 94; para. 54. The Appeals Chamber limited the observations to be received from the victims to observations specifically relevant to the issues directly related to their personal interest, arising in the appeal rather than more generally.

103 Timm, above note 20, p. 298; Safferling, above note 54, pp. 377f.; Stahn et al., above note 18, p. 224; Donat-Cattin, "The role of victims in ICC proceedings", above note 4, p. 271.

104 Article 68(3) and Rule 91(3)(b). Read together with Article 21(3) of the Statute, this clause must be interpreted in the light of international human rights law concerning fair trial and rights of the accused. 17.01.2006 PTC I Decision, above note 10, paras. 70 ff.; Donat-Cattin, "On Article 68", above note 4, p. 881, para. 26; Margaret McAuliffe deGuzman, "On Article 21", in Triffterer, above note 4, p. 435, para. 23.

## Initiation and triggering stage

Clearly, victims play an important role in the referral or triggering phase prior to the existence of a proper judicial procedure in a situation or a case, and without being formally admitted to participate in proceedings. Referrals by states, for example, must be accompanied by “supporting documentation as is available to the State”, which will to a large extent rely on information gathered from victims.<sup>105</sup> The same goes for referrals by the UN Security Council acting under Chapter VII of the UN Charter<sup>106</sup> and the initiation of investigations by the Prosecutor *ex proprio motu*.<sup>107</sup> The reality of conflict situations, where civilians are caught between opposing parties, is such that persons giving information to whatever organization obviously put themselves in considerable danger. Gathering information in such situations is an extremely sensitive matter. The formulation of a code of conduct, emphasizing the vital nature of confidentiality for ICC investigators and all organizations acting at the Court’s request,<sup>108</sup> therefore seems indispensable.

Some NGOs have raised the question of whether victims would have any capacity by legal means to instigate an investigation,<sup>109</sup> similar to institutions in certain civil law systems where the *partie civile* (a plaintiff who, as a private person, may initiate legal action for damages within the framework of a criminal trial as a

105 See Statute, Article 14, and RPE, Rule 104. Information gathering in a sensitive conflict situation may expose defenceless civilians to high risks. As no detailed information on the content of the referral documents is available, it can only be assumed that victim statements formed an important basis in the state referrals, as the Office of the Prosecutor (OTP) press release regarding the DRC referral suggests: “After receiving several communications from individuals and non-governmental organizations, the Prosecutor had announced in July 2003 that he would closely follow the situation in the DRC, indicating that the situation would be a priority for his Office.” See press release of 19.08.2004, “Prosecutor receives referral of the situation in the Democratic Republic of Congo”, ICC-OTP-20040419-50-En, available at [www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html), accessed 12 March 2008.

106 As in the case of the Security Council referral of the situation in Darfur by Resolution 1593 (2005) (UN Doc. S/RES/1593 (2005), “Reports of the Secretary-General on the Sudan”, available at [www.un.org/Docs/sc/unsc\\_resolutions05.htm](http://www.un.org/Docs/sc/unsc_resolutions05.htm), accessed 12 March 2008. The decision was largely based on the January 2005 “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General”, adopted by the Security Council at its 5158th meeting on 31 March 2005, UN Doc. S/2005/60, available at [www.ohchr.org/english/darfur.htm](http://www.ohchr.org/english/darfur.htm), accessed 12 March 2008. The report predominantly relied on victim testimonies, e.g. on p. 1: “During its presence in the Sudan, the Commission held extensive meetings with ... tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.”

107 Article 15 of the Statute. When analysing the seriousness of the information the Office of the Prosecutor (OTP) receives, it also relies on additional information from states, UN organs, NGOs or other reliable sources. See Reporters Without Borders, *Victims’ Guide to the ICC*, Reporters Without Borders/Damocles Network, Paris, 2003, available at [www.reseau-damocles.org/IMG/pdf/doc-2255.pdf](http://www.reseau-damocles.org/IMG/pdf/doc-2255.pdf), accessed 12 March 2008, p. 9. The UNHCHR estimates that about 90 per cent of the information on massive human rights violations originates from NGOs, which are themselves in direct contact with the victims. See also Héctor Olásolo, “The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of the Office of the Prosecutor”, *International Criminal Law Review*, Vol. 1 (2005), pp. 121 ff., 127.

108 As stipulated in Rule 17(2)(a)(vi) of the Rules.

109 Reporters Without Borders, above note 107, p. 61: “It is thus entirely feasible that victims may one day raise before the PTC the issue of the Prosecutor’s inaction and the PTC’s power to review both the Prosecutor’s action, or lack thereof.”

third party, apart from the prosecution) is in a strong position.<sup>110</sup> Nothing in the Statute or in the Rules indicates that such a possibility exists. It is evident, however, that by providing the Prosecutor with relevant information, victims' organizations and other NGOs will play an important role in "triggering" a *proprio motu* investigation, and that victim participation<sup>111</sup> puts a certain pressure on the Office of the Prosecutor to pursue an investigation or prosecution.<sup>112</sup> If the Prosecutor decides not to proceed,<sup>113</sup> victims can apply for participation in the subsequent proceedings before the Pre-Trial Chamber, contrary to the referring state or the UN Security Council. In the light of this the contention that victims cannot refer matters directly to the Court, although such possibilities do exist in certain national judicial systems,<sup>114</sup> seems less relevant, especially if one takes into consideration the above-mentioned dangers of an instrumentalization of victims and the security risks they might face in conflict situations.<sup>115</sup>

### Investigation stage

The procedural rights of victims admitted to participate in the investigation phase under Rule 89 has so far not been clearly defined. The Pre-Trial Chamber stressed that participation should not be prejudicial to or inconsistent with the rights of the defendant and envisaged specific measures, such as appointing an ad hoc counsel to represent a potential future defendant's interests. The Pre-Trial Chamber also held that the victims' right to be heard by the Chamber entails the right to present views and concerns and to file documents pertaining to the ongoing investigation. It places the Court under a positive dual obligation, not only to allow the presentation of victims' views and concerns but also to examine them.

110 Alan N. Young, *The Role of the Victim in the Criminal Process*, Policy Centre for Victim Issues, Department of Justice, Canada, 2001, p. 47; see also *Handbook on Justice for Victims*, above note 1, pp. 36 and 38.

111 Provided for in Articles 15(3) and 53 of the Statute in connection with Rule 92(2) of the Rules. The compromise found in the Rome Statute to enable investigations to be triggered by the Prosecutor acting on his/her own initiative was a strict control of these *proprio motu* powers by the Pre-Trial Chamber, as laid down in Article 15(3) of the Statute: Bergsmo and Pejić, above note 19, pp. 360f.

112 Olásolo, above note 107, p. 127. Articles 13(c) and 15(1) of the Statute allow any physical or legal person to communicate directly with the Office of the Prosecutor (OTP), and Article 15(3) allows victims to make representations to the PTC with regard to the authorization of *proprio motu* investigations. Rule 92(2) of the RPE provides for notification of victims concerning the OTP's decision not to initiate an investigation or not to prosecute pursuant to Article 53 of the Statute, "in order to allow them to apply for participation in the proceedings in accordance with rule 89".

113 Due to the grounds listed in Article 53 of the Statute, e.g. because it would not be in the interest of justice, because of insufficient gravity of the crime or because a state prosecutes pursuant to Article 17 of the Statute.

114 *Handbook on Justice for Victims*, above note 1, p. 39.

115 The Prosecutor's decision to investigate on his or her own initiative is always subject to Pre-Trial Chamber scrutiny with victim involvement, as described above. Olásolo, above note 26, pp. 66 ff. In order to guarantee that victims can present their view, the Prosecutor must inform victims known to the Office of the Prosecutor or to the Victims and Witnesses Unit (VWU) prior to seeking authorization from the PTC. (RPE, Rule 50). The rationale of this provision is that victims are close to the situation and therefore best able to inform the Pre-Trial Chamber about the situation presented by the Office of the Prosecutor. Stahn et al., above note 18, p. 226.

Furthermore, victims are generally entitled to participate in public proceedings unless it is otherwise decided by the chamber.<sup>116</sup> Victims are also entitled to request the Pre-Trial Chamber to order specific proceedings and to issue all notifications.<sup>117</sup>

As already mentioned, Article 19(3) of the Statute provides for another possibility of victim participation in the pre-trial phase, namely in proceedings on challenges to the jurisdiction of the Court and the admissibility of a case<sup>118</sup> either by the accused/suspect or by a state with jurisdiction over a case. It is not clear whether the Article 19 provision is also regulated by the general rules on participation. In the *Lubanga* case, the small group of persons accepted as victims according to Rule 89 of the Rules were invited to submit their views.<sup>119</sup> This suggests that only persons accepted as victims under Rule 89 of the Rules may participate in the proceedings in accordance with Article 19(3) of the Statute.

### Confirmation of charges hearing

Article 61 of the Statute provides that the charges brought against a person must be confirmed within a reasonable time after the person's surrender or voluntary appearance before the Court. In order to assess the charges, the Pre-Trial Chamber holds a hearing in the presence of the Prosecutor, the person charged and his or her counsel. It confirms the charges if it considers that "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".<sup>120</sup> Although the right of victims to participate in the confirmation hearing is not evident at first sight when reading Article 61 of the Statute, they do seem to have an interest in participation, *inter alia* to influence the final formulation of the charges or even to request measures regarding forfeiture.<sup>121</sup> Four victims

116 Whereas in confidential proceedings no victim participation is possible unless the Chamber decides otherwise. 17.01.2006 PTC I Decision, above note 10, paras. 71 ff.

117 Rule 92(5). These are: notification of proceedings before the Court, including the date of hearings and any postponement thereof, and the date of delivery of the decision; victims are also entitled to be "informed about requests, submissions, motions and other documents relating to such specific proceedings, where they are held in public or where persons having the status of victims are authorised to participate". 17.01.2006 PTC I Decision, above note 10, para. 76.

118 Article 17 of the Statute regulates whether a case is admissible or not, which is mainly a question of complementarity, an issue that is not the subject of this study. In brief, a case is not admissible if it is being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or genuinely unable to carry out the investigation or prosecution.

119 In particular with regard to the alleged illegal detention of Thomas Lubanga by the DRC authorities prior to his transfer to The Hague, and the alleged irregularities in the subsequent arrest and the transfer to the Court in execution of the warrant of arrest. 24.07.2006 Decision inviting the Democratic Republic of the Congo and the Victims in the Case to Comment on the Proceedings pursuant to Article 19 of the Statute, ICC-01/04-01/06-206, p. 4.

120 Statute, Article 61(7). This system is inspired by the French *Chambre d'accusation*; see Gauthier de Beco, "The confirmation of charges before the International Criminal Court: evaluation and first application", *International Criminal Law Review*, Vol. 2–3 (2007), pp. 469 ff., 470 f. On 29 January 2007, Pre-Trial Chamber I rendered the first confirmation of charges decision, approving the charges against Thomas Lubanga. 29.01.2007 Decision on the Confirmation of Charges, above note 63.

121 Furthermore, Rule 92(3) of the RPE provides for notification of the victims about the confirmation of charges hearing, which implies the right to participate. Stahn et al., above note 18, p. 235.



participated through their legal representatives in the confirmation of charges hearing in the *Lubanga* case.<sup>122</sup> Their participation was limited to an opening and a closing statement, both containing only legal observations, as their request for anonymity did not allow any personal statements, and the presentation of facts other than those put forward by the Prosecutor would have resulted in anonymous accusations.<sup>123</sup> Yet if the purpose of victim participation is to give victims a voice and the possibility of telling their story, purely legal presentations do not fulfil that purpose. The hope is that views of a more personal nature might subsequently be presented.<sup>124</sup> In addition, the prosecution and the defence were ordered to draw up a list of the public documents included in their evidence and provide that list to the victims' legal representatives. Those representatives themselves were not allowed to present evidence or to question witnesses.<sup>125</sup>

### Trial stage

Unlike the participation discussed in the previous sections, the participation in further procedural stages seems to be regulated solely by the regime of Article 68(3) of the Statute and Rule 93 of the Rules, independently of the stage of the proceedings.<sup>126</sup> It would go beyond the scope of this paper to discuss in detail the right to notification and legal representation of victims,<sup>127</sup> although these are essential for victim participation. In the *Lubanga* case the representatives of the four victims who had participated in the confirmation of charges hearing were allowed to present their views in written<sup>128</sup> and oral<sup>129</sup> form with regard to all the procedural and substantive issues that arose prior to the actual trial procedure.<sup>130</sup> In the 18 January 2008 decision, Trial Chamber I specified further where and how victims may participate in a trial. It held, for instance, that victims "may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has

122 See 07.11.2006 PTC I Decision on the Schedule and Conduct of the Confirmation Hearing, above note 101.

123 22.09.2006 PTC I Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, p. 7.

124 De Beco, above note 120, pp. 479f.

125 Apart from one exceptional occasion where leave was granted for one representative to put one question to the single witness called by the prosecution. 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 12.

126 Stahn et al., above note 18, p. 224, speak of "... three regimes for victim involvement in the pre-trial phase: the submission of "representations" and "observations" pursuant to Articles 15(3) and 19; participation pursuant to Articles 53(3) and (61); and the "seeking [of] the views of victims" by a Chamber pursuant to Rule 93."

127 See Rules 90 to 92.

128 E.g. the submission of responses to the defence request for interim release of Thomas Lubanga Dyilo, 11.06.2007 PTC I Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-924.

129 E.g. participation in the first hearing of Trial Chamber I aimed at resolving certain matters of law and other procedural issues on 04.09.2007, Transcript ICC-01/04-01/06-T-50 available at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-50\\_en.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-50_en.pdf), accessed 12 March 2008.

130 See the section "Outline of the ICC victim participation framework", above.

“requested” the evidence”. They are allowed to put appropriate questions whenever the evidence under consideration engages their personal interests.<sup>131</sup> The participating victims had access to the public redacted version of the prosecution’s “summary of presentation of evidence” and the public evidence listed in the prosecution’s annexes thereto.<sup>132</sup> On the other hand, inspection pursuant to Rules 77 and 78 relates only to the prosecution and the defence.<sup>133</sup> Further, victims may, upon request, be permitted to participate in closed and *ex parte* hearings, depending on the circumstances and the facts of the particular application and subject to consultation with the parties.<sup>134</sup>

### Victim representation

An important procedural difference exists between victims who are legally represented and those who are not. Rule 91 makes it clear that only victims assisted by legal representatives enjoy the specific “enhanced” procedural rights which go beyond the right to participate in hearings. According to Pre-Trial Chamber I it could even entail questioning of witnesses, experts or the accused, whereby such procedural actions would be strictly reserved to the legal representative of victims in order to protect the rights of the accused.<sup>135</sup> The Court seems to go beyond the modalities stipulated in Rules 89 or 144.

As to the issue of common legal representation,<sup>136</sup> Trial Chamber I held in the 18 January 2008 decision that “the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings” and that “victims’ common views and concerns may sometimes be better presented by a common legal representative”. The decision whether or not there should be joint representation would be decided at any particular stage in the proceedings *proprio motu* or upon request of a party or participant<sup>137</sup> It is indeed necessary “to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common legal representative”, and “detailed criteria cannot be laid down in advance”.<sup>138</sup>

131 Such questioning is not restricted to reparations issues. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 108.

132 Even confidential documents “should be made available in a suitably redacted form”. *Ibid.*, paras. 110f.

133 However, the prosecution should, upon request, provide individual victims with any materials within its possession relevant to the personal interests of victims. *Ibid.*, para. 111.

134 The same applies for confidential or *ex parte* written submissions by victims. *Ibid.*, paras. 113 f.

135 See 01.02.2007 PTC I Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-01/05-134, para. 3.

136 Rule 90(2).

137 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 116.

138 *Ibid.*, paras. 123–125. In order to protect the individual victim interests the chamber would apply a flexible approach, taking into consideration criteria such as the language spoken by the victims, “links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance”. An application of the victims’ representatives to participate in the appeals procedure initiated by the defence against the confirmation of charges was rejected, due to lack of personal interest. 13.02.2007 Appeals Chamber Judgement, above note 94, para. 55.

## Appeal and review proceedings

Whereas the right to appeal against acquittal or conviction or against a sentence pursuant to Article 81 of the Statute is clearly limited to the Prosecutor and to the convicted person, Article 82(4) of the Statute explicitly mentions the right of victim representatives to appeal against an order for reparations. With regard to other appeals, the general participation rules mentioned above seem to apply and the key question here is again whether the “personal interests of the victims are affected” by the matter under appeal. This could conceivably be so if the victims’ security would be affected. In the *Lubanga* case the Appeals Chamber accepted victim participation in the defendant’s appeal against the Pre-Trial Chamber decision to refuse provisional release; observations were, however, “limited and had to be specifically relevant to the issues arising in the appeal rather than more generally”.<sup>139</sup>

The same probably goes for participation in the revision procedure,<sup>140</sup> especially because in a revision a new trial is opened and victims’ personal interests might again be affected.<sup>141</sup>

## Reparation procedures

As mentioned above, special procedural rules are laid down for the reparation proceedings, which are also open to persons who did not previously participate as victims in the ICC proceedings.<sup>142</sup> A decision on reparation must be requested by the victims in writing, in quite a comprehensive and detailed application that differs from other participation applications,<sup>143</sup> as the Court would only in exceptional circumstances act on its own motion. While the Statute and Rules seem to foresee that the reparation decision would normally be taken within the regular trial proceedings, Article 76(3) of the Statute suggests that if a separate sentencing hearing<sup>144</sup> had been requested, reparations would be dealt with in a distinct sentencing proceeding of that nature or even, where necessary, in another additional reparation hearing. In any form of reparation procedure, the Court considers representations from or on behalf of the convicted person, victims, other interested persons or interested states,<sup>145</sup> and then makes an order directly against

139 13.06.2007 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, paras. 28 ff.

140 Article 84 of the Statute.

141 Anne-Marie La Rosa, “Revision procedure under the ICC Statute”, in Cassese, above note 5, pp. 1559 ff., 1570f.

142 There seems to be a specific interest of the Court to make reparation procedures widely public. See e.g. RPE, Rule 96.

143 Rule 95 ff. of the RPE lay down a quite detailed set of norms spelling out the application procedure.

144 Article 76(2) of the Statute.

145 State co-operation is an important condition for the functioning of the reparation regime, thus Articles 75(4) and (5) of the Statute refer to Articles 93(1) and 101 thereof, which both contain provisions

a convicted person, specifying appropriate reparations to, or in respect of, victims, such as restitution, compensation or rehabilitation.<sup>146</sup> Unlike victims' representations in other proceedings, the questioning in a reparation hearing is more comprehensive, and cannot be limited to written observations or submissions pursuant to Rule 91(4). On the contrary, the victim representative can, subject to leave by the Chamber concerned, even question witnesses, experts and the person concerned. Reparation hearings aim at establishing injury, harm or loss resulting from a crime committed by the convicted person. Pre-Trial Chamber II has already indicated that the standard of proof with regard to the nexus element of the victim definition is much higher for reparation purposes than for other stages of the proceedings.<sup>147</sup> Awarding reparations on a collective basis is explicitly provided for in Rule 97(1), which also stipulates that such awards may be handled by the Trust Fund "where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate".<sup>148</sup>

### Specific problems in relation to victim participation

One of the most evident problems arising from the participation regime of the ICC is that of striking a balance between victim interests and other interests in criminal procedures.<sup>149</sup> It has often been argued that such participation impedes the equilibrium between prosecution and defence, and that it interferes with the suspected or accused person's right to a fair<sup>150</sup> and expeditious trial<sup>151</sup> and the interest of the Prosecutor in preserving evidence and bringing victims into play as witnesses. Also victim participation, especially if granted with the proviso of protection measures, might obstruct the public's interest in a public hearing which

designed to secure assets for potential forfeiture, such as Article 93(1)(k), "The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture ...", and Article 109 on "Enforcement of fines and forfeiture measures". See also the 31.03.2006 Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Dylko ICC-01/04-01/06-62, and the detailed rules of Rule 99 of the RPE on "Cooperation and protective measures for the purpose of forfeiture".

146 Where appropriate, Article 75 of the Statute provides for reparations through the Trust Fund established pursuant to Article 79.

147 10.08.2007 PTC II Decision on Victims' Applications, above note 53, para. 14.

148 Rule 98 even provides for awards for reparations to "an intergovernmental, international or national organization approved by the Trust Fund".

149 Due to the limited scope of this article, it will not be possible to deal adequately with this vast topic.

150 Especially as regards protection measures and its impact on the right to be heard. Although this problem is more closely related to witness protection, it may also be an issue in terms of victim participation. Extensive case law of the European Court of Human Rights exists with regard to anonymous witnesses: e.g. ECtHR Jud.: *Lüdi v. Switzerland*, 25.06.1992, appl. 12433/86, para. 47; *Windisch v. Austria*, 27.09.1990, appl. 12489/86, para. 26.

151 Anne-Marie La Rosa, *Juridictions pénales internationales: La procédure et la preuve*, Presses universitaires de France, Paris, 2003, p. 268; Florence Mumba, "Ensuring a fair trial whilst protecting victims and witnesses: balancing of interests?" in May, above note 3; pp. 361 ff.; Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, pp. 276 ff.

offers full scrutiny of the administration of justice.<sup>152</sup> There is an additional concern specific to the ICC as a treaty-based institution, namely the interests of the member states in expeditious trials and the limitation of costs and expenses. As shown above, early victim participation at the investigation phase might interfere with the Prosecutor's interests in an objective, impartial and confidential investigation.<sup>153</sup> The balancing of these conflicting interests must be taken into account by the judges when granting access to victims, especially when defining the scope and modalities of participation. The issue of the balancing of interests may also be seen in a broader context when discussing general aspects of the purposes of punishing and sentencing in international criminal law.

Another important issue to consider in relation to victim participation is the ambiguity of how to deal with victims who are of interest as witnesses; this issue is especially pertinent in international criminal law processes, which largely rely on victim testimonies.<sup>154</sup> Whereas the ad hoc International Criminal Tribunal for the former Yugoslavia and for Rwanda (ICTY and ICTR) had to deal with the problem of excessive instrumentalization of victims by the parties, the ICC will face the far more complex dilemma of admitting persons to participate as victims in the proceedings who are at the same time of potential interest as witnesses. Neither the Statute nor the Rules excludes victims from participating in the proceedings to testify as witnesses. However, a person who participates as a victim in the ICC proceedings could be lost as witness, mainly because of that person's quasi-party position akin to that of a *partie civile* in civil law systems and its impact on fair trial guarantees.<sup>155</sup> In view of the above-mentioned limitation of the "enhanced" participation rights to the victims' representatives, it could be assumed that the personal involvement of a victim does not reach such a level that his or her participation would be incompatible with the role of a witness.<sup>156</sup> However, even if victims can be heard as witnesses, their testimony could be somewhat flawed because of a certain appearance of partiality and the clear interests they have in the outcome of the procedure, that is, with regard to reparations. The Prosecutor's strong opposition to early and extensive victim

152 *Stefanelli v. San Marino*, ECtHR (Judgment, 2000), paras. 16ff.

153 25.06.2007 Prosecution's Reply under Rule 89(1), above note 10, para. 27: "[a]ll investigative functions, including the determination of the incidents warranting investigation and of the crimes and perpetrators that should be prosecuted, must accordingly unfold pursuant to this principle of objectivity. Allowing victim participation in the situation could give rise to the perception that the Prosecution is subject to external influences into the investigative process." See also n. 36 thereto.

154 Pascale Chifflet, "The role and status of the victim", in Gideon Boas et al.(eds.), *International Criminal Law: Developments in the Case Law of the ICTY*, Nijnhof Publishers, Leiden, 2003, pp. 75 ff., 75 f., 98. Criticism that their dignity had not been respected when they were testifying before the ad hoc tribunals was often expressed, mainly by NGOs, victims' organizations and victims. See e.g. Reporters Without Borders, above note 107, p. 9: "If one of the ultimate aims of international justice is to restore victims' dignity, this objective has obviously still not been reached – far from it." Also Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 222 f.

155 Jorda and de Hemptinne, above note 5, p. 1409. Not so Robert Cryer, above note 22, p. 362, who assumes that a victim may also give testimony as a witness.

156 Claus Kreß, "Witnesses in proceedings before the International Criminal Court: an analysis in the light of comparative criminal law", in Horst Fischer et al.(eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz Verlag, Berlin, 2001, pp. 309 ff., 320f.

participation, as discussed above, consequently becomes somewhat understandable. Trial Chamber I addressed the issue of dual status of victim-witnesses in its 18 January 2008 decision, stating that their status would depend on whether they are called as witnesses during the proceedings and that witnesses would not be generally banned from participating as victims, as this would “be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber’s obligation to establish the truth”.<sup>157</sup>

## Change of paradigm in punishing international crimes

### Victims’ interests in sentencing

When discussing the influence of victim participation on sentencing in international criminal trials, consideration of some general issues of sentencing in international criminal law cannot be avoided. Penal lawyers and criminologists have discussed them extensively.<sup>158</sup> The focus here therefore centres on the specific role victims play in international sentencing practice mainly in the context of the ICC, which, unlike the statutory provisions of the ad hoc tribunals,<sup>159</sup> provides some guidelines for the determination of sentences. As none of the cases before the ICC has yet reached the sentencing stage, this issue is analysed in the light of general considerations with regard to sanctions and their purposes.

One would expect that the scale of the atrocities and the immensity of international crimes would be reflected in the sentences rendered, or at least that justifications for punishment in international criminal law would take into account the magnitude and abhorrence of the acts.<sup>160</sup> This raises the question of whether sanctions and their justifications can and should, in one way or another, reflect victims’ interests. “Classic” theories of justifications of punishment – such as deterrence, retribution, rehabilitation – usually do not. However, in specific purposes of punishment that are inherent in international criminal law, victims play a more important role than is usually the case in domestic legal contexts.<sup>161</sup>

157 Yet it must be established on a case-by-case evaluation “whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case”. The judges did not, however, explain in detail what measures could be taken to avoid adverse effects on these rights. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 132 ff.

158 Some recent works give a good overview. See, for the Anglo-Saxon legal systems, Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice*, Oxford University Press, Oxford, 2005; for the French-influenced jurisdictions Noëlle Languin et al., *L’art de punir: Les représentations sociales d’une “juste” peine*, Schulthess Verlag, Zurich, 2006; for the international justice system Ralph Henham, *Punishment and Process in International Criminal Trials*, Ashgate, Aldershot, 2005.

159 ICTR Statute, Article 23(2), and ICTR-RPE, Rule 101; ICTY Statute Article 24(2), ICTY-RPE, and Rule 101; SCSL Statute, Article 19(1), and SCSL-RPE, Rule 101. Ralph Henham “Some issues for sentencing in the International Criminal Court”, *International and Comparative Law Quarterly*, Vol. 52 (2003), pp. 81 ff., 87 ff.

160 Mark A. Drumble, “Collective violence and individual punishment: the criminality of mass atrocity”, *Northwestern University Law Review*, Vol. 99 (2) (2005), pp. 539 ff., 541 ff.

161 Ralph Henham, “International sentencing in the context of collective violence”, *International Criminal Law Review*, Vol. 7 (2007), pp. 449 ff., 454 f.; Henham, above note 159, pp. 109 ff.



Such particular “international” sentencing purposes, tailored for crimes committed in the context of collective and/or state violence, could, for instance, be an expression of international solidarity with the victims and a documentation of the facts that goes beyond state propaganda.<sup>162</sup>

Seen from a human rights perspective, the obligation of states to prosecute perpetrators of gross violations of human rights and international humanitarian law is generally acknowledged for acts constituting crimes under international law, such as genocide, crimes against humanity and war crimes.<sup>163</sup> Although this obligation is not explicitly spelt out in international human rights instruments, it is nevertheless deemed by international<sup>164</sup> and regional<sup>165</sup> human rights supervisory bodies to be part of the right to remedy and of the states’ obligation to ensure respect for human rights.

The judges of the ad hoc tribunals, although given considerable scope with regard to sentencing,<sup>166</sup> nevertheless dealt with the question of the purpose of penalties. Yet victim-related issues played a rather insignificant role in the judges’

162 Frank Neubacher, “Kriminologie und internationale Strafgerichtsbarkeit”, in Frank Neubacher et al. (eds.), *Vom Recht der Macht zur Macht des Rechts? – Interdisziplinäre Beiträge zur Zukunft internationaler Strafgerichte*, Duncker & Humblot, Berlin, 2006, pp. 17 ff., 24 f.; Daniel Joyce, “The historical function of international criminal trials: re-thinking international criminal law”, *Nordic Journal of International Law*, Vol. 4 (2004), pp. 461 ff.

163 E.g. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, above note 70, Principle 4, “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.” Principle 5 goes even further, establishing an obligation for states to provide domestic norms allowing universal jurisdiction “where so provided, in an applicable treaty or under other international law obligations”, to facilitate extradition or surrender of offenders “to other States and to appropriate international judicial bodies and provide judicial assistance...”.

164 UN Human Rights Committee (HRC), *Bautista de Arellana v. Colombia*, Comm. No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), para. 10: “... the Committee urges the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista.” Also *Josi Vicente and Amado Villafaqe Chaparro, Lums Napolesn Torres Crespo, Angel Marma Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Comm. No. 612/1995 (14 June 1994), CCPR/C/60/D/612/1995 (“*Arhuaco* case”), para. 5.2.; *Basilio Laureano Atachahua v. Peru*, Comm. No. 540/1993, UN Doc. CCPR/C/56/D/540/1993 (1996), para. 10; *Rodríguez v. Uruguay*, Comm. No. 322/1988, UN Doc. CCPR/C/51/D/322/1988 (1994), para. 12.4.

165 The IACtHR was the first international human rights body to highlight clearly the specific obligation of states “to prosecute and punish the perpetrator in cases of such serious human rights violations: *Velásquez Rodríguez v. Honduras*, IACtHR Judgment of 29.07.1988 (Ser. C) No. 4 (1988), paras. 178, 181, 186. The ECtHR followed this jurisprudence only recently, in its case law on “effective remedy” under Article 13 of the European Convention on Human Rights (ECHR), mainly in cases concerning serious human rights violations occurring in the context of south-east Turkey, e.g. ECtHR Judgement of 25.09.1997, *Aydın v. Turkey*, appl. 23178/94, para. 103 and Judgement of 25.08.1998, *Kurt v. Turkey*, appl. 24276/94; Judgement of 18.12.1996, *Aksoy v. Turkey*, appl. 21987/93, para. 98. And see Manfred Nowak, “The right of victims of gross human rights violations to reparation”, in Fons Coomans et al. (ed.), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven*, Kluwer Law International, The Hague, 2001, para. 70.

166 E.g. *Prosecutor v. Rutanganda*, Case No. ICTR-96-3-T Judgement and Sentence (Trial Chamber), 09.12.1999, para. 458; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A Judgement (Appeals Chamber), 20.02.2001, paras. 717 f.; Drumble, above note 160, p. 558f.

considerations,<sup>167</sup> although they indicated that sanctions in international criminal law do have certain objectives that differ from those typically found in national legal contexts.<sup>168</sup> The purposes of penalties considered by the ad hoc tribunals were mainly retribution, deterrence, rehabilitation, the protection of society, justice, ending impunity, promoting reconciliation and restoring peace.<sup>169</sup> Only one sentencing judgment specifically mentions victims' interests<sup>170</sup> as a particular purpose of punishment.

The constitutive documents of the ICC do not specifically refer to the purposes of punishment, although they are implied in some way in the Preamble to the Statute,<sup>171</sup> thus leaving the ICC judges with broad discretion. Some victim-oriented sentencing principles might, however, be drawn from the above-mentioned case law. Retribution, often referred to as the main objective of punishment,<sup>172</sup> could to some extent accommodate victims' interests as long as it is not understood as revenge. In view of the specific circumstances of massive and collective violence, retributive sentiments of victims and their relatives cannot be completely disregarded. Such considerations are, however, a balancing act, as they may hamper reconciliation<sup>173</sup> and impede efforts to respect the right of the accused or convicted person to individualized, fair and proportional punishment. Reconciliation and reconstruction efforts are seen as an important aim of international justice, and punishing those most responsible for gross violations of human rights and international humanitarian law can in many respects add to

167 Jan Christoph Nemitz, *Strafzumessung im Völkerstrafrecht: ein Beitrag zur Strafzwecklehre und zur Strafzumessungsmethode unter besonderer Berücksichtigung des Römischen Statuts*, Edition Iuscrim, Freiburg im Breisgau, 2002, pp. 149 ff.

168 *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement (Trial Chamber), para. 62.

169 See e.g. Nemitz, above note 167, pp. 21 ff., 145 ff. For a detailed discussion of "classic" sanction purposes and specifically international criminal sentencing purposes, see Christina Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte*, Lit Verlag, Münster, 2003, pp. 438 ff.

170 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16.11.98, para. 1231.

171 The second preambular paragraph, "*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", suggests that the interests of victims have an important place in all the considerations of the Court, including those when sentencing. The absence of "penological justifications" has been criticised by Henham, who is of the opinion, that this lack of guidelines "weakens [the ICC's] claim to provide a rational foundation for the exercise of democratic principles of criminal justice." Henham, above note 159, p. 87. Rule 145 of the RPE gives some guidance as to how judges should determine a sentence. Some of the elements of this provision contain, in a certain manner, components of victim interests. Besides other factors, "the extent of the damage caused, in particular the harm caused to the victims and their families" should be considered. Furthermore, efforts of the convicted person to compensate the victims might be considered as mitigating factor, whereas the commission of crimes in cases where the victim was particularly defenceless or where there were multiple victims is seen as an aggravating circumstance. Rule 223 of the RPE contains the criteria to be taken into account by the Appeals Chamber for review with regard to reduction of sentences. It also lists in sub-para.(d) the victim-related criteria of "significant action taken by the sentenced person for the benefit of the victims" and possible impacts on the victims and their families as a result of the early release.

172 Faiza P. King and Anne-Marie La Rosa, "Penalties under the ICC Statute", in Flavia Lattanzi et al., *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, Editrice Il Sirente, Ripa Fagnano Alto, 1999, pp. 311 ff., 329 f.

173 William A. Schabas, "Sentencing by international tribunals: a human rights approach", *Duke Journal of Comparative & International Law*, Vol. 2 (1997), pp. 461 ff., 502.

such efforts,<sup>174</sup> although the inherent risk exists that it may be misunderstood by the public and potentially lead to adverse effects, such as the self-victimization of the perpetrators or perception of that punishment as ineffective<sup>175</sup> victors' justice.<sup>176</sup> Therefore aspects of restorative justice should also be taken into consideration, as reflected for example in the Statute's Article 75 on reparations and Article 79 on the Trust Fund.<sup>177</sup> Moreover, the declaratory value of criminal law<sup>178</sup> can have a healing impact on victims at both a collective<sup>179</sup> and an individual level.<sup>180</sup> The public perception that justice is done is one way to break the vicious circle of hatred and violence.<sup>181</sup> Even classic purposes such as deterrence and incapacitation could accommodate the interests of victims by giving them a general, collective feeling of security in knowing that the former regime will not return, and a personal awareness that the perpetrator is not at liberty and able to repeat what he or she did to them.<sup>182</sup> A more systematic and coherent approach to sentencing, which would enhance the foreseeability of the sanction and thus better respect the principle of legality, would also help victims to cope with the difficult psychological process of following a criminal proceeding.<sup>183</sup>

## Selectivity

One factor to be taken into account in international criminal procedure is the high level of selectivity due to the very aim of international criminal prosecutions, namely to focus on the most heinous crimes and on the perpetrators who bear the

174 It is widely acknowledged that criminal procedures allow for reconstruction of the truth and therefore help traumatized societies to recover, stabilize and rebuild. Francois-Xavier Nsanzuwera, "The ICTR contribution to national reconciliation", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 944 ff., 948: "By arresting the architects of the genocide, the ICTR deprived the perpetrators of their main leaders. The overarching feeling among survivors is that without such arrests, the former political and military leaders involved in the genocide would have continued to destabilize Rwanda, eliminate witnesses and aggravate the moral suffering of survivors."

175 Helena Cobban, *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*, Paradigm, Boulder, 2007, p. 209.

176 Pierre Marie Gallois and Jacques Verge, *L'apartheid judiciaire: Le Tribunal pénal international, arme de guerre*, L'Age d'Homme, Lausanne, 2002.

177 Also the penalty, provided for in Article 77(2)(b) of the Statute, of forfeiture of proceeds, property and assets derived directly or indirectly from the crime for which the person is convicted, contains restorative elements. Adrian Hole, "Sentencing provisions of the International Criminal Court", *International Journal of Punishment and Sentencing*, Vol. 1 (2005), pp. 37 ff., 58.

178 Schabas thinks that it "is probably its most important contribution to the struggle against impunity", above note 173, p. 513.

179 Pierre Hazan, "Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice", *International Review of the Red Cross*, No. 861 (March 2006), pp. 19 ff., 25: "They control the behaviour of the various players, redefine their identities and impart new values, which gradually pervade the national institutions." Also, Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 03.08.2004, S/2004/616.

180 Martha Minow, "Breaking the cycles of hatred", in Martha Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, Princeton, 2002, pp. 14 ff., 16 ff.

181 Nancy L. Rosenblum, in Minow (ed.), above note 180, pp. 76 ff., 80.

182 Tom J. Farer, "Restraining the barbarians: can international criminal law help?", *Human Rights Quarterly*, Vol. 22 (2000), pp. 90 ff., 91ff.

183 La Rosa, *Juridictions pénales internationales*, above note 151, p. 210.

greatest responsibility.<sup>184</sup> This extreme selectivity is expressed in the very object and purpose of the ICC as set out in the Preamble to the Statute, and is inherent in the structure of ICC procedure as a whole.<sup>185</sup> With regard to victim interests to be reflected in that procedure the selectivity is even greater, as shown by the practical and individual impediments facing victims wishing to approach the Court and the high procedural thresholds explained above. This high degree of selectivity results in a somewhat prejudiced conception of the events in question; the resulting sanction thus cannot make up for the atrocities committed and the suffering caused, as it might be able to do in a national system of penal sanctions. However, as pointed out by several authors, it is ultimately impossible to determine empirically whether international punishment really contributes to peace and reconciliation and is thus justifiable from this perspective.<sup>186</sup> Sentencing therefore takes on a more symbolic dimension, which might serve not only the victims able to put forward their views directly, but ultimately the victimized group as a whole. The trials of the few selected perpetrators, representing only a very small proportion of all that has occurred, acquire a kind of *pars pro toto* character;<sup>187</sup> they are a symbolic act, which is of course of limited effect for the society concerned or the international community as a whole if the main perpetrators cannot be brought to justice. The sanction becomes exemplary, and the demand for one-to-one compensation for the injustice suffered thus becomes less relevant.

### The necessity of reparation

However, to leave the rather theoretical and philosophical discussion on purposes of sanctions and return to the harsh reality of the problems facing victims in their everyday lives, it must be stressed that there are often many material needs that are more important for their survival.<sup>188</sup> The aspect of material reparation, going beyond the immaterial satisfaction of judgment and sentence, should consequently not be neglected. Yet the threshold for victims to be compensated under Article 75 of the Statute is even higher than for their participation in proceedings under Article 68(3) thereof. In situations with typically large numbers of victims, only a very small number of them would finally receive reparation. The ICC will probably

184 Herbert Jäger, “Makroverbrechen als Gegenstand des Völkerstrafrechts: Kriminalpolitisch-kriminologische Aspekte”, in Gerd Hankel and Gerhard Stuby, *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, Hamburger Edition, Hamburg, 1995, pp. 325 ff., 420 ff.

185 E.g. in Articles 5 and 6; Article 17(1)(d) and Article 53(1)(c) of the Statute. See Olásolo, above note 26, p. 182. Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof: Zur Auslegung des Article 17 IStGH-Statut unter besonderer Berücksichtigung von Amnestien und Wahrheitskommissionen*, Berliner Wissenschafts-Verlag, Berlin, 2005, p. 176.

186 Ralph Henham, above note 161, p. 452.

187 Felix Bommer, “Strafzwecke im Völkerstrafrecht”, in Hans Münk (ed.), *Die Vereinten Nationen sechs Jahrzehnte nach ihrer Gründung: Bilanz und Reformperspektiven*, Peter Lang Verlag, Berne, 2008, pp. 29 ff., 53.

188 Henham, above note 161, p. 452: “Consequently, however we theorise the presumed effects of international criminal law or punishment, the gulf between the social reality of what victims and victimised communities perceive as justice and what passes as ICJ remains.”

therefore have to envisage collective reparations rather than individual ones. Otherwise, a large and costly mass claims administration would need be set up<sup>189</sup> similar, for example, to the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) for Bosnia and Herzegovina<sup>190</sup> or the UN Compensation Commission (UNCC).<sup>191</sup> The ICC Trust Fund seems to focus more on reparation based on community projects benefiting the victimized community as a whole, rather than only individual victims.<sup>192</sup>

A discrepancy between victims who participate in ICC proceedings and those who do not will nonetheless still remain. Another factor to be considered with regard to selectivity is that of victim protection. Since the situation in regions where ICC investigations take place can continue to be extremely volatile and insecure even during those investigations, the singling out of certain victims or witnesses might create problems not only for them but also for others who, unlike them, remain unprotected. One solution proposed to counterbalance the high level of selectivity inherent in international criminal jurisdiction is to combine it with other transitional justice mechanisms such as truth and reconciliation commissions, as for instance in Sierra Leone.<sup>193</sup>

## Concluding remarks

If the ICC wants to keep its promise of serious consideration for victims' interests, it urgently needs to define a more comprehensive, concerted and defined approach towards victim participation. Without this, the laudable project of giving victims a voice in criminal proceedings on the most serious crimes of concern to the international community risks ending as a farce. Today it is already clear that the Court's capacity to handle huge numbers of victim applications is limited. Solutions must therefore be found to allow the ICC to discharge its primary mandate, namely to "put an end to impunity for the perpetrators of these crimes" and thus to contribute to their prevention, while at the same time according due respect to the opposing interests of the accused, the prosecution, the public and the victims and complying with general standards of a fair, impartial and

189 Marc Henzelin, Veijo Heiskanen and Guénaél Mettraux, "Reparations to victims before the International Criminal Court: lessons from international mass claims processes", *Criminal Law Forum*, Vol. 17 (2006), pp. 317 ff., 333 ff.

190 Hans van Houtte, "The Property Claims Commission in Bosnia-Herzegovina: A new path to restore real estate rights in post-war societies?", in Karel Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague, 1998, pp. 549 ff. See also the commission's website, [www.law.kuleuven.ac.be/ipr/eng/CRPC\\_Bosnia/CRPC/new/en/main.htm](http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm), accessed 12 March 2008.

191 Created in 1991 as a subsidiary organ of the UN Security Council by SC Res. 687/91, to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait. Information available at <http://www2.unog.ch/uncc/resoluti.htm>, accessed 12 March 2008.

192 Information available at [www.icc-cpi.int/vtf/vsfmeetings.html](http://www.icc-cpi.int/vtf/vsfmeetings.html), accessed 12 March 2008. See "ICC Trust Fund, goals, mission and mode of operation: A programmatic framework", The Hague, May 2007, p. 7.

193 This was one of the conclusions of the Secretary-General's Report: The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 23 August 2004.

expeditious trial. If this delicate balance is not attained throughout the whole trial, in such a way that the Court remains just and credible to all participants and to the society affected by the crimes, even sentencing will become insignificant and fail to meet the purposes of punishment in international criminal law.

The attempt of Trial Chamber I to develop a more consistent approach to victim issues is indispensable. The organs of the ICC must promptly devise and establish a common strategy to bring about a meaningful victim participation that respects to the fullest extent possible the rights, needs and interests of all participants. Serious consideration of victims' interests also implies an obligation not to create erroneous hopes and expectations that cannot be fulfilled, will leave victims frustrated and may place them in an even more difficult situation than they would have been without participating in ICC proceedings. Overenthusiastically allowing victims to take part in investigations at situation level, for instance, gave rise to such hopes. In addition, a more transparent, precise and above all cohesive and consistent jurisprudence would enhance the credibility and predictability of the Court's case law, enabling victims and their representatives to estimate better whether their application has a chance at all. Otherwise, the Court is in danger of becoming paralysed by processing applications and handling purely procedural submissions without substantially advancing cases. Finally, sentencing practice needs to compensate in some way for the extremely selective character of international criminal trials, taking into consideration the effects of punishment on victims and the societies affected by the massive crimes under review, although without impeding the rights of the accused.