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The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?

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Abstract
The provisions of the ICC Statute allowing victims to participate in the criminal proceedings in their own right were a novel feature in international criminal proceedings. While representing a welcomed restorative element, victim participation has been a time and resource consuming issue for the ICC to handle. After a number of decisions concerning participation in the investigation and pre-trial phases of the process, the trial chamber in the *Lubanga* case and the Appeals Chamber have issued the first rulings with respect to victim participation at trial. This note addresses these decisions and controversial issues therein, such as the nexus between the victim and the crime charged and the victim's right to adduce and challenge evidence. One may now ask whether victims as 'participants' are in fact becoming 'parties' to the criminal proceedings.

Key words
court-adduced evidence; harm; International Criminal Court; *Lubanga* case; participation; victims

1. Introduction

The introduction of provisions on victim participation in the Rome Statute of the International Criminal Court (ICC Statute)[1] and the Court's Rules of Procedure and Evidence (ICC Rules)[2] represented a departure from the earlier ad hoc international criminal tribunals (for the former Yugoslavia and for Rwanda) which were established by the UN Security Council. According to the ICC Statute and Rules, victims are not merely seen as 'witnesses' but are also afforded the right to participate in the proceedings and to seek reparations from the perpetrator.

Clearly, one important objective behind the creation of international criminal jurisdictions has been providing redress to the victims of atrocities. Redress may take different forms and be provided in different fora, however, and the relatively extensive scheme that was developed for the ICC was not an obvious one. On the contrary, the issues and how best to address them were rather controversial

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1 The Rome Statute of the International Criminal Court, 2187 UNTS 90, adopted on 17 July 1998.

2 Rules of Procedure and Evidence, adopted on 9 September 2002, doc. ICC-ASP/1/2 (Part II-A).

matters during the negotiations.[3] Some states and the non-governmental organization (NGO) community were strongly in favour of far-reaching participatory rights for victims. Other states were concerned, to a greater or lesser extent, with whether such participation could work in practice without affecting the rights of the suspect or accused and the fairness and efficiency of the proceedings. Nevertheless, an independent right for victims to participate was accepted, which was fully in line with other developments in the sphere of international criminal justice.[4]

The comments by observers have been mixed, too. Many have hailed the victims-related provisions as a substantial advance when compared with the law and practice of the ICC's predecessors.[5] The scheme has been described as representing a move away from the exercise of purely retributive justice.[6] But the regime of victim participation also has its critics and some warn that it is a potentially harmful experiment in what is still a highly fragile system.[7] Others, without being so critical, identify problems such as the unclear purposes behind the right of participation, and tensions with respect to the rights of the accused, the role of the prosecution, and the victim's potential parallel role as a witness.[8]

In short, victim participation is a right provided for in Article 68(3) of the ICC Statute, but it is a right with caveats, which are explicitly set out in the article. Importantly, the exercise of this right – where, when, and how – is to be firmly controlled by the relevant chamber. Hence jurisprudence in this area is particularly important and eagerly awaited. It is now emerging. In practice, these issues have occupied, and continue to occupy, much time and effort on the part not only of the judges but also of the parties (prosecution and defence), the Registry of the Court, and the victims and their representatives.

The early decisions, and comments concerning them,[9] primarily concern victim participation in the investigation and pre-trial stages. The first and very influential

3 On the negotiations, see G. Bitti and H. Friman, 'Participation of Victims in the Proceedings', in R. S. Lee et al. (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001), 456.

4 See, e.g., A. Eide, 'Preventing Impunity for the Violator and Ensuring Remedies for the Victim', (2000) 69 *Nordic Journal of International Law* 1, and M. Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', (2006) 24 *Netherlands Quarterly of Human Rights* 641.

5 See, e.g., T. van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', in H. von Hebel et al. (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 87.

6 See, e.g., S. A. Fernández de Gurmendi and H. Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', (2001) 3 *Yearbook of International Humanitarian Law* 289, at 312.

7 E.g. A. Zahar and G. Sluiter, *International Criminal Law* (2007), 75–6.

8 E.g. C. Jorda and J. de Hemptinne, 'The Status and Role of Victims', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1338–9; E. Haslam, 'Victim Participation in the International Criminal Court: A Triumph of Hope over Experience?', in D. McGoldrick et al. (eds.), *The Permanent International Criminal Court – Legal and Policy Issues* (2004), 334; M. Heikkilä, *International Criminal Tribunals and Victims of Crime* (2004), 152–4; R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007), 361.

9 E.g. C. Stahn et al., 'Participation of Victims in Pre-trial Proceedings of the ICC', (2006) 4 *Journal of International Criminal Justice* 219; C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', (2008) 6 *Northwestern Journal of International Human Rights* 459; S. Vasiliev, 'Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 635; H. Friman, 'Participation of Victims before the ICC: A Critical Assessment of the Early Developments', in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (forthcoming in 2009); E. Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', (2008) 90 *International Review of the Red Cross* 409.

decision by the Pre-Trial Chamber was handed down in January 2006 in the *Situation in the Democratic Republic of the Congo* (DRC),[10] soon to be followed by several other Pre-Trial Chamber decisions. The first decision concerning the trial stage of the process was made in January 2008 by the Trial Chamber in the subsequent *Lubanga* case.[11]

Being interlocutory matters, appeals against the decisions on victim participation require leave to be granted by the chamber in question. The practice concerning leave to appeal is very restrictive, and for some time the Appeals Chamber was prevented from expressing itself on these issues beyond the question of such participation in the actual appeals proceedings before it.[12] When it transpired, however, that the practice of the different chambers was not entirely consistent, leave to appeal was granted against a few decisions, among them the *Lubanga* trial decision.[13] On 11 July 2008, the Appeals Chamber issued its decision ('judgment') on victim participation in the *Lubanga* case.[14]

This article addresses the appeals decision and the relevant parts of the underlying Trial Chamber decision of 18 January 2008. For background, one should also take note of the Appeals Chamber's more recent decision, in the *Situation in the DRC*,[15] which provides, *inter alia*, a very good and clarifying overview of victim participation in accordance with Article 68(3) of the ICC Statute, and distinguish this general right from other forms of participation: proceedings – reparations and protective measures – that victims may initiate themselves; solicitation of the victims' views regardless of whether they participate or not; and the special provisions in Articles 15 and 19 of the Statute concerning participation.

2. Decisions on victim participation in the *Lubanga* trial

The Trial Chamber decision in *Lubanga* was issued so as to provide 'general guidelines on all matters related to the participation of victims throughout the proceedings'.[16] Hence it was intended to enhance predictability rather than to determine any

10 *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04–101-tEN-Corr, P.T. Ch. I, 17 January 2006.

11 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on Victims' Participation, ICC-01/04-01/06-1119, T. Ch. I, 18 January 2008 (hereinafter Trial Chamber *Lubanga* Decision).

12 E.g. *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0005/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, ICC-01/04-01/06-925, A. Ch., 13 June 2007. For a critical view see e.g. H. Friman, 'Interlocutory Appeals in the Early Practice of the International Criminal Court', in Stahn and Sluiter, *supra* note 9, at 553–61.

13 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1191, T. Ch. I, 26 February 2008.

14 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA9 OA10, A. Ch., 11 July 2008 (hereinafter Appeals Chamber *Lubanga* Decision).

15 *Situation in the Democratic Republic of the Congo*, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 17 December 2007 and in the appeals of the OPDC and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, A. Ch., 19 December 2008.

16 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 84.

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particular victim's right of participation in the trial proceedings. Consequently, rulings concerning individual victims were made only later, taking into account the ruling by the Appeals Chamber.[17] In effect, the Trial Chamber created a three-step approach to the issue of victim participation: first, general guidelines; second, decisions concerning the right in principle of individual victims to participate in the proceedings; and, third, separate determinations of where, when, and how such participation will take place subsequent to each victim setting out 'in a discrete written application the nature and the detail of their proposed intervention'.[18]

Even so, the Trial Chamber granted leave to appeal against the initial decision concerning general guidelines, but only in part and not to the extent requested by the prosecution and the defence. The questions that the Trial Chamber allowed to be subject to interlocutory appeal related to the nature of the harm required in order to qualify as a victim; the linkage between the harm, the notion of 'personal interests', and the charges levelled against the accused; and the scope for victims to lead evidence at trial pertaining to the guilt or innocence of the accused and to challenge the admissibility of evidence. These key issues will be addressed in the following.

But the Trial Chamber's majority ruling[19] also rejected leave to appeal with respect to some other interesting questions addressed in the January decision. Evidence concerning reparations, access to confidential material, and participation in closed hearings will also briefly be addressed in this paper.

A notable feature of the three decisions now under review is that they were not unanimous and that strong dissent was expressed by the minorities – by Judge René Blattmann in the Trial Chamber and Judges Georghios Pikis and Philippe Kirsch in the Appeals Chamber. The dissenting views will also be observed in the following.

3. The notion of 'harm'

A 'victim' is by any definition – including the definition provided in Rule 85 of the ICC Rules – someone who has suffered 'harm'. Establishing whether a person (natural or legal) is a victim would thus require some kind of assessment of the harm sustained, albeit that the determination for this purpose and at an early stage of the proceedings will necessarily be of a preliminary nature[20] and might be based on weak evidentiary material.[21]

17 E.g. *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on the Applications by Victims to Participate in the Proceedings, ICC-01/04-01/06-1556, T. Ch. I, 15 December 2008.

18 Ibid., para. 137. See also Trial Chamber *Lubanga* Decision, *supra* note 11, para. 138.

19 Judge Blattmann, dissenting, disagreed with the majority's application of the provisions on leave for appeal and considered that leave should also be granted concerning the modalities of identification of a victim, the participation of anonymous victims, and the scope of a provision allowing evidence relating to reparations to be presented during the trial process; see *Situation in the Democratic Republic of the Congo*, *supra* note 13, Separate and Dissenting Opinion of Judge René Blattmann.

20 See *Situation in the Democratic Republic of the Congo*, PT.Ch. I, 17 January 2006, *supra* note 10, para. 82. See also Bitti and Friman, *supra* note 3, at 461.

21 Some commentators even argue that the judges, at least of the Pre-Trial Chamber, should refrain from an adjudication of harm during the evaluation of victims' participation; see e.g. American University Washington

But the notion of 'harm' may be understood in a number of different ways, and the statutory law of the ICC, as noted by the Trial Chamber,[22] does not provide a definition. Hence the Chamber resorted for guidance to the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[23] ; this approach was criticized by the dissenting judge of the Trial Chamber, who cautioned that 'this is not a strongly persuasive or decisive authority' and that it 'seems inappropriate to go beyond the scope of what was approved by the drafters of the Rome Statute and following legislation'.[24] The defence resorted to the same criticisms in its appeal, arguing an error in law, but the Appeals Chamber rejected this argument.[25] Because what the Trial Chamber had actually done, as observed by the Appeals Chamber, was to seek guidance from the UN Basic Principles what analysing Rule 85 of the ICC Rules.

Moreover, the Trial Chamber noted that Rule 85(b), on legal persons, refers to 'direct harm' and concluded, *e contrario*, that no such limitation applies to natural persons (Rule 85(a)), who therefore may be direct or indirect victims of a crime within the jurisdiction of the Court.[26] The Appeals Chamber, explaining that 'harm' in its ordinary meaning denotes hurt, injury, and damage, found that material, physical, and psychological harm all fall under the definition, but only insofar as the harm is suffered personally by the victim ('personal harm').[27] The harm could be both personal and collective in nature, but the former kind of harm is decisive for the right to participate.[28]

The majority of the Appeals Chamber agreed with the Trial Chamber that both direct and indirect victims are covered and that 'the notion of victim . . . does not necessarily imply the existence of direct harm', but still with the caveat that the harm must be 'personal'.[29] Judge Pikis parted from the conclusion on 'indirect harm' and stated that '[t]here must be a direct nexus between the crime and the harm, in the sense of cause and effect' and thus that 'the crime itself must be the cause generating the harm'.[30] The clarification made by Judge Pikis reads better with the Appeals Chamber's conclusion on the linkage between the harm and the crime (see below), but it is not entirely clear that the majority actually were of a different view concerning the causal requirement when establishing the personal harm. For example, the conscription of a child soldier may cause, indirectly, emotional harm or economic loss to the child's parents – that is, an indirect victim may suffer,

College of Law, Victim Participation before the International Criminal Court, War Crimes Research Office, November 2007, at 63.

22 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 92.

23 Adopted by the UN General Assembly, Resolution 60/147 of 16 December 2005.

24 Trial Chamber *Lubanga* Decision, *supra* note 11, Separate and Dissenting Opinion of Judge Blattmann, paras. 4–5.

25 Appeals Chamber *Lubanga* Decision, *supra* note 14, paras. 20 and 33.

26 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 91.

27 Appeals Chamber *Lubanga* Decision, *supra* note 14, paras. 31–32.

28 Ibid., paras. 35 and 37.

29 Ibid., para. 32.

30 Appeals Chamber *Lubanga* Decision, *supra* note 14, Partly Dissenting Opinion of Judge Pikis, para. 3.

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personally, harm caused by the action of the perpetrator, which could very well be labelled 'indirect harm'.

One should remember, however, that the question here was 'harm' for the purpose of victim participation in the (criminal) proceedings, and not for protective measures or reparations, for which such participation is not a precondition.[31] On the other hand, the definition of 'victims' in Rule 85 is a 'catch-all provision', and thus the interpretation will in all likelihood be the same with respect to protective measures and reparations.

4. Linkage between 'harm', the notion of 'personal interests', and the crimes charged

The most controversial aspect of the Trial Chamber's findings was the ruling that participating victims do not need to have suffered harm from the crimes contained in the charges; this would, according to the chamber, be a restriction not found anywhere in the regulatory framework of the ICC.[32] Instead, any crime under the jurisdiction of the Court would do and the chamber, based on its understanding of 'the interests of victims', established a different test:[33] the applicant must establish either (i) a real evidentiary link between the victim and the evidence to be considered at trial, or (ii) that the victim was 'affected by an issue arising during . . . trial because his or her personal interests are in a real sense engaged by it'. However, Judge Blattmann strongly disagreed (see further below). The majority decision was also at odds with earlier decisions by the Pre-Trial Chamber, including in the same case,[34] which required a causal link between the harm and the crimes covered by the warrant of arrest.

Hence the majority of the Trial Chamber held 'personal interests' to be decisive and disregarded any formal requirement of a link between the 'harm' and the charges in question. In essence, this would leave the gates wide open for the formal right of a large number of victims to participate, in principle making it relatively easy for the victims to apply and for the Court to assess the applications, but considerably narrowing the right to participate in practice by introducing a rather stringent threshold; once the entrance ticket has been received, a victim who wishes to participate in relation to any identified stage of the proceedings is required to make a 'discrete written application' setting out the nature and the detail of the proposed

31 See also ibid., para. 18.

32 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 93.

33 Ibid., paras. 94–95 (misquoting Art. 68(3) of the ICC Statute by leaving out that the interests must be 'personal').

34 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172, PT. Ch. I, 29 June 2006, p. 6 ('Considering that at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant'); see also *Situation in Uganda*, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Case No. ICC-02/04-101, PT. Ch. II, 10 August 2007, paras. 9, 30, 39, 49, 59, 66, 75.

intervention and describing how his or her 'personal interest' is affected.[35] The link to the charges was not entirely ignored, however, and the Trial Chamber stressed that the evidence and issues to which the victim must relate are such that 'the Chamber will be considering in its investigation of the charges brought against Mr Thomas Lubanga Dyilo'.[36]

Both the Prosecutor and the defence appealed and were granted leave. The Appeals Chamber unanimously reversed the Trial Chamber's decision on this point. While the Trial Chamber based its conclusions on an interpretation of Rule 85 (definition of victims),[37] the Appeals Chamber rejected this approach and instead sought the answer primarily in Article 68(3).[38] In the view of the Appeals Chamber, 'the purpose of the trial proceedings is the determination of guilt or innocence of the accused person of the crimes charged', and therefore 'only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests'.[39] The Appeals Chamber accordingly rejected the Trial Chamber's contention that it would be sufficient for the victim to satisfy a test with respect to the 'personal interests' alone.

But the Appeals Chamber did not end its reasoning here. The dissenting trial judge, Judge Blattmann, as well as the defence and the Prosecutor, had emphasized that the jurisdiction of the Trial Chamber is confined by the charges against the accused as confirmed by the Pre-Trial Chamber. Hence the Trial Chamber would be acting outside its legal authority – that is, would be acting *ultra vires* – by allowing victims who have suffered harm unrelated to the charges against the accused to participate in the trial proceedings; the Chamber would then be acting outside the 'case' at hand. The Appeals Chamber agreed.[40] This is also a strong line of argumentation.

The finding of the Appeals Chamber, that victim participation be confined at the trial stage to those who have suffered harm caused by the crimes charged against the particular accused, is a very reasonable one. The reasoning of the decision is convincing and the same would apply in domestic jurisdictions. The Trial Chamber, to be sure, also understood this, but the majority still opted for the very broad right to participation in principle and one may ask why. The Trial Chamber clearly strove to give the participation of victims a meaningful effect[41] and most likely also to make the scheme manageable. The inability of the ICC to keep pace in processing applications for participation is clearly a concern.[42] A very broad right to gain entrance to the proceedings with a minimum of formal conditions would probably be effective, also when there are numerous applicants, and would allow the victims certain basic rights such as access to the (public) record, documents and files, and notifications. Many victims would thus have the right to take some part in the proceedings if they so wish. While such symbolic rights may be perceived as

35 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 103.
36 Ibid., para. 97.
37 Ibid., para. 93.
38 Appeals Chamber *Lubanga* Decision, *supra* note 14, paras. 58–66.
39 Ibid., para. 62.
40 Ibid., paras. 63–64.
41 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 85.
42 See Chung, *supra* note 9, at 497–503.

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important by victims,[43] the rights thus afforded do not go much further than what the general public may benefit from.[44] There is also a very unfortunate risk that this approach will create erroneous hopes and expectations of participation that in fact is subject to a much higher hurdle (or test).

Moreover, the simplification of the entrance test in a two-step approach does not exempt the Chamber from the very challenging task of determining whether the criteria for more substantive participation are met. In fact, some argue that

> it verges on folly to undertake to determine, on a case-by-case basis, and in relation to evidence which will change and develop, whether any of the thousands or millions of victims of a crime within a situation may have information relevant to the evidence and issues to be addressed at trial.[45]

Any hope that broad participatory rights would catch potential (and perhaps otherwise unknown) witnesses and other pieces of evidence would thereby be in vain. And delays – to the detriment of everyone involved, most notably to the accused – would most likely ensue.

5. The right to lead evidence at trial and to challenge the admissibility of evidence

Another intriguing, and indeed controversial,[46] question was the decision to permit participating victims to submit evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. On these points the Trial Chamber's decision was adopted unanimously.

Evidence in judicial proceedings is intrinsically linked with pursuing a matter to be determined by the court in the judicial cause under examination; the evidence is aimed at proving or disproving the matter that has been put before the court for resolution. Hence introducing evidence is not a stand-alone right. The right to introduce evidence in criminal proceedings belongs to and is a core right of the parties – that is, those who bring or answer to a case before the court. If someone is allowed to intervene and pursue a certain matter, for example a witness claiming protective measures or a state regarding judicial co-operation, this is normally accompanied by a right to present evidence in support of the request. But the general victim participation scheme of the ICC, under Article 68(3), does not relate to the victim pursuing a particular matter to be adjudicated by the Court; he or she does not bring a case (leaving aside the procedural standing of the victim with respect to reparations).

The Trial Chamber's departure was the conclusion that the right to introduce evidence during trials is not limited to the parties and its reference in particular to the power of the judges, according to Article 69(3) of the ICC Statute, to request the

43 American University Washington College of Law, Victim Participation at the Case Stage of Proceedings, War Crimes Research Office, February 2009, 38–9.
44 See also Chung, *supra* note 9, at 509–14.
45 Ibid., at 530.
46 For critical comments see, e.g., American University Washington College of Law, *supra* note 43, at 51–2.

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submission of evidence: 'the Court has a general right (that is not dependant upon the cooperation or consent of the parties) to request the presentation of all evidence necessary for the determination of the truth'.[47] Moreover, the Trial Chamber did not limit to reparations issues the interaction with respect to evidence, but explicitly also covered evidence pertaining to the guilt or innocence of the accused, and in addition to entertain evidence relating to reparations during the trial.[48]

Hence the Trial Chamber clearly realized that the victims did not, under the procedural regime of the ICC, have an independent right to tender evidence pertaining to the guilt or innocence of the accused, and used the Chamber's own authority to do so as the 'hook'. The requirement, according to the Chamber, was that the evidence 'will assist in the determination of the truth, and in this sense the Court has "requested" the evidence'.[49] The Trial Chamber also decided that the participating victims could be granted the right to challenge the admissibility or relevance of evidence 'when their interests are engaged'.[50]

Unsurprisingly this gave rise to strong reactions. Both the Prosecutor and the defence appealed and were granted leave. In short, both sides argued that the right to present evidence relating to guilt or innocence would turn the participating victims into parties, in contravention of the ICC Statute. This convinced two of the appeal judges, Judge Pikis and Judge Kirsch, who issued strong dissenting opinions agreeing that the leading of evidence on guilt or innocence (i.e. with respect to the charges) belongs exclusively to the role assigned to the parties. Both referred to the procedural scheme of the Court, also taking note of the fact that no disclosure provisions apply to victims, the role of participating victims, and difficulties such as delays that may result from granting the victims these rights. From the provisions of the Statute and the Rules, Judge Kirsch also concluded that it was not the intention of the drafters that victims should lead evidence on guilt or innocence. On the right to challenge the relevance or admissibility of evidence, Judge Pikis rejected the idea out of hand while Judge Kirsch thought it inappropriate if permitted routinely but admitted that there could be instances when it would be permissible, since the admission of a certain piece of evidence could affect the victim's personal interests.[51]

Nevertheless, the majority of the Appeals Chamber agreed with the Trial Chamber. At the outset the Appeals Chamber emphasized that the right to lead and challenge evidence in trial proceedings lies primarily with the parties, being the prosecution and the defence, which explicitly follows the ICC Statute, and that the Prosecutor, on whom the onus of proof rests, is charged with the investigation of the crimes, the formulation of the charges, and determining what evidence should be brought in relation to the charges.[52] But, like the Trial Chamber, the majority took note of the fact that the Court – that is, the judges – may request the submission of all

47 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 108.
48 Ibid., paras. 119–122.
49 Ibid., para. 108.
50 Ibid., para. 109.
51 Partly Dissenting Opinion of Judge Pikis, *supra* note 30, at para. 19; Appeals Chamber *Lubanga* Decision, *supra* note 14, Partly Dissenting Opinion of Judge Kirsch, paras. 36–38.
52 Appeals Chamber *Lubanga* Decision, *supra* note 14, para. 93.

evidence in order to determine the truth (Arts. 64(6)(d) and 69(3) of the ICC Statute), and concluded that the statutory regime 'leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth'.[53] Allowing the victims this right was, according to the majority, a result of the interest in making the participation by victims meaningful and thus necessary in order to give effect to the spirit and intention of Article 68(3) of the Statute.[54] They even argued that the participation of victims would otherwise potentially become ineffectual. The dissenting judges did not explicitly address this issue.

Hence the victims do not have an independent and unfettered right to lead evidence, but are entitled to do so only through a chamber and its powers to request evidence. This is a clever construct, but one that prompts a number of questions. First, it is not clear how the power of the Chambers, as set out in Articles 64(6)(d) and 69(3), is to be effective in practice. The wording of the provisions authorizing the Chamber to '[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties' and to 'request the submission of all evidence' indicates that someone else is to present the further evidence; another solution would have been to allow the Court to call additional evidence itself.[55] However, the provisions do not specify who should then do so:[56] always the prosecution (in the light of the objectivity principle in Art. 54(1)(a) of the ICC Statute), one of the parties, or even a 'participant' like a victim? Both the Trial Chamber decision and the Appeals Chamber decision are geared towards the victims presenting evidence at the request of the Court, although the Appeals Chamber also held open all the other alternatives.[57] This is clearly stretching the interpretation of the provisions and prompts an answer to the question what allegation or claim – that is, which pleaded facts – this adduction of evidence is meant to verify; in other words, could the victims in reality fulfil this function without being a party?

Furthermore, the provisions make it clear that the initiative shall come from the Chamber ('the Court'), although this does not necessarily rule out the possibility that someone first 'whispers in the Court's ear' about the need for, and perhaps even availability of,[58] additional evidence. The Trial Chamber does not conduct any investigation[59] and thus depends primarily upon the material submitted by

53 Ibid., paras. 95 and 98.
54 Ibid., para. 97.
55 The International Criminal Tribunal for the former Yugoslavia (ICTY), where the judges have a similar power (Rule 98 of the ICTY Rules of Procedure and Evidence), has in practice applied different alternatives; see, e.g., *Prosecutor v. Blaškić*, Decision of Trial Chamber in Respect of the Appearance of General Enver Hadžihasanović, IT-95–14-T, T. Ch. I, 25 March 1999 (order to appear as a court witness); and *Prosecutor v. Deronjić*, Decision on Production of Additional Evidence Pursuant to Rule 98, IT-02–61-S, T. Ch. II, 5 December 2003 (order to the Prosecution to produce additional evidence).
56 Cf. Partly Dissenting Opinion of Judge Kirsch, *supra* note 51, paras. 20–21 ('the Statute is unambiguous in this reference to evidence at trial being presented by the parties' – referring to Art. 64(6)(d) of the ICC Statute).
57 Appeals Chamber *Lubanga* Decision, *supra* note 14, para. 100.
58 See *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, T. Ch. I, 26 February 2008, *supra* note 13, para. 42.
59 Compare, however, the investigation conducted by an ICTY trial chamber with respect to two court witnesses who were not called by any of the parties; *Prosecutor v. Krajišnik*, Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and BrankoDerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, IT-00-39-T, T. Ch. I, 14 August 2006, paras. 3–7.

the parties, and there is no civil-law-style dossier with all the material collected during the (prosecutor's or investigative judge's) investigation. The participation of victims may be an additional source of information. But in an orderly court of law, material that is to be considered in the court's adjudication must be formally submitted to the court and included in the court record. Any information from victims on available evidence must therefore reach the Trial Chamber through one of the parties or directly by way of a formal submission (a request, observation, or other communication).

It is also important to note that the Court's and the victims' motivations differ; the Court is guided by what is necessary for the 'determination of the truth', while the rationale of victim participation is that their 'personal interests are affected'. If the Trial Chamber's authority is the basis for the adduction of additional evidence, the truth-finding requirement shall be decisive, but the two motivations must still coincide if the victims are to actually lead the evidence. This is a limitation, although 'truth-finding' is a rather amorphous concept. More importantly, however, this means that it should be the Chamber that decides the theme of the particular adduction of evidence – that is, which facts are meant to be verified. Not the victim.

Another matter, also identified as problematic by commentators,[60] relates to disclosure of evidence, the *Lubanga* Trial Chamber earlier having expressed the importance of 'full disclosure' prior to trial.[61] The majority of the Appeals Chamber merely concluded that the Trial Chamber 'could rule on the modalities for the proper disclosure'.[62] Judge Kirsch, on the other hand, considered the lack of disclosure obligations placed upon participating victims to be a sign that 'it was not envisaged that victims would disclose, and thereafter lead, evidence relating to guilt or innocence'.[63]

It must be noted, however, that the issue of disclosure is not explicitly addressed with respect to evidence 'requested by the Court' in general, an issue that the relevant Chamber would have to address, regardless of whether victims are involved or not, should the situation occur. Such disclosure might then take place after the commencement of the trial and the Chamber would have to make specific provision for how it should be done. One may note that trial chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY), when utilizing their equivalent power to request additional evidence, have made separate rulings on disclosure.[64]

The Appeals Chamber also found support in Rule 91(3) of the ICC Rules, which provides a possibility for legal representatives of victims to question witnesses, and stated that such questions may also pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence.[65]

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60 See, e.g., American University Washington College of Law, *supra* note 43, at 52; Chung, *supra* note 9, at 520.

61 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, T. Ch. I, 9 November 2007, para.16.

62 Appeals Chamber *Lubanga* Decision, *supra* note 14, para. 100.

63 Partly Dissenting Opinion of Judge Kirsch, *supra* note 51, para. 16.

64 See, e.g., *Prosecutor v. Momir Nikolić*, Order Summoning Miroslav Deronjić to Appear as a Witness of the Trial Chamber Pursuant to Rule 98, IT-02-60/1-S, T. Ch. 1A, 10 October 2003, at 4.

65 Appeals Chamber *Lubanga* Decision, *supra* note 14, para. 102. The Appeals Chamber also read a right to produce documents, i.e. written evidence, into the provisions of Rule 91(3), but arguably this goes further

However, there is a major difference between allowing victims, with special leave, to put questions to a witness called by someone else (primarily by one of the parties) and a right of victims to lead evidence themselves. In fact, Rule 91(3) as such could be taken rather to show that the negotiating states did not intend that participating victims be given a right to lead evidence on guilt or innocence, as did Judge Kirsch in his dissenting opinion.[66]

One may also take a step further and ask how the Chamber's truth-finding role is to be understood. Quite apart from the above-mentioned practical issues concerning the relationship between the primary responsibility of the parties and the supplementary power of the Chamber to bring in evidence at trial, there are also more fundamental questions regarding the role of the judges in this respect.

The truth-finding task could be interpreted, as in many civil law jurisdictions, as a mandate for the judges, or even an obligation – to be pursued actively regardless of whether the evidence thus adduced is favourable or detrimental to the accused. Such an approach, however, does not sit easily with a basically adversarial trial and a burden of proof unequivocally placed upon the Prosecutor, as in the ICC;[67] after all, it does mean judicial interference in the 'case' as devised and presented by the party. Nonetheless, a comparison can be made with the deliberations of an ICTY trial chamber which decided to call two witnesses (one also a former co-accused) who had been on the preliminary witness list of the defence but were later withdrawn. The chamber concluded:

> The Chamber and the parties in an adversarial system have different interests, and once it became clear that the parties were not going to call these two important insiders, and once the Chamber had made the additional determination that their potential testimony might assist in the search for truth, it would have been quite inexcusable for the Chamber not to call them.[68]

The ICTY Appeals Chamber later endorsed the process applied by the trial chamber.[69] Also with respect to the ICC, it has been argued that the 'principle of equality will lead the judges to act whether *pro* or *contra* the accused', and that by placing the truth at the centre the trial will no longer be 'just the organization of a competition between two adversaries'.[70] Whether this will be the practice remains to be seen.

For reference, however, it is also interesting to note that in some domestic systems, where the judges have the power to call evidence although the trial procedures are basically adversarial in nature, a practice has emerged among judges to refrain from exercising the power to the detriment of the accused. Sweden may serve as an example in this respect.[71]

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than the scope of the provisions; sub-para. 3 is clearly confined to questions to a witness called by someone else, and the 'production of documents' mentioned in sub-para 3(b) must refer to auxiliary documents to the testimony and the questions, not to written evidence as such.

66 Partly Dissenting Opinion by Judge Kirsch, *supra* note 51, paras. 31–32.

67 See also Chung, *supra* note 9, at 530–1.

68 See *Prosecutor v. Krajišnik*, 14 August 2006, *supra* note 59, para. 13.

69 See *Prosecutor v. Krajišnik*, Judgement, IT-00-39-A, A. Ch., 17 March 2009, paras. 111–16.

70 See, e.g., F. Terrier, 'Powers of the Trial Chamber', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1272–3.

71 See also P. O. Ekelöf, *Processuella grundbegrepp och allmänna processprinciper* (1956), 240.

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To complicate the matter further, victims may assume the role of a 'party' concerning reparations, with the accompanying right to bring evidence.[72] Reparations can only be claimed against a convicted person, and the ICC Statute foresees a separate hearing for dealing with these matters.[73] However, the possibility that legal representatives of victims might question witnesses at trial – Rule 91(3) of the ICC Rules – was in part motivated by the fact that certain evidence with a bearing also on reparations could already be obtained at trial, whereby repeated witness appearances could be avoided.[74] The *Lubanga* Trial Chamber accordingly, despite the opposition of the defence, accepted that evidence relevant to reparations might also be accepted at trial.[75] But the Chamber rejected an interesting proposal by the prosecution, called a 'blended approach', whereby participating victims should be allowed to question witnesses called by the parties and even introduce evidence at trial, solely for the purposes of reparations.[76] It was explained that the main reason for the Chamber's rejection was that it would not be appropriate, fair, or efficient to consider all evidence concerning reparations as part of the trial process. But, of course, this approach was also contrary to the Trial Chamber's overarching opinion that evidence led by participating victims should not be confined to issues concerning reparations. The Trial Chamber refused to grant leave to appeal this part of the decision.[77]

As to challenges concerning the admissibility or relevance of evidence, the majority of the Appeals Chamber again referred to the Trial Chamber's power to determine such issues on its own motion, and concluded that 'nothing in articles 69(4) and 64(9) excludes the possibility of a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims'.[78] While this is true, there is force in the dissenting judges' argumentation that there is a reason behind this not being provided for in the ICC Statute or Rules, with an explicit exception concerning crimes of sexual violence or evidence of other sexual conduct (Rule 72 of the ICC Rules), namely that such challenges were not meant to be; it is an issue closely connected to the standing as a party and the right to lead evidence. A reasonable approach, however, is the one advocated by Judge Kirsch: that there may be specific instances when it would be appropriate to allow the victim to approach the Court concerning the admissibility or relevance of evidence because it affects the victim's personal interests.

Finally, one may note that the Pre-Trial Chamber, in a later decision concerning victim participation in the confirmation hearing, rejected the proposition that victims should not have the right to discuss evidence or to question a witness 'in matters

72 ICC Rules, Rules 91(4) and 94(1)(g).
73 ICC Statute, Arts. 75 and 76(3).
74 See Bitti and Friman, *supra* note 3, at 487. See also the Regulations of the Court, Regulation 56.
75 Trial Chamber *Lubanga* Decision, *supra* note 11, paras. 119–121. Interestingly, the Chamber also claimed that it 'will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations' (para. 121).
76 Ibid., paras. 61 and 122.
77 See *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, T. Ch. I, 26 February 2008, *supra* note 13, paras. 51–53.
78 Appeals Chamber *Lubanga* Decision, *supra* note 14, para. 101.

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that pertain to the guilt or innocence of the suspect'.[79] These matters, according to the Pre-Trial Chamber, 'affect[s] the very core interests of those granted the procedural status of victim'.[80] But the Pre-Trial Chamber also rejected a request by victims to present 'additional evidence on which neither the Prosecution nor the Defence intend to rely' at the confirmation hearing, referring particularly to the delay that this would cause.[81]

6. Access to confidential material and participation in closed hearings

The Trial Chamber, but not the Appeals Chamber, also addressed certain other modes of participation. In accordance with Rule 131(2) of the ICC Rules, victims and their legal representatives may consult the record of the proceedings, subject to any restrictions with respect to confidentiality and the protection of national security information. The Trial Chamber found this to result in a presumption that the legal representatives of victims shall have access only to public files, although access to confidential material may be granted if they are considered to be 'of material relevance to the personal interests of participating victims'.[82]

This ruling is generally in line with other decisions of pre-trial chambers, including that of the Pre-Trial Chamber in the *Lubanga* case; victims were granted, *inter alia*, access to public documents in the record, but this and other rights could be extended due to 'exceptional circumstances' not further elaborated.[83] For the confirmation hearing in the *Katanga and Ngudjolo* case, however, a distinction was made between anonymous and non-anonymous victims, whereby the latter were granted extended rights of participation which included, *inter alia*, access to the case record, including confidential documents and files, except those labelled '*ex parte*'.[84] In the *Bemba* case, on the other hand, the Pre-Trial Chamber made no distinction between anonymous and non-anonymous victims and granted access to the record, decisions, documents, evidence, and transcripts, but only insofar as they were public.[85] In spite of containing awkward differences, the approach of the pre-trial chambers seems to consider access to public documents as a basic right, but without ruling out access to confidential material if so motivated in a particular instance.

A related issue is participation in closed and *ex parte* hearings, and the *Lubanga* Trial Chamber's conclusion was that victims may be permitted to participate

79 *Prosecutor v. Katanga and Ngudjolo Chui (Situation in the Democratic Republic of the Congo)*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-trial Stage of the Case, ICC-01/04-01/07-474, PT. Ch. I, 13 May 2008, paras. 30–31.

80 Ibid., para. 35.

81 Ibid., para 101.

82 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 106.

83 *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-228, PT. Ch. I, 22 September 2006, 6–7.

84 See *Prosecutor v. Katanga and Ngudjolo Chui (Situation in the Democratic Republic of the Congo)*, PT. Ch. I, 13 May 2008, *supra* note 79, para. 128.

85 *Prosecutor v. Bemba Gombo (Situation in the Central African Republic)*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, PT. Ch. III, 12 December 2008, paras. 99, 103–105.

'depending on the circumstances'.[86] Again, this follows the approach taken by the Pre-Trial Chamber, the most radical of these being the ruling in *Katanga and Ngudjolo*, where non-anonymous victims, without any case-by-case determination, were granted the right to attend all public and closed session hearings, and to see all transcripts, except those conducted on an *ex parte* basis.[87] However, restrictions were subsequently imposed and the Pre-Trial Chamber decided that only the legal representatives of non-anonymous victims would have access to the confidential part of the record and the right to attend closed sessions.[88]

It is possible to construe examples when access to confidential material and closed hearings are necessary for a meaningful participation. But this is a sensitive matter and clearly the presumption is against such participation unless there are compelling reasons for allowing it. After all, the victims are not meant to be full parties to the criminal proceedings.

7. Concluding remarks

The Appeal Chamber's decision has thereafter been followed in subsequent decisions by the Trial Chamber on victim participation – decisions that have granted more than ninety victims the right to participate in the trial proceedings.[89] In the latter decisions the Trial Chamber applied the criteria of 'personal harm', suffered directly or indirectly, and the required link to 'the commission of crimes included in the charges against the accused'. Similarly, other chambers have adhered to the legal findings of the Appeals Chamber.[90] The trial against *Lubanga* has now commenced – on 26 January 2009 – and it remains to be seen how the Trial Chamber will deal with any request by a victim to challenge offered evidence or to call evidence on the issue of guilt or innocence.

It is quite clear that the Court is still struggling with how best to accommodate victim participation in accordance with Article 68(3) of the ICC Statute. One discernible feature of many of the decisions is that the conclusions tend ultimately to be based upon opinions rather than on an interpretation of the law – opinions that go towards the rationales of the participatory right and how best to meet these objectives. In part, this may go back to the understanding of the main purpose behind the entire enterprise of international criminal prosecutions. Of course, combating impunity by prosecuting the atrocities is a purpose in itself, and one clearly laid down in the Preamble of the ICC Statute, but, at least for some, redress for the victims, and thereby a foundation for a more lasting peace, may be an even more important

86 Trial Chamber *Lubanga* Decision, *supra* note 11, para. 113.
87 See *Prosecutor v. Katanga and Ngudjolo Chui (Situation in the Democratic Republic of the Congo)*, PT. Ch. I, 13 May 2008, *supra* note 79, paras. 130, 140.
88 *Prosecutor v. Katanga and Ngudjolo Chui (Situation in the Democratic Republic of the Congo)*, Decision on Limitations of Set of Procedural Rights for Non-anonymous Victims, ICC-01/04-01/07-537, PT. Ch. I, 30 May 2008.
89 See, e.g., *Prosecutor v. Lubanga Dyilo (Situation in the Democratic Republic of the Congo)*, (Public) Decision on the Applications by Victims to Participate in the Proceedings, ICC-01/04-01/06-1556, T. Ch. I, 15 December 2008, as amended on 13 January 2009 (ICC-01/04-01/06-1556-Corr).
90 E.g. *Prosecutor v. Bemba Gombo*, *supra* note 85.

objective. With the latter approach, which is also reflected in the Preamble, the active involvement of the victims comes to the forefront.

But an even more compelling reason, and one noted by many observers,[91] is that the objectives and purposes behind the victim participation scheme are far from clear and have not yet been developed comprehensively and in-depth by the Court in its decisions. This is, to be sure, not a simple task, since the ICC Statute and the ICC Rules give little guidance and leave the task of framing the scheme largely to the judges. Nevertheless, it appears pertinent to develop this unique feature of international criminal procedures slowly and step by step, avoiding radical measures at the outset.

Another feature well worth mentioning, and linked to the previous issue, is the different approaches to the written law. While some judges stress whether there is any express support, others rather point out that a particular solution is not prevented by the statutory law, that is, 'what is not explicitly provided for is prohibited' versus 'what is not explicitly prohibited is allowed'. In this sense, one could expect the judges' national legal traditions to play a role, judges from common law jurisdictions being more accustomed to 'making law' than their colleagues from civil law jurisdictions. But this pattern does not really reflect practice, and obviously other reasons than the legal tradition influence the approach taken by a judge.

Returning to the somewhat provocative title of this paper, one may indeed ask whether participating victims are to be seen as a third party to the criminal proceedings. Well, all involved seem to agree that victims are 'participants in' and not 'parties to' the proceedings. There are different views, however, as to what the status of 'participants' may be. The determination that victims may lead and challenge evidence pertaining to guilt or innocence at trial pushes the role of the 'participant' very far, indeed so far that it is difficult to avoid the notion of their in fact being 'parties'. This conclusion is warranted in spite of the clever construct of attaching these rights to the powers of the Trial Chamber instead of considering them independent functions of the status of 'participant'. How to balance such interventions, by victims or indeed by the Trial Chamber itself, with the primarily adversarial trial and the prosecution's onus of proof will be a delicate task for the Court. What is settled regarding the pre-trial and trial proceedings, however, is that participating victims must have a clear link to the 'case', that is to the allegations against the accused, be it the arrest warrant or the charges.

91 See, e.g., American University Washington College of Law, *supra* note 43, at 30–43.

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