The role of victims in international criminal proceedings

INTERNATIONAL CRIMINAL PROCEDURE:

TOWARDS A COHERENT BODY OF LAW

edited by

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CHAPTER 4

THE ROLE OF VICTIMS IN INTERNATIONAL CRIMINAL PROCEEDINGS

*Anne-Marie de Brouwer and Marc Groenhuijsen**

I. Introduction

The International Criminal Court, established in Rome in 1998 and residing in The Hague, the Netherlands, is the first international criminal court which allows victims of mass crimes to participate in its proceedings as victims. In this role, victims may, *inter alia*, present, either themselves or through a legal representative, their views and concerns, where their personal interests are affected. In addition, victims may request and receive reparation from the Court.

The role of victims before the International Criminal Tribunal for the former Yugoslavia and that for Rwanda, established in 1993 and 1994 respectively, is, on the other hand, very different: victims are only allowed to participate in the trials of the Tribunals as witnesses.[1] Victims are therefore only called to testify in court if their testimony is expected to corroborate the charges or arguments the Prosecutor is trying to prove. This approach is based on the idea that the Tribunals first and foremost were established to punish alleged perpetrators of serious violations of international humanitarian law and that the rights of the accused, to a fair and expeditious trial, need to be safeguarded in this process. Providing a role to victims in the trial would, in this view, bring unnecessary sentiments into the courtroom which could possibly influence the judges and would only delay the proceedings. Furthermore, the Prosecutor would already be protecting the interests of the international community, and therefore also those of the victims, when prosecuting the alleged perpetrators.

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* This chapter takes into account the jurisprudential developments up to 10 June 2008.

[1] It should be noted that also the older international criminal tribunals, Nuremberg and Tokyo, did not provide for any procedural rights for victims. For a brief history of victims' rights in international criminal tribunals, see T. van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', in H. von Hebel, J.G. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1999) 77-89.

Experiences at the ICTY and the ICTR have, however, shown that the Prosecutor's interest does not always coincide with those of the victims. The argument that victim participation would bring international criminal proceedings closer to the ones who had suffered as a result of the crimes proved another important argument to justify the shift in providing a role to victims in the ICC proceedings.

The situation in national jurisdictions, influenced by international instruments dealing with victims' rights, shows a similar shift where victim participation in proceedings is concerned. In national criminal law and procedure, victims used to be the 'forgotten party' for a long time as well, only serving the interests of society by assisting the criminal justice authorities in their capacity of reporters of crime or as witnesses who testified in court. Criminal procedure was just not geared to paying attention to the individual rights and interests of victims of crime. Similar arguments against victim participation as upheld to be applicable in the case of the international tribunals and as described above, were brought to the fore in the national setting. However, the arguments that, through victim participation, unnecessary sentiments will be brought into the courtroom and would only further delay the proceedings have in many jurisdictions proven to be untrue.[2]

The state of affairs concerning victim participation in national settings has changed considerably during the last three decades. Starting in the final quarter of the 20th century, in all regions of the world the view gained ground that the victim deserves to be given a role in the proceedings. These developments in national criminal procedure were thus already put in motion quite some time before the establishment of the ICC and have, like the practice before the ICTY and the ICTR, influenced the drafters of the ICC as well.

The role of victims in the proceedings before the ICC needs to be studied from this broader perspective of the emancipation of victims of crime.[3] The first issue that will be addressed in this contribution is why the perspective of incorporating victim participation in national criminal trials was changed and how this change came about (section II). In other

[2] M.S. Groenhuijsen, M.E.I. Brienen and E.H. Hoegen, 'Evaluation and Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe', (2000) 33(1) *Criminology* 121-44.

[3] Another question, which is outside the scope of this contribution, is whether the rules of the Court should constitute the more or less uniquely available provisions on international criminal procedural law. Although this has been argued by Prof. Göran Sluiter in his inaugural speech *Het internationale strafprocesrecht. De geboorte van een rechtsgebied* (Amsterdam: Vossiuspers UvA, 2007), this point of view cannot be considered self-evident. See M.S. Groenhuijsen, 'Boekbespreking' (review of Göran Sluiter, *Het internationaal strafprocesrecht. De geboorte van een rechtsgebied* (inaugurele rede Universiteit van Amsterdam)), (2008) 38(5) *Delikt en Delinkwent* 515, at 519.

words, why was victim participation, for so long absent in criminal proceedings, suddenly important? The next issue that will be looked at is how the abstract concept of giving victims a role in the proceedings could be operationalised (section III). In other words, how to take interests of victims in national criminal proceedings into account? This requires one to look into the objectives that are served by victim participation as well as the categories of victims' rights that go hand in hand with these objectives. The answers to these questions give an idea of how the ICC came about including a role for victims in its proceedings and how it concretely shapes its responsibility to provide victims a role in the proceedings (section IV). Perhaps the ICC can benefit and learn from these national (and global) developments and vice versa. In section V, the challenges faced by the Court with regard to victim participation, protection and reparation will be dealt with in detail, including how to deal with large numbers of victim applicants, challenges which national jurisdictions generally do not face. In section VI, some final remarks and recommendations on the role of victims in ICC proceedings will be made.

II. Why Giving Victims a Role in Criminal Proceedings is Important

There are a number of sociological reasons why victims gained more prominence in the discourse on criminal justice. In academic literature, the most often quoted factors are: (1) the increasingly assertive individualism in late twentieth century society; (2) the women's liberation movement of the 1970s; (3) some spectacular incidents, such as high profile terrorist attacks; and (4) the general rise in crime rates exposing many influential people to the negative effects of crime.[4]

Therefore, as of the last quarter of the twentieth century, a fundamental change originated in the way crime as such was perceived. In the 'old' days, crime was primarily seen as a violation of the public order, as an offence against the common good. Later, the view surfaced – and subsequently became dominant – that of course crime involves an element of public interest, but it is first and foremost to be regarded as an infringement of the individual rights and interests of the victim. If and when the latter view is accepted as a starting point of discussing the meaning and the objectives of criminal law and criminal procedure, the situation is transformed in a drastic way. In a nutshell: doing justice requires more than just punishing offenders. The perspective must be broadened; the list of goals of the criminal justice system must be expanded. The notion of administering justice gains a new, additional dimension: it also involves paying attention to the needs and interests of

[4] M. Groenhuijsen, 'Slachtoffers van misdrijven in het recht en in de victimologie. Verslag van een intellectuele zoektocht', (2008) 38(2) *Delikt en Delinkwent* 121, at 122-3.

the individuals whose rights have been violated and who have suffered loss.

If this is one of the new objectives of criminal justice, the next question is how this new ambition is to be attained? What measures are considered to be necessary and appropriate to give victims a role in the proceedings?

III. How to Take Interests of Victims into Account in Domestic Criminal Proceedings?[5]

One would have expected insurmountable differences of opinion between the various countries and legal traditions as to the new position victims could be awarded in the framework of criminal procedure. Surprisingly, though, quickly and relatively easily the international legal community managed to reach some sort of consensus on the extent of victims' rights in criminal proceedings. This emerging consensus was reflected by the content of a number of leading international instruments on victims' rights. Most prominent among these were the United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985).[6]

Before summarising the basic victims' rights the international community has agreed on, it is important to note that these new rights were predominantly *not* created at the expense of the offenders. Victim emancipation has never been considered a 'zero-sum-game'. For that reason, most of the international protocols in this area explicitly state that the introduction of victims' rights in criminal proceedings shall not prejudice a fair trial for the accused.

Now, turning to the nature and content of the new rights, the following catalogue appears to have been generally accepted:

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[5] This section is based on M. Groenhuijsen, 'Victims' Rights and the International Criminal Court: The Model of the Rome Statute and its Operation', in W. van Genugten and M. Scharf (eds.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference* (The Hague: T.M.C. Asser Press, forthcoming in 2009).

[6] GA Resolution 40/34 of 29 November 1985 and Recommendation (85)11 of 28 June 1985, respectively. There are many other similar instruments. Reference can be made to the Statement of Victims' Rights in the Process of Criminal Justice (1996), issued by the European Forum for Victims Services, an NGO representing service providers; and the Council of Europe Recommendation (2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims, adopted on 14 June 2006, which, it could be argued, represents the 'state of the art' in international protection of victims' rights. See further M. Groenhuijsen and R. Letschert (eds.), *Compilation of International Victims' Rights Instruments* (2nd rev. ed., Nijmegen: Wolf Legal Publishers, 2008).

- *The right to respect and recognition*

This is probably the most important right for crime victims. Acknowledgement of victimisation is a prerequisite for affirming any of the other rights.

- *The right to receive information*

The list of items on which the victim is entitled to receive information has expanded gradually and steadily.[7] One cannot exercise rights if one is unaware of having them. Hence, victims should always be informed of their rights. Similarly, the victim ought to be informed of the progress of the case (when a suspect has been apprehended, the date and time of a trial, etc.).

- *The right to provide information*

After the adoption of the international protocols, it has generally been accepted that the authorities have to take the victims' interests into account whenever they make a decision in the course of criminal proceedings. In order to enable them to do so, the authorities need to be aware of these needs. The most efficient way to ensure this is to provide an opportunity for the victim to express his or her view. The right to provide information further covers an opportunity to give evidence and – more recently – to express himself on the impact of the crime (the so-called 'victim impact statement').

- *The right to legal advice or representation*

Again, it is hard to make use of one's rights effectively unless one is fully aware of the extent of these rights. The best way to provide for this is to have legal counsel present. The difficulty in this respect is reimbursement of expenses. Since legal advice can be very costly, virtually all jurisdictions have placed a number of restrictions on this right. For instance, in the majority of countries this is limited to the most serious crimes, and free services are usually means-tested.

- *The right to protection of privacy and physical safety*

Although these are in actual fact two different rights, they have much in common. In many jurisdictions the relevant protection is provided by adjusting means and ways to give evidence in court. Examples include the use of screens or closed circuit TV systems. Some countries even allow the victim to testify anonymously. A generally acknowledged problem remains: how to protect a victim from retaliation by the offender after he has assisted the government in securing a conviction?

[7] In the UN Declaration (1985) and the Council of Europe Recommendation (1985) the right to information is still limited to only a few topics (rights and progress of the case). In later instruments, such as the Council of Europe Recommendation (2006)8 and the EU Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA) of 15 March 2001, the number of topics is much longer.

- *The right to financial compensation from the offender and from the state*

Seen from a global perspective, state compensation still appears to be the exception rather than the rule. Where it exists, it is usually limited to cases of intentional violent crime. The right to reparation by the offender is recognised across the board. Opinions continue to differ on the question whether forced reparation should be recognised as a sentencing option in criminal cases.

- *The right to receive victim support*

In the middle 80s of last century, service-providing organisations in most countries were still (at best) in their infant stages. When these non-governmental organisations (NGOs) had matured, the right to receive victim support by independent outside agencies was increasingly recognised in international protocols on victims' rights.[8]

What lessons can be learned from this basic background information? In connection with the later developments at the ICC, two conclusions must be drawn. The first one is that apparently it is possible to design minimum standards regarding victims' rights in a criminal justice environment, which are acceptable for the entire world community. This is remarkable in the sense that the vast differences in legal cultures – ranging from strictly adversarial systems to more inquisitorial systems – do not pose an obstacle to identifying generally applicable rights to accommodate victims' needs. The second conclusion is somewhat more sobering. Practical experience with all the previously mentioned international protocols has demonstrated that it is extremely difficult to translate these generally recognised standards into living realities in domestic legal systems. We can go one step further in finding that the implementation of the various victims' rights appears to correspond to a fixed pattern. During the course of the past twenty-five years, many jurisdictions have achieved substantial progress in the areas of treatment and protection.[9] In quite a few countries police officers and prosecutors have learned to adapt their professional behaviour in order to take the victims' perspective into account. In doing so, they have brought the 'law in action' more in line with the 'law in the books'. As far as the informational rights are concerned, it turned out to be more difficult to comply with accepted obligations in each and every case. In Europe, for instance, the best performing jurisdictions had trouble achieving a success-rate of over 70%.[10] Some failures were due to

[8] Here again, reference can be made to the EU Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA) of 15 March 2001 and the Council of Europe Recommendation (2006)8 on Assistance to Crime Victims, as adopted on 14 June 2006.
[9] More on this in M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The implementation of Recommendation (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure* (Nijmegen: Wolf Legal Productions, 2000).
[10] *Ibid.*

logical reasons – such as an inability to locate the victim entitled to receive information – but in many other instances the required information was not supplied without any justification. Finally, the issue of restitution by the offender proved the hardest of all to tackle.[11] As mentioned before, virtually every jurisdiction in the world recognises the right to reparation in the framework of criminal justice. However, for a variety of different factors in most countries only a very small proportion of the victims in the end receive the money they are entitled to. Even the victims in cases where the offender is arrested, prosecuted and convicted, quite often do not secure a court verdict in which their claim for damages is awarded. And the lucky ones – *i.e.* the victims who do succeed in seeking court ordered reparation – are frequently disillusioned at an even later stage: the court order turns out to be very hard to execute. It does not need ample explanation that in all these circumstances expectations are being raised with victims which will later not be fulfilled. It is a well established fact that this is a major cause of so-called secondary victimisation.

How the ICC has taken the interests of victims into account and how it has implemented victims' rights is the subject of discussion in the next section.

IV. The Role of Victims in the Proceedings of the ICC

The Rome Statute and its accompanying Rules of Procedure and Evidence are generally characterised as being innovative in the area of victims' rights. The Rome Statute primarily provides for three types of victims' rights: (1) participation, (2) protection and (3) reparation.[12] As mentioned above, participation, protection and reparation are well known items from the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985) and various other instruments.[13] Largely inspired by these international instruments, numerous national jurisdictions provide a role for victims to play in criminal process, albeit in different forms and degrees. The ICC approach to victims' rights is therefore also drawn from these national jurisdictions, in particular from civil law jurisdictions.

The role of victims before the ICTY and ICTR is, as mentioned before, very different. The right of victims to participate in the proceedings

[11] *Ibid.*

[12] See, *inter alia*, S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', (2003) 3 *International Criminal Law Review* 345-67.

[13] It is interesting to note that these international instruments on victims' rights differentiate the various rights in the following three compartments: (1) information, (2) treatment and protection, and (3) reparation.

is lacking before the ICTY and the ICTR[14] and the right of victims to reparation – though existent in the sense that victims could receive forms of reparation but not request for it themselves – has never really been asserted by these Tribunals. The Tribunals, despite their ability to do so, never ordered the restitution of property (Articles 24 (3) of the ICTY Statute and 23 (3) of the ICTR Statute) nor did they deliver judgements by which compensation could be awarded to victims through competent national authorities (common Rule 106 of the ICTY and ICTR RPE).[15] In addition, the Tribunals may also decide on support measures, such as psychological and medical care (common Rule 34 of the ICTY and ICTR RPE). Despite victims' need for such care before and after trial, support measures have generally only been provided to victim-witnesses during their stay at the Tribunal.[16] Although protective measures are available to victims testifying before the ICTY and ICTR, it should be noted that the ICC has broadened the scope and types of such measures for victims.[17]

Especially in the light of the ICTY and ICTR experiences, where the focus has been on retributive justice, victims' rights to participation and reparation was felt justified at the Court as it was hoped that a contribution could be made to the Court's restorative role. It was generally felt that these rights of victims would bring the proceedings closer to the ones who had suffered as a result of the crimes. Victim participation and reparation at the Court was therefore advocated by the representatives of some governments, in particular France, and several NGOs, such as Amnesty International, Human Rights Watch and Redress.[18]

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[14] Although victims do not participate in the proceedings of the Tribunals as commonly understood, three situations of 'victim participation' before the Tribunals deserve to be mentioned: (1) victims 'participating' in the trial proceedings through victim impact statements submitted by the Prosecutor to the Chamber; victims 'participating' in the trial proceedings through *amicus curiae* intervention; and (3) victim 'participation' by addressing the Prosecutor directly through, for instance, letter writing. These forms of 'victim participation' are, however, very much dependent on the goodwill of others; the victims themselves have no enforceable right to participation. See further A.-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005) 284-301.

[15] See further *ibid.*, at 394-406.

[16] *Ibid.* Note, however, that an initiative by the ICTR's Registry's Gender Advisor led in 2004 to improvements in relation to medical support, including HIV/AIDS treatment for rape survivors who appeared as witnesses before the ICTR.

[17] For example, Article 68 (2) Rome Statute innovatively states that: 'such measures [*in camera* proceedings or allowing the presentation of evidence by electronic or other special means] shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.'

[18] For the negotiating history of the RPE on victim participation, see, *inter alia*, 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* (Ardsley, NY: Transnational Publishers, 2001) 457-9.

In this section the following topics will be discussed: participation of victims (subsection 2); protection of victims and witnesses (subsection 3); and reparation to victims (subsection 4). First, however, some attention will be given to the interpretation of the term 'victims' by the Court and the possibility of victims having dual status, that is, that they may be appearing in court as witnesses as well (subsection 1).

1. Definition of Victims

The term 'victims' is defined in Rule 85 of the ICC RPE as follows:

> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
> (b) Victims may include 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.

From this definition it follows that not only natural persons may qualify as victims, but also organisations and institutions. The definition of victims departs from the one given for the ICTY and ICTR, which is restricted to 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[19] The ICC definition of victims is thus broader than its ICTY and ICTR counterpart, in the sense that all who have suffered harm may qualify as victims before the ICC, which may include immediate family members or dependants of those who have suffered harm.[20] Furthermore, the ICC definition truly recognises a victim as a victim from the moment he or she reports the crime, whereas the ICTY and ICTR definition only seems to recognise a victim from the moment the guilt of the accused has been established. It is argued here that the ICC definition of victims as contained in Rule 85 should be embraced, as it offers the best possible protection of the rights and interests of the victim, *e.g.* to be informed of his or her rights and opportunities, to seek reparation and to participate in the proceedings.[21]

[19] Common Rule 2 (A) of the ICTY and ICTR RPE.

[20] Although strong opposition existed to the inclusion of the definition of victim as laid down in Principle 8 of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the current ICC definition strongly resembles the broad definition of victims laid down in that Declaration.

[21] See on this point M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note 9, at 30; and Principle 9 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Trial Chamber I made the following remark on this point: 'Addressing the standard of proof to be applied in order for victims to participate, there is no statutory or regulatory provision in this regard. It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the

Continued

A remark is due regarding the dual status of victims. In its 18 January 2008 Decision, the Trial Chamber held that victims may furthermore also appear as witnesses when they are called to give testimony during the proceedings.[22] It was furthermore argued that since victims are often able to give direct evidence about the alleged offences, a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68 (3) of the Rome Statute and the Chamber's obligation to establish the truth.[23] The Chamber made, however, clear that

> when the Trial Chamber considers an application by victims who have this dual status, it will establish 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 Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.[24]

The Court stressed that information on victims with a dual status would need to be shared with the VWU by the organs of the Court and usually the Defence in order to adequately protect such victims-witnesses.[25]

2. Participation of Victims

Participatory rights of victims are explicitly found in quite a number of ICC provisions.[26] As mentioned, the Court is the first court in the history of supranational criminal prosecutions to allow victims to participate in the proceedings as victims. In this capacity, victims may, *inter alia*, make representations to the Pre-Trial Chamber upon examination by that Chamber of the Prosecutor's request for authorisation to proceed with an investigation (Article 15 (3) of the Rome Statute); submit observations to the Court in proceedings with respect to jurisdiction or admissibility (Article 19 (3) of the Rome Statute); and present, either themselves or through a legal representative, their views and concerns, where their personal interests are affected (Article 68 (3) of the Rome Statute). For the

reliability of a victim's application before the commencement of the trial. Accordingly the Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court. The Trial Chamber will assess the information included in a victim's application form and his or her statements (if available) to ensure that the necessary link is established.' See Decision on victims' participation, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1119, T. Ch. I, ICC, 18 January 2008 ('*Lubanga* trial decision of 18 January 2008'), para. 99.

[22] *Lubanga* trial decision of 18 January 2008, *ibid.*, para. 132.
[23] *Ibid.*, para. 133.
[24] *Ibid.*, para. 134.
[25] *Ibid.*, para. 135.
[26] See, *inter alia*, Articles 15 (2), 15 (3), 19 (3), 65, 68 (3), 75 (3), 82 (4) of the Rome Statute and Rules 85-93 of the RPE.

purposes of this contribution, the focus is on the latter kind of intervention. This provision, Article 68 (3) of the Rome Statute, is a more general rule on victim participation providing the following:

> where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[27]

2.1 ICC Developments Regarding Participation of Victims

The ICC faces real challenges with regard to victim participation as it has to act without real precedent: although some developments at national jurisdictions may be helpful in determining how to arrange victim participation at the Court, on the whole, these national courts have not dealt with large numbers of victims of genocide, crimes against humanity or war crimes, situations that the Court is dealing with. International protocols, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), are of no real help either.[28] In addition, the Court will also have to ensure that their involvement is not detrimental to an impartial, expeditious and fair trial. The large number of victim applicants who wish to participate in the proceedings may impact hereon. For this reason, the drafters of the Rome Statute decided that victim participation should largely be left within the overall control of the judges. It is therefore up to the judges to determine, on a case-by-case basis, if the victims' personal interests are affected and when and in what manner victims' right to participation will be exercised. Some ICC case-law has already clarified the concept of victim participation and the modalities thereof will be discussed below.

This section will deal with the following ICC developments regarding victim participation: criteria of victim participation (subparagraph 2.1.1); applications of victims to participate and/or for reparation (subparagraph 2.1.2); modalities of participation (subparagraph 2.1.3);

[27] Note that the language contained in Article 68 (3) of the Rome Statute strongly suggests the influence of the wording contained in Article 6 (b) of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

[28] The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also contains a section which refers to victims of abuse of power, in which case violations of internationally recognised norms relating to human rights are involved (Principles 18-21). In those instances of violations, often large-scale violations are involved. This section of the Declaration is, however, the least developed section containing four provisions only.

access to documents (subparagraph 2.1.4); common legal representation (subparagraph 2.1.5); and legal aid (subparagraph 2.1.6).

Before addressing these issues, it is interesting to mention that by the end of 2007, the Court had received a total of more than 500 applications from victims seeking to participate in the ICC proceedings.[29] Yet, thus far – with many more victim applications received by the Court – only 152 victims have been recognised by the ICC to participate in the proceedings: 70 victims (including a school) have been recognised in the *Situation in the DRC*, four victims in the *Lubanga* case and 57 in the *Katanga and Ngudjolo* case;[30] six victims have been recognised in the *Situation in Uganda* and eleven victims in the *Kony and Others* case;[31]

[29] Women's Initiatives for Gender Justice, *Gender Report Card 2007*, at 26. Of the applications received by the Court most, 70%, were in relation to the DRC; 26% were in relation to Uganda; and only 4% were in relation to Darfur, Sudan. By the end of 2007, no applications had been received for the CAR situation. Furthermore, most applications received by the Court were from men (62%); 38% of applications received were from women, of which 37% of applicants from the DRC were women; 41% of applicants from Uganda were women; and 27% of applicants from Darfur were women.

[30] As regards the *DRC* situation, see: Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006 ('*DRC* pre-trial decision of 17 January 2006') (six victims were recognised); and Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République Démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06, *Situation en République Démocratique du Congo*, ICC-01/04-423, PTC I, ICC, 24 December 2007 (61 victims were recognised, including a school). As regards the *Lubanga* case, see: 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* and of the investigation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-228-tEN, PTC I, ICC, 28 July 2006 ('*Lubanga* pre-trial decision of 28 July 2006') (three applicants and their children, who were former boy-child soldiers, were recognised as victims of the case); and 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, Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-601-tEN, PTC I, ICC, 20 October 2006 ('*Lubanga* pre-trial decision of 20 October 2006') (one applicant was recognised as a victim of the case). Note furthermore that three victims were recognised both in the situation and the case. As regards the *Katanga and Ngudjolo* case, see: Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-357, PTC I, ICC, 2 April 2008 (five applicants were accorded victim status); Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-579, PTC I, ICC, 10 June 2008 (52 applicants were granted victim status in the case).

[31] As regards the *Uganda* situation and the *Kony and others* case, see Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda*, ICC-02/04-101, PTC II, ICC, 10 August 2007 ('*Uganda* pre-trial decision of 10 August 2007') (six applicants were recognised as victims of the case and two applicants were recognised as victims of the situation); Decision

Continued

and eleven victims have been recognised in the *Situation in Darfur*.[32] Moreover, to date, only one victim applicant has requested reparation.

2.1.1 *Criteria of Victim Participation*

On 17 January 2006, Pre-Trial Chamber I allowed six victims to participate in the investigation stage of the *Situation in the DRC*.[33] This was the first decision of the Court with regard to victim participation in the proceedings before the Court. In this Decision, the Court held that a distinction needs to be drawn between victims of a situation and victims of a case. The distinction between a situation and a case basically comes down to the question of whether a suspect has yet been identified and an arrest warrant or summons to appear has been issued. If the answer to this question is 'no', one still speaks of a situation. If, on the other hand, the answer to this question is 'yes', one can speak of a case.

In order to qualify as a victim, the Chamber held that

> during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case.[34]

The Chamber subsequently looked at the four criteria contained in Rule 85 (a), that is:

- are the victims natural or legal persons?[35]
- have they suffered harm? Whereas legal persons must have sustained direct harm, natural persons can be direct or indirect victims of crime.[36]

Although no definition of 'harm' is provided for under the Rome Statute,

on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, *Situation in Uganda*, ICC-02/04-125, PTC II, ICC, 14 March 2008 (five applicants were recognised as victims of the case and four applicants were recognised as victims of the situation). Note that, overall, four victims were recognised in both the situation and the case.

[32] As regards the *Darfur* situation, see Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur*, ICC-02/05-111-Corr, PTC I, ICC, 14 December 2007 (eleven applicants were recognised as victims of the situation).

[33] *DRC* pre-trial decision of 17 January 2006, *supra* note 30.

[34] *Ibid.*, para. 66.

[35] See subsection IV.2.1.2 for more information on proof of identity regarding natural and legal persons.

[36] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 91.

the Trial Chamber looked for guidance at the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), which states that a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights;[37]

- do the crimes alleged by the applicants fall within the jurisdiction of the Court? Thus, do the crimes amount to genocide, crimes against humanity or war crimes committed after 1 July 2002, the entry into force of the Rome Statute, and was the harm suffered as a result of a crime committed in the territory of a State Party or by a national of a State Party; and
- is there a causal link between these crimes and the harm suffered by the applicants?[38] The last criterion mentioned, the one pertaining to a causal link, is the most crucial factor to consider and is applied differently as regards the determination of whether applicants can be considered victims of the situation or the case.

Although the above-mentioned six victims were recognised as victims of the DRC situation on 17 January 2006, they were rejected as victims of the case against Lubanga on 29 June 2006. The reason for this rejection was the fact that the crimes allegedly committed against them were outside the charges brought against the suspect, that is, enlistment and conscription of child soldiers and actively using them in hostilities.[39] It was said that no causal link between the harm the victims suffered and the charges against the suspect was found. This criterion has been consistently applied by the Chamber when determining applications by victims to participate in the proceedings against the accused Lubanga. However, such a link was found with regard to four victims only: on 28 July 2006, Pre-Trial Chamber I granted victim status to three applicants who are all parents of male children who were enlisted by the UPC militia.[40] On 20 October 2006, one more applicant was granted victim status in the case against the suspect.[41] Other applicants were thus not granted victim status because they had not demonstrated a direct, causal link between the harm they suffered

[37] *Ibid.*, para. 92. See Principle 8 of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

[38] *Ibid.*, paras. 77-101. See also the slightly different approach to victims' participation in the *Uganda* pre-trial decision of 10 August 2007, *supra* note 31, para. 12, in which Judge Politi considered the following criteria: (1) whether identity had been established; (2) whether the events described constitute crimes within the Court's jurisdiction; (3) whether applicants claim to have suffered harm; and (4) whether the harm appeared to have arisen *as a result of* the event constituting a crime within the jurisdiction of the ICC.

[39] 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, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-172-tEN, PTC I, ICC, 29 June 2006.

[40] *Lubanga* pre-trial decision of 28 July 2006, *supra* note 30.

[41] *Lubanga* pre-trial decision of 20 October 2006, *supra* note 30 (victim status was only granted to Applicant a/0105/06).

and the charges against the suspect. The Chamber nevertheless held that they would be considered at a later date with regard to their victim status in relation to the situation. On a final note, in respect of obtaining victim status in the situation, Pre-Trial Chamber II in the *Uganda* situation held that in order for the Chamber to be satisfied that the applicants have suffered harm as a result of a crime within the jurisdiction of the Court, applicants' statements must be corroborated by sufficient information from other sources such as UN and NGO reports, confirming at least to a high degree of probability the occurrence of the incidents related to the applicants, both in temporal and territorial terms.[42]

The criterion of the existence of a direct causal link between the crimes and the harm suffered by the applicants in order to establish victim status is, however, broadened by a Decision of the Trial Chamber of 18 January 2008. In this Decision, the majority of the Judges held that victims do not need to bring evidence of harm suffered as a result of the charges confirmed against the accused Lubanga.[43] Instead, they would have to establish a link to the evidence being brought against Lubanga. According to the Trial Chamber, victims would need to establish either: (1) a real evidential link between the victim and the evidence which the Court will be considering during Mr. Lubanga's trial, leading to the conclusion that the victim's personal interests are affected; or (2) that the victim is affected by an issue arising during Mr. Lubanga's trial because his or her personal interests are in a real sense engaged by it.[44] These criteria seem to presume that also an indirect causal link between the crimes and the harm suffered might be sufficient in order for an applicant to obtain standing in the proceedings. Therefore, in such situations, the interests of victims in the case can be affected. The Decision of 18 January 2008, on this point, has been appealed.

In addition, whether the interests of victim are affected at a particular stage in the proceedings, needs to be established by means of a written application, stating the reasons why the interests are affected by the

[42] *Uganda* pre-trial decision of 10 August 2007, *supra* note 31, para. 106.

[43] According to Trial Chamber I: '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. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a 'crime within the jurisdiction of the Court' and to add the proposed additional element – that they must be the crimes alleged against the accused – therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court. Instead, the relevant restrictions are set out in Articles 5, 11 and 12 of the Statute.' *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 93. Judge Blattmann attached a Separate and Dissenting Opinion to this Decision, in which he held that the Chamber must determine victim status and victim participation based on the charges brought against Mr. Lubanga.

[44] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 95, with Judge Blattmann contesting this approach in his dissenting opinion.

evidence or issue arising in the case and the nature and extent of the participation sought.[45] The Trial Chamber gave some guidance on this matter, stating that the 'involvement in or presence at a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident, are examples of the factors that the Chamber will be looking for prior to granting the right to participate at any particular stage in the case.'[46]

2.1.2 *Applications of Victims to Participate and/or for Reparation*

Application forms for victims to participate and/or request reparation can be obtained from the Victims' Participation and Reparation Section (VPRS) or the ICC Field Offices and are also available on the website of the ICC. The ICC has developed a standard booklet explaining how to complete the participation and reparation forms, which are 17 and 19 pages long, respectively.[47] In many cases, victims wishing to participate and/or request reparation will be assisted (if necessary) in filling in the forms by local, national or international organisations working with victims of the conflict. On 17 August 2007, a decision by Pre-Trial Chamber I provided further clarification on the requirements for completion of victim applications to participate in the proceedings and the standards necessary for determining proof of identity.[48] The Decision is important as it outlines which information for an application to be considered complete should be available, that is: (1)

[45] *Ibid.*, para. 96.

[46] *Ibid.* On 2 June 2008, the Trial Chamber rendered a decision clarifying the 18 January 2008 decision on victims' participation as follows: '(a) In accordance with the decision of the Appeals Chamber of 22 May 2008, pending the decision on the substantive appeal on victims' participation, the personal interests of the victims are limited to those who have suffered personal and direct harm as a result of the events covered by the charges brought against the accused. (b) In order to exercise their right to receive relevant material, the legal representatives of victims are instructed to set out in a document provided to the prosecution how material in the latter's possession is relevant to an individual victim's personal interests (e.g. material relating to involvement in particular events at a given time or location). (c) The prosecution shall thereafter identify and provide any material in its possession which satisfies the above criteria. (d) The above procedure should be dealt with by the prosecution and legal representatives of victims *inter se* and a filing before the Chamber should only be made in case of disagreement. (e) In order to participate at the trial, and once victims have received the above documents, they are instructed to file discrete applications before the Chamber, in accordance with paragraphs 103-104 of the majority's decision, specifying how their personal interests are affected at a given phase of the trial.' See Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 'Decision on victims' participation', *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1368, T. Ch. I, ICC, 2 June 2008, para. 35.

[47] ICC, Booklet, 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court', available at http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

[48] Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, *Situation in the DRC*, ICC-01/04-374, PTC I, ICC, 17 August 2007 ('*DRC* pre-trial decision of 17 August 2007').

identity of the applicant; (2) date of crime(s); (3) location of crime(s); (4) description of harm suffered resulting from the commission of crime(s) under the jurisdiction of the Court; (5) proof of identity; (6) if application is made by a person acting with the consent of the victim, the express consent of that victim; (7) if application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; and (8) a signature or thumb print on the document and at least on the last page of the application.[49] In the same decision it was held that proof of an applicant's identity can be provided by submission of official documents, such as an identity card, a passport or a birth certificate, but if such documents are not available – thereby taking into account the problems of availability of records in situations of conflict – other less official documents may be provided, such as a voting card, a student identity card, school documents or a statement signed by two witnesses attesting to the identity of the applicant.[50] With regard to the latter possibility, the Pre-Trial Chamber observed that this should be 'a statement signed by two witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The Statement should be accompanied by proof of identity of the two witnesses.'[51] Moreover, in cases where the applicant is an organisation or institution, the Chamber will consider 'any document constituting it in accordance with the law of the relevant country, and any credible document that establishes it has sustained "direct harm to any of [its] 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", as provided for in Rule 85(b).'[52]

The considerable length of the forms and the amount of detail needed in order to complete the application forms is troublesome for many victims. Even for organisations acting as intermediaries it may be difficult to assist victims in filling in the forms; some of the questions require a certain level of understanding of the legal mandate of the Court, which

[49] *Ibid.*, at 9. The Chamber ordered the Registrar to present complete applications to the Chamber only as well as a report on applications where the Registry is unable to gather the required information.

[50] *Ibid.*, at 10-11; also applied in *Lubanga* trial decision of 18 January 2008, *supra* note 21, paras. 87-8. In the *Uganda* pre-trial decision of 10 August 2007 (*supra* note 31, at 12), Judge Politi, however, held that confirmation of identity must be through a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder; and (iii) showing a photograph of the holder.

[51] *DRC* pre-trial decision of 17 August 2007, *supra* note 48, at 10-11.

[52] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 89.

not all organisations have.[53] The fact that only four victim applicants participated in the *Lubanga* confirmation of charges hearing was partly due to the complexity of the application procedure and the absence of legal aid.[54] Yet, not only at the level of filling in the application forms do problems arise; the Chamber's decision-making process on whether or not to recognise the applicants as victims is not much better. Many victim applicants, who submitted their applications years ago, are still waiting for a decision of the Chamber today. This development seriously causes prejudice towards victims and their right to participate in the proceedings.

2.1.3 *Modalities of Participation*

Before the modalities of participation of victims can be decided upon, the Chamber has to first look into the question of whether participation of these victims is at all appropriate at the stage of the proceedings the Court is in. As mentioned, a victim who wishes to participate should therefore set out in a written application the nature and detail of the proposed intervention. A victim should thereby describe the way in which his or her personal interests are affected, for example by identifying how the harm the victim suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges. As regards the victims' right to participate in a proceeding before the Appeals Chamber, the Appeals Chamber similarly held that this is not an automatic right, even if victims have already participated in a pre-trial hearing.[55] Rather,

[53] For example, on page 9 of the application form to participate, the question is asked to give a detailed description of the alleged crime(s) which form the basis of the victim's application. In order to give a good answer to this question it would be helpful to understand the legal technicalities of the definitions of the crimes over which the Court has jurisdiction. See also K. Glassborow, 'Victim Participation in ICC Cases Jeopardised', Institute for War & Peace Reporting, AR No. 148, 20 December 2007.

[54] Legal Representative Luc Walleyn, the legal representative for victims a/0001/06, a/0002/06 and a/0003/06, mentioned in this regard: 'Your Honours, I think this is a very important issue, and I emphasise I would like the court to give out a message that will give confidence to the victims who need to be placed in a position where they feel safe constantly. It is not by chance that a few victims are participating in these proceedings, whereas they have thousands of victims. There are thousands of children who were recruited into these militias. The reason is because it is not easy do make these – to follow these procedures, and at each stage of the procedure the victims have to go through a lot. See Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06, PTC I, ICC, 4 December 2007, at 49. Further on legal aid, see subsection IV.2.1.6 below.

[55] Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-824, A. Ch., ICC, 13 February 2007. On 13 June 2007, the Appeals Chamber held that the victims concerned had not demonstrated that their personal interests would be affected in this particular hearing on whether the appellant was entitled to appeal against the decision on confirmation of charges under Article 82 (1) (b). See Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the

Continued

an application by victims must state the impact of the appeal on their personal interest and why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented. Clear examples of where the personal interests of victims are affected are when their protection is at issue and in relation to proceedings for reparations.[56] The determination of whether the personal interests of victims are affected is thus decided on a case-by-case basis. As observed by Judge Blattmann in his Separate and Dissenting Opinion attached to the 18 January 2008 Decision, this is a rather cumbersome procedure. He suggests that 'any information needed by the Trial Chamber to determine their right to participate and the appropriate moment at which to do so should be extracted by the Chamber from the information provided in the original victim application.'[57]

On 17 January 2006, Pre-Trial Chamber I allowed six victims to participate in the investigation stage of the *DRC* situation by: (1) presenting their views and concerns; (2) filing documents; and (3) requesting the Chamber to order specific measures.[58] The Chamber based their conclusion on the fact that the applicants' interests were affected in the investigation stage, and that this stage amounts to 'proceedings' as contained in Article 68 (3) in which victims have the right to participate. In the Pre-Trial Chamber's view, 'the close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute.'[59] On 22 September 2006, Pre-Trial Chamber I defined the modalities of victim participation in the *Lubanga* case. The Chamber held that for this stage of proceedings, the pre-trial phase, non-communication of the three victims' identities to the Defence was the only protective measure available to protect the victims, but also warned against anonymous accusations. As such, victims could participate anonymously, but without introducing new facts or evidence or questioning witnesses.

It was considered that the legal representatives would have access to public documents and to status conferences and parts of the confirmation hearing which are held in public. Victims' representatives may, furthermore, make opening and closing statements (address points of law including legal characterisation of modes of liability with which a suspect is charged) and request leave to intervene, to be decided on a

'Directions and Decision of the Appeals Chamber' of 2 February 2007, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-925, A. Ch., ICC, 13 June 2007.

[56] *Ibid.*

[57] Separate and Dissenting Opinion of Judge René Blattmann, *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 22.

[58] *DRC* pre-trial decision of 17 January 2006, *supra* note 30.

[59] *Ibid.*, para. 72.

case-by-case basis. On 20 October 2006, one other applicant was granted victim status in the case against the suspect, and was accorded the same modalities of participation applicable to the other three recognised victims. During the *Lubanga* confirmation of charges hearing there was a slight but significant expansion of these modalities, that is, that the legal representatives were allowed access to non-public documents and were allowed to pose questions to the expert witness. In a decision of Pre-Trial Chamber I in the *Katanga and Ngudjolo* case of 13 May 2008, it was furthermore held that non-anonymous victims have the right to access the case record prior to and during the confirmation hearing, but not to the filings and decisions classified as *ex parte*.[60]

The 18 January 2008 Decision in the *Lubanga* case dealt with the modalities of participation leading up to and during trial. The modalities of participation are more extensive than those allowed during the confirmation of charges hearing. The following five modalities of participation of victims have been decided upon:

- access to the public record; only in exceptional circumstances is access to confidential filings allowed;[61]
- to tender and examine evidence if this assists in the determination of the truth, and if in this sense the Court has 'requested' the evidence (Article 69 (3) and Rule 91 (3)), as well as to challenge the admissibility or relevance of evidence when the victims' interests are engaged by it;
- access to hearings, status conferences and trial proceedings as well as to file written submissions. Furthermore, the Trial Chamber may, *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and *ex parte* hearings. They may also make confidential or *ex parte* filings;
- to make opening and closing statements; and
- to initiate procedures, for instance by filing applications and requests, whenever an issue arises that affects their interests, individually or collectively. In addition, it was held that Regulation 56 of the Regulations of the Court allows that evidence related to reparation may sometimes be considered during the trial proceedings.[62]

2.1.4 Access to Documents

Before the Court, as mentioned, there is a presumption that access by victims' legal representatives to public filings in the record is allowed, but that this would not be applicable as far as confidential filings are

[60] Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-474, PTC I, ICC, 13 May 2008, paras. 128-33.
[61] See further subsection IV.2.1.4 on access to documents.
[62] *Lubanga* trial decision of 18 January 2008, *supra* note 21, paras. 101-22.

concerned.[63] This has to do with the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations. The Office of Public Counsel for Victims (OPCV) has pointed out that this situation has already led to absurd results, including the situation in which victims did not have access to confidential filings which expressly dealt with their submission (as could be understood from the title of the filing containing the pseudonyms of the victims).[64]

The responses by the Chambers to the issue of access to confidential documents have been different. In the 18 January 2008 Decision, the Trial Chamber ordered that all victims participating in the proceedings against Lubanga should be provided access to the full public record and index of the case as well as the public version of the prosecution's 'summary of presentation of evidence'.[65] However, victim participants are furthermore to receive, 'upon a specific request, subject to a demonstration of relevance to their personal interests, material in its [Prosecution's] possession and public evidence listed in Annexes 1 and 2 to the Prosecution's summary of presentation of evidence'.[66] With this order, Trial Chamber I said that 'if confidential filings are of material relevance to the personal interests of participating victims, consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place'.[67] However, another Chamber, Pre-Trial Chamber II, denied access to confidential filings in the record and therefore the Court's response to this issue remains obscure.

2.1.5 Common Legal Representation for Victims

The issue of common legal representation for victims is laid down in Rule 90 and Regulation 79 of the Regulations of the Court. Common legal representation may be helpful where large numbers of victims are anticipated to participate in the proceedings. Rule 90 (2) gives the Chamber the power to request the victims or a particular group of victims to choose a common legal representative or representatives 'for the purposes of ensuring the effectiveness of the proceedings'. In so doing, the victims may receive the assistance of the Registry by, *inter alia*, referring them to the list of counsel or assistants to counsel maintained by the Registry. If

[63] See also Rule 131 (2) of the ICC RPE.
[64] Observations du Bureau de conseil public suite à l'invitation de la Chambre de première instance, *Procureur c. Lubanga Dyilo, Situation en République Démocratique du Congo*, ICC-01/04-01/06-1020, OPCV, ICC, 9 November 2007, para. 44 ('*Lubanga* OPCV Observations of 9 November 2007').
[65] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 138.
[66] *Ibid.*
[67] *Ibid.*, para. 106.

victims are unable to choose a common legal representative, Rule 90 (3) states that the Chamber may request the Registrar to choose one or more.[68] Accordingly, and as explicitly mentioned by the Trial Chamber in the *Lubanga* case, 'the determination of when common legal representation is necessary in order to ensure the effectiveness of the proceedings is to be made by the Chamber.'[69]

Nevertheless, Rule 90 (4) provides that in the process of the selection of common legal representatives, 'the Chamber and the Registry shall take all reasonable steps to ensure that ... the distinct interests of the victims, particularly as provided in Article 68, paragraph 1 [referring to, *inter alia*, sexual or gender violence or violence against children], are represented and that any conflict of interest is avoided.' In this regard, the Trial Chamber held that:

> [I]n order to protect these individual interests effectively, it is 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. As a result, detailed criteria cannot be laid down in advance. However, the Chamber envisages that considerations such as the language spoken by the victims (and any proposed representative), 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. In order to assist it in the consideration of this issue, the Trial Chamber directs the Victims Participation and Representation Section to make recommendations on common legal representation in its reports to the Chamber.[70]

Moreover, 'the Chamber will take into consideration the views of victims under Article 68(3) of the Statute, along with the need to ensure that the accused's right to a fair and expeditious trial under Article 67 of the Statute is not undermined.'[71]

Although one or more common legal representatives may be needed in proceedings of the Court in which large number of victims participate, the application of Rule 90 seems to be more difficult than may have been foreseen. For example, groups of victims that may seem homogenous at first sight may in reality not be so homogenous. A group of victims of sexual violence may, for instance, come from different regions and/or

[68] Regulation 79 (2) of the Regulations of the Court, moreover, states that 'when choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.'
[69] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 123.
[70] *Ibid.*, para. 124.
[71] *Ibid.*, para. 126.

may have been sexually violated by perpetrators of different ethnicity. One possible solution could be to organise subgroups within one more or less homogenous group of victims. The distinct interests of victims furthermore impacts on the qualifications required from common legal representative(s). In the case at hand, they would need to have, *inter alia*, expertise on dealing with victims of sexual violence. Unfortunately, it appears that the list of legal counsel still does not contain a significant number of legal counsel with such expertise.[72]

It still remains to be seen how the issue of common legal representation for large numbers of victims is going to be applied in practice. It is, however, suggested that the Court should not appoint too many common legal representatives in a certain proceeding at the same time as this would most probably lead to unacceptable delays and fragmentation of the trial.[73] Moreover, in anticipation of this kind of problems, the application procedure could become even more restrictive than it is today.[74] A balance will therefore need to be found in between appointing a limited number of common legal representatives and, at the same time, ensuring the distinct interests the victims may have.

2.1.6 Legal Aid

Victims who can prove they are indigent can apply for legal representation through the legal aid system of the Court. However, legal aid is only provided in those cases in which victims have been recognised as victims, which may well be too late in the proceedings. Of course, if victims can afford it, they can obtain their own legal representation before victim status has been granted to them, but these victims will be the exception rather than the rule. The OPCV may furthermore be representing applicants who have no legal representation until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court.[75] Until that time, the OPCV can provide support and assistance to these applicants.

[72] According to the Gender Report Card 2007 of the Women's Initiatives for Gender Justice, at 30, 'although Rule 90(4) requires that there should be legal representatives on the List of Legal Counsel with expertise on sexual and gender violence, this criteria has not been promoted by the ICC, is not taken into account by the Court when assessing the eligibility of applicants to the List, nor is information sought from applicants with regard to their experience in this area.' In the same document it is mentioned on page 9 that only 19% of appointments to the list of legal counsel is made out of women, with only two women coming from a country situation in which is under investigation by the Court, namely the DRC (as of 24 October 2007).

[73] See M. Groenhuijsen, 'Victims' Rights and the International Criminal Court: The Model of the Rome Statute and its Operation', *supra* note 5.

[74] *Ibid.*

[75] *DRC* pre-trial decision of 17 August 2007, *supra* note 48.

No information is currently available of the number of victims who have applied for legal aid from the Court. Yet, the Court's limited provision of legal aid may prove to be a major obstacle to victims' involvement in the proceedings.[76] Without legal aid from the initial application stage, for many victims it is impossible to apply successfully. Providing legal aid from the start would therefore help in receiving fewer incomplete applications.

2.2 Some Interim Observations Regarding the Participation of Victims

Participation is a new and important feature in supranational criminal law proceedings. However, the application and participation process brings with it some interesting challenges for the Court, especially in light of the large number of victim applicants. Although the appointment of common legal representatives may be an outcome for streamlining the proceedings, the question of how many such representatives can be appointed without endangering the interests of victims as well as the effectiveness and fairness of the trial remains. The low number of participating victims to date, in light of the crimes the Court is dealing with, is also a cause for worry and is indicative of the complicated application process. Lack of access to legal aid is one of the causes. In addition to this, certainly less than one-third of victim applicants have been recognised by the Court as victim participants today, which is indicative of the cumbersome procedure at the Court. Offering victims an opportunity to apply for standing in the proceedings and then disappointing them by failing to meet their expectations is a powerful source of potential secondary victimisation. In order to fill in some of these gaps, it may be wise to develop more regulation in this field rather than to depend so heavily on case-law.

3. Protection of Victims and Witnesses

The main provisions governing the protection of victims and witnesses in the Rome Statute are Articles 68 (Protection of the victims and witnesses and their participation in the proceedings) and 69 (2) (Evidence). Rules 87 (Protective measures) and 88 (Special measures) of the RPE further

[76] See K. Glassborow, 'Victim Participation in ICC Cases Jeopardised', *supra* note 53. It seems furthermore difficult for victims to prove that they are indigent as the Court does not seem to use, in light of the context of victims in conflict or post-conflict situations, a presumption of indigence. See Registrar's Decision on the Indigence of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06,a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06, *Situation in the DRC*, ICC-01/04-490-tENG, PTC I, ICC, 26 March 2008, in which the Registry indicated that a number of victims would be provisionally considered indigent until such time as a full inquiry into their means could be undertaken. This decision is under review and a final decision of the Presidency is pending.

elaborate on the appropriate measures that can be taken for the protection of victims and witnesses.[77] It is useful first to recall the rationale behind the use of protective and special measures for victims and witnesses within international and national criminal courts, that is: (1) to minimise serious risks to their security; (2) to avoid serious incursions on their privacy and dignity; and (3) to reduce trauma associated with their participation or giving testimony in court.[78] In addition, and this is particularly relevant with regard to cases of international criminal trials where documentary evidence of the accused's war plans might not be readily available, a fourth reason can be discerned, that is, without victims and witnesses there would generally not even be a trial. Protective and special measures are therefore necessary in order to establish the truth. Thus, based on the above-mentioned rationales, three main categories of protective and special measures for victims and/or witnesses can be discerned, namely, those aimed at: (1) protection from the accused and his counsel (also referred to as anonymity measures); (2) protection from the press and the public, such as the use of pseudonyms for victims and witnesses (also referred to as confidentiality measures); and (3) protection from re-traumatisation, such as measures that avoid face-to-face confrontation with the accused.[79] In choosing the applicable protective and special measures, the Rome Statute requires that the Court take into account all relevant factors, including age, gender and health, and the nature of the crime, in particular in case of crimes involving sexual or gender violence or violence against children.[80]

The Rome Statute furthermore states that protective and special measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[81] In addition, these measures must be taken in particular during the investigation and prosecution of the crimes[82] and therefore mainly minimise the risks the victims and witnesses run after testimony. However, even in the post-trial phase, the ICC has taken up

[77] The significance of victim and witness protection is furthermore recognised on several other occasions in the Rome Statute and RPE. See, *inter alia*, Article 57 (3) (c), Rules 16-19, Rule 50 (1), Rule 52 (1), Rule 59, Rule 67, Rule 68, Rule 76 (4), Rule 77, Rule 81, Rule 84, Rule 86, Rule 105 (3), Rule 106 (2), Rule 107 (3), Rule 112 (4), Rule 119 (3), Rule 121 (10) and Rule 131 (2).

[78] Or, in the language of Article 68 of the Rome Statute, 'the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.' These goals are also recognised in, *inter alia*, Article 6 (d) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, Council of Europe, 28 June 1985, C.8, F.15, G.16.

[79] For an elaborate overview of all these protective and special measures, see de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, *supra* note 14, at 231-82.

[80] Article 68 (1) of the Rome Statute. See also Rule 86 of the RPE.

[81] Articles 68 (1) and 67 of the Rome Statute ('Rights of accused').

[82] Article 68 (1) of the Rome Statute.

certain obligations to ensure victims' and witnesses' safety, including by relocating them.[83]

3.1. ICC Developments Regarding the Protection of Victims and Witnesses

The ICC is facing serious challenges where the safety, physical and psychological well-being, dignity and privacy of victims and witnesses are concerned. On a number of occasions, security concerns for victims and witnesses in the situations and cases the Court is dealing with were recognised by the Court as well as expressed by participants and parties to the proceedings.[84] Such concerns are, however, not completely unexpected in light of the volatile situations the ICC is dealing with. Similar challenges were, and still are, felt at the ICTY and the ICTR, where several witnesses who have testified before these Tribunals experienced intimidation and threats after giving testimony in court.[85] Moreover, at least one case is known where a witness was killed after giving testimony in court.[86] Such incidents are cause for worry and indicate that confidentiality measures – the most commonly used form of protection – might not always protect the ones who come before the court to testify and/or, in the case of the ICC, to participate. In terms of security challenges, the situation before the ICC might even be considered more complex: unlike the Tribunals, the ICC is operating in volatile areas where a conflict is still ongoing. The Trial Chamber in the *Lubanga* case therefore rightly underlined that

[83] Rule 16 (4) of the RPE (dealing with the possibility of relocation and support services) and Rule 17 RPE (referring to long-term plans for protection).

[84] See, *inter alia*, *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 130 (while discussing the possibility of anonymity, the Chamber mentioned that it is 'conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety'); Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0106/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procés et lors du procés, *Procureur c. Lubanga Dyilo, Situation en République Démocratique du Congo*, ICC-01/04-01/06-964, ICC, 28 September 2007, para. 3 ('*Lubanga* joint conclusions of legal representatives of 28 September 2007') (in which the legal representatives of the four recognised victims, a/0001/06 to a/0003/06 and a/0105/06, pointed out that since the victims all live in the DRC they are at risk of intimidation and threats from their own community – the same community the accused comes from and where he is still influential).

[85] For the ICTY, see, *inter alia*, M. Simons, 'Court Rejects Any Liberty for Milosevic, Citing Threats', *New York Times*, 7 March 2002 ('According to the office of the prosecutor, several Balkans-based witnesses scheduled to testify at the trial, which began February 12, have been threatened, and some have received death threats'). For the ICTR, see, *inter alia*, 'Survivors Accused 14 Defence Investigators of Genocide Crimes', Hirondelle News Agency, 25 March 2002 (female victim-witnesses who had testified about rape in court faced intimidation through verbal harassment or death threats and some had to go into hiding).

[86] 'Prosecution Witness Assassinated in Rwanda', Hirondelle News Agency, 20 October 2004 (the Prosecution witness, a confessed *génocidaire*, was killed at his home in Kaduha (Gikongoro) after he returned from the ICTR, where he had given evidence against Colonel Simba. It remains unclear whether his murder was directly linked to his testimony before the ICTR).

'protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute.'[87] Furthermore, the Chamber held that 'protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings.'[88] In other words, and as has already been mentioned before, without protection many victims may not be able or willing to participate or to give testimony in the ICC proceedings at all.

Some of the challenges the Court is facing, and is likely to face, with regard to the protection of victims and witnesses are discussed in the following subparagraphs, that is, protection of victims who have applied to participate (subparagraph 3.1.1); redactions of victims' applications (3.1.2); anonymity measures (3.1.3); and protection from re-traumatisation (3.1.4). Some interim observations on this topic will furthermore be given in paragraph IV.3.2.

3.1.1 Protection of Victims Who Have Applied to Participate

In its 18 January 2008 Decision, the Trial Chamber in the *Lubanga* case clarified the reference in Article 43 of the Rome Statute confining protection provided by the Victims and Witnesses Unit (VWU) to 'victims appearing before the Court'. The Chamber held that victim applicants should not be excluded: 'once a completed application to participate is *received* by the Court, ... "an appearance" for the purposes of this provision has occurred.'[89] Protection of victim applicants by the VWU is thus not dependent on acceptance of the victims' applications by the Chamber or the physical attendance of the recognised participants during trial. The Chamber nevertheless recognised the burdens this would bring on the VWU and stated that the extent of such protection will need to be realistic.[90] It is, however, unclear what kind of protective measures the Court has in mind here, especially in the light of the fact that the

[87] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 129.

[88] *Ibid.*, para. 128.

[89] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 137 (italics added). The Legal Representatives of the four victims submitted that protection should start from the moment the victims fill in their applications; thus even some time before the Court receives their applications. See Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-T-62, T. Ch. I, ICC, 4 December 2007, at 42-52.

[90] The Trial Chamber accepted here the statement made by a representative of the Registry at a hearing on 4 December 2007 that overall responsibility rests with the VWU. However, a subsequent filing of the VWU seemed to start off from another point of view, that is, that 'victims who appear before the Court" only refers to those victims participating in the proceedings and whose status has therefore been recognized by a Chamber'. See Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-T-62, T. Ch. I, ICC, 4 December 2007, p. 42; and Protection of Victims and Mandate of the Victims and Witnesses Unit, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1078, Registry, ICC, 12 December 2007, para. 18, respectively ('*Lubanga* Registry report of 12 December 2007').

number of victim applicants will be significantly high in this phase of the proceedings. The VWU has, moreover, already made clear that, in order for it to be successful, the responsibility to protect victim applicants will need to be a shared responsibility with other organs of the Court and participants to the proceedings.[91] The VWU does thus not consider this to be a task of the Unit only.

3.1.2 *Redactions of Victims' Applications*

Redactions of victim applications are primarily decided on the basis of Articles 57 (3) (c) and 68 (1) of the Rome Statute and Rules 86 and 89 of the RPE.[92] A consistent practice on whether applications from victims to participate need to be provided to the Prosecution, Defence and the Office of Public Counsel for the Defence (OPCD) in a redacted or unredacted version, taking into account victims' concerns regarding security for themselves and their families, has, however, not yet developed. For example, on 1 February 2007, Pre-Trial Chamber II in the *Uganda* situation ordered the Registrar to provide the Prosecutor and the Defence with a redacted copy of the 49 victims' applications, expunging any information that may identify applicants.[93] In the *DRC* situation, redacted copies of victims' applications to the Defence had likewise been ordered by the Chamber.[94] However, for example, on 23 May 2007, despite the fact that the Court stressed that applicants should only be contacted, if needed, via their legal representative in order not to expose them to further security risks, Pre-Trial Chamber I in the *Darfur* situation ordered the Registrar to provide the Prosecution and the OPCD with unredacted copies of the victims' applications.[95] In a decision dated 8 June 2007, the Chamber ordered the OTP and the OPCD to respect the confidentiality of the applicants and to refer to them only by the numbers that were assigned to them by the VPRS, and

[91] *Lubanga* Registry report of 12 December 2007, *ibid.*, paras. 20-2.

[92] According to Article 57 (3) (c), the Pre-Trial Chamber is to provide, where necessary, for the protection and privacy of victims and witnesses. Rule 86 of the RPE establishes furthermore that the Pre-Trial Chamber, in making any direction or order, shall take into account the needs of all victims and witnesses in accordance with Article 68 of the Rome Statute. Under Rule 89 (1) of the RPE, the Prosecutor and the Defence are entitled to reply to any application for participation within a time limit set by the Pre-Trial Chamber and in order to allow them to effectively exercise this right, the Registrar shall provide them with a copy of any such application.

[93] The 1 February 2007 Decision is not public, but references to this decision can be found in the *Uganda* pre-trial decision of 10 August 2007, *supra* note 31, paras. 2-3.

[94] See, *inter alia*, Decision authorising the Prosecutor and the Defence to file observations on the applications of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06 in the case of the Prosecutor *v.* Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-270-tEN, PTC I, ICC, 4 August 2006 (note that non-redacted copies of the applications were provided to the Prosecution).

[95] Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, *Situation in Darfur*, ICC-02/05-74, PTC I, ICC, 23 May 2007.

ordered the OPCD to file a confidential version of its observations on the applications until otherwise decided by the Chamber.[96]

3.1.3 *Anonymity Measures*

On 18 January 2008, Trial Chamber I in the *Lubanga* case very interestingly held that victims, under certain circumstances, could remain anonymous in the proceedings leading up to and during the trial. In particular, the Chamber held that it 'rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings.[97] Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.'[98] The Chamber continued as follows:

> however, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given

[96] Decision on Confidentiality Matters and Extension of Page Limit, *Situation in Darfur*, ICC-02/05-79, PTC I, ICC, 8 June 2007.

[97] See the Prosecutor's submission: Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial, *Prosecutor* v. *Lubanga Dyilo*, *Situation in the DRC*, ICC-01/04-01/06-993-Conf, OTP, ICC, 19 October 2007, paras. 25-9 (the Prosecution submitted that there is no legal basis to withholding the identity of victim participants from the accused during the trial proceedings: fairness *vis-à-vis* the accused requires that the identity be known to the Defence. Other protective measures, such as protection from the public, would, on the other hand, be possible); and the Defence's submission: Argumentation de la Défence sur des questions devant être tranchées à un stade précose de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées au fins de donner des instructions aux témoins experts et la préparations des témoins aux audiences, *Procureur c. Lubanga Dyilo, Situation en République Démocratique du Congo*, ICC-01/04-01/06-991, OTP, ICC, 18 October 2007, paras. 36-8 (the Defence submitted that anonymity is no longer the only protective measure available at this stage of the proceedings).

[98] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 130. See in a similar vein the OPCV in the *Lubanga* OPCV Observations of 9 November 2007, *supra* note 64, at 13-5. Also the Legal Representatives of the four recognised victims held that full anonymity might be needed in certain cases. Furthermore, if anonymity were to be found inapplicable by the Chamber, the Legal Representatives would need to be given time to come up with alternative protective measures as well as to inform victims of the state of affairs and offer them the possibility to withdraw. See *Lubanga* joint conclusions of legal representatives of 28 September 2007, *supra* note 84, paras. 42-3.

the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.[99]

Therefore, in certain circumstances, anonymity may be provided to victims in the proceedings leading up to and during the trial. Anonymity had furthermore already been provided to victims in the proceedings leading up to the confirmation of charges hearing as well as the confirmation of charges hearing itself.[100]

It should be recalled here that anonymity measures go a substantial step further in the protection offered to victims and witnesses when compared to confidentiality measures; the latter only regulate withholding the victims' and witnesses' identity from the press and the public, but not from the accused and his counsel. Granting full anonymity to a victim or witness has been highly controversial in both national and international jurisdictions since it touches upon the rights of the accused to a fair trial, particularly the right to examine the witness against him or her. In the history of the *ad hoc* tribunals, only the ICTY Trial Chamber in the *Tadić* case, the first case that came before this Tribunal, accepted testimony of an anonymous witness. It held that 'a fair trial means not only fair treatment to the defendant but also to the prosecution and to the witness.'[101] The ICTY Chamber ultimately concluded that the right of the accused to a fair trial would not be compromised if certain specified criteria and guidelines were to be followed.[102] For each and every individual application, the

[99] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 131. Although both the Defence and the Prosecution appealed this decision on a number of issues, including the issue of anonymous victims, leave to appeal this issue was refused on 26 February 2008, with a dissenting opinion of Judge Blattmann. See Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1191, T. Ch. I, ICC, 26 February 2008.

[100] On 22 September 2006, Pre-Trial Chamber I decided that anonymity was the only protective measure at hand during the stage of the confirmation of charges hearing in the case of Lubanga. However, because the participation of victims was anonymous, the modalities of participation were also refined. See Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-462-tEN, PTC I, ICC, 22 September 2006. See further subparagraph IV.2.1.3 on the modes of participation during this stage of the proceedings above.

[101] Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1, T. Ch., ICTY, 10 August 1995 ('*Tadić* protective measures decision'), para. 55.

[102] The ICTY Trial Chamber in the *Tadić* case required that the following five conditions need to be met: (1) There must be a real fear for the safety of the witness or her or his family. The horrendous nature and ruthless character of the crime could justify such fears; (2) The testimony of the particular witness must be important to the Prosecutor's case. In

Continued

criteria would need to be carefully scrutinised and decisions to accord anonymity would therefore not be made lightly. Since the *Tadić* protective measures decision, full anonymity to protect witnesses has never been granted again by the ICTY, or the ICTR for that matter.[103] The reason not to make use of anonymity measures within the ICTY (or the ICTR) after the *Tadić* case is in all probability found in the controversial nature of its application.[104] The application of anonymity as a protective measure became even more controversial when an anonymous witness in the *Tadić* case appeared to be an unreliable witness.[105]

Nevertheless, the Trial Chamber's decision in the *Lubanga* case – not banning anonymity as a protective and special measure altogether, though focusing on the participation of victims only and thus not witnesses – must

this respect, it was noted that the Tribunal was heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber to testify; (3) The Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; (4) The ineffectiveness or non-existence of a witness protection programme; it was noted that the Tribunal did not have a police force available to protect witnesses after trial, nor does it provide for a long-term witness protection programme; and (5) Any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. In addition to these five criteria, four guidelines were set out in the *Tadić* case that need to be followed in order to ensure that a trial is fair: (1) The judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony; (2) The judges must be aware of the identity of the witness, in order to test the reliability of the witness; (3) The Defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information; and (4) The identity of the witness must be released when there are no longer reasons to fear for the security of the witness. See *ibid.*, paras. 62-6 and 71.

[103] However, even though anonymity was not granted in the *Blaškić* case, it was not precluded either provided that there was convincing proof of the five factors enumerated in the *Tadić* protective measures decision for each individual application. See Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch. I, ICTY, 5 November 1996. Note that the ICTR has never even sought recourse to total anonymity to protect its witnesses.

[104] Against full anonymity is, *inter alia*, M. Leigh, 'Editorial Comment. The Yugoslav Tribunal: The Use of Unnamed Witnesses Against Accused', (1996) 90 *American Journal of International Law* 235-8. In favour of full anonymity is, *inter alia*, C. Chinkin, 'International Tribunal for the former Yugoslavia: *Amicus Curiae* Brief on Protective Measures for Victims and Witnesses', (1996) 7 *Criminal Law Forum* 179-212.

[105] Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch., ICTY, 5 December 1996. It was found out that Witness L had given false testimony, which he later claimed to have given because he had been trained to do so by the Bosnian Government. Featherstone has noted that 'the circumstances surrounding the evidence of Witness L, and the subsequent request for it to be disregarded, indicate that the Defence does have an opportunity to investigate the truth of the evidence even of protected witnesses, and that these measures do not unduly hinder a fair trial.' See Y.M.O. Featherstone, 'The International Criminal Tribunal for the former Yugoslavia: Recent Developments in Witness Protection', (1997) 10 *Leiden Journal of International Law* 179, at 197.

be supported. From a broader perspective on the issue of anonymity, one can find support for total anonymity in national penal codes[106] and case-law[107] as well as European human rights case-law.[108] Developments in this field can furthermore be witnessed on an international level.[109]

Of particular relevance for the discussion of anonymity with regard to the ICC is Rule 88. This rule states that the Chamber may 'order special measures such as but not limited to measures to facilitate the testimony of a ... victim or witnesses.' In addition, orders under this rule can be made *ex parte*. It could therefore be argued that total anonymity as a special measure, both for victims participating and (victim-) witnesses testifying in court, could be based on Rule 88.[110] In any event, and as

[106] See, *inter alia*, the *Wet getuigenbescherming* 1993 [the Protection of Witnesses Act] and Article 226(a)-(f) of the *Wetboek van Strafvordering* [Code of Criminal Procedure] (The Netherlands); the Evidence (Witness Anonymity) Amendment Act 1997 (NZ) (New Zealand); Article 184(1) and (4) of the Polish Code of Criminal Procedure 1997 (Poland); Article 68 (3) of the German Code of Criminal Procedure 1987 (Germany); Section 23 (3) of the Criminal Justice Act 1988 (England). In some jurisdictions, anonymous testimony is allowed in court, while in other jurisdictions it is only allowed as hearsay evidence, and in some jurisdictions both possibilities are available.

[107] See, *inter alia*, *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others* (1994), VR 88 (Australia); *R. v. Watford Magistrates' Court ex Parte Lenman* (1992), (1993) *Criminal Law Review* 388 (England); and *R. v. Taylor* (1994), TLR. 484 (England).

[108] See, *inter alia*, *Doorson v. The Netherlands*, Judgment, Application No. 20524/92, ECtHR, 26 March 1996; *Kostovski v. The Netherlands*, Judgment, Application No. 11454/85, ECtHR, 20 November 1989; *Ludi v. Switzerland*, Judgment, Application No. 12433/86, ECtHR, 15 June 1992.

[109] See, *inter alia*, Recommendation No. R (97) 13 of the European Council's Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence, 10 September 1997, paras. 10-3; and the Resolution of the International Association of Penal Law, adopted by the International Association of Penal Law at its Budapest session 'The Criminal Justice Systems Facing the Challenge of Organized Crime', 1999, para. 6.

[110] See also H. Brady, 'Protective and Special Measures for Victims and Witnesses', in R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001) 453. This conclusion is further reinforced by Rule E, the predecessor of Rule 88, which was developed during the International Seminar 'Access of Victims to the International Criminal Court', held to suggest recommendations for rules concerning victims that could be inserted into the Rules of Procedure and Evidence of the ICC. Rule E was negotiated in workshop 3 ('Protection of Victims and Witnesses') of the seminar and states: 'In exceptional circumstances, the Court may order on the request of the parties, victims or their representatives and witnesses, *other special measures* than those listed above [referring to Rule D, the predecessor of current Rule 87(3)]. These measures must be in accordance with the statute' (italics added). See International Seminar 'Access of Victims to the International Criminal Court', Paris, 27-29 April 1999, Report of Workshops, 29 April 1999. What these 'other special measures' should encompass was not specified. However, it had been submitted that the underlying idea of Rule E was that the final decision on whether an anonymous witness is allowed in ICC proceedings is left to the judges' wide discretion and that the witness's identity is known only to the judges and the party seeking the anonymity. However, on the basis of the ICC provisions, the opposite conclusion could be drawn as well. Brady explains (at 453), with reference to Article 68 (5) ICC Statute, Rule 81 (4) and (6) and Rules 87 and 88 ICC RPE, that anonymity for witnesses at trial can be rejected. The provisions could be interpreted to mean that anonymity of the witness is only allowed before the commencement of the

Continued

rightly observed by the legal representatives of victims a/0001/06 to a/0003/06 in the *Lubanga* case, nowhere in the Rome Statute is anonymity as such prohibited.[111] An interesting and alternative suggestion was, moreover, made by the Legal Representative of victim a/0105/06 that it may be possible to reveal the identity of a so-called 'key person' only for each group of victims wishing to participate.[112] This approach appears apposite when the victims allegedly lived in the same place, at the same time and suffered from the same crimes. As the Court will most of the time be dealing with large groups of victims wishing to participate, such a solution may indeed be a practicable one, ensuring the effectiveness of the proceedings, the protection of a large number of victims as well as the rights of the accused. In such a case, the protection offered by the VWU may then be primarily focused on the key person, who will have disclosed his or her identity on behalf of the rest of the group that will remain anonymous.

What is important is to conclude that in certain circumstances anonymity might be a valid and necessary tool to ensure victims' participation and witnesses' testimony in court. As has been said, victim and witness anonymity does not necessarily compromise the rights of the accused to a fair trial, including his right to examine the witness against him. If conditions and procedural guarantees like those established in the *Tadić* decision on protective measures are followed carefully, a fair trial for the accused can be realised. However, in conformity with the European Court's case-law, a conviction may not be based either solely or to a decisive extent on anonymous statements.[113] The Trial Chamber's decision of 18 January 2008 in the *Lubanga* case seems to take these considerations adequately into account when balancing the rights of the accused with those of the victims.[114]

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trial. Within a reasonable time before the start of the trial, the identity should be disclosed to the accused in order to enable him to prepare his case.

[111] Corrigendum de la réponse des Représentants légaux des victimes a/0001/06 à a/0003/06 aux requêtes de la Défense et du Procureur sollicitant l'autorisation d'interjeter appel de la décision du 18 janvier 2008, *Procureur c. Lubanga Dyilo, Situation en République Démocratique du Congo*, ICC-01/04-01/06-1147, ICC, 31 January 2008, para. 36.

[112] See Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-T-57, T. Ch. I, ICC, 29 October 2007, at 31-2. A similar suggestion was made by the VWU. See *Lubanga* Registry report of 12 December 2007, *supra* note 90, para. 25.

[113] See, *inter alia*, *Doorson v. The Netherlands*, *supra* note 108; *Van Mechelen v. The Netherlands*, Judgment, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, ECtHR, 23 April 1997.

[114] See also the reference of the Court to the *Doorson* case of the European Court of Human Rights when stating the following: 'Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice'. See *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 131, footnote 114.

3.1.4 *Protection from Re-traumatisation*

Another category of protective and special measures, those that seek to prevent re-traumatisation of victims participating or giving testimony in court, are likely to be challenging for the Court to deal with and therefore deserve to be discussed here as well. These measures may be of particular relevance to children, like the ex-child soldiers recognised in the *Lubanga* case, and victims who survived rape and other forms of sexual violence. Although to date no victims of sexual violence have (yet) come before the Court, the example of victims of sexual violence is in particular interesting to discuss in terms of measures aimed at protection from re-traumatisation. With regard to victims of sexual violence, the Chamber recognised in the *Tadić* case that 'rape and sexual assault often have particularly devastating consequences' and that 'traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial' which resulted in a general feeling of 'being raped a second time'.[115] The possibility of this so-called secondary victimisation of victims of sexual violence who are to testify in court is nowadays no longer categorically denied. The question remains, however, what kind of protective and special measures for victims of sexual violence are allowed, without compromising the right of the accused to a fair trial.

Avoiding direct confrontation with the accused in court is one such measure and could consist of one-way closed circuit television, the use of a screen in court or even removal of the accused from the courtroom.[116] A second category of measures that protect victims of sexual violence from re-traumatisation is the possibility of giving evidence by means of prior recorded testimony, which may spare victims from repeated testimony in court.[117] The measure of prior recorded testimony has a disadvantage that the victim's demeanour cannot always be directly assessed. However, the measure is not prohibited and the weight given to such evidence should, as for any evidence, be evaluated in light of Article 69 (4) of the Rome Statute.[118] In fact, Antonio Cassese, in his capacity of Chairperson of the International Commission of Inquiry on Darfur, submitted an *amicus curiae* application on 25 August 2006 to the Court, in which he, amongst other things, suggested that in order to protect victims of sexual violence from re-traumatisation, testimonies obtained during the investigation

[115] *Tadić* protective measures decision, *supra* note 101, para. 46.
[116] Rules 87 (3) (c) and 88 of the RPE. See also Article 68 (2) of the Rome Statute.
[117] Articles 56 and 69 (2) of the Rome Statute; and Rules 68, 88 and 112 of the RPE.
[118] Article 69 (4) of the Rome Statute states: 'The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.'

stage could be preserved for trial so that victims need not appear in court at a later stage.[119]

A third category of measures that protect victims of sexual violence from re-traumatisation relate to the Court's special evidentiary rules on sexual violence crimes, which restrict admitting consent and prior or subsequent sexual conduct into evidence and therefore protect the victims of sexual violence from re-traumatisation in court as well.[120] Admitting such evidence would subject the witness to unnecessary and humiliating questions, and may only be accepted in very limited circumstances.[121] However, in light of the nature of the sexual violence crimes as genocide, crimes against humanity and war crimes, it seems very unlikely that a situation could exist in which consent or prior or subsequent sexual conduct could ever be successfully raised before the Court. In addition, in contrast to the developments regarding the definition of rape before the ICTY and the ICTR,[122] the definition of rape or any other form of sexual violence in the ICC Elements of Crimes fortunately does not explicitly include the element of consent.[123] Such an inclusion is indeed not relevant in cases of this nature and could keep victims of sexual violence away from testifying in court as it places the Prosecutor in the

[119] Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, *Situation in Darfur*, ICC-02/05-14, ICC, 25 August 2006 (note that Pre-Trial Chamber I had invited Antonio Cassese on 24 July 2006 to submit observations concerning the protection of victims and the preservation of evidence in Darfur, Sudan).

[120] Rules 70 (Principles of evidence in cases of sexual violence), 71 (Evidence of other sexual conduct) and 72 of the RPE (*In camera* procedure to consider relevance or admissibility of evidence).

[121] See Rules 71 and 72 of the RPE for the circumstances in which evidence of other sexual conduct may be accepted or the issue of consent be raised.

[122] Rape has been defined differently by different ICTY and ICTR Chambers. In the *Akayesu* trial judgement, the Trial Chamber defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'. In the *Kunarac et al.* appeal judgement (quoting and concurring with the Trial Chamber's definition of rape), the Appeals Chamber defined rape in mechanical terms with non-consent as an element of the crime. Although subsequent Chambers have either applied the broadly worded *Akayesu* definition of rape or the more restrictive *Kunarac* definition of rape, the *Kunarac* definition has been accepted on appeal and therefore enjoys more authority. See Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, T. Ch. I, ICTR, 2 September 1998, para. 688; and Judgement, *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-A and IT-96-23/1-A, A. Ch., ICTY, 12 June 2002, para. 127.

[123] The Elements of Crimes on the definition of rape only refer to consent where it concerns a person who is incapable of giving genuine consent due to natural, induced or age-related incapacity (which refers, *inter alia*, to situations where a person is mentally incapable, unconscious, drugged, or senile). As such, the definition of rape (or any of the other crimes of a sexual violence nature) refers to force or threat of force, but also to coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment. Thus, where force or threat of force, coercion or coercive circumstances are apparent and the jurisdictional requirements of crimes against humanity, war crimes or genocide are fulfilled, the issue of consent cannot be introduced into evidence.

position to inquire into the issue of consent with the victim. The latter practice unfortunately occurred before the ICTY in the *Kunarac, Kovač and Vuković* case. In this case, the reaction of Witness 95 to the question posed by the Prosecutor if the sexual contact was against her will, was met with outrage: 'Please, madam, if over a period of 40 days you have sex with someone, with several individuals, do you really think that is with your own will?'[124] Witness 95 had just explained to the court that she had been selected for the purpose of rape more than 150 times in a period of 40 days. Under the ICC's definition of rape, however, the Prosecutor will be able to focus on force, threat of force, coercion or coercive circumstances rather than lack of consent. Last but not least, the special evidentiary rules acknowledge that corroboration of evidence is not a requirement for any crime, and particularly not with regard to crimes of sexual violence.[125] The evidentiary rules thus specifically acknowledge that biases against victims of sexual violence, in particular women, are not accepted and clearly state that they are as reliable as any other witnesses. This acknowledgement is in line with the equality and non-discrimination provision contained in Article 21 (3) of the Rome Statute.

Other measures protecting victims of sexual violence from re-traumatisation relate, *inter alia*, to the manner of questioning, the length of time of questioning and the possibility of having a person present to support the victim when testifying in court.[126] As the practice before the tribunals has seen several discouraging episodes of inappropriate treatment of victims of sexual violence during trial, especially where cross-examination is concerned,[127] it is argued that a set of guidelines needs to be established dealing with the conduct of parties during the testimony and participation of victims of sexual violence. Such guidelines would be particularly practicable if they set out one common approach towards the treatment of victims of sexual violence. This is necessary as judges, prosecutors and defence lawyers come from different regions all

[124] Transcript, *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, T. Ch. II, ICTY, 25 April 2000, at 2235-6.

[125] Rule 63 (4) of the RPE.

[126] Rule 88 of the RPE refers to some of these measures.

[127] '[An] example is the *Butare* case, where Witness TA, a victim of multiple rapes by multiple perpetrators, was asked, *inter alia*, the following questions by the Defence: "Did you see his penis?", "Did you touch Shalom's [the accused's] penis?", "How was it introduced into your vagina?", "Now on the earlier first occasion I asked you whether you had seen Shalom's penis, do you remember that? ... Are you able to tell the Judges of this Chamber whether he was circumcised or not?" The Defence Counsel also insinuated that she could not have been a victim of rape because she smelled as a result of not having been able to take a bath for a long time. At the end of one of the Defence Counsellor's cross-examination, he practically called her a liar when he asked TA: "Is it true and possible that these things that you have testified to before the Chamber did not happen to you, but were suggested to you?" Although the President of the Trial Chamber remarked that the latter question was "impressive", no further attention was given to it by the judges.': de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, *supra* note 14, at 272-5.

over the world with different legal backgrounds and may therefore have different approaches to addressing victims of sexual violence. Taking into account the nature of the sexual violence committed, it is not at all appropriate to address rape victims in an aggressive way and not to intervene if this happens. It could be argued that this is in fact more a matter of simple human courtesy, rather than that it has anything to do with someone's legal background. Some of the issues that need to be addressed in the guidelines have been included in the Court's Code of Professional Conduct for Counsel that applies to both Defence Counsel and Legal Representatives of victims.[128] Article 29 of this Code ('Relations with witnesses and victims') states:

> 1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom;
> 2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

Misconduct of Counsel will be sanctioned, including by means of payment of a fine and suspension of or a permanent ban on practising before the Court.[129]

In short, for the Prosecutor, the guidelines would need to indicate that he or she will have to object during trial when rape victims are asked unnecessary or humiliating questions by defence counsel. Before trial he or she will need to prepare victims as to the kind of evidence he or she needs to elicit from them in order to make his or her case. The Prosecutor will have to make the victim realise that, although he or she understands that such questions may be painful, the questions need to be posed in order to establish the truth. Recent ICC decisions regarding the protocol on the practices to be used to prepare witnesses for trial, show, however, a different approach.[130] This task is given to the VWU; representatives of the parties or participants are allowed to be present during the familiarisation process, but are unable to speak with the witness about the evidence. In our view, this does not look like a positive development. For the defence, the guidelines would need to stipulate that aggressive, irrelevant questioning of the rape victim is not allowed. Cross-examination needs to operate in between the boundaries of establishing

[128] Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting on 2 December 2005, by consensus.
[129] Article 42 (1) of the Code of Professional Conduct for Counsel.
[130] Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1049, T. Ch. I, ICC, 30 November 2007; Decision regarding the Protocol on the Practices to be Used to Prepare Witnesses for Trial, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-1351, T. Ch. I, ICC, 23 May 2008.

the truth and respect for the rape victim. Questions as to whether or not she touched his penis are irrelevant for the establishment of the truth and may cause secondary victimisation for the victim concerned. For the Judges, the guidelines need to emphasise that they have actively to control the proceedings and step in when defence lawyers approach the rape victim with unnecessary, irrelevant or intimidating questions. On the basis of the ICC provisions – Articles 64 (8) (b), 64 (9) and Rule 88 (5) – the Judges are given such a power.

It is important that victims of sexual violence are treated with respect. Disrespectful attitudes towards victims of sexual violence such as those that have been demonstrated before the tribunals should not be shown again before the ICC. Only if victims of sexual violence are treated with respect will they come forward and testify or participate before the ICC. Only then will present and future generations know about the crimes that have been committed against them; crimes that have since time immemorial been characterised by underreporting and lack of investigation and prosecution.

3.2 Some Interim Observations Regarding the Protection of Victims and Witnesses

The protection of victims and witnesses is a delicate matter, especially in the often volatile situations the Court is concerned with. Where the *ad hoc* tribunals are only dealing with the protection of (victims as) witnesses, the ICC also needs to protect victims participating in the proceedings. As regards the latter category, this will most of the time mean that large number of victims, divided or not into subgroups, will need protection. In light of the fact that the Court is held to provide protection to victim applicants from the moment their applications are received by the Court, this brings with it an enormous burden upon the VWU that is in charge of their protection. Moreover, although anonymity as a protective measure should not be easily granted, there could be circumstances in which recourse to it might be needed and possible. The possibility that anonymity as a protective measure for victims participating in the trial proceedings might have to be used by the Court has also been accepted by the Trial Chamber in the *Lubanga* case. The suggestion by a Legal Representative that one key person of a group of victims reveals his identity to the benefit of the other – anonymous – victims might also be a good solution to tackle the problem of protecting large numbers of victim participants. Finally, protection from re-traumatisation is important to all victims, especially to children and victims of sexual violence. In light of some disturbing practices before the ICTY and the ICTR, measures that secure their protection from re-traumatisation should be carefully implemented when they participate or testify before the Court. Preferably,

a set of guidelines need to be developed which deal with the conduct of parties during the testimony and participation of victims in general and victims of sexual violence and children in particular. Such guidelines would be especially valuable as they would set out one common approach towards the treatment of victims in court.

4. Reparation to Victims

The ICC reparation regime is laid down in Articles 75 and 79 of the Rome Statute and further elaborated in Rules 94 to 99 of the RPE. The reparation regime for victims can be linked to the various stages of the trial. The Court can pass an order awarding reparation on the basis of the conviction of the accused. In addition, the creation of a Trust Fund for Victims allowed for a broader system of reparation, which can be accessed at any stage in the trial, including the investigation, pre-trial and trial stages, at least in those cases where the Trust Fund for Victims will be able to operate in a fashion complementary to the Court. Apart from this, Article 75 (6) of the Rome Statute makes it clear that a victim may also look for and receive reparation from other sources.[131]

The reparation regime under the ICC is clearly a novelty in supranational criminal law. As mentioned, before the ICTY and the ICTR, some reparation possibilities are existent. However, victims do not have standing themselves in restitution matters, nor are the Tribunals allowed to award compensation to victims directly. Support services are only provided in small amounts, usually over a short period of time whilst the witness is in The Hague or Arusha, and do not meet the needs of most victims. According to Van Boven, the provisions on reparation were included in the RPE of the Tribunals 'as a symbolic afterthought rather than being expected to produce concrete results'.[132] This indeed seems to have been the case. Awards of reparation to victims of crimes falling within the tribunals' jurisdiction have therefore been almost non-existent. Yet, the lack of restorative justice for survivors in Rwanda and the former Yugoslavia did lead to a general awareness that reparation to victims is of great importance in order to achieve recovery of and justice to victims.[133]

[131] Article 75 (6) Rome Statute reads: 'Nothing in this article shall be interpreted as prejudicing the rights of victims and witnesses under national or international law.'

[132] T. van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', *supra* note 1, at 81-2.

[133] A good example is the address of the then ICTR President, Judge Pillay, in October 2002 to the UN Security Council and General Assembly on the achievements of the ICTR during the year 2001-2002, in which she stated: 'Many Rwandans have questioned the ICTR's value and its role in promoting reconciliation where claim for compensation is not addressed. For every hour of every day over the past 7½ years, we have lived with the voices of the survivors of genocide and so we strongly urge the United Nations to provide compensation for Rwandan victims.' See Statement by the President of the ICTR to the United Nations General Assembly by Judge Navanethem Pillay, 28 October 2002.

Hence, the Rome Statute benefited therefrom and a reparation regime was established in 1998.

4.1 ICC Developments Regarding Reparation to Victims

As is the case with participation and protection matters, the ICC also faces serious challenges where the issue of reparation to victims is concerned. This is not different for the Trust Fund for Victims. Reparation by an international criminal court or institution comparable to the Trust Fund for Victims to large groups of victims from conflict situations is unprecedented and therefore not without certain potential problems. Both ways to provide reparation to victims, through court awards and the Trust Fund for Victims, and related challenges, will be discussed in subparagraphs 4.1.1 and 4.1.2, respectively.

4.1.1 Court Awards

After an individual has been convicted of one of the crimes under the ICC's jurisdiction, the Court may determine the scope and extent of any damage, losses and injuries suffered by the victims on the basis of principles relating to reparation, including restitution, compensation and rehabilitation (Articles 75 (1) and 75 (2) of the Rome Statute). The judges of the Court have full discretion in deciding whether or not the victim is to receive reparation,[134] and if it decides to award reparation, the Court itself is to determine the principles relating to reparation. A footnote attached to the final report of the Working Group on Procedural Matters of the Rome Conference, however, strongly indicates that the principles for reparation should be inspired by developing international standards on reparation, in particular the so-called 'Van Boven/Bassiouni Principles'.[135] According to this document, the terms 'restitution', 'compensation' and 'rehabilitation' should be understood as:

> 19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

[134] Article 75 (2) of the Rome Statute ('may').
[135] Footnote 5 to Article 73 on reparations to victims in the final report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998. See also H. Friman and P. Lewis, 'Reparation to Victims', in R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001) 477-8.

> 20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> (a) Physical or mental harm;
>
> (b) Lost opportunities, including employment, education and social benefits;
>
> (c) Material damages and loss of earnings, including loss of earning potential;
>
> (d) Moral damage;
>
> (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
>
> 21. Rehabilitation should include medical and psychological care as well as legal and social services.[136]

While the type and modalities of reparation will thus be determined by the ICC judges, they may be assisted in this task by experts with knowledge of the needs of victims in a particular situation.[137] In any event, before deciding on an order concerning reparation, the Court may invite and to take into account representations from or on behalf of the convicted person, victims, other interested persons or interested States.[138] Awards for reparations can be made on an individualised or collective basis or both, taking into account the scope and extent of any damage, loss and injury.[139] Where the number of victims is very high, the Court may be more inclined to award reparations on a collective basis.[140] In principle, the implementation of court awards on reparation will need to be channelled through the Trust Fund for Victims.[141]

As no trial before the ICC has yet come to an end, no reparation awards have so far been ordered. Partly due to this, the principles with regard to reparation are still undecided. Nevertheless, in light of intense debates about the content of victims' rights in the Rome Statute and RPE, it needs to be observed that the concept of 'reparation' has been significantly clarified.[142] From the 'Van Boven/Bassiouni Principles' it becomes clear

[136] Respectively, Principles 19, 20 and 21 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Commission on Human Rights, E/CN.4/2005/L.48, 13 April 2005 (Van Boven/Bassiouni Principles). It should be noted that in the field of victimology, the terms 'restitution', 'compensation' and 'assistance' are used differently. See the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 8, 12 and 14 in particular.

[137] Rule 97 (2) of the ICC RPE.

[138] Article 75 (3) of the Rome Statute; Rule 97 (3) of the ICC RPE.

[139] Rule 97 of the ICC RPE.

[140] Rule 98 (3) of the ICC RPE.

[141] Article 75 (2) of the Rome Statute.

[142] M. Groenhuijsen, 'Victims' Rights and the International Criminal Court: The Model of the Rome Statute and its Operation', *supra* note 5.

that 'theory formation on reparation has moved far beyond the monolithic dimension of financial settlements between the individual victim and his offender', as still found in most of the standard victimological vocabulary.[143] On whether or not evidence concerning reparations will need to be considered during trial or as a separate procedure after trial, the Trial Chamber held that it 'may allow such evidence to be given during trial if it is in the interest of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination'.[144] The Trial Chamber continued by saying that 'at all times it will ensure that this course does not involve any element of prejudgment on this issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.'[145] In this way, dealing with trial and reparations issues in a joint hearing will further the objective of expediting the proceedings and limiting unnecessary trauma to the victims by removing the necessity of giving testimony twice. This is, in fact, the very purpose of Regulation 56 of the Regulations of the Court, which was discussed above.

That reparation is a very important aspect of the Court's work was made clear in a decision of Pre-Trial Chamber I dated 24 February 2006, which highlighted that 'the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. ... [T]he success of the Court is, to some extent, linked to the success of its reparation regime.'[146] In view of this, the Judges determined that the requests for measures to secure the freezing and seizing of assets for the purposes of future reparation awards should be transmitted simultaneously with cooperation requests to States for arrest and surrender of suspects.

4.1.2 *The Trust Fund for Victims*

The Trust Fund for Victims was officially established on 9 September 2002 under a Resolution of the Assembly of States Parties pursuant to Article 79 (1) of the Rome Statute[147] and is managed by a five-member independent Board of Directors.[148] The mission of the Trust Fund for

[143] *Ibid.*

[144] *Lubanga* trial decision of 18 January 2008, *supra* note 21, para. 122.

[145] *Ibid.*

[146] Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case of Mr. Thomas Lubanga Dyilo, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-8-US-Corr, PTC I, ICC, 24 February 2006, at 60.

[147] Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of Such Victims, Resolution ICC-ASP/1/Res.6, adopted at the 3rd plenary meeting on 9 September 2002, by consensus.

[148] *Ibid.* The Board was elected by the ASP and is made up of five members, each elected for a three year term with a possibility of being re-elected once. The members of the Board all work on a voluntary basis.

Victims is 'to support programs which address the harm resulting from the crimes under the jurisdiction of the ICC by assisting the victims to return to a dignified and contributory life within their communities'.[149] In other words, 'to ensure hope, dignity and empowerment for victims of genocide, crimes against humanity and war crimes'.[150] The Regulations of the Trust Fund for Victims were adopted at the 4th Session of the ASP in 2005 and were imperative for the Board to start its work in a proper way.[151] The Regulations address such issues as management and oversight of the Trust Fund for Victims, receipt of funds, and activities and projects of the Trust Fund for Victims. Some important developments since then include the establishment and expansion of the Secretariat of the Trust Fund for Victims over the course of 2007.[152] Moreover, in the same year, the Secretariat developed programmatic and financial frameworks which define the criteria for the acceptance of projects and voluntary contributions.[153] As at 30 June 2007, the total balance of the Trust Fund for Victims was € 2.6 million.[154]

By early 2008, the Trust Fund for Victims had received a total of 43 project proposals, mainly related to the DRC and Uganda.[155] Several of these projects have been approved by the Board and subsequently the Chamber and are now awaiting implementation or have already started to be implemented. Therefore, on 24 January 2008, in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims,[156] the Board

[149] See Trust Fund for Victims Program Overview, prepared by the Trust Fund for Victims, undated, at 1.
[150] *Ibid.*
[151] Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, adopted at the 4th plenary meeting on 3 December 2005, by consensus.
[152] Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2006 to 30 June 2007, ICC-ASP/6/11, 14 September 2007, at 1.
[153] *Ibid.*, at 2.
[154] *Ibid.*, at 4.
[155] Information provided by the Director of the Trust Fund for Victims, André Lapperière, during his lecture on 5 March 2008 at the T.M.C. Asser Institute, The Hague, the Netherlands.
[156] Regulation 50 of the Trust Fund Regulations reads, in part, as follows: 'For the purposes of these regulations, the Trust Fund shall be considered to be seized when: (a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and (ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. (iii) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension

Continued

of Directors of the Trust Fund for Victims notified Pre-Trial Chamber I that it had assessed victims' needs in the DRC and that it had identified specific projects assisting victims in the DRC.[157] In a similarly worded notification on 25 January 2008, the Trust Fund for Victims notified Pre-Trial Chamber II that it had assessed victims' needs in Northern Uganda and that it had identified projects in accordance with Regulation 50.[158] These were the first notifications of the Trust Fund for Victims to the Court. For this reason, the notifications sought to clarify in more detail the Trust Fund for Victims' dual mandate, which includes implementation of reparations awards from the Court as well as assistance to victims,[159] the process of evaluation and assessment of victims' needs for physical and/or psychosocial rehabilitation and/or material support in the situations (the *DRC* and *Uganda*), and the proposed activities in the situations on behalf of victims and their families. With regard to identifying victims' needs, the Board mentioned that it had undertaken 'livelihood' assessments (e.g. assessing 'the possession of human capabilities (such as education, skills, health, psychological orientation); access to tangible and intangible assets; and the existence of economic activities') and that it had consulted with victims, experts, local and international NGOs, international community, and local authorities.[160] Consultations with victims themselves were, logically, held to be a crucial aspect of identifying victims' needs. With regard to the proposed activities, mention was made in the notifications of three categories of projects that have been established, viz. physical rehabilitation, psychological rehabilitation and material support with each project incorporating a protection approach.[161]

shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities.'

[157] Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, *Situation in the DRC*, ICC-01/04-439, TFV, ICC, 24 January 2008 ('Notification of TFV of 24 January 2008').

[158] Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, *Situation in Uganda*, ICC-02/04-114, TFV, ICC, 25 January 2008. In the following text, references will be made to the notification of the Board in the *DRC* situation. Similar references can, however, be found in the notification of the Board on the *Situation in Uganda*.

[159] According to the Board, 'the drafters of the Regulations clearly provide for two different mandates of the Trust Fund, implementation of reparations awards and provision of assistance to victims in general through the use of "other resources." This interpretation is supported by the clear distinction between the use of "resources collected through fines or forfeiture or awards for reparations" [Regulation 43] and the use of "other resources of the Trust Fund" referred to as "resources other than those collected from awards for reparations, fines and forfeitures" [Regulation 47] to be used for assistance [Regulations 48 and 50] to victims and their families.' See Notification of TFV of 24 January 2008, *supra* note 157, para. 17.

[160] *Ibid.*, paras. 22-6.

[161] *Ibid.*, paras. 55-6.

Although the proposed activities themselves were included in a confidential annex to the notifications of the Board, examples of projects in the DRC include: (1) 'rehabilitation reinsertion of victims' and 'socio-economic reintegration' as projects aiming for physical rehabilitation; (2) 'healing of memories' and 'support to victims of sexual violence' as projects aiming for psychological rehabilitation; (3) 'holistic community rehabilitation', 'non-formal education' and 'taking care of each other' as projects aiming materially to support victims.[162] Similar and other projects are anticipated in Uganda.[163] Some of these projects have, as mentioned, already been started with; in some of these cases, the official procedure laid out in Regulation 50 had, despite its controversial creation, not been followed. For example, in the DRC, the Secretariat of the Trust Fund for Victims had provided a group of widows with 200 chickens. These chickens were given to the widows on loan for a year. Already after eight months, the women were able to give the chickens back to the Secretariat of the Trust Fund for Victims as the chickens had sufficiently multiplied and had provided the women with sufficient income to sustain themselves. This had even made it possible for the women to buy cattle to generate an even better income.[164] This example makes clear that even with not much money or means, a difference can be made to the lives of victims of genocide, crimes against humanity or war crimes.

[162] The projects are described as follows: (1) 'rehabilitation reinsertion of victims' as 'to provide an immediate medical and psychological assistance to victims and to facilitate their return in their families and communities through psychosocial and training initiatives'; (2) 'socio-economic reintegration' as 'to reintegrate the victims of rape, other forms of sexual violence and physical mutilations (men, women, girls) through socio-economic activities'; (3) 'healing of memories' as community mobilisation and awareness raising on peace, reconciliation and reparations"; (4) 'support to victims of sexual violence ... to provide psychosocial assistance through counselling and other support including micro-credit schemes'; (5) 'holistic community rehabilitation' by 'rehabilitation/reintegration of groups of victims into their communities'; (6) 'non-formal education ... to reinforce non-formal education centers for children, youths and adults to whom the formal system is inaccessible'; and (7) 'taking care of each other' as 'to mobilize and rehabilitate communities of victims through ceremonies, micro-credit initiatives and medical support'. See Trust Fund for Victims Program Overview, prepared by the Trust Fund for Victims, undated, at 2.

[163] Examples of projects in Uganda are as follows: (1) 'rehabilitation of mutilated victims' ('to provide victims physical surgery and psychological counselling to assist with their healing and reintegration into society') and 'victim medical rehabilitation' ('to support rehabilitation centre to address the needs of rehabilitation of the victims') as projects aimed at physical rehabilitation; (2) 'addressing stigma and ensuring peace and reconciliation' ('to raise awareness of groups of victims and to find agreement on the elimination of traditional or new obstacles to reconciliation, peace and rebuilding') and 'victim empowerment project' ('reintegrate groups of victims through counselling and inter-generational healing programs') as projects aimed at psychological rehabilitation; and (3) 'holistic community rehabilitation' ('to facilitate the reintegration of groups of victims through vocational training and accelerated literacy') and 'livelihood support' ('to provide counselling integrated with income generating projects') as projects aimed to materially support victims and their families. See Trust Fund for Victims Program Overview, prepared by the Trust Fund for Victims, undated, at 3.

[164] This example was given by the Director of the Trust Fund for Victims, André Lapperière, during his lecture on 5 March 2008 at the T.M.C. Asser Institute, The Hague, the Netherlands.

Some other important observations that were made in the Board's notifications to the respective Chambers included the observation that since the Trust Fund for Victims is considering the needs of victims in the overall situations and not crimes allegedly committed by identified persons, its intention 'to undertake specified activities to address the identified needs does not pre-determine any issue to be determined by the Court, including the determination of the admissibility, the jurisdiction, nor violate the presumption of innocence or cause prejudice to the rights of the accused and a fair and impartial trial', as required under Regulation 50.[165] This point of view was also supported by the Prosecution and the Legal Representative of a number of victims recognised in the *DRC* situation.[166] Furthermore, the Board held that in order to have a maximum number of persons to benefit of the Trust Fund for Victims' assistance, the activities need to benefit groups of victims rather than individuals, and that such victims would not be restricted to those participating in the proceedings or those who appear before the Court as witnesses.[167] The Board also stressed that, in the light of Article 68 (1) of the Rome Statute on protective measures, the specified activities need to be implemented by intermediaries (competent organisations and experts in the field) in order to assure the safety of groups of victims who could be exposed if they are seen as having contact with the Court.[168] In addition, in order to preserve the victims' well-being, dignity and privacy (Article 68 (1) of the Rome Statute), the Trust Fund for Victims will need to take all measures to avoid discrimination (which could lead to new tensions between groups) and stigmatisation, often through identification, which is contrary to the aim of rehabilitation.[169] In order to respect the protective measures as

[165] Notification of TFV of 24 January 2008, *supra* note 157, para. 31. This decision was held to be in line with Principle 2 of the 1985 UN Declaration, which states that 'a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.' See, in a similar vein, also the Van Boven/Bassiouni Principles on the definition of victim.

[166] See Prosecution's observations on the 'Notification of the Board of Directors of the Trust Fund for Victims', *Situation in the DRC*, ICC-01/04-462, OTP, ICC, 20 February 2008, para. 7; and Observations of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06 and a/0228/06 on the Notification of the Board of Directors of the Trust Fund for Victims, *Situation in the DRC*, ICC-01/04-461, ICC, 20 February 2008, paras. 11-8. Otherwise, OPCD observations on the Notification of the Board of Directors of the Trust Fund for Victims, *Situation in the DRC*, ICC-01/04-458, OPCD, ICC, 20 February 2008.

[167] Notification of TFV of 24 January 2008, *supra* note 157, paras. 34-5. See also para. 52: 'the fact that a victim would benefit from the specified activities of the Trust Fund does not lead to the automatic conclusion that she/he is recognized as a victim who participates in the situation.'

[168] *Ibid.*, paras. 40-4. In the notification it is held in para. 41 that 'whereas this second mandate of the Trust Fund [assistance to victims] is detached from the judiciary process, the distinction in mandates between the Court and the Trust Fund is not properly understood by the overall population in the DRC.'

[169] *Ibid.*, paras. 45-9.

worded in Article 68 (1) of the Rome Statute, it has therefore been held that when the Trust Fund for Victims targets a group of victims rather than individuals, victims would be rehabilitated and/or supported in an anonymous way. That assuring the safety of victims is, however, not an easy task was demonstrated by the remark of the Board that recently threats had been received 'by potential intermediaries and beneficiaries as a result of the perceived connection to the Court's judiciary process'.[170]

On 19 March 2008, Pre-Trial Chamber II approved the proposed activities of the Board of Directors in the situation in Uganda.[171] In the decision, the Pre-Trial Chamber recognised the dual mandate of the Trust Fund for Victims and confirmed that 'the proposed activities are defined in general and non-discriminatory terms, without reference to any identified alleged perpetrator, specific crime or location or individually identified victim and thus they are not incompatible with the criteria laid down in regulation 50 (a) (ii) of the TFV Regulations.'[172] The Decision of Pre-Trial Chamber I in the *DRC* situation is a somewhat different, more complicated story. The Chamber informed the Board of the Trust Fund for Victims that the projects notified to the Chamber did not appear to pre-determine any issue to be determined by the Court. At the same time, the Chamber recommended that, before resorting to any other activities or projects, the TFV undertake, in accordance with its obligations under Regulation 56, a study evaluating and anticipating the resources which would be needed to execute an eventual reparation order in the cases pending before the Court pursuant to Article 75 of the Rome Statute.[173] Although this seems indeed to be the idea behind Regulation 56, it goes without saying that a low balance in the Trust Fund for Victims could endanger the so-called second mandate of the Trust Fund for Victims.

4.2 Some Interim Observations Regarding Reparation to Victims

Obtaining reparation is often an important reason for victims to participate in a trial. Although progress has been made as to the clarification of the concept of 'reparation', there are still uncertainties as to which principles of reparation the Court will apply. Also, how will the Court deal with large number of victims requesting reparation? In line with the approach of the Trust Fund for Victims, the Court might

[170] *Ibid.*, para. 58.
[171] Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification, *Situation in Uganda*, ICC-02/04-126, PTC II, ICC, 19 March 2008.
[172] *Ibid.*, at 3-5.
[173] Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund, *Situation in the DRC*, ICC-01/04-492, PTC I, ICC, 11 April 2008, at 11.

want to consider providing collective reparation to victims most of the time. Although the dual mandate of the Trust Fund for Victims has also been clarified, the notification process to the Chamber as well as the low balance in the Trust Fund for Victims may prove problematic for its mission in assisting victims to return to a dignified and productive life within their communities as soon as possible.

V. Challenges for the Court[174]

In section III one of the conclusions drawn was that practical experience of the general international protocols on victims' rights has proved that it is extremely difficult to translate the generally accepted standards into living realities in domestic legal systems. The same issue now has to be addressed with respect to the Rome Statute and its RPE. The model as such looks great. Yet, will the model work?

As far as the role of victims is concerned, a number of potentially big problems can be identified. These problems, or better challenges, concern the issues of participation, protection and reparation. Two related additional concerns are outreach and the attitude of the officials of the Court. After all, if no proper outreach by the Court is conducted, how can victims be informed about their right to participate, request reparation or means of protection available? One challenge all the items have in common is how to deal with large numbers of victims, which is mostly the situation before the Court. Also, reform on behalf of crime victims can only be achieved if and when the attitude of the officials operating the system is one supportive of change. These five issues and its ensuing challenges will be the topic of discussion in this final section.

1. Participation

The first and most obvious problem is the number of victims involved. Given the jurisdiction of the ICC, it is very likely that the crimes the Court will have to deal with will involve large numbers of victims. War crimes, crimes against humanity and genocide are synonymous with mass-victimisation. In most cases, the only question will be whether the numbers should be measured in the hundreds or in the thousands. It must be noted from the outset that criminal courts just do not have any experience with this range of numbers of victims. Domestic criminal justice systems are not equipped to handle claims of large numbers of victims. In many jurisdictions an escape clause has been introduced, allowing the court to refer multiple claims to the private law court system because inclusion in the criminal trial would interfere with a careful, fair

[174] This section is partly based on M. Groenhuijsen, 'Victims' Rights and the International Criminal Court: The Model of the Rome Statute and its Operation', *supra* note 5.

and speedy procedure. Against this background a purely individualistic approach at first sight looks like an illusion. A literal application of all the relevant provisions for each and every victim who has suffered from the crime which is prosecuted before the Court, like we are used to in traditional criminal justice settings, appears to be inconceivable. The examples of participation and reparation, the latter to be discussed in paragraph 3 below, quickly come to mind.

In traditional domestic systems of criminal justice the most frequently found participatory rights are linked to the status of *partie civile* (*e.g.* in France and many countries with a legal system rooted in the French tradition) or *Nebenkläger* (in Germany, the *Nebenkläger* is a sort of assistant prosecutor). These roles can not logically be performed by large numbers of victims. Yet, another common right to participate is the right to present a 'victim impact statement' to the court. The authors are not aware of any significant case in any country where this right was exercised by a large number of victims. Article 68 (3) of the Rome Statute holds that 'where the personal interests of the victims [plural] are affected, the Court shall permit their views and concerns to be presented and considered…' These views can also be presented by legal representatives. Now if this right were to be interpreted as applying to each and every individual in a case where hundreds or even thousands of victims are involved, no practicable way to handle the logistical implications can be easily seen. It would most likely result in chaos and massive delays and it could distort an uninterrupted fact-finding process. In short: this would clearly compromise a 'fair and expeditious trial' of the accused. In order to streamline the participation of large numbers of victims better, Rule 90 of the RPE determines: 'Where there are a number of victims, the Chamber may, for the purpose of ensuring the effectiveness of the proceedings, *request* [italics added] the victims or particular groups of victims ... to choose a common legal representative or representatives.' This line of reasoning is obviously sound. It begs the question though to what extent the victims can be compelled to join forces in this way. Liesbeth Zegveld analyses initial case-law in which the ICC gives a rather narrow (*i.e.* at first glance victim-friendly) interpretation to Rule 90: the rule only provides the Court with the power *to request* that the victims choose a common representative.[175] In this interpretation, the victims can decline the request and still retain their standing in court. Zegveld concurs with this decision of the court. One can wonder whether this position is tenable in the long run. If the number of victims is too large realistically to allow each and every one of them to present their views and concerns or have their views and concerns presented by their own

[175] L. Zegveld, 'Mass Claims before the International Criminal Court', in W. van Genugten and M. Scharf (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, *supra* note 5, discussing the 1 February 2007 Decision of Pre-Trial Chamber II (not made public).

legal representative, this interpretation is self-defeating.[176] It would most probably lead to unacceptable delays and fragmentation of the trial. And there is another danger involved. In anticipation of this kind of problems, the application procedure of Rule 89 could become even more restrictive than it is today. If that were to be the case, the victim-friendly interpretation of Rule 90 in the case-law of the Court would backfire and turn out to be counterproductive.

The first problem in making the ICC model a living reality was about the numbers of victims involved. The second problem is partly an extension of the first one. It is about the application procedure governed by Rule 89. Under domestic criminal procedure, it is usually relatively easy for victims to access the system. Except for unusual circumstances, a simple statement or declaration expressing the will to play a role in the proceedings suffices to grant the victim some standing. In other terms: in most jurisdictions the victim can gain a specific status during the procedure by unilateral action. During the course of the proceedings the victim will then be treated as a 'victim'.[177] It is important to underline that there is no such thing as the procedural standing of an 'alleged victim'. The protection offered to the defendant by the presumption of innocence does not have a mirror image in the sense that the victim shall only be acknowledged as such if and when the accused is found guilty in a court of law.[178]

Not so at the level of the ICC. In order to have an opportunity to present their views and concerns, victims have to make a written application to the Registrar, on which the relevant Chamber will then decide. The Chamber may reject the application if it considers that the person is not a victim or that the criteria set forth in Article 68 (3) are not otherwise fulfilled (Rule 89). Of course, this provision aims to prevent the Court system from being inundated by victims wishing to participate in the trial. The avalanche of potential participants has to be dealt with as expeditiously as possible. The question remains, however, to what extent this admission procedure corresponds to the initial objectives of allowing the victims to take part in the procedure. The relevant population will quite often not have the level of literacy that is common in Western, industrialised countries. On

[176] Perhaps a compromise solution might be to differentiate between sub-groups within more or less homogeneous clusters of victims.

[177] Or, alternatively, as a participant endowed with a derived status, such as the *'partie civile'* (France, Belgium and many others), the private prosecutor or as auxiliary prosecutor (*'Nebenkläger'* in Germany, Austria, and many others).

[178] Three different conceptualisations of the victim exist in this respect. Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note 9, at 30: 'A person who reports to the authorities and claims to be a victim should be presumed as such until proven otherwise in order to safeguard his legal rights. ... The guidelines of the Recommendation clearly show that it embraces the first conceptualization of the victim, which is theoretically justified by the victimological ground rule that the victim should be allowed to seek redress and participate in the criminal justice system.'

top of that, they are quite often faced with a language barrier and with a lack of legal knowledge. Can these victims be expected to complete an elaborate (17 pages) and complicated application form? Does the availability of Court-annexed personnel or representatives from NGOs to offer assistance in completing the form provide adequate protection of victims' interests?[179] This is at least subject to doubt.[180] The mechanism of this kind of admission procedure is likely to be a bureaucratic threshold which might easily turn out to be an insurmountable obstacle for large numbers of victims who deserve to be treated in a more sympathetic manner by the Court system.

2. Protection

As addressed in section III above, many national jurisdictions have achieved substantial progress in the areas of treatment and protection; in quite a few countries, police officers and prosecutors have learned to adapt their professional behaviour in order to take the victim's perspective into account. In the international context, the issue of protection is often more complicated, especially since the Court usually has to operate in volatile situations of ongoing conflict. Not only will the Court need to protect witnesses testifying before the Court, it will also need to offer protection to, most of the times, large numbers of victims that have requested participation. Practical solutions need to be found in order to deal with these large numbers of victims so that their voices will be heard. As discussed above, one such option is having one key person of a group of victims to reveal his or her identity to the benefit of the other victims that will thus retain anonymity. The practices before the *ad hoc* tribunals have shown that protection, including the treatment of victims (especially those of sexual violence) in court, is clearly no issue that was implemented easily, and the Court should therefore learn from these Tribunal experiences by, for example, establishing guidelines on the treatment of victims in court. In the end, it cannot be expected from victims that they put their lives at risk for giving their testimony or participating in court.

[179] Here one can identify a potential 'Catch 22' situation. Victims are not entitled to legal aid before they have been recognised and acknowledged as such; in practice, they are in dire need of such aid in order to pass the application procedure. Hence it is of paramount importance that the Pre-Trial Chamber has decided the OPCV can act before the victims have been properly recognised as such.

[180] Which is further compounded by the fact that in some regions (Sudan) victims are apparently deterred from filing applications by threats from (former) government officials.

3. Reparation

First of all, it has to be recalled that taking care of financial reparation has consistently proved to be the single most difficult part of domestic legal reform on behalf of victims. At the international level, the problems involved will multiply. As mentioned, the Court is supposed to establish principles relating to reparations, including restitution, compensation and rehabilitation. How are these principles going to look, considering the large number of victims involved and huge cultural diversity due to geographical backgrounds? How to incorporate traditionally incompatible views on many related issues, such as the standards for the assessment of damages, the question of whether or not to include moral damages, pain and suffering, etc.? Just a single concrete example: how best to financially assess the implications of sexual violence in different countries, cultures and religions?[181] According to Rule 97 of the RPE, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both. Given the large numbers of actual victims, adhering to the principle of individual reparation will inevitably lead to an element of caprice within the entire process. Conversely, if we abandon the notion of individual reparation, new opportunities – and new questions – will surface. It is easy to argue that collective reparation can take the form and shape of building hospitals or schools in damaged areas, providing for medical care etc. If that position were to be accepted, it inevitably leads to the question of how the ICC related reparation should be positioned *vis-à-vis* more general projects of humanitarian assistance. Could a Court-ordered reparation by the offender or reparation from the Trust Fund for Victims in any way be linked with mechanisms which are already in place, for example the projects of the World Bank? During the negotiations that lead to the Rome Statute these kinds of joint ventures were rejected. On the other hand it looks like a natural avenue to explore, since the alternative of reparations on an individualised basis does not appear to be very practical.

The Trust Fund for Victims, on the other hand, seems to start from the presumption that collective forms of reparation are the only possible answer to the massive victimisation caused by genocide, crimes against humanity or war crimes. As mentioned, not only will the Trust Fund for Victims implement reparation awards from the Court, it will also implement programmes that will assist victims of mass crimes in terms of physical and psychological rehabilitation as well as material support, which can already take place at the investigation stage. Yet, the road of the Trust Fund for Victims is not without obstacles or challenges either.

[181] A.-M. de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', (2007) 20 *Leiden Journal of International Law* 207-37.

One of such obstacles is caused by Regulation 50, which requires the Board to notify the Chamber of any projects it intends to implement. Apart from the fact that the needs of victims may be very pressing and the procedure of notification to the Chamber is rather time consuming (it can take up to 75 days), it is also questionable whether such requests are at all needed in light of the Trust Fund for Victims' independent mandate to assist victims through other resources not related to the judicial activities of the Court. Even though Regulation 50 was highly debated and finally became a compromise solution, thought should be given to amending this regulation.

Another problem faced by the Trust Fund for Victims concerns safety, non-discrimination and stigmatisation. In addition to targeting groups of victims, more outreach needs to be undertaken to explain the differences between the Court as a legal institution and the mission of the Trust Fund for Victims in providing assistance to victims unrelated to the judicial function of the Court. Finally, an often heard criticism is that the Trust Fund for Victims does not have adequate resources to assist the victims of mass crimes. Even though it would be good if a more rigorous funding campaign were to be conducted, some of the programmes already implemented by the Trust Fund for Victims show that a lot of money is not always needed in order to assist victims. Nevertheless, in light of Regulation 56, which stipulates that resources for an eventual reparation order may need to be reserved for this purpose, a low balance in the Trust Fund for Victims might ultimately leave the Trust Fund for Victims' second mandate, and thus many victims, empty-pocketed.

4. Outreach

In order to reach as many victims as possible so that they can apply for participation and assert their reparation claims, the Court – in practice the Victims' Participation and Reparations Section – is required to give adequate publicity to the Court's participation and reparation proceedings and may seek the assistance of States Parties and intergovernmental organisations for this purpose.[182] It is furthermore important that victims are also informed about the protective and special measures available, so that they can make an informed choice whether or not to participate or request for reparation.

Although the Court had a slow start where outreach is concerned, the outreach activities undertaken by the Court increased over the year 2007, particularly in the DRC and Uganda.[183] Outreach is essential to

[182] Rule 96 of the ICC RPE.

[183] The outreach activities of the Court for the different situations before the Court can be found at http://www.icc-cpi.int/outreach.html.

ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities. The lack of sufficient outreach at the *ad hoc* tribunals is exemplary in this. Yet, despite an increase in outreach activities, many victims in the situations concerned are still unaware of what the Court is about and how they can play a role in its proceedings. A good example is the lack of outreach conducted with regard to female survivors of sexual violence, a group that may be easily underrepresented in court if no extra attention is given to them. This may in particular be caused by the fact that many survivors of sexual violence suffer from stigmatisation or shame and often are the caretakers of a family. Since the Court's operation, outreach activities have generally been conducted without any specific strategies to reach women in the conflict situations. This seems, however, to be changing and several consultations with women have been taken place, including with regard to the *Darfur, DRC* and *Uganda* situations.[184] In sum, the role that victims may have before the ICC will only be fully enforced if adequate outreach strategies by the Court are undertaken.

5. Institutional Aspects

The fifth problem that looms ahead is of an institutional nature. It concerns the attitude of the agencies and authorities which make up the Court system. From domestic criminal justice systems it is known that reform on behalf of crime victims can only be achieved if and when the attitude of the officials operating the system is supportive of change.[185] In the ICC setting, the signals are mixed. On the one hand, the staff of the Victim and Witnesses Unit is mandated to provide training to all organs of the Court on victims' issues (Rules 16 and 17 of the RPE). This is supposed to enhance sensitivity and to ensure that the objectives of the provisions on victims' rights are actually attained. The question remains how realistic such an expectation is. The Trial Attorneys at the ICC and the Judges making up the Chambers are all veteran lawyers, many of them with a lifetime of trial experience behind them.[186] It is very likely that their views

[184] Women's Initiatives for Gender Justice, Gender Report Card 2007, at 32; ICC Press Release, The ICC organises open discussions in Bunia (Ituri) and Béni (North Kivu), 10 March 2008; and ICC Press Release, ICC involves women in the Acholi and Lango sub-regions of Northern Uganda in discussion about the Court, 14 July 2008, respectively.

[185] This has been documented extensively. For the police: J.-A. Wemmers, *Victims in the Criminal Justice System* (Amsterdam: Kugler, 1996). More generally: I. Waller, *Crime Victims: Doing Justice to their Support and Protection* (Helsinki: HEUNI, 2003) 48 *et seq.*; and M. Groenhuijsen, 'International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology', in R. Snyman and L. Davis (eds.), *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 333-51.

[186] As far as the qualifications of Judges is concerned, Article 36 (3) (b) of the Rome Statute states: 'Every candidate for election to the Court shall: (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge,

Continued

on the proper role of the victim during proceedings have taken shape during the formative years of their careers and can hardly be affected by a couple of afternoons of 'training' by VWU employees at the ICC. Given the wide discretionary powers of the Chambers in deciding on the proper application of victims' rights, it is to be expected that their long-held convictions will decisively influence the interpretation of the Rome Statute. It remains to be seen whether the application of the relevant provisions will be generous for the (potential) victims involved. These concerns are further compounded by the fact that during the first period of activity of the ICC the Prosecutor's Office has quickly acquired the reputation of doing virtually anything within its powers to marginalise the role of victims during the proceedings. Apparently, the Trial Attorneys do not consider it as a challenge to welcome victims in order to improve the quality of the trial. Instead, they radiate the rather traditional attitude that victims are some sort of nuisance imposed on them, who should be treated in a way which interferes as little as possible with their job proper. If this type of attitude is the dominant one in the years to come, it will be extremely hard to apply the provisions on victims' rights in the way it was envisaged by the drafters of the Rome Statute.

VI. Final Remarks

Obviously, the Court has a *sui generis* and unprecedented character as far as the role of victims is concerned. The Court needs to deal with large numbers of victims wishing to participate and/or request reparation. This is, admittedly, not a straightforward task but a challenging one. In order to implement victims' rights on the supranational criminal law level effectively, the Court needs to apply them in a practical manner and without compromising the rights of the accused. This entails, for example, that collective reparation to victims is likely to be the best solution in the majority of cases. Although the Court is still trying to find its balance in this process, in the end, it cannot be that the victims of mass crimes suffer as a consequence of bad implementation of these hard-fought rights in the Rome Statute and the RPE.

Putting the law concerning victims' rights into action requires, for one, a solid institutional structure at the ICC with officials supportive of victims' rights. In addition, instead of constantly trying to find the right approach towards certain victims' rights and issues in endlessly appearing and changing case-law, some substantial victims' issues preferably need to

prosecutor, advocate or in other similar capacity, in criminal proceedings; or; (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.' Therefore, not only individuals with a legal background in court can be elected as a Judge, but also individuals with a legal background in, *inter alia*, academia or diplomacy.

be regulated, such as the modalities of participation of victims and the treatment of victims in court. Although there is nothing wrong in having discretionary powers within the Chambers, with regard to some victims' rights and issues, it can be argued that a more solid legislative foundation might be preferable.