

Summer 2008

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### Recommended Citation

Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 Nw. J. INT'L HUM. RTS. 459 (2008).  
<http://scholarlycommons.law.northwestern.edu/njihr/vol6/iss3/4>

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# Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?

By Christine H. Chung\*

## I. INTRODUCTION

¶1 No single legal issue at the International Criminal Court (“ICC”) has garnered as much attention as the manner in which the ICC judges have interpreted the right of victims to participate in proceedings. It was a major innovation—many would say *the* major innovation—of the Court to grant to victims a right they had never previously enjoyed in any prior international criminal tribunal: the right to participate in court proceedings by expressing “views and concerns” through their own legal representatives. The first decision on the topic issued by the ICC judges, in January 2006, established that the unprecedented right would be interpreted expansively. Pre-Trial Chamber I held that victims would be granted a general right to participate in the investigation in the Democratic Republic of Congo (“DRC”), in addition to any future case, while conceding that the Rome Statute—the treaty which created the ICC—nowhere expressly required the granting of this general right. Since that decision, the Pre-Trial and Trial Chambers of the ICC have continued to endorse a broad approach to permitting victims’ participation, while failing to reach agreement on the boundaries of that participation, or the standards by which applications to participate should be evaluated.

¶2 The end of 2007 saw two significant developments. First, there was growing evidence, noted also by observers outside the ICC, that the system of victims’ participation established in the

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early decisions of the Court might be failing in its most central objective of providing effective participation to victims. Specifically, the first five hundred or so applications to participate in investigation and pre-trial proceedings had jammed in the machinery of the proceedings. These hundreds of applications were submitted by individuals among the massive numbers of victims of the conflicts under investigation by the ICC: in the Darfur region of The Sudan, the DRC, northern Uganda and the Central African Republic (“CAR”). The record of proceedings showed that applicants typically waited for over a year to learn whether they would obtain the “status of victim,” a status which conferred only eligibility to participate in specific proceedings. Less than a hundred victims had obtained even this theoretical right to participate nearly two years after the first decision on victims’ participation. From those eligible to participate, moreover, less than a handful of applicants had meaningfully participated in any specific ICC proceeding.

¶3 On January 23, 2008, two years after the first decision of Pre-Trial Chamber I, came the second development. Noting that various Chambers of the Court had interpreted the relevant provisions of the Rome Statute, the ICC Rules of Procedure and Evidence (“RPE”), and the Regulations of the ICC “in a significantly different manner,” pre-trial judges assigned to the Darfur and DRC situations granted leave to appeal the question of whether they had correctly interpreted the governing rules to permit them to grant a “procedural status of victim,” or the theoretical right to participate, during the investigative and pre-trial stages of proceedings.<sup>1</sup> The judges also sought, rather poignantly, given the persistent backlog of applications to participate, Appeals Chamber review on the question of: “how applications for participation at the investigation

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<sup>1</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-118, Decision on Request for Leave to Appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First Darfur Grant of Appeal]; Situation in the Democratic Republic of the Congo, Situation No. ICC-01/04-438, Decision on Request for Leave to Appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First DRC Grant of Appeal].

stage of a situation and the pre-trial stage of a case must be dealt with.”<sup>2</sup>

¶4 One ICC judge has cautioned against activism in broadening the victims’ participation right granted by the Rome Statute. On January 18, 2008, the Trial Chamber assigned to conduct the ICC’s first trial ruled that victims of any crime committed in the DRC and within the jurisdiction of the Court could potentially participate in the trial, although the trial itself involves only a single former DRC militia leader, Thomas Lubanga Dyilo (“Lubanga”), who faces charges of child conscription, child enlistment, and use of children in hostilities.<sup>3</sup> Writing in dissent, the Honorable René Blattman reasoned primarily that it transgressed “fundamental principles of criminal law, such as the principle of legality, to not link the status of victim and consequent rights of participation to the charges confirmed against the accused.”<sup>4</sup> Judge Blattman found it “necessary to state, first and foremost, . . . that victims’ participation is not a concession of the Bench, but rather a right accorded to victims by the [Rome] Statute.”<sup>5</sup>

¶5 This article posits that the framework for victims’ participation established in the first years of the ICC has proven to be unworkable and is falling short, most importantly, in delivering meaningful participation to victims, the intended beneficiaries. The source of the failing, moreover, has been precisely the tendency of the ICC’s judicial decisions to grant concessions rather than observe the compromises reached during the negotiation of the Rome Statute, when it was fully foreseen that the innovation of victim’s participation could, if poorly defined or administered, overwhelm the core mandate of prosecuting and trying perpetrators of atrocities. The record of the ICC’s early years demonstrates that thousands of pages and thousands of hours (likely representing a substantial number of euro), have been expended in delivering actual participation in proceedings on behalf of very few victims.

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<sup>2</sup> See First Darfur Grant of Appeal, *supra* note 1, at 8; First DRC Grant of Appeal, *supra* note 1, at 8.

<sup>3</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation, Public, ¶¶ 93-95 (Trial Chamber I, Jan. 18, 2008) [hereinafter Decision on *Lubanga* Trial Participation].

<sup>4</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Separate and Dissenting Opinion of Judge René Blattman to Decision on Victim’s Participation, Public, ¶ 21 (Appeals Chamber, Jan. 18, 2008) [hereinafter J. Blattman Dissent to Decision on *Lubanga* Trial Participation].

<sup>5</sup> See *id.* ¶ 13.

The call for new ideas or shifts in direction, including to the Appeals Chamber, is timely.

¶6

Although it was never expected that meaningful victims' participation would be incorporated into complex international criminal trials without difficulty, it would be unfortunate for the ICC to fail to adapt in response to experience gained. After describing the ICC's performance in providing meaningful victims' participation to date, and exploring the sources for the shortcomings in that performance, this article attempts to answer the question of how the ICC might alter its manner of "dealing with" applications to participate as victims in ICC proceedings. Finally, it is logical that ICC prosecutions will remain extremely narrow in scope, in relation to the underlying conflicts, criminality and victimization, and therefore that victims may continue to find participation in ICC proceedings a blunt instrument for fully vindicating their interests. The article accordingly suggests ways that victims and victim representatives might: (1) obtain more meaningful and extensive participation in ICC proceedings; and (2) better capitalize on the existence of ICC investigations and cases to disseminate views and concerns, inside and outside the Court, in the cause of bringing accountability and vindicating victims' interests.

## II. ICC JURISPRUDENCE ON VICTIMS' PARTICIPATION

¶7

At the time of the writing of this article, the true nature of the right being provided to individuals seeking to participate in ICC proceedings is the entitlement to stand in a queue, for longer than a year, to obtain a theoretical participation privilege which most likely will never be converted to an actual right to express views and concerns in court proceedings. The War Crimes Research Office of American University Washington College of Law ("WCRO"), in the first comprehensive review of the operation of the ICC victim participation framework, described in late 2007 that the ICC system has "consumed a substantial portion of the Court's resources since January 2006," while delivering "largely hypothetical" participation to a "limited number of victims," making it "questionable whether the Pre-Trial Chambers have struck a reasonably effective balance between the restorative goals of the ICC victim participation scheme and the [Rome Statute] drafters' con-

cerns about efficiency and fairness.”<sup>6</sup> Victims’ representatives are currently among those expressing doubt and concern about the workability of the ICC victim participation scheme.<sup>7</sup> To understand how this state of affairs came about, it is necessary to explore the development of the law regarding victims’ participation at the ICC. It is also helpful to trace the evolution of the parties’ objections to the emerging framework.

*A. The Negotiations Creating the ICC and the Balance Struck in the Rome Statute*

¶8

The issue of victims’ participation was prominent during the negotiations at which the Rome Statute took shape. Non-governmental organizations, including groups advocating the rights of victims, were indeed a powerful force in ensuring that the ICC became a reality.<sup>8</sup> Negotiators agreed upon the major innovation of conferring upon victims, for the first time in any internationalized criminal court, rights to participate in proceedings and to obtain reparations.<sup>9</sup> The granting of a right to participate in proceedings, independent of the right to obtain recompense, recog-

<sup>6</sup> WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASHINGTON COLL. OF LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT, 5 (2007) [hereinafter WCRO Report].

<sup>7</sup> See, e.g., *Sudan Victim Lawyers recount their experiences with the ICC so far*, ACCESS: VICTIMS’ RIGHTS BEFORE THE INTERNATIONAL CRIMINAL COURT, (Victims’ Rights Working Group, London, Eng.), Issue No. 9, Summer/Autumn 2007, at 1, 7 [hereinafter VRWG Article re Darfur Applicants]; Katy Glassborow, *Victim Participation in ICC Cases Jeopardised*, AFRICA REPORT NO. 148 (Institute of War and Peace Reporting, Washington, D.C.), Dec. 20, 2007 [hereinafter IWPR Report].

<sup>8</sup> See Marlies Glasius, *How Activists Shaped the Court*, THE INTERNATIONAL CRIMINAL COURT: AN END TO IMPUNITY? (Crimes of War Project), Dec. 2003, available at [http://www.crimesofwar.org/icc\\_magazine/icc-glasius.html](http://www.crimesofwar.org/icc_magazine/icc-glasius.html) (describing importance of non-governmental organizations in negotiations at Rome, including efforts by NGO coalitions formed to advocate on behalf of victims).

<sup>9</sup> See Rome Statute of the International Criminal Court, opened for signature July 17, 1998, art. 68(3), 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; Claude Jorda and Jérôme de Hemptinne, *The Status and Role of the Victim*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1387, 1388 (Antonio Cassese et al. eds., 2002) [hereinafter Jorda and de Hemptinne] (stating that the Rome Statute “appears to mark a new step forward . . . victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals. First they are able to take part in the criminal process . . . . Secondly, they are entitled to seek form the Court reparations . . .”).

nized that victims had a unique “voice” to raise in proceedings, and that any justice obtained in the ICC should have the nature of restoring dignity to victims in addition to seeking retribution.<sup>10</sup> Victims therefore obtained, in the text of the Rome Statute, the right to “express views and concerns,” through a legal representative, at proceedings at which their personal interests are affected.<sup>11</sup>

¶9

The consensus in favor of granting victims, quite literally, a “place at the table” in ICC proceedings, predictably was tempered by a view—equally widely considered and shared—that victims’ participation should not occur to a degree or in a manner that would undermine the core ICC mission of trying perpetrators of mass crimes. As one participant in the negotiations put it, “[i]t was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.”<sup>12</sup> The concern to protect the Court’s ability to function effectively in adjudicating cases recognized that victims share with other affected parties the strong interest that the ICC succeed in prosecuting cases and reaching judgments.<sup>13</sup> Drafters of the Rome Statute also logically had apprehensions that greater victims’ participation would undermine the rights of the defense<sup>14</sup> or upset the balance of roles between the prosecution and the defense.<sup>15</sup>

<sup>10</sup> See WCRO Report, *supra* note 6, at 8-11, 16-18, and sources cited therein.

<sup>11</sup> Rome Statute, *supra* note 9, art. 68(3) (stating in pertinent part, “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”).

<sup>12</sup> See Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 429 (Roy S. Lee ed., 2001) [hereinafter Fernández de Gurmendi].

<sup>13</sup> See, e.g., HUMAN RIGHTS WATCH, COMMENTARY TO THE SECOND PREPARATORY COMMISSION MEETING ON THE INTERNATIONAL CRIMINAL COURT, § 2 (1999) (“The interests of justice and the interests of victims are complementary. The overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done.”).

<sup>14</sup> See, e.g., Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 2001) [hereinafter Bitti and Friman] (“some delegations were also uncertain what impact such an individual role would have on the rights of the accused”).

<sup>15</sup> See, e.g., Jorda and de Hemptinne, *supra* note 9, at 1399 (“It is not a simple matter, however, to allow a third protagonist to play an active role in the adversarial proceedings. Since such proceedings are based on an already delicate

¶10 The right of participation granted in the Rome Statute therefore was both unprecedented yet consciously bounded. Victims obtained the status of “participants,” but not “parties.”<sup>16</sup> The RPE specified that at trials, for example, victims could be restricted to written submissions made by their legal representatives and would be permitted to question witnesses or experts or defendants, again through their representatives, only after submitting proposals to the Chamber and obtaining Chamber approval.<sup>17</sup> Victims were curbed from obtaining forms of participation that they enjoyed as *parties civiles* in certain civil law systems.<sup>18</sup> For example, they could not initiate prosecutions or compel the bringing of criminal cases, nor could they routinely obtain the evidence of the Prosecution or defense or call witnesses.<sup>19</sup>

¶11 As happened with many of the thorny issues discussed during negotiations at Rome, the task of more precisely defining the right of victims’ participation, and balancing that right with objectives of fairness and efficiency, was deferred for the consideration of the judges who would later be appointed. Article 68(3) of the Rome Statute, the sub-section granting the right of victims’ participation, provides, in pertinent part:

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equilibrium between two parties, there is a real danger that, unless the rights of victims are accompanied by the conferment on the judge of effective powers of control, the rights of the accused may be prejudiced and the trials considerably delayed.”).

<sup>16</sup> In the terminology of the Statute and Rules of Procedure and Evidence, the Prosecution and Defense are referred to as “parties” and participating victims as “participants.”

<sup>17</sup> Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3(2002), R. 91(2) & (3) [hereinafter RPE].

<sup>18</sup> In some civil law systems, a victim may act as a *partie civile*, a claimant authorized to pursue civil damages as part of the criminal case. See, e.g., Marion E. I. Brienen & Ernestine H. Hoegen, *Victims of Crime*, 22 EUR. CRIM. JUST. SYS. 27 (2000). The authority of victims in certain civil law jurisdictions can extend to requesting investigative steps, initiating cases against alleged perpetrators, questioning witnesses, and presenting evidence. See *id.* at 27-29.

<sup>19</sup> See Bitti and Friman, *supra* note 14, at 457 n.67 (“Contrary to what is the case in, for example, French and Swedish municipal systems, victims do not have the right under the Rome Statute to initiate the criminal proceedings.”); Jorda and de Hemptinne, *supra* note 9, at 1406 (“a victim does not enjoy the same rights as the other parties to the proceedings. He may not participate in the investigation undertaken by the Prosecutor, have access to the evidence gathered by the parties, nor call witnesses to testify at the hearing. Furthermore, he has no right of appeal . . .”).

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.<sup>20</sup>

¶12 The governing documents of the ICC—the Rome Statute and the RPE—offer concrete directives about victims’ participation at certain proceedings, such as proceedings relating to jurisdiction and admissibility questions,<sup>21</sup> confirmation hearings,<sup>22</sup> and trials.<sup>23</sup> The text of Art. 68(3), however, ensures that the ICC judges will determine the scope of victims’ participation, because it leaves “personal interests” undefined and calls upon the judiciary to decide the appropriateness of participation at different stages of the proceeding.

*B. The January 17, 2006 Decision of Pre-Trial Chamber I in the DRC Situation*

¶13 Against this backdrop, the decision taken on January 17, 2006 by Pre-Trial Chamber I, to grant victims a general right to participate in proceedings during the investigation of a “situation,”<sup>24</sup> was accurately seen to be a watershed decision of the fledgling Court. The first interpretation of Article 68(3) came in

<sup>20</sup> Rome Statute, *supra* note 9, art. 68(3).

<sup>21</sup> See Rome Statute, *supra* note 9, art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”); RPE, *supra* note 17, R. 59(1)(b) (directing the Registrar to inform victims who have communicated with the Court, when there is any question or challenge of jurisdiction or admissibility).

<sup>22</sup> See RPE, *supra* note 17, R. 92(3) (“In order to allow victims to apply for participation . . . the Court shall notify victims regarding its decision to hold a hearing to confirm charges . . .”).

<sup>23</sup> See RPE, *supra* note 17, R. 91(2) and 91(3)(a) & (b) (providing that legal representatives of victims who attend and participate at trial may be limited to written observations or submissions and may seek authorization to question witnesses and the accused).

<sup>24</sup> In the terminology of the Rome Statute, the subject matter of an investigation is a “situation,” see, e.g., Rome Statute, *supra* note 9, art. 13, and thus the two terms are synonymous.

the context of the DRC investigation, before the commencement of any ICC case or the naming of any defendant.

¶14

Pre-Trial Chamber I, led at the time by the Honorable Claude Jorda, expanded the victim's participation right: (1) beyond any definition foreseen or advocated by any commentator on the Rome Statute;<sup>25</sup> and (2) by the Chamber's own description, beyond any right required by the Statute's text. The ruling of Pre-Trial Chamber I was that participation by victims in the investigation was warranted because "victims are affected *in general* at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered."<sup>26</sup> The Chamber carefully disclaimed that Article 68(3) required that victims be permitted to participate during the investigation; it found instead that the provision "does not necessarily exclude the stage of investigation of a situation."<sup>27</sup> The Chamber found that the textual ellipsis was best treated by granting a general right of victims to participate in the investigation, because this broader participation was "consistent with the object and purpose of the victims participation regime established by the drafters of the Statue [sic] . . . ."<sup>28</sup> In particular, the Chamber noted that the ICC had been created as a result of "a debate that took place in the context of a growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law."<sup>29</sup> The Chamber found persuasive a trend it saw in cases from the European Court of Human Rights and the Inter-American Court of Human Rights to grant victims the right to participate in proceedings during the investigation stage, "to have the facts clarified and the perpetrators prosecuted," particularly when "the outcome of criminal proceed-

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<sup>25</sup> Claude Jorda himself had commented, before being appointed a judge of the ICC, that victims "may not participate in the investigation undertaken by the Prosecutor. . . ." Jorda and de Hemptinne, *supra* note 9, at 1406.

<sup>26</sup> Situation in the DRC, Situation No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public Redacted Version, ¶ 63 (Pre-Trial Chamber I, Jan. 17, 2006) [hereinafter 17 January 2006 DRC Decision] (emphasis added).

<sup>27</sup> *Id.* ¶ 38.

<sup>28</sup> *Id.* ¶ 50.

<sup>29</sup> *Id.*

ings is of decisive importance for obtaining reparations for the harm suffered.”<sup>30</sup>

¶15 The decision anticipated victims’ participation in a variety of investigation-phase proceedings. The decision ruled that victims might “be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.”<sup>31</sup> The decision opined that victims could potentially participate in proceedings relating to the protection of victims and witnesses and the preservation of evidence, and in other proceedings initiated by the Prosecution or defense.<sup>32</sup> Pre-Trial Chamber I granted to victims vis-à-vis the investigation or situation the right to seek “specific measures,” without further defining what those measures might be.<sup>33</sup>

¶16 Pre-Trial Chamber I interpreted in a narrow fashion its obligation under Article 68(3) to disallow victims’ participation that is prejudicial to the rights of the accused or to a fair and impartial trial. The Pre-Trial Chamber disclaimed any need to consider whether the general right to participate in the investigation phase itself implicated or impaired fairness, efficiency, or the rights of the defense.<sup>34</sup> This was because, in the Chamber’s view, victims’ participation during the investigation phase “does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security.”<sup>35</sup> The Chamber determined that any prejudice to the defense or to fairness or efficiency could instead be regulated by determining, on a case-by-case basis, the appropriate “modalities,” or methods of participation, when victims sought to intervene in particular investigation-stage proceedings.<sup>36</sup>

¶17 The result of Pre-Trial Chamber I’s ruling was to grant to six applicants what it termed “the status of victim,” or the general right to participate during the DRC investigation phase, in the absence of any request to participate in any particular investigation-phase proceeding, and before any case in the DRC investigation had

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<sup>30</sup> See *id.* ¶¶ 50-53, 63.

<sup>31</sup> *Id.* ¶ 71.

<sup>32</sup> See *id.* ¶¶ 73-74.

<sup>33</sup> See *id.* at 42.

<sup>34</sup> See *id.* ¶ 57.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* ¶¶ 57, 70.

commenced.<sup>37</sup> Given the circumstance that the DRC investigation extended to all crimes within the Court's jurisdiction which might have been committed within the territory of the DRC since July 1, 2002, the Chamber granted the right to participate based on reasoning that the six applicants established "grounds to believe" that they had suffered harm resulting from some crime within the ICC's jurisdiction (i.e., genocide, war crimes, or crimes against humanity) and committed somewhere in the DRC since July 1, 2002.<sup>38</sup> The Chamber reasoned that the burden of proof of "grounds to believe" was appropriate because that same low standard triggered another right during the investigation phase.<sup>39</sup> Specifically, a witness' entitlement to be warned about the right against self-incrimination, and to counsel, under Article 55(2), applies when the Prosecutor finds "grounds to believe" that the witness has committed a crime within the jurisdiction of the Court.<sup>40</sup>

¶18

After the first case of the DRC investigation commenced, with the arrest of Thomas Lubanga Dyilo in March 2006, Pre-Trial Chamber I invited views on whether the same six applicants should be granted the right to participate in the *Lubanga* case.<sup>41</sup> The Chamber ruled, after hearing from the parties and the applicants' representative, that to qualify to participate in the case, the applicants would have to meet the much more stringent standard of demonstrating "that a sufficient causal link exists between the harm they suffered and the crimes . . . for which the Chamber has issued an arrest warrant."<sup>42</sup> The six applicants failed to qualify to participate in the case, and thus it became clear that they were not victims of the specific crimes with which Lubanga was charged: child conscription, child enlistment or use of children in hostilities.

¶19

By the time Lubanga's confirmation hearing was held, in November 2006, four other victims of the DRC conflict had obtained the "status of victim" in the *Lubanga* case.<sup>43</sup> These appli-

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<sup>37</sup> See *id.* at 41.

<sup>38</sup> See *id.* ¶¶ 94, 98, 102-86.

<sup>39</sup> See *id.* ¶ 98.

<sup>40</sup> See *id.*

<sup>41</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-172-tEN, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, Public Redacted Version, 2-3 (Pre-Trial Chamber I, June 29, 2006) [hereinafter DRC Decision on Case Participation of VPRS 1 to VPRS 6].

<sup>42</sup> See *id.* at 6.

<sup>43</sup> Situation in the DRC, Situation No. ICC-01/04-177-tENG, Decision on the

cants qualified for participation in the case because they established that their sons had been conscripted or enlisted by Lubanga's armed group, the *Union des Patriotes Congolaises* ("UPC") during late 2002 or early 2003, the time periods at issue in Lubanga's arrest warrant.<sup>44</sup> The four victims, whose applications had been culled from over seventy applications to participate in the case considered by Pre-Trial Chamber I,<sup>45</sup> expressed views and concerns through representatives in Lubanga's confirmation hearing, held in late 2006.<sup>46</sup>

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Applications for Participation in the Proceedings 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, Public, 10, 12, 13, 16 (Pre-Trial Chamber I, July 31, 2006) [hereinafter 31 July 2006 *Lubanga* Case Decision] (admitting three applicants to participate in *Lubanga* case and DRC situation); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-601-tEN, Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06, and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Public, 12-13 (Pre-Trial Chamber I, Oct. 20, 2006) [hereinafter 20 October 2006 *Lubanga* Case Decision] (admitting one applicant to participate in *Lubanga* case).

<sup>44</sup> See 31 July 2006 *Lubanga* Case Decision, *supra* note 43, at 8-13, 16; 20 October 2006 *Lubanga* Case Decision, *supra* note 43, at 11-12, 13. The applicants were held to the standard of establishing "reasonable grounds to believe" victimization resulted from a crime charged in the arrest warrant. See 31 July 2006 *Lubanga* Case Decision, *supra* note 43, at 9; 20 October 2006 *Lubanga* Case Decision, *supra* note 43, at 12. This standard for participation in case proceedings had been adopted in the DRC Decision on Case Participation of VPRS 1 to VPRS 6, *supra* note 41, at 6, presumably based on reasoning that the applicants should meet the same burden the Prosecutor had satisfied obtaining the arrest warrant that had commenced the case. See Rome Statute, *supra* note 9, art. 58(1)(a) (providing that warrant issuance will be conditioned upon finding of "reasonable grounds to believe" that the person whose arrest or appearance is sought has committed crimes within the jurisdiction of the Court).

<sup>45</sup> See DRC Decision on Case Participation of VPRS 1 to VPRS 6, *supra* note 41, at 8-9 (denying participation to six applicants); 31 July 2006 *Lubanga* Case Decision, *supra* note 43, at 16 (granting participation to three applicants); 20 October 2006 *Lubanga* Case Decision, *supra* note 43, at 13 (granting participation to one of sixty-five applications considered).

<sup>46</sup> See 20 October 2006 *Lubanga* Case Decision, *supra* note 43, at 13; Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, Public Redacted Version with Annex I, ¶¶ 30-31 (Pre-Trial Chamber I, Jan. 29, 2007) (specifying dates of hearing and submissions of victims' representatives).

*C. The Subsequent Decisions of the Pre-Trial Chambers in the Northern Uganda and Darfur Situations*

¶20 In subsequent decisions, judges of the Pre-Trial Chambers sitting in the investigations in northern Uganda and in Darfur joined the view that it was appropriate to grant a general right to participate in investigations. These decisions stated more explicitly that the participation right remained hypothetical, pending a separate determination of the propriety of participation in a specific proceeding. The Chambers also defined victim participation standards differently than the January 17, 2006 decision of Pre-Trial Chamber I.

¶21 The decision in the Uganda situation was issued on August 10, 2007, more than a year and a half after Pre-Trial Chamber I's decision.<sup>47</sup> By that time, five arrest warrants in the case *Prosecutor v. Joseph Kony* had been made public, in October 2005,<sup>48</sup> but no defendant had been arrested.

¶22 The Single Judge assigned by Pre-Trial Chamber II to manage victims' issues<sup>49</sup> in the Uganda situation affirmed the "broad approach" of granting a general right of victims to participate in the investigation phase.<sup>50</sup> The August 10, 2007 decision was made in the context of deciding forty-nine applications, submitted from June to November 2006, by individuals seeking to participate in the Uganda investigation and the *Kony* case.<sup>51</sup> Like Pre-Trial Chamber I, the Single Judge determined that participation at the investigation stage was not *required* by the Rome Statute, but instead "was not excluded from" the scope of Article 68(3)<sup>52</sup> and remained "consistent with" the object and purpose of the Rome

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<sup>47</sup> Situation in Uganda, Situation No. ICC-02/04-101, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06, Public Redacted Version (Pre-Trial Chamber II, Aug. 10, 2007) [hereinafter 10 August 2007 Uganda Decision].

<sup>48</sup> ICC Press Release, Warrants of Arrest Unsealed Against Five LRA Commanders, ICC-20051014-110-EN (Oct. 14, 2005) *available at* [http://www.icc-cpi.int/pressrelease\\_details&id=114&l=ehtml](http://www.icc-cpi.int/pressrelease_details&id=114&l=ehtml) [hereinafter ICC Press Release re Uganda Warrants].

<sup>49</sup> See 10 August 2007 Uganda Decision, *supra* note 47. A judge acts as Single Judge pursuant to appointment of the Chamber, see *id.* at 2, and thus his or her decision is equal to that of the Chamber itself. The 10 August 2007 Uganda Decision was rendered by Judge Mauro Politi.

<sup>50</sup> See *id.* ¶ 83.

<sup>51</sup> See *id.* at 2-3 & ¶ 2.

<sup>52</sup> *Id.* ¶ 7.

Statute.<sup>53</sup> While agreeing on the existence of the general right, however, the Single Judge believed it “critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victims’ participation” to “specify[] the nature and scope of the proceedings in which victims may participate in the context of a situation, prior to, and/or irrespective of, a case . . . .”<sup>54</sup> The decision thus undertook to provide a non-exhaustive list of proceedings in which victims might expect to participate.<sup>55</sup> Some of the proceedings on the list, however, were ones in which victims could have expected to participate in any event, because the Rome Statute specifies them as proceedings in which victims’ views must be sought.<sup>56</sup> The Single Judge proposed new possibilities of victim participation, for example, in proceedings relating to protective measures for victims or the preservation of evidence, even “when it would still be unknown whether the evidence to be preserved refers to an incident which will be the subject of a warrant of arrest or summons to appear.”<sup>57</sup>

¶23 The decision in the northern Uganda situation committed the Chambers to undertake two separate case-by-case inquiries in relation to any application to participate in the investigation: first, to determine whether the “status of victim” could be granted vis-à-vis an investigation, and second, to determine whether that “victim” may participate in any given investigation-phase proceeding without impairing fairness or efficiency.<sup>58</sup> This aspect of the Single Judge’s decision was consistent with the January 17, 2006 decision of Pre-Trial Chamber I, which had also deferred fairness and efficiency considerations. The Single Judge’s decision, however, added a requirement to the second step of the inquiry by holding that even an applicant granted the theoretical right to participate in

<sup>53</sup> *Id.* ¶ 7 (quoting 17 January 2006 DRC Decision, *supra* note 26, ¶ 50).

<sup>54</sup> *Id.* ¶ 88.

<sup>55</sup> *See id.*

<sup>56</sup> *See, e.g., id.* ¶¶ 90-95 (discussing right of victims under Arts. 15, 19, and Rule 92(2) to be heard when Prosecutor commences investigation *proprio motu*, when questions relating to jurisdiction or admissibility are raised, or when the Prosecutor determines not to investigate or prosecute based on interests of justice concerns under Art. 53).

<sup>57</sup> *See id.* ¶¶ 96-101.

<sup>58</sup> *See id.* ¶ 83 (stating that the “only requirement” for granting the status of victim “would be that applicant victims claim to have suffered harm as a consequence of events allegedly qualifying as crimes within the jurisdiction of the Court that, while encompassed in the scope of the situation, are not, or are yet to be, the subject matter of a case.”).

investigation-phase proceedings, based on the general interests of victims in investigations, would additionally “need to indicate how [his or her] ‘personal interests’ could be affected in relation to proceedings in which [he or she] may participate, despite the fact that no case . . . is (as yet) under judicial scrutiny.”<sup>59</sup> The Single Judge thus found that whether the Chamber would grant victim participation in a specific investigation-stage proceeding would depend, “not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question,” as well as potential effects on fairness and efficiency.<sup>60</sup>

¶24 This legal rule, which was not further explained, appeared to echo, without citing, a prior ruling of the Appeals Chamber in the *Lubanga* case. In a decision dated June 13, 2007, the Appeals Chamber had decided that the four victims participating in the *Lubanga* case would *not* be permitted to submit views and concerns on the question of whether the Appeals Chamber would grant the defense an appeal from the Pre-Trial Chamber decision confirming the charges against Lubanga.<sup>61</sup> The Appeals Chamber had found that the victims had failed to demonstrate an effect on their personal interests, despite their claims: (1) that the appeal affected whether the case would proceed against Lubanga; and (2) that their participation in the confirmation hearing itself rendered it impossible that they could not participate in an appeal arising from that hearing.<sup>62</sup> The Appeals Chamber held that “whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis.”<sup>63</sup> The Appeals Chamber also had noted that victims would be held to demonstrate, in particular, that the interests they assert do not “belong instead to the role assigned to the Prosecutor.”<sup>64</sup>

¶25 The Single Judge in the Uganda situation approached the applicant’s burden of proof in the same manner as Pre-Trial Chamber I, but did not agree on the terminology of “grounds to

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<sup>59</sup> *Id.* ¶ 89.

<sup>60</sup> *See id.* ¶¶ 89, 103.

<sup>61</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, Public, ¶ 29 (June 13, 2007).

<sup>62</sup> *See id.* ¶¶ 10-11.

<sup>63</sup> *Id.* ¶ 28.

<sup>64</sup> *Id.*

believe.”<sup>65</sup> Rather, the Single Judge characterized the test as one requiring “intrinsic coherence” of the applicant’s claim to have suffered from a crime within the scope of the ICC investigation.<sup>66</sup> The Single Judge also took up a matter not addressed in detail in the Pre-Trial Chamber I decision: the forms of identification sufficient to prove an applicant’s identity. The Single Judge determined that applicants could not qualify for participation, “in principle,” without first submitting proof of identity issued by a “recognized public authority.”<sup>67</sup> Using this rule, the Single Judge deferred decisions on applications supported by less formal forms of proof of identity.<sup>68</sup>

¶26

The Single Judge found, upon applying the legal standards announced in his decision, that only two of the forty-nine applicants had properly established a claim to have suffered harm as a result of crimes committed since July 1, 2002 in northern Uganda, and thus should be granted the “status of victim” vis-a-vis the investigation.<sup>69</sup> The Single Judge also determined that six of the forty-nine applicants should be granted the “status of victim” in the *Kony* case.<sup>70</sup> In making determinations about eligibility to participate in the case, the Single Judge applied the same test as had Pre-Trial Chamber I. Thus, the six successful applicants had demonstrated that they had suffered from one of the crimes charged in the warrants of arrest in the case.<sup>71</sup> In the *Kony* case, five leaders of the Lord’s Resistance Army, an armed rebel group, had been charged in thirty-three counts for their role in six of the hundreds

<sup>65</sup> 10 August 2007 Uganda Decision, *supra* note 47, ¶ 15.

<sup>66</sup> *See id.* The Single Judge imposed the additional requirement that applicants to participate in the situation must establish “to a high degree of probability the occurrence of incidents related by the applicants, both in temporal and territorial terms.” *Id.* ¶ 106. The requirement could be satisfied, in the Single Judge’s view, by the submission of information from the applicant or the Registry that the incidents during which the applicants claimed to have suffered harm in fact occurred. *See id.*

<sup>67</sup> *See id.* ¶ 16.

<sup>68</sup> *See id.* ¶¶ 109-11. The decision of the Single Judge directed the Victims’ Participation and Reparations Section (“VPRS”) to inform the applicants whose petitions had been deferred of the deficiencies in their applications. *See id.* at 61.

<sup>69</sup> *See id.* at 61. One of the case victims was also admitted as a situation victim. *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* ¶¶ 9, 10 (describing necessity that victim have been involved in crime charged) & 30, 39, 49, 59, 66, 75 (granting participation in case to applicants who related having been victimized as a result of “incidents . . . included in the warrants of arrest issued in the Case”).

of attacks allegedly carried out in northern Uganda after July 1, 2002.<sup>72</sup>

¶27 The Single Judge deferred consideration of the vast majority of the applications—forty-two in total—pending submission of additional information by the applicants and/or the Registry.<sup>73</sup> In March 2008, seven months after his first decision, the Single Judge revisited the deferred applications, following the submission of further information by the Registry.<sup>74</sup> The result of this evaluation was the adjudication of another fifteen of the original forty-nine applications, based on the Single Judge’s decision to “lower” the requirements for forms of identification which would be deemed reliable, in light of “the factual circumstances in the region” such as widespread reliance on non-official forms of identification.<sup>75</sup>

¶28 The Pre-Trial Chamber assigned to the Darfur situation issued on December 3, 2007 its first decision regarding standards it would apply in deciding applications to participate.<sup>76</sup> The Chamber was Pre-Trial Chamber I, but of a different membership because of the intervening retirement of Judge Jorda.<sup>77</sup> In the Darfur

<sup>72</sup> ICC Press Release re Uganda Warrants, *supra* note 48.

<sup>73</sup> 10 August 2007 Uganda Decision, *supra* note 47, at 62.

<sup>74</sup> Situation in Uganda, Situation No. ICC-02/04-125, Decision on Victims’ Application 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, Public Redacted Version (Pre-Trial Chamber II, Mar. 14, 2008) [hereinafter Second Decision re Uganda Participation].

<sup>75</sup> See *id.* at 70-71 & ¶¶ 4, 6. The Second Decision re Uganda Participation has been appealed by *ad hoc* defense counsel. See Situation in Uganda, Situation No. ICC-02/04-128-tENG, Defence Application for Leave to Appeal *the Decision on Victims’ Applications for Participation* Issued on 14 March 2008, Public (Pre-Trial Chamber II, Mar. 25, 2008) [hereinafter Defense Request for Leave to Appeal Second Decision re Uganda Participation] (challenging existence of general right to participate in the investigation). The OTP has stated that it does not oppose the application. See Situation in Uganda, Situation No. ICC-02/04-128, Prosecution’s Response to Defence’s Request for Leave to Appeal the Single Judge’s 14 March 2008 Decision on the Applications for Participation in the Proceedings, Public, ¶ 10 (Mar. 31, 2008).

<sup>76</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-110, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Public (Pre-Trial Chamber I, Dec. 3, 2007) [hereinafter 3 December 2007 Darfur Decision on OPCD Requests for Addt’l and Exculpatory Information].

<sup>77</sup> The Chamber was then composed of Judge Akua Kuenyehia, Judge Anita Ušacka, and Judge Sylvia Steiner. See Situation in Darfur, Sudan, Situation No.

situation, the case *Prosecutor v. Ahmad Harun* had commenced, but again, no defendants were in custody, and therefore the Office of Public Counsel for the Defense (“OPCD”), a unit of the Registry, had been authorized to file observations regarding victims’ applications on behalf of future defendants.<sup>78</sup> In relation to some of the first applications to participate in the Darfur situation and case, the OPCD filed requests that the applicants and the Office of the Prosecutor (“OTP”) be required to provide information that might tend to undermine the credibility of the allegations of the applicants.<sup>79</sup> The Single Judge charged with managing victim-related matters denied these requests in the December 3, 2007 decision and, in the course of doing so, affirmed that “there is a *procedural status of victim* in relation to situation and case proceedings before the Pre-Trial Chamber.”<sup>80</sup> The Single Judge affirmed, without extended discussion, that she would follow the ruling of Pre-Trial Chamber I in deeming the stage of investigation of a situation to be an appropriate stage for victim participation.<sup>81</sup>

¶29

Three days later, the Single Judge issued a decision in which she granted “the procedural status of victim,” vis-à-vis the investigation, to eleven applicants.<sup>82</sup> A total of twenty-one applications

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ICC-02/05-83, Decision Replacing a Judge in Pre-Trial Chamber I, Public (Presidency, June 22, 2007).

<sup>78</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-74, Decision Authorising the Filing of Observations on Applications for Participation in the Proceedings a/0011/06 to a/0015/06, Public, 3 (Pre-Trial Chamber I, May 23, 2007).

<sup>79</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-95, Public Redacted Version of Request for the Single Judge to Order the Production of Relevant Supporting Documentation Pursuant to Rule 86(2)(e), Public (Aug. 21, 2007) [hereinafter OPCD Darfur Request for Addt’l Information from Applicants]; Situation in the Darfur, Sudan, Situation No. ICC-02/05-97, Request for the Single Judge to Order the Prosecutor to Disclose Exculpatory Materials, Public (Aug. 24, 2007) [hereinafter OPCD Darfur Request for Exculpatory Materials].

<sup>80</sup> See 3 December 2007 Darfur Decision on OPCD Requests for Addt’l and Exculpatory Information, *supra* note 76, ¶ 2 (emphasis added). The Single Judge was Judge Akua Kuenyehia.

<sup>81</sup> See *id.* The OPCD later argued that the lack of reasoning was itself a ground of appeal, and that the Single Judge appeared wrongly to have believed that the 17 January 2006 DRC Decision was binding in the Darfur situation. See Situation in Darfur, Sudan, Situation No. ICC-02/05-113, Request for Leave to Appeal the “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,” Public, ¶ 15 & n.9 (Dec. 12, 2007).

<sup>82</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-111-Corr, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to 1/015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Public, 3-5, 22-23 (Pre-Trial Chamber I, Dec. 14, 2007)

had been submitted to the Court between June 2006 and July 2007, and each applicant had sought to participate in the situation and case.<sup>83</sup> The Single Judge deferred consideration of the applicants' requests to participate in the case.<sup>84</sup> The eleven applicants that obtained the "status of victim" vis-à-vis the investigation were deemed to have established "grounds to believe" that they suffered harm from crimes within the jurisdiction of the Court and committed in Darfur.<sup>85</sup> The Single Judge denied ten applicants the right to participate in the investigation, on grounds, for example, that two applicants were deceased, and that other applicants had not presented adequate proof of relation to the victims on whose behalf they claimed to act.<sup>86</sup> Two of the ten applicants denied the right to participate were invited to submit missing or supplementary information.<sup>87</sup> The Single Judge gave notice of the proofs of identity that would be deemed acceptable in the Darfur situation.<sup>88</sup>

¶30

The Single Judge's decision in the Darfur situation adopted the framework of the "two-stage qualification system" envisioned by the Pre-Trial Chamber in its January 17, 2006 decision in the DRC situation. Thus, she emphasized that even applicants granted the procedural "status of victim" would need to demonstrate, in relation to any future proceeding in which they might seek to participate, that participation could occur "in a manner which is not prejudicial to or inconsistent with the rights of the accused."<sup>89</sup> The Single Judge, however, rejected the views of the Appeals Chamber and the Single Judge in the Uganda situation that effect on "personal interests" of victims must be re-assessed in the context of the particular proceeding in which a victim sought to participate. Instead, the December 6, 2007 decision stated that "the assessment of

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[hereinafter 6 December 2007 Darfur Decision]. The decision was re-issued by means of the Corrigendum, dated 14 December 2007, which does not acknowledge that the original decision was issued on December 6, 2007.

<sup>83</sup> See *id.* at 3-5 & ¶ 8.

<sup>84</sup> See *id.* ¶ 8 ("The Single Judge also notes that although all of the Applicants have requested to participate in all stages of proceedings, she will, at this stage, only examine whether the Applicants fulfil [sic] the criteria to be granted the procedural status of victims at the investigation stage of the Situation in Darfur, Sudan . . .") (citation omitted).

<sup>85</sup> See, e.g., *id.* ¶¶ 45-47.

<sup>86</sup> See *id.* at 23 & ¶¶ 33, 35, 36.

<sup>87</sup> See *id.* ¶¶ 31, 33 & at 23.

<sup>88</sup> See *id.* ¶ 28.

<sup>89</sup> See *id.* ¶ 14.

the personal interests of the victims . . . is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim.”<sup>90</sup>

*D. The January 18, 2008 Trial Chamber Decision Regarding Participation in the Lubanga Trial*

¶31 Just after each of the Pre-Trial Chambers in the DRC, northern Uganda and Darfur situations had completed furnishing their decisions, the first active Trial Chamber, sitting on the *Lubanga* case, issued a “Decision on Victims’ Participation,” dated January 18, 2008.<sup>91</sup> The decision of Trial Chamber I knocked away one of the linchpins of the existing jurisprudence on victims’ participation, by rejecting *sua sponte* the prior rulings of Pre-Trial Chamber I in the DRC situation and of the Single Judge in the Uganda situation that the status of victim, insofar as a case was concerned, should only be granted to victims of the crimes charged in arrest warrants.<sup>92</sup>

¶32 The majority opinion, joined by the Honorable Adrian Fulford and Honorable Elizabeth Odio Benito, stated the intention to “provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings.”<sup>93</sup> As of the date of the Trial Chamber decision, there were still only four victims to whom the Chamber had granted the right to participate in any proceeding in the *Lubanga* case, despite the pendency of scores of applications to participate in the case, some filed as early as the fall of 2006,<sup>94</sup> and the approaching trial date of March 31, 2008.<sup>95</sup> The majority opinion did not discuss, or

<sup>90</sup> *Id.* ¶ 13.

<sup>91</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3.

<sup>92</sup> Compare *id.* ¶¶ 93-95 with, e.g., DRC Decision on Case Participation of VPRS 1 to VPRS, *supra* note 41, at 6 (“at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant”); 10 August 2007 Uganda Decision, *supra* note 47, ¶¶ 9, 30, 39, 49, 59, 66, 75 (applying standard of requiring applicant to have suffered harm from crimes which “appear to be included in the warrants of arrest issued in the Case”).

<sup>93</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3, ¶ 84.

<sup>94</sup> See *id.* at 1 (referencing as participants Victims a/0001/06 to a/0003/06 and a/0105/06); discussion *infra* in Part III.A (relating to number of pending applications).

<sup>95</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1019,

even cite, any of the prior decisions of the Pre-Trial Chambers in which those Chambers had ruled that the status of victim vis-à-vis a case would be limited to applicants who alleged harm resulting from the charges prosecuted in the Court. The majority held that an applicant would be entitled to “potentially participate” in a case—i.e., obtain an entitlement analogous to the right the Pre-Trial Chambers had called the “status of victim”—if he or she was “a victim of *any* crime falling within the jurisdiction of the Court.”<sup>96</sup> This ruling lowered the standard for granting the “status of victim” vis-à-vis a case, at a minimum, to the standard which until then had been applied to grant the “status of victim” vis-à-vis a situation.<sup>97</sup>

¶33 The majority reasoned that Rule 85(a) of the RPE, which defined the term “victims” for the purposes of the Statute and the RPE, provided that “victims” were “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>98</sup> The majority opined that because there was no further requirement set forth in Rule 85(a) that the harm to the victim must have resulted from the crimes prosecuted in the ICC, no such limitation could lawfully be imposed.<sup>99</sup> The majority also found support for its broad definition of “victim” in Principles 8 and 9 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly in 2005

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Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, Public, ¶ 29 (Trial Chamber I, Nov. 9, 2007).

<sup>96</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3, ¶ 95 (emphasis added).

<sup>97</sup> The standard may even be lower than that used by the Pre-Trial Chambers to grant the “status of victim” and “procedural status of victim” to applicants to participate in the investigation, because the majority opinion does not limit the potential participation to applicants who allege crimes within the same situation. See J. Blattman Dissent to Decision on *Lubanga* Trial Participation, *supra* note 4, ¶ 9 (“in the Majority opinion there seems to be a re-categorisation of victims who are related neither to the situation nor to the case”). As is described *infra* in notes 102-05 and in the accompanying text, the second inquiry envisioned by the majority opinion is to determine if there is a “real evidential link” between the victim and the evidence the Court will be considering at trial. It is not inconceivable that a victim of crimes within the jurisdiction of the Court and committed in Uganda, for example, could have evidence or information relating to the *Lubanga* trial.

<sup>98</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3, ¶ 93.

<sup>99</sup> See *id.*

(“Basic Victims’ Principles”).<sup>100</sup> Those Principles provided that victims were persons “who individually or collectively suffered harm . . . through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law,” without regard to “whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted . . . .”<sup>101</sup>

¶34 While substantially removing boundaries from the “status of victim” in a case, the majority stated that actual participation at trial would be limited by imposing a requirement that an applicant demonstrate credible grounds to infer either: (1) a “real evidential link” between the evidence considered by the Chamber during Lubanga’s trial and himself or herself; and (2) that his or her personal interests would otherwise be affected because those interests “are in a real sense engaged” by “an issue arising” during the trial.<sup>102</sup> In requiring applicants to demonstrate, in a second step, links between their proposed participation and the evidence and issues likely to arise at trial, the reasoning of the majority openly favored applicants who would also qualify as witnesses. The majority indeed ruled that “the right to introduce evidence during trials before the Court is not limited to the parties,”<sup>103</sup> and gave as examples of victims who would be permitted to participate at trial those who were “involve[d] in or presen[t] at a particular incident which the Chamber is considering,” or who “suffered identifiable harm” from such an incident.<sup>104</sup> The Chamber declared it “critical to emphasise and repeat that for victims to participate in this trial these interests must relate to *the evidence and the issues* the Chamber will be considering in *its investigation* of the charges brought against Mr Thomas Lubanga Dyilo . . . .”<sup>105</sup>

¶35 The Trial Chamber’s majority opinion triggered the separate and dissenting opinion of Judge Blattman referenced in the Introduction above. Judge Blattman noted that he harbored “grave con-

<sup>100</sup> See *id.* ¶¶ 35, 92.

<sup>101</sup> See *id.* ¶ 35 (quoting Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Principles 8 & 9 (Dec. 16, 2005)).

<sup>102</sup> See *id.* ¶ 95.

<sup>103</sup> *Id.* ¶ 108.

<sup>104</sup> *Id.* ¶ 96.

<sup>105</sup> See *id.* ¶ 97 (emphasis added).

cerns with some fundamental premises within the decision.”<sup>106</sup> He questioned, in particular, the standard chosen by the majority for granting the “status of victim,”<sup>107</sup> a standard he found to be without foundation “in any national legislation or jurisprudence.”<sup>108</sup> Judge Blattman opined that the majority was mistaken in failing to read the text of Rule 85 within the context of the implicit but absolute limitation of the Court’s competency, or jurisdiction.<sup>109</sup> In Judge Blattman’s view, “the Trial Chamber has the competency to determine whether a person is a victim only when linked to the facts and circumstances found within the charges presented by the prosecution and confirmed by the Pre-Trial Chamber, and must stay within this framework in its consideration of victims.”<sup>110</sup> The majority opinion’s reliance on the Basic Victims’ Principles “concerned” Judge Blattman, because “the particular provisions relied on in the Majority decision were specifically considered and rejected during the preparatory stages of the drafting of the Rome Statute.”<sup>111</sup>

¶36

In Judge Blattman’s opinion, failing to observe the parameters established by the confirmed charges compromised the rights of the Accused, the fairness of the process, and equally the rights of victims. An “over inclusive and imprecise” definition of victims, according to the dissenting opinion, made it “very difficult to know who is actually a victim of the alleged crimes attributed to the Accused,”<sup>112</sup> a circumstance which in turn impaired the defendant’s due process rights in a way which “upset” the “important balance” between the rights of victims to participate and “the absolute right of the Accused to a fair and impartial trial.”<sup>113</sup> Judge Blattman elaborated that neglecting to limit properly “the accusations that may be brought and . . . the actors that may intervene in the proceedings . . . would bring about . . . the inappropriate sce-

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<sup>106</sup> See J. Blattman Dissent to Decision on *Lubanga* Trial Participation, *supra* note 4, ¶ 32.

<sup>107</sup> *Id.* ¶ 21.

<sup>108</sup> *Id.* ¶ 29.

<sup>109</sup> *Id.* ¶¶ 16, 17, 21.

<sup>110</sup> *Id.* ¶ 16.

<sup>111</sup> *Id.* ¶ 4 (citing Fernández de Gurmendi, *supra* note 12, at 428-29, and David Donat-Cattin, *Article 75: Reparations to Victims*, in COMMENTARY TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 969 (Otto Triffterer ed., 1999)).

<sup>112</sup> *Id.* ¶ 10.

<sup>113</sup> *Id.* ¶ 30.

nario in which the Trial Chamber could be forced to make determinations based on evidence which is outside of the scope the charges [sic] against the Accused.”<sup>114</sup> Judge Blattman noted that defining victims vaguely or preliminarily equally failed to “provid[e] tangible benefits for victims . . . .”<sup>115</sup> Additionally, elevating the entitlement of applicants who had “suffered harm not linked to the charges in the present case” compromised “the rights of those victims who do fulfill the criteria of victims.”<sup>116</sup>

¶37 The dissenting opinion pointed out that the majority ruling, expanding the grant of the “status of victim” vis-à-vis a case, had been rendered in the absence of any argument from the OTP, the defense, or victims’ representatives in favor of the liberalized standard.<sup>117</sup> Judge Blattman noted that both Pre-Trial Chambers I and II “have required, in order to determine the status of victims, that a causal link be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with.”<sup>118</sup> The Appeals Chamber also had “never overruled this important causal link” in any of the interlocutory appeals it had heard.<sup>119</sup>

¶38 Finally, Judge Blattman noted his view that the framework created by the majority opinion would tend “to cause delays and legal insecurities,”<sup>120</sup> and was “over burdensome” for victims.<sup>121</sup> He stated that the framework adopted by the majority “appears to be requiring two applications of victims”: one “to be recognized by the Trial Chamber as a victim who may generally participate in the proceedings,” and a second “to indicate at what specific stage in the proceedings they may participate as victims.”<sup>122</sup> The majority opinion thus “adopt[ed] a system in which every application is to be evaluated on a case-by-case basis for every procedural action.”<sup>123</sup> Rather than providing “a solution for modalities of par-

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<sup>114</sup> *Id.* ¶ 11.

<sup>115</sup> *Id.* ¶ 10.

<sup>116</sup> *Id.* ¶ 32.

<sup>117</sup> *See id.* ¶ 28 (stating that none of the “submissions from the parties and participants [had] requested or argued for the position that victims’ status in a particular case would not be tied to whether the harm suffered is a result of the charges confirmed against the Accused.”)

<sup>118</sup> *Id.* ¶ 17.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 31.

<sup>121</sup> *See id.* ¶¶ 22, 32.

<sup>122</sup> *Id.* ¶ 22.

<sup>123</sup> *Id.* ¶ 31.

ticipation,” the majority ruling, in Judge Blattman’s view, “instead postpone[d] decisions for future determination.”<sup>124</sup> The dissenting Judge emphasized his belief that the Rome Statute rendered it mandatory, not elective, to consider burdens and inefficiency when determining “at what stage during the trial proceedings it is appropriate for victims to present any views or concerns,” since appropriateness depended on factors including the factor of judicial economy.<sup>125</sup>

### *E. The Positions of the Parties*

¶39 As the Pre-Trial and Trial Chambers were assessing the first applications to participate in ICC investigations and cases, both the OTP and defense counsel assigned in the situations and cases had been making observations and arguments, most notably under RPE Rule 89(1), which entitles the parties to comment upon applications.<sup>126</sup> The OTP and defense counsel had strongly opposed the ruling that the Statute recognizes the granting of a “status of victim” or “procedural status of victim,” or a general right to participate, in ICC investigations.<sup>127</sup> The OTP and defense counsel also each disputed the notion that effects on fairness and efficiency are irrelevant when determining when to grant a “status of victim,” “procedural status of victim,” or a general or potential right to participate, and only should be considered when later determining the modalities of participation.<sup>128</sup> Indeed, by the time the Pre-Trial Chambers assigned to the DRC and Darfur situations granted, in essence, leave to appeal these issues, the OTP and defense counsel

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<sup>124</sup> *Id.*

<sup>125</sup> *See id.* ¶ 25.

<sup>126</sup> The rule provides, in pertinent part, “Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate . . . .” *See RPE, supra* note 17, R. 89(1).

<sup>127</sup> *See infra* notes 130-33 and accompanying text for a discussion of the OTP position that there is no general right to participate in the investigation and *infra* note 154 and accompanying text for a discussion of the position of Lubanga’s pre-trial counsel that victim participation is improper even at the pre-trial stage.

<sup>128</sup> *See infra* note 139 and accompanying text for a discussion of the OTP position and *infra* notes 156-57 and accompanying text for a discussion of the position of Lubanga’s pre-trial counsel.

had previously filed unsuccessful applications for leave to appeal.<sup>129</sup>

¶40

From its first submissions on the issue to Pre-Trial Chamber I in 2005, the OTP contested the legality of granting a general right to victims to participate in the investigation or situation. The OTP contended that whether an applicant's "personal interests" were "affected," within the meaning of Article 68(3), could not be determined except in reference to a "proceeding," which in turn could not be equated with the "investigation."<sup>130</sup> The OTP argued, for example, that because Article 68(3) was clearly meant to impose some limitation upon participation in ICC proceedings, the provision could not be read to permit participation for victims of any crime within the theoretical jurisdiction of the Court without violating the principle of treaty interpretation requiring every treaty provision to be given effect.<sup>131</sup> The OTP took the view in its early submissions that in the investigation phase, participation by vic-

<sup>129</sup> See, e.g., Situation in the Democratic Republic of Congo, Situation No. ICC 01/04-103, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6," Public (Jan. 23, 2006) [hereinafter OTP's 23 January 2006 DRC Submission re Leave to Appeal]; Situation in the Democratic Republic of Congo, Situation No. ICC-01/04-141, Prosecution's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Public (Apr. 24, 2006); Situation in Uganda, Situation No. ICC-02/04-103, Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Public (Aug. 20, 2007) [hereinafter OTP's 20 August 2007 Uganda Submission re Leave to Appeal]; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-272, Request for Leave to Appeal the "D cision sur les demandes de participation   la procedure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enqu te en R publique d mocratique du Congo," Public (Aug. 7, 2006) [hereinafter Defense 7 August 2006 Lubanga Submission re Leave to Appeal].

<sup>130</sup> See, e.g., Situation in the Democratic Republic of Congo, Case No. ICC-01/04-84-Conf, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, Reclassified as Public, ¶¶ 11-17 (Aug. 15, 2005) [hereinafter OTP's 15 August 2005 DRC Submission] (arguing that there are no "proceedings" within the meaning of Article 68(3) during the investigation phase); Situation in Uganda, Situation No. ICC-02/04-85, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, Public, ¶ 22 (Feb. 28, 2007) [hereinafter OTP's 28 February 2007 Uganda Submission] ("the investigation of a situation is a phase which does not form part of the concept of proceedings as defined in [Art. 68(3)]").

<sup>131</sup> See, e.g., OTP's 15 August 2005 DRC Submission, *supra* note 130, ¶ 25; OTP's 28 February 2007 Uganda Submission, *supra* note 130, ¶ 29.

tims was permissible, but only in the “proceedings” specifically identified in the Rome Statute and the RPE, for example:

- Through presentation of views when the OTP seeks authorization to commence an investigation *proprio motu*, under Article 15(3);
- By being informed if the OTP decides not to investigate or prosecute (see Article 53; Rule 92(2)), and being heard on that matter;
- Through submission of observations when the OTP seeks a ruling from the Court regarding a question of jurisdiction or admissibility, under Article 19(3).<sup>132</sup>

The granting of a general right to participate in the investigation, in the view of the OTP, wrongly made redundant these provisions in the Statute and RPE specifying instances of victims’ participation relating to the investigation.<sup>133</sup>

¶41

The OTP’s argument relied on the proposition that the clear design of the Rome Statute was to increase or expand victims’ participation as investigations and cases advanced to the proceedings in which participation was most vital to victims—trial and hearings relating to reparations.<sup>134</sup> During the earliest phase of investigation, victims thus were expressly granted rights to be heard only regarding specific matters in which their interests were plainly “affected,” such as the commencing of an investigation *proprio motu* or the declining of an investigation on interests-of-justice grounds.<sup>135</sup> To grant a general right to participate in the investiga-

<sup>132</sup> See, e.g., OTP’s 15 August 2005 DRC Submission, *supra* note 130, ¶¶ 5, 54; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 20.

<sup>133</sup> See, e.g., OTP’s 15 August 2005 DRC Submission, *supra* note 130, ¶ 15; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 27.

<sup>134</sup> See, e.g., OTP’s 15 August 2005 DRC Submission, *supra* note 130, ¶¶ 11-22; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 20-27; Situation in the Democratic Republic of Congo, Situation No. ICC-01/04-346, Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, Public Redacted Version, ¶¶ 13-14 (June 25, 2007) [hereinafter OTP’s 25 June 2007 DRC Submission]; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 21-22.

<sup>135</sup> See, e.g., OTP’s 15 August 2005 DRC Submission, *supra* note 130, ¶¶ 5, 54; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 20.

tion, by contrast, failed to acknowledge that providing ill-defined participation during that early phase would undermine the independence of the Prosecutor, the objectivity of the investigation, and the efficiency of the Court.<sup>136</sup> It also created forms of participation that approached or surpassed the *partie civile* system rejected at Rome: for example, a victim's ability during an investigation to submit to the judges factual material collected outside of the prosecutor's investigation and unrelated to any crimes actually being investigated.<sup>137</sup> The granting of an open-ended participation right during the investigation, in the OTP's view, upended the rational plan of the Statute to focus the Court's limited resources on providing greater participation rights to victims who had suffered from crimes specifically prosecuted at the ICC.<sup>138</sup>

¶42

The OTP also contended that Article 68(3) did not permit the Chambers to decline to consider how granting a general right to participate might affect the fairness and efficiency of proceedings, and to rely instead on a sweeping judgment that such a right was not *per se* at odds with fair and expeditious proceedings.<sup>139</sup> Because of the breadth of the general right, ICC proceedings could be debilitated, the OTP argued, by the need to adjudicate, in successive steps, the participation rights of the hundreds of thousands of victims of the conflicts under investigation.<sup>140</sup> Moreover, given the extreme selectivity of cases actually commenced in the ICC, if the

<sup>136</sup> See, e.g., OTP's 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶¶ 5, 13-19, 31; OTP's 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 32-33; OTP's 20 August 2007 Uganda Submission re Leave to Appeal *supra* note 129, ¶¶ 13-14.

<sup>137</sup> See, e.g., OTP's 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶¶ 17, 21; OTP's 28 February 2007 Uganda Submission, *supra* note 130, ¶ 38 n.60.

<sup>138</sup> See, e.g., OTP's 15 August 2005 DRC Submission, *supra* note 130, ¶¶ 18-22 (arguing that the drafting history of Article 68 demonstrates the intent to provide greater participation in case proceedings); OTP's 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶ 5 (contending that 17 January 2006 DRC Decision wrongly granted participation "regardless of whether the person demonstrates any connection to the actual focus of the investigation at the time, or any future case" and thus opened the right to tens of thousands, or hundreds of thousands of individuals in the DRC).

<sup>139</sup> See, e.g., OTP's 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶ 22 (stating that it is "no satisfactory solution" for the Chamber to "merely state[] that it must arrange for the victims to take part in a way that respects the rights of the defence . . .").

<sup>140</sup> See, e.g., *id.* ¶¶ 5, 31-33; OTP's 25 June 2007 DRC Submission, *supra* note 134, ¶¶ 22-25.

Chambers persisted in the dominant view that case participation would only be conferred on victims who suffered from charged crimes, only the smallest fraction of those who participated in an investigation would ever qualify to participate in any ICC case.<sup>141</sup> The OTP argued that it was unfair to victims, as well as damaging for the Court, to raise false expectations by granting a general right to participate that was highly unlikely to lead to any opportunity to express views or concerns in ICC trials or to the receipt of reparations.<sup>142</sup>

¶43

Finally, the OTP maintained that permitting general participation in the investigation, or the “procedural status of victim,” also undermined the fairness and integrity of ICC proceedings, in that:

- The burden of processing the applications for participation, and managing the ensuing participation, would not be offset by meaningful victims’ participation.<sup>143</sup>
- It prejudiced the defense to grant to victims the ability to participate in investigations, and present facts to the Chambers, without subjecting that participation to safeguards which apply to the OTP (such as the obligation to investigate exonerating circumstances under Article 54(1)(a)), or to both parties (such as duties of disclosure);<sup>144</sup>

<sup>141</sup> See, e.g., Situation in the DRC, Situation No. ICC-01/04-315, Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, Public with Confidential, *Ex parte* Annex, ¶ 20 (Nov. 30, 2006); OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 12.

<sup>142</sup> See, e.g., Situation in the DRC, Situation No. ICC-01/04-315, Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06, Public with Confidential, *Ex parte* Annex, ¶ 20 (Nov. 30, 2006); OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 12.

<sup>143</sup> See, e.g., OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 12-14, 40; OTP’s 25 June 2007 DRC Submission, *supra* note 134, ¶¶ 12-14, 22-24.

<sup>144</sup> See, e.g., OTP’s 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶¶ 10, 13-22; OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 32-33, 38-39; OTP’s 20 August 2007 Uganda Submission re Leave to Appeal, *supra* note 129, ¶¶ 13-14.

- It damaged the judges' appearance of impartiality, and ignored that the Statute conferred no authority upon the judges to conduct investigation, to permit the judges to rule upon the existence of crimes within the jurisdiction of the Court, and of victims of those crimes, before any defendant is present or the OTP has presented any evidence.<sup>145</sup>

¶44 After the *Lubanga* case commenced and applications to participate in the situations and cases came under consideration, defense counsel also strongly challenged the standards selected by the judges for evaluating applications to participate.<sup>146</sup> In particular, the lawyers who have represented Lubanga, as well as the OPCD, in representing future defendants in the Darfur and DRC situations,<sup>147</sup> have contended that: (1) the applications to partici-

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<sup>145</sup> See, e.g., OTP's 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶¶ 14, 16, 26-27; OTP's 28 February 2007 Uganda Submission, *supra* note 130, ¶¶ 35-37.

<sup>146</sup> The first two times the "status of victim" was granted—in the 17 January 2006 DRC Decision and 10 August 2007 Uganda Decision—the Pre-Trial Chamber had before it no argument that opposed the granting of a general right to participate in the investigation. The relevant filing by *ad hoc* counsel in the DRC case is not public, but is referenced in the 17 January 2006 DRC Decision, *supra* note 26, which notes that *ad hoc* defense counsel did not "challenge either the applicability of article 68(3) of the Statute to this stage of the investigation or the possibility in legal terms of participation by the victims at this stage of the proceedings." See *id.* ¶ 24. In the Uganda situation and case, from the public filing of *ad hoc* defense counsel it appears that she believed that a public information document issued in 2005 by the ICC, which stated that victims could participate "from the earliest stages of the proceedings," precluded "the Defence [from submitting] arguments against victim participation at all stages in the proceedings." See *Prosecutor v. Joseph Kony*, Case No. ICC-02/04-01/05-216-tEN, Defence observations on applications for participation in the proceedings 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, Public, ¶¶ 43-46 (Mar. 5, 2007). The lack of opposition by these first defense counsel, especially given the subsequent objections raised by counsel for Lubanga and OPCD, see *infra* notes 147-78 and accompanying text, may reflect the difficulty that *ad hoc* counsel often faces in representing abstract interests.

<sup>147</sup> The OPCD was first appointed in the Darfur and DRC situations in May 2007 to represent the interests of defendants during the investigation by replying to observations to participate. See *Situation in Darfur, Sudan*, Situation No. ICC-02/05-74, Decision Authorising the Filing of Observations on Applications for Participation in the Proceedings a/0011/06 to a/0015/06, Public, 3 (Pre-Trial Chamber I, May 23, 2007); *Situation in the DRC*, Situation No. ICC-01/04-329-tEN, Decision Authorising the Filing of Observations on Applications for Participation in the Proceedings, Public, 3 (Pre-Trial Chamber I, May 23, 2007)

pate, and the accounts contained therein, prejudice defendants by exposing the judges to “accusers” other than the OTP;<sup>148</sup> (2) it is extra-legal to grant the status of victim based on collective “effects” shared by all victims of crimes within the jurisdiction of the Court;<sup>149</sup> and (3) the process of evaluating applications is burdensome to the defense and delays proceedings and trials, which also prejudices the defense.<sup>150</sup>

¶45

Lubanga’s pre-trial counsel, whose defense of Lubanga was vigorous, was the first to argue that applicants seeking participation inevitably and wrongly served as other “accusers” of the defendant, in providing accounts of their victimization.<sup>151</sup> Lubanga’s pre-trial counsel argued that the prejudice was compounded because the names of applicants were withheld from the defense (a practice routinely ordered at the ICC to maintain the security of the applicants), meaning that applicants functioned as anonymous accusers.<sup>152</sup> Lubanga’s counsel noted that many applicants had advanced accusations about the UPC, the group Lubanga had led, and some recounted crimes like murder, rape, and torture, that were not among the only charges in the case: child conscription, child enlistment, and use of children in hostilities.<sup>153</sup>

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[hereinafter 23 May 2007 DRC Decision Authorizing Observations].

<sup>148</sup> See *infra* notes 151-53 & 162-65 and accompanying text.

<sup>149</sup> See, e.g., Situation in Darfur, Sudan, Case No. ICC-02/05-119, OPCD Appeal Brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” Public, ¶¶ 20-21 (Feb. 4, 2008) [hereinafter 4 Feb. 2008 OPCD Darfur Appeal Brief]; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-901-tEN, Response to the Application by Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for Authorization to Participate in the Appeal Proceedings Relating to the *Decision on the Confirmation of Charges*, Public, ¶¶ 23-25 (May 11, 2006) [hereinafter Defense 11 May 2006 *Lubanga* Response].

<sup>150</sup> See *infra* notes 159-60 & 174 and accompanying text.

<sup>151</sup> See, e.g., Defense 7 August 2006 *Lubanga* Submission re Leave to Appeal, *supra* note 129, ¶ 45. Counsel in the pre-trial stage was Jean Flamme. See *id.* at 1.

<sup>152</sup> See, e.g., *id.* ¶¶ 7, 36-47; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-386-tEN, Defence Submissions regarding the Applications for Participation in the Proceedings of Applicants a/0004/06 to a/0052/06, Public, ¶¶ 1-4 (Sept. 4, 2006) [hereinafter Defense 4 September 2006 *Lubanga* Submission re Applicants a/0004/06 to a/0052/06].

<sup>153</sup> See, e.g., Defense 4 September 2006 *Lubanga* Submission re Applicants a/0004/06 to a/0052/06, *supra* note 152, ¶¶ 73-77; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-585, Observations de la Défense sur les

¶46 The position of Lubanga’s pre-trial counsel was that victim participation during pre-trial proceedings should be disallowed and participation commenced following the confirmation of charges.<sup>154</sup> Counsel noted that applicants to participate were indiscriminately seeking to participate equally in all phases of proceedings, rather than making any attempt to show the effects of any proceeding on “personal interests.”<sup>155</sup> Also, in counsel’s estimation, it “put the cart before the horse” to grant victim status while deferring any evaluation of the impact on the defense and on efficiency until the Chamber considered “modalities” of participation in specific proceedings.<sup>156</sup> Counsel stated: “the Pre-Trial Chamber should not conduct a purely theoretical and ‘in abstracto’ examination of the issue of whether, generally speaking, it is appropriate to participate in the pre-trial stage.”<sup>157</sup> Lubanga’s counsel argued that it undermined the appearance of the impartiality of the Pre-Trial Chamber and Lubanga’s right to the presumption of innocence for the Chamber to find, before the confirmation of any charges, that certain applicants to participate had suffered harm as a result of the crimes allegedly perpetrated by Lubanga.<sup>158</sup>

¶47 Lubanga’s counsel argued further that especially, but not uniquely, in the circumstances Lubanga faced, participation at the pre-trial stage could not be accomplished without “undue delay” of the proceedings and infringement of Lubanga’s rights.<sup>159</sup> Counsel repeatedly complained before Lubanga’s confirmation hearing that the burden of responding to applications to participate, and the

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demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06, Public, ¶¶ 21-27 (Oct. 18, 2006).

<sup>154</sup> See, e.g., Defense 7 August 2006 *Lubanga* Submission re Leave to Appeal, *supra* note 129, ¶ 10; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06, Public, ¶¶ 22-26 (Sept. 4, 2006) [hereinafter Defense 4 September 2006 *Lubanga* Submission re Applicants a/0001/06 to a/0003/06].

<sup>155</sup> See Defense 11 May 2006 *Lubanga* Response, *supra* note 149, ¶¶ 23-25.

<sup>156</sup> Defense 7 August 2006 *Lubanga* Submission re Leave to Appeal, *supra* note 129, ¶ 49.

<sup>157</sup> Defense 4 September 2006 *Lubanga* Submission re Applicants a/0001/06 to a/0003/06, *supra* note 154, ¶ 25.

<sup>158</sup> See, e.g., Defense 4 September 2006 *Lubanga* Submission re Applicants a/0004/06 to a/0052/06, *supra* note 152, ¶¶ 50-53.

<sup>159</sup> See, e.g., Defense 7 August 2006 *Lubanga* Submission re Leave to Appeal, *supra* note 120, ¶¶ 50-53.

“potentially detrimental” allegations raised therein, was impairing the defense’s preparation for the hearing.<sup>160</sup>

¶48

The OPCD, while serving as *ad hoc* counsel to as-yet theoretical defendants in the DRC and Darfur situations, made a series of objections through which it finally obtained leave to challenge the notion, first expressed in the January 17, 2006 decision of Pre-Trial Chamber I, that there was nothing inherently unfair in permitting the “procedural status of victim.”<sup>161</sup> When the first applications to participate in the Darfur situation were under consideration, in June 2007, the OPCD contended that the “the participation of the victims at this stage of the proceedings would prejudice the rights of the Defence.”<sup>162</sup> In nearly identical filings in the DRC and Darfur situations, the OPCD also challenged the application process, contending that the Chambers could not rule on the applications without considering information which might contradict the applicants’ claims.<sup>163</sup> The OPCD sought to have the judges require applicants to participate to disclose information which might tend to impugn their own credibility or establish that injuries were pre-existing.<sup>164</sup> It requested that the Chambers order the OTP to

<sup>160</sup> See *id.* ¶¶ 50-51; see also Defense 4 September 2006 *Lubanga* Submission re Applicants a/0001/06 to a/0003/06, *supra* note 154, ¶¶ 25-26 (noting that confirmation hearing had been postponed once already and that the admission of victim-participants would “inevitably delay them further” and deprive the defense of “the means and resources . . . to ensure the accused’s right to a defence as guaranteed by the Statute”).

<sup>161</sup> See First Darfur Grant of Appeal, *supra* note 1, at 6-7; First DRC Grant of Appeal, *supra* note 1, at 6-7. Presumably the OPCD was referring to the pre-trial phase, as arrest warrants had been issued in that situation.

<sup>162</sup> The quotation in the text is the Single Judge’s characterization, as stated in the 6 December 2007 Darfur decision, *supra* note 82, at 4, but the OPCD submission—a filing entitled “Observations on Applications a/0011/06 to a/0015/06,” numbered ICC-02/05-80-Conf, and dated 8 June 2007, see *id.* at 4 n.9—is not publicly available.

<sup>163</sup> See OPCD Darfur Request for Addt’l Information from Applicants, *supra* note 79; OPCD Darfur Request for Exculpatory Materials, *supra* note 79; Situation in the DRC, Situation No. ICC-01/04-382, Request for the Single Judge to Order the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e), Public (Aug. 31, 2007) [hereinafter OPCD DRC Request for Addt’l Information from Applicants]; Situation in the DRC, Situation No. ICC-01/04-378, Request for Single Judge to Order the Prosecutor to Disclose Exculpatory Materials, Public (Aug. 28, 2007) [hereinafter OPCD DRC Request for Exculpatory Materials].

<sup>164</sup> See, e.g., OPCD DRC Request for Addt’l Information from Applicants, *supra* note 163, ¶ 81 (seeking information of any pre-existing medical condition suffered by applicant, national investigations or convictions of applicant, and relationships between applicant and other applicants).

disclose information that might undermine applicants' claims that the acts from which they suffered were crimes within the Court's jurisdiction. The OPCD specified, for example, that it sought information from the OTP suggesting that there was no "armed conflict" in the DRC or that the villages mentioned in the applications had been legitimate military targets.<sup>165</sup>

¶49 The OPCD applications were rejected by Single Judges in both the Darfur and DRC situations, based on identical reasoning: that because the process of admitting victims to participate "is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses," it was unnecessary to expand the information-seeking which precedes decisions on applications to participate.<sup>166</sup> On January 23, 2008, however, the same judges granted leave to appeal their denial of the OPCD motions, and particularly the issue of whether a "procedural status of victim" can be granted during the investigation or in pre-trial proceedings.<sup>167</sup> This was the set of decisions that also sought appellate guidance on "how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with."<sup>168</sup> On February 6, 2008, the Single Judges in the Darfur and DRC situations again

<sup>165</sup> See, e.g., *id.* ¶¶ 25-38; OPCD Darfur Request for Exculpatory Materials, *supra* note 79, ¶¶ 29-40.

<sup>166</sup> 3 December 2007 Darfur Decision on OPCD Requests for Add'l and Exculpatory Information, *supra* note 76, ¶ 20; Situation in the DRC, Situation No. ICC-01/04-417, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Public, ¶ 11 (Pre-Trial Chamber I, Dec. 7, 2007) [hereinafter DRC Decision on OPCD Requests for Add'l and Exculpatory Information].

<sup>167</sup> See First Darfur Grant of Appeal, *supra* note 1, at 7-8; First DRC Grant of Appeal, *supra* note 1, at 7-8. Pre-Trial Chamber I, in the DRC situation, and the Single Judge of Pre-Trial Chamber II, in the Uganda situation, had previously declined to permit appeal of the same issue, insofar as it concerned investigation. See Situation in the DRC, Situation No. ICC-01/04-135-tEN, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public (Pre-Trial Chamber I, Mar. 31, 2006); Situation in Uganda, Situation No. ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Public (Pre-Trial Chamber II, Dec. 19, 2007).

<sup>168</sup> First Darfur Grant of Appeal, *supra* note 1, at 8; First DRC Grant of Appeal, *supra* note 1, at 8.

granted leave to appeal the same issues, after the OPCD and OTP sought leave to appeal the December 6, 2007 decision of the Single Judge in the Darfur situation,<sup>169</sup> and the OPCD, the OTP and victims' representatives sought leave to appeal a December 24, 2007 decision by the Single Judge in the DRC situation, which undertook to decide approximately 140 applications for victims' participation.<sup>170</sup>

¶50

In briefs filed in support of the pending appeals, the OPCD and the OTP are thus joined in arguing that the Chambers have erred in creating a "procedural status of victim" which is nowhere recognized in the Rome Statute or the RPE<sup>171</sup> and which wrongly relies, as the OPCD has put it, "on generic presumptions concerning all applicants, and all situation and pre-trial phases at the ICC," rather than on a "specific determination" regarding "personal interests" affected by an actual proceeding in the situation or pre-trial phase.<sup>172</sup> The parties also are agreed that the Statute requires a Chamber to determine, with respect to concrete proceedings, and in a single step, the personal interests *and* the appropriateness of the participation, given likely effects on the defense and the proceedings as a whole.<sup>173</sup> Both the OTP and the defense have called attention to the illogic, and the waste, in determining and granting the "status of victim" in relation to hypothetical "proceedings."<sup>174</sup>

<sup>169</sup> See Situation in Darfur, Sudan, Situation No. ICC-02/05-121, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, Public, 4-5, 11 (Pre-Trial Chamber I, Feb. 6, 2008).

<sup>170</sup> See Situation in the DRC, Case No. ICC-01/04-444, Decision on the Prosecution, OPCD, and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, Public, 6, 15 (Pre-Trial Chamber I, Feb. 6, 2008).

<sup>171</sup> See, e.g., 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶ 23; Situation in Darfur, Sudan, Situation No. ICC-02/05-125, Prosecution's Document in Support of Appeal against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, Public, ¶ 14 (Feb. 18, 2008) [hereinafter 18 Feb. 2008 OTP Appeal Brief].

<sup>172</sup> 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶¶ 18-21.

<sup>173</sup> See, e.g., 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶¶ 18-20; 18 Feb. 2008 OTP Appeal Brief, *supra* note 171, ¶¶ 17-18.

<sup>174</sup> See, e.g., 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶¶ 19, 21; 18 Feb. 2008 OTP Appeal Brief, *supra* note 171, ¶ 35. *Ad hoc* defense counsel appointed in the Uganda situation has also taken this view in appealing the Second Decision re Uganda Participation. See Defense Request for Leave to Appeal Second Decision re Uganda Participation, *supra* note 75, ¶ 30 ("If there are no possible proceedings in which an applicant may participate or which require a formal determination as to the victim's status, issuing a general decision which

¶51 On appeal, the OPCD has argued it would better protect the rights of the defense, as well as the impartiality of the Chambers, if views and concerns of victims during the investigation were directed at the OTP, which is charged with statutory obligations to seek truth, to investigate exonerating circumstances, and to disclose exonerating information.<sup>175</sup> During the investigation phase, the OPCD has emphasized, the defense is indeed reliant on the triggering of the OTP's statutory obligations, because it "does not have the possibility at the situation phase to challenge jurisdiction, conduct investigations, or (as concluded by the Honourable Single Judge) request disclosure from either the Prosecution or the applicants."<sup>176</sup>

¶52 Additionally, the OPCD has contended that the opining of ICC judges on allegations not related to any commenced ICC case is inappropriate. According to the OTP, the ICC should not undertake to make pronouncements on matters that would "normally fall purely within the competence of domestic authorities," especially in light of the fact that the ICC "has neither the obligation nor the power to give effect to the right to a remedy for every potential victim" within the territory of any State-party.<sup>177</sup> The OPCD has argued that overly broad victims' participation, defined in relation to all crimes within the potential jurisdiction of the Court rather than "the overarching objectives (and limitations) of the ICC itself," cannot help but begin to transform the ICC into "a broad based forum for litigating all alleged violations of international criminal law . . . ." or a "quasi-truth and reconciliation forum."<sup>178</sup>

¶53 More recently, Lubanga's defense counsel has had the opportunity to address the ruling of Trial Chamber I establishing standards for victim's participation in the *Lubanga* case. By order dated February 26, 2008, Trial Chamber I granted the OPCD and the OTP leave to appeal the January 18, 2008 decision.<sup>179</sup> Specifici-

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will never be implemented in practice affects the expeditious conduct of the proceedings, resulting in waste of time and resources for the Court instead of concentrating on concrete rights.").

<sup>175</sup> See, e.g., 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶¶ 37-48.

<sup>176</sup> See *id.* ¶ 43.

<sup>177</sup> See *id.* ¶¶ 48-54.

<sup>178</sup> See *id.* ¶¶ 3-5, 53-54.

<sup>179</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, Public (Trial Chamber I, Feb. 26, 2008) [hereinafter Decision Granting Leave to Appeal *Lubanga* Trial Par-

cally, Trial Chamber I granted leave to appeal the question of “whether the harm alleged by a victim and the concept of ‘personal interests’ under Article 68 of the Statute must be linked with charges against the accused.”<sup>180</sup> The parties also obtained leave to address “whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.”<sup>181</sup> The Appeals Chamber is thus poised to consider the breadth of victims’ participation in cases and investigations and the proper relation between the standards governing participation in those two phases.

¶54

Notably, while the Pre-Trial Chambers had deemed the topic of the proper definition of “personal interests” worthy of appeal mainly because of potential effects on the efficiency of proceedings,<sup>182</sup> Trial Chamber I openly acknowledged that the issue affected fairness to the defense. Trial Chamber I confirmed that its decision of January 18, 2008 contemplated permitting victims to introduce evidence at trial,<sup>183</sup> and expressed that the extent of victims’ participation was bound to alter the *content* and length of the case, by “affect[ing] the nature and extent of the evidence called and the issues raised.”<sup>184</sup> The Trial Chamber conceded that while “the impugned decision does not have the effect *per se* of shifting the burden of proof,” the decision “could lead, in particular circumstances and in some degree, to such an effect, and this could

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participation Decision]. In the trial phase, Lubanga has been represented by Catherine Mabilile. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-932-tENG, Registration of Solemn Undertaking by Ms Catherine Mabilile and of Her Undertaking Under Article 22(3) of the *Code of Professional Conduct for Counsel*, Public (Trial Chamber I, July 6, 2007).

<sup>180</sup> See Decision Granting Leave to Appeal *Lubanga* Trial Participation Decision, *supra* note 179, ¶¶ 29-34, 54.

<sup>181</sup> See *id.* ¶¶ 39-42, 54. Trial Chamber I granted leave to appeal a third issue: “Whether the notion of victim necessarily implies the existence of personal and direct harm.” See *id.* ¶¶ 26-28, 54.

<sup>182</sup> See, e.g., First Darfur Grant of Appeal, *supra* note 1, at 6-8 (characterizing issue as involving “risk of consecutive multiple applications [to participate]” which in turn affects “the efficient and effective operation of the Court as a whole”); First DRC Grant of Appeal, *supra* note 1, at 6-8 (same).

<sup>183</sup> See Decision Granting Leave to Appeal *Lubanga* Trial Participation Decision, *supra* note 179, ¶ 42 (analyzing whether the fair and expeditious conduct of proceedings would be affected by “the introduction of evidence touching on the issue of the guilt or innocence of the accused” and “considering evidence that otherwise would not be available”).

<sup>184</sup> See *id.* ¶ 33.

significantly affect the fairness of the proceedings pursuant to Article 67(1)(i) of the Statute.”<sup>185</sup>

¶55 On the topic of whether participation at trial must be conditioned on harm suffered as a result of a charged crime, Lubanga’s trial counsel has relied extensively upon Judge Blattman’s reasoning that it exceeds the competence of the ICC, imperils the fairness of ICC proceedings, and violates fundamental principles of criminal law, including the principle of legality, to fail to require the link.<sup>186</sup> Lubanga’s counsel has contended, in addition, that to permit victims to become witnesses and sources of evidence: (1) fails to observe the limitation that victims participate by voicing “views and concerns,” and that witnesses may only be questioned with approval of the Chamber, and only when their personal interests are affected;<sup>187</sup> (2) accords rights to victims which the legislator clearly had intended to reserve to the parties;<sup>188</sup> and (3) wrongly relieves the Prosecution of its unique burden of proving the charges beyond a reasonable doubt.<sup>189</sup>

### III. ICC PERFORMANCE IN PROVIDING MEANINGFUL PARTICIPATION

¶56 Pre-Trial Chamber I aspired in its January 17, 2006 decision to afford a “right of access” to victims and “to enable them to exercise that right concretely and effectively.”<sup>190</sup> Over two years later, this objective has not been met, nor is it certain that it can be

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<sup>185</sup> *Id.* ¶ 42.

<sup>186</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1135, Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision on Victims’ Participation » rendue le 18 janvier 2008, Public, ¶¶ 29-30 (Jan. 28, 2008), [hereinafter Defense Request for Leave to Appeal *Lubanga* Trial Participation Decision]; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1220, Acte d’appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes, Public, ¶¶ 34-39 (Mar. 10, 2008) [hereinafter Defense Brief in Support of Appeal of *Lubanga* Trial Participation Decision].

<sup>187</sup> See Defense Request for Leave to Appeal *Lubanga* Trial Participation Decision, *supra* note 186, ¶¶ 42-43; Defense Brief in Support of Appeal of *Lubanga* Trial Participation Decision, *supra* note 186, ¶¶ 45-47.

<sup>188</sup> See Defense Request for Leave to Appeal *Lubanga* Trial Participation Decision, *supra* note 186, ¶ 44; Defense Brief in Support of Appeal of *Lubanga* Trial Participation Decision, *supra* note 186, ¶49.

<sup>189</sup> See Defense Request for Leave to Appeal *Lubanga* Trial Participation Decision, *supra* note 186, ¶ 42; Defense Brief in Support of Appeal of *Lubanga* Trial Participation Decision, *supra* note 186, ¶ 48.

<sup>190</sup> See 17 January 2006 DRC Decision, *supra* note 26, ¶ 71.

met. Victims' participation has been substantive and unique in some case proceedings, such as Lubanga's confirmation hearing and pre-trial proceedings. The considerable effort expended by the judges and the participants in attempting to define and provide meaningful victims' participation, however, has not yielded a coherent or workable system of providing concrete participation. The progression of decisions of the Pre-Trial and Trial Chambers reflects an evolution from conviction that broad participation can be conferred, to uncertainty in the first standards chosen, to hope that the Appeals Chamber will find solutions from among the disparate, potentially controversial, and burdensome standards implemented by the lower Chambers.

¶57 Facts not acknowledged by the Chambers are also a source of unease. The filing of mere hundreds of applications to participate in ICC proceedings has overburdened the participation framework. The pace of adjudicating the applications is glacial, and side litigation over the application process is flourishing. Nor is the unwieldy process yielding benefits for victims. As of May 1, 2008, over two years after the first victims' participation decision, substantive participation in proceedings remains limited to a handful of victims who are participating in the *Lubanga* case.

¶58 There are three noteworthy aspects of the ICC's track record: (1) the inability of the Chambers to render timely or effective decisions on applications to participate; (2) the volume and depth of litigation regarding matters related to the process of adjudicating applications to participate, and the effect of that litigation on Court proceedings generally; and (3) the failure of the Court to provide meaningful victims' participation to more victims, or outside the instances of participation that are explicitly set forth in the Rome Statute.

*A. The Failure to Keep Pace in Processing Applications to Participate*

¶59 The most fundamental problem in providing meaningful participation to victims has been the inability of the Chambers to process applications to participate in a timely fashion, or to generate decisions resulting in actual participation. The OTP, in early submissions regarding victims' participation, had raised the specter of hundreds of thousands of applicants to participate, given the

broad scope of ICC investigations.<sup>191</sup> From court records it appears that approximately five hundred applicants—from among all the victims of the conflicts in Darfur, the DRC, northern Uganda and the CAR—had sought participation as of this writing, in May 2008. That relatively modest number nonetheless has been ample to demonstrate the weakness in the participation scheme and to burden the Court’s operations. Also as of May 2008, the Chambers have succeeded in granting less than 110 applicants, in any of the ICC’s investigations, even the “status of victim” vis-à-vis the investigation, i.e., the theoretical right to participate. It is not apparent that a single victim has actually participated in an investigation phase proceeding or provided any view or concern that affected any investigation. Eighteen victims of the conflicts in the DRC, northern Uganda, and Darfur have obtained the “status of victim” in case proceedings, and only four of those are actually participating, in the *Lubanga* case. Finally, applicants typically wait for over a year, and some have waited for over a year and a half, to learn the disposition of their requests to participate.

¶60

Applications to participate in ICC proceedings can be delayed in one of two places in the ICC: (1) in the Registry, the administrative organ of the ICC, because the Registry is the first to receive applications and also bears the responsibility of forwarding groups of applications to the Chambers, together with a covering report required by ICC Regulation 86(5);<sup>192</sup> or (2) in Chambers, because a Chamber is in the process of receiving observations from the parties pursuant to Rule 89(1), has sought supplementation from the applicants or the Registry, or has decided to defer consideration. The relevant figures, drawn from information publicly available as of May 1, 2008, are as follows. (To make it possible for this chart to appear on one page, notes to the chart (i.e., notes i to viii) appear in an Addendum to this article.)

<sup>191</sup> See, e.g., OTP’s 23 January 2006 DRC Submission re Leave to Appeal, *supra* note 129, ¶ 5 (“Given the massive scale of alleged criminality in the DRC, this ruling could result in tens of thousands, or hundreds of thousands of individuals, having the right to participate in the investigation stage.”).

<sup>192</sup> The regulation provides: “The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.” Regulations of the Court, *adopted* on 26 May 2004 by the Judges of the Court, Fifth Plenary Session, ICC-BD/01-01-04, Chapter 5, The Hague, 17-28 May 2004, at Reg. 86(5) [hereinafter ICC Regulations]. In practice, the preparation of the report has been assigned to the VPRS.

Chart: Adjudication of Applications to Participate

	ICC Situation				
	DRC	Uganda	Darfur	CAR	Total
<b>Applications Received by Registry<sup>i</sup></b>	344	127	38	0	<b>509</b>
<b>Applications Forwarded by Registry to Chamber<sup>ii</sup></b>	186	49	21	0	<b>256</b>
<b>Applicants Granted “Status of Victim” in Situation/Case<sup>iii</sup></b>	82/9	14/9	11/0	0	<b>107/18</b>
<b>Applicants Denied “Status of Victim” in Situation/Case<sup>iv</sup></b>	3/70	1/6	10/0	0	<b>14/76</b>
<b>Applications Pending in Chambers in Situation/Case<sup>v</sup></b>	101/107	35/35 <sup>vi</sup>	3/21 <sup>vii</sup>	0	<b>139/163</b>
<b>Dates on which Applications Forwarded to Chambers were Filed or Registered by the Registry<sup>viii</sup></b>	June 2005 to Apr. 2007, and Jan. 2008	June to Nov., 2006	June 2006 to July 2007	n/a	n/a

¶61

These figures demonstrate the following:

- At least 509 applications to participate in ICC proceedings, and likely a higher number, have been received by the Registry.<sup>193</sup> The number of applications to participate has been deduced from the identification numbers assigned by the Registry to applicants to participate. For example, in the DRC situation, the highest number assigned to an applica-

<sup>193</sup> One source reported at the end of 2007 that “approximately 500 victims have applied to participate in proceedings at the court and most are still waiting to find out if they will be accepted.” IWPR Report, *supra* note 7. From the context, it appears that the reported figure was supplied by the Registry. *See id.*

tion, and known from public filings, is a/0337/07,<sup>194</sup> presumably meaning that at least 337 applicants have received “a” or applicant numbers. The figure in the chart is 344 rather than 337 because one number with an “08” prefix is known to have been assigned,<sup>195</sup> and the six applicants who were the subject of the 17 January 2006 decision in the DRC situation were not assigned “a” numbers, but instead received designations “VPRS 1” to “VPRS 6.”<sup>196</sup>

- The reason that the first column of the chart likely understates the total number of applications is that in the Uganda and Darfur situations, the last applications known to exist because of public court filings were ones submitted by victims in July 2007 (see last column of chart). This means that any applications received by the Registry in those situations since mid-2007 are not reflected in the chart. Applications received by the Registry since January 2008 in the DRC situation likewise are not reflected.
- The Chambers have called for the observations of the parties on a total of 256 applications, which means that about 50% of the 509 applications believed to have been received by the Registry through January 2008 remain pending in the Registry.
- If one assumes that each applicant has applied to participate in all phases of proceedings (i.e., investigation, pre-trial proceedings, and case),<sup>197</sup> only

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<sup>194</sup> See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC/01/04-01/07-357, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, Public (Pre-Trial Chamber I, Apr. 2, 2008).

<sup>195</sup> See *id.* (noting applicant a/0001/08). There appear to have been a total of 337 applicants in the DRC situation in the years 2006 and 2007, because no number from 1 to 337 is duplicated in those years, despite the change in suffix from “06” to “07”.

<sup>196</sup> 17 January 2006 DRC Decision, *supra* note 26, at 1.

<sup>197</sup> It is the practice of most applicants to seek participation in all phases. For example, of the twenty-one applications in the Darfur situation that have been considered by the Single Judge, all contained requests “to participate in all stages of the proceedings.” See 6 December 2007 Darfur Decision, *supra* note 82, ¶ 8. The forty-nine applications so far considered in the Uganda situation each

104, or 20%, of applicants to participate have obtained even a theoretical right to participate in an investigation. Only eighteen, or 4%, of applicants who submitted their applications before July 2007 have obtained even a theoretical right to participate in an ICC case.

- The Chambers have yet to make final determinations regarding the status of victim, in the situation and case, on well over half of the applications which were filed with the Registry between June 2005 and January 2008 and remain pending before the Chambers.

¶62

One dimension not adequately depicted in the numbers of applications processed is the extent of the delay between the submission of the application and the issuance of any decision either to grant “the status of victim” or to deny it, in either the situation or the case. Most applicants wait more than a year to obtain the theoretical right to participate, in either the situation or the case, and for many applicants the process is circular and time-consuming because the Chamber’s “decision” is to defer consideration of the application or to deem it incomplete. For example, in the DRC situation, Pre-Trial Chamber I issued, on December 24, 2007, a decision initially addressing one group of 140 applications to participate in proceedings.<sup>198</sup> All 140 applications had been

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sought participation at all stages of the proceedings. *See* Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-134, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures, and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06, Public, ¶ 1 (Pre-Trial Chamber II, Feb. 1, 2007). The largest group of applications forwarded to the parties for the making of observations consisted of seventy-five applications in the DRC situation. *See* 23 May 2007 DRC Decision Authorizing Observations, *supra* note 147. Of that group, according to the OTP’s submission under Rule 89(1), sixty-five applicants sought to participate in the investigation, sixty-eight sought to participate in the pre-trial phase, and seventy-four sought participation at trial. *See* OTP’s 25 June 2007 DRC Submission, *supra* note 134, ¶ 2.

<sup>198</sup> Situation in the DRC, Situation No. ICC-01/04-423-Corr, Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06, a/0230/06, a/0234/06 à a/0236/06,

filed with the Registry at least eight months prior, and some had been filed more than a year and a half before the Chamber issued its decision.<sup>199</sup> In its December 2007 decision, moreover, the Chamber failed to reach any determination on over half of the 140 applications considered, thus ensuring that many applicants would continue to wait further for any disposition.<sup>200</sup> Similarly, when in August 2007 the Single Judge in the Uganda situation first considered the first forty-nine applications upon which the parties had submitted observations, only seven applications were resolved, and forty-two were deferred.<sup>201</sup> The forty-two applicants whose requests had been deferred then waited another seven months, until March 2008, when the Single Judge issued the next decision reconsidering their applications.<sup>202</sup> This second decision resolved another thirteen applications, leaving thirty-five applicants, of the forty-nine originally in the group, who yet had no decision from the Chamber, despite having applied to participate at least one year and four months previously.<sup>203</sup>

¶163

Notably, the delay just described precedes any attempt to carry out the second step of the two-stage analysis adopted by the Pre-Trial and Trial Chambers: the assessment of whether the theoretical right should be translated to actual participation, based on consideration, *inter alia*, of the potential effects of the proposed participation on fairness and efficiency. The second step, of deciding to permit participation in specific proceedings has, in case proceedings, been carried out only in connection with the four victims who have been participating in the *Lubanga* case since 2006 and another five applicants who in April 2008 obtained the right to participate in the second DRC case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.<sup>204</sup> In the ICC investigations, of the

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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 », Public (Pre-Trial Chamber I, Jan. 31, 2008) [hereinafter Second Decision re DRC Situation Participation]. The decision was re-issued by means of the Corrigendum, dated 31 January 2008, which does not acknowledge that the original decision was issued on 24 December 2007.

<sup>199</sup> See *id.* at 3-5.

<sup>200</sup> See *id.* at 57-59.

<sup>201</sup> See 10 August 2007 Uganda Decision, *supra* note 47, at 2-3, 61-62.

<sup>202</sup> See Second Decision re Uganda Participation, *supra* note 74.

<sup>203</sup> See *id.* at 2-3, 70-71.

<sup>204</sup> The other nine victims who obtained the “status of victim” in a case did so in the *Kony* proceeding, in which there has been no arrest. See *supra* note iii and accompanying text.

107 applicants who have obtained a theoretical right to participate, the vast majority have never pursued any request to participate in a specific proceeding. Others have participated, thus far, only in the proceedings relating to the existence or scope of the right to participate. Only a handful of the 107 “situation victims” have even arguably been permitted to participate in any investigation-phase proceeding. As is related *infra* in Part III.C, six applicants granted the “status of victim” in the DRC situation requested further information about the OTP’s investigative strategy in the DRC, but Pre-Trial Chamber I denied the request.

¶64 The Chambers embraced a system requiring application-by-application consideration at each of the two stages, with the view that the granting of a broad theoretical right could be balanced by a separate consideration of the effects of participation. The operation of the system, however, seems to be proving that victims will continue to fail to obtain actual participation, because both steps of the analysis are strongly resistant to completion.

*B. The Proliferation of Litigation Relating to Victims’ Participation*

¶65 Contributing to the slow pace at which applications to participate have proceeded to actual participation is an entirely predictable circumstance: the opening of the door to victim’s participation has correspondingly opened an entire area of litigation relating to the novel right. The OTP, defense counsel, and victims’ representatives have raised and briefed—and the ICC judges have adjudicated—dozens of issues relating to the process of submitting, evaluating, and adjudicating applications to participate. In addition to such fundamental questions as the proper definition of “personal interests” in Article 68(3), or the extent of information-gathering that a Chamber must undertake in determining whether to grant an application to participate, this litigation has addressed numerous other issues, including:

- Whether applicants or individuals granted the status of victim are entitled to protective measures furnished by the Court;<sup>205</sup>

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<sup>205</sup> See, e.g., 17 January 2006 DRC Decision, *supra* note 26, ¶ 73 (referencing Art. 57(3)(c), which among other things, empowers Pre-Trial Chambers to pro-

- Which parties, participants, and counsel are entitled to know the identities of the applicants, and when;<sup>206</sup>
- Whether the form distributed by the Registry to applicants adequately records the circumstances in which the application was completed;<sup>207</sup>
- The extent of the duties that the Office of Public Counsel for Victims (“OPCV”) may perform on behalf of applicants who have no legal representative;<sup>208</sup>
- The extent to which non-public information and evidence should be made available to participating victims or applicants to participate;<sup>209</sup>

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vide protective measures to victims and witnesses); OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 15; 10 August 2007 Uganda Decision, *supra* note 47, ¶¶ 98-99; Situation in Darfur, Situation No. ICC-02/05-81, Prosecution’s Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, Public, ¶ 27 (June 8, 2007).

<sup>206</sup> See, e.g., Defense 7 August 2006 *Lubanga* Submission re Leave to Appeal, *supra* note 129, ¶¶ 5-6, 36-47 (seeking leave to appeal practice of Pre-Trial Chamber I to provide redacted applications to defense); Situation in the DRC, Situation No. ICC-01/04-374, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, Public, ¶¶ 16-29 (Aug. 17, 2007) [hereinafter 17 August 2007 DRC Decision on Application Process] (resolving dispute between OPCV and OPCD as to whether OPCD was entitled to unredacted versions of victims’ applications); Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-209, Decision on Prosecutor’s “Application to Lift Redactions from Applications for Victims’ Participation to be Provided to the OTP” and on the Prosecution’s Further Submissions Supplementing such Application, and Request for Extension of Time, Public, 6 (Pre-Trial Chamber II, Feb. 20, 2007) (denying OTP’s request to be furnished with unredacted versions of applications to participate in situation and case).

<sup>207</sup> See, e.g., OPCD DRC Request for Addt’l Information from Applicants, *supra* note 163, ¶¶ 20-21; DRC Decision on OPCD Requests for Addt’l and Exculpatory Information, *supra* note 166, ¶ 15.

<sup>208</sup> See, e.g., Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-243, Decision on the OPCV’s Observations on Victims’ Applications and on the Prosecution’s Objections Thereto, Public, 4-6 (Pre-Trial Chamber II, Apr. 16, 2007) (dismissing as inadmissible OPCV submission in the case and situation on behalf of applicants, on ground that it is beyond the OPCV’s mandate of providing support and assistant to legal representative of victims).

<sup>209</sup> See, e.g., 17 January 2006 DRC Decision, *supra* note 26, ¶¶ 74, 76 (stating that Chamber will determine on case-by-case basis whether to admit victims to proceedings otherwise conducted in closed session; also denying applicants access to non-public documents “for the time being”); OTP’s 28 February 2007 Uganda Submission, *supra* note 130, ¶ 18 & n.31 (arguing that expansion of

- Whether and at what stage a participating victim may remain anonymous without infringing the rights of accused persons;<sup>210</sup>
- Whether representatives of applicants or victims are entitled to remain anonymous;<sup>211</sup>
- The extent to which common representatives should be appointed for participating victims;<sup>212</sup>
- Whether applicants granted the status of victim are entitled to a presumption of indigence such that the Court should bear the expenses of their representation.<sup>213</sup>

¶66

These issues suggest the dimensions of the burden imposed on the participants, the judges, and the Registry. As to any group of applications under consideration, the Chamber must resolve all of the preliminary disputes about the application process before it may proceed to granting or denying even the “status of victim.” Applications are often found to be deficient under the developing standards, and thus are deferred, supplemented, and then reconsid-

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participation rights should not lead to disclosure of investigative activities to victims); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1211, Decision on the Role of the Office of Public Counsel for Victims and Its Request for Access to Documents, Public, ¶ 40 (Trial Chamber I, Mar. 6, 2008) (declining to permit the OPCV, who represented applicants to participate in the case, same access to non-public information as representatives of victims).

<sup>210</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-462, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Public, 5-7 (Pre-Trial Chamber I, Sept. 22, 2006) (determining that victims who obtained right to participate in confirmation hearing could only remain anonymous if they did not “add any point of fact or evidence at all to the Prosecution’s case-file . . . in the notification of charges document and the list of evidence,” and thus that they could not question the witnesses); Decision on *Lubanga* Trial Participation, *supra* note 3, ¶¶ 130-31 (rejecting arguments of defense and the OTP that victims should not be permitted to testify anonymously at trial).

<sup>211</sup> See, e.g., 17 August 2007 DRC Decision on Application Process, *supra* note 206, ¶¶ 30-31, 45-48.

<sup>212</sup> See, e.g., Decision on *Lubanga* Trial Participation, *supra* note 3, ¶¶ 123-26.

<sup>213</sup> See Situation in the DRC, Situation No. ICC-01/04-494, Demande de réexamen de la “Décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposé par Maître Keta au nom des victimes des victimes 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/0028/06” datée du 28 Mars 2008 selon la norme 85.3 du Règlement de la Cour, Public, ¶ 8 (Apr. 14, 2008) (request by legal representative of victims).

ered. The decisions undertaking to render determinations on the “status of victim” are lengthy and onerous to compose, because individual consideration of each application is required. Finally, the announcement of any new standard, or submission of supplemental information, can itself open other doors to new legal challenges.

¶67 The public record of ICC proceedings makes it possible to begin to quantify the time and energy expended in administering the victim participation system. Under this author’s count, and again as of May 1, 2008, the Chambers have rendered over 100 decisions relating to the process of obtaining victims’ participation. Filings by the participants on the same topic number over 180.<sup>214</sup> The relevant material consists of thousands of pages, and represented by the material are thousands of man-hours of the work of judges, prosecutors, defense counsel, and victims’ representatives. The Registry additionally bears a considerable burden, because it routinely conducts missions to the field to educate potential situation and case victims, to obtain applications, to gather information to include in its reporting under Rule 86(5), and to seek supplementation of applications deemed by the judges to be incomplete. The Registry units of the OPCD, OPCV and the Victim Participation and Reparation Section (“VPRS”), have also been heavily involved in litigation relating to victims’ participation, especially in the investigation phase, although the mandate of each unit embraces several other duties.<sup>215</sup>

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<sup>214</sup> The figures count only public decisions and submissions relating to the process of obtaining participation rights. They exclude submissions by participating victims expressing “views and concerns” in specific proceedings, or filings by the parties responding to such submissions.

<sup>215</sup> The duties of the OPCD include representing the interests of defendants during the initial stages of the investigation, see ICC Regulations, at Reg. 77(4), and “provid[ing] support and assistance” to defense counsel, including “legal research and assistance” and help in appearing before the Chamber, see *id.* at Reg. 77(5). The OPCV can be appointed to represent participating victims, see *id.*, at Reg. 80(2), but also has duties to “provide support and assistance to the legal representative for victims and to victims,” see *id.* at Reg. 81(4). The VPRS is charged with receiving applications for participation and reparations, helping victims to organize their representation, providing the notifications to victims which must occur under the RPE, for example, when the Prosecutor determines to open an investigation *proprio motu*, and publicizing the Court’s proceedings, including reparations proceedings. See Participation of victims in proceedings, <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (last visited June 10, 2008); Reparations for Victims, <http://www.icc-cpi.int/victimissues/victimsreparation.html> (last visited June 10, 2008).

¶168 Examination of the litigation related to victims' participation led the WCRO to conclude, in its November 2007 report, that the trade-off between effective participation and the efficiency of court proceedings was proving to be unfavorable. It noted that "despite the slow process of evaluating victims' applications and the small number of successful applications to date, the ICC victim participation scheme has consumed a substantial part of the Court's resources since January 2006."<sup>216</sup> It also concluded that "the detailed, individualized procedure developed by the Court to review victims is a drain on the resources of the Prosecutor and Defence . . ."<sup>217</sup> Since the issuance of the WCRO Report, trial-phase work has also been affected by the resource drain. The starting date for the ICC's first trial—the Lubanga trial—was postponed from March 31, 2008 to June 23, 2008, shortly after Trial Chamber I's February 26, 2008 decision to grant leave to the parties to appeal issues relating to victims' participation at trial.<sup>218</sup>

¶169 The question is the extent to which the litigation regarding victims' participation could be mitigated, given the reality that, in a court of limited resources, every resource expended to implement the victim participation framework is a resource that cannot be used to support other court activities. These alternative activities would include, for example, continuing or expanding the number of investigations and cases, providing protection for victims and witnesses who will appear in court, supplementing the resources of defense counsel, or providing hearings and trials more expeditiously. Some of the expenditure and delay associated with providing victims' participation is unavoidable, because incorporating meaningful participation into court proceedings necessitates the setting of legal standards, outreach efforts, and adjudication of applications. Still, the developing record identifies certain circumstances that are failing to bring reward, either to victims or the Court. One is the failure of the Chambers and judges to harmonize

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<sup>216</sup> WCRO Report, *supra* note 6, at 5.

<sup>217</sup> *Id.* at 60.

<sup>218</sup> See ICC Press Release, Trial in the Case of Thomas Lubanga Dyilo Will Commence on 23 June 2008 (Mar. 13, 2008), available at <http://www.icc-cpi.int/press/pressreleases/348.html>; Transcript in Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-75-ENG (Feb. 13, 2008), at 2-4 (explaining that Trial Chamber I was contemplating delaying trial because of OTP delay in completing disclosure and Chamber's intention to grant leave to appeal victims' participation decision).

the governing legal standards. The preference for innovation, or “concessions,” at the expense of pragmatic, non-controversial rulemaking, has fostered uncertainty and delay. Years into the ICC’s operations, there is a substantial possibility that the Appeals Chamber will change, yet again, the standards governing victims’ participation.

¶70 The step of granting hypothetical rights has also diverted significant time and energy. If it typically takes a year or more to adjudicate an applicant’s right to participate, it appears particularly unproductive for the Chambers to grant hypothetical rights to participate in any case in which arrest has yet to be effected. A logical priority would be for Pre-Trial Chambers to focus on pre-trial issues arising in cases involving defendants in custody, and to adjudicate applications to participate in cases only after a defendant has come into custody. The record also indicates that individuals granted “the status of victim,” particularly in the investigation, are rarely seeking participation in any specific proceeding.<sup>219</sup> It might better serve the Court, and victims, for Chambers to decline to grant any right to participate, in the absence of greater specification by the applicant of the proceedings in which he or she wishes to participate.

¶71 All of the time and resources expended to administer the general right to participate in the investigation are particularly susceptible to critical review. The difficulty of adjudicating the first few hundred applications to participate, and the failure of the general right to produce actual participation during investigations, suggests strongly that it may have been ill-considered for the Court to undertake to provide general participation in the investigation before settling the practice of administering far less controversial participation rights.

¶72 Moreover, the theoretical right to participate in the investigation is the right most removed from the core mandate of the Court and most likely to raise false expectations among applicants. In over two years, only eighteen applicants have successfully obtained participation in a case, and all eighteen have qualified under the rule that such participation requires the applicant to have suffered from a charged crime.<sup>220</sup> The figure shows that if the rule

<sup>219</sup> See discussion *infra* in Part III.C.

<sup>220</sup> This is because Trial Chamber I, the Chamber which disagreed with that rule, has yet to apply its more generous test for granting the potential right to participate in a case.

requiring the causal link between the charged crime and the harm suffered by the victim is upheld on appeal, even victims who successfully obtain the status of victim in the investigation are highly unlikely to qualify to participate in any ICC case. Most of the energy now expended in providing victims' participation is thus devoted to granting a theoretical right to victims of crimes and perpetrators who are not, and are likely never to become, the subject of any ICC case.

¶73 As the foregoing suggests, identifying and remedying inefficient and unproductive efforts will ultimately better serve victims in addition to the Court itself. A resource drain created by the victims' participation framework prejudices victims by delaying the meting of justice as well as victims' participation in the judicial process. It is less acknowledged but equally true that poor administration of participation rights also constrains the number of victims who can participate and the extent of their participation.

### *C. Victims' Inability to Obtain Meaningful Participation*

¶74 Perhaps the most troubling aspect of the current victims' participation framework is that the extent of meaningful participation has been negligible. The process of granting the participation right has been intense and all-consuming, whereas the incorporation of the substance of victims' "views and concerns" in underlying ICC proceedings has been meager.

¶75 It should be clarified at the outset that by "meaningful participation" is meant the participation intended in the Statute: the actual expression of views and concerns by victims in proceedings following the determination that their participation is appropriate. The Chambers have thus far purported to be granting nothing less than such a "concrete" and "effective" right.<sup>221</sup> Victims' representatives likewise have not characterized the objective of Article 68(3) to be the distribution of theoretical or hypothetical rights. Rather they have adopted the strategy of pursuing concrete participation in the broadest range of proceedings<sup>222</sup> while articulating,

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<sup>221</sup> See, e.g., 17 January 2006 DRC Decision, *supra* note 26, ¶ 71.

<sup>222</sup> See, e.g. Situation in Uganda, Situation No. ICC-02/04-106, Response of Legal Representative of Victims a/0101/06 and a/0119/06 to the "Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06," Public, ¶ 23 (Aug. 31, 2007) (arguing that victims

for example, that victims' "enjoyment of their right to participate in the proceedings," cannot be impaired by "technical difficulties," such as a lack of Court resources.<sup>223</sup>

¶76

Some differentiation between the investigation and case phases is necessary in evaluating the extent of meaningful victims' participation, so defined. The general right to participate in the investigation phase is failing conspicuously to yield meaningful participation. Of the 107 or so applicants who have succeeded in obtaining the procedural status of victim vis-à-vis an investigation, only six have made any request related to any investigation, and the two applications they submitted were rejected. The two requests that the Chamber considered were made in the DRC investigation,<sup>224</sup> and concerned an issue which the victims likely viewed to be of great importance to their "personal interests": the scope and direction of the OTP's investigation, following an OTP announcement, in June 2006, that it had temporarily suspended the bringing of additional charges against Lubanga.<sup>225</sup> The victims requested that Pre-Trial Chamber I order the OTP to provide more information about the DRC investigation, in light of what they termed the OTP's "tacit decision not to prosecute under article

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should be permitted to participate in investigation because "their participation can serve to clarify the facts and to assist the Court to fight impunity").

<sup>223</sup> See Situation in the DRC, Situation No. ICC-01/04-105-tEN, Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber 1's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6, Public, ¶¶ 21-26 (Jan. 27, 2006).

<sup>224</sup> The two submissions by victims, ICC-01/04-213-Conf-Exp, and ICC-01/04-214-Conf-Exp, and the OTP responses, remain non-public, but are known from the resulting decision. See Situation in the DRC, Situation No. ICC-01/04-399, Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 Regarding "Prosecutor's Information on Further Investigation," Public (Sept. 26, 2007) [hereinafter 26 September 2007 DRC Decision on Victims' Applications re Scope of Investigation]. The conclusion that only these two applications have been made by individuals granted the "status of victim" is necessarily drawn from publicly available documents and filings. The WCRO Report deems as another instance of victims' participation in a proceeding the submission of the victims' representative relating to the OTP's request to appeal the January 17, 2006 decision of Pre-Trial Chamber I. See WCRO Report, *supra* note 6, at 5. This request sought the right to participate, however, instead of providing "views and concerns" in a substantive proceeding.

<sup>225</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-170, Prosecutor's Information on Further Investigation, Public Formatted and Redacted Document, ¶ 11 (June 28, 2006).

53(2)(c).”<sup>226</sup> They also requested that the OTP be required to inform the Chamber of any information which might bear on the need to “preserve evidence” relating to the crimes from which they themselves had suffered.<sup>227</sup> After a year passed, Pre-Trial Chamber I issued its ruling. The Chamber determined, without extended discussion, that because the OTP had taken no decision not to investigate or prosecute, under paragraphs 1(c) or 2(c) of Article 53, and because there was no information that the OTP had not preserved evidence, the two victims’ applications should be rejected.<sup>228</sup>

¶77 The account of these requests by the victims is instructive. Pre-Trial Chamber I had held out the offer of broad and independent victims’ participation during the investigation. When faced with applications to obtain actual participation via these two applications, however, the Chamber in fact limited the victims to exactly the same participation right they would have obtained without the “general” participation right granted in the January 17, 2006 decision: the express right under Rule 92(2) to submit views and concerns about any decision not to prosecute under the terms of Article 53(1) or 53(2).<sup>229</sup>

¶78 In addition, the nearing of the end of one portion of the DRC investigation serves to underscore that granting the “procedural status of victim” vis-à-vis an investigation may often frustrate, rather than serve, victims’ interests. Earlier this year, the Prosecutor suggested that the focus of OTP investigations in the DRC would change from the Ituri district in Oriental Province to the provinces of North and South Kivu.<sup>230</sup> The 340 or so applicants who have sought participation in the DRC investigation thus far, and the

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<sup>226</sup> See 26 September 2007 DRC Decision on Victims’ Applications re Scope of Investigation, *supra* note 224, at 2-3.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 5-6.

<sup>229</sup> See RPE, *supra* note 17, R. 92(2) (providing in relevant part, “In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53”).

<sup>230</sup> See Associated Press, *Congo turns over to international court colonel suspected of war crimes*, INT’L HERALD TRIB., Feb. 7, 2008, available at <http://www.ihl.com/articles/ap/2008/02/07/europe/EU-GEN-War-Crimes-Congo.php> (“Now the Court is turning its attention to more recent violence in the North and South Kivu regions of Congo, where forces loyal to rebel leader Laurent Nkunda have been accused of widespread atrocities.”).

eighty-odd who ultimately obtained the “status of victim” in that investigation, are likely to have sought participation because they were victims of crimes committed in Ituri, given the OTP’s early announcements of an intent to focus investigative activities there,<sup>231</sup> and the fact that the first DRC cases involved Ituri armed groups. If the DRC investigation, and proceedings related to that investigation, now turn to the Kivus, the opportunities of the individuals who thus far have applied to participate in the DRC investigation are ending, without any such applicant having achieved meaningful participation. These applicants also are highly unlikely to be afforded the right to participate in the two pending cases relating to Ituri, at least based on previous decisions of the Pre-Trial Chambers, unless they are found to be victims specifically of the charged crimes.

¶79 In case proceedings, by contrast, there has been promising, influential, and meaningful victim participation. Again, though, the most prominent example was victim participation at the *Lubanga* confirmation hearing, and such participation is uncontroversial under the Statute in any event. At that hearing, conducted over a period of days in November 2006, legal representatives of the participating victims expressed “views and concerns” that were uniquely informed by the victims’ experiences and desires.<sup>232</sup> The interventions were relevant, often eloquent, and did not lend themselves to criticism that they impaired either the fairness or the efficiency of the proceedings.<sup>233</sup> Over a year after the confirmation hearing, however, the same four victims who participated at con-

<sup>231</sup> See, e.g., ICC Press Release, Communications Received by the Office of the Prosecutor of the ICC, No. pids.009.2003-EN, at 2-3 (July 16, 2003) (announcing OTP intention to follow closely the situation in Ituri), available at [http://www.icc-cpi.int/library/press/mediaalert/16\\_july\\_\\_english.pdf](http://www.icc-cpi.int/library/press/mediaalert/16_july__english.pdf).

<sup>232</sup> See Transcripts of Confirmation Hearing in Prosecutor v. Thomas Lubanga Dyilo, Case Nos. ICC-01/04-01/06-T-30-EN (Nov. 9, 2006), ICC-01/04-01/06-T-32-EN (Nov. 10, 2006), ICC-01/04-01/06-T-33-EN (Nov. 13, 2006), ICC-01/04-01/06-T-34-EN (Nov. 14, 2006), ICC-01/04-01/06-T-37-EN (Nov. 15, 2006), ICC-01/04-01/06-T-38-EN (Nov. 20, 2006), ICC-01/04-01/06-T-39-EN (Nov. 21, 2006), ICC-01/04-01/06-T-41-EN (Nov. 22, 2006), ICC-01/04-01/06-T-43-EN (Nov. 23, 2006), ICC-01/04-01/06-T-44-EN (Nov. 24, 2006), ICC-01/04-01/06-T-45-EN (Nov. 27, 2006), ICC-01/04-01/06-T-47-EN (Nov. 28, 2006).

<sup>233</sup> See *id.* The opening arguments of victims’ representatives can be found at Case No. ICC-01/04-01/06-T-30-EN (Nov. 9, 2006), at pp. 75-102, and their closing arguments at Case No. ICC-01/04-01/06-T-47-EN (Nov. 28, 2006), at pp. 45-86.

firmation remain the only ones who have qualified to participate in the *Lubanga* case, despite the pendency of hundreds of applications. These four are in the position of representing thousands or tens of thousands of children or family members who suffered harm from the alleged crime perpetrated by Lubanga: helping to implement a policy of conscription and enlisting children into his militia group and using them in hostilities. They have not, however, been determined to be representative. They simply are the few who have been fortunate enough to have had their applications considered and ruled upon.

¶80 In addition, if the ruling of Trial Chamber I stands on appeal, participation at the pre-trial and trial phases is likely to become much more burdensome for victims to obtain. Applicants who have participated in pre-trial proceedings in the *Lubanga* case have qualified under the bright-line rule of having suffered from the specific crimes charged in the case. The January 18, 2008 ruling of Trial Chamber I, by contrast, would create a large class of theoretical participants—individuals who have been the victim of any crime within the jurisdiction of the Court—but require each of those victims to demonstrate additionally that he or she holds information relevant to the issues and evidence being considered. The inquiry will again be fact-intensive, and experience suggests that timely adjudications are unlikely.

¶81 Rulings of the Chamber that expanded theoretical rights were met with wide approval, especially by victims, but the vast majority of applicants are overwhelmingly likely never to participate in specific proceedings. Representatives of victims have begun complaining about how difficult it has been to obtain victims' participation and have acknowledged the challenge of maintaining realistic expectations among clients who can easily and mistakenly believe that an application to participate will lead inexorably to a "day in court" and reparations.<sup>234</sup> The challenge for the ICC is to enhance real prospects for meaningful victims' participation and to

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<sup>234</sup> See, e.g., VRWG Article re Darfur Applicants, *supra* note 7 (quoting legal representatives of applicants in the Darfur situation: "We were surprised at how difficult it turned out to be from a practical point of view " and "the delay [in obtaining decisions on the applications] is difficult to explain to our clients"); IWPR Report, *supra* note 7 (reporting views of lawyers at Avocats Sans Frontières and REDRESS, and legal representatives of applicants in Darfur situation, that applicants do not receive adequate legal aid from the ICC; ICC reported to have stated that the 735,000 euro in the ICC budget available for legal aid for victims would go to victims approved for participation).

clarify standards to eliminate false expectations that can, over the long-term, undermine the credibility of the Court and dishonor the dignity of victims.

#### IV. SOURCES OF THE FAILURE TO PROVIDE GREATER MEANINGFUL PARTICIPATION

¶82 Several broad causes of the ICC's lack of success in developing viable victims' participation standards have particular relevance to attempts to formulate strategies for strengthening the participation framework.

##### A. *Departure from the Balances Struck in the Rome Statute*

¶83 One factor that has contributed prominently to the deficiencies in the victim participation system has been the repeated disregard of fundamental balances struck during the negotiation of the Rome Statute. The decisions of the Chambers on the topic of victims' participation have aspired to innovate; each Chamber and Judge has eschewed limits in favor of granting more and more expansive forms of participation (in some cases, more expansive than any participant had sought). The common shortcoming is the failure to acknowledge that the drafters of the Rome Statute fully considered the extent of victims' participation and set limitations to participation.

¶84 The first example of overreaching was the decision to create a general right to participate in the investigation. The reasoning of the January 17, 2006 decision of Pre-Trial Chamber I rebuffed the proposition that formed the foundation for discussions at Rome: that the rights of defendants and participation by victims must be regarded as inherently in conflict. Thus Pre-Trial Chamber I opined (and predicted) that it could expand victims' participation in investigations, while regulating, through later decisions, the adverse affects on defense rights. The passage of time has shown the self-confidence of the Chamber to be less astute than the restraint of the negotiators of the Rome Statute. Neither the Chambers, nor victims, have identified any investigation-phase proceeding in which victim participation can profitably occur, beyond the instances already expressly identified in the Statute. The *Lubanga* defense, in the meantime, has compiled a record of the ways in which the Chambers' consideration of accounts of victimization

may have prejudiced the defense or adversely affected the Chambers' appearance of impartiality.

¶85 Instead of recognizing the necessity of limits, the methodology has been to justify each expansion of the participation right by invoking recent, and significant, developments in a growing movement to enhance the rights and entitlements of crime victims. The Chambers have drawn support from both human rights jurisprudence and U.N. declarations. The January 17, 2006 Decision of Pre-Trial Chamber I, for example, relied on rulings from the European and Inter-American Courts of Human Rights in making its central determination: that the objective or purpose pursued by those Courts, of granting victims "an independent voice and role," justified conferring a general right to participate in an ICC investigation, even if the text of the Statute did not mandate that right.<sup>235</sup> Trial Chamber I, two years later, used similar analysis in reasoning that the Basic Victims Principles adopted by the U.N. General Assembly, which expressly declined to condition one's status as a "victim" upon any apprehension of a perpetrator, dictated that the ICC should use the same definition.<sup>236</sup>

¶86 Both of these decisions wrongly departed from the outcomes at Rome. The drafters were equally aware of the advances in human rights law in favor of granting "an independent voice" to victims, and of promoting the rights and entitlements of victims.<sup>237</sup>

<sup>235</sup> See 17 January 2006 DRC Decision, *supra* note 26, ¶¶ 50-54 (section entitled "the teleological argument"). The Single Judge of the Uganda situation adopted this reasoning. See 10 August 2007 Uganda Decision, *supra* note 47, ¶ 7.

<sup>236</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3, ¶¶ 35, 92.

<sup>237</sup> See WCRO Report, *supra* note 6, at 8 ("The unprecedented provisions for victim participation in the proceedings of the International Criminal Court are largely a product of a much broader movement in recent decades towards the achievement of restorative—as opposed to strictly retributive—justice") & 10 ("the drafters of the ICC Rome Statute were particularly influenced by United Nations Declaration of Basic Principles of Justice for Victims and Crime and Abuse of Power" which was "the first formal recognition at the international level that victims are entitled 'access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered'") (quoting United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40<sup>th</sup> Sess., 96<sup>th</sup> plenary mtg, Annex, U.N. Doc. A/RES/40/34 (Nov. 29, 1985)); Fernández de Gurmendi, *supra* note 12, at 428-31 (describing that the broad definition of victims in the United Nations Declaration of Basic Principles of Justice for Victims and Crime and Abuse of Power was advocated before Rome and by many delegations at Rome, but that ultimately the idea of incorporating a definition of victims from the Declaration, or from any other source, was aban-

They, too, sought to promote and lend further momentum to that movement, and the consequence was a Statute that granted to victims a role representing a high-water mark in victims' participation in international criminal law. Still, the negotiators at Rome also clearly rejected the notion that the goal or trend of giving victims a "voice" could justify ever-expanding participation in ICC proceedings. The objective of providing participation, it was decided, would not confer the status of a party, for example, nor would it permit more than the expression of "views and concerns," indirectly through legal representatives. Boundaries were imposed because of the specific considerations that apply to an international criminal court: the need to balance the interests of the defense with the Court's ability to prosecute efficiently those responsible for the most serious crimes in the world.

¶87 The weakness in the decision of Pre-Trial Chamber I thus was disregard of the fact that the Statute already answers the important questions of *how much* of an independent voice and role the victims were to obtain, and *in what ways* victims will be enabled to participate in the fight against impunity. Any ellipsis in the Statute about any general right to participate in the investigation, or any other instance or form of participation, should not be regarded as a negative space into which additional participation rights should be granted. Rather, and especially in light of the other distinctions the negotiators plainly made, it should be respected that the incremental participation was disfavored because of the consequences for fairness and efficiency.

¶88 Trial Chamber I's decision that an applicant could obtain the potential right to participate at trial, regardless of whether he or she suffered harm from any crime being prosecuted by the ICC, likewise disregarded a fundamental limit: the jurisdiction of the Court. The dissent of Judge Blattman correctly pointed out that, in any court, the implicit limitation of the court's jurisdiction or competence must inform the extent of a participation right. For Trial Chamber I to permit participation in a trial by victims of crimes other than the only crimes being tried, in essence, arrogated power to the Chamber that it does not possess. No court, domestic or international, has even attempted such an expansion of its own authority. The majority opinion's reliance on the Basic Victims Principles is infirm, in addition, because the majority either ig-

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doned because the definition was too controversial).

nored, or failed to appreciate, that the Principles have been adopted for a critical but different purpose: to express the obligation and agreement of *states* to provide redress to all victims of violations of international humanitarian and human rights law, regardless of whether perpetrators are identified or punished. The ICC is not a state, and it has no such broad obligation, nor the capability to fulfill it. As the OPCD has argued in the pending appeals in the DRC and Darfur situations: the Court “has neither the obligation nor the power to give effect to the right to a remedy for every potential victim” of all crimes within the jurisdiction of the Court.<sup>238</sup>

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Finally, in certain instances the Chambers have chosen a balance that appears to have been affirmatively rejected in the Court’s governing documents. The Statute and the RPE, for example, clearly disapprove granting victims the right to adduce evidence at trial. Those documents declined to give victims the status of “party” and prohibit victims from even posing questions to witnesses at hearings and trial, absent prior court approval. The negotiators at Rome rejected proposed text granting victims the right to present evidence.<sup>239</sup> Against this background, for Trial Chamber I

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<sup>238</sup> See 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶ 52; Situation in the DRC, Situation No. ICC-01/04-440, OPCD Appeal Brief on the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” Public, ¶ 53 (Feb. 4, 2008).

<sup>239</sup> Compare U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., Preparatory Committee on the Establishment of an Int’l Crim. Ct., *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, at 109, A/CONF.183/2/Add.1 (Apr. 14, 1998) (proposing Art. 68(8) that provided victims’ representatives with a “right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation”), and Proposal Submitted by Canada, at 2, A/CONF.183/C.1/WGPM/L.58 (July 6, 1998) (proposing during Rome negotiations, and as part of an Art. 68(3), the same language contained in the Preparatory Commission draft), with U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., Comm. of the Whole, Working Group on Procedural Matters, *Report of the Working Group on Procedural Matters*, at 4, A/CONF.183/C.1/WGPM/L.2/ADD.6 (July 11, 1998) (proposing deletion of Art. 68(8) of the version of the Statute authored by the Preparatory Commission); see also Jorda and de Hemptinne, *supra* note 9, at 1406 (“a victim does not enjoy the same rights as other parties to the proceedings. He may not participate in the investigation undertaken by the Prosecutor, have access to evidence gathered by the parties, nor call witnesses to testify at the hearing”).

to grant victims the right to lead evidence not only upsets statutory balances, but risks fostering disrespect of the Statute.

¶90 The additional irony of this aspect of Trial Chamber I's decision in the *Lubanga* case is that it affirmatively undermines the interests of victims. The negotiators at Rome, in granting the right of victims' participation, aimed to promote the understanding that victims have a role in proceedings in their own right, *beyond* serving as witnesses.<sup>240</sup> The decision of Trial Chamber I directly returns victims to the limited function of furnishing evidence. Even worse, and as Judge Blattman also suggested, because the decision has granted victim status to anyone who suffered harm as a consequence of any crime within the Court's jurisdiction, the victims of the crimes at issue in the trial are effectively discriminated against, even in seeking to obtain the limited role of a provider of evidence.

¶91 Favoring the importation of innovations in human rights law over application of the Statute has not paid rewards. Perhaps most troubling is the implicit judgment in the ICC's judicial decisions that the drafters of the Statute must have failed to regard victims' rights, and the means of vindicating those rights, with sufficient seriousness or foresight.

#### B. *Insufficient Regard for Fairness Considerations*

¶92 Balances struck in the Rome Statute are inevitably redrawn if victim participation rights are expanded: balances between the Prosecutor's right to independence and the victims' entitlement to pursue redress, for example, or between the need to maintain confidentiality of investigative information and to provide victims with knowledge that might enhance participation. The balance which is of paramount importance to maintain, however, is the one between the rights of the accused and the rights of victims. Article 68(3) could not be clearer in repeating and endorsing the basic precept that when victims' participation is "inconsistent with" the rights of the accused, victim participation must yield.<sup>241</sup>

<sup>240</sup> Fernández de Gurmendi, *supra* note 12, at 429 (debate at Rome was about "the role of victims—beyond their auxiliary function as witnesses"); WCRO Report, *supra* note 6, at 17 ("the ability of victims to participate before the ICC independently of providing witness testimony is a key contribution of the Rome Statute in the effort to recognize and respond to victims' interests in the work of the Court").

<sup>241</sup> Rome Statute, *supra* note 9, art. 68(3) (stating that participation can only take place "at stages of the proceedings determined to be appropriate by the Court

¶93 The decisions of the Chambers regarding victim participation have failed seriously to abide this directive to safeguard defense rights. The Chambers have embraced the notion that fairness to the defense should be considered only when the victim seeks to participate in a specific proceeding, based on reasoning that conferring the “status of victim” does not *per se* prejudice defense interests. This methodology is infirm. There is no logical basis for concluding that the Chambers can excuse themselves from considering whether prejudicial effects flow from the initial determination of whether to grant the “status of victim.” If granting the “status of victim,” in itself, cannot be squared with providing a fair proceeding, due process or fairness principles, as well as the terms of Article 68(3), prohibit even the conferring of the theoretical right.

¶94 In addition, it is becoming clear that creating the “procedural status of victim” does concretely and unduly prejudice the defense. Merely the resource diversion and delay in proceedings occasioned by the adjudication of theoretical rights to participate has already had significant effects on the content and pace of the Lubanga proceedings. Lubanga’s defense team has also posed, for example, the fair question of how a Chamber can render rulings that crimes within the Court’s jurisdiction are likely to have been committed, based almost exclusively on first-hand accounts by victims, rather than on evidence presented by the Prosecution and subject to disclosure obligations, without creating an appearance of bias against the defense. Strangely, the Pre-Trial Chambers appear not to have foreseen that such issues would arise, and the Appeals Chamber now is left with the consequences.

¶95 The more recent decision of Trial Chamber I implicates the rights of the accused even more dramatically, and again impairs the predictability and efficiency of Court proceedings. If accused persons can be confronted, at trial, not only by victims of the crimes with which he or she is accused, but by victims of any crime within the jurisdiction of the Court, the burden on the defense, and the prejudice to it, is patently heightened.<sup>242</sup> Selecting

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and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”).

<sup>242</sup> There is no assumption that victims uniformly will give evidence tending to incriminate the defense. Rather, the fact that the defense must prepare to meet additional evidence, presented by victims, with the risk that the evidence may be prejudicial, burdens defense rights.

victims for trial participation based largely on whether the applicant has the ability to enhance the trial evidence and trial issues will fundamentally alter the relationship between victims and the defense and also risks lifting the burden of proof from the Prosecution.<sup>243</sup>

¶196

It can be argued that the Court, in the end, has created a balance that does nothing to offend defense rights; that is certainly the view of the Chambers whose decisions are now on review. It is nonetheless unsettling that the Court, in connection with its first cases, has been so willing to create genuine questions about whether it will be compromising due process rights of the defense to provide incremental benefits to victims. The courting of risk seems particularly ill-advised given that the Court would achieve unprecedented success in vindicating victims' rights if it granted meaningful participation in the proceedings and by modalities that are uncontroverted under the Rome Statute. Will the Court, or States or the public, be satisfied that justice is served by a first conviction obtained in a manner not so far countenanced in any domestic or international court system: through testimony, in part or in whole, offered by victims of crimes not allegedly committed by the defendant, not proffered by the Prosecution, and not subject to any disclosure requirements? The Court's repeated invocation of the Basic Principles, in effect, without any balancing consideration of human rights declarations establishing the rights of the accused, such as the International Covenant on Civil and Political Rights,<sup>244</sup> or the Universal Declaration of Human Rights,<sup>245</sup> is a telling circumstance.

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<sup>243</sup> In addition, the system envisioned by the majority opinion, as Judge Blattman took pains to point out, imposes significant additional burdens: on victims to submit two applications to obtain potential and actual participation, on the Chambers to assess both potential participation and the value of the victims' information in the context of an evolving record, and on the parties to respond to the applications to participate as well as the content of the evidence adduced by victims.

<sup>244</sup> International Covenant on Civil and Political Rights, *opened for signature* 19 December 1966, *entered into force* 23 March 1976, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6316, art. 14(1) (1966) (recognizing right of all criminal defendants to a "fair and public hearing by a competent, independent and impartial tribunal").

<sup>245</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., U.N. Doc. A/810, arts. 10 & 11(1) (Dec. 10, 1948) (declaring that criminal defendants have entitlement to a "fair and public hearing by an independent and impartial tribunal" and presumption of innocence).

*C. Over-Estimation of Ability to Manage and Resolve  
Applications to Participate*

¶197 An additional problem in the Chambers' approach to victim participation has been over-confidence in their ability to resolve applications to participate and provide actual participation.

¶198 The most basic misstep was the decision to establish a two-stage process by which, with respect to each and every application, the status of victim is assessed and then the eligibility to participate in a specific proceeding determined. The parties have advanced reasons why this two-part, case-by-case analysis, and particularly the conferring of a "status of victim," is not lawful.<sup>246</sup> Equally worthy of consideration is the gross inefficiency. The problem in the first step is almost self-describing: what is the worth of evaluating hundreds, potentially thousands, of applications to participate for the purpose of granting a theoretical right to participate in court proceedings? In addition, because the "status of victim" is available to any applicant who can advance some credible claim that he or she has suffered harm as a result of any crime within the Court's jurisdiction, the step in practice culls only the procedurally deficient applications.

¶199 To date, the Chambers have indeed deferred all analytically difficult determinations to the second step, a step which has been completed only rarely. In the investigation stage, for example, in theory the Pre-Trial Chambers would be considering the effects of participation on fairness and efficiency, at a minimum, with respect to applications to participate in specific proceedings. In advance of the trial of Lubanga, under Trial Chamber I's ruling, the Chamber would be determining whether any of the (currently) hundreds of applicants to participate in the trial have information relevant to the issues to be considered at trial, in addition to such issues as whether disclosure obligations apply to victims. The burdens imposed by the framework are manifest. Certainly, the operation of the system suggests that if it is ever truly tested—meaning either that applicants begin seeking participation in substantially higher numbers or that those who have obtained the pro-

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<sup>246</sup> See *supra* note 173 and accompanying text; see also *Prosecutor v. Thomas Lubanga Dyilo*, Case No. 01/04-01/06-1219, Prosecution's Document in Support of Appeal Against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, Public, ¶ 23 (Mar. 10, 2008).

cedural status of victim begin routinely seeking to participate in specific proceedings—the system may simply break down.

¶100 The inclination to add unproductive components to legal tests, to defer important or difficult analysis, and to underestimate the time and effort required to apply the legal standards features too prominently in the ICC’s record on victims’ participation. The results for victims, as noted in the WCRO report, include: a lack of progress in granting actual rights to participate,<sup>247</sup> “frustration among applicants,” and “the risk of inconsistent treatment for similarly-situated victims.”<sup>248</sup> The WCRO has gone so far as to suggest that the “onerous application process” and the “lack of clarity surrounding the victim participation scheme” may explain why “the ICC has seen a far smaller-than-anticipated number of applicants overall.”<sup>249</sup>

#### *D. Failure to Prioritize Core Objectives*

¶101 Finally, the failure of the ICC to set priorities relating to victims’ participation with strict reference to its mandate of prosecuting “the most serious crimes of concern to the international community,”<sup>250</sup> has worked to the detriment of the efficient proceedings and meaningful victims’ participation. The ICC is under tremendous pressure to demonstrate that the world’s first permanent international criminal court can deliver international justice fairly and with efficiency and impact. The element missing from the record of the Court’s operations is a sense that the Chambers are holding paramount the implementation of the instances and forms of victims’ participation most closely connected to the core business of the Court, the rendering of determinations of guilt and innocence. Instead, the Court’s decisions have tended to regard participation as an end in itself, or to define the objective of participation so abstractly that all participation appears equally desirable.

¶102 The Statute and the RPE clearly focus victims’ participation at the specific junctures in ICC proceedings critical to the mission of bringing accountability to perpetrators of mass crimes. The Statute and RPE provide that victims should participate when key

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<sup>247</sup> WCRO Report, *supra* note 6, at 5.

<sup>248</sup> *See id.* at 6.

<sup>249</sup> *See id.* at 56.

<sup>250</sup> Rome Statute, *supra* note 9, Preamble.

determinations altering the course of an investigation or case will be made, and the issues or interests relevant to victims are sufficiently crystallized that the expression of “views and concerns” will have high value, without risking disruption of the parties’ roles and responsibilities, or the efficiency of the Court. The Statute and the RPE specify as the moments at which victims should participate: any decision by the Prosecutor to start an investigation on his own initiative, any admissibility challenge by a State or defendant, the holding of confirmation hearings and trials, and proceedings regarding reparations.

¶103 It dramatically alters this system to grant participation rights based on a rationale as unbounded as allowing victims to participate to help “clarify the facts” or “punish the perpetrators of crimes.”<sup>251</sup> Inherent in the Statute, as well as the jurisdiction of any court, is the notion that not every fact will help bring the court’s cases to judgment, and not every perpetrator will come before the court, particularly if the court has a limited mandate.

¶104 Victims have been disserved by the Court’s foray into testing the boundaries of victims’ participation. Although the Chambers have immersed themselves in participation-related adjudications, their approach is willy-nilly; there is no collective effort to focus on decision-making which has the best chance of yielding meaningful participation. For example, applicants to participate in the *Lubanga* trial have waited in a queue, some now for years, while the Chamber managing the Uganda situation has been rendering participation determinations in a case in which no defendant has been arrested. The energy devoted to sorting theoretical rights to participate in the DRC investigation has outstripped the effort to qualify more than a handful of victims each to participate in the *Lubanga* trial and in pre-trial proceedings relating to defendants Katanga and Ngudjolo Chui.

¶105 Finally, the tendency to disregard the link between the extent and forms of victims’ participation and the Court’s mandate inevitably risks improperly expanding the mandate. Granting applicants a general right to participate during the investigation phase, for example, cannot help but convert the Court into a forum for general conflict-related advocacy, as *Lubanga*’s lawyers have pointed out. It can easily be considered improper, and unproductive, for the ICC to be inviting, considering, and opining about issues such as

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<sup>251</sup> 17 January 2006 DRC Decision, *supra* note 26, ¶ 63.

whether individuals have been victims of crimes within the ICC's jurisdiction, when there is no likelihood that the applicants' allegations will fall within the scope of any case commenced at the ICC.

¶106 The Court's victim protection responsibilities have also been expanded in a dramatic and troubling fashion. Because the Rome Statute imposes an affirmative obligation on the Chambers to protect "victims" and "witnesses,"<sup>252</sup> every expansion of the term "victim" brings with it the potential obligation to protect additional individuals and populations. The judges have indeed expressly embraced a responsibility to protect those granted the "status of victim,"<sup>253</sup> and, in the case of the majority opinion of Trial Chamber I, to protect even individuals who have only applied to obtain that status.<sup>254</sup> At the same time, the Court is struggling with the issue of whether it has the capacity to protect individuals the parties propose to call as witnesses in ICC proceedings.<sup>255</sup> The issue becomes one of whether the ICC's obligation of protection should be focused on individuals linked to ICC proceedings, or should be expanded to approximate the security responsibilities of a state or aid organization vis-à-vis populations threatened by conflict.

¶107 In the future, it may develop that participation rights can be expanded further as experience is gained in the Court. The Court's short history, however, strongly suggests that in the near term, par-

<sup>252</sup> See Rome Statute, *supra* note 9, art. 57(3)(c).

<sup>253</sup> See, e.g., 17 January 2006 DRC Decision, *supra* note 26, ¶ 73 (providing that Chamber may decide to permit persons "having the status of victims" in the investigation to participate in proceedings it initiates under Art. 57(3)(c), which provides in pertinent part that the Chamber may "provide for the protection and privacy of victims"); 10 August 2007 Uganda Decision, *supra* note 47, ¶¶ 98-99 ("victims in the context of a situation should be allowed to submit requests aimed at obtaining the adoption of such measures [i.e., protective measures] by the Pre-Trial Chamber").

<sup>254</sup> See Decision on *Lubanga* Trial Participation, *supra* note 3, ¶¶ 136-37 (providing that while Chamber "readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided," applicants are entitled to protection at "the point at which the application form is received by the Court," since filing an application to participate constitutes "appearing before the Court" within the meaning of art. 43(6) of the Rome Statute).

<sup>255</sup> See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-428-Corr, Corrigendum to the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, Public Redacted Version, ¶¶ 55-63 (Apr. 25, 2008) (determining that it is not sustainable for the ICC to provide protection to all witnesses deemed by the OTP to be in need and thus that the OTP must rely on fewer witnesses).

ticipation in ICC proceedings might best be promoted by prioritizing some forms of participation over others, consistent with the Statute itself. The experience of the first years of the ICC has served to underscore that it is simply not feasible, productive, or equitable to equate a “victim” of a conflict to a “victim” entitled to ICC participation.

#### V. PROPOSALS FOR STRENGTHENING THE VICTIM PARTICIPATION SCHEME

¶108 The matter that the Pre-Trial and Trial Chambers have largely avoided discussing—the record of the operation of the victims’ participation framework—must be considered in formulating a response to the question currently on appeal, asking how applications to participate “must be dealt with.”

¶109 Whether the Appeals Chamber is willing or able, in the appeals currently being heard, to harmonize the law so that a more rational and effective system of victim participation results, cannot be known. On the one hand, Appeals Chamber review cannot help but set some more unified course, as the appealed questions relate to both investigations and cases and will apply to all lower Chambers. The Appeals Chamber also has the benefit of having seen the operation of the victim participation system and the successive decisions of the Pre-Trial and Trial Chambers. Still, the Appeals Chamber faces some difficult circumstances. The issues on appeal are undeniably difficult, and none of the lower Chambers made an effort to engage or discuss opposing or differing rulings. If the Appeals Chamber were inclined to define the victim participation right to be any more limited than the lower Chambers, it would confront the hardship of disappointing expectations built up by the earlier decisions. Finally, in its prior decisions in interlocutory appeals, the Appeals Chamber has failed to reach unanimity with some frequency,<sup>256</sup> a circumstance which raises the possibility that

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<sup>256</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-824 OA7, Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, Public, 55 (Appeals Chamber, Feb. 13, 2007) (dissenting from denial of right of victims to participate in appeal from decision declining to release Lubanga from custody, and advocating rule that once victims participate in lower chamber on a matter, their participation should automatically continue on appeal); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-766 OA7, Dissenting Opinion of Judge Piki to the Order of the Appeals Chamber Issued on 4 December 2006, Public (Appeals Chamber, Dec. 11, 2006) (dis-

the Chamber may not be able to express the degree of consensus or certainty which will bring clarity to victims or the proceedings.

¶110 The following consist of measures for consideration over the short or long term, based on the record of the functioning of the victims' participation system in the past years.

*A. Disallow Participation in the Investigation Stage Based Solely on a General Interest in Investigation*

¶111 Both the OTP and the OPCD have argued on appeal that the requirement of an effect on personal interests, pursuant to Article 68(3), cannot be met by an interest so broad and common to all victims as a general interest in ICC investigations, without rendering Article 68(3) meaningless.<sup>257</sup> The alternate way of expressing the parties' common position is that there can be no conferring of a "procedural status of victim": that status is nowhere recognized under the Statute or the RPE and it was an error to create such a status based on a general interest in investigation.<sup>258</sup> Before the Appeals Chamber, the OPCD has contended that the prejudice to the defense which results from the Chamber considering applications to participate, and rendering decisions about the existence of crimes and victims, without first being provided with the evidence and information resulting from the OTP's investigation, means that no participation should be permitted before the OTP seeks and obtains warrants of arrest.<sup>259</sup>

¶112 The Prosecution has contended that the defense position is not entirely correct, because certain forms of participation are ex-

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senting from order permitting out-of-time filing by victims on the ground that the order wrongly avoided answering the question of whether victims could participate in the appeal as of right); Situation in the DRC, Situation No. ICC-01/04-450, Decision of the Appeals Chamber on the OPCV's Request for Clarification and the Legal Representatives' Request for Extension of Time and Order of the Appeals Chamber on the Date of Filing of Applications for Participation and on the Time of the Filing of the Responses thereto by the OPCD and the Prosecutor, Public (Feb. 13, 2008) (denying request for clarification from OPCD and request for extension of time filed by legal representatives of victims, noting that Judge Song dissented, and stating that the reasons for the order and dissent would follow).

<sup>257</sup> See *supra* notes 171-72 and accompanying text.

<sup>258</sup> *Id.*

<sup>259</sup> See, e.g., 4 Feb. 2008 OPCD Darfur Appeal Brief, *supra* note 149, ¶¶ 39-47 (contending that until Prosecutor puts forth evidence and case is commenced, factual findings regarding the existence of crimes, harms resulting therefrom, and potential perpetrators unduly prejudice defense).

pressly provided in the Statute during the investigation phase (*i.e.*, in the case of admissibility challenges, or if the Prosecutor proposes to commence a *proprio motu* investigation, or closes an investigation based on interests-of-justice considerations).<sup>260</sup> The OTP proposes that the right to participate in the investigation, however, must be limited by permitting participation beyond these instances only when the applicant demonstrates that his or her personal interests will be affected by the proceeding at issue, and not by the entire phase of investigation.<sup>261</sup> In other words, there should be no first stage in which any applicant is pre-qualified for a hypothetical right.<sup>262</sup> Rather, the Chamber must consider and admit or deny participation with respect to particular investigation phase proceedings.<sup>263</sup>

¶113 The reform strongly suggested by the functioning of the victims' participation system since 2006 is adoption of the rule urged by the OTP in earlier proceedings: to revoke entirely the general right to participate in the investigation and thus to limit participation to the investigation-phase proceedings expressly identified in the Statute and the RPE. Pre-Trial Chamber I itself denied that the general right was required by the Statutory text, and as discussed above, in Part IV.A, the Statute cannot properly be interpreted to follow, without limits, the movement or trend in human rights law to promote the role of victims. Perhaps equally relevant is the fact that since the general right to participate in the investigation was granted, over two years ago, no exercise of that right has

<sup>260</sup> See, e.g., Situation in Darfur, Sudan, Situation No. ICC-02/05-123, Prosecution's Response to OPCD's Appeal Brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the and [sic] Disclosure of Potentially Exculpatory Material," Public, ¶ 25 (Feb. 15, 2008) [hereinafter 15 Feb. 2008 OTP Response to OPCD's Appeal of Supporting Documentation Decision].

<sup>261</sup> See, e.g., *id.* ¶¶ 15-17. This position is more expansive than the OTP's stance in early proceedings, in which the OTP contended that no investigation-phase proceedings, other than the ones expressly identified in the Statute, were appropriate for victims' participation. See *supra* notes 132-33 and accompanying text.

<sup>262</sup> See, e.g., 15 Feb. 2008 OTP Response to OPCD's Appeal of Supporting Documentation Decision, *supra* note 260, ¶¶ 15-18 (agreeing with defense position that grant of victim status without any finding other than that applicant is affected by the investigation is contrary to the Statute).

<sup>263</sup> See *id.* ¶ 18. In the view of the OTP, this reform is required by Rule 89(1), at a minimum, because that rule requires a Chamber, when deciding to accept or reject an application for participation, to simultaneously "specify the proceedings and manner in which participation is considered appropriate . . . ." See *id.*

changed any part of any investigation at the ICC. Instead the consequence has been the significant burdening of Court proceedings and of the victims' opportunities to obtain more meaningful forms of participation.

¶114 Returning to providing only the forms of investigation-phase participation expressly envisioned in the Statute would affirm that the drafters defined a limit in choosing specific junctures during investigation at which victims should be permitted to participate. The proposed reform would also have the benefit of re-focusing victims' participation on case proceedings, the main business of the Court. In the investigation, victims would continue to participate in the proceedings prejudged by the Statute and the RPE to be the ones in which their personal interests are implicated. The Court would avoid, however, raising expectations among the millions of conflict-victims that the Court will hear individual requests to have certain crimes or perpetrators investigated, to obtain protection from the Court, or to have evidence pertaining to each victim, crime, or perpetrator preserved or collected.

¶115 Like denying the general right to participate in the investigation altogether, the OTP-advocated measure of compelling a one-stage review, such that applicants to participate must establish an effect on personal interests in some specific investigation-phase proceeding, would eliminate the unproductive task of adjudicating the "procedural status of victim" or theoretical rights to participate in the investigation. Under either proposal, the Court would regain the thousands of hours which have been spent on the metaphysical task of assessing and granting purely theoretical rights to participate in the investigation.

¶116 The shortcoming of the OTP's recommendation is that it preserves too much of the open-endedness of the general right. The OTP's current proposal appears to envision that applicants might identify, as investigation-phase proceedings in which participation is appropriate, proceedings other than those expressly specified in the Rome Statute or the RPE. This flexibility undoubtedly carries conceptual appeal, but it leaves a difficult question unanswered. What investigation-phase proceedings, other than those already identified in the Statute and the RPE, would sufficiently affect the personal interests of a victim, without unduly prejudicing defense rights and efficient proceedings, such that participation in those proceedings should be permitted? Failure to anticipate the answer to this question will perpetuate the resource

drain by again deferring complicated issues for future decision-making. In concrete terms, victims will continue to make requests relating to investigative strategies of the OTP, evidence-gathering, the protection of witnesses, their own protection, and their legal representation, to take some examples. The Chambers will carry on sorting through, on a case-by-case basis, which of these investigation-phase proceedings might or might not affect the personal interests of the applicants, and/or the fairness and efficiency of proceedings. Clarity will again be delayed and the gap between victims' expectations and the reality of actual participation will persist.

¶117 To avoid the inefficiency of continuing to define participation through trial and error, the Chambers should confront, in advance, the question of whether there is any specific investigation-phase proceeding in which it appears likely that: (1) a victim's "personal" interests—as distinguished from the interests common to all victims within the scope of an investigation—will be affected; and (2) the vindication of those interests will not be outweighed by fairness and efficiency concerns. If consideration of this question leads to a continued inability to identify any proceeding appropriate for participation, other than those in which victims' participation is already required by the Statute and the RPE, the right to participate during the investigation should be pared to the terms of those governing documents. If there are such proceedings, they should be identified, and the reasoning articulated, to enable applicants to make informed decisions about whether and when to seek to participate in ICC proceedings.

*B. Define Participation in a Case to Be Limited to Victims of Charged Crimes*

¶118 In the context of cases, the *sua sponte* decision of Trial Chamber I to grant the "status of victim" to any victim of any crime within the situation, or investigation, should be reversed, as both the OTP and the defense have argued.<sup>264</sup>

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<sup>264</sup> See Defense Brief in Support of Appeal of Lubanga Trial Participation Decision, *supra* note 186, at 14 (seeking declaration that harm and personal interests of applicant must be linked to the charges against the accused); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1219, Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, Public, ¶ 51 (Mar. 10, 2008) (requesting reversal of

¶119 The legal reasons that Trial Chamber I’s ruling must be revisited have been cogently explored by Judge Blattman in his dissenting opinion. Incorporating wholesale the definition of victims, as set forth in the U.N. Basic Principles, wrongly ignores the limit of the competence of the Court and the Trial Chamber, which is to adjudicate criminal cases. For this reason, applicants to participate in a case, or at trial, should not be deemed to have demonstrated that the case or trial will affect their personal interests unless they are victims of the crimes being adjudicated by the Court.

¶120 Observing the competence of the Court will again eliminate a two-step analysis which promises to be impossible to implement. As already discussed, in Part IV.C, it verges on folly to undertake to determine, on a case-by-case basis, and in relation to evidence which will change and develop, whether any of the thousands or millions of victims of a crime within a situation may have information relevant to the evidence and issues to be addressed at trial.

¶121 The Trial Chamber’s reason for expanding the definition of victim vis-à-vis a case is, in any event, a patently improper one. The Chamber has been frank in acknowledging that the purpose of the expansion is to permit the Chamber to qualify as “victims” any individuals who might be in a position to lead evidence, regardless of whether they suffered harm from the charged crimes.<sup>265</sup> Notwithstanding the understandable nature of the Chamber’s curiosity about the availability of evidence, the Chamber is not permitted under the Statute and the RPE to engage in investigation, to seek evidence from other than the parties, or to elevate the standing of victims to parties. Moreover, as is suggested by Judge Blattman’s dissent and by the pendency of the appeal, the Trial Chamber can collect and select evidence only at the cost of raising controversy about the Court’s commitment to upholding the rights of accused persons and enforcing the Prosecution’s duty to meet the burden of proof.

¶122 Returning to the standard endorsed by the Pre-Trial Chambers thus will restore two limits at once: a proper limit on participation and likewise on the function of the judiciary. The majority decision of Trial Chamber I assumes a proposition which is highly doubtful, especially in advance of any completed trial at

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Trial Chamber I’s decision).

<sup>265</sup> See *supra* notes 102-05 and accompanying text.

the ICC: that the massive effort of seeking potential victims who could serve as witnesses would be repaid by evidence and information that otherwise would not be presented in Court by the parties. It would be irrational, to say the least, to base ICC legal standards, and the expenditure of ICC resources, on this extreme and untested view. More relevant, in any event, is that the Chambers are not entitled to use victims to enhance the evidence adduced by the Prosecutor or the defense. The Trial Chamber's power, and recourse, is to find charges proven or not proven. The Chamber should be limited to this remedy.

*C. Enforce More Rigorously The Requirement That The "Proceeding" in Question Have an Effect on "Personal Interests"*

¶123 Implicit in the measures being proposed is the recommendation that the Chambers assess more rigorously, in the context of both investigations and cases, the requirement in Article 68(3) that an applicant demonstrate that the "proceeding" in which he or she seeks to participate affects his or her "personal interests."

¶124 Pre-Trial Chamber I's decision to equate an entire phase—the investigation—with a "proceeding," and then to find that "personal interests" of victims were affected in general by the investigation proceeding was, as the parties have pointed out, the equivalent of no meaningful determination at all.

¶125 To fulfill the plain meaning of Article 68(3), and to create a system which promotes, rather than hinders, effective victim's participation, the two operative terms must be interpreted to have independent substance. The Appeals Chamber has already given guidance that it would be correct to interpret the term "proceeding" far more narrowly than to signify an entire phase, such as investigation. Its ruling that victims who participated in the *Lubanga* confirmation hearing could not automatically participate in the proceeding to determine whether leave to appeal the decision confirming charges would be granted, implicitly recognizes two distinct "proceedings," even between the hearing of a matter and an appeal on the same question.<sup>266</sup> Second, applicants must be required to demonstrate an effect on "personal interests" more specific than an interest he or she shares with all or most of the victims of crimes within the jurisdiction of the Court, such as to help

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<sup>266</sup> See *supra* notes 61-63 and accompanying text.

to clarify facts or punish perpetrators. The Appeals Chamber, again, seems inclined to endorse a more restrictive view of the requirement, as in the past it has opined that the “personal interest” of the applicant, for example, should be one which does not “belong instead to the role assigned to the Prosecutor.”<sup>267</sup>

¶126 Although the Appeals Chamber has not yet had the opportunity to offer elaboration, these rulings suggest that the Chambers should strive, from the outset of their inquiries, to identify contributions by participating victims that will be unique, or add incremental value to the information already before the Chambers. Participating victims also should be affected by the proceeding at issue in some more direct and tangible way than other victims of the investigated conflict or even of the charged crimes. These requirements are not a judgment that victims, if permitted to participate to a greater extent, would fail to make valuable contributions or to obtain a greater sense of redress. Importantly, they should not be regarded as such. Rather, the requirements reflect the judgment of the governing Statute to permit victims’ participation, while giving effect to the limitation of not impairing the core objective of providing fair and efficient Court proceedings.

*D. Within a Single-Stage Qualification Process, Limit in the Short Term the Proceedings in Which Participation will be Granted*

¶127 Even assuming that the thus-far unproductive step of granting of “the status of victim” were eliminated, that trial participation was limited to victims whose harms are linked to the charges, and that the requirements of Article 68(3) were applied more rigorously, especially in the investigation phase, there remains the fact that the Chambers will need to undertake case-by-case determinations with respect to a potentially high number of applicants who may seek to participate in each specific pre-trial and trial proceedings, at a minimum. A question persists about the extent to which the Chambers could successfully manage even a one-step process, if the remaining step does not eliminate the need for the judges to consider applications to participate in reference to numerous proceedings and their varied effects on “personal interests” of each of many applicants.

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<sup>267</sup> See *supra* note 64 and accompanying text.

¶128 As is discussed *supra* in Part V.A, if the Court elects to retain any right to participation in investigation-phase proceedings, beyond the instances specified in the Statute and the RPE, it should simultaneously provide elaboration on the specific investigation-phase proceedings in which participation is likely to be permitted—and not permitted.

¶129 In case proceedings, the same winnowing should take place. Even if the Chambers switched to evaluating, in one step and with respect to a specific case proceeding only, the effect of the proceeding on personal interests of the applicant and the consequences for fairness and efficiency, there is still the potential for any applicant to seek to participate, for example, in every discovery or disclosure issue, every issue of victim or witness protection, and all hearings related to evidentiary challenges. Unless the Chambers manage further the applications to participate in specific proceedings, they will remain in the open-ended, resource-consuming loop of attempting to specify, from within some universe of potential instances of participation, the actual instances of participation that they will provide.

¶130 It is therefore essential for the ICC to make known some initial, modest selections about which, if any, case proceedings, other than the ones specified in the Statute and the RPE, it expects to be occasions for victims' participation. The method would be to disseminate to applicants, in effect, rebuttable presumptions about the proceedings upon which their efforts to obtain participation should be focused. The Chambers could in addition permit applicants to demonstrate, on a timetable set by the Court, that a specific, upcoming proceeding not previously favored by the Court for participation is one in which participation should be allowed.

¶131 To select and publicize certain proceedings in which participation presumptively will be allowed is dramatically less ambitious than the current system, but the depth of the resource drain resulting from the current framework, and its failure to deliver more concrete participation, demonstrates that victims' participation, at least initially, must be provided in a far more targeted way. Narrowing the proceedings in which victims' participation normally will be allowed will bring multiple benefits. The Court will be able to provide more and better actual participation to victims. Victims will obtain participation based on the merits of the applications, rather than the happenstance of having been among

the few who succeeded in having their applications heard. Prejudice to defendants can be more meaningfully assessed if it arises in the context of instances of participation. Finally, evaluating concrete requests in the context of a defined subset of proceedings also will afford the Court the opportunity to gain the experience that will enable it to assess whether, and at what pace, instances of victims' participation should be expanded.

¶132 It is fully feasible to define a list of proceedings in which participation would normally be envisioned, based on the Court's experience. It also turns out that this list comprises proceedings in which the interest of victims is immediately apparent. Victims in the *Lubanga* proceeding, for example, have participated in proceedings held when, pursuant to Article 60(3), the Pre-Trial Chamber undertook the periodic review of its initial decision to detain Lubanga prior to trial.<sup>268</sup> They participated in the confirmation hearing<sup>269</sup> and expressed views and concerns regarding the date of trial.<sup>270</sup> When the Trial Chamber has taken up disclosure issues related to a system or court-wide practice in which victims will participate—such as the “e-Court protocol,” which sets the standards and methods by which the Court and the participants will record and exchange evidence at trial, and information about the evidence—victims participated.<sup>271</sup> On the other hand, victims did not participate, and generally did not even seek to participate, in other issues relating to disclosure or evidence.<sup>272</sup> The Pre-Trial

<sup>268</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-530-tEN, Observations of Victims a/0001/06, a/0002/06 and a/0003/06 in Respect of the Application for Release Filed By the Defence, Public (Oct. 9, 2006).

<sup>269</sup> See *supra* notes 232-33 and accompanying text.

<sup>270</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-957-tENG, Submissions on Preliminary Issues, Public, ¶¶ 3-5 (Sept. 24, 2007).

<sup>271</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1127, Decision on the E-Court Protocol, Public, ¶¶ 7-8 (Trial Chamber I, Jan. 24, 2008) (noting filings by victims' representatives).

<sup>272</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-658, Decision on the Prosecution Application Pursuant to Rule 81(2) of 3 November 2006, Public Redacted Version, 2 (Pre-Trial Chamber I, Nov. 3, 2006); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, Public, 3-5 (Pre-Trial Chamber I, Nov. 8, 2006); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-718, Decision on Defence Requests for Disclosure of Materials, Public with Confidential Annex, 1-3 (Nov. 17, 2006); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1097, Order on the Prosecution's Applications for the Lifting of Redactions, Non-disclosure of Information and Disclosure of Summary Evidence, Public, ¶¶ 1-5 (Trial Chamber I, Dec.

Chamber in the *Lubanga* case expressly excluded participation in the instances described above in Part III.C, when victims sought further information about the OTP investigation in the DRC,<sup>273</sup> and also at hearings when it deemed that victims' participation was unlikely to alter the matters under consideration.<sup>274</sup>

¶133 Identifying a set of core proceedings from which to build victims' participation begins to make apparent that the definition of the participation right need not be amorphous or haphazard. The current practice does nothing to facilitate the provision of even the instances or forms of participation that the Chambers and victims would agree should be prioritized. Applicants routinely submit boilerplate containing a blunderbuss request to participate in all investigation, pre-trial, trial, and reparations proceedings. The judges, for their part, have indulged in repeatedly offering some universe of participation possibilities, without reaching decisions about the permissibility of concrete participation in specific proceedings. A participation system in which the judges and the victims each are speculating about the other's preferences will never attain viability or fairness.

¶134 The short-term goal is, then, is to promote clarity and efficiency by fostering the ability of the Court and the victims to match expectations about preferred forms of participation. This in turn will permit a greater volume of views and concerns to be expressed, even if the number of proceedings in which those views are expressed is modest, at least initially. The next set of challenges relating to victims' participation and reparations awaits, including, for example, the task of determining to what extent victims will have common or diverse interests, how representation can effectively be provided when interests are not unified, and the principles upon which reparations will be rewarded. This circum-

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18, 2007); Transcript in Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-69-ENG, at 40-63 (Jan. 10, 2008) (parties' arguments regarding OTP's applications for the lifting of redactions, non-disclosure of evidence, and disclosure of summary evidence).

<sup>273</sup> See *supra* notes 224-28 and accompanying text.

<sup>274</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-335-tENG, Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 24 August 2006, Public, 3 (Pre-Trial Chamber I, Aug. 17, 2006) (deciding that because status conference concerns only technical issues relating to system of disclosure in effect among the Prosecution, Defence and Registry, victims are not authorized to participate in the conference).

stance makes it even more crucial to lay a sound foundation, at a minimum, for resolving the basic question of the proper scope of the participation right.

## VI. CONSIDERATIONS FOR VICTIMS AND VICTIMS' REPRESENTATIVES

¶135 Finally, the experience of the ICC in attempting to implement meaningful victims' participation presents lessons for victims and victims' representatives. Victims are entitled to insist that the ICC improve its record of providing concrete and effective forms of participation, and there are steps victims can take to assist in attaining that goal. In addition, the record of the past years confirms that victims must be cautious about coming to regard ICC proceedings as the sole or primary means by which they should raise views and concerns, or seek justice, accountability, and reparations. The design of the Rome Statute, and the practical limitations on the Court, make it unlikely that more than a minute percentage of victims of crimes within the jurisdiction of the Court, save those who have some direct connection to the crimes being adjudicated in the Court, can count on obtaining a "day in court" at the ICC. In addition, the ICC is intended as a court of complementarity: a court that supplements and promotes the efforts of other courts. For these reasons, it is important that, in addition to participating in ICC proceedings, victims capitalize on the existence of ICC investigations and cases to promote and demand complementary efforts, including domestic efforts, to bring justice. Victims will not fail to obtain an unprecedented degree of participation in ICC proceedings, but the interests of all victims of atrocities will better and more equitably be served if participation in ICC proceedings routinely serves as a jumping-off point for promoting restorative justice in other courts and fora.

### *A. Requesting Better Responsiveness from the ICC*

¶136 Victims, victim representatives, and other interested Court observers should communicate with the Court, as part of approved participation; through reports, publications or articles; or by appropriate contacts to Court staff, to urge the Court to: (1) be more prompt in processing and deciding applications to participate; (2) be more transparent in disseminating likely timelines and prospects

for concrete participation in proceedings; and (3) attempt to reach more unified and clear standards for victims' participation. Victims and their representatives will also undoubtedly be able to suggest specific measures for improving the victim participation scheme. Finally, to the extent that applicants believe that they are failing to obtain the degree of participation they expected, the expectations gap should be described to the Court, so that there can be analysis and understanding on both sides of why the gap exists, and measures can be adapted to close the gap, if appropriate.

*B. Prioritizing Whether to Seek Participation, and Forms of Participation Sought*

¶137 As is suggested above, victims will be better able to obtain participation if they are clear about which instances and forms of participation they are seeking.

¶138 In the first instance, each victim should consider, in relation to the factual context he or she confronts, whether participation in court proceedings is a productive means of vindicating his or her personal rights and interests. While there is understandable interest in participating in the ICC's proceedings, arguably that interest has wrongly diverted energies from other victim-based initiatives, equally important to obtaining restorative justice for victims. Conspicuous examples are presented by the Darfur and Uganda cases. None of the defendants named in those two cases has successfully been arrested, and the ICC itself has no power to effectuate arrest. Victim advocacy to states, the U.N. and other international, regional, and domestic authorities could play a critical role in generating support for arrest efforts, which in the ICC system must be carried out by states. Victims thus logically should weigh whether it better serves their interests to stand in line to participate in ICC proceedings or to organize advocacy in support of arrest efforts and directed at states or other entities. Victims also could logically prioritize bringing public attention to the accounts of victims, as a means of promoting grass-roots support for arrest and transfer.

¶139 Equally important is for victims to identify the ICC proceedings in which they have the greatest interest in participating. The blunderbuss approach to requesting participation in all proceedings thus far has impeded the conferring of participation rights, and it also suggests that victims are not considering, in other than abstract terms, the desirability of participation. Consideration

of *how* and *in what* ways a victim wants to participate, or is willing to participate, is important to ensuring that the interests of victims are not ultimately disserved. In the Darfur situation, for example, a recent media report has quoted the victims' representatives for the twenty-one applicants whose applications were considered by the Single Judge of Pre-Trial Chamber I as having stated that the applicants at issue preferred to participate in trials.<sup>275</sup> The same representatives noted the difficulty in explaining to the victims they represent why it has been so difficult to obtain decisions on their applications to participate.<sup>276</sup> The missed opportunities here are in part the responsibility of the Court, but it also is incumbent on victims' representatives, particularly as the process becomes clearer, to explain likely outcomes and timetables to victims. In the Darfur case, the twenty-one applicants waited for between six months and a year to learn only the dispositions of their requests to participate in the situation, because the Single Judge deferred considering any trial participation. Had the applicants understood the limits of potential participation in an investigation, or made clearer their preference to participate at trial, it is entirely possible that they would have obtained by now the determinations in which they had the higher interest.

*C. Guarding Against the Circumstance that the Prospect of ICC Participation Distracts From Other Important Means of Expressing Views and Concerns and Obtaining Justice*

¶140 Because it is unlikely that the ICC can serve as an effective forum for any but a small portion of victims of conflicts, victims and their representatives should consider that a focus on obtaining participation in ICC proceedings may wrongly detract from efforts to pursue other methods of raising and promoting victims' voices. ICC participation has been granted only slowly, in a limited fashion, and in highly unpredictable ways, and it is unlikely that reform will bring any dramatic alteration of this scenario, at least in the short term. ICC participation also, of necessity, will be concentrated on participation relevant to the ICC's cases, which are extremely selective, or the issues raised in those cases. It is thus important that victims avoid over-estimating the responsiveness of

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<sup>275</sup> See VRWG Article re Darfur Applicants, *supra* note 7.

<sup>276</sup> See *id.*

the ICC victim participation system, or the degree of expression or vindication that can be obtained through that system, especially insofar as victims seek to express views and concerns that relate broadly to conflicts, their causes, and their consequences and costs.

¶141 Victims might better promote victims' interests by using the interest and profile created by the ICC investigation itself, and not solely the participation right, as a means of raising victims' voices about mass crimes. The objective should be to capitalize on the ICC's investigation and use it as a platform for the expression of victims' views and concerns either about crimes prosecuted by the Court, or crimes not prosecuted by the Court but within the same conflict or investigation. Victims vis-à-vis the conflict could use the ICC's intervention, for example, as a basis to advocate for domestic prosecutions of like crimes. The ICC intervention also makes it more likely that international media will have an interest in victims' accounts and issues that are important to victims but beyond the mandate of the ICC. This opportunity should be fully exploited so that, for example, the ICC intervention can promote exploration of such issues as the humanitarian crises caused by the displacement of victim populations.

¶142 Victims also should not neglect to target states and international organizations in expressing views about conflicts and the crimes they engender, to ensure that victims' views are not neglected when these entities are called upon to cooperate with the ICC or to initiate or aid other efforts to mete justice. Victims' advocates should continue to use ICC investigations as a basis for using technologies to promote dialogues enabling victims to share and exchange accounts of their victimization and questions about justice. The directors of a project called "Interactive Radio for Justice," for example, have travelled to the DRC and the CAR to record and broadcast via radio victims' accounts and their questions, concerns, and hopes about justice in general and the ICC in particular. These accounts are then publicized again through the internet and are "answered" by radio broadcasts and "web-posts" of ICC personnel responding to the victims' statements and questions.<sup>277</sup>

¶143 The point is that the ICC intervention can promote varied means of raising victims' voices, and the objective more produc-

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<sup>277</sup> The Interactive Radio For Justice website can be viewed at [www.irfj.org](http://www.irfj.org) (last visited June 11, 2008).

tively could be viewed—given the narrowness of ICC proceedings—as one of connecting victims to the cause of justice rather than to an ability to participate specifically in an ICC proceeding.

*D. Share and Disseminate Accurate Information About ICC Participation*

¶144 Outreach efforts carried out by the Court and by NGOs in the field have been extensive, and predictably one of the great challenges has been disseminating information about the ICC and its authority and capabilities, in light of a general lack of knowledge, or affirmative misunderstandings, about the ICC and its work. On the topic of victims’ participation, it is critical that the Court, victims’ representatives, and other interested observers implement educational and outreach initiatives which provide victims and affected communities with concrete information, based in the ICC’s experience to date, about the ICC’s authority and activities, the likely limit of its work, the forms and likelihood of victims’ participation, and the potential for reparations. It is now possible to provide specific information which victims are likely to find important: statistics about forms of participation sought and obtained, the forms of identification that applicants for participation are likely required to submit, or the prospects that a victim can participate in confirmation or trial proceedings while maintaining anonymity. While there are many reasons to keep the interchange of information up-to-date, the most significant is that victims are entitled to make informed decisions about their own interactions with the Court. The fact that the vast majority of applicants for participation seem to view all options as equal is a disturbing indication that they are not currently receiving adequate information or guidance about the choices available to them.

*E. Exercise Clear Rights to Participate*

¶145 Finally, victims and victims’ representatives should take care that energies devoted to broadening hypothetical rights, or transforming the “status of victim” to instances of actual participation, do not divert from expressing “views and concerns” in ways and in proceedings that the Rome Statute and the RPE clearly and unequivocally identify. The Statute and the RPE specifically author-

ize participation in a number of proceedings, and also identify mechanisms by which victims can obtain the participation.

¶146 Victims can easily avail themselves of some of these core participation rights by the simple step of “communicating” with the Court. For example, under the Statute and RPE, individuals who have “communicated” with the Court are eligible to receive notice of the Prosecutor’s decisions not to investigate or prosecute under Article 53,<sup>278</sup> challenges to jurisdiction and admissibility,<sup>279</sup> and Court decisions to hold confirmation hearings.<sup>280</sup> Thus, victims who are interested in expressing views and concerns on these occasions should be encouraged to submit the triggering communications.

¶147 Similarly, it would be fruitful for victims and victims’ representatives to prioritize plans to gather and express views and concerns in proceedings which are highly likely to occur and in which victims’ views must be sought, by express direction of the Statute and the RPE. The *Lubanga* confirmation hearing, for example, was widely seen as a victory (and a very high-profile one) for the cause of victim participation, because victims and their representatives dramatically demonstrated the unique value of the expression of victims’ views and concerns. In a similar fashion, victims’ views, for example, are likely to be critical if the admissibility of the Darfur case is challenged by the Sudanese Government, or if “interests of justice” applications are brought to the Chamber assigned to the Uganda case, in light of peace talks between the Lord’s Resistance Army and the Ugandan government. These proceedings will determine if ICC trials of accused persons ever take place in those cases. For this reason, it would be astute for victims and their representatives to plan for participation in these proceed-

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<sup>278</sup> See Rome Statute, *supra* note 9, art. 53(1)(c) & 51(2)(c) (Prosecutor may choose not to investigate or prosecute on grounds of interest of justice); RPE, *supra* note 17, R. 92(2) (in order to allow participation, the Court shall notify victims concerning the decision of the Prosecutor not to prosecute pursuant to Article 53).

<sup>279</sup> See Rome Statute, *supra* note 9, art. 19 (Court, parties, and states may seek determinations on admissibility) & art. 53(1)(c); RPE, *supra* note 17, R. 59(1)(b) (Registrar should inform victims who have communicated with the Court of any question or challenge of jurisdiction or admissibility).

<sup>280</sup> See Rome Statute, *supra* note 9, art. 61 (entitled “Confirmation of the Charges Before Trial”); RPE, *supra* note 17, R. 92(3) (in order to allow participation, the Court shall notify victims of decisions to hold confirmation hearings).

ings first, and to file applications to participate in trial after it has been ascertained that trials will indeed occur.

## VII. CONCLUSION

¶148 The great experiment of incorporating victims' participation into international criminal proceedings has had important successes. Moreover, the best of intentions, and a willingness to devote vast amounts of time and energy, feed the continuing efforts to make the venture a productive one for victims and for international criminal justice together. For the reasons discussed, it remains the case that the experiment is ongoing. The judges of the International Criminal Trial for Rwanda predicted, in the course of determining not to undertake to provide reparations to victims at that court, that such a scheme "would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal."<sup>281</sup> The specter of this prediction proving true for the ICC victim participation scheme cannot entirely be discounted. A consideration of empirical outcomes, prompt correction of courses found to be unproductive, and the exercise of discipline in estimating the Court's true capacity, will be critical—and would always have been necessary—to successful implementation of an innovative victim participation scheme. In addition, the value of achieving modest short-term goals, to preserve possibilities of providing more extensive forms of participation in the longer term, both at the ICC and elsewhere, should never be underestimated. To do no harm to the aspiration of restorative justice for victims should be the first principle. Constructing a sound foundation for further efforts to serve the dignity and well-being of victims of mass crimes would be precisely the attainment to which the drafters of the Rome Statute aspired.

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<sup>281</sup> WCRO Report, *supra* note 6, at 12 n.31 (quoting Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, *annexed to* Letter of the UN Secretary-General to the Security Council dated 14 December 2000, U.N. Doc S.2000/1198).

ADDENDUM

## (Notes to Chart: Adjudication of Applications to Participate)

<sup>i</sup> See text discussion *infra* in Part III.A (explaining how figures were derived). For the numbers assigned in the DRC situation, see Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC/01/04-01/07, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, Public, 2 (Pre-Trial Chamber I, Apr. 2, 2008) [hereinafter Decision re *Katanga* Case Participation] (noting applicant number a/0337/07 and a/0001/08). Only one number has been assigned with an “08” suffix (a/0001/08) and there appear to have been a total of 337 applicants in the DRC situation in the years 2006 and 2007, because no number from 1 to 337 is duplicated in those years, despite the change in suffix from “06” to “07.” See also 17 January 2006 DRC Decision, *supra* note 26, at 1 (referencing six additional applicants in the DRC situation, given designations VPRS 1 to VPRS 6). In the Uganda situation, see 10 August 2007 Uganda Decision, *supra* note 47, at 1 (noting applicant number a/0127/06 in the Uganda situation). For the Darfur situation, see 6 December 2007 Darfur Decision, *supra* note 82, at 1 (noting applicant number a/0038/07 in the Darfur situation).

<sup>ii</sup> The figure for the DRC situation is summed from the decisions calling for observations of the parties: Situation in the DRC, Situation No. ICC-01/04-73, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, Public Redacted Version, 2-3 (Pre-Trial Chamber I, July 21, 2005) (authorizing filing of observations regarding applicants who later were designated “VPRS 1” to “VPRS 6,” see 17 January 2006 DRC Decision, *supra* note 26, at 4 n.4); Situation in the DRC, Situation No. ICC-01/04-147, Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, Public (Pre-Trial Chamber I, May 18, 2006); Situation in the DRC, Situation No. ICC-01/04-228, Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, Public (Pre-Trial Chamber I, Sept. 22, 2006); Situation in the DRC, Situation No. ICC-01/04-241, Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06, Public (Pre-Trial Chamber I, Sept. 29, 2006); 23 May 2007 DRC Decision Authorizing Observations, *supra* note 147 (calling for observations on seventy-five applications); Situation in the DRC, Situation No. ICC-01/04-358, Decision authorising the filing of observations on applications for participation in the proceedings, Public (Pre-Trial Chamber I, July 17, 2007) (calling for observations on twenty-five applications); Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-182, Decision Authorising the Filing of Observations on the Applications for Participation in the Proceedings a/0327/07 to a/0337/07 and a/0001/08, Public (Feb. 7, 2008) (calling for observations on twelve applications to participate in case).

<sup>iii</sup> These numbers are drawn from the decisions adjudicating participation rights. In the DRC situation, see 17 January 2006 DRC Decision, *supra* note 26, at 41

(granting six applicants, VPRS 1 to VPRS 6, status of victim vis-à-vis situation); Situation in the DRC, Situation No. ICC-01/04-423-Corr, Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06, 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 », Public, 57-58 (Pre-Trial Chamber I, Jan. 31, 2008) [hereinafter Second Decision re DRC Situation Participation] (correcting decision initially issued on December 24, 2007, and granting sixty-eight applications to participate in the investigation, including a/0105/06); Decision re Katanga Case Participation, *supra* n. i, at 13 (granting five applicants the status of victim vis-à-vis the situation). For decisions relating to the Lubanga and Katanga cases, see 20 October 2006 Lubanga Case Decision, *supra* note 43, at 13 (granting one applicant, a/0105/06, the status of case victim); 31 July 2006 Lubanga Case Decision, *supra* note 43, at 16 (granting three applicants, a/0001/06, a/0002/06 and a/0003/06, the status of victim vis-à-vis case and situation); Decision re Katanga Case Participation, *supra* n. i, at 13 (granting five applicants the status of victim vis-à-vis the case). Note that in the DRC situation, unlike in the Uganda situation, victims vis-à-vis the case are automatically considered to have obtained the status of victim in the investigation. *See id.* at 13. For the Uganda situation, see 10 August 2007 Uganda Decision, *supra* note 47, at 61 (six applicants granted the right to participate in the case, two in the situation, and one of these granted participation rights in both case and situation); Second Decision re Uganda Participation, *supra* note 74, at 70 (granting eight victims right to participate in case, seven in situation; two of these were admitted in both case and situation). In the Darfur situation, the single decision issued thus far granted eleven applicants the status of victim vis-à-vis the situation only. *See* 6 December 2007 Darfur Decision, *supra* note 82, at 23.

<sup>iv</sup> Second Decision re DRC Situation Participation, *supra* n. iii, ¶¶ 23, 24 & 58 (adjudging as improper two applications and denying third, insofar as it sought participation in investigation); DRC Decision on Case Participation of VPRS 1 to VPRS 6, *supra* note 41, at 8-9 (denying requests of VPRS 1 to 6 to participate in case); 20 October 2006 Lubanga Case Decision, *supra* note 43, at 13 (denying fifty-eight applications insofar as they sought participation in case); Decision re Katanga Case Participation, *supra* n. i, at 13 (denying six applicants the status of victim vis-à-vis the case); 10 August 2007 Uganda Decision, *supra* note 47, ¶¶ 138-44 (implicitly denying participation in case to an applicant granted status of victim in investigation); Second Decision re Uganda Participation, *supra* note 74, ¶¶ 75-81, 91-97, 130-36, 167-73 & p. 70 (expressly denying one applicant status of victim in investigation; implicitly denying applications of four others who were admitted to participate in the situation); 6 December 2007 Darfur Decision, *supra* note 82, at 23 & ¶¶ 31, 33 (denying ten applicants status of victim in situation but also characterizing three of the ten applications rejected as incomplete).

<sup>v</sup> The figures in this column are derived by subtracting the number of applications granted or denied, in the situation and case respectively, from the applications forwarded to the Chamber.

<sup>vi</sup> In the Uganda situation, the Chamber has thirty-seven applications pending in both the situation and case, despite the granting of the status of victim vis-à-vis the situation to fifteen of forty-nine applicants, and the denying of the status of victim to fifteen of forty-nine applicants, because three of the same applicants were granted participation rights in both the situation and case. *See* 10 August 2007 Decision, *supra* note 47, at 61 (six applicants granted the right to participate in the case, two in the situation, and one of these granted participation rights in both the case and situation); Second Decision re Uganda Participation, *supra* note 74, at 70 (granting eight victims right to participate in the case, seven in the situation; two of these were admitted in both the case and situation).

<sup>vii</sup> In the Darfur situation, all twenty-one applications considered by the Chamber thus far have been deferred and therefore remain pending, insofar as the case is concerned. *See* 6 December 2007 Darfur Decision, *supra* note 82, ¶ 8.

<sup>viii</sup> These dates are contained in the decisions rendered by the Chambers. *See* 17 January 2006 DRC Decision, *supra* note 26, ¶ 2 (VPRS 1 to VPRS 6 filed applications to participate in June 2005); Second Decision re DRC Situation Participation, *supra* n. iii, at 3 (most recently filed application under consideration was filed in April 2007); Decision re Katanga Case Participation, *supra* n. i, at 2 (twelve applications under consideration were filed by the Registry on January 30, 2008); 10 August 2007 Uganda Decision, *supra* note 47, at 2-3 (forty-nine applications under consideration were filed between June 2006 and November 2006); 6 December 2007 Darfur Decision, *supra* note 82, at 3, 5 (twenty-one applications under consideration were filed either in June 2006 or July 2007).