



Juan Pablo Pérez León Acevedo

Victims' Status at International and Hybrid Criminal Courts

Victims' Status as Witnesses, Victim Participants/Civil Parties
and Reparations Claimants

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Dedicated to:
Victims of international crimes, and
my mother and late grandmother.

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List of Acronyms and Abbreviations

ACHR= American Convention on Human Rights
ACmHR= African Commission on Human and Peoples' Rights
ATCA= Alien Tort Claims Act (United States)
CAR= Central African Republic
CAT= Committee Against Torture
CICA= Criminal Injury Compensation Authority (England and Wales)
CIVI= *Commission d'indemnisation des Victimes d'infractions* (Compensation Commission for Crime Victims) (France)
CJA= Coroners and Justice Act (England and Wales)
CoE Recommendation (85) 11= Council of Europe Recommendation (85) 11 on the Position of the Victims in the Framework of Criminal Law and Procedure
CPP = *Code de Procédure Pénal* (France) (Code of Criminal Procedure)
CPS= Crown Prosecution Service (England and Wales)
CVRA= Crime Victims' Rights Act (United States)
DRC= Democratic Republic of Congo
ECCC= Extraordinary Chambers in the Courts of Cambodia
ECHR= European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ= European Court of Justice
ECtHR= European Court of Human Rights
EU Framework Decision on Victims= European Union Framework Decision on the Standing of Victims in Criminal Proceedings
EU Directive on Victims= European Union Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime of the European Parliament and of the Council
FARG= *Fonds National pour l'Assistance aux Rescapés du Genocide* (National Funds for the Assistance of the Genocide Survivors) (Rwanda)
FGTI= *Fonds de Garantie des Victimes des Actes de Terrorisme et d'autres Infractions* (Guaranty Funds for Victims of Terrorism and other Crimes)
HRC= Human Rights Committee
IACtHR= Inter-American Court of Human Rights
ICC= International Criminal Court
ICCPR= International Covenant on Civil and Political Rights
ICTR= International Criminal Tribunal for Rwanda
ICTY= International Criminal Tribunal for the Former Yugoslavia

IMT= International Military Tribunal at Nuremberg
IMTFE= International Military Tribunal for the Far East
JCE= Joint Criminal Enterprise
MVRA= Mandatory Victims Restitution Act
OPCV= Office of Public Counsel for Victims (ICC)
OTP= Office of the Prosecutor (ICC)
RPE= Rules of Procedure and Evidence (ICTY, ICTR, SCSL, ICC and STL)
SC= United Nations Security Council
SCSL= Special Court for Sierra Leone
STL= Special Tribunal for Lebanon
TFV= Trust Fund for Victims (ICC)
TRC= Truth and Reconciliation Commission
UNMIK= United Nations Interim Administration Mission in Kosovo
UN Victims' Declaration= United Nations General Assembly Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power
UN Basic Principles and Guidelines= United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
VPRS= Victims Participation and Reparations Section (ICC)
VIS= Victim Impact Statement
VPS= Victim Personal Statement
VPU= Victims' Participation Unit (STL)
VSS= Victims Support Section (ECCC)
VWS= Victims and Witnesses Section (ICTY and SCSL)
VWSS= Victims and Witnesses Support Section (ICTR)
VWPA= Victim Witness and Protection Act (United States)
VWU= Victims and Witness Unit (ICC)
WESU= Witness and Expert Support Unit (ECCC)
YJCEA= Youth Justice and Criminal Evidence Act (England and Wales)

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Åbo/Turku, 2 January 2014.

Chapter I. Introduction

1. Setting the Scene

Punishment of crimes, in general, and international crimes, in particular, remains primarily guided by Western-driven retributive modalities rather than by restorative initiatives.¹ Victims' status at international and hybrid criminal courts is broadly guided by the uneasy, but not necessarily opposed, relationship between the predominant retributive justice approach and increasing restorative-oriented justice approach manifestations.² Moreover, victims' status in criminal proceedings, both national and international, can be strengthened or weakened depending on whether the criminal system or court in question presents a higher or lower presence of features of the inquisitorial or adversarial systems. On the one hand, at an adversarial system, i.e., a system based on opposing parties and in a neutral judicial setting, victims have no much room for action and, therefore, their status is basically limited to that of witnesses.³ On the other hand, at an inquisitorial system where, *inter alia*, judges normally assume a more active role, victims in principle hold a more active status not limited to being witnesses.⁴

Traditionally, international and hybrid criminal courts, based on the Anglo-American systems, have followed a predominantly adversarial system.⁵ As a consequence, victims' status was limited to that of witnesses. This was the case of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) and, more recently, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In this context, the International Criminal Court (ICC) has meant a pivotal change in how victims are considered

¹ Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 99 *Northwestern University Law Review* (2005) 539, 600.

² On definitions of retributive and restorative justice see, e.g., Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1st edn., Herald Press 1990) 181.

³ See, e.g., Mirjan Damaška, *The Faces of Justice and State Authority* (Yale University Press 1986); Alphons Orié, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press 2002) 1439, 1439-1456.

⁴ See Orié (2002) 1443-1446.

⁵ See Antonio Cassese, *International Criminal Law* (2nd edn., Oxford University Press 2008) 366-377.

in international criminal justice forums, i.e., from a paternalistic view regarding them only as witnesses to a judicial scenario at which they can also voice their views and concerns (victim participants) and additionally claim reparations. The historical background to this new scene for victims at the ICC is powerfully and succinctly called upon in the ICC Statute Preamble ‘The States Parties to this Statute [...] Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’. Victims’ status that goes beyond being witnesses has actually been qualified as one of the great innovations of the ICC Statute.⁶

This trend has continued at the international criminal justice level as evidenced in hybrid criminal courts created after the ICC such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) and which are considered in this thesis. This is also true for other hybrid criminal courts such as the UNTAET Special Panels for Serious Crimes in East Timor, the UNMIK/EULEX War Crimes Panels in Kosovo, and the War Crimes Chamber for Bosnia-Herzegovina, which are not included in this thesis.⁷ The Special Court for Sierra Leone (SCSL), considered in this thesis, however, followed the ICTY and the ICTR models.

It is necessary to notice that in selecting what courts should be considered as ‘scenarios’, in this thesis, where victims’ status takes place two main factors are taken into account. First, all the contemporary international criminal courts have been considered in this thesis, i.e., the ICC, the ICTY and the ICTR. The IMT and the IMTFE have not been included as they belong to a (much) earlier generation of international criminal justice institutions. Second, with regard to what hybrid criminal courts should be taken into account, only the SCSL, the ECCC and the STL are considered in this thesis due to, *inter alia*, similarities in their institutional and procedural frameworks with the international criminal courts, which allow among other things to conduct a more pertinent comparative analysis among international and hybrid criminal courts. The few references to the IMT and the IMTFE in the third chapter of this

⁶ William Schabas, *An Introduction to the International Criminal Court* (4th edn., Cambridge University Press 2011) 347; Jérôme de Hemptinne, ‘Victims’ Participation in International Proceedings’ in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009); Otto Triffterer, ‘Preamble’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (2nd edn., C. H. Beck/Nomos/Hart 2008) 1, 7.

⁷ For very general considerations on the victims’ status at some of these courts see, e.g., Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 151-159.

thesis ('Victims as Witnesses') as well as the few references to the UNMIK/EULEX War Crimes Panels in Kosovo and the War Crimes Chamber for Bosnia Herzegovina in the fifth chapter of this thesis ('Victims as Reparations Claimants') are only for illustrative purposes and do not change the material scope of this thesis.

Accordingly, when the expressions 'international and hybrid criminal courts' or 'all the international and hybrid criminal courts' are employed in this thesis, they only refer to the international and hybrid criminal courts that are examined in this thesis. Thus, the expression 'international and hybrid criminal courts' in this thesis only includes six courts: the ICTY, the ICTR, the SCSL, the ICC, the ECCC and the STL.

In connection with the ICTY and the ICTR, it must be added that, in this thesis, the UN International Residual Mechanism for International Criminal Tribunals is not considered. This mechanism was created via Security Council Resolution 1966 (2010) to progressively undertake and complete the mandate of the ICTY, and the ICTR in years to come.⁸ Its Rules of Procedure and Evidence were adopted on 8 June 2012. The reasons for not considering this mechanism are: i) the contents of their legal framework (its Statute and rules) concerning victims' status are basically the same than those of the ICTY and the ICTR legal frameworks; ii) this mechanism is in essence a temporal extension of the ICTY and the ICTR to complete their mandates; and iii) on parallel basis to the ongoing work of the ICTY and the ICTR, the ICTR branch of this mechanism commenced functioning on 1 July 2012 and the ICTY branch only did so on 1 July 2013.⁹ Be that as it may, since the contents of this mechanism's legal framework, concerning victims' status, are the same than those of the ICTY and the ICTR legal instruments (and consequently the mechanism's emerging practice), the analysis and conclusions reached in this thesis are *mutatis mutandi* also applicable to the victims' status at it. Similar considerations are applicable to the Residual SCSL,¹⁰ which is not considered in this thesis due to reasons equivalent to those for the other tribunals' residual mechanism. The Residual SCSL replaces the SCSL as the latter has quite recently completed its mandate by rendering its appeals judgment in *Taylor*. In any case, in this thesis, references to the now extinct SCSL are mainly in the present tense due to *inter alia* the fact

⁸ See UN Doc. S/RES/1966 (2010).

⁹ For further information, see the web-site of the United Nations Mechanism for International Criminal Tribunals. Available at: <http://unmict.org/> (last visit on 1 August 2013).

¹⁰ See Residual SCSL Agreement (Ratification) Act, 9 February 2012.

that the Residual SCSL's legal framework is basically the same than that of the SCSL.

Two extra notions should be preliminary addressed here, namely, victims and status. One of the meanings of the word victim, in common language, is 'a person harmed, injured, or killed as a result of a crime, accident, etc'.¹¹ This definition is quite similar to a general legal definition of the word 'victim', which is 'a person harmed by a crime, tort, or other wrong'.¹² Although specific legal definitions of victims relevant to and/or applicable at international and hybrid criminal courts are examined later, it is pertinent to reproduce here the definition of victims contained under rule 85 (a) of the Rules of Procedure and Evidence (RPE) of the ICC as follows previous victims' definitions and is consistent with subsequent definitions of victims in international law, and can generally speaking be considered as an operational definition of victims at the level of international and hybrid criminal courts. This definition of victims reads as follows "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.

It must be emphasized that although certain legal entities/persons may qualify as victims at the ICC and the ECCC,¹³ this thesis exclusively examines victims' status in relation to natural persons as victims. It should be noticed that the use of the plural 'victims' instead of the singular 'victim' corresponds to the fact that, at the international and hybrid criminal courts, any case normally involves a large number of victims. Accordingly, the use of the plural is arguably a good manner to keep in mind victimization in contexts of criminal violence at a large or massive scale that international and hybrid criminal courts have to deal with. Indeed, the international and hybrid criminal courts instruments normally use the plural to refer to victims.¹⁴

With regard to 'status', a general legal definition thereof is 'A person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations, or any particular group of them separately considered'.¹⁵ This definition, as adapted to the present thesis, involves the existence of (procedural) rights held by the victims, procedural/evidence requirements to be met by the victims, and legal relations involving victims in the context of international and hybrid criminal courts.

¹¹ Concise Oxford English Dictionary (11th edn. Oxford University Press 2004) 1610.

¹² Bryan Garner (ed.), Black's Law Dictionary (8th edn., Thomson West 2004) 1598.

¹³ ICC RPE, rule 85 (b); ECCC Internal Rules, glossary.

¹⁴ See, e.g., ICC RPE, rule 85 (a); STL Statute, article 17.

¹⁵ Garner (2004) 1447.

2. Research Questions

The present thesis aims to address two main research questions.

The first research question is: *What is the victims' status at international and hybrid criminal courts?*

It is argued herein that the victims' status at international and hybrid criminal courts may mainly consist of up to three dimensions, i.e., victims as witnesses, victims as victim participants/civil parties, and victims as reparations claimants.

Victims as witnesses testify about facts witnessed by them. Victims' status as witnesses is present at all international and hybrid criminal courts. Indeed, this dimension of the victims' status is the only existent at the ICTY, the ICTR and the SCSL. Victims as participants/civil parties participate in the proceedings to voice their own interests and concerns (victim participants) or to support the prosecution and to seek reparations (civil parties). Victims' status as victim participants/civil parties is only present at the ICC and the STL (victim participants) as well as at the ECCC (civil parties). At the ICTY, the ICTR and the SCSL, there are only some limited instances of 'participation'. Victims as reparations claimants can claim and benefit from reparations for harm caused by crimes. Victims' status as reparations claimants only exists at the ICC and the ECCC. It should be noticed that, depending on the court, these victims' status dimensions can be cumulative.

The second research question is: *How does victims' status as witnesses, victim participants/civil parties and reparations claimants work at international and hybrid criminal courts?*

With regard to victims as witnesses, victims are subject to a restricted regime whereby they cannot express as such their own views and concerns since they are called as an evidentiary source. However, specific protective and special measures (especially for vulnerable witnesses), which may exceptionally include anonymity (normally before trial) are provided to victims for security reasons and in order to avoid secondary victimization.

With regard to victims as victim participants/civil parties, to hold the official victim participant status (ICC, STL) or the civil party status (ECCC), victims first need to apply for and be granted it. Once this is done, and according to the respective courts' instruments and case law, victims can participate as victim participants (ICC, STL) or as civil parties (ECCC) through a variety of modalities of participation/procedural rights to move forward their own interests. Participation as victim participants/civil parties is feasible under the respective courts' instruments during investigation/pre-trial, trial, sentencing

and/or appeals. At the ICC, victims without holding the 'official' victim participant status (granted upon application) can still participate in specific proceedings during investigation/pre-trial.¹⁶

With regard to victims as reparations claimants, procedural steps are necessary to be taken by victims who want to claim reparations for the harm inflicted to them and linked to crimes in the ICC and the ECCC cases, including specific reparations proceedings at these courts. Victims can claim and receive individual/collective reparations (ICC) or collective and moral reparations (ECCC), whose implementation may involve mechanisms such as the ICC Trust Fund for Victims (TFV).

Under the second research question, it is also argued that when examining how these dimensions of the victims' status work at international and hybrid criminal courts, attention needs to be given not only to victims' interests but also to other parallel and/or competing interests such as the accused's rights,¹⁷ efficient conduct of the proceedings, search for judicial truth, and/or implementation challenges. All of this taking place in the context of large numbers of victims and courts with limited resources.

3. Sources

At a general level, legal sources considered in this thesis correspond to the sources enumerated under article 38 of the International Court of Justice (ICJ) Statute which, according to the ICTY Appeals Chamber, 'is generally regarded as a complete statement of the sources of international law'.¹⁸ This article reads as follows:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;

¹⁶ See *infra* Chapter IV.

¹⁷ Article 67 (Rights of the accused) of the ICC Statute provides for a complete illustrative list of the rights of the accused, as considered in this thesis. This article resembles article 14 of the International Covenant on Civil and Political Rights (ICCPR), articles of other human rights instruments as well as provisions of instruments of other international and hybrid criminal courts. As for other international and hybrid criminal courts instruments see: ICTY Statute, article 21; ICTR Statute, article 20; SCSL Statute, article 17; ECCC Law on the Establishment of the Extraordinary Chambers, article 35 new; STL Statute, article 16.

¹⁸ Aleksovski (IT-95-14/1-A), Judgment, Appeals Chamber, 24 March 2000, footnote 364; Kupreškić (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

At a more specific level, article 21 of the ICC Statute provides a complete list of sources of law applicable by it. This list is *mutatis mutandi* also relevant for the other international and hybrid criminal courts. Article 21 reads as follows:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.¹⁹

Taking into account, *inter alia*, the previous provisions and considering the nature and contents of this thesis, the following legal sources have mainly been used.

First, instruments constitutive of international and/or hybrid criminal courts, either international treaties (ICC Statute), statutes included as annexes to

¹⁹ For a detailed analysis of the sources of law applicable by international and hybrid criminal courts see William Schabas, *The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 74-120; William Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (Oxford University Press 2010) 381-400; William Schabas, 'International Tribunals' in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2nd ed., Åbo Akademi University Institute for Human Rights 2012a) 695, 716-717; and Frédéric Mégret, 'The Sources of International Criminal Procedure' in Göran Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 68.

UN Security Council Resolutions adopted under chapter VII of the UN Charter (ICTY and ICTR Statutes), and bilateral treaties between the UN and a particular State (SCSL, ECCC and STL). These instruments contain the general framework within which victims' status falls.

Second, rules of procedure and evidence adopted either by judges of the court in question (ICTY, ICTR, SCSL, ECCC), or by an assembly of States Parties (ICC) as complemented by the respective regulations and/or directives of the respective court. These sets of rules flesh out considerably the provisions contained in the constitutive instruments of international and hybrid criminal courts, which are by nature of a more general scope. Therefore, they provide the necessary detail to examine the three dimensions of the victims' status and how these work.²⁰ It should be noticed that the latest versions of these rules are used, unless otherwise indicated.

Third, case law of international and hybrid criminal courts, which constitutes a fundamental authoritative interpretation of the above-referred provisions. Moreover, since the topic of victims' status as witnesses, victim participants/civil parties and reparations claimants is intrinsically quite dynamic, the consolidated and emerging jurisprudence of international and hybrid criminal courts constitutes a necessary source to better understand how all the sets of provisions are put into practice. Accordingly, case law of international and hybrid criminal courts is used in this thesis extensively. Complementary to it, submissions by, *inter alia*, the Prosecutor, legal representatives of victim participants and civil parties are in some instances also considered. Furthermore, where relevant, transcripts of hearings have also been examined.

In addition to the three above-mentioned sources, the following legal sources are used.

First, instruments applicable by and, especially, case law of international human rights bodies, in particular the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) in applying/interpreting the pertinent articles of their constitutive instruments, i.e., the American Convention on Human Rights (ACHR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Second, set of UN General Assembly Resolutions containing principles and guidelines on victims of international crimes and their rights to, *inter alia*,

²⁰ As mentioned in the explanatory note to the ICC RPE 'The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases'.

participate in criminal proceedings and to receive reparations for the wrongful acts inflicted on them, in particular the UN Declaration of Basic Principles of Justice for Victims and Abuse of Power and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Third, official non-judicial documents such as reports and press statements issued by international and hybrid criminal courts.

Fourth, where pertinent, relevant rules of customary international law, general principles of public international law and/or principles common to the major criminal law traditions.

Fifth, legal literature consisting in theses, books, articles and on-line resources and which systematizes and/or analyzes both the law applicable by international and hybrid criminal courts and the case law of these courts.

Sixth, interdisciplinary literature such as criminology/transitional justice academic materials and/or reports, especially used in the second chapter ('Shaping the Victims' Status and International Criminal Proceedings').

Seventh, in some specific instances, victims' opinions/considerations as found in the reviewed literature.

Eighth, indirectly some Cambodian procedural criminal law via ECCC's case law references is considered.

Ninth, taking into account that three influential national systems: the English, the American and the French ones, are in a general manner presented in this thesis for illustrative and to some extent comparative purposes, the following sources are examined: i) national legislation, e.g., codes/acts, directives as well as Council of Europe/European Union instruments; ii) national case law and ECtHR's case law; and iii) related legal literature which has been extremely useful, especially concerning systematization and analysis of case law. Quotes of English-translated French legal materials have been obtained from the database 'Legislation on Line',²¹ unless otherwise made and indicated by the author.

Tenth, some other instruments and/or practice of other national systems and of international/hybrid institutions from the Balkan region, Rwanda and Sierra Leone have been considered in the last chapter ('Victims as Reparations Claimants').

²¹ Available at: <http://legislationline.org/documents/section/criminal-codes> (last visit on 3 December 2012).

4. Sources Limitations

Concerning sources used in this thesis, it must be mentioned two limitations related to the thesis timeframe and access to materials.

Timeframe

The sources used and analyzed in this thesis are limited to those existent as of 2 January 2014. Thus, for example, the analysis corresponding to victims' status at the ICC puts special emphasis on *Lubanga* since it was the first ICC case in which the trial was completed and also due to the seminal decisions on victims' status rendered in/connected to that case.

Access to materials

With regard to case law sources, the materials considered in this thesis are those which were publicly available as of 2 January 2014 in, for example, the respective web-sites of the international and hybrid criminal courts.

5. Methodological Approach

In order to discuss the research questions and when examining the above-listed sources, it has been followed a legal research methodology implemented as follows.

First, a thorough analysis of the international instruments that constitute the law applicable by international and hybrid criminal courts at which victims may exercise one or more dimensions of their status. Under the interpretation provisions of the Vienna Convention on the Law of Treaties, which have been applied by international and hybrid criminal courts,²² the legal analysis of the provisions in this thesis pays attention to: i) the provision wording; ii) the object and purpose of the instrument in question; iii) a systematic and contextual reading of the provision; and/or iv) a survey of the legislative history (*travaux préparatoires*) that led to the adoption of the provision in question.²³

²² See, e.g., Situation in the Democratic Republic of Congo (ICC-01/04-168), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006, para. 33.

²³ Vienna Convention on the Law of Treaties, article 31 (1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'), (2) (3) and article 32 (2) (referring to the supplementary means of interpretation, including the preparatory work of a treaty). For rules and principles of treaty interpretation specifically relevant to international and hybrid criminal courts see Schabas (2006) 80-84; Schabas (2010) 387-388; Elizabeth Salmón Gárate, Introducción al Derecho Internacional Humanitario (IDEHPUCP/CICR 2004) 42-47.

Second, the examination of the applicable law takes into account painstakingly and critically how it has been interpreted and applied by the competent international or hybrid criminal court. Emphasis is given to how and to what extent the judicial reasoning has shaped the victims' status. Moreover, it is closely analyzed how victims' status has been enhanced or weakened by the jurisprudence of international and hybrid criminal courts and also, where relevant, how these jurisprudential outcomes have impacted on the efficiency of the proceedings and the accused's right to a fair and impartial trial/proceedings. Furthermore, where relevant, it is also considered whether the Judges/Chambers of the international and hybrid criminal courts issued their decisions or judgments within the limits of applicable law or whether they implemented an excessively 'creative' or restrictive interpretation. Submissions by victims' legal representatives are in some specific instances also examined to see their impact on the respective jurisprudential outcomes.

Third, the analysis of both the law applicable by international and hybrid criminal courts and their case law is substantially complemented by using and discussing relevant academic literature commenting on both sources. This academic literature is used either to back up the thesis argumentation or, where pertinent, this literature is also criticized. In addition, some of the academic literature has been employed as a very important source of systematized case law from international and hybrid criminal courts.²⁴

Fourth, jurisprudential contributions from international human rights monitoring bodies, in particular the IACtHR and the ECtHR, are examined especially when they have been cited/referred to by international and hybrid criminal courts to give content to some aspects of the dimensions of the victims' status and how these work.

Fifth, analysis of some empirical evidence, in particular, comments/opinions from victims, found in academic literature, are integrated as part of the argumentation to especially analyze jurisprudential outcomes.

Sixth, the above-detailed methodological guidelines are employed to examine specific aspects of the victims' status as witnesses, victim participants/civil parties and reparations claimants in a particular international or hybrid criminal court or a subgroup of them, put together when they are quite similar in a particular dimension of the victims' status. In particular, the ICTY, the ICTR and the SCSL are always grouped together due to the identical

²⁴ In this regard, *inter alia*, the following material has been particularly useful: McGonigle Leyh (2011); Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 227-313, 383-424.

situation of the victims' status in their dimensions at these courts. After having examined the victims' status in a specific international or hybrid criminal court or a subgroup of them, some comparisons with the other international and hybrid criminal courts are made to have a better approach to the similarities and differences among these institutions as well as to identify some trends concerning victims' status at international and hybrid criminal courts.

Seventh, although the thesis research questions concern the victims' status as witnesses, victim participants/civil parties and reparations claimants at international and hybrid criminal courts, as previously said, three national systems have been considered for illustrative and, to some extent and where relevant, comparative purposes. Those national systems, as mentioned, are the English and the American systems (adversarial systems) and the French system (inquisitorial system). The general presentation of national systems is based on the fact that, like international and hybrid criminal courts, at these systems, victims also have a status in criminal proceedings. The selection of those three systems correspond to their high influence not only on the procedural/evidence law of the international and hybrid criminal courts and, in particular, victims' status as witnesses, victim participants/civil parties and reparations claimants, but also on criminal proceedings and victims' status in other national systems worldwide.

6. Structure

In addition to this introduction (first chapter), the present thesis consists of five chapters. While the second chapter is of a general/introductory character, the three subsequent chapters develop respectively each of the three dimensions of victims' status as considered in this thesis. The thesis general conclusions are contained in the last (sixth) chapter.

Under the second chapter titled 'Shaping the Victims' Status and International Criminal Proceedings', it is brought an introductory framework to victims' status in criminal proceedings and relevant procedural features of the international and hybrid criminal courts. The chapter consists of four subchapters: introduction, followed by three subchapters. The second subchapter explores victims' status under restorative, retributive/utilitarian justice paradigms and under inquisitorial/adversarial systems, some international law landmarks on victims, national models of victims' roles and victims' status in transitional justice scenarios. The second subchapter examines the main adversarial and inquisitorial features of international and hybrid criminal courts. The last subchapter is chapter conclusions.

Under the third chapter titled ‘Victims’ Status as Witnesses’, it is discussed the first of the three dimensions of the victims’ status as considered in this thesis. Since victims’ status as witnesses is present across all international and hybrid criminal courts, the analysis focus tries to be evenly distributed across the courts. This chapter consists of four subchapters, being the chapter introduction the first one. In the second subchapter, it is discussed the general legal regime applicable to victims as witnesses at international and hybrid criminal courts, including the dual status victim participant-victim witness. Under the third subchapter, protective measures and special measures adopted in favor of victims are examined. The fourth subchapter examines the controversial issue of anonymity, especially during trial. Each of those three subchapters begins with a general presentation of the three considered national systems. Then, the analysis focuses on victims’ status at the ICTY/ICTR/SCSL, the ICC, and the ECCC/STL. Comparative conclusions are provided within each subchapter. Chapter conclusions constitute the last subchapter.

Under the fourth chapter titled ‘Victims’ Status as Victim Participants/Civil Parties’, it is discussed the second dimension of the victims’ status as considered in this thesis. Since the participatory dimension of the victim status formally only exists at the ICC, the STL (victim participant) and the ECCC (civil party), the analysis is mainly focused on these courts, but also examining some specific indirect ‘participation’ instances at the other courts. The chapter introduction (first subchapter) and other five subchapters constitute this chapter. Under the second subchapter, legal definitions of victims and the requirements to participate as victim participants (ICC, STL) or civil parties (ECCC) are discussed. In the subsequent subchapters, it is examined victims’ modalities of participation/procedural rights following the sequential flow of the procedural stages, i.e., investigation/pre-trial, trial, sentencing and appeals, which respectively constitute the third, the fourth, the fifth and the sixth subchapters. Each subchapter starts with a general presentation of the three considered national systems. Then, it is examined the victims’ status at the ICTY/ICTR/SCSL, the ICC, and the ECCC/STL. Within each subchapter, comparative conclusions are provided. Chapter conclusions constitute the last subchapter.

Under the fifth chapter titled ‘Victims’ Status as Reparations Claimants’, it is discussed the third dimension of the victims’ status as considered in this thesis. Due to the fact that the victims’ status as reparations claimants only exists at the ICC and the ECCC, emphasis is put on these two courts. However, the situation at the other international and hybrid criminal courts as for some

references to reparations under their instruments is also evaluated. This chapter consists in five subchapters, including the introduction (first subchapter). Under the second subchapter, the general framework of victims as reparations claimants is provided, which includes categories of reparations claimants and beneficiaries and resources for implementing reparations. Under the third subchapter, the reparations proceedings, including bringing reparations requests and specific reparations proceedings are evaluated in detail. Under the fourth subchapter, categories such as individual/collective reparations, modalities of reparations and reparations implementation are examined. Each subchapter begins with a general evaluation of the three considered national systems. Then, the analysis addresses the victims' status at the ICTY/ICTR/SCSL/STL, the ICC (and its TFV), and the ECCC. Within each subchapter comparative conclusions are provided. Chapter conclusions constitute the last subchapter.

Under the sixth and last chapter titled 'General Conclusions', it is provided some general conclusions applicable to both each of the three dimensions of the victims' status as witnesses, victim participants/civil parties and reparations claimants as well as concerning the overall victims' status in the examined international and hybrid criminal courts.

Two extra observations should be added concerning the thesis structure. First, within the third, fourth and fifth chapters, the 'Comparative Conclusions' subsections refer to: i) a summary of the argumentation discussed in the respective subchapter and some general conclusions; ii) a comparison of victims' status across and among international and hybrid criminal courts; and iii) some general references, where relevant, to the three considered national systems. 'Comparative Conclusions' thus provide both an analytical summary and conclusions, and the comparison is made across and among international and hybrid criminal courts, complemented, where relevant, by referring to the three considered national systems. Second, international and hybrid criminal courts have been grouped to facilitate the analysis taking into account their quite similar procedural law. Thus, this is the case of the ICTY/ICTR/SCSL in the chapters on victims' status as witnesses (chapter III) and victims' status as victim participants/civil parties (chapter IV); and, in the case of the chapter on victims' status as reparations claimants (chapter V), the sub-grouping corresponds to the ICTY/ICTR/SCSL/STL. Although the ECCC and the STL, due to their nature as hybrid criminal courts, appear under the same subsections on the chapters on victims' status as witnesses (chapter III) and victims' status as civil parties/victim participants (chapter IV), independent analysis of victims' status at each court is conducted. Lastly, but equally important, the ICC is always analyzed

autonomously due to, *inter alia*, its importance as the first permanent international criminal court and its scope. In any case, in the chapter on victims' status as reparations claimants (chapter V), the ECCC is also examined autonomously.

7. Originality of the Present Study and Aimed Contributions

The present study aims to contribute to the field of victims' status at international and hybrid criminal courts basically in three manners, each of them of academic and practical nature as well as effects.

First, the originality of this thesis mainly lies on that it is arguably the first study which seeks to comprehensively and truly draw the 'full picture' of victims' status at the six considered international and hybrid criminal courts. Although a seminal study by Mikaela Heikkilä first examined the three dimensions of the victims' status as presented in this thesis, it is limited to the ICTY, the ICTR, and the ICC and under the legal sources existent in the early 2000s.²⁵ Similar remarks can be said as for an important study by Anne-Marie de Brouwer.²⁶ In turn, a recent and comprehensive book chapter by Anne-Marie de Brouwer and Mikaela Heikkilä, which covers the six international and hybrid criminal courts considered in this thesis (plus the Special Panels for Serious Crimes in East Timor), focuses mainly on victim participation and, more concisely, on reparations for victims but only tangentially deals with protection of victims.²⁷ Concerning victims' status as witnesses, that study is complemented to an important extent by a comprehensive book chapter section by Guido Acquaviva and Mikaela Heikkilä in the same recent and outstanding collective work.²⁸

Accordingly, taking into the account the existent literature, which has been inspirational, this thesis contribution is expected to be achieved by examining the victims' status as witnesses, victim participants/civil parties and reparations claimants at international and hybrid criminal courts in order to reach, as much as possible, accurate and complete answers to the research questions formulated. Moreover, the holistic and integrated study of victims' status as witnesses, victim participants/civil parties and reparations claimants in

²⁵ Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Åbo Akademi University Press 2004).

²⁶ Brouwer (2005).

²⁷ Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance' in Sluiter et al. (2013) 1299.

²⁸ Guido Acquaviva and Mikaela Heikkilä, 'Protective and Special Measures for Witnesses' in Goran Sluiter et al. (2013) 818.

six international and hybrid criminal courts distinguishes this study from previous theses/studies, which have mainly focused on one specific dimension of the victims' status, for example, an important study by Brianne McGonigle Leyh,²⁹ and/or which have only examined one court in particular, for example, an important study by Eva Dwertmann.³⁰ Thus, unlike the vast majority of publications in the field which explore one or other dimension of the victims' status at international and hybrid criminal courts and/or topics related to those dimensions,³¹ this thesis presents an original (and arguably necessary) integrated study of those dimensions. At the same time, this thesis seeks to update and largely expand previous works that, to a large or short extent, considered victims' status as witnesses, victim participants/civil parties and/or reparations claimants.³² With regard to this second group of studies, the originality of the present study consists in: i) the analysis of the three dimensions constitutive of the victims' status in an integrated and exhaustive manner, across six international and hybrid criminal courts and under the most up-to-date legal sources; and/or ii) the continuous and analytical use of legal sources from legal areas other than international criminal law, mainly, comparative criminal procedural law and international human rights law.

Second, it is aimed that the analysis made and the conclusions arrived in this thesis be taken into consideration by other researchers, practitioners and policy makers who are in one or another manner involved in victim-related issues at international and hybrid criminal courts. Moreover, due to some general presentation of three national systems in this thesis, some of the analysis made can also be of relevance for individuals and organizations working and/or researching on victim-related issues in criminal proceedings at the national level. This feature also distinguishes the present thesis from other theses/studies that examined issues on victims' status at international and hybrid criminal courts like in a 'bubble' without paying (further) attention to national criminal systems. Furthermore, this thesis can arguably be considered as the first study which, to

²⁹ McGonigle Leyh (2011) (focusing mainly on victims' status as victim participants/civil parties at the ICC and the ECCC although with some general references to victims' status as witnesses and reparations claimants). As for aspects relevant to the victims' status as reparations claimants, see, e.g., Eva Dwertmann, *The Reparation System of the International Criminal Court. Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers 2010).

³⁰ Dwertmann (2010) (examining the ICC as for reparations). In turn, the study by McGonigle Leyh is focused on the ECCC and the ICC although with some general presentation of victims' status at other international and hybrid criminal courts. See McGonigle Leyh (2011).

³¹ For detailed references to legal literature, see both the thesis bibliography and the footnotes.

³² See, e.g., Heikkilä (2004); Brouwer (2005) 227-313, 383-424; Brouwer and Heikkilä (2013).

some level of detail, tries to set up a bridge and open a dialogue between the victims' status at international and hybrid criminal courts and victims' status at national criminal courts.³³ This has been to a large extent ignored in previous theses and studies examining the victims' status at international and hybrid criminal courts. This effort aims at hopefully encouraging future academic production to deepen such dialogue much further.

Third, this thesis constitutes to date, arguably, the most complete and exhaustive study on victims' status at international and hybrid criminal courts. It is expected that this feature can be measured not only quantitatively through the length of the thesis but also, and more importantly, qualitatively via the depth of the analysis and argumentation aimed to be presented in each and every of the chapters and sections of this thesis.

³³ In a much lower level of detail, some general comparative criminal procedure analysis is present in Brouwer and Heikkilä (2013) 1341-1344 and 1367-1370, and Acquaviva and Heikkilä (2013) 854-855.

Chapter II. Shaping the Victims' Status and International Criminal Proceedings

1. Introduction

This chapter seeks to examine some underlying and foundational questions in order to better understand the status of victims as witnesses, victim participants/civil parties and reparations claimants in the following chapters. The analysis and conclusions in this chapter address some of the main general issues in the always difficult process of shaping, giving content to and enhancing victims' status as well as building up platforms, i.e., international and hybrid criminal courts, at which the status of victims of the most serious international crimes can be exercised. Bearing in mind that two broad legal categories, i.e., victims' status and international criminal proceedings, are present across the whole thesis, this chapter is accordingly structured in two main parts: the first one on victims' status and the second one on international criminal proceedings.

After this introduction, the following subchapter ('Shaping the Victims' Status') concerns the analysis and discussion of theoretical approaches as well as of national and some international law developments, especially in contexts of serious human rights and international humanitarian law violations, in the long and not easy path to recognize victims as important agents in criminal proceedings. This first sub-chapter, in turn, consists of four sections. In the first section, both traditional and more recent criminal justice paradigms which have led or influenced criminal justice systems are examined with regard to the victims' status allocated in each of them. This first section is concluded by mapping some of the most important international law developments in the building up process of victims' status in criminal proceedings. The second section deals with some general notions and main characteristics of adversarial and inquisitorial systems followed by a very brief presentation of the victims' status in each system. The third section concerns six models of victims' status in criminal proceedings as existent and implemented in national criminal justice systems. The fourth and last section critically draws the broad picture constituted by transitional justice scenarios and mechanisms where victims' status and international, hybrid criminal courts are brought to existence and operate.

The next subchapter ('Shaping International Criminal Proceedings') consists of two sections. In the first one, a very general presentation of the

international and hybrid criminal courts considered in this thesis is provided, paying attention to the impact of them on the respective victimized populations. Under the second section, criminal procedural elements identified as belonging to the adversarial/common law system or inquisitorial/civil law system are applied to the international and hybrid criminal courts that are examined in this thesis. The idea of this exercise is not only to demonstrate that international criminal justice proceedings are arguably unique or mixed but also to set the general procedural and evidentiary law where the three dimensions of victims' status, as presented in this thesis, take place.

This chapter ends with chapter conclusions.

2. Shaping the Victims' Status

2.1. Victims' Status under Retributive, Utilitarian and Restorative Paradigms and Enhancement of Victims' Status at the International Level

Victims' status in criminal proceedings has been traditionally driven by retributive justice paradigms. This situation has, however, progressively changed due to the increasing presence of a restorative justice paradigm in criminal proceedings. Retributive and restorative justice paradigms and what role victims are allocated under either paradigm will be briefly considered herein followed by references to some landmark moments in the evolution of victims' status at the international level.

2.1.1. Victims' Status in the Retributive Justice Paradigm

Retributive or desert justice theories are grounded on the relationship between punishment and culpability insofar as punishment is justified 'because and only because offenders deserve it'.³⁴ The retributive criminal justice paradigm endeavors to achieve proportional punishment, i.e., punishment has to be proportional to the gravity of the crime, and criminal justice systems should be consistent with treatment of offenders.³⁵ The idea that the severity of a sentence should be proportional to the seriousness of the criminal conduct is intrinsic to retributive justice.³⁶ Such notion has led to criticism against retributive justice

³⁴ Michael Moore, 'The Moral Worth of Retribution' in Andrew von Hirsch and Andrew Ashworth (eds.), *Principled Sentencing: Readings on Theory and Policy* (2nd edn., Oxford University Press 1998) 179, 190.

³⁵ James Dignan and Michael Cavadino, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice System from a Victims' Perspective' (1996) 4 *International Review of Victimology* 153, 155; Loretta Stalans and Julian Roberts, 'Retribution', Richard Wright and J. Mitchell Miller (eds.), *Encyclopedia of Criminology*, vol 3. (Routledge, 2005) 1430, 1431.

³⁶ Andrew Ashworth, 'Desert' in Andrew von Hirsch and Andrew Ashworth (1998b) 141, 141.

based on, *inter alia*, the assumption of a widespread moral agreement about wrong and right,³⁷ difficulties to find a proportional punishment and why two harms (crime and punishment) are always better than just one (crime).³⁸ The degree of guilt and also punishment cannot hence vary with identity of the victim.³⁹ Accordingly, victims do not play a role in the determination of guilt or punishment under the retributive justice paradigm. Indeed, retributive scholars barely discuss about victims' status in criminal justice.⁴⁰

Although victims may obtain satisfaction out of perpetrators' punishment, moral culpability of the latter and not the degree of harm inflicted on the victims determines the seriousness of the offences.⁴¹ In this manner, the defendant's deed and not the suffering of the victim is what is examined on trial. There is, however, arguably certain recognition of the victims' plight as Ashworth, a prominent representative of the retributive justice paradigm, acknowledges 'the justice of punishment for culpable and criminalized wrongdoing may be said to stem from the wrongdoer's denial of respect for the victims' integrity'.⁴² This has been read by some as a victim-friendly approach since punishment expresses society's 'solidarity with the victim'.⁴³ Nevertheless, due to the fact that retributive justice is a response to the crime inflicted on the victim rather than a reaction to the harm experienced by him/her, there is consensus to consider retributive justice as a non-victim-friendly paradigm.⁴⁴ Therefore, consideration of victims' sorrow under retributive justice does not make it a victim-centered or even a victim friendly approach as criminal proceedings are focused first and foremost on the offence committed and not on the victimized individual.

Even though victims are considered important as information providers (witnesses), this substantive role assigned to victims does not grant them any

³⁷ Heikkilä (2004) 26.

³⁸ As for the critique, see, e.g., Aleksandar Fatić, *Punishment and Restorative Crime-Handling: A Social Theory of Trust* (Avebury Publishers 1995) 188; Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (Routledge Publishers 1992) 20-23. Referred to in Heikkilä (2004) 26, footnote 84.

³⁹ Andrew Ashworth, 'Some Doubts about Restorative Justice' (1993) 4 *Criminal Law Forum* 277, 298.

⁴⁰ Heikkilä (2004) 27.

⁴¹ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, 54.

⁴² Andrew Ashworth, *Principles of Criminal Law* (5th edn., Oxford University Press 2006) 16.

⁴³ Randy Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 *Ethics* 279, 284.

⁴⁴ *Ibid.*, Loc. cit.

procedural role in the criminal trial process.⁴⁵ This arguably depersonalizes the process, which means that ‘the victim loses his central role in the drama whose focus is the wrong committed and not the person wronged’.⁴⁶ Thus, individuals originally and directly victimized and who are, in principle, the most interested in the prosecution of and sentencing of offenders for crimes inflicted on them are relegated to a background position. Indeed, retributive justice approach exponents justify the limited role assigned to victims in criminal justice as a sort of control mechanism to avoid arbitrariness in the process and, therefore, victims’ revenge or forgiveness should not play a role.⁴⁷ Under this approach, victims’ participation in criminal proceedings has to be assessed paying very close attention to the accused’s right to a fair trial.⁴⁸ Some retributivists have argued for the need to accord a procedural role to the victims so that doing justice to them becomes part of retributive punishment.⁴⁹ However, those scholars have not addressed the unfolding impact of this victims’ enhanced role in terms of impartiality.⁵⁰

The fact that the state or public prosecutor constitutes the counter-part of the accused person leaves the victims a witness status.⁵¹ As already said, this corresponds to the logics underlying a retributive criminal justice system, which primarily aims at reaching a proportional punishment. The emphasis on the protection of the rights of the accused so that no innocent is convicted complements that primary aim. Such emphasis is reflected in the role assigned to the public prosecutor who, as a state representative, has mandate to control victims’ subjective experiences or suffering from negatively affecting the outcome of a trial, which explains why retributive justice has been described as a theory which speaks for state punishment.⁵² Critics of the retributive justice paradigm have precisely highlighted the quite weak role played by victims as: i) State and offender are the key elements, ii) victim is ignored, iii) victims lack

⁴⁵ Michael Moore, ‘Victims and Retribution: A Reply to Professor Fletcher’ (1999) 3 Buffalo Criminal Law Review 65, 72, 73.

⁴⁶ Cragg (1992) 19. See also Heikkilä (2004) 29; McGonigle Leyh (2011) 39.

⁴⁷ Moore (1999) 77.

⁴⁸ David Hall, ‘Victims’ Voices in Criminal Court: The Need for Restraint’ (1991) 28 American Criminal Law Review 233, 256.

⁴⁹ George Fletcher, ‘The Place of Victims in the Theory of Retribution’ (1999) 3 Buffalo Criminal Law Review 51, 55.

⁵⁰ McGonigle Leyh (2011) 41.

⁵¹ Heikkilä (2004) 28.

⁵² Dennis Klimchuck, ‘Retribution, Restitution and Revenge, Law and Philosophy’ (2001) 20 Law and Philosophy 81, 83.

information, iv) victims' 'truth' remains secondary, v) restitution is rare, and vi) victims' suffering is ignored.⁵³

There is no surprise in that victims' participation and voice in criminal proceedings with retributive justice framework have historically been limited because their interventions have been regarded as unlikely impartial or independent.⁵⁴ However, even retributivists concede that compensation claims is an area where victims should have a voice.⁵⁵

To sum up, the retributive justice paradigm does not require or even less ambition a central role for victims in criminal proceedings. On the contrary, a victims' enhanced status is perceived as a threat to the rights and guarantees crafted in favor of the accused, which are pivotal in retributive justice theories. To certain extent, the retributive justice paradigm explains why criminal justice systems have traditionally marginalized victims in criminal proceedings and have hence narrowed down their status mainly to that of (prosecution) witnesses.

2.1.2. Victims' Status and Utilitarian or Deterrent Theories

Different from retributive justice, which is backward-looking, utilitarian theories are forward-looking as they focus on the benefits of criminal justice such as a predictable punishment as a result of an offence.⁵⁶ Although deterrence aimed at by utilitarian theories has been considered a traditional goal of criminal justice, criminology literature has raised fundamental questions about assumptions of deterrence especially under the retributive justice paradigm.⁵⁷ Empirical evidence has indeed proved that the punishment system has not worked as reflected in the

⁵³ Zehr (1990) 212-213; Howard Zehr, *Retributive Justice, Restorative Justice*. *New Perspectives on Crime and Justice* 15 (MCC Canada Victim Offender Ministries Program and the MCC U.S. Office on Crime and Justice, Occasional Paper No. 4, Sept., 1985) 18.

⁵⁴ See for further discussion Andrew Ashworth, 'Victim Impact Statements and Sentencing' (1993b) *Criminal Law Review* 498; Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice* (Darmouth Publishing 2000) 185-206.

⁵⁵ Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002) 11.

⁵⁶ Fatić (1995) 1.

⁵⁷ See Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed., Cambridge University Press 2005) 75-80; Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy* (3rd ed., Hart Publishers 2009) 189, 197.

record prison population in many countries and the overcrowding of prisons.⁵⁸ Studies have failed to prove that, for example, the death penalty deters and some evidence shows that it may even cause some persons to kill.⁵⁹ Hence, deterrence may only work in relation to some offenders and some crimes.⁶⁰

Like retributive justice, utilitarian theories do not provide the victim with a central role in the criminal justice system. Punishment objectives such as deterrence and prevention sought by utilitarianism mainly focus on society and/or the offender.⁶¹ Although utilitarian approaches may conduct to victim-friendly trials,⁶² they can also end up in outcomes which are completely detrimental to the victims due to the flexibility brought by utilitarianism to sanction proceedings.⁶³ Be that as it may, victims' interests are often overlooked when those conflict with other interests, which is not an exceptional situation,⁶⁴ as utilitarian or deterrent theories focus on crime prevention.⁶⁵ In this scenario, victim-friendly responses such as payment of compensations are ruled out as these do not carry out a sufficient level of deterrent or preventive effect.⁶⁶ A criminal justice system led by a utilitarian paradigm undertakes factors which are completely irrelevant for the victims when having to reach a judicial outcome.⁶⁷ An example that may illustrate the potential negative effect of utilitarian theories on the status and interests of victims is the grant of amnesties or presidential pardons owing to political or extra-legal considerations.⁶⁸ Regardless of the legitimacy of the ends sought by these decisions, e.g., national reconciliation in a post-conflict context, the outcome thereof certainly cuts off victims' chances to seek remedy for offences committed against them and annuls

⁵⁸ Ezzat Fattah, 'A Critical Assessment of Justice Paradigms: Contrasting the Restorative and Retributive Justice Models' in Ezzat Fattah & Tony Peter (eds.), *Support for Crime Victims in a Comparative Perspective* (Leuven University Press 1998) 99, 99.

⁵⁹ E.g., William Bowers and Glenn Pierce, 'Deterrence or Brutalization: What Is the Effect of Executions?' (1980) 26 *Crime and Delinquency* 453-484. Cited by Zehr (1990) 77.

⁶⁰ Andrew Ashworth, 'Deterrence' in von Hirsch and Ashworth (1998) 44, 50; Aukerman (2002) 39, 65.

⁶¹ See, e.g., George Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Reading Massachusetts: Addison-Wesley Publishing Company 1995) 192, 193.

⁶² For a positive appraisal of victim-friendliness of utilitarian theories, see Fatić (1995) 34, 35.

⁶³ Heikkilä (2004) 31.

⁶⁴ *Ibid.*, Loc. cit.

⁶⁵ Aukerman (2002) 63.

⁶⁶ Heikkilä (2004) 31.

⁶⁷ *Ibid.*, Loc. cit.

⁶⁸ *Ibid.*, Loc. cit.

any dimension of victims' status in criminal proceedings. Accordingly, a central role for victims in criminal proceedings is not feasible under utilitarian theories.

Similar to the retributive justice paradigm, utilitarian theories consider interests of the offender and society. Their justification for punishment of the crime is given in 'broad terms'.⁶⁹ In other words, the society as a whole is regarded as the crime victim. Sanctions are hence 'not designed to meet the private interests of the individual victim, but rather, are imposed in the public interest [...] ultimately, to provide public protection from crime through retribution and deterrence'.⁷⁰ Victims' status can hence be severely weakened. For instance, utilitarian considerations may advise to refuse the adoption of protective measures such as closed hearings out of victims' concerns when testifying as witnesses and, instead, to conduct trials entirely public in order to, *inter alia*, more efficiently spread a message of zero tolerance for commission of certain offences. This clearly mirrors the notion whereby a deterrent theory aims to 'reinforce the value structure inherent in the criminal law'.⁷¹

2.1.3. Victims' Status and the Restorative Justice Paradigm

Whereas retributive and utilitarian justice paradigms both correspond to the traditional justifications of criminal justice and deny victims a central role in criminal justice, the modern movement of restorative justice that started in the early 1970s both represents a new paradigm in criminal justice and identifies victims as central actors in criminal justice. A generally accepted definition by Marshall of restorative justice presents this as 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future'.⁷² It is important, however, to note that restorative justice as such is not limited to criminal justice proceedings. The restorative justice paradigm, thus, includes a set of out-of-court practices such as family group conferencing, victim-offender mediation and peacemaking circles.⁷³

⁶⁹ Ibid., 32.

⁷⁰ Chris Corns, 'Criminal Sanctions: Offenders, Victims and the State' (1995) 7 *Legaldate*, Section: Crimes of Violence. Cited by Ibid., 32.

⁷¹ Ashworth (2006) 17.

⁷² Tony Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate 1999) 5.

⁷³ See Elmar Weitekamp, 'Reparative Justice: Towards a Victim Oriented System' (1993) 1 *European Journal of Criminal Policy Research* 70, 81-84; Heikkilä (2004) 37-38; McGonigle Leyh (2011) 54.

For Randy Barnett, one of the first restorative justice scholars, crime is an offense by an individual against the rights of another individual and he advocated for the substitution of criminal court proceedings with civil court proceedings, i.e., a sort of civil model restorative justice approach.⁷⁴ This restorative approach has been criticized as blurs the distinction between crimes and torts as well as misses what could be lost if the message conveyed by punishment is lost at all.⁷⁵

A subsequent restorative justice approach, the so-called victim-offender reparation model, by Howard Zehr has proven to be more popular. Victims' needs constitute the starting point for restorative justice but without neglecting offender and community needs.⁷⁶ Accordingly, the first step in restorative justice is to meet immediate needs in particular those of the victim. Victims' participation translates empowerment for victims, which is 'crucial to recovery and justice'.⁷⁷ For victims, the 'new lenses' to see criminal justice brought by the restorative justice paradigm would mean that: i) victim's needs are central, ii) victim and offender are key elements, iii) information is provided to victims, iii) victims are given chance to 'tell their truth', iv) victim's suffering is lamented and acknowledged, v) victim is recognized, vi) balance righted by raising both victim and offender, vii) victim-offender relationships are central, and viii) victim and offender are central.⁷⁸ However, this particular restorative justice approach has received some criticism due to a supposed over-individualized nature and overlooking of the public interest.⁷⁹ Nevertheless, it is clear that restorative justice approach enhances victims' status. The underlying logics are that the State is not the victim and the actual participants, i.e., victims and offenders, need to be given back significant power and responsibility in the process.

A sort of communitarian model constitutes a third variety of the restorative justice approach and originated in Australia and New Zealand.⁸⁰ The role of the community to reach a solution is emphasized because crime is regarded as affecting not only the victim and the offender but also the

⁷⁴ Barnett (1977) 287-291; Roger Pilon, 'Criminal Remedies: Restitution, Punishment or Both?' (1978) 88 Ethics 348, 350.

⁷⁵ See, e.g., Franklin Miller, 'Restitution and Punishment: A Reply to Barnett' (1978) 88 Ethics, 358, 359; Dignan and Cavadino (1996) 165.

⁷⁶ Zehr (1990) 200.

⁷⁷ Ibid., 204.

⁷⁸ Ibid., 212-214.

⁷⁹ See, e.g., Tony Marshall, 'Grassroots Initiatives Towards Restorative Justice: The New Paradigm?' in Antony Duff et al. (eds.), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press 1994) 245, 253.

⁸⁰ Hennessey Hayes, 'Restorative Justice' in Wright and Miller (2005) 1428, 1428, 1429.

community, approach indeed followed by some non-western indigenous societies.⁸¹ This approach has been criticized for taking for granted some assumptions such as the existence of an identifiable victim of crime and of a sufficiently defined sense of morality shared by the community in question.⁸²

Although the above-introduced restorative approaches present their own particularities, their focus on victims is what makes them similar to each other and, on the other hand, different from retributive and utilitarian paradigms of justice. Accordingly, besides restoring the offender and the community, the restorative justice paradigm seeks to restore the victim by reparation, including compensation and apology, and give him/her a participatory role in the (judicial or extra-judicial) process.⁸³ Victims' status under restorative justice gains considerable strength as crimes are seen to be committed against them and their communities. Thus, the 2006 United Nations Office on Drugs and Crime (UNDOC) Handbook on Restorative Justice envisages a central role for victims who 'must be allowed to tell their story'.⁸⁴ Since crime is mainly a breach of a social relationship,⁸⁵ redressing the harm inflicted on victims rather than inflicting a punishment on the perpetrators becomes central.

It is herein argued that the restorative justice paradigm constitutes possibly the only model to answer strong and sound criticism against the criminal justice system, which regards this system as a source of dissatisfaction and frustration for victims. Such a high dose of skepticism stems from the entire emphasis on punishment which becomes an obstacle for settlement of conflicts. Criminal justice systems primarily based on retribution can only increase the conflict.⁸⁶ Nevertheless, it is also reckoned here that a radical reform of the criminal justice system is arguably a long-term project and necessary reforms can become extremely difficult to implement. Moreover, in spite of empirical studies at the national level showing an increase in victim's satisfaction with restorative justice mechanisms meeting victims' concerns,⁸⁷ with benefits

⁸¹ Marshall (1999) 7.

⁸² Fatić (1995) 244, 245.

⁸³ Erik Luna, 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice' (2003) 1 Utah Law Review 205, 229.

⁸⁴ UNODC, Handbook on Restorative Justice Programmes (2006) 60.

⁸⁵ Luna (2003) 228.

⁸⁶ Ezzat Fattah, 'Toward a victim policy aimed at healing, not suffering' in Robert Davis, Arthur Lurigio and Wesley Skogan (eds.), *Victims of Crime* (Sage 1997) 257, 257-272.

⁸⁷ See, e.g., Dena Gromet and John Darley, 'Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures' (2006) 19 *Social Justice Research* 395, 396-397.

exceeding the harms,⁸⁸ extra-judicial mechanisms are not seen as alternatives to traditional justice crime institutions and imprisonment.⁸⁹ This is particularly and understandably the case of serious offences. Bearing in mind these difficulties, it is herein argued that restorative justice elements have to be incorporated progressively and smoothly in criminal justice proceedings. This is arguably the soundest option to truly address the harm suffered by victims and also to heal other actors involved and/or affected by the crime such as the offenders and communities. Accordingly, a victims' enhanced status reflected in a greater participation in criminal proceedings should in principle be implemented.⁹⁰ In the next subsection, integration and combination of the presented criminal justice paradigms are briefly discussed.

2.1.4. Victims' Status in Criminal Justice Systems Led by Mixed Paradigms

To begin with, no domestic criminal justice has adopted totally one or other criminal justice paradigm as each of them has its own advantages and weaknesses. On the contrary, national criminal justice systems have embraced those paradigms jointly. As a result, the lower or higher degree of presence of the restorative justice paradigm is arguably the principal factor to explain a stronger or weaker status of victims in a criminal justice system.

Although the use of mixed theories has come under criticism from advocates of different paradigms,⁹¹ it is, however, necessary to determine whether the apparently opposed paradigms of retributive/utilitarian and restorative justice may be brought together in criminal justice. This point is important since victims' status is mainly examined in this thesis at the international and hybrid criminal courts, which are by definition 'criminal' justice forums. It is argued herein that those paradigms are indeed not diametrically opposed as their goals can be integrated within the criminal justice system and, hence, are reconcilable as Zehr concedes 'Polarization [between retributive and restorative approaches] may be somewhat misleading',⁹² in the

⁸⁸ Heather Strang and Lawrence Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) 15 Utah Law Review 15, 25.

⁸⁹ Weitekamp (1993) 73-74 (stating that 'Despite the wealth of historical examples the contemporary literature has abandoned the concept of reparative justice as a viable penal sanction for crimes against persons').

⁹⁰ See, for a similar position, David Miers, *An International Review of Restorative Justice* (Home Office Research, Development and Statistics Directorate 2001).

⁹¹ Luna (2003) 226; Paul Robinson, 'Hybrid Principles for the Distribution of Criminal Sanction' (1987) 82 Northwestern University Law Review 19-24; Alan Goldman, 'The Paradox of Punishment' (1979) 9 Philosophy & Public Affairs 42, 49.

⁹² Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002) 59.

sense that it may hide 'important similarities and areas of collaboration'.⁹³ Other restorative justice scholars also support the need for combining restorative and retributive/utilitarian elements to reach a broader sense of justice.⁹⁴ The restorative justice paradigm may fulfil the several objectives of criminal law better than the other paradigms.⁹⁵ Accordingly, the (increasing) incorporation of restorative justice elements within the still predominantly retributive/utilitarian (deterrent) oriented criminal justice system seems to be advisable and even necessary so that victims' needs, rights and concerns are taken into account and enforced.

Indeed, restorative justice has also been considered as an inverted constructive retributivism as the former shares some basic elements of the latter, i.e., blameworthiness of the unlawful behavior is expressed, offender's responsibility is indicated, and the moral imbalance is repaired, but restorative justice presents these retributive justice elements in a constructive manner.⁹⁶ Therefore, the retributive/utilitarian paradigm and the restorative paradigm 'may be seen as two sides of a coin, rather than a pair of opposites'.⁹⁷

Even though the retributive/utilitarian response to the crime underlies national, international and hybrid criminal courts, it must and can be combined with the social constructiveness of restorative justice approaches as some retributive justice proponents such as Duff, Von Hirsch, Ashworth and Shearing admit.⁹⁸ Actually, the 'paying back' idea is also present in restorative justice even though the offender's 'paying back' role in punitive retributivism is reversed from a passive to an active role.⁹⁹ Thus, the offender must himself pay back by repairing as much as possible the harm and suffering inflicted.¹⁰⁰ This in

⁹³ Ibid., 58. See also Mary Reimund, 'The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice' (2005) 53 Drake Law Review 668, 673.

⁹⁴ Gromet and Darley (2006) 395-432; Antony Duff, 'Restoration and Restitution' in Andrew von Hirsch et al. (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing 2003) 43, 50.

⁹⁵ Luna (2003) 205.

⁹⁶ Lode Walgrave, *Restorative Justice, Self-Interest and Responsible Citizenship* (Willan Publishing 2008) 60.

⁹⁷ Ibid., 62.

⁹⁸ Antony Duff, 'Restorative Punishment and Punitive Restoration' in Lode Walgrave (ed.), *Restorative Justice and the Law* (Willan Publishing 2002) 82, 97; Andrew von Hirsch, Andrew Ashworth and Clifford Shearing, 'Specifying Aims and Limits for Restorative Justice: A "Making Amends" Model?' in Andrew von Hirsch et al. (2003) 21-41.

⁹⁹ Lode Walgrave, 'Has Restorative Justice Appropriately Responded to Retribution Theory And Impulses?' in Howard Zehr and Barb Toews (eds.), *Critical Issues in Restorative Justice* (Criminal Justice Press 2004) 47, 48.

¹⁰⁰ Ibid., Loc. cit.

national, international and hybrid criminal courts may be implemented via compensation and other modalities of reparations for the victims. Concerning victims' status at international and hybrid criminal courts, the retributive/utilitarian and restorative justice paradigms can therefore be reconciled regardless of the still predominantly retributive criminal proceedings.¹⁰¹ How these paradigms work in relation to victims' status in transitional justice settings characterized by the massive commission of international crimes is later discussed in this chapter.¹⁰²

2.1.5. Philosophical Arguments for the Change of Paradigms

At this point, it is necessary to present the philosophical arguments that justified/justify the change of paradigms guiding the criminal justice system, i.e., from a system almost exclusively oriented by the retributive and utilitarian paradigms to a system which has increasingly been including important restorative justice paradigm elements.

First, the fact that retributive and utilitarian paradigms justify alone the infliction of pain on an offender has been considered as particularly disturbing from a moral viewpoint.¹⁰³ Concerning the retributive paradigm, as del Vecchio highlights, the absolute justice of repaying evil with evil (as sustained by Kant and other philosophers) is 'really an empty sophism' and, therefore, it was instead necessary to consider a philosophical framework where 'an evil is to be put right only by doing good'.¹⁰⁴ Retribution has been considered not as a theory but only as a philosophical justification to deliberately inflict pain and suffering on a human being, which makes it not only ethically flawed but 'also morally indefensible'.¹⁰⁵ It has also been said that ethical justifications, or obligations, to sanction norm violations do not resist further scrutiny as 'the necessity for [...] restoration of an intuitive moral balance after a crime does not necessarily imply the intentional infliction of pain on the offender' and, hence, keeping an exclusive retributive justice paradigm 'is in itself ethically doubtful'.¹⁰⁶ A criminal

¹⁰¹ Aukerman (2002) 63. See also Gwynn Davis, *Making Amends: Mediation and Reparation in Criminal Justice* (1992) 11.

¹⁰² See *infra* Chapter II 2.4.

¹⁰³ Barnett (1977) 282.

¹⁰⁴ Giorgio del Vecchio, 'The Struggle against Crime' in Harry Acton (ed.), *The Philosophy of Punishment* (London 1969) 197, 199.

¹⁰⁵ Ezzat Fattah, 'From Philosophical Abstraction to Restorative Action, from Senseless Retribution to Meaningful Restitution: Just Deserts and Restorative Justice Revisited' in Elmar Weitekamp and Hans-Jürgen Kerner (eds.), *Restorative Justice. Theoretical Foundations* (Willan Publishing 2002) 308, 313.

¹⁰⁶ Walgrave (2008) 65.

justice system led predominantly by the retributive paradigm is not the most appropriate to restore the moral balance disrupted by a crime.¹⁰⁷ Additionally, the ‘construction of the punitive proportionality is itself highly debatable’.¹⁰⁸ Therefore, it is not advisable to consider the criminal justice system exclusively as sanction of crimes punished according to criminal law.¹⁰⁹

Concerning the utilitarian paradigm, the levying of punishment is undertaken not for the criminal himself, but for its educational impact on the community, i.e., the crime is transformed in mainly a mere excuse for punishing and, thus, treating offenders as means to the ends of others in this manner may raise serious moral problems.¹¹⁰ The use of force against an individual merely based on the effect that such use will have on others may be questioned as the criminal justice system exclusively becomes a means to make it legitimate the use of force and, hence, it does not constitute a truth-seeking device.¹¹¹ An exclusively utilitarian or instrumentalist response to crime is potentially ‘insatiable’ as it may ‘lead to punishing the innocent or to draconian punishments, in order to increase the deterrent impact’ and the utilitarian justifications of punishment ‘are limited by some (possibly hidden) deontological principles’.¹¹² It has even been argued that as the punitive criminal justice system has lost its moral function, it no longer has a moral authority to censure criminal behavior.¹¹³

Retributive and utilitarian benefits should be incidental to the criminal justice system and, hence, they cannot provide, alone, a justification of the criminal justice system. Accordingly, something else was needed. Restorative justice precisely shifts the moral and ethical justifications of punishment under retributive and utilitarian paradigms as under the latter punishment is morally viewed and justified as an end in itself.¹¹⁴ Therefore, the crisis of retributive and utilitarian paradigms, due to the uncertainty of their moral status,¹¹⁵ justified the emergence and incorporation of the restorative justice paradigm.

¹⁰⁷ *Ibid.*, 59.

¹⁰⁸ *Ibid.*, *Loc. cit.*

¹⁰⁹ Federico Reggio, ‘Dialogical Justice: Philosophical Considerations for Re-Thinking the Reaction to Crime in a Restorative Way’ in David Cornwell et al. (eds.), *Civilising Criminal Justice: An International Restorative Agenda for Penal Reform* (Waterside Press 2013) 315, 337.

¹¹⁰ Barnett (1977) 282.

¹¹¹ *Ibid.*, *Loc. cit.*

¹¹² Walgrave (2008) 54.

¹¹³ *Ibid.*, 55.

¹¹⁴ Barnett (1977) 283.

¹¹⁵ *Ibid.*, *Loc. cit.*

Second, the previous argument is directly connected to the need for a theory of good, i.e., how one moves from the bad to the good,¹¹⁶ or, in other terms, restorative justice seen as a theory of social justice.¹¹⁷ Under this logic, restorative justice philosophy lies on a set of values which include, among others, non-domination, empowerment, respectful listening, equal concern for all stakeholders (victims included) and respect for human rights specified in international instruments.¹¹⁸ In comparison to retributive and utilitarian paradigms, the restorative justice paradigm is based on a different ethics of justice due to its framing values and principles.¹¹⁹ These come from various discursive traditions of justice including: i) theological roots and moral philosophy at which ‘compassion, forgiveness, healing and caring tend to come to the fore’;¹²⁰ ii) political and social theories; and iii) ideals from communitarian philosophy which focus on how to repair collective relational fabrics affected by crime.¹²¹ Indeed, as pointed out by Braithwaite, restorative justice values may be considered as cultural universals as all cultures value redress of damage to persons and property, security, dignity, empowerment, based on justice and social support and they are indispensable to ‘our emotional survival as human beings’.¹²² Restorative justice aims to address the emotional dimensions of crime as much as possible, and to transform the destructive dimensions present in those emotions into constructive motivations, ‘which may contribute directly to the quality of social life while avoiding the ethically negative apriorism of pain infliction’.¹²³

Third, the ethical need to respond to crime cannot adopt manifestations that themselves violate the dialogical principle, which ‘includes the necessity of re-empowering the victim and meeting his or her needs’,¹²⁴ as postulated by the restorative justice paradigm. The reparative and participatory dimensions of the restorative justice paradigm reflect a dialogical idea of justice which corresponds, in turn, to the dialogical condition that characterizes both human beings and

¹¹⁶ John Braithwaite, ‘Principles of Restorative Justice’ in von Hirsch et al. (2003) 1, 4.

¹¹⁷ Gerry Johnstone, ‘Introduction’ in Gerry Johnstone (ed.), *A Restorative Justice Reader. Texts, Sources, Context* (Willan Publishing 2003) 1, 7.

¹¹⁸ *Ibid.*, 9.

¹¹⁹ George Pavlich, ‘Ethics, Universal Principles and Restorative Justice’ in Gerry Johnstone and Daniel Van Ness (eds.), *Handbook of Restorative Justice* (Willan Publishing 2007) 615, 618.

¹²⁰ *Ibid.*, Loc. cit.

¹²¹ *Ibid.*, Loc. cit.

¹²² John Braithwaite, ‘Restorative Justice and a Better Future’ in Johnstone (2003) 83, 89.

¹²³ Walgrave (2008) 60.

¹²⁴ Reggio (2013) 337.

institutions.¹²⁵ Accordingly, the so-called militaristic manner of criminal justice led almost exclusively by retributive/utilitarian paradigms is to be replaced by a system that meaningfully incorporates the 'peaceful co-operative dialogue of restorative justice'.¹²⁶

Fourth, as highlighted by Barnett, restorative justice is oriented by humanitarian goals, including provision of reparations to victims, which makes the criminal justice system more just overall speaking.¹²⁷ Thus, the goal brought by the restorative justice paradigm is 'not the suppression of crime: it is doing justice to victims'.¹²⁸ Although the restorative justice paradigm is not a panacea, it may lead to a fairer and improved criminal justice system and society, which cannot arguably be offered by the traditional retributive and utilitarian justice paradigms alone.¹²⁹ Therefore, a moral and ethical principle for the shift from a system only led by the retributive/utilitarian paradigms to one that also is guided by the restorative justice paradigm is 'not to harm the guilty but to help the innocent'.¹³⁰

Fifth, restorative justice philosophy offers a balanced approach to justice as it elevates the roles of victims, communities and offenders.¹³¹ Restorative justice philosophical framework orients its pursued goals towards the primary actors of the criminal system, i.e., the victim, the offender and the community. Hence, criminal justice system exclusively led by retributive/utilitarian paradigms, which robs crime victims the opportunity to express their views and concerns, is replaced by a criminal justice system where via the increasing incorporation of restorative justice elements, i.e., led by mixed paradigms, provides more recognition and validation to victims.¹³² Restorative justice, as a philosophical framework, is not punitive or lenient in focus and brings important elements absent in a traditional criminal justice system oriented only by retributive/utilitarian paradigms.

Sixth, a concept of equality of justice justified the need for a shifting of paradigm in the sense that not (equal) hurting of offenders but restitution of victims is sought and, thus, 'Equality of justice means equal treatment of

¹²⁵ *Ibid.*, 340.

¹²⁶ Johnstone (2003) 5.

¹²⁷ Barnett (1977) 294.

¹²⁸ *Ibid.*, 296.

¹²⁹ *Ibid.*, 299.

¹³⁰ *Ibid.*, 301.

¹³¹ Kathy Elton, 'The Practice of Restorative Justice: Restoration, a Component of Justice' (2003) 1 *Utah Law Review* 43, 50.

¹³² *Ibid.*, 45.

victims'.¹³³ Human rights should be equally enforced and respected.¹³⁴ Thus, the restorative justice paradigm acknowledges *inter alia* a victim's right to receive reparations from the party responsible and, hence, equality of justice demands equal enforcement of each individual victim's right to restitution.¹³⁵

Seventh, even though the previous arguments are arguably and mainly supported by the natural law theory and constructive interpretivism, it is also possible to justify the shift of paradigms under legal positivism.¹³⁶ As known, under the philosophy of legal positivism, what the state establishes as law, provided that all the correct political proceedings were adopted, is law and therefore whatever the state says is law, is law.¹³⁷ Following the legal positivism philosophy, by shifting the criminal justice from only the retributive/utilitarian paradigm to also include the restorative paradigm, the state would have to enforce individual rights via, for example, the recovery of individual damages.¹³⁸ Moreover, since internal aspiration to do the morally right thing, community values and fear of community's disapproval are among the most important elements of compliance with law,¹³⁹ a criminal justice system that is also guided by the restorative justice paradigm is strengthened.

The previous arguments justified/justify, from a philosophical perspective, the shift from a criminal justice system exclusively led by retributive/utilitarian paradigms to a system led by mixed paradigms as it incorporates restorative justice elements and, thus, is also led by the restorative justice paradigm. Through the inclusion of restorative justice elements, the deficiencies of criminal justice system may to an important extent be amended. Thus, as powerfully illustrated by Zehr, whereas justice only led by retributive/utilitarian paradigms was envisioned as the blindfolded goddess with balance in hand and impersonal, by the incorporation of restorative justice

¹³³ Barnett (1977) 298.

¹³⁴ *Ibid.*, Loc. cit.

¹³⁵ *Ibid.*, 298-299.

¹³⁶ As for natural law theory see, e.g., John Finnis, 'Natural Law and Legal Reasoning' (1990) 38 *Cleveland State Law Review* 1. As for constructive interpretivism see, e.g., Ronald Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527. As for legal positivism see, e.g., H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; Joseph Raz, 'Authority, Law and Morality' (1985) 68 *Monist* 295.

¹³⁷ Barnett (1977) 301.

¹³⁸ *Ibid.*, Loc. cit.

¹³⁹ Zvi Gabbay, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices' (2005) 2 *Journal of Dispute Resolution* 349, 387.

paradigm elements to the criminal system, justice may be imagined as healing a wound.¹⁴⁰

2.1.6. Victims' Rights Movement

In addition to the restorative justice paradigm, the emergence of the so-called victims movement in the 1960s and 1970s have left an impact on new approaches to victim's status in criminal justice as evidenced by two important components of this movement: victimology and feminist theories. Victimology, as a new discipline emerging out of criminology,¹⁴¹ proved to be important to strengthen the status of victims. Victimology shares with restorative justice paradigm a focus on and highlights victims' participation in criminal proceedings. The role of the victim in the criminal incident and criminal proceedings called for increased rights of victims of crimes.¹⁴² The increase in popularity of this discipline responded to victims' desires of re-emergence of restitution remedies and increase in victims' participation in the criminal justice process.¹⁴³ Victimology was accordingly seen in England, Australia, United States and Canada as an opportunity to discuss victims' status away 'from the normative tenets of criminology – criminal deviance and control'.¹⁴⁴ Victimology considers that the crime victim has been neglected as a relevant actor in criminal justice. Victimology spawned academic reflexion as for victim's status in criminal justice and also triggered state concern over the situation of victims in criminal proceedings. For example, in the United States, the victims' rights movement was decisive to reach the President's Task-Force on Victims of Crime in 1982 during the Reagan's administration and with mandate to 'address the needs of millions of Americans and their families who are victimized by crime'.¹⁴⁵ Accordingly, victimology helped to realise the intrinsic relationship between victims and the criminal justice system.

Feminist concerns also catalyze victims' rights movement as, alongside homicide and assaults, rape and domestic violence constituted the first organized

¹⁴⁰ Zehr (1990) 189.

¹⁴¹ Mendelson applied the term 'victimology' to argue for an independent discipline, tracing this term back to 1937. See Benjamin Mendelson, 'The Origin of the Doctrine of Victimology' (1963) 3 *Excerpta Criminologica*, Vol. 3, (1963) 239-244.

¹⁴² See Hans Von Henting, *The Criminal and his Victims: Studies in the Sociobiology of Crime* (Yale University Press 1948).

¹⁴³ Peggy Tobolowsky, 'Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime (1999) 25 *New England Journal On Criminal and Civil Confinement* 21, 25.

¹⁴⁴ Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan 2006) 164.

¹⁴⁵ President's Task Force on Victims of Crime, *Final Report* (1982) vii.

victims groups of the 1970s. Women's movement first focused on victims of domestic violence and sexual assault.¹⁴⁶ Rape crisis groups were set as an organized support structure, based on the feminist ideals of the emancipation of women from the oppression of male hegemony.¹⁴⁷ Much more recently, state agencies such as the United Kingdom Home Office have recognized how female violence victims can be accommodated by alternative rights agencies.¹⁴⁸ The reasons underlying a search for non-judicial mechanisms in cases of domestic violence is explained by the Home Office as follows 'the interests of the victim are important; they cannot however, be the final word on the subject of prosecution'.¹⁴⁹ This represents a balance and cautious approach towards victims' needs and sorrow without overinflating their status.

2.1.7. Some Landmarks on Victims' Status in the International Law Scenario

The restorative justice paradigm and victims' rights movement impacted not only at the domestic but also at the international level. Certain developments at the UN during the 1970s and early 1980s paved the way to the adoption of the UN General Assembly Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims' Declaration),¹⁵⁰ which has been considered as the Magna Carta for victims.¹⁵¹ In fact, the UN Victims' Declaration was the first international instrument that explicitly established victims' rights to access to justice and to receive reparations for the harm they suffered.¹⁵² Victims as defined in this declaration are:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of

¹⁴⁶ Charles Baird and Elizabeth McGinn, 'Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment' (2004) 15 *Stanford Law and Policy Review* 447, 451-452.

¹⁴⁷ See R. Gartner and R. Macmillan, 'The Effect of Victim-Offender Relationship on Reporting Crimes of Violence Against Women' (1995) 37 *Canadian Journal of Criminology* 393-429.

¹⁴⁸ Home Office, *Domestic Violence: Break the Chain – Multi-Agency Guidance for Addressing Domestic Violence* (Home Office UK 2001) 8.

¹⁴⁹ *Ibid.*, 10.

¹⁵⁰ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34/Annex (1985).

¹⁵¹ UNODC, *Handbook on Restorative Justice Programmes* (2006) 105.

¹⁵² McGonigle Leyh (2011) 95-96.

criminal laws operative within Member States, including those laws proscribing criminal abuse of power.¹⁵³

This definition has been influential in the definition of victim under the ICC RPE as seen later.¹⁵⁴ States are under the UN Victims' Declaration recommended to: i) adopt measures to improve victims' access to justice and fair treatment, ii) allow restitution from the offender and state compensation, iii) treat victims with dignity and respect, iv) provide information to the victims of their respective rights, and v) provide overall assistance.¹⁵⁵ The UN Victims' Declaration also exhorts States to criminalize abuse of power violations, provide remedies for harm inflicted and provide for social services.¹⁵⁶

Victims accordingly include victims of crimes committed by state or private actors and victims include not only direct victims but also, where appropriate, immediate family members, dependents and those individuals who intervened in order to assist victims or prevent victimization.¹⁵⁷ Victims indeed may be identified even when a perpetrator is unidentified.¹⁵⁸ However, the UN Victims' Declaration does not provide for rights of specific involvement in the trial such as the right to bring evidence although, for example, the Handbook on Justice for Victims interprets the Declaration as requiring States to provide some sort of review mechanism to challenge the decision not to prosecute.¹⁵⁹ In any case, the wording of the Victims' Declaration is broad enough to enable States to adapt their systems to implement the general aim of protection imbedded in the declaration. Be that as it may, the Victims' Declaration constitutes an international law hallmark in enhancing victims status in criminal justice as victims' right to present their views and concerns at certain stages of criminal proceedings was enunciated for first time at the international level. In spite of its soft-law nature, the UN Victims' Declaration has influenced courts' decisions dealing with victims' status and has triggered similar processes of subsequent resolutions on victims' status, which reveals certain consensus across common law and civil law jurisdictions on victims' status.

¹⁵³ UN Victims' Declaration, article 1.

¹⁵⁴ See *infra* Chapter IV 2.3.1.

¹⁵⁵ UN Victims' Declaration, articles 1-17.

¹⁵⁶ *Ibid.*, article 19.

¹⁵⁷ *Ibid.*, article 1.

¹⁵⁸ *Ibid.*, article 2.

¹⁵⁹ United Nations Criminal Justice Information Network (UNCJIN), Handbook on Justice for Victims (1999) 39.

As a follow-up to the adoption of the UN Victims' Declaration, a study on the status of the right to reparation for victims of human rights violations was commissioned to Professor Theo Van Boven by the then Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Final version of the Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms was submitted in 1997,¹⁶⁰ and later, under Professor Cherif Bassiouni, continued and completed.¹⁶¹ After consultation with international actors, on 16 December 2005 the General Assembly finally adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines).¹⁶² The UN Basic Principles and Guidelines adopted a victim-based perspective in order to provide 'mechanisms, modalities, procedures and methods' for implementing existing international human rights law and international humanitarian law obligations.¹⁶³

Under the UN Basic Principles and Guidelines, victims are:

[...] persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights violations or serious violations of international humanitarian law.¹⁶⁴

Immediate family members of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization also fall in this instrument's definition of victims.¹⁶⁵ Drafted in a

¹⁶⁰ Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/1997/104 (1997).

¹⁶¹ Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62 (2000).

¹⁶² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).

¹⁶³ UN Basic Principles and Guidelines, Preamble, paragraph 7. See also Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203, 251.

¹⁶⁴ UN Basic Principles and Guidelines, Section V, principle 8.

¹⁶⁵ *Ibid.*, Loc. cit.

broad language, the UN Basic Principles and Guidelines call remedies for victims of serious human rights and international humanitarian law violations. This explains why they have been regarded as a Bill of Rights for victims of grave international crimes even though it does not create substantive international or national legal obligations.¹⁶⁶

In spite of the absence of a direct call for victims' participation, the UN Basic Principles and Guidelines focus on three victims' rights: i) equal and effective access to justice; ii) adequate, effective and prompt reparation for harm suffered; and iii) the right to truth.¹⁶⁷ Be that as it may, it is argued herein that these rights generally speaking correspond to the three dimensions of victims' status, i.e., victims' status as witnesses, victim participants/civil parties and reparations claimants as discussed in this thesis. Aspects relevant to the right to truth and especially the right to reparation are examined later.¹⁶⁸ As for the right to access to justice, the State has to meet its obligation to investigate, prosecute and punish perpetrators of serious human rights and international humanitarian law violations as well as victims hold an individual right to enforce that obligation. The right to access to justice, as Bassiouni states, is hence the 'right to be heard and the right to an effective remedy'.¹⁶⁹

At the regional level, in Europe in particular, some important developments have also taken place. The Council of Europe Recommendation (85) 11 on the Position of the Victims in the Framework of Criminal Law and Procedure (CoE Recommendation (85) 11)¹⁷⁰ constituted an important first step to enhance victims' status in the Council of Europe as recommended the States Members of the Council to review their legislation and practice so that, *inter alia*: i) victims are informed of the final decision concerning prosecution and can ask for a review thereof; ii) questioning of the victims be conducted with due respect to their rights and dignity; iii) victims' information of the court proceedings; and iv) the possibility for victims to obtain compensation from the offenders as outcome of the criminal process.¹⁷¹ Although of a soft-law nature, the Recommendation, as concluded by Brienen and Hoegen, 'has had an impact on the vast majority of criminal systems of the Council of Europe's Member

¹⁶⁶ McGonigle Leyh (2011) 100.

¹⁶⁷ Bassiouni (2006) 260; McGonigle Leyh (2011) 100.

¹⁶⁸ See respectively *infra* Chapter II 2.4.3 and Chapter V.

¹⁶⁹ Bassiouni (2006) 263.

¹⁷⁰ Recommendation (85) 11 on the Position of the Victims in the Framework of Criminal Law and Procedure, 28 of June 1985.

¹⁷¹ See respectively: *Ibid.*, 11, I.B.6-7, I.C.8, I.D.9, I.D. 10-13.

States'.¹⁷² The Netherlands and England and Wales best implemented the Recommendation, which demonstrated that the best practices do not depend on a specific legal system.¹⁷³ However, it was also concluded that no country implemented the Recommendation perfectly.¹⁷⁴

The European Union has also contributed to enhance the victims' status in criminal proceedings via its Council's Framework Decision on the Standing of Victims in Criminal Proceedings (EU Framework Decision on Victims),¹⁷⁵ replaced by the Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime of the European Parliament and of the Council (EU Directive on Victims) issued on 25 October 2012.¹⁷⁶ The EU Framework Decision on Victims was the first 'hard-law' international instrument on victims' status in criminal proceedings.¹⁷⁷ Victim was defined as 'a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State'.¹⁷⁸ The EU Framework Decision on Victims approached matters forcefully and speedily as set one-year time limit to implement most of its provisions, which provided for, *inter alia*, these victims' rights: i) right to respect and recognition at all stages of the criminal proceedings; ii) right to receive information about the case, in particular, right to be provided with information by those responsible for decisions relating to the case; iii) right to protection for victims' privacy and their physical safety; and iv) right to compensation from the offender.¹⁷⁹ Attention should be drawn to the European Commission Report on the compliance with the Framework Decision on Victims, which concluded that 'No Member State can claim to have transported all the obligations arising from the Framework

¹⁷² M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal justice Systems* (Wolf Legal Publishers 2000) 1156.

¹⁷³ *Ibid.*, 1157.

¹⁷⁴ *Ibid.*, 1558. In addition to CoE Recommendation (85) 11, see also: Recommendation of the Committee of Ministers on Assistance to Victims and the Prevention of Victimization, 410th meeting of the Ministers' Deputies, Doc. No. R (1987) 21 (1987).

¹⁷⁵ Framework Decision on the Standing of Victims in Criminal Proceedings, 2001/220/JHA, 15 March 2001.

¹⁷⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA.

¹⁷⁷ It should be noticed that the Framework Decision has later been followed by the Framework Decision Recommendation 2006(8) on Assistance to Crime Victims, 14 June 2006.

¹⁷⁸ Framework Decision on Victims, article 1 (a).

¹⁷⁹ *Ibid.*, articles 2, 4, 8 and 9 respectively.

decision, and no Member State has correctly transposed the First paragraph of Article 2'.¹⁸⁰ The latter holds particular significance as that paragraph is generally speaking the root of all other concrete victims' rights.¹⁸¹ This led to turn the principles of the Framework Decision on Victims into a directive,¹⁸² i.e., the EU Directive on Victims, which contains uniform rules for Member States and requires direct implementation in domestic law.¹⁸³ Otherwise, a complaint can be filed before the European Court of Justice (ECJ). It should be remembered that directives like framework decisions are binding as to the effect to be achieved but both leave the choice concerning the form and method to the Member States; however, unlike directives, framework decisions were not capable of direct effect and, therefore, only subject to the ECJ's optional jurisdiction,¹⁸⁴ and enforcement proceedings could be not taken by the European Commission in case of a failure to transpose the framework decision into national law.¹⁸⁵ Victims under the EU Directive on Victims are defined as:

- (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
- (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death [...];¹⁸⁶

The EU Directive on Victims further developed the rights contained in the EU Framework Decision on Victims, including among others: i) right to receive information about their case; ii) right to be heard, i.e., victims may be heard and may provide evidence; iii) right to return of property; iv) right to compensation from the offender; and v) right to protection, including protection

¹⁸⁰ Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings {SEC(2004)102} /* COM/2004/0054 final */

¹⁸¹ Article 2 contains the victims' right to respect and recognition at all stages of the criminal proceedings.

¹⁸² European Commission, Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, 2011/0129 (COD), 18 May 2011.

¹⁸³ See McGonigle Leyh (2011) 125.

¹⁸⁴ See Treaty on European Union (Nice Version), 2001/C 80/01, 26 February 2001, article 35; Treaty on the Functioning of the European Union, 2010/C 83/01, 30 March 2010, article 288.

¹⁸⁵ Carl Lebeck, 'Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino' (2007) 8 German Law Journal 501, 507; Margot Horspool and Matthew Humphreys, *European Union Law* (6th edn., Oxford University Press 2010) 114-115.

¹⁸⁶ EU Directive on Victims, article 2 (1).

of victims with specific needs.¹⁸⁷ Rights to understand/be understood and to interpretation/translation are also explicitly recognized.¹⁸⁸ Like the EU Framework Decision on Victims,¹⁸⁹ the EU Directive on Victims does not directly oblige States to grant victims the civil party status.¹⁹⁰ However, the catalogue of victims' rights under both instruments has certainly contributed to enhance one or more dimensions of the victims' status, i.e., *inter alia*, as witnesses or civil parties, existent in EU national systems. The provisions of the EU Framework Decision on Victims and the EU Directive on Victims are detailed in this thesis, where relevant, when examining the English system.

Lastly, but equally important, relevant developments on victims' status at the international human rights bodies, in particular the ECtHR and IACtHR, are examined as follows and, some of them, in further detail in later parts of this thesis. To begin with, it should be mentioned herein in general terms that victims' status in criminal proceedings of serious human rights violations such as torture, arbitrary/extrajudicial execution and enforced disappearance of persons has been enhanced by international human rights bodies. These developments correspond to victims' rights underlying the victims' status as witnesses, victim participants/civil parties and reparations claimants.

Thus, the ECtHR, in cases relating to violations of article 2 (right to life), article 3 (prohibition against torture, inhuman and degrading treatment) read together with articles 6 (right to a fair trial), and 13 (right to an effective remedy), has regarded those provisions as granting victims certain participatory rights.¹⁹¹ Victims' legitimate interest in serious human rights violations cases, i.e.,

¹⁸⁷ See *Ibid.*, articles 6, 10, 15, 16 and 18-19 respectively.

¹⁸⁸ See respectively EU Directive on Victims, articles 3 and 7.

¹⁸⁹ Framework Decision on Victims, Preamble, para. 8.

¹⁹⁰ EU Directive on Victims, Preamble, para. 20 ('The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system').

¹⁹¹ See, e.g., ECtHR, *Shanaghan v. United Kingdom*, App. No. 37715/97, Judgment, 4 August 2001; *Kelly and Others v. United Kingdom*, App. No. 30054/96, Judgment, 4 August 2001; and *Hugh Jordan v. United Kingdom*, App. No. 24746/94, Judgment, 4 August 2001. See also Juan Carlos

‘their close and personal concern with the subject matter of the inquiry [...] to safeguard their interests’,¹⁹² has been explicitly referred to by the ECtHR as a ground for their involvement in criminal proceedings. The ECtHR has identified as victims’ rights the following.

First, right to be informed of how proceedings are progressing and the respective decisions.¹⁹³ Indeed, the right to information has been regarded as crucial under the ECtHR’s case law. Second, right to be heard during criminal proceedings, including investigation,¹⁹⁴ and regardless of whether the State in question belongs to the civil or common law system.¹⁹⁵ Third, right to have access to case files although this can be limited during the investigation due to potential prejudicial effects to other individuals and investigations.¹⁹⁶ The ECtHR has found state responsibility when victims (and their families) were not given access to the investigation and other court documents.¹⁹⁷ Fourth, right to be informed by the Prosecutor of his/her decision not to prosecute in serious human rights violations cases so that the victim can challenge (appeal) this decision.¹⁹⁸ Accordingly, the ECtHR has found violations of article 2 of the ECHR when the State did not inform direct victims and/or their next-of-kin of decisions not to carry out prosecution.¹⁹⁹ Fifth, dead victim’s relatives should be involved in the investigation without necessarily being civil parties,²⁰⁰ which is particularly important in civil law countries.²⁰¹ Sixth, in an investigation, right to access witness statements before the appearance of the witness.²⁰²

Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff Publishers 2013) 122-131; McGonigle Leyh (2011) 106-111.

¹⁹² See, e.g., ECtHR, *Paul and Audrey Edwards v. United Kingdom*, Appl. No. 46477/99, Judgment, 14 March 2002, para. 70.

¹⁹³ See, e.g., ECtHR, *Orhan v. Turkey*, Appl. 25656/94, Judgment, 18 June 2002, paras. 346, 348.

¹⁹⁴ See, e.g., ECtHR, *Paul and Audrey Edwards v. United Kingdom*, Appl. No. 46477/99, Judgment, 14 March 2002, paras. 84 and 87; ECtHR, *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Judgment, 7 January 2010, para. 286.

¹⁹⁵ See Ochoa (2013) 130.

¹⁹⁶ ECtHR, *Kelly and Others v. United Kingdom*, App. No. 30054/96, Judgment, 4 August 2001, para. 115.

¹⁹⁷ See, e.g., ECtHR, *Gul v. Turkey*, App. No. 22676/93, Judgment, 14 December 2000, para. 93.

¹⁹⁸ *Ibid.*, para. 118; *Ogur v. Turkey*, App. No. 21594/93, Judgment, 20 May 1999, para. 92.

¹⁹⁹ See, e.g., ECtHR, *Ogur v. Turkey*, 20 May 1999, para. 92.

²⁰⁰ ECtHR, *Slimani v. France*, Appl. No. 57671/00, Judgment, 27 July 2004, para. 47.

²⁰¹ Ochoa (2013) 126.

²⁰² ECtHR, *Kelly and Others v. United Kingdom*, 4 August 2001, para. 128. See also Ochoa (2013) 125 (commenting that, in this case, the investigation was of non-criminal nature).

In addition, the ECtHR has stressed the importance of the victim's right to claim reparations in national proceedings, based on article 13 of the ECHR.²⁰³ Furthermore, the ECtHR has found the application of article 6 (1) (right to a fair trial) concerning the civil party participation in criminal trials;²⁰⁴ however, this is subject to the condition according to which such proceedings must be decisive for the compensation of damages that victims suffered as result of the crime, which has been criticized as a restrictive interpretation.²⁰⁵

In interpreting article 8 (right to fair trial) and article 25 (right to judicial protection) of the American Convention on Human Rights (ACHR),²⁰⁶ the IACtHR has in cases of enforced disappearance, extrajudicial killings and torture recognized *inter alia* the following aspects. First, the right of victims' relatives to criminal investigation, prosecution, punishment and compensation:

[right of the victim's relatives] to have his disappearance and death to effectively investigated by the [...] authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained.²⁰⁷

Second, victims' rights to be heard and act in the respective proceedings,²⁰⁸ and, in particular, the right to a hearing, as developed by the IACtHR's case law in application of article 8 (1) of the ACHR, has included *inter alia* the following elements: i) a person's access to the state body or tribunal in charge of determining his/her rights and obligations;²⁰⁹ ii) in cases of amnesty

²⁰³ ECtHR, *Kaya v. Turkey*, Appl. No. 22729/93, Judgment, 19 February 1998, para. 107.

²⁰⁴ ECtHR, *Perez v. France*, Appl. No. 47287/99, Judgment, 12 February 2004, paras. 62-63.

²⁰⁵ Ochoa (2013) 127.

²⁰⁶ For a detailed analysis of the IACtHR's case law on the rights to fair trial and judicial protection see, e.g., Elizabeth Salmón Gárate and Cristina Blanco, *El Derecho al Debido Proceso en la Jurisprudencia de la Corte Interamericana de Derechos Humanos* (IDEHPUCP/Pontificia Universidad Católica del Perú 2012); and Laurence Burgorgue-Larsen and Amaya Úbeda, *The Inter-American Court of Human Rights* (Oxford University Press 2011) 641-691.

²⁰⁷ IACtHR, *Case of Blake v. Guatemala*, Merits, Judgment of 24 January 1998, Series C No. 36, para. 97.

²⁰⁸ IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Merits, Judgment of 19 November 1999, Series C No. 63, para. 27.

²⁰⁹ IACtHR, *Case of Aptiz Barbera (First Court of Administrative Proceedings) et al. v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 5 August 2008, Series C No. 182, para. 72; IACtHR, *Case of Cabrera García y Montiel Flores v. Mexico*, Judgment of 26 November 2010, Series C No. 220, para. 140. It should be added that, depending on the kind of proceedings, the right to a hearing does not necessarily have to be exercised orally in all

laws applied to serious human rights violations, these laws were considered as obstacles to the right to a hearing as they prevented victims' next of kin and surviving victims from being heard by a judge, from judicial protection (article 25 of the ACHR), and from resorting to an effective and adequate remedy to redress the violations perpetrated and to know the truth;²¹⁰ iii) victims' relatives to a hearing in cases of enforced disappearance of persons as previously examined; and iv) sexual violence victims' right to a hearing, including special protective measures, as examined later.²¹¹

Third, victims' access to a criminal process conducted with due process guarantees.²¹² Indeed, the IACtHR has recognized that the right to a fair trial 'includes victims' relatives right to judicial guarantees, and specifically to a criminal investigation for the purpose of identifying and, when appropriate, prosecuting and punishing those responsible'.²¹³

Therefore, under the IACtHR's robust case law, victims of serious human rights violations or their next of kin 'should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation'.²¹⁴ The legal bases for victims' participation in criminal proceedings in cases of serious human rights violations, under the IACtHR's case law, have been said to be: i) the right to a fair hearing (article 8 (1) of the ACHR); ii) the right to judicial

proceedings. See IACtHR, *Case of Apitz Barbera (First Court of Administrative Proceedings) et al. v. Venezuela*, Judgment of 5 August 2008, paras. 73-75. See also Salmón Gárate and Blanco (2012) 108.

²¹⁰ IACtHR, *Case of Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C No. 75, para. 42; IACtHR, *Case of Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C No. 154, para. 126; IACtHR, *Case of Gomes Lund et al. (Guerrilha do 'Araguaia') v. Brazil*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 24 November 2010, Series C No. 219, para. 174; IACtHR, *Case of Gelman v. Uruguay*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 24 February 2011, Series C No. 221, para. 239. See also Salmón Gárate and Blanco (2012) 110-111. For further discussion on amnesty laws, see Juan Pablo Pérez León Acevedo and Dan Kulawi, 'Smoke Screens—A Survey of the Evolving Trends in Amnesty Laws in Africa y Latin America' (2008) 2 *Malawi Journal of Law* 115.

²¹¹ See *infra* Chapter III 3.3.2.

²¹² IACtHR, *Case of Bámaca-Velásquez v. Guatemala*, Merits, Judgment of 25 November 2000, Series C No. 70, paras. 182-196; *Case of Durand and Ugarte v. Peru*, Merits, Judgment of 16 August 2000, Series C No. 68, paras. 111-130.

²¹³ IACtHR, *Case of Blake v. Guatemala*, Judgment of 24 January 1998, paras. 96-97.

²¹⁴ IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Judgment of 19 November 1999, para. 227. See also IACtHR, *Case of Durand and Ugarte v. Peru*, Merits, Judgment of 16 August 2000, Series C No. 68, para. 129; *Case of Las Palmeras v. Colombia*, Merits, Judgment of 6 December 2001, Series C No. 90, para. 59.

protection (article 25 of the ACHR); and iii) the victims' right to know the truth.²¹⁵ Victims' right to state reparations for serious human rights violations is based on article 63 (1) of the ACHR and, as observed, the IACtHR has acknowledged victims' right to receive reparations related to criminal proceedings.

However, the Human Rights Committee (HRC) has adopted a more cautious approach. Even though the HRC has concluded that victims' right to an effective remedy obliges States to investigate and prosecute human rights violations, it has considered that the ICCPR provides for neither a private right to demand criminal prosecutions nor a right to participate in the criminal proceedings.²¹⁶ Despite this, the HRC has considered that the right to an effective remedy requires States to conduct prosecutions in cases of serious human rights violations and to provide compensation to the victims.²¹⁷ Also, the HRC has concluded that States should give information to the victim concerning the violation as a manner to provide an effective remedy.²¹⁸ Additionally, articles 13 and 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and interpreted by the Committee Against Torture (CAT), provides for victims' rights to a prompt and impartial investigation and to redress and adequate compensation.²¹⁹

In turn, although the African Charter on Human and Peoples' Rights in its article 7 (1) refers to the right to a fair trial 'Every individual shall have the right to have his cause heard', this treaty does not provide for the right to a victims' effective remedy. This has led to quite limited case law from the African Commission on Human and Peoples' Rights (ACmHR),²²⁰ situation not helped

²¹⁵ Ochoa (2013) 118.

²¹⁶ See, e.g., HRC, *H.C.M.A. v. The Netherlands*, Comm. No. 213/1986, Views, 3 April 1989, para. 11.6; HRC, *Vicente et al. v. Colombia*, Comm. No. 612/1995, Views, 14 June 1994.

²¹⁷ See, e.g., HRC, *Laureano Atachahua v. Peru*, Comm. No. 540/1993, Views, 25 March 1996, para. 10; HRC, *Vaca v. Colombia*, Comm. No. 859/1999, Views, 25 March 2002, para. 9; HRC, *Telitsin v. Russian Federation*, Comm. No. 888/1999, Views, 29 March 2004, para. 9; HRC, *Kouidis v. Greece*, Comm. No. 1070/2002, Views, 26 April 2006, para. 9.

²¹⁸ See, e.g., HRC, *Khalilov v. Tajikistan*, Comm. No. 973/2001, Views, 30 March 2005, para. 9; HRC, *Aliboev v. Tajikistan*, Comm. No. 985/2001, Views, 18 October 2005, paras. 6-7.

²¹⁹ See Ochoa (2013) 103-104. As for the CAT's case law see *inter alia* CAT, *Baraket v. Tunisia*, Comm. No. 60/96, Views, 10 November 1999; CAT, *Dragan Dimitrijevic v. Serbia and Montenegro*, Comm. No. 2007/2002, Views, 29 November 2004, paras. 5.4-5.5; CAT, *Guridi v. Spain*, Comm. No. 212/2002, Views, 24 May 2005, paras. 6.3-6.8.

²²⁰ See, e.g., ACmHR, *Amnesty International v. Zambia*, Comm. No. 212/98, 5 May 1999, paras. 47-61. The Commission found violations of the Charter but did not provide too much as for effective remedies. See also McGonigle Leyh (2011) 117.

by the African Court on Human and People's Rights. Indeed, the ACmHR (in an individual case) only once explicitly concluded that the victims' right to criminal proceedings access is included within the right to a fair hearing.²²¹ It is, however, expected that the Court, or what, in the future, will be the African Court of Justice and Human Rights, will follow the jurisprudential developments on victims' status from the other regional systems, especially in cases of serious human rights violations.

At this point, it should be reminded that victims at international and regional human rights mechanisms hold primarily the status of parties to the cases litigated against an alleged defendant State.²²² Also, whereas victims can directly access the ECtHR (after having met the respective admissibility requirements), victims cannot do it at the IACtHR and at the African Court on Human and People's Rights that depends on a State's optional declaration.²²³

With regard to victims' participation in criminal proceedings regulations/references under international instruments, international/regional human rights instruments and regional human rights courts' decisions, it has been observed that they: i) barely dictate participation during specific criminal proceedings and, considering the wide diversity existent in national legal systems and in their approaches to victims' status in criminal proceedings, victims' rights are worded in a broad manner, setting minimum standards for States to meet; ii) provide wide reference to domestic law and practice; and iii) it has been preferred victims' participation during early phases in criminal proceedings, as a way to ensure that States are adequately investigating and prosecuting alleged violations, rather than giving victims the right to be involved in decision-making such as sentencing.²²⁴

Be that as it may, victims' rights in criminal proceedings under, *inter alia*, the international sources surveyed in this sub-section include among others: the right to investigation and to prosecution, the right to effective access to law and justice, the right to be heard, the right to protection of their dignity and

²²¹ See ACmHR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Comm. No. 245/2002; Ochoa (2013) 134.

²²² See, *inter alia*, ECHR, article 34; IACtHR, Rules of Procedure, article 2 (25) and (33); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights, articles 5 (3) and 34 (6); Optional Protocol to the ICCPR, articles 1 and 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22.

²²³ See respectively ECHR, articles 34 and 35; ACHR, article 61 (1); and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, articles 5 (3) and 34 (6).

²²⁴ McGonigle Leyh (2011) 129. See also Brouwer and Heikkilä (2013) 1338-1339.

security, the right to information, the right to truth, and the right to reparations.²²⁵ These rights underlie the victims' status as witnesses, victim participants/civil parties and reparations claimants.

2.2. Victims' Status in Adversarial and Inquisitorial Systems

Since the terms adversarial and inquisitorial are used to describe criminal justice systems, a general consideration thereof is necessary. Accordingly, in this section, the notion of adversarial and inquisitorial systems is presented. Then, victims' status under each system is examined here in a general manner.

2.2.1. Adversarial and Inquisitorial Systems in General

The two leading legal traditions considered in this thesis are the common law or Anglo-American and civil law, Romano-Germanic or European Continental law. The civil law tradition is the oldest and prevailing legal tradition worldwide.²²⁶ In turn, the common law tradition, original from England, is now present in countries like the United States, Canada and Australia. Whereas the adversarial system is also named as the common law or Anglo-American system, the inquisitorial system is also referred to as the continental European system.²²⁷ To be more accurate, however, it should be noticed that the 'adversarial' and 'inquisitorial' terms refer to the procedural features of the (criminal justice) system and are not necessarily related to their historical origins. Damaška describes the adversarial system as 'a mode of proceedings [that] takes its shape from a contest or dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict'.²²⁸ In turn, Damaška presents the gist of a non-adversarial system as 'an official inquiry'.²²⁹ However, Damaška himself acknowledges that the classification of a national system as inquisitorial or adversarial is difficult as 'criteria remain uncertain for the inclusion of specific features into the adversarial and the inquisitorial types'.²³⁰ Moreover, adversarial features have been adopted

²²⁵ For a further discussion, see Carlos Fernández de Casadevante Romani, *International Law of Victims* (Springer 2012) 133- 243.

²²⁶ John Merryman, *The Civil Law Tradition: An Introduction to the Legal System of Western Europe and Latin America* (2nd ed., Stanford University Press 1985) 1-3.

²²⁷ G. F. Cole, S. J. Frankowski, and M. G. Gertz, *Major Criminal Justice Systems: A Comparative Survey* (2nd edn., Sage 1987) 23-26.

²²⁸ Damaška (1986) 3.

²²⁹ *Ibid.*, Loc. cit.

²³⁰ *Ibid.*, 4.

positively by inquisitorial systems and vice-versa.²³¹ It is clear that a purely adversarial or inquisitorial system does not exist and, accordingly, references to a particular national system as either adversarial or inquisitorial must be understood as predominantly adversarial or inquisitorial. A very brief presentation of the main features of both systems follows which, where relevant, is discussed in a larger detail in other sections of this thesis when examining the English, American and French criminal justice systems.

As for the role of the judge, in an adversarial system, this plays a function similar to a referee deciding on mainly procedural issues brought up by the parties and is passive in the search for truth. This general idea has to be nuanced as the judges may call and examine witnesses as evidenced in England and Wales,²³² and the United States.²³³ In any case, the (relatively) passive role played by the judges matches the active role by the parties, the assumption that the tension between two equally armed parties will lead to the truth,²³⁴ and the role assumed by lay-men jury as fact-finders. In the inquisitorial system, professional judges are active in seeking for the truth.²³⁵ Thus, (s)he can interrogate the accused and witnesses as well as order the production of evidence and remains in control of the proceedings. The access to the dossier, i.e., a report of the pre-trial investigations prepared by the prosecutor or the pre-trial judge and unknown in the adversarial system, by not only the parties but also the judge, enables the latter to control the trial proceedings. Unlike the adversarial system, the judges normally play an important role during pre-trial under the inquisitorial model. For instance, the French *juge d'instruction* (investigating judge), who decides whether the evidence collected is enough for trial. It is important to note that while the defendant in the adversarial system is in

²³¹ Orie (2002) 1441.

²³² See, e.g., United States Federal Rules of Evidence, as for United States, rule 614; *People v. Santana* (2000) 80 Cal. App. 4th 1194 (a state court case where the trial judge actively questioned witnesses about substantive factual issues in dispute at trial).

²³³ See English case law (see Blackstone's Criminal Practice (1996) 1317: 'the power should be sparingly exercised'). Cited by Orie (2002) 1443, footnote 10. In England, this power may be especially exercised to protect the interests of the defendant. See *R. v. Wellingborough JJ. ex p. Francois* (1994) 158 JP 813 and *R. v. Haringey Justices, ex p. DPP* [1996] QB 351.

²³⁴ See Jay Sterling Silver, 'Equality of Arms and the Adversarial Process: A New Constitutional Right' (1990) 27 Wisconsin Law Review 1007; Orie (2002) 1443.

²³⁵ Thus, for example, article 81 of the French *Code de Procédure Pénal* (Code of Criminal Procedure) states 'The investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt'. ('Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge').

principle entitled to be tried by jury, juries are known in the inquisitorial system but most of the cases are under the competence of professional judges.²³⁶

With regard to the position of the parties, in the adversarial system, they present their respective case during the trial and in a public hearing with the goal to persuade the jury to take a favorable decision for either party. This dominant role relies on their intensive fact-finding activities during pre-trial.²³⁷ There is also a strict order, separating evidence introduced by the prosecution and the defence as the parties present their respective cases. The central role assigned to the parties in the adversarial system explains why trials *in absentia* are generally inadmissible,²³⁸ and also the traditional decisive impact of the plea entered by the defendant on what proceedings should follow later, i.e., bringing the trial to sentencing.²³⁹ Additionally, the defendant may defend himself/herself in court and present his/her case but (s)he is limited to presentation of facts to his/her personal knowledge, i.e., (s)he can do so if (s)he decides to testify as witness of his/her own case and, thus, is cross-examined by the prosecution.²⁴⁰ Under the inquisitorial system, the parties may introduce additional evidence and suggest supplementary investigations but it is the judge who dominates the trial.²⁴¹ Thus, the parties mainly supplement investigation, make observations and present their opinions. There is no distinction between evidence filed by the prosecutor and that by the defence because there are not two cases but only one. Parties' relatively passive roles in inquisitorial systems underlie the common use of trials *in absentia* although the right of the accused to be present at trial is recognized.²⁴² In inquisitorial systems, judges' active role makes them hear evidence even when the accused confessed although this certainly shapes the

²³⁶ While some civil law countries like France, Belgium, Denmark and Italy reserve jury trials for (very) serious cases, others reject them. See Orié (2002) 1454.

²³⁷ *Ibid.*, 1445.

²³⁸ In the English system, there must be exceptional circumstances to justify a judgment before the Crown Court in absence of the accused. See *R v. Jones* [2002] 2 WLR 524.

²³⁹ However, English case law states that the judge, in cases of guilty plea, is not bound to accept the version of facts agreed by the Prosecution and defence and, if (s)he is suspicious, (s)he can call evidence to determine what really happened. See *R. v. Beswick* [1996] 1 CrAppR (S) 343; *R. v. Tolera* [1999] 1 CrAppR 29.

²⁴⁰ The defendant cannot be called by the Prosecution since this would violate the rule, according to which, no one can be compelled to give evidence against himself. See, e.g., United States Constitution, 5th Amendment; Canadian Constitution Act 1982, Part 1, Article 11c of the Charter; and English Criminal Evidence Act 1898, s. 1(a)(1).

²⁴¹ Orié (2002) 1445.

²⁴² Whereas, for example, in the French, Italian, Belgian and Dutch systems defendants are quite commonly tried in their absence, article 320 of the German Code of Criminal Procedure (StPO) does not allow a trial *in absentia*.

procedures to be followed, and the defendant can be questioned by the court, prosecutor and defence counsel and (s)he is not even allowed to take an oath.²⁴³ Accordingly, the difference with the adversarial system is not on whether the defendant is obliged or allowed to speak in his/her defence but on what capacity does it.²⁴⁴ Victims' status is discussed in the next sub-section.

Concerning the rules of evidence, adversarial systems normally follow much stricter evidentiary rules than those used in inquisitorial systems.²⁴⁵ Whether evidence introduced by one of the parties can be admitted or should be excluded becomes the main issue and its admissibility depends on factors such as content of evidence, how the information was obtained and its protection as well as its presentation in court.²⁴⁶ Evidentiary rules work as mechanisms at trial, which enable to keep the parties on the right track of presenting evidence. Even though the parties traditionally are not obliged to disclose results of pre-trial investigations, the court can assist parties via necessary coercive measures.²⁴⁷ There has been progress via expansion and codification of disclosure obligations in adversarial systems.²⁴⁸ Variations within the adversarial model are related to a defence's reciprocal obligation to disclose.²⁴⁹ Disclosure is, in any case, a vital issue in an adversarial model. In inquisitorial systems, trial judges normally have a dossier at hand making it easy to call for evidence just by referring to the dossier whereas adversarial-system lawyers can only speak of potential evidence. However, the contents of the dossier may be subject to dispute during trial. The so-called principle of 'free proof' is normally present in inquisitorial national systems.²⁵⁰ Rules of evidence in inquisitorial systems primarily constitute a

²⁴³ This is even the case of the Italian common law oriented Code of Criminal Procedure whereby the defendant does not take an oath although (s)he is examined and cross-examined. For the Italian system, see Antoinette Perrodet, 'The Italian System' in Mireille Delmas-Marty and John Spencer (eds.), *European Criminal Procedures* (Cambridge University Press 2002) 348-412.

²⁴⁴ Jean Pradel, *Droit Pénal Comparé* (Daloz 1995) 449.

²⁴⁵ Orie (2002) 1451.

²⁴⁶ *Ibid.*, 1452. It should, however, be mentioned that, for example, a part of the body of exclusionary rules concerning evidence obtained illegally or improperly do have their counterparts in inquisitorial systems. See John Spencer, 'The English System' in Delmas-Marty and Spencer (2002) 142, 162.

²⁴⁷ There are still, however, places in the United States where producing a 'surprise witness' for the Prosecution is a legitimate technique. John Spencer, 'Evidence' in *Ibid.*, 594, 631.

²⁴⁸ E.g., the English Criminal Procedure and Investigations Act (1996) codified the disclosure obligations, previously governed by the common law.

²⁴⁹ E.g., Rule 16(b) (1) (A) and (B) of the Federal Rules of Criminal Procedure in the United States.

²⁵⁰ E.g., article 427 of the French Code de Procédure Pénale states 'Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his

normative instrument for the judge to evaluate dossier contents and what was presented at trial.²⁵¹ Results of pre-trial investigations are already disclosed when inserted in the dossier.

Among other features, it is pointed out that whereas the process in adversarial systems is normally divided between the trial phase, i.e., determination of guilt or innocence, and a later sentencing phase, in inquisitorial systems material for both conviction and sentence is usually examined and decided together.²⁵² When it comes to appeals, the adversarial system limits it. Indeed, the right to appeal is not regarded as an essential part of the due process.²⁵³ When implemented, the appeals phase does not mean a trial *de novo* but consists in examining the court record to find errors claimed by the appellant.²⁵⁴ In contrast with the adversarial model, defence and prosecutor in the inquisitorial system can normally appeal and this consists in a full re-hearing of the case which may lead to replacement of the trial judgment.²⁵⁵ Thus, the appeals phase consists in principle of a trial *de novo* and is granted more generously.

2.2.2. Victims' Status

Whereas in both adversarial and inquisitorial systems the parties to a criminal case are by definition the prosecution and the defence, victims' status changes under one or the other system. In the adversarial system, victims were originally given a central role.²⁵⁶ However, this situation changed from the beginning of the eighteenth century when the State assumed the role once granted to the victim in the prosecution and victims' interest were relegated to 'a subservient position to those of the State'.²⁵⁷ The contemporary adversarial system is, thus, built on the

innermost conviction'. ('Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction'.).

²⁵¹ Orié (2002) 1452.

²⁵² Ibid., 1454-55.

²⁵³ The right to appeal against a condemnatory judgment is actually only granted to the convicted. See James Richardson (ed.), *Archbold Criminal Pleading, Evidence and Practice* (Sweet & Maxwell 1999) 13. Moreover, in the United States, prosecutorial appeals against the verdict are considered as a violation of the double jeopardy clause of the 5th Amendment. See Orié (2002) 1455.

²⁵⁴ Orié (2002) 1455.

²⁵⁵ See Valérie Dervieux, 'The French System' in Delmas-Marty and Spencer (2002) 218, 271, 275.

²⁵⁶ Stephen Schafer, *The Victim and His Criminal* (Random House 1968) 7.

²⁵⁷ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008) 4.

premise of a contest between the prosecution (State) and the defendant.²⁵⁸ Hence, victims' rights and interests are automatically excluded and they do not hold a status of parties to the proceedings.²⁵⁹ Accordingly, victims have traditionally and primarily played the passive role of witnesses during trial in adversarial systems. Victims can also play a limited role as a private prosecutor in certain crimes as detailed in the next section. Nevertheless, there have been important reforms across the common law world to enhance victims' status,²⁶⁰ such as the United States Federal Crime Victims' Rights Act (CVRA).²⁶¹ Thus, although victims are not civil parties or official victim participants, certain 'participation' to voice their own interests and concerns and not as mere witnesses is possible but only during some specific procedural stages, sentencing in particular, via victims' impact statements (e.g., United States) or victims' personal statements (e.g., England).²⁶²

In the adversarial system, even though victims are not properly speaking reparations claimants in criminal proceedings,²⁶³ they can still receive reparations as an outcome of the criminal trial, e.g., via compensation orders to be paid by the convicted.²⁶⁴ Victims can also rely on extra-criminal proceedings such as state funds and torts; however, some state compensation programs were said to frustrate many victims rather than appease them, which was worsened by their treatment as 'third parties' to the crime.²⁶⁵ The points mentioned in this

²⁵⁸ It has been said that, under the English system, a private individual who would prosecute does not have the same standing as the victim in inquisitorial systems since the former does not primarily seek compensation for damages. See Pradel (1995) 534.

²⁵⁹ As for the English system, Spencer comments that '[i]n English criminal procedure the victim has no particular status'. See Spencer (2002) 156. As for the American System, after the investigation, the victim 'no longer participates and becomes a passive spectator free to attend the arraignment and possible trial. The victim is not a party to the proceedings and has no formal legal representation. However, he or she has the right to be informed about the criminal proceedings [...]'. Lucia DiCicco, *The Rights of Victims in United States Criminal Proceedings and at the ICC* (The American Non-Governmental Organization Coalition for the International Criminal Court 2009) 2. Available at: <http://www.amicc.org/docs/VictimsUS.pdf> (last visit on 12 August 2012).

²⁶⁰ See, for further discussion, Kirchengast (2006) 186-217.

²⁶¹ 18 U.S.C. § 3771. As the Ninth Circuit stated 'The criminal justice has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making independent participants in the criminal justice system'. *Kenna v. United States Dist. Ct. for the Central Dist. of Ca.* 435 F.3d 1011, 1013 (9th Cir. 2006).

²⁶² See respectively *infra* Chapter IV 5.1.1 and 5.1.2.

²⁶³ Brien and Hoegen (2000) 28.

²⁶⁴ See *infra* Chapter V 2.1.1, 2.1.2; 3.1.1, 3.1.2; 4.1.1 and 4.1.2.

²⁶⁵ Joanna Shapland, Jon Wilmore, and Peter Duff, *Victims in the Criminal Justice* (Gower Publishing Company 1985) 3.

paragraph are dealt with in detail when examining the English and American adversarial systems.

What can be left clear here is the victims' lack of power, especially the prosecution process, compared to their once exclusive status as private prosecutors in the adversarial system.²⁶⁶ Legislative amendments of the common law and executive measures adopted in the last years have certainly enhanced victims' status in adversarial national systems, and these should encourage further discussion of the victim's status in the adversarial system as a 'significant constitutive agent of the justice system'.²⁶⁷ Nevertheless, regardless of improvements on victims' status, victims are still largely excluded from the process, especially in comparison with inquisitorial systems. Additionally, their chances to claim and/or receive reparations from the offender are quite limited or inexistent.²⁶⁸ This situation is rooted in factors such as the still predominant perception of victims as mere 'evidentiary cannon fodder',²⁶⁹ and the absence of a victims' right to be heard to provide their own narrative account.²⁷⁰ Thus, a significant proportion of victims have been dissatisfied with the manner that they are treated by the criminal justice system.²⁷¹ Victims in adversarial systems have in most of the cases and traditionally been denied a proactive and meaningful role under the adversarial logics of a State vs. defendant dispute where victims are 'conscripted' into an operational role and mostly treated as servants or agents of the criminal justice system.²⁷² Moreover, cross-examination, i.e., the questioning of a witness by a party other than the one who called him/her to testify,²⁷³ and orality, quintessential features of adversarial system litigation, have been said to lead to secondary victimization.²⁷⁴ This is particularly serious inasmuch as even when victims play their traditionally

²⁶⁶ Kirchengast (2006) 171.

²⁶⁷ *Ibid.*, 230.

²⁶⁸ Doak (2008) 35.

²⁶⁹ *Ibid.*, *Loc. cit.* (citing John Braithwaite and Kathleen Daly, 'Masculinities, violence, and communitarian control' in Susan Miller (ed.), *Crime Control and Women: Feminist Implications of Criminal Justice Policy* (Sage 1998), 151, 154).

²⁷⁰ *Ibid.*, *Loc. cit.*

²⁷¹ Helen Reeves and Peter Dunn, 'The Status of Crime Victims and Witnesses in the Twenty-First Century' in Anthony Bottoms and Julian Roberts (eds.), *Hearing the Victim. Adversarial Justice, Crimes Victims and the State* (Willam Publishing 2010) 46, 50.

²⁷² Doak (2008) 35.

²⁷³ Brienen and Hoegen (2000) 259.

²⁷⁴ Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press 2001) 7.

assigned and limited role of witnesses in an adversarial system, their status could be worsened rather than strengthened.

Increasing adoption of pro-victim measures in adversarial systems to enable a larger participation of victims has also raised the question of whether victims would 'potentially cause immense structural and normative problems within any adversarial system' as this is construed as a confrontation of two parties.²⁷⁵ Current developments adopted to enhance victims' status are illustrated later by references to the English and American systems, which allow to identify what victim-friendly measures have been undertaken and their impact on the victims' status. It should be borne in mind that, after all, the victims' right movement had their roots in common law jurisdictions.

In contrast to adversarial systems, victims' status in inquisitorial systems is normally and at least in theory stronger. Accordingly, victims can appear at court not only as an information provider (witness) but also as an individual who suffered harm and has the right to be heard (victim as such).²⁷⁶ Concerning the latter, the role of victim as a *partie civile* (civil party) is the most common and this allows the victim to attach his/her civil claim for compensation to the state criminal proceedings.²⁷⁷ In this manner, the victim becomes a full-fledged party in the criminal proceedings,²⁷⁸ i.e., on an equal standing than the prosecutor and defence. As a civil party, the victim holds a set of procedural rights such as i) the right to call witnesses, ii) ask questions, iii) make closing arguments, and iv) the right to claim reparations at the end of the criminal proceedings.²⁷⁹ One of the axioms underlying the inquisitorial system, namely, the search for the truth, explains this central role granted to victims, who are indeed encouraged to participate so that the judicial bench can reach a more accurate judgment.²⁸⁰ The role of the victim in inquisitorial systems is, hence, directly connected with the inquisitorial judge's role in finding the truth.

Moreover, victims within inquisitorial systems can challenge the prosecutorial discretion to forgo prosecution. Victims can accordingly launch on

²⁷⁵ Jonathan Doak, 'Victims' Rights in Criminal Trials', (2005) 32 *Journal of Law and Society* 294, 297.

²⁷⁶ See, in general, Brienen and Hoegen (2000).

²⁷⁷ *Ibid.*, 129 and 320.

²⁷⁸ Mirjan Damaška (1986) 200, 212-213.

²⁷⁹ Mirjan Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (2007) 45 *American Journal of Comparative Law* 839, 841.

²⁸⁰ Rudolph Schlesinger, Ugo Mattei, Teemy Ruskola and Antonio Gidi, *Comparative Law* (7th ed., Foundation Press 2009) 858-62.

their own motion prosecution, e.g., France,²⁸¹ often limited to certain minor offences though or appeal the prosecutor's decision not to prosecute, e.g., Germany.²⁸² This avenue of action is not only symbolically important but also enables victims to use the state apparatus to begin investigations leading towards reparations. Thus, for example, investigations against the former dictator Augusto Pinochet for serious human rights violations were initiated by victims in Spain and Chile, both civil law countries.²⁸³ It should, however, be mentioned that victims not always constitute official parties to the proceedings.²⁸⁴

As part of the preparation of the dossier, witnesses' statements are placed in it. Moreover, in case the victim wants someone to be interviewed, his/her legal counsel brings the name of such potential witness to the investigatory authority, i.e., either the investigating judge or the prosecutor. A narrative testimony characterizes inquisitorial trial proceedings and aims at presenting unrehearsed and un-manipulated evidence.²⁸⁵ This allows the victim to speak 'more naturally', in a narrative manner, unlike their interventions as cross-examined witnesses in adversarial systems. Additionally, the likelihood of secondary victimization is reduced by the fact that judges, and not the defence, are those who decide which witnesses are called to trial and, especially, how those are questioned.²⁸⁶ Combined guilt and sentence phases may also be considered as another victim-friendly inquisitorial feature inasmuch as victims will always be asked the impact of the crime on them during the determination of guilt.

As presented, victims' status in inquisitorial systems is multifaceted and enhanced. Victims can thus intervene to voice their own concerns and needs as parties to criminal proceedings during trial and even participate prior to it by

²⁸¹ See Richard Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, How Can We Find Out, and Why Should We Care?' (1990) 78 *California Law Review* 539, 545, 671, 672.

²⁸² Schlesinger (2009), 858-62.

²⁸³ See Brienen and Hoegen (2000) 28, 857-858; Naomi Roth-Arriaza, *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (University of Pennsylvania Press 2005).

²⁸⁴ In Germany, for example, victims are not officially given the status of parties since a victim is simply considered as a witness. See Rodolphe Juy-Birmann and Jörg Biermann, 'The German System' in Delmas-Marty and Spencer (2002) 292, 301.

²⁸⁵ See, e.g., German Code of Criminal Procedure, section 69, providing for that the witness shall be directed to state all (s)he knows concerning the subject of his/her examination and then clarifying questions that are posed to the witness. See also William Pizzi and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) 32 *Stanford Journal of International Law* 37, 42-43.

²⁸⁶ Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial*, Vol. 2: Calling to Account and Judgment, (Hart Publishing 2006) 223, 223-226.

requesting investigations. In addition, victims' participation as witnesses normally runs smoothly and they have the possibility to adhere a reparations claim to the criminal proceedings, bringing civil and criminal claims at the same time. Therefore, the inquisitorial system can be considered as more appropriate to enhance victims' status in criminal proceedings as 'it has the major advantage of allowing the victims to have a voice in the criminal process and of granting him several participatory rights in the pre-trial stages'.²⁸⁷ The dimensions of the victims' status in the inquisitorial system are illustrated later with the French system.

2.3. Victims' Status in National Criminal Proceedings: Overview of National Models

This section presents an overview of models of victims' role/victims' participation in national criminal systems. It is important to mention that a victim can normally play one or more of these roles in the same national system, either adversarial or inquisitorial. The elements examined in this section are much further discussed when examining the three dimensions of victims' status as proposed in this thesis.

2.3.1. Civil Party

As already said, civil party or *partie civile*, in French, characterizes civil law jurisdictions.²⁸⁸ Generally speaking, victims who become civil parties can initiate a prosecution, have active participation in the proceedings and claim reparations for harms suffered.²⁸⁹ Accordingly, victims join the criminal proceedings led by the public prosecutor as parties introducing a civil claim to obtain reparations for damages caused by the crime. By initiating an independent action before the *juge d'instruction (constitution de partie civile)*, victims join the proceedings.²⁹⁰ This model is also referred to as 'adhesion model' as victims' claim is of a civil nature which is adhered to or integrated into the criminal proceedings.²⁹¹ Civil

²⁸⁷ Hogen and Brien (2000) 1169. See also Damaška (1986) 200-204.

²⁸⁸ See, e.g., *Code de Procédure Pénale* (Code of Criminal Procedure) (CPP) (France), articles 2, 85 and 87; Procedure Criminal Code (Austria), section 47; Procedure Criminal Code (Belgium), articles 63, 66 and 67; and New Procedure Criminal Code (Peru), articles 98-106.

²⁸⁹ Doak (2005) 311.

²⁹⁰ Victims can also initiate proceedings via issuance of a summons to bring the accused directly before the trial court (*citatiton directe*). See infra Chapter IV 2.13. See also Jean Pradel, 'France' in Christine Van Den Wyngaert (ed.), *Criminal Procedure Systems in the European Community* (Butterworths 1993) 105, 115.

²⁹¹ Hoegen and Brien (2000) 27.

claimants are, hence, those individuals, i.e., direct victims, but also immediate relatives or dependants, 'entitled [...] to claim compensation from the offender for the material and moral losses [...] caused by the offence, but who present their claim in criminal court'.²⁹² Therefore, victims have the right to lead and challenge evidence provided that this is pertinent to the claim for damages against the accused.²⁹³ In general, the civil party has procedural rights during pre-trial and trial stages, including asking authorities to conduct certain investigative actions, to be questioned in presence of their legal counsels, and the right to appeal decisions affecting their interests.²⁹⁴ In general, the civil party constitution provides three rights to the victims: i) they can use it to initiate a prosecution, ii) they have the right to participate and be heard as a party in the prosecution, and iii) they have a right to pursue a claim for civil damages in the criminal action.²⁹⁵ This indeed allows the victim to 'participate in the establishment of the truth of the facts and responsibility'.²⁹⁶ However, in certain jurisdictions, civil parties hold a limited capacity to participate as, for example, they cannot appeal an acquittal and are excluded from the sentencing stage.²⁹⁷ Victims' status as a civil party, at the national level, is discussed in detail when examining the French system later.²⁹⁸

An important advantage of this model is that victims have a voice in the criminal process and they are granted with a set of important participatory rights.²⁹⁹ A second advantage is that victims can profit from the burden of proof which lies with the prosecution as opposed to victims' situation before civil courts.³⁰⁰ This provides the victim with a relatively inexpensive, easy and quick proceeding to obtain reparations from the defendant as the victim does not need to be involved in both civil and criminal proceedings based on the same facts

²⁹² Ibid., Loc. cit.

²⁹³ Jonathan Doak (2005) 310-311.

²⁹⁴ Hoegen and Brienens (2000) 27.

²⁹⁵ Frase (1990) 615.

²⁹⁶ '[l]ui permettre de participer à l'établissement de la vérité des faits et des responsabilités'. Robert Cario, 'Les droits des victimes dans la procédure pénale française. Entre équité et effectivité in Les cahiers de PV, Antenne sur la victimologie', (Pub. Association québécoise Plaidoyer-Victimes, 2010-6) 69-82. Publication obtained from: http://criminologie.univ-pau.fr/ficheintervenant_RCario.htm (last visit on 12 August 2012) (p. 5 in the on-line version).

²⁹⁷ Ralph Henham and Grazia Mannozzi, 'Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis' (2003) 11 European Journal of Crime, Criminal Law and Criminal Justice 278, 288.

²⁹⁸ See *infra* Chapters IV and V.

²⁹⁹ Brienens and Hoegen (2000) 27.

³⁰⁰ Ibid., Loc. cit.

and the same crimes/unlawful acts. On the other hand, a (potential) disadvantage of this model, as illustrated by the French system, is that victims' participation 'tends to be limited to the pursuit of the civil claim [for damages]'.³⁰¹ Limitations to victims' participation and status relate to the nature and objective of criminal proceedings. This may lead a criminal court to refer the claim to a civil court and also the termination of a criminal case puts an automatic end to the civil claim, which may be later filed in a civil court.³⁰² A second disadvantage is that the victim needs to take the initiative and expressly request the court compensation, substantiate such request, and execute the court's decision.³⁰³

2.3.2. Private, Secondary/Subsidiary or Auxiliary Prosecutor

Victims can also participate in criminal proceedings by contributing to the prosecutor. Three variants can be identified under this model. First, the private prosecution present in civil law jurisdictions such as Argentina,³⁰⁴ Belgium,³⁰⁵ France,³⁰⁶ Spain³⁰⁷, and Poland,³⁰⁸ as well as in common law jurisdictions such as Australia,³⁰⁹ England and Wales,³¹⁰ and New Zealand.³¹¹ The victim prosecutors possess full prosecutorial rights including bringing charges, conducting prosecution and deciding on its termination but they are obligated to cover trial costs when there is dismissal or acquittal in the case.³¹² Moreover, this private

³⁰¹ Doak (2005) 311.

³⁰² Brienen and Hoegen (2000) 1069. See also J.J.M van Dijk, 'Victim Rights: A Right to Better Services or a Right to Active Participation?' in J. van Dijk, C. Haffmans, F. Ruter, J. Schutte (eds.), *Criminal Law in Action: An Overview of Current Issues in Western Societies* (Martinus Nijhoff Publishers 1986) 353, 354.

³⁰³ Brienen and Hoegen (2000) 27.

³⁰⁴ Procedural Criminal Code of Argentina, articles 82-86.

³⁰⁵ With respect to the Belgian system, it has been, however, said that there is no real 'private prosecution'. See Christine Van den Wyngaert, 'Belgium' in Van den Wyngaert (1993) 1, 16-18.

³⁰⁶ Called *citation directe par exploit d'huissier*. See Brienen and Hoegen (2000) 321-322.

³⁰⁷ Called *acción particular*. See Brienen and Hoegen, at 857-858.

³⁰⁸ See Edna Erez and Eva Bienkowska, 'Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland' (1993) 21 *Journal of Criminal Justice* 47, 50-58.

³⁰⁹ New South Wales Crimes Act (1900). See Kirchengast (2006) 190.

³¹⁰ See the following decisions relating to the right to initiate a private prosecution: Queen's Bench Division R. (on the application of Gladstone Pic) v. Manchester City Magistrates [2005] All.E.R. 56 (All England Law Reports); Divisional Court Jones v. Whalley [2006] 2 *Criminal Law Review* 67 on appeal to the House of Lords Jones v. Whalley [2006] 4 All.E.R. 113.

³¹¹ See Wallace v Abbott [2002] NZAR 95; [2003] NZAR 42.

³¹² Mario Chiavario, 'The Rights of the Defendant and the Victims' in Delmas-Marty and Spencer (2002) 541, 545. As examples of jurisdictions where victims are obligated to pay the costs of a trial

prosecution is limited to a special category of offences, i.e., petty crimes.³¹³ Thus, victims have to deal with a heavy burden of responsibility and their views may be regarded as revenge. This model has indeed been described as ‘an antiquated institution that should be supplemented with, or even replaced by, the right to judicial review to discontinue a prosecution’.³¹⁴ Further discussion is done when examining the three national systems considered in this thesis.

Second, victim as a secondary or subsidiary prosecutor, which is triggered by the public prosecutor’s decision not to proceed with the case,³¹⁵ e.g., subsidiary aggrieved party in Norway,³¹⁶ and the Austrian *Subsidiaranklager*.³¹⁷ Victims who normally have joined as civil parties can begin or take over the investigation and prosecution and their powers are comparable to those of the public prosecutor.³¹⁸ However, victims are liable to pay the trial costs in case of acquittal, which arguably constitutes a serious disincentive.

Third, victims can participate on the prosecution’s side as auxiliary or accessory prosecutors, e.g., the figure of *Nebenkläger* in Germany,³¹⁹ and Austria.³²⁰ Even though most of the prosecutorial work is conducted by the public prosecutor, victims are entitled to: attend trial, regardless of being heard as witnesses; adduce additional evidence; provide input on examining a witness by putting questions to him/her and by contesting the admissibility of questions; and to be heard in court as to a charge.³²¹ This variant may be considered as more balanced due to the fact that victims can express their views and concerns, they are also relieved from the prosecutorial burden and even run no financial

in case of unsuccessful prosecution, see StPO (Austria), section 390-1; Wetboek van Strafvordering (Belgium), sections 162 and 194; and RB (Sweden), s. 8, ch. 20. See Brienens and Hoegen (2000) 78 and 137.

³¹³ Matti Joutsen, ‘Listening to the Victim: The Victim’s Role in European Criminal Justice Systems’ (1987) 34 Wayne Law Review 95, 102-103. For example, in some US jurisdictions with limited resources, states have allowed victims to privately prosecute minor offences. See e.g., *New Jersey v Kinder*, 701 F. Supp. 486, 491-492 (D.N.J. 1988).

³¹⁴ Brienens and Hoegen (2000) 4.

³¹⁵ Heikkila (2004) 52.

³¹⁶ Criminal Procedure Act of 22 May 1981 No. 25, section 404. See Brienens and Hoegen (2000) 737.

³¹⁷ StPO (Austria), section 48. See Brienens and Hoegen (2000) 74.

³¹⁸ Joutsen (1987) 114.

³¹⁹ Strafprozeßordnung (StPO), sections 395-402. See Brienens and Hoegen (2000) 363-364.

³²⁰ Strafgesetzbuch (StGB), section 11-4. See Brienens and Hoegen (2000) 80.

³²¹ See Joutsen (1987) 114; Brienens and Hoegen (2000) 363-364.

risk in case of acquittal. Nevertheless, some studies have concluded that this model is underdeveloped in Germany.³²²

2.3.3. Victim-Witness

The third category is found both in civil law and common law countries. As already said, in the latter, victims' status is mainly limited to participate as witnesses during trials. This corresponds to the notion, predominant in adversarial criminal models, where the very idea of a victim as a legitimate stakeholder with rights still generates considerable contention.³²³ An exclusively adversarial trial that leads to perpetrators' punishment may be considered as a wholly inadequate response to victims' harm.³²⁴ Victims as witnesses are not normally granted the same rights as civil parties or private, secondary/subsidiary or auxiliary prosecutor. Victims as witnesses swear under oath that their testimony at trial is a correct account of the facts although some jurisdictions allow victim-witnesses to forgo testifying at trial and submit their pre-trial testimony instead. In any case, especially in adversarial systems, victims as witnesses may be re-victimized due to certain cross-examination techniques.³²⁵ In countries where the civil party institution exists, if victims want to testify as witnesses and become civil parties, they have to testify first and only then can become civil claimants.³²⁶ This scheme corresponds to the idea that victims cannot be civil parties and witnesses at the same time as they may be biased in their testimonies. Victims' status as witnesses at the national level is examined later when discussing their situation in the English, American and French systems.

2.3.4. Complainant

This model of participation is present in all common law and civil law jurisdictions as the complainant procedure, or reporting procedure,³²⁷ normally

³²² See, e.g., H. Kury, M. Kaiser, and JR Teske (1991) 'The Position of the Victim in Criminal Procedure-Results of a German Study' in (1994) 3 *International Review of Criminology*, 69, 75.

³²³ Doak (2008) 245.

³²⁴ Connor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 *International Journal of Transitional Justice* 250, 253

³²⁵ Brien and Hoegen (2000) 29. For example, in France according to article 335 of the CPP, the civil party cannot be heard as witness. See also *infra* Chapter III. 2.1.3.

³²⁶ Brien and Hoegen (2000) 29.

³²⁷ Brien and Hoegen consider reporting the offence and the complainant as two different modes of victims' participation. Herein, they are considered as one. In any case, it is important to mention that the person who reports an offence does not necessarily have to be the individual harmed by the crime, i.e., the victim. See Brien and Hoegen (2000) 26.

kicks off an investigation.³²⁸ This investigation may later lead to the state decision to prosecute, in which case the victim-complainant may be called as a witness. Moreover, when such state prosecution does not ensue, the victim is allowed to force a prosecution in certain jurisdictions.³²⁹ This model of victims' role/victims' participation is important as otherwise many crimes would go unnoticed and not punished.³³⁰ Additionally, this model in many cases opens up the other modes of victims' roles/victims' participation presented in this subsection. In civil law jurisdictions, the term 'complainant' refers to the individual required by law to inform the criminal justice authorities of his/her wish to prosecute the offender with regard to certain specific offences.³³¹ An important number of offences cannot be prosecuted if the victim has not first filed a complaint, which enables the victim-complainant to retain the option to withdraw the complaint and end the prosecution.³³² In common law jurisdictions, the term 'complainant' is properly used to refer to the victim during the criminal proceedings and mostly used in reference to victims of sexual offences.³³³ On the other hand, the victim-complainant possesses, if any, few rights in common law systems.

2.3.5. Impact Statement Provider or Allocation

Influenced by the victim rights movement as a restorative justice manifestation, victims have been granted with limited procedural standing mainly exemplified by victim impact statements (VIS) in the sentencing stage in certain common law jurisdictions,³³⁴ for example, in most US states,³³⁵ Canada,³³⁶ England and Wales,³³⁷ Ireland,³³⁸ Australia,³³⁹ and New Zealand.³⁴⁰ Generally speaking, these

³²⁸ McGonigle Leyh (2011) 79.

³²⁹ See *Ibid.* Loc. cit. (referring to Christian Dado and Susan Ferran, *The French Legal System*, (2nd edn., Sweet and Maxwell 1993) 200); Brien and Hoegen (2000) 317-318.

³³⁰ McGonigle Leyh (2011) 79.

³³¹ Brien and Hoegen (2000) 26.

³³² *Ibid.*, Loc. cit.

³³³ *Ibid.*, Loc. cit.

³³⁴ See *Ibid.*, 481.

³³⁵ See Douglas Beloff, Paul Gassel and Steven Twist, *Victims in Criminal Procedure* (2nd edn., Carolina Academic Press 1999) 621 (referring to, at 626, *Payne v. Tennessee* 501 U.S. 808 (1991)).

³³⁶ Criminal Code, section 722 (obliging judges to 'consider' victim impact statements when available).

³³⁷ In 2001, England and Wales introduced the Victim Personal Statement Scheme. See Doak (2008) 150.

³³⁸ Criminal Justice Act (1993), section 5 (1) and (3).

statements can be submitted once the accused pleads or is found guilty and reflect the physical and emotional harm inflicted on victims as well as loss and property damage caused by the crime.³⁴¹ These statements are heard for sentencing, parole and plea bargaining purposes. Although this model does not necessarily provide effective power to influence the prosecutorial or adjudicative process and is limited in moving victims' status forward substantially, it has met resistance in the jurisdictions where implemented because of due process concerns.³⁴² Furthermore, some scholars have perceived it as an institutionalized private revenge in criminal proceedings potentially leading to disparity in sentences,³⁴³ insofar as 'in the context of sentencing whose primary aim is not restorative [...] there must be grave doubts about allowing a victim to voice an opinion as to sentence'.³⁴⁴ Further discussion on this model of participation is done when examining 'participation' of victims during sentencing in the English and American systems.³⁴⁵

It is important to note that in some civil law jurisdictions, like The Netherlands, victim statements are also used for certain kinds of crimes. Unlike most of the common law countries, however, Dutch judges allow defendants to respond via the presiding judge the statements presented by victims in court.³⁴⁶ Nevertheless, in the context of combined guilt and sentencing phases, the Dutch system has been not particularly comfortable with victims' statements as this would affect the presumption of innocence and create the impression of an influenced judge.³⁴⁷

³³⁹ See, Victoria: 1A of Part 6 of the Sentencing Act 1991 (L-49/1991); South Australia: section 7A of the Criminal Law (Sentencing) Act 1988; New South Wales: sections 26 to 30A of the Crimes (Sentencing Procedure) Act 1999 (L-92/1999).

³⁴⁰ Victims' Rights Act 2002, part 22, sections 17-27.

³⁴¹ McGonigle Leyh (2011) 84.

³⁴² As for the situation in, for example, New Zealand, see Peter Sankoff and Lisa Wansbrough, 'Is There Really a Crowd' Thoughts about Victim Impact Statements and New Zealand's Revamped Sentencing Regime', paper submitted for the 20th International Conference of the ISRCL, Brisbane, Australia (July 2006) 14-19. Available at: <http://www.isrcl.org/Papers/2006/Sankoff.pdf> (last visit on 12 August 2012).

³⁴³ Ashworth (1993a) 298.

³⁴⁴ Ashworth (2005) 356.

³⁴⁵ See *infra* Chapter IV 5.1.1 and 5.1.2.

³⁴⁶ See Code of Criminal Procedure and Law of 17 December 2009, article 302. Referred to by McGonigle Leyh (2011) 85; Renée Kool and Martin Moerings, 'The Victim Has the Floor: The Victim's Right to be Heard in Writing or Orally in the Dutch Courtroom' (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 46, 54.

³⁴⁷ McGonigle Leyh (2011) 86; Kool and Martin Moerings (2004) 55.

2.3.6. Compensation Order Beneficiary

In common law jurisdictions, victims' status as reparations claimants in criminal proceedings is unknown.³⁴⁸ However, victims can still receive compensation from the offender and be awarded it in the course of the criminal proceedings, which is the situation of, *inter alia*, Cyprus,³⁴⁹ Ireland³⁵⁰ and England and Wales.³⁵¹ This penal sanction is known as compensation order and the victim is referred to as the compensation order beneficiary or compensatee.³⁵²

An important advantage of this mode of victims' participation is that victims are not required to present a claim for civil damages as compensation order is a penal sanction which the court may impose *ex officio*. A second connected advantage consists in that the compensation order is 'enforced by the state on behalf of the compensation order beneficiary'.³⁵³ On the other hand, the disadvantage is that the victim generally lacks an enforceable right to be present and clarify his/her claim in court as this is done by the public prosecutor.³⁵⁴ The potential compensation order beneficiary totally depends on the criminal justice authorities and cannot intervene even when the prosecutor does not inform the court of the victims' sustained losses or injuries or when victims' interests seem not to be represented by the prosecutor. Nevertheless, in Ireland, the victim may actually address the court with regard to his/her compensation claim.³⁵⁵ Compensation order beneficiaries are discussed in detail when examining the English and the American systems.³⁵⁶

2.4. Victims' Status in Transitional Justice Scenarios

Transitional justice scenarios, i.e., societies in recovery process from or still enduring the commission of the most serious international crimes such as genocide, crimes against humanity and war crimes, constitute the big picture where international, hybrid and national criminal courts work as important but, by no means, unique mechanisms.³⁵⁷ This section discusses how feasible is to

³⁴⁸ Brien and Hoegen (2000) 28.

³⁴⁹ Criminal Procedure Law, Chapter 155 of the Statute Laws of Cyprus (1948), section 324.

³⁵⁰ Criminal Justice Act (1993), section 6 (1).

³⁵¹ Powers of Criminal Courts (Sentencing) Act 2000, section 130 (4).

³⁵² Brien and Hoegen (2000) 28.

³⁵³ *Ibid.*, Loc. cit.

³⁵⁴ *Ibid.*, Loc. cit.

³⁵⁵ Criminal Justice Act (1993), section 6 (1). See Brien and Hoegen (2000) 478-479.

³⁵⁶ See *infra* Chapter V 2.1.1, 2.1.2, 3.1.1, 3.1.2, 4.1.1 and 4.1.2.

³⁵⁷ Thus, 'The notion of transitional justice [...] comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may

apply retributive/deterrent or utilitarian justice and restorative justice paradigms in relation to victims' status under the described circumstances.

2.4.1. Victims and Retributive/Deterrent Mechanisms in Transitional Justice Settings

International criminal courts have considered retribution and deterrence as their most important objectives as exemplified by the ICTY:

[...] the Trial Chamber deems most important the concepts of deterrence and retribution [...] in the context of gross violations of human rights which are committed in peace time, but are similar in their gravity to the crimes within the International Tribunal's jurisdiction, reprobation (or stigmatization) is one of the appropriate purposes of punishment.³⁵⁸

The ICC in its first sentence decision in *Lubanga*, when discussing the purposes of punishment took into account the contents of the ICC Preamble:

[...] which provides that "the most serious crimes of concern to the international community as a whole must not go unpunished". The Preamble further provides that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". The ICC was established "to these ends and for the sake of present and future generations".³⁵⁹

In turn, the ECCC in its first judgment in *Duch* (Case 001) stated that 'While an obvious function of a sentence is to punish, its goal is not revenge'. The feasibility of this kind of statements should however be examined

include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, S/2004/616, 23 August 2004, para. 8. See also Elizabeth Salmón Gárate, 'Reflections on International Humanitarian Law and Transitional Justice: Lessons to be Learnt from the Latin American Experience' (2006) 88 International Review of the Red Cross 327, 328.

³⁵⁸ Erdemović (IT-96-22-T), Sentencing Judgment, Trial Chamber, 29 November 1996, para. 64. See also, e.g., Kupreskić et al. (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000, para. 848; Delalić et al. (IT-96-21-A), Appeal Judgment, Appeals Chamber, 20 February 2001, para. 806; and Naletilić and Matinović (IT-38-94-T), Judgment, Trial Chamber, 31 March 2003, para. 739. As for the ICTR, see, e.g., Serushago (ICTR-98-39-T), Judgment, Trial Chamber, 1 May 1999, para. 20.

³⁵⁹ Lubanga (ICC-01/04-01/06-2901), Decision on Sentence pursuant Article 76 of the Statute, Trial Chamber I, 10 July 2012, para. 16.

carefully.³⁶⁰ To begin with, true retribution via only prosecutions is almost always unachievable in 'radical evil' situations, i.e., wide-scale commission of the most serious international crimes.³⁶¹ This is explained by the impossibility to impose a punishment truly proportional to very serious international crimes,³⁶² and as prosecutions are by definition limited and selective,³⁶³ only some 'radical evil' gets sanctioned 'whereas much escapes its grasp'.³⁶⁴ The latter is itself a contradiction as retributive justice is grounded in the idea of giving everyone a just desert.³⁶⁵ In addition, from a pragmatic perspective, in transitional justice scenarios achieving retribution in itself is partially limited regardless of how justified the desire for retribution may be.³⁶⁶ This situation is also complicated by the fact that transitional societies have to 'deal with ordinary crime even as they confront the extraordinary evil of the past',³⁶⁷ which is even more dramatic in those frequent cases where there are still ongoing international crimes in the country in question. In addition to prosecution, other retributive justice mechanisms such as lustration, financial penalties against perpetrators and triggered by victims and or their heirs via civil suits, and even national truth commissions that may 'generate social opprobrium',³⁶⁸ do not constitute sanctions proportional to serious human rights and international humanitarian law violations.

As for the deterrent effect, scholars like Bassiouni have argued that 'the relevance of prosecution and other accountability measures to the pursuit of

³⁶⁰ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 580.

³⁶¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963) 193; Hannah Arendt, *The Human Condition* (1958) 241 ('Such offences [...] transcend the realm of human affairs and potentialities of human power'); and Carlos Nino, *Radical Evil on Trial* (Yale University Press 1996) viii and 142.

³⁶² It should be mentioned that sentencing practice of international and hybrid criminal courts points out the need that the sentence must be proportional to the crime and individualised. See, e.g., Lubanga (ICC-01/04-01/06), 10 July 2012, para. 93; Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 580; Furundžija (IT-95-17/1-A), Appeals Chamber, Appeal Judgment, 21 July 2000, para. 249. Although this is a necessary guarantee for the accused's right to a fair and impartial trial, another question is whether a punishment rendered by an (international or hybrid) criminal court can be really proportional to the most serious international crimes.

³⁶³ Aukerman (2002) 57.

³⁶⁴ Drumbl (2005) 581, 600.

³⁶⁵ Aukerman (2002) 61, 63.

³⁶⁶ *Ibid.*, Loc. cit.

³⁶⁷ *Ibid.*, 62.

³⁶⁸ Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law and Contemporary Problems* 81, 84.

peace is that through their effective application they serve as deterrence, and thus prevent future victimization'.³⁶⁹ The creation of the ICTY/ICTR by the UN Security Council, under Chapter VII of the UN Charter,³⁷⁰ to contribute to restoration and maintenance of international peace and security illustrates a utilitarian/deterrent aim. In principle, deterrence theory may be more consistent than the retributive justice paradigm in justifying exemplary punishment for just a few individuals as the former does not require punishment of all the offenders. However, it is almost impossible to determine whether the threat of prosecution has ever prevented potential perpetrators from committing international crimes against a large number of victims.³⁷¹ Accordingly, deterrent mechanisms will solely work against some offenders and some crimes.³⁷² The deterrent effect of criminal prosecution for international crimes should not be taken for granted and its efficacy to avoid further and new victims may be questioned.

Limitations of restorative and utilitarian/deterrent justice paradigms are exemplified via the challenge from important sectors of the population in the former Yugoslavia and Rwanda and on the legitimacy of the ICTY and the ICTR.³⁷³ In spite of shortcomings, victims of the most serious international crimes normally have a powerful thirst for justice both in contexts of international and national criminal prosecutions.³⁷⁴ Thus, as highlighted by Salmón Gárate, victims of serious human rights and international humanitarian law violations 'have non-negotiable moral and legal demands for the truth about violations and for justice, while the perpetrators are anxious to avoid

³⁶⁹ Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 18.

³⁷⁰ See *infra* Chapter II 3.1.1. for further details.

³⁷¹ Martha Minow, *Between Vengeance and Forgiveness: A Facing History After Genocide and Mass Violence* (Beacon Press 1998) 27, 146.

³⁷² Aukerman (2002) 67, 70.

³⁷³ See, e.g., Human Rights Center, International Human Rights Clinic, University of California & Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors* (2000); Kingsley Chiedu Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal For Rwanda' (2002) 26 *The Fletcher Forum of World Affairs* 21.

³⁷⁴ As for victims' perceptions of the ICC investigations and prosecutions in, for example, Uganda see Phuong Pham et al., *Forgotten Voices: A Population-based Survey on Attitudes About Peace and Justice in Northern Uganda* (International Center for Transitional Justice (ICTJ)/University of California Berkeley Human Rights Center, January 2005). As for victims' families persistence for prosecution, in national criminal justice contexts, in, for example, Argentina, see U.S. Department of State, *Country Reports on Human Rights Practices: Argentina* (2006).

prosecution'.³⁷⁵ Moreover, victims and survivors have sometimes perceived sentences from the international criminal tribunals as too lenient.³⁷⁶

2.4.2. Victims and Restorative Mechanisms in Transitional Justice Settings

Restorative justice mechanisms, in particular Truth and Reconciliation Commissions (TRCs) and reparations programmes, allow victims to play a central role and to stand better chances to heal relationships between them, offenders, and their societies. Since international criminal justice mainly reflects hegemonic Western punitive criminal justice values focusing primarily on retribution and deterrence and only secondarily on restoration,³⁷⁷ TRCs may be more suitable to fulfil restorative justice and better voice victims' needs and viewpoints. Therefore, TRCs can meaningfully contribute to the personalization, humanization, recognition and restoration of the dignity of the victims.³⁷⁸ TRCs and other restorative mechanisms such as traditional dispute resolution³⁷⁹ focused on reconciliation of a society, victims, storytelling and reparations seem to be in principle a better option if the main goal is healing individuals and societies after the trauma of international crimes.³⁸⁰

TRCs, in particular, can focus on victims and facilitate their involvement as well as the participation of the other actors such as perpetrators and victims'/perpetrators' communities.³⁸¹ TRCs are in principle an efficient means to bring back the conflict to those who participated in it and also the possibility for the officials to grieve publicly with victims in an informal process.³⁸² By involving all the stakeholders of the conflict, TRCs endeavour to address the sorrow and harm endured by victims. As restorative justice is multidirectional,³⁸³ TRCs consider that in contexts of serious international crimes the distinction between victims and perpetrators is not necessarily clear as one same individual may assume several roles during an armed conflict, e.g., child soldiers. The manner of victims' participation in TRCs, at which victims are encouraged to

³⁷⁵ Salmón Gárate (2006) 330.

³⁷⁶ See Eric Stover, *The Witnesses: War Crimes and The Promise of Justice in The Hague* (2005) 76, 105-109.

³⁷⁷ Drumbl (2005) 600, 601.

³⁷⁸ Salmón Gárate (2006) 343.

³⁷⁹ Drumbl (2005) 594.

³⁸⁰ Minow (1998) 57.

³⁸¹ This is related to the fact that the right to truth is held not only by the direct victims and their relatives but also by the respective society as a whole. See Salmón Gárate (2006) 341.

³⁸² For example, in opinion of South Africa's Truth and Reconciliation Commission Chairperson Archbishop Desmond Tutu 'a judge does not cry'. Quoted in Minow (1998) 73.

³⁸³ Aukerman (2002) 82, 83.

provide their testimonies in a narrative form, is in principle a guarantee to a more inclusive process for victims and a safeguard against potential re-victimization as opposed to the situation that may exist in international, hybrid and national criminal courts. All of this also promotes national reconciliation and deals with impunity in a collective rather than an individual manner as exemplified by the South African Truth and Reconciliation Commission,³⁸⁴ and pointed out by Hayner.³⁸⁵

Indeed, TRCs can provide a special, if not unique, platform for traditionally excluded victims such as women and children to be heard as the experiences in East Timor, Sierra Leone and Liberia have shown.³⁸⁶ TRCs in general provide a good avenue for victims' status to be enhanced. Thus, for example, in the South African Truth and Reconciliation Commission, victim definition included not only direct victims, either individual or collective, but also their relatives.³⁸⁷ Moreover, the principles followed by this Commission explicitly acknowledged: i) respect for victims' dignity; ii) their right to information; iii) the protection of their privacy; and, even more importantly, iv) their 'right to have their views and submissions presented and considered at appropriate stages of the inquiry'.³⁸⁸

Even though it can be argued that TRCs are better than trials at addressing victims' fear, trauma or anger,³⁸⁹ some studies have called into

³⁸⁴ See, e.g., South African Truth and Reconciliation Commission Act 34 of 1995, section 3. Objectives of Commission: 'The objectives of the Commission shall be to promote national unity and Reconciliation'.

³⁸⁵ Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge 2001) 155.

³⁸⁶ The Commission for Reception, Truth and Reconciliation in East Timor made a special effort to hold special hearings on gender issues to encourage female participation. See Clara Ramírez-Barat, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (International Center for Transitional Justice January 2011) 25.

The commissions in Sierra Leone and Liberia are, in turn, regarded as pioneers in ensuring participatory process for children. Whereas in the case of Sierra Leone children were invited to thematic hearings, in Liberia they were invited to statement-taking and hearings on issues relevant to them. See UNICEF and ICTJ, *Children and Truth Commissions* (2010) 11.

³⁸⁷ South African Truth and Reconciliation Commission Act 34 of 1995, section 1. Definitions. 'victims'.

³⁸⁸ *Ibid.*, sections 11 (a), 11 (d), 11 (e) and 11(d) (ii) respectively.

³⁸⁹ See, e.g., Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425-1438.

question the role of TRCs in healing traumatized victims.³⁹⁰ Moreover, some TRCs failed in advancing victims' needs and perspectives, e.g., the Haiti Truth Commission did not publish its report and only released few pages of 'recommendations'.³⁹¹ Even when it comes to relatively well-organized and functioning TRCs, not necessarily victims regard truth-seeking mechanisms as options to meet their needs for justice and reparations.³⁹²

Concerning reparations programs, these can play a central role for victims' status in transitional justice scenarios. As Greiff highlights 'For some victims reparations are the most tangible manifestation of the efforts of the state to remedy the harms they have suffered'.³⁹³ Reparations programs are actually an attractive restorative mechanism in comparison with criminal prosecution as the latter may be perceived first and foremost as a struggle against perpetrators rather than a mechanism on behalf and for the victims. Reparations programs constitute an appealing option for victims' status also when compared to other restorative mechanisms. Thus, truth-seeking has been said to be an empty gesture if not accompanied with tangible and positive manifestations.³⁹⁴ However, reparations also present weaknesses in transitional justice scenarios as they may be overtly disproportionate to the damage inflicted, and this may lead to a trivialization of victims' suffering.³⁹⁵

2.4.3. Victims' Status and a Combined Retributive/Deterrent-Restorative Approach in Transitional Justice Scenarios

As discussed, although victims' status in situations of massive human rights and international humanitarian law violations is enhanced via restorative justice

³⁹⁰ See, e.g., David Backer, *Exit, Voice & Loyalty in Transitional Justice Processes: Evidence on Victims' Responses to South Africa's Truth and Reconciliation Commission*, paper presented at the annual conference of the American Political Science Association, Illinois (2004) 16; Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (United States Institute of Peace 2005) 6-7.

³⁹¹ Reed Brody, *Impunity continues in Haiti 1* (North American Congress on Latin America, Report on the Americas, Sept.-Oct. 1986).

³⁹² See, e.g., the conclusion in this sense reached by Fletcher et al. out of a comparative study in Argentina, Cambodia, Guatemala, Northern Ireland, Sierra Leone, South Africa and Timor-Leste: Laurel Fletcher, Harvey Weinstein and Jamie Rowen 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 *Human Rights Quarterly* 163, 219.

³⁹³ Pablo de Greiff, 'Introduction. Repairing the Past: Compensation for Victims of Human Rights Violations' in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006) 1, 2.

³⁹⁴ *Ibid.*, 2. Having said so, TRCs may provide a measure of reparations by setting up reparations policies for victims and their relatives. See Salmón Gárate (2006) 343.

³⁹⁵ Minow (1998) 93.

rather than by retributive/deterrent justice mechanisms, the former also presents important limitations. Accordingly, it is argued herein that retributive/deterrent and restorative justice should not be seen as unrelated or conflicting but indeed as complementary and mutually reinforcing. Both retributive/deterrent and restorative justice, as indicated by Villa-Vicencio, are necessary for democracy, rule of law and human rights culture in societies in transition.³⁹⁶ It is suggested here that integrating the two paradigms should not only be applied to the relation between international, hybrid and national criminal courts, and other transitional justice mechanisms, e.g., TRCs and reparations programs, but also within each international, hybrid and national criminal court. Therefore, it is reasonable to talk about a 'restorative side' of the criminal justice system,³⁹⁷ and in particular, a 'restorative side' of the international criminal justice system. Four arguments are discussed below to sustain the feasibility and convenience of a combined application of retributive/deterrent and restorative justice paradigms as the best alternative for victims' status in contexts of spread and/or systematic commission of international crimes.

First, taking into account the scenarios at which international and hybrid criminal courts are set up, the transitional justice approach, i.e., 'the conception of justice in periods of political transition',³⁹⁸ confirms the suitability of the proposed combined approach. Since transitional justice is a holistic approach including several measures which complement each other,³⁹⁹ international and hybrid criminal courts which strengthen victims' status are implementing at least indirectly that justice approach. Thus, reparations for victims at the ICC and the ECCC may be considered as a good example of what Teitel has denominated transitional reparatory practices, which display both backward-looking and forward-looking purposes with regard to the victims and the societies.⁴⁰⁰ The IACtHR in *Velásquez-Rodríguez v. Honduras*, a seminal case triggered by the

³⁹⁶ Charles Villa-Vicencio, 'Transitional Justice, Restoration and Prosecution' in Dennis Sullivan and Larry Tiff (eds.), *Handbook of Restorative Justice. A Global Perspective* (Routledge 2006) 387, 390.

³⁹⁷ Charles Villa-Vicencio, 'Restorative Justice. Ambiguities and Limitations of a Theory' in Charles Villa-Vicencio and Erik Doxtader (eds.), *The Provocations of Amnesty: Memory, Justice and Impunity* (Africa World Press 2003) 30, 41.

³⁹⁸ Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 3.

³⁹⁹ International Center for Transitional Justice (ICTJ), *What is Transitional justice? 1* (Factsheet, 2009), available at: http://www.ictj.org/static/Factsheets/ICTJ_TJ_fs2009.pdf (last visit on 12 August 2012); Neil Kritz, 'The Dilemmas of Transitional Justice' in Neil Kritz (ed.), *Transitional Justice, Vol. I: General Considerations* (United States Institute of Peace Press 1995) xix-xxx.

⁴⁰⁰ Teitel (2000) 127.

private involvement of the victim's relatives in criminal proceedings actions,⁴⁰¹ laid part of the legal foundations of transitional justice in international law.⁴⁰² The IACtHR determined the state obligations of prevention, investigation, sanction of crimes and reparations for victims.⁴⁰³ It is argued herein that, at least, some of these dimensions are *mutatis mutandi* considered by international and hybrid criminal courts. It is also claimed herein that the transitional justice approach seeks to integrate the retributive/deterrent or utilitarian and restorative justice paradigms. Although some transitional justice advocates strongly resist 'restorative justice' labels,⁴⁰⁴ they assert that this approach is victim-centered.⁴⁰⁵

Second, there have been important and relatively recent developments in international law that mark a clear trend towards an integrated combination of the retributive/deterrent and restorative justice approaches as the best alternative for victims in contexts of societies in transition. The 2005 UN Basic Principles and Guidelines, previously examined,⁴⁰⁶ when listing the forms of reparations, in a restorative justice context, consider judicial sanctions against persons responsible for serious international humanitarian law and human rights violations, which in principle corresponds to retributive justice, as satisfaction.⁴⁰⁷ The ICC as such constitutes an excellent example of the above-mentioned synergy. Thus, the ICC Statute is a milestone in integrating, to its predominant

⁴⁰¹ IACtHR, Case of Velásquez-Rodríguez v. Honduras, Merits, Judgment of 29 July 1988, Series C No. 4.

⁴⁰² ICTJ (2009) 2.

⁴⁰³ IACtHR, Case of Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988, paras. 149-194. On the IACtHR's case law on the state obligation to investigate (serious) human rights violations see, e.g., Salmón Gárate and Blanco (2012) 25-35.

⁴⁰⁴ For instance, Mendez does not explicitly use the expression 'restorative justice' and solely employs it when commenting that communities, in certain cases, resort to customary law and traditional practices in order to engage in attempts to implement 'restorative justice'. See Juan Mendez, National Reconciliation, Transnational Justice, and the International Criminal Court (2001) 15 *Ethics & International Affairs* 25, 41.

⁴⁰⁵ The term victim-centered has been used in many transitional justice processes to indicate that the process places the victim at its centre. See Raquel Aldana-Pindell, 'A Victim-Centered Reflection on Truth and Reconciliation Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 *Journal of Human Rights* 107-126. In turn, Mendez considers that the transitional justice components of the rights to see justice done, to know the truth, and to compensation and non-monetary modalities of restitution lie primarily with the victims and their families and, only then, with the society. See Juan Mendez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* 255, 261. See also Julian Roberts, 'Restorative Justice' in von Hirsh, Ashworth and Roberts (2009) 163, 163 ('Restorative theories are not necessarily victim-centered and victim-centered approaches are not necessarily restorative').

⁴⁰⁶ See supra Chapter II 2.1.7.

⁴⁰⁷ UN Basic Principles and Guidelines, principle 22 (f).

retributive and deterrent goals, an important restorative justice component. This contrasts with the ICTY's timid case law references to restoration, rehabilitation or social defence in sentencing when the ICTY concluded that those goals 'have not yet achieved the same dominance as retribution and deterrence in the history of this Tribunal'.⁴⁰⁸ The Preamble of the ICC Statute embodies the objects and purposes of the ICC as an institution. While the fourth and fifth paragraphs of the Preamble respectively read 'the most serious crimes of concern to the international community as a whole must not go unpunished' and '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' reflecting a retributive justice approach with a deterrent component, its second paragraph explicitly refers to victims 'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. This arguably underlies a restorative justice approach embedded and present in the ICC Statute.

It should, however, be left clear that international and hybrid criminal courts as such are still predominantly retributive. That is why even the ICC and the ECCC, where the victims' status is more complete than at the other international and hybrid criminal courts, should not be referred to as 'restorative justice' mechanisms but they could instead be labelled as manifestations of 'victim-oriented justice'. In other words, international and hybrid criminal courts may integrate to their goals, victim-friendly measures but without altering or replacing their core objectives and mandate.⁴⁰⁹ Those measures would constitute 'retributive/deterrent model victim-based measures' providing victims with participatory rights, impacting the operation of criminal justice but without changing its rationale, which is different from restorative justice that questions or negates that rationale.⁴¹⁰ Without neglecting the importance of restorative justice, the victim empowerment at the ICC was inspired first and foremost by

⁴⁰⁸ Brdjanin (IT-99-36-T), Judgment, Trial Chamber, 1 September 2004, para. 1092. As for rehabilitation, see, e.g., Erdemović (IT-96-22), Sentencing Judgment, Trial Chamber, 29 November 1996, para. 66. As for reconciliation and protection of society, see, e.g., Blaškić (IT-95-14-T), Judgment, Trial Chamber, 3 March 2000, paras. 761-762; Delalić et al. (IT-96-21-T), Judgment, Trial Chamber, 16 November 1998, paras. 1203 and 1232; and Jelisić (IT-95-10-T), Judgment, Trial Chamber, 14 December 1999, para. 116.

⁴⁰⁹ As for the distinction between 'victim-oriented' criminal justice and 'restorative justice' see, e.g., Ybo Buruma, 'Doubts on the Upsurge of the Victim's Role' in Hendrik Kaptein and Marijke Malsch (eds.), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate 2004) 1, 2-4.

⁴¹⁰ See Michael Cavadino and James Dignan, 'Toward a framework for conceptualizing and evaluating models of criminal justice from a victim's perspective' (1996) 4 *International Review of Criminology*, 153, 153-160.

the victim rights movement.⁴¹¹ The victim accordingly participates in victim-oriented/restorative justice-oriented mechanisms at, for example, the ICC and the ECCC to influence the criminal proceedings for their own interest by claiming reparations and being heard not merely as a witness. The judicial adjudication, on the other hand, is lacking in a purely restorative justice approach.

Third, a delicate balance between restorative justice mechanisms, in particular TRCs, and retributive/deterrent justice mechanisms, e.g., criminal prosecutions by international and hybrid criminal courts has been feasible in the past. Although TRCs can be set as alternatives to (international) criminal prosecutions, they and international or hybrid criminal courts can work simultaneously and appropriately if there is a coordinated concurrent operation as illustrated in East Timor.⁴¹² Concerning Sierra Leone, even though the existence of two independent institutions, a TRC⁴¹³ and the SCSL, raised inevitable complications and issues,⁴¹⁴ they likely had an additive effect in the end.⁴¹⁵ While recognizing the importance of a TRC for victims, the SCSL itself

⁴¹¹ As evidenced by the ICC Statute's drafters reliance on the UN Victims Declaration and Van Boven Principles. See Draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, 24 May 1996, UN Doc. E/CN.4/Sub.2/1996/17.

⁴¹² The relation between the East Timorese Commission for Reception, Truth and Reconciliation and the Special Panels for Serious Crimes, established by UNTAET Resolution 2000/15 (6 June 2000), despite some shortcomings, has been praised due to a coordinated concurrent operation. See Christopher Totten, 'The International Criminal Court and Truth Commissions: A Framework for Cross Interaction in the Sudan and Beyond' (2009) 7 *Northwestern University Journal of International Human Rights* 1, 13-14; Elizabeth Evenson, 'Truth and Justice in Sierra Leone: Coordination Between Commission and Court' (2004) 104 *Columbia Law Review* 730, 754-755.

⁴¹³ Sierra Leone Truth and Reconciliation Commission Act 2000, section 6 (I). See also Sierra Leone Truth and Reconciliation Commission, Final Report (October 2004).

⁴¹⁴ It has been suggested that two autonomous institutions, i.e., a TRC and an international or hybrid criminal court, conducting parallel and complementary functions may originate coordination problems when there is an unclear demarcation of roles, functions and mechanisms to solve conflicts. See James Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2005a) 28 *Fordham International Law Journal* 616, 650-654. This may be connected to TRCs' evolution to the point that they reflect many procedural aspects of criminal justice. See Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth and Reconciliation Commission for East Timor' (2001) 95 *American Journal of International Law* 952, 954.

⁴¹⁵ William Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004a) 15 *Criminal Law Forum* 3, 54. See also William Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the

was able to an important extent to reconcile the mandates of the SCSL and the Sierra Leonean TRC:

Truth Commissions and International Courts are both instruments for effectuating the promise made by states that victims of human rights shall have an effective remedy. Criminal courts offer the most effective remedy – a trial followed by punishment of those found guilty, in this case of those who bear the greatest responsibility. Truth Commissions offer two distinct prospects for victims –of truth, i.e. learning how and why their loved ones were murdered or mutilated, and of reconciliation, through understanding and forgiveness of those perpetrators who genuinely confess and regret [...] [t]he work of the Special Court and the TRC is complementary and each must accommodate the existence of the other.⁴¹⁶

The almost necessary convergence of TRCs and criminal courts can be summarized as follows: whereas the former offers the advantage of listening to victims and their families with dignity and respect and not in a piecemeal fashion like in courts and often just as witnesses, the judicial ‘truth’ holds ‘a “tested” quality that makes it all the more persuasive’.⁴¹⁷ Indeed, the complementary relationship between TRCs and (international, hybrid or national) criminal courts, as Schabas suggests, ‘may have a synergistic effect on the search for post-conflict justice as part of the struggle against impunity’.⁴¹⁸ The mutually complementary function of transitional justice mechanisms both restorative (e.g., reparations, truth-seeking) and retributive/deterrent (e.g., criminal prosecution) stands more chances to enhance victims’ situation. This can be seen through ‘lens of recognition’ as these mechanisms working together ‘can be interpreted as efforts to institutionalize the recognition of individuals with equal rights’.⁴¹⁹ The need for an integrated and combined use of mechanisms is actually confirmed by the victims’ perceptions. Based on surveys of victimized populations in relation to some of the ICC situations,⁴²⁰ it is

Special Court for Sierra Leone’ (2004b) University of California Davis Journal of International Law & Policy 145-169.

⁴¹⁶ Norman (SCSL-2003-08-PT), Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, Trial Chamber, 29 October 2003, paras. 33 and 44.

⁴¹⁷ Mendez (1997) 278.

⁴¹⁸ Schabas (2004a) 6.

⁴¹⁹ Pablo de Greiff, ‘Justice and Reparations’ in Greiff (2006) 460.

⁴²⁰ Pham et al. (2005) 4, 5; Phuong Pham et al., When the War ends: Peace, Justice, and Serious Reconstruction in Northern Uganda (ICTJ/University of California Berkeley Human Rights Center/Payson Center December 2007) 2-5; Phuong Pham and Patrick Vinck, Transitioning to

possible to, *inter alia*, conclude that: i) prosecutions are perceived by victims as an important but not unique accountability mechanism, being considered alongside other parallel transitional justice options ranging from compensation to amnesties; and ii) the ICC is perceived not only as a mechanism of justice but also as contributing to peace.

Fourth, the victims' right to truth also speaks about some unexpected similarities between apparently dissimilar mechanisms, i.e., between TRCs and (international/hybrid) criminal courts. Notwithstanding its statutory limitation, the ICTY early acknowledged its broader 'truth finding' role and in connection with victims' situation.⁴²¹ Although the ICC and the ECCC instruments do not refer to the right to truth as a victims' right, their case law has regarded it as a 'victims' central interest'⁴²² or as a 'right to truth'⁴²³ when victims participate in the proceedings. This is coherent with the case law of the IACtHR and the ECtHR, which has recognized that right as the victims' right to access to justice,⁴²⁴ as well as the HRC, according to which, victims' right to truth is a

Peace, A Population-based Survey on Attitudes about Social Reconstruction in Northern Uganda (University of California Berkeley Human Rights Center December 2010); Patrick Vinck et al., Living with fear: A Population Based-survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo (ICTJ/ University of California Berkeley Human Rights Center/Payson Center August 2008) 2-3; South Consulting, Situation Analysis of Post-election Violence Areas (May 2009) 26-28 (concerning the situation in Kenya); South Consulting, Situation Analysis of Post-election Violence Areas (2010) Annex 1 (Summary of Survey Findings); Darfurian Voices: Documenting Darfurian Refugees' Views on Issues of Peace, Justice and Reconciliation (24 Hours for Darfur July 2010); and Patrick Vinck and Phuong Pham, Building Peace, Seeking Justice: A Population-based Survey on Attitudes about Accountability and Social Reconstruction in The Central African Republic (University of California Berkeley Human Rights Center August 2010).

⁴²¹ 'When called to appear by the Prosecutor, the victims may use this forum to have their voices heard and to live on in history. International criminal justice, which cannot accommodate the failures of individuals or States, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility'. Karadžić and Mladić (IT-95-5-R6, IT-95-18-R61), Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, 11 July 1996, para. 3.

⁴²² Katanga and Ngudjolo Chui, (ICC-01/04-01/07-474), Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 34-36.

⁴²³ Ieng Sary (Case 002), Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber 03, 29 August 2008, para. 5.

⁴²⁴ The IACtHR has concluded in its case law that 'the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution [...]'. Case of Barrios Altos v. Peru, Merits, Judgment of 14 March 2001, Series C No. 75, para. 48. See also Case of Pueblo Bello Massacre v. Colombia, Merits, Reparations and

manner to prevent or end the psychological torture of families of victims of enforced disappearances or secret executions.⁴²⁵ These developments are also reflected in the UN Basic Principles and Guidelines.⁴²⁶ The individual and collective dimensions of the right to truth have also received recognition.⁴²⁷

The consideration of the victims' right to truth can expand the horizon of international and hybrid criminal courts beyond a narrow conception of a criminal court. Criminal proceedings have indeed upheld victims' right to truth,⁴²⁸ which is connected with the role that victims can play in criminal proceedings.⁴²⁹ Victims' right to truth can actually be implemented and safeguarded through several transitional justice mechanisms including international criminal courts, national criminal courts and TRCs.⁴³⁰ Therefore, provided that criminal trials are used for what they are usually intended for,⁴³¹ they can indeed contribute to the truth.⁴³² Accordingly, criminal trials should

Costs, Judgment of 31 January 2006, Series C No. 140, para. 219; and *Chitay Nech et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 25 May 2010, Series C No. 212, para. 206. On the relationship between the right to the truth and due process guarantees under the IACtHR's case law see Salmón Gárate and Blanco (2012) 42-45. As for ECtHR's case law see, e.g., *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment, 10 May 2001, para. 19.

⁴²⁵ See, e.g., HRC, *R.A.V.N. et al. v. Argentina*, Comm. No. 343, 344 and 345/1988, Views, 5 April 1990 (with the individual opinion of Mr. Bertil Wennergren); HRC, *Sarma v. Sri Lanka*, Comm. No. 950/2000, Views, 31 July 2003. Accordingly, the HRC has considered that, as a manner of providing an effective remedy mechanism, States should provide information to the victim concerning serious human right violations. See, e.g., HRC, *Staselovich and Lyashkevich v. Belarus*, Comm. No. 887/1999, Views, 3 April 2003, para. 11.

⁴²⁶ As for the UN Basic Principles and Guidelines, the principle 24 states that 'victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and to learn the truth in regard to these functions'. Principle 22 (b) further adds that 'verification of the facts and full and public disclosure of the truth [...]'.
⁴²⁷ See, e.g., Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006), para. 59; IACtHR, *Case of the "Las Dos Erres" Massacre v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 24 November 2009, Series C No. 211, para. 310.

⁴²⁸ See Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council,' Right to the truth, Report of the Office of the High Commissioner for Human Rights, UN Doc. A/HRC/5/7 (2007), para. 89.

⁴²⁹ See, e.g., Updated set of Principles for the Protection and Promotion of Human Rights Trough Action to Combat Impunity, UN Doc. E/CN.4/2005/1027Add.1 (2005), principle 19.

⁴³⁰ See, e.g., Right to Truth, Commission on Human Rights Resolution 2005/66, UN Doc. E/CN.4/RES/2005/66 (2005).

⁴³¹ Mendez (1997) 278.

⁴³² See Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2546 at footnote 32; Laurel Fletcher and Harvey

neither become places for 'historic' judgments nor become instruments to settle long-term social, political or ideological conflicts as this may result in an unsatisfactory 'truth' or even a mockery of justice.⁴³³ Actually, as pointed out by Schabas, historical truth has in some occasions been 'presented as a by-product of the international criminal proceedings rather than as an objective'.⁴³⁴

3. Shaping International Criminal Proceedings

After failed attempts to establish an international criminal court to try the crimes committed by the Imperial German forces during the First World War,⁴³⁵ the IMT and IMTFE were set to prosecute the Nazi and the Japanese Imperial leadership respectively for their crimes committed during the Second World War.⁴³⁶ Although frequently criticized as examples of victor's justice and for having allegedly breached the principle of legality because of new offences included in their statutes,⁴³⁷ the IMT and IMTFE set the path for future international and hybrid criminal courts. Due to, *inter alia*, a predominant presence of common law background drafters, the IMT and IMTFE proceedings were largely adversarial oriented.⁴³⁸ In this subchapter, the international and hybrid criminal courts considered in this thesis are presented as the judicial forums where victims' status may take place.⁴³⁹ A very brief survey of those courts is followed by a general examination of how adversarial and inquisitorial

Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 587.

⁴³³ Mendez (1997) 279.

⁴³⁴ William Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012b) 100.

⁴³⁵ No international criminal court to try German military personnel was set up as envisaged in articles 228-230 of the Versailles Treaty. Nor was the provision (article 227) to determine the responsibility of the German Emperor (Wilhelm II) implemented.

⁴³⁶ See, respectively, Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 82 UNTS 279; Special Proclamation – Establishment of an International Military Tribunal for the Far East, 19 January 1946.

⁴³⁷ See, e.g., Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971) 74-124; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn., Cambridge University Press 2010) 113-115, 118-119; Cassese (2008) 323.

⁴³⁸ For details on the adversarial and inquisitorial components at the IMT and IMTFE, see Orie (2002) 1456-1463.

⁴³⁹ At a more general level, the criminalization of the most serious human rights violations and their international prosecution are important towards a new international public order. See Elizabeth Salmón Gárate, 'La Globalización de la Justicia Internacional: Hacia un Nuevo Orden Público Internacional' (2007c) 34 *Ius et Veritas* 245, 252.

components are present and co-exist at them, which has arguably led to mixed or unique international criminal proceedings. Victims' status at international and hybrid criminal courts as the central issue of this thesis is not considered here but developed through the three following chapters. Also, when comparing certain issues on evidence, in particular related to witnesses, the analysis is mainly conducted in the next chapter as it falls into the dimension of the victims' status as witnesses and may be considered as measures to minimise inconveniences to victim witnesses.⁴⁴⁰

3.1. Overview of International and Hybrid Criminal Courts

3.1.1. The ICTY and the ICTR

As a consequence of the conflicts in the former Yugoslavia and Rwanda, the UN Security Council pursuant its powers under Chapter VII of the United Nations Charter, i.e., to maintain or restore international peace and security, decided to establish the ICTY and the ICTR in 1993 and 1994 respectively.⁴⁴¹ The ICTY was given jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity allegedly perpetrated in the former Yugoslavia since 1 January 1991.⁴⁴² The ICTR, in turn, was called upon to adjudicate genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of the Additional Protocol II to the Geneva Conventions, allegedly perpetrated in Rwanda or in the neighbouring States in respect of serious violations of international humanitarian law committed by Rwandans between 1 January and 31 December 1994.⁴⁴³ The ICTY and the ICTR have three main organs: the Registry, the Office of the Prosecutor and the Chambers; and have primacy over national courts.⁴⁴⁴ As mentioned in the introduction to this thesis, a completion mechanism is set to gradually complete the mandate of the ICTY and the ICTR in years to come.⁴⁴⁵

The ICTY and the ICTR have made a great contribution to the fight against impunity.⁴⁴⁶ However, they have come under criticism. Thus, the ICTY

⁴⁴⁰ See Heikkilä (2004) 116 et seq.

⁴⁴¹ UN Doc. S/RES/827 (1993); UN Doc. S/RES/955 (1994).

⁴⁴² ICTY Statute, articles 1-5.

⁴⁴³ ICTR Statute, articles 1-4.

⁴⁴⁴ ICTY Statute, article 9; ICTR Statute, article 8.

⁴⁴⁵ See UN Doc. S/RES/1966 (2010).

⁴⁴⁶ See, e.g., Cryer, Friman, Robinson and Wilmschurst (2010) 133, 140; Ralph Zacklin, 'The Failings of ad hoc International Tribunals' (2004) 2 *Journal of International Criminal Justice* 541, 541-542.

has been criticized for being too expensive and bureaucratic,⁴⁴⁷ delayed trials,⁴⁴⁸ and alleged violation of the rights of the defendants.⁴⁴⁹ In turn, the ICTR has been criticized for not having prosecuted alleged crimes committed by the Rwandan Patriotic Forces.⁴⁵⁰

A problem common to the ICTY and the ICTR is that trials at them became inaccessible to victims, mostly ordinary citizens. The late implementation of outreach programmes worsened the situation.⁴⁵¹ Trials do not reach those who should first be reached: the victims. International criminal courts tend to be perceived as primarily responding to their patrons, i.e., the international community, and just incidentally to victims.⁴⁵² This risks international criminal courts' national ownership as they do not necessarily involve the local population. Thus, the ICTY and the ICTR created not only a physical but also a 'symbolic' distance.⁴⁵³ The ICTY/ICTR's remoteness has also originated hurdles for witnesses and investigation. Although the ICTY has made efforts to bring corrective justice to victims,⁴⁵⁴ these efforts have not always been perfect according to victims' rights advocates.⁴⁵⁵ Nor have victims' experiences at it been uniformly positive.⁴⁵⁶

⁴⁴⁷ Zacklin (2004) 543-4.

⁴⁴⁸ Håkan Friman, 'Procedural Law of Internationalized Criminal Courts' in Cesare Romano, Andre Nollkaemper and Jann Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press 2004) 317, 338.

⁴⁴⁹ Patrick Robinson, 'Ensuring Fair and Expeditious Trials at the ICTY' (2000) 11 *European Journal of International Law* 569-589.

⁴⁵⁰ Cryer, Friman, Robinson and Wilmshurst (2010) 141.

⁴⁵¹ Antonio Cassese, 'The ICTY a Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 585, 595; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 *Journal of International Law of Criminal Justice* 950, 953-954 (2005); Mark Ellis, 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals' (2006) 2 *Journal of National Security, Law and Policy* 111, 158.

⁴⁵² Lindsey Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *New York University Journal of International Law and Policy* 1013, 1020.

⁴⁵³ Frederic Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 *Cornell International Law Journal* 725, 730.

⁴⁵⁴ Sometimes these measures have been criticized. See, e.g., José Alvarez, 'Rush to Closure: Lessons of the Tadic Judgment' (1998) 96 *Michigan Law Review* 2031-2112.

⁴⁵⁵ See, e.g., Marie-Bénédict Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15 *European Journal of International Law* 151-177.

⁴⁵⁶ See, e.g., Stover (2007).

3.1.2. The ICC

In 1989, Trinidad and Tobago proposed that the creation of a permanent international criminal court be put back on the UN agenda.⁴⁵⁷ The General Assembly asked the International Law Commission to draft a Statute for such court, and this produced a final text in 1994.⁴⁵⁸ An *ad hoc* committee was established to work on that draft Statute, followed by a Preparatory Committee, whose draft Statute served as the basis for negotiation at the Rome Conference for an International Criminal Court. During the Rome Conference, the most difficult issues concerned how broad the ICC's jurisdiction would be, which States would have to agree before its jurisdiction could be exercised,⁴⁵⁹ and the Prosecutor's power to initiate proceedings *proprio motu*.⁴⁶⁰ The ICC Statute was adopted on 17 July 1998. A Preparatory Commission was established to adopt, *inter alia*, the ICC Rules of Procedure and Evidence (RPE) and Elements of Crimes,⁴⁶¹ work concluded in July 2002. The ICC Statute entered into force the 1 July 2002.

The ICC has jurisdiction over genocide, crimes against humanity, war crimes and crime of aggression.⁴⁶² Its temporal jurisdiction is limited to crimes committed since 1 July 2002.⁴⁶³ The ICC's jurisdiction can be triggered by States Parties to the ICC Statute, the UN Security Council and by the Prosecutor *proprio motu*.⁴⁶⁴ The ICC can exercise jurisdiction on territorial and perpetrators' nationality jurisdictional links but when the Security Council refers a situation to the ICC such restrictions are inapplicable.⁴⁶⁵ The ICC in a similar fashion than the ICTY, the ICTR and the SCSL has three main organs: i) Chambers, divided into Pre-Trial, Trial and Appeals Chambers; ii) the Prosecutor; and iii) the Registry. The ICC works based on the principle of complementarity, i.e., only when a State is unwilling or unable to carry out proceedings genuinely, the ICC can step in.⁴⁶⁶ Admissibility of cases also requires that they are 'of sufficient

⁴⁵⁷ UN Doc. A/RES/44/89, 11 December 1989.

⁴⁵⁸ Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May-22 July 1994, UN Doc. A/49/10, chapter II, paras. 23-41.

⁴⁵⁹ See, e.g., UN Doc. A/CONF.183/C.1/L.94; UN Doc. A/CONF.183/C.1/L.95; UN Doc. A/CONF.183/C.1/L.70; and UN Doc. A/CONF.183/C.1/L.90.

⁴⁶⁰ See, e.g., UN Doc. A/CONF.183/C1/SR9, paras. 82-88.

⁴⁶¹ As provided for in articles 51 and 9 of the ICC Statute respectively.

⁴⁶² ICC Statute, articles 5-8.

⁴⁶³ *Ibid.*, article 11 (1).

⁴⁶⁴ *Ibid.*, articles 13-15.

⁴⁶⁵ *Ibid.*, article 12.

⁴⁶⁶ *Ibid.*, articles 1 and 17.

gravity'.⁴⁶⁷ The ICC is currently handling eight situations, each of them leading to one or more cases.⁴⁶⁸

A preliminary appraisal of the first ICC situations and cases have been characterized *inter alia* by delayed proceedings as consequence of problems in disclosing evidence to the defence, the crafting of victims' procedural rights during investigatory, pre-trial and trial phases, and also States reluctant to implement arrest warrants.⁴⁶⁹ The exercise of prosecutorial discretion has also come under criticism for, *inter alia*, not having taken into account ongoing national peace negotiation processes.⁴⁷⁰ Nevertheless, as already mentioned,⁴⁷¹ members of the victimized populations relating to the situations and cases of the ICC regard the ICC not only as an important mechanism of accountability or justice but also as contributing to peace. Accordingly, at least, in some of the ICC situations, the ICC has arguably contributed to international peace and security.⁴⁷²

3.1.3. Hybrid Criminal Courts (the SCSL, the ECCC and the STL)

In the late 1990s and 2000s, the Security Council considered some situations for hybrid criminal courts. As for the SCSL, the Security Council requested the Secretary General to negotiate an agreement with Sierra Leone to establish a special court to prosecute the most responsible for crimes committed in Sierra Leone's armed conflict.⁴⁷³ The Secretary-General-drafted statute became part of the SCSL Constitutive Agreement of 16 January 2002.⁴⁷⁴ As mentioned in the introduction to this thesis, the SCSL has recently completed its mandate after

⁴⁶⁷ Ibid., articles 17 (1) (d) and 53 (1) (c).

⁴⁶⁸ The situations of the Democratic Republic of Congo, Uganda, Central African Republic and Mali were self-referred to by ICC State parties; the situations of Darfur (Sudan) and Libya were referred to by the Security Council; and the situations of Kenya and Ivory Coast were began by the ICC Prosecutor *proprio motu*.

⁴⁶⁹ See Cryer, Friman, Robinson and Wilmshurst (2010) 178-179.

⁴⁷⁰ See, e.g., Kenneth Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99, 101, 124-125.

⁴⁷¹ See *supra* Chapter II 2.4.3.

⁴⁷² In particular, in the Uganda situation by indicting the Lord Resistance Army leaders and, to some extent, in the Darfur situation. See Philipp Kastner, *International Criminal Justice in bello? The ICC between Law and Politics in Darfur and Northern Uganda* (Martinus Nijhoff Publishers 2012) 156.

⁴⁷³ UN Doc. S/RES/1315 (14 August 2000).

⁴⁷⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

rendering its appeals judgment in *Taylor*, the last pending case before it.⁴⁷⁵ Accordingly, it is now replaced by the Residual SCSL, which ‘must continue after the closure of the [SCSL],’⁴⁷⁶ and have the ‘power to prosecute the remaining fugitive [SCSL] indictee’,⁴⁷⁷ namely, Johnny Paul Koroma, former President of Sierra Leone.

In turn, Cambodia requested assistance in 1997 to prosecute the most responsible for the Khmer Rouge’s genocide (1975-1979). Following negotiations between the UN and the Cambodian Parliament, this adopted the 2001 Law establishing the ECCC.⁴⁷⁸ This Law was amended in 2004 based on a 2003 agreement with the UN.⁴⁷⁹ By Resolution 1757 (2007), the Security Council brought into force the agreement between the UN and Lebanon setting up the STL to try suspects in the assassination of former Lebanese Prime Minister Rafiq Hariri and other dead or injured persons in relation to that attack.⁴⁸⁰

The hybrid criminal courts that are considered in this thesis present the following general characteristics. First, the SCSL and the STL were constituted by agreement between the UN and a State (Sierra Leone and Lebanon). The ECCC was set up by national law in the light of negotiations between the UN and Cambodia. Second, whereas the SCSL and the STL were set up as independent organizations,⁴⁸¹ the ECCC was constituted as part of the Cambodian national judiciary system.⁴⁸² Third, their hybrid character is, *inter alia*, reflected in their applicable law, i.e., international and domestic crimes,⁴⁸³ excepting the STL that

⁴⁷⁵ Taylor (SCSL-03-01-A-1389), Judgment, Appeals Chamber, 26 September 2013.

⁴⁷⁶ Statute of the Residual SCSL, article 1 (1).

⁴⁷⁷ *Ibid.*, article 1 (2).

⁴⁷⁸ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter ECCC Law].

⁴⁷⁹ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, June 6, 2003, UN Doc A/RES57/228B (Annex) (13 May 2003) [hereinafter ECCC agreement].

⁴⁸⁰ UN Doc. S/RES/1757 (30 May 2007), para. 1 (a). As for the Agreement see: Agreement between the United Nations and the Government of Lebanon on the Establishment of a Special Tribunal for Lebanon, UN Doc. S/RES/1757 Annex (2007) [hereinafter STL Constitutive Agreement].

⁴⁸¹ Kallon and Kamara, (SCSL-2004-15/16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord, Appeals Chamber, 13 March 2004, para. 85 (‘Description as hybrid should not be understood as denoting that is part of two or more legal systems’).

⁴⁸² For further details see, e.g., Sarah Williams, *Hybrid and Internationalised Criminal Tribunals* (Hart 2012).

⁴⁸³ As for international crimes, the ECCC has jurisdiction over genocide, crimes against humanity and grave breaches of the Geneva Conventions. See ECCC Law, articles 4-6. The SCSL has jurisdiction over crime against humanity, violations of article common 3 to the Geneva

can only exercise jurisdiction over certain crimes under Lebanese law;⁴⁸⁴ and their judges' mixed composition. Fourth, their financing is via: i) States' voluntary contributions (SCSL); or ii) via shared financing: UN, the corresponding State (Cambodia) and donors' contributions (ECCC), or the corresponding State (Lebanon) and States' voluntary contributions (STL).

Four reasons may explain the constitution of hybrid criminal courts. First, in a judiciary system's breakdown caused by an armed conflict (Sierra Leone) and/or by historical factors that impede the judiciary from a fair justice administration (Cambodia and Lebanon),⁴⁸⁵ national courts are not a real option. Second, international criminal courts do not represent an option either due to the lack of will of the relevant organs/members of international organizations; and/or the lack of will of major powers to fund an international criminal court.⁴⁸⁶ Third, hybrid criminal courts may merge the best of two worlds and also better capture the complex nature of international crimes that includes domestic elements.⁴⁸⁷ Fourth, hybrid criminal courts are seemingly more suitable to reach victims because of their proximity to the population most directly concerned, i.e., victims.⁴⁸⁸ Bearing in mind hurdles for victims and investigation, the locations of hybrid criminal courts (SCSL, ECCC) were decided to be proximate to the crime scene and, hence, enable them to have reasonably immediate access to witnesses and potentially evidentiary material.⁴⁸⁹ This has been helped by implementing early outreach programmes.⁴⁹⁰ However, operating hybrid criminal courts in the same countries where crimes were committed has raised concerns with respect to the security of, *inter alia*, victims participating at those

Conventions and Additional Protocol II, and other serious violations of international humanitarian law. See SCSL Statute, articles 2-4.

⁴⁸⁴ STL Statute, article 2.

⁴⁸⁵ Cassese (2008) 333; Laura Dickinson, 'Notes and Comments. The Promise of Hybrid Courts' (2003) 97 American Journal of International Law 295, 301.

⁴⁸⁶ Cassese (2008) 333, 334.

⁴⁸⁷ Mégret (2005) 745.

⁴⁸⁸ Alain Pellet, 'Internationalized Courts: Better than Nothing, Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo and Cambodia' in Romano, Nollkaemper and Kleffner (2004) 437, 438.

⁴⁸⁹ Marcus Benzing and Morten Bergsmo, 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court' in Romano, Nollkaemper and Kleffner (2004) 407, 409.

⁴⁹⁰ See Tom Perriello and Marieke Wierda, The Special Court for Sierra Leone Under Scrutiny, (ICTJ, Working Paper, 2006) 35-37. Available at: <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf> (last visit on 12 August 2012); Norman Pentelovitch, 'Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals' (2008) 39 Georgetown Journal of International Law 445, 479.

forums. The locations of the STL and SCSL's trial of Charles Taylor, outside Lebanon and Sierra Leone respectively, were indeed adopted to better protect among others potential witnesses.⁴⁹¹ Indeed, important practical problems negatively impacting the work of the hybrid criminal courts may arise and have arisen. These problems include: i) challenges to ensure a harmonic and smooth coordination between the national and international components,⁴⁹² ii) financial problems,⁴⁹³ and iii) security issues.⁴⁹⁴

3.2. The ICTY, the ICTR, and the SCSL: Adversarial, Inquisitorial and Unique/Hybrid Procedural Elements

3.2.1. Adversarial Elements

To begin with, it should be mentioned that both the ICTY and the ICTR and later the SCSL were to a very large extent predominantly adversarial. However, elements of the inquisitorial system have progressively been added as discussed later.⁴⁹⁵ In any case, the prevalence of the adversarial system, arguably still in place,⁴⁹⁶ can be explained in, for example, the ICTY, due to factors such as common law background draftsmen, the perception of the adversarial system as better equipped to guarantee the accused's rights, and the IMT and the IMTFE as antecedents.⁴⁹⁷ As for the SCSL, it was the common law background of the draftsmen the most relevant factor.⁴⁹⁸ The ICTY Rules of Procedure and Evidence (RPE) were initially copied by the ICTR RPE and this, in turn, by the SCSL RPE. However, they have evolved and, hence, present some differences with each other.⁴⁹⁹

⁴⁹¹ See Raub (2009) 1042.

⁴⁹² See, e.g., Open Society Justice Initiative, Political Interference at the Extraordinary Chambers in the Court of Cambodia (Jul. 2010) 16-17. Available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706/political-interference-courts-cambodia-20100706.pdf (last visit on 12 August 2012).

⁴⁹³ See, e.g., Thordis Ingadottir, 'The Financing of Internationalized Criminal Courts and Tribunals' in Romano, Nollkaemper and Kleffner (2004) 271-289.

⁴⁹⁴ See, e.g., Cassese (2008) 335.

⁴⁹⁵ See *infra* Chapter II 3.2.2.

⁴⁹⁶ Kordić et al. (IT-95-14/2-A), Judgment, Appeals Chamber, 17 December 2004, para. 22. See also: Erdemović (IT-96-22-A), Judgment, Separate and Dissenting Opinion of Judge Cassese, Appeals Chamber, 7 October 1997, para. 4; Schabas (2006) 601.

⁴⁹⁷ Cassese (2008) 369.

⁴⁹⁸ Nina Jørgensen, 'The Proprio Motu and Interventionist Powers of Judges at International Criminal Tribunals' (2009) in Göran Sluiter and Sergey Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 121, 124.

⁴⁹⁹ Schabas (2006) 85.

With regard to judges' role, judges were originally conceived as referees who would only become cognizant of the evidentiary material upon commencement of the trial. For instance, in the ICTY, the original ICTY RPE set a system in which the Trial Chamber Judges would approach each case as a *tabula rasa*, similar to common law fact-finders.⁵⁰⁰

With regard to the role of the parties, the RPE introduced an adversarial model. After the opening statements,⁵⁰¹ the parties present their cases in a traditional common law order,⁵⁰² i.e., a witness can be examined in chief by the party who has called him/her followed by the subsequent cross-examination and re-examination,⁵⁰³ as examined later in further detail.⁵⁰⁴ As originally drafted, the ICTY RPE did not introduce a prosecutorial duty to search for exculpatory evidence as part of its investigations and only required prompt disclosure of this sort of evidence as was known to the Prosecutor.⁵⁰⁵ This corresponds to party-driven proceedings.⁵⁰⁶ Trials *in absentia* of the accused were neither contemplated in nor formally excluded from the ICTY Statute although there 'was a brief flirtation with a watered down form of *in absentia* trial',⁵⁰⁷ i.e., the so-called 'Rule 61 Procedure'.⁵⁰⁸ Nothing comparable existed in the ICTR and the SCSL. The defendant who gives evidence as witnesses has this status at trial.⁵⁰⁹ Victims are not parties and their role is primarily of witnesses.⁵¹⁰

As for evidence, the complex and strict common law evidentiary rules are in general of limited application.⁵¹¹ As seen later,⁵¹² the order of presentation

⁵⁰⁰ Megan Fairlie, 'Revised Pre-Trial Procedure before the ICTY from a Continental/Common Law Perspective' in Sluiter and Vasiliev (2009) 311, 316.

⁵⁰¹ ICTY RPE, rule 84; ICTR RPE, rule 84; SCSL RPE, rule 84.

⁵⁰² This means evidence for the prosecution, evidence for the defence, prosecution evidence in rebuttal and the defence evidence in rejoinder. ICTY RPE, rule 85 (A).

⁵⁰³ ICTY RPE, rule 85 (B) and (C); ICTR RPE, rule 85 (B) and (C); SCSL RPE, rule 85 (B) and (C).

⁵⁰⁴ See *infra* Chapter III 2.2.2 and 3.2.2.

⁵⁰⁵ ICTY RPE, rule 68 (IT/32, 11 February 1994).

⁵⁰⁶ Fairlie (2009) 313.

⁵⁰⁷ William Schabas, 'In *Absentia* Proceedings before International Criminal Courts' in Sluiter and Vasiliev (2009) 335, 335.

⁵⁰⁸ This procedure early applied to individuals such as Karadžić and Mladić, who had not been back then yet arrested, consisted in submission of evidence by the Prosecutor to the Trial Chamber for an international arrest warrant. However, this did not result in a verdict. The ICTY always stressed that this procedure was not a trial *in absentia*. See, e.g., Raiić (IT-95-12-R61), Decision, 13 September 1996, under B. Preliminary matters, para. 2.

⁵⁰⁹ ICTY RPE, rule 85 (C); ICTR RPE, rule 85 (C); SCSL RPE, rule 85 (C).

⁵¹⁰ As for the victim's status at the ICTY, ICTR and SCSL, see *infra*, Chapters III, IV and V.

⁵¹¹ See Orié (2002) 1472; Mark Klamburg, 'General Requirements for the Admission of Evidence' in Sluiter et al. (2013) 1016, 1018.

of evidence followed and the principle of live testimony are examples of adversarial features. Concerning the ICTY rules on disclosure, it should be mentioned that they were influenced by the United States Federal Rules of Criminal Procedure.⁵¹³ Accordingly, the Prosecutor: i) has the obligation to provide copies of material that accompanied the indictment as soon as possible after the initial appearance; ii) upon defence's request, shall allow the inspection by the defence of evidentiary material in the Prosecution's custody or control; iii) the Prosecutor shall give to the defence the list of witnesses (s)he intends to call at trial; iv) and the Prosecutor shall disclose to the defence any exculpatory material although the protection of witnesses or confidentially obtained information may lift the disclosure obligations.⁵¹⁴ The alibi and any special defences trigger some obligations for the defence.⁵¹⁵

Additional adversarial features include that originally the ICTY RPE both distinguished between trial and sentencing stages,⁵¹⁶ and followed a straightforward common law guilty plea procedure.⁵¹⁷ Finally, the appeal is not a trial *de novo*,⁵¹⁸ and presents only limited opportunities for new evidence.⁵¹⁹

3.2.2. Inquisitorial Elements

Concerning judges' role, this has been strengthened as the ICTY, the ICTR and, to a lesser extent, the SCSL,⁵²⁰ increasingly incorporated inquisitorial components. The ICTY, the ICTR and the SCSL Trial Chambers have the power to order the parties to present additional evidence and the ICTY and the ICTR can additionally summon witnesses.⁵²¹ Also, a judge at any stage, and not only at

⁵¹² See *infra* Chapter III 2.2.2 and 3.2.2.

⁵¹³ In particular, rules 16(a)(1)(C) and 16(b)(1)(A) of the United States Federal Rules of Criminal Procedure. See Orie (2002) 1469.

⁵¹⁴ See respectively ICTY RPE, rules 66 (A); 66 (B), 67 (A) (i); 66 (A) (ii); 68, 68*bis*, and 69. ICTR RPE, rules 66 (A); 66 (B), 67; 66 (A) (ii); 68, 68 *bis*, and 69. SCSL RPE, rules 66 (A); 66 (B); 67, 68; and 69.

⁵¹⁵ See ICTY RPE, rule 67(B).

⁵¹⁶ *Ibid.*, rules 86-88, 100 and 101(D).

⁵¹⁷ *Ibid.*, rule 62 (A) (iii)-(v).

⁵¹⁸ *Ibid.*, rule 111.

⁵¹⁹ On judges' broad discretion on this issue, see Kupreskić et al. (IT-95-16-A), Appeal Judgment, Appeals Chamber, 23 October 2001, para. 42 et seq.

⁵²⁰ Jørgesen (2009) 125.

⁵²¹ ICTY RPE, rules 85(A)(v) and 98; ICTR RPE, rules 85(A)(v) and 98; SCSL RPE, rule 85. As for case law of the ICTY and the SCSL see respectively, e.g., Kupreskić et al. (IT-95-16-T) Witness Summons by the Chamber pursuant to Rule 98 of the Rules of Procedure and Evidence, Trial Chamber, 30 September 1998; Brima (SCSL-04-16-T), Judgment, Trial Chamber II, 20 June 2007, 'Annex A: Procedural History', para. 60.

the end of the examination by the parties, can put any question to the witness,⁵²² which has often been applied by the Judges of these courts.⁵²³ The ICTY, the ICTR and the SCSL Trial Chambers, prior to the beginning of the trial, are entitled with extensive powers to: i) call upon the Prosecutor to reduce the number of witnesses;⁵²⁴ ii) shorten the estimated length of examination-in-chief of some witnesses;⁵²⁵ iii) determine the time available to the Prosecutor for presenting evidence;⁵²⁶ iv) to invite the Prosecutor to reduce the number of counts charged in the indictment ‘in the interest of a fair and expeditious trial’;⁵²⁷ and v) after commencement of the trial, to fix a number of crime or incidents representative of the crimes charged.⁵²⁸ The introduction of a Pre-Trial Judge with a broad mandate, under the ICTY RPE,⁵²⁹ also increases judicial intervention although this Judge has only coordinating but not investigating functions. The ICTR RPE and the SCSL RPE go a step further as at the pre-trial and the pre-defence conferences, the Prosecution and the defence may be ordered to provide the Trial Chamber with copies of written statements of witnesses they intend to call to testify.⁵³⁰ At the ICTY, this has sometimes happened under rule 65 *ter*. Those provisions among others in principle give the judges more detailed information on the cases presented at trial and accordingly enable them to play a more active role. Although the ICTY Judges have progressively favored a proactive style of courtroom management in consideration of better ‘trial efficiency, trial fairness and the administration of justice through trial’⁵³¹ the SCSL Judges did not adopt this extensive involvement and rejected a proposal to give them a more proactive role.⁵³² Trial Chambers

⁵²² ICTY RPE, rule 85 (B); ICTR RPE, rule 85 (B); and SCSL RPE, rule 85 (B).

⁵²³ See also Nancy Combs, ‘Judicial Powers During Trial Proceedings’ in Sluiter et al. (2013) 689, 700-702.

⁵²⁴ ICTY RPE, rule 73 *bis* (D); ICTR RPE, rule 73 *bis* (D); and SCSL RPE, rule 73 *bis* (D).

⁵²⁵ ICTY RPE, rule 73 *bis* (B); ICTR RPE, rule 73 *ter* (C); and SCSL RPE, rule 73 *ter* (C). See, e.g., Galić (IT-98-29-AR73), Decision on Application by Prosecution for Leave to Appeal, Appeals Chamber, 14 December 2001, para. 7.

⁵²⁶ ICTY RPE, rule 73 *ter* (E).

⁵²⁷ ICTY RPE, rule 73 *bis* (D); ICTR RPE, rule 73 *ter* (D); and SCSL RPE, rule 73 *ter* (D).

⁵²⁸ ICTY RPE, rule 73 *bis* (D). See, e.g., Milutinović (IT-05-87-T), Decision on Application of Rule 73 *bis*, Trial Chamber, 11 July 2006.

⁵²⁹ Pre-Trial Judge’s broad mandate consists in taking ‘any necessary measure to prepare the case for a fair and expeditious trial’. ICTY RPE, rule 65 *ter* (B).

⁵³⁰ ICTR RPE, rule 73 *bis* and *ter*; SCSL RPE, rule 73 *bis* and *ter*.

⁵³¹ See, e.g., Orić (IT-03-68-T), Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, Trial Chamber, 21 October 2004, para. 1.

⁵³² See Antonio Cassese, Report on the Special Court for Sierra Leone submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 110.

can exercise some control over the mode and order of witness interrogation.⁵³³ There is no jury at the ICTY, the ICTR and the SCSL and, indeed, the ICTY has remarked the importance of conduction of proceedings by professional judges instead.⁵³⁴

As for parties, prosecutor's impartiality, and his/her obligation to establish the truth and present not only inculpatory but also exculpatory evidence have been explicitly recognized by the ICTY.⁵³⁵ The Prosecutor of the *ad hoc* tribunals accordingly, as Judge Shahabuddeen concluded, 'is not required to be neutral in the case; she is a party. But she is of course, not a partisan'.⁵³⁶ The ICTY RPE allow the accused to make an opening statement after the parties' statements 'under the control of the Trial Chamber' and without being cross-examined,⁵³⁷ which at least in theory makes the accused be transformed from a mere 'object' of the trial (adversarial system) to an active party (inquisitorial system).⁵³⁸ Moreover, the ICTY has concluded that once a witness has taken the oath, (s)he becomes a 'witness of truth' and ceases to be 'a witness for either party'.⁵³⁹

As for evidence, as discussed later,⁵⁴⁰ it is possible to admit out of court, written evidence instead of live, oral testimony. What should be detailed now is that after the pre-trial brief, the defence 'shall' (ICTY) or 'may' (ICTR) file its own brief and although the required contents of the brief differ between the ICTY and the ICTR, the brief should generally speaking provide the Trial

⁵³³ ICTY RPE, rule 90 (F); ICTR RPE, rule 90 (F); SCSL RPE, rule 90 (F).

⁵³⁴ Orić (IT-03-68-T), Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, Trial Chamber, 21 October 2004, para. 11; Delalić et al. (IT-96-21-T), Decision on the Motion of the Prosecution for the Admissibility of Evidence, Trial Chamber, 19 January 1998, para. 20.

⁵³⁵ '[...] the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal [...] whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting [...]'. Kupreskić et al. (IT-95-16-T), Decision on Communications between the Parties and their Witnesses, Trial Chamber, 21 September 1998.

⁵³⁶ Barayagwiza (ICTR-97-19-AR72), Decision (Prosecutor's Request for Review of Reconsideration), Appeals Chamber, Separate Opinion of Judge Shahabuddeen, 31 March 2000, para. 68.

⁵³⁷ ICTY RPE, rule 84 *bis* (A).

⁵³⁸ Orić (2002) 1468; Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or "Mixed"' (2003) 3 International Criminal Law Review 1, 19.

⁵³⁹ Kupreskić et al. (IT-95-16-T), Decision on Communications between the Parties and their Witnesses, Trial Chamber, 21 September 1998, consideration 3 (iii).

⁵⁴⁰ See *infra* Chapter III 2.2.2 and 3.2.2.

Chamber with an idea of which aspects of the prosecution case the defence is likely to contest.⁵⁴¹

Additional inquisitorial features include that the Trial Chamber shall at the same time determine the guilt and penalty to be imposed within the same procedure.⁵⁴² Appeals are allowed not only for the convicted person but also for the Prosecutor.⁵⁴³ The existence of a Pre-Trial Judge at the ICTY and his/her authority to order parties to explain their position in pre-trial brief(s) is not yet comparable to a dossier. However, the powers under the ICTR and the SCSL RPE to order the parties to file the written statements of prospective witnesses have a very similar effect to the dossier, i.e., judges can read in advance witnesses' early statements.⁵⁴⁴

3.2.3. Unique or Mixed Outcome

As evidenced, the ICTY, the ICTR and the SCSL in a higher or lesser degree have increasingly incorporated inquisitorial system elements to their adversarial frameworks to the point that there is some consensus to refer to them as of a unique or mixed nature.⁵⁴⁵ In the particular case of the ICTY, the amendments introduced by the Judges to its RPE transformed the ICTY system from a largely adversarial one into a mixed or a *sui generis* model.⁵⁴⁶ Even though a rule can be traced back to either an adversarial or inquisitorial origin, 'the final product may be an amalgam of both [...] so as to render it *sui generis*' as concluded by the ICTY.⁵⁴⁷ The identification of a rule as clearly non-inquisitorial led the ICTY to rely on common law systems of interpretation to 'determine its scope and

⁵⁴¹ ICTY RPE, rule 65 *ter* (F); ICTR RPE, rule 73 *bis* (F). As for the SCSL, see SCSL RPE, rule 73 *bis* (F) (similar to the ICTR rule)

⁵⁴² ICTY RPE, rule 87 (C). A similar change can be observed in the ICTR RPE although its rule 98 (judgment, dealing only with determination of guilt) was not deleted unlike the ICTY RPE.

⁵⁴³ ICTY Statute, article 25 (1); ICTR Statute, article 24 (1); and SCSL Statute, article 20 (1).

⁵⁴⁴ See ICTR RPE, rules 73 *bis* and 73 *ter*; Orié (2002) 1470. As for the SCSL, see SCSL RPE, rules 73 *bis* and 73 *ter* (similar to the ICTR rules).

⁵⁴⁵ See, e.g., Ambos (2003) 5; Lal Chand Vohrah, 'Pre-Trial Practices and Procedures' in Gabrielle McDonald and Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law*, Vol. 1 (Springer 2000) 477, 545; Megan Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit' (2004) 4 *International Criminal Law Review* 243, 318; and Rod Dixon, 'Developing International Rules of Procedure and Evidence for the Yugoslav and Rwanda Tribunals' (1997) 7 *Journal of Transnational Law and Contemporary Problems* 81, 83 and 97.

⁵⁴⁶ Delalić et al. (IT-96-21-T), Decision on the Motion on Presentation of Evidence by the Accused, Esad Lanzo, Trial Chamber, 1 May 1997, para. 15.

⁵⁴⁷ *Ibid.*, Loc. cit.

meaning if there is any ambiguity'.⁵⁴⁸ What is decisive is not so much whether a rule comes from the adversarial or inquisitorial system but whether it assists the tribunals to implement their mandate and whether it meets basic fair trial standards.⁵⁴⁹ As for the latter, the ECtHR has found that the ICTY Statute and RPE provide all necessary due process guarantees 'including those of impartiality and independence'.⁵⁵⁰

In addition to the discussion on adversarial and inquisitorial components, an extra example to further illustrate the hybrid or *sui generis* nature of the proceedings at the ICTY, the ICTR and the SCSL follows. This consists in that the initially relatively straightforward common law guilty procedure at the ICTY, i.e., bringing trial directly to the sentencing,⁵⁵¹ was amended and accordingly since then it is only acceptable upon satisfaction of certain requirements.⁵⁵² This change was incorporated as a consequence of an accused's inadequate 'confession' of having killed civilians under duress in an ICTY case.⁵⁵³

3.3. The ICC: Adversarial, Inquisitorial and Unique/Hybrid Procedural Elements

3.3.1. Adversarial Elements

As for the role of the judges, this is more active at the ICC than at the ICTY, the ICTR and the SCSL. A common law feature is that, in principle, the Pre-Trial Chamber may only confirm or reject the charges or adjourn the hearing,⁵⁵⁴ and 'request the Prosecutor to consider' either to provide further evidence or amend a charge because of a different legal qualification.⁵⁵⁵ However, Pre-Trial Chamber I in *Lubanga* decided to add a charge,⁵⁵⁶ which reflects the active role that Pre-Trial Judges may assume. Be that as it may, as Damaška remarks, Pre-trial Judges

⁵⁴⁸ Ibid., para. 16. (the reference was to rule 85 (A)-presentation of evidence).

⁵⁴⁹ See Dixon (1997) 98; Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha' (1999) 37 Columbia Journal of Transnational Law, 725, 753 et seq., 764.

⁵⁵⁰ ECtHR, *Mladen Naletilić v. Croatia*, Appl. No. 51891/99, Judgment, 4 May 2000, para. 1.b.

⁵⁵¹ ICTY RPE, rule 62 (iii)-(v).

⁵⁵² Ibid., rule 62 *bis*. See, e.g., the plea agreements in *Sikirica et al.* (IT-95-8), Judgment, Trial Chamber, 13 November 2001, para. 17 et seq.

⁵⁵³ *Erdemović* (IT-96-22-T), Sentencing Judgment, Trial Chamber, 29 November 1996, para. 10.

⁵⁵⁴ ICC Statute, article 61 (7) (a), (b).

⁵⁵⁵ Ibid., article 61 (7) (c) (i), (ii).

⁵⁵⁶ *Lubanga* (ICC-01/04-01/06-803), Decision on the Confirmation of the Charges, Pre-Trial Chamber I, 29 January 2007, paras. 200-237.

coordinate and supervise party interaction but do not search for evidence.⁵⁵⁷ Moreover, the end-product of the pre-trial stage is not a dossier but two separate adversarial submissions. As for the Trial Chamber, it makes the parties and participants 'responsible for identifying' the relevant evidence,⁵⁵⁸ but reserves itself the right to intervene whenever it sees fit.⁵⁵⁹ However, in the ICC first trial judgment in *Lubanga*, Trial Chamber I seemingly did not take judges' potential active role very seriously, which was indeed criticized in one dissenting opinion.⁵⁶⁰ Jury does not exist as the ICC Judges are professional judges.

As for the role of the parties, the positions of the Prosecution and defence are still predominantly adversarial-oriented. During pre-trial, in particular, the 'two-case' structure remains as Prosecution and defence still retain a dual monopoly in collecting information and evidence.⁵⁶¹ The parties decide the order and the manner in which the evidence shall be submitted to the Trial Chamber.⁵⁶² The ICC Statute explicitly rejects trials *in absentia*⁵⁶³ although several options were considered until the Rome Conference.⁵⁶⁴ The Prosecutor has a wide discretion to initiate an investigation which ultimately depends on the 'interests of justice',⁵⁶⁵ and may even enter into agreements with States, intergovernmental organizations or private persons for cooperation.⁵⁶⁶ This may raise some concerns among civil law lawyers as they may consider it similar to a plea bargaining.⁵⁶⁷

⁵⁵⁷ Mirjan Damaška, 'Problematic Features of International Criminal Procedure' in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 175, 176.

⁵⁵⁸ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 95.

⁵⁵⁹ *Ibid.*, Loc. cit. (citing Hearing of 1 April 2011).

⁵⁶⁰ Judge Odio Benito criticized that the Chamber did not take into account certain additional video footage as evidence. See *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, paras. 41, 43.

⁵⁶¹ Damaška (2009) 176.

⁵⁶² ICC RPE, rule 140 (1).

⁵⁶³ ICC Statute, article 63 (1).

⁵⁶⁴ See A/CONF.183/2/Add.I, pp. 119-123; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), UN Doc. A/51/22, para. 226.

⁵⁶⁵ ICC Statute, article 53 (1) (c), (2) (c).

⁵⁶⁶ *Ibid.*, article 54 (3) (d).

⁵⁶⁷ Håkan Friman, 'The Rules of Procedure and Evidence in the Investigative Stage' in Horst Fischer, Claus Krefß, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (BWV 2001) 191, 201.

As for evidence, some general evidentiary principles contained in the ICC Statute preserve the traditional common law function of evidence.⁵⁶⁸ Adversarial features are still prevalent in the ICC legal framework on evidence but civil law influence cannot be ignored such as the possibility to submit written or recorded testimony as exceptions to live, oral testimony as discussed later.⁵⁶⁹ Even though the Presiding Judge directs the trial proceedings,⁵⁷⁰ when (s)he declines to do so the parties can ‘agree on the order and manner in which the evidence shall be submitted’.⁵⁷¹ Finally, the disclosure obligations imposed on the prosecution correspond to disclosure as an inherently adversarial feature although they have lost a bit their character due to the fact that all the disclosed material and information has to be communicated to the Trial Chamber.⁵⁷² The defence has limited disclosure obligations.⁵⁷³

Other adversarial features include that although the Prosecution can appeal against an acquittal, which goes against the common law tradition, both the enumeration of grounds for appeals and the character of appeals not as a trial *de novo* but as a review of the proceedings on points of fact and of law are in accordance with the common law tradition.⁵⁷⁴ The granting of appeal of interlocutory decisions before the judgment is passed is also a common law feature.⁵⁷⁵

3.3.2. Inquisitorial Elements

As for the role of the judges, the Pre-Trial Chamber is not limited to facilitate the parties by issuing the respective orders and arrest warrants.⁵⁷⁶ The Pre-Trial Chamber can *inter alia*: i) proceed *proprio motu* to preserve evidence that would be essential for the defence at trial and risks becoming unavailable,⁵⁷⁷ ii) provide

⁵⁶⁸ See ICC Statute, article 69.

⁵⁶⁹ See *infra* Chapter III 2.2.2 and 3.2.2.

⁵⁷⁰ ICC Statute, article 64.8.

⁵⁷¹ ICC RPE, rule 140 (1).

⁵⁷² Orié (2002) 1484. As for disclosure obligations see, among others, ICC RPE, rule 76 (names and prior statements of prospective witnesses must be disclosed by the Prosecutor); rule 77 (on defendant’s right to inspect books, documents and tangible objects in prosecution’s possession).

⁵⁷³ See ICC RPE, rule 78; and rule 79(1) (a) and (b) (on disclosure of defences mentioned in article 31 of the ICC Statute).

⁵⁷⁴ See ICC Statute, article 81; ICC RPE, rules 150-153.

⁵⁷⁵ See Orié (2002) 1491; ICC Statute, article 82; ICC RPE, rules 154-158.

⁵⁷⁶ ICC Statute, article 57.

⁵⁷⁷ *Ibid.*, article 56 (3). Additionally, the Pre-Trial Chamber may act upon request of the Prosecutor, who does not want to miss a unique investigative opportunity. See ICC Statute, article 56 (1) and (2).

for the protection and privacy of victims and witnesses and other persons, and the protection and preservation of evidence or information;⁵⁷⁸ and iii) judicially review a Prosecutor's decision not to commence an investigation.⁵⁷⁹ Pre-Trial's more active involvement corresponds to its truth seeking role, as pointed out by the former ICC French Judge Jorda, who also said that 'the objective of this confirmation hearing is to supplement the adversarial debate between the parties'.⁵⁸⁰ The confirmation hearing was indeed proposed by the French delegation during the drafting of the ICC Statute.⁵⁸¹ During the Rome Conference, different approaches, i.e., common law and civil law, were considered concerning what role should be adjudicated to the Trial Chamber.⁵⁸² As the ICC Statute text stands, the Trial Chamber has ample powers to intervene and, accordingly, is not only in a position to question witnesses,⁵⁸³ but it may also request or order supplementary evidence to be produced.⁵⁸⁴ The Trial Chamber can even call its own witnesses as took place in Lubanga's trial.⁵⁸⁵ The logics underlying the Trial Chamber's active role is summarized when ICC English Judge Fulford refers to the Chamber's 'statutory authority to request any evidence that is necessary to determine the truth'.⁵⁸⁶ The Trial Chamber

⁵⁷⁸ ICC Statute, article 57 (3) (c); ICC Regulations of the Court, regulations 30 and 46 (2). E.g., Pre-Trial Chamber I, some months into the investigations relating to the Situation in the Democratic Republic of Congo, decided *proprio motu* to convene a status conference to assess the need for it to provide for, *inter alia*, the protection of victims and witnesses and the preservation of evidence. Situation in the Democratic Republic of Congo (ICC-01/04), Decision to Convene a Status Conference, 17 February 2005.

⁵⁷⁹ ICC Statute, article 53 (3).

⁵⁸⁰ Lubanga (ICC-01/04-01/06-T-45-EN), Transcript, 27 November 2006, p. 19 lines 7-10. It should be pointed out that the search for the truth is not incompatible with an adversarial system. It has been indicated that the search of truth is common to adversarial and inquisitorial systems but the method to arrive to it differs. In other words, the common law approach follows a more liberal approach, i.e., a sort of procedural truth rather than a material truth. See Ambos (2003) 21.

⁵⁸¹ See UN Doc. A/AC.249/L.3 (1996), article 48. See too UN Doc. A/CONF.183/2/Add.1.

⁵⁸² See Gilbert Bitti, 'Article 64' in Triffterer (2008) 1199, 1201; 'Working paper on article 64', UN Doc. A/CONF.183/C1/WGPM/L.41.

⁵⁸³ ICC RPE, rule 140 (2) (c). See also Combs (2013) 702.

⁵⁸⁴ ICC Statute, articles 64 (6) and 69 (3). Trial Chamber I stated that 'the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69 (3) of the Statute'. Lubanga (ICC-01/04-01/06-1119), Decision on Victims' Participation, 18 January 2008, para. 18 (see also para. 21).

⁵⁸⁵ Trial Chamber I called four expert witnesses to testify in issues such as child soldiers. Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, para. 11.

⁵⁸⁶ Lubanga (ICC-01/04-01/06-1399-Corr), Decision on the Admissibility of Four Documents, Trial Chamber I, 13 June 2008 (corrigendum issued on 20 January 2011), para. 24.

Presiding Judge, in consultation with the other Chamber members, can ‘determine the mode and order of questioning witnesses and presenting evidence’.⁵⁸⁷ The Trial Chamber also has the authority to modify the legal characterization of the facts.⁵⁸⁸

With regard to the role of the parties, the drafters of the ICC Statute devised a role for the Prosecutor ‘resembling that of an officer of justice rather than a partisan advocate’.⁵⁸⁹ As the Prosecutor has the obligation to establish the truth and present not only inculpatory but also exculpatory evidence, (s)he can be arguably conceived as ‘both a party to the proceedings and also an impartial truth seeker or organ of justice’.⁵⁹⁰ As for the accused, this may ‘make an unsworn oral or written statement in his or her defence’.⁵⁹¹ Although plea bargaining under strict conditions is included in the ICC Statute, this is not binding for the Trial Chamber that can decide that a more complete presentation of the facts in the case is necessary ‘in the interests of justice, in particular the interests of the victims’.⁵⁹² This corresponds to drafters’ intention to avoid the phenomenon of plea bargaining.⁵⁹³ Even though victims are not civil parties, i.e., an adversarial feature, they can participate in the proceedings and claim reparations besides their status as witnesses.⁵⁹⁴

As for the rules of evidence, although the ICC is strongly influenced by the common law approach, ‘it rejects many of its more anachronistic rules’.⁵⁹⁵

⁵⁸⁷ ICC Regulations of the Court, regulation 43.

⁵⁸⁸ *Ibid.*, regulation 55. See, Lubanga (ICC-01/04-01/06-2049), Decision Giving Notice to the Parties and Participants that the legal Characterization of the Facts may be subject to Change in Accordance with regulation 55(2) of the Regulations of the Court, Trial Chamber I, 14 July 2009. This was reversed in appeal by the Appeals Chamber as Pre-Trial Chamber I included additional facts and circumstances not described in the charging document. See, Lubanga (ICC-01/04-01/06-2205), Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled ‘Decision Giving Notice to the Parties and Participants that the legal Characterization of the Facts may be subject to Change in Accordance with regulation 55(2) of the Regulations of the Court’, Appeals Chamber, 8 December 2009.

⁵⁸⁹ Claus Kieß, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) *Journal of International Criminal Justice*, 603, 608. See also: ‘Proposal Submitted by Germany for Article 44 (a)’, UN Doc. A/AC.249/WP.37; Preparatory Committee (1996), Vol. I, para. 226.

⁵⁹⁰ Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) *10 European Journal of International Law* 144, 168.

⁵⁹¹ ICC Statute, article 67 (1) (h).

⁵⁹² *Ibid.*, article 65 (4).

⁵⁹³ ‘Revised Abbreviated Compliation’, UN Doc. A/AC.249/1997/WG.4/CPR.3. See also: UN Doc. A/AC.249/1997/L.8/Rev.1, p. 32.

⁵⁹⁴ See *infra* Chapters III, IV and V.

⁵⁹⁵ Schabas (2010) 837.

Moreover, there is some important civil law influence, e.g., admissibility of witness's written or recorded evidence as an exception to oral, live and in person testimony, as examined later.⁵⁹⁶ Also, as already detailed, the ICC has the power to request the submission of all evidence that it considers necessary for the determination of truth,⁵⁹⁷ and the Trial Chamber can order the production of evidence additional to that already collected during the trial or prior to it by the parties.⁵⁹⁸ Moreover, concerning agreements as to evidence by the parties, an ICC Chamber may consider the respective alleged fact as being proven 'unless is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims'.⁵⁹⁹

As for other inquisitorial features, there is no need to divide the ICC proceedings into trial and sentencing hearings. However, the ICC Trial Chamber I in *Lubanga* decided to have sentencing hearings separated from the verdict.⁶⁰⁰ Concerning appeals, the Prosecutor can appeal against acquittal,⁶⁰¹ and also make an appeal on the convicted person's behalf.⁶⁰² The right to appeal is indeed more broadly conceived than it is in the inquisitorial system. Finally, even though the dossier as such is not included in the ICC legal framework, all the information gathered by the Pre-Trial Chamber is transmitted to the Trial Chamber.⁶⁰³ This includes all the material disclosed between the parties,⁶⁰⁴ and all the other documents transmitted to the Pre-Trial Chamber,⁶⁰⁵ which may be consulted by both parties and victims participating in the proceedings.

3.3.3. Unique or Mixed Outcome

As evidenced, the ICC procedural law contains elements of both the adversarial and inquisitorial systems. Even though the common law model has been basically adopted, there has been the incorporation of important and numerous civil law system elements,⁶⁰⁶ to the point that there is consensus to describe the

⁵⁹⁶ See *infra* Chapter II 2.3.1 and 3.3.

⁵⁹⁷ ICC Statute, article 69 (3).

⁵⁹⁸ *Ibid.*, article 64 (6) (d).

⁵⁹⁹ ICC RPE, rule 69.

⁶⁰⁰ In an oral decision, the Chamber decided that there would be a separate sentencing hearing if the accused is convicted. See *Lubanga* (ICC-01/04-01/06), Transcripts, T-99-ENG, 25 November 2008, p. 39, lines 22-23.

⁶⁰¹ ICC Statute, article 81 (1) (a).

⁶⁰² *Ibid.*, article 83 (1) (b); ICC RPE, rule 152 (2).

⁶⁰³ ICC RPE, rule 131.

⁶⁰⁴ *Ibid.*, rule 121 (2) (c).

⁶⁰⁵ *Ibid.*, rule 121 (10).

⁶⁰⁶ Cassese (1999) 168.

ICC procedural law as mixed or truly unique.⁶⁰⁷ A good example of this is the flexibility in the order of questioning witnesses as examined later.⁶⁰⁸ In addition to the examples and features already presented, three extra and final points are discussed herein to better illustrate the co-existence, not always easy, of adversarial and inquisitorial elements in a unique procedural structure like the ICC's.

First, the ICC Prosecutor's role conceived as an organ of justice and not only a party may generate some problems when performing his/her disclosure obligations as evidenced in the ICC first cases.⁶⁰⁹ On the one hand, the former ICC Prosecutor in exercise of his attributions collected evidence on confidential basis although he relied on this excessively.⁶¹⁰ On the other hand, the Prosecutor has the obligation to disclose to the defence, as soon as practicable, evidence in his/her possession which 'he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'.⁶¹¹ The lack of authorization from the information's provider to disclose potentially exculpatory evidence led to the Trial Chamber I in *Lubanga* to order the stay of proceedings as Lubanga's right to fair trial was affected.⁶¹² This stay of proceedings was lifted only later when the relevant materials were made available to the defence.⁶¹³ Even though the obligation to disclose exculpatory evidence is generally accepted in adversarial

⁶⁰⁷ Ambos (2003) 5; Kress (2003) 605; and Silvia Fernández de Gurmendi, 'The Elaboration of the Rules of Procedure and Evidence' in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publisher 2001a) 235, 251.

⁶⁰⁸ See *infra* Chapter III 2.3.1.1.

⁶⁰⁹ Besides the *Lubanga* case, referred to in the following notes, see too: *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-621), Decision on Article 54 (3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, Pre-Trial Chamber I, 20 June 2008, paras. 2, 33, 39 and 46.

⁶¹⁰ Up to fifty percent of the Prosecution's evidence regarding *Lubanga* was covered by such agreements. *Lubanga* (ICC-01/04-01/06-T-52-ENG) Transcripts, 1 October 2007, p. 13, line 21. As for the Prosecutor's powers to conclude confidentiality agreements see: ICC Statute, article 54 (3) (e).

⁶¹¹ ICC Statute, article 67 (2).

⁶¹² *Lubanga* (ICC-01/04-01/06-1401), Decision on the Consequences of Non-disclosure of Exculpatory Materials covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008, paras. 90-93.

⁶¹³ *Lubanga* (ICC-01/14-01/06), Reasons for Oral Decision Lifting the Stay of Proceedings, 23 January 2009, paras. 36-46.

and inquisitorial systems,⁶¹⁴ disclosure proceedings as such are adversarial as in inquisitorial systems there is a case dossier. Also, the ICC's particular features may have made it more difficult for the former ICC Prosecutor to meet his disclosure obligations.

Second, the dominant role of the Chamber and of the Presiding Judge is a good example of the disputes between common and civil law lawyers during the Rome Conference and later when drafting the ICC RPE, which was described by observers as a 'clash of cultures' between the civil and common law.⁶¹⁵ In other words, the inquisitorial system favouring an active strong judge and the adversarial system based on the conduct of trial by parties via, in particular, cross-examination. The compromise solution reached allows the Chamber to question a witness but only before or after the Prosecution and the defence does it,⁶¹⁶ which implicitly recognises cross-examination. 'Cross-examination' and other typical terms of art for either adversarial or inquisitorial system are, however, not present, which corresponds to drafters' intention to leave it clear the mixed nature of the ICC's proceedings. As Damaška acknowledges, since the ICC framework on trial stage is less definitive as it does not impose a single pattern on fact-finding activity, judicial involvement in fact finding would likely vary according to the composition of the chamber in question.⁶¹⁷ The language adopted by the ICC Statute concerning trial proceedings 'The parties may submit evidence relevant to the case [...] The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of truth',⁶¹⁸ hence, incorporates neither a purely adversarial nor inquisitorial model but points to a mixed model.⁶¹⁹

⁶¹⁴ Orié (2002) 1483. The ECtHR considers that the disclosure of all relevant material to the defendant is a requirement of fairness. See, e.g., *Jasper v. United Kingdom*, Appl. No. 27052/95, Judgment, 16 February 2000; *Fitt v. United Kingdom*, Appl. No. 29777/96, Judgment, 16 February 2000; *Rowe and Davis v. United Kingdom*, Application no. 28901/95, Judgment, 16 February 2000.

⁶¹⁵ See Fernández de Gurmendi (2001a) 252; Claus Kreß, 'Witnesses in Proceedings before the International Criminal Court: An Analysis from a Perspective of Comparative Criminal Procedure' in Horst Fischer, Claus Kreß, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (BWV 2001) 309, 352; Peter Lewis, 'Trial Procedure' in Lee (2001), 539, 547-550. See Australian Proposal, Rule 90, PCNICC/1999/DP.1 (26 January 1999); PCNICC/2000/WGRPE/INF/1 (24 May 2000) 66; and Colombian comments in PCNICC/1999/WGRPE/DP.15 (20 July 1998) and PCNICC/1999/WGRPE/DP.30 (2 August 1999) as well as Rules 6.18 and 6.18 *bis* in PCNICC/1999/WGRPE/DP33.

⁶¹⁶ ICC RPE, rule 140 (2).

⁶¹⁷ Damaška (2009) 176.

⁶¹⁸ ICC Statute, article 69 (3).

⁶¹⁹ Kreß (2003) 612; Ambos (2003) 32.

Third, this amalgamation of the two systems originating a unique one can be both beneficial and problematic. For instance, concerning plea bargaining, the practical common law tradition advantages are adopted but the ICC is left the last word in search of the truth. However, the situation of the rules of evidence is more problematic as implementation of general principles closely linked to either the inquisitorial or adversarial system in the ICC mixed model may be difficult.

3.4. The ECCC and the STL: Adversarial, Inquisitorial and Unique/Hybrid Procedural Elements

3.4.1. Adversarial Elements

As a preliminary point, it should be mentioned that, in this thesis, references to the ECCC Internal Rules, correspond to their current version (Rev. 8),⁶²⁰ unless otherwise determined. The ECCC Internal Rules explicitly state that ‘ECCC proceedings shall be fair and adversarial’.⁶²¹ However, as shown later,⁶²² this statement is not completely accurate. Be that as it may, some adversarial features present in the ECCC are examined as follows. Concerning the role of the judges, the Co-Investigating Judges can order the provisional detention of the charged person but only after an ‘adversarial hearing’ with him/her and his/her lawyer present.⁶²³ Bearing in mind the role allocated to the Co-Investigating Judges, the ECCC Pre-Trial Chamber’s functions are more limited than those of the ICC Pre-Trial Chamber.⁶²⁴ Some of the wide appellate powers (inquisitorial feature) were reduced via an amendment to the ECCC Internal Rules and, thus, departing from the inquisitorial system,⁶²⁵ the ECCC Supreme Court Chamber can hear only appeals against judgments or interlocutory decisions on the grounds of: (1) an error on a question of law invalidating the impugned decision, or (2) an error of fact that has occasioned a miscarriage of justice.⁶²⁶ Also, such amendment put the ECCC’s appeals procedure in line with other international and hybrid criminal courts such as the ICTY, the ICTR and the SCSL.⁶²⁷

⁶²⁰ ECCC Internal Rules (Rev. 8), 3 August 2011.

⁶²¹ *Ibid.*, rule 21 (1) (a).

⁶²² See *infra* Chapter III 2.4.1.1.

⁶²³ ECCC Internal Rules, rule 63 (1) (a).

⁶²⁴ As for the ECCC pre-trial proceedings, see ECCC Internal Rules, rules 71-78.

⁶²⁵ Robert Petit and Anees Ahmed, ‘A Review of the Jurisprudence of the Khmer Rouge Tribunal’ (2010) 8 *Northwestern Journal of International Human Rights Law* 165, 171

⁶²⁶ ECCC Internal Rules, rule 104 (1).

⁶²⁷ See Petit and Ahmed (2010) 169 (footnote 49).

With regard to the STL, its procedure, as stated by the STL first President Antonio Cassese, is substantially based on the adversarial system.⁶²⁸ As for the role of the judge, there is no investigating judge proper (*juge d'instruction*). As for the accused, this can appear as witness on his/her own defence if (s)he desires so.⁶²⁹ Victims are not civil parties but they can participate in the proceedings as victim participants besides their status as witnesses.⁶³⁰ As for the rules of evidence, live testimony is the rule as examined later.⁶³¹ Each party, i.e., the Prosecutor and defence, and victims participating in the proceedings are responsible for gathering evidence in support of its own case. Even in cases when exceptionally the Pre-Trial Judge gathers evidence upon request of a party or victim participating in the proceedings and in application of certain conditions,⁶³² this evidence still has to be introduced by the parties or victim participants and, hence, they remain free from doing so. This constitutes a very important difference from evidence gathered by the inquisitorial investigating judge since evidence gathered by him/her normally becomes available at trial without initiative of the parties or victims. Parties have disclosure obligations.⁶³³ Finally, the STL RPE split the proceedings into two different stages: one to establish the guilt or innocence and the other aimed at sentencing.⁶³⁴

3.4.2. Inquisitorial Elements

Concerning the ECCC, as foreseen by the ECCC Agreement and the ECCC Law,⁶³⁵ the ECCC's procedure is conducted according to the Cambodian criminal procedure, which in turn reflects the French inquisitorial system. As remarked by the ECCC in its first judgment in *Duch*:

⁶²⁸ STL President, Rules of Procedure and Evidence. Explanatory Memorandum by the Tribunal's President, 25 November 2010, para. 4. See also STL President, Rules of Procedure and Evidence. Explanatory Memorandum by the Tribunal's President (as of 12 April 2012), para. 4.

⁶²⁹ STL RPE, rule 144 (D).

⁶³⁰ See *infra* Chapters III, IV and V.

⁶³¹ See *infra* Chapter III 2.41.1.

⁶³² See *infra* Chapter II 3.4.2.

⁶³³ See STL RPE, rules 110 *et seq.*

⁶³⁴ *Ibid.*, rule 171.

⁶³⁵ The Agreement creating the ECCC requires that its procedure shall be in accordance with Cambodian procedural law. See ECCC Agreement, article 12 (1); ECCC Law, article 33 new. See also ECCC Law, article 20 new (concerning the Co-Prosecutors), and article 23 (new) (concerning the Co-Investigating Judges).

Pursuant to the ECCC Agreement and the ECCC Law, the Chambers of the ECCC operate in accordance with Cambodian procedural law. Following its establishment, the ECCC adopted its Internal Rules. The purpose of the Internal Rules is to consolidate applicable Cambodian procedure in relation to proceedings before the ECCC. The ECCC Agreement and the ECCC Law envisage that additional rules may be adopted where existing procedures do not deal with a particular matter, in case of uncertainty regarding their interpretation or application, or where questions arise regarding their consistency with international standards. Thus, while Cambodian law governs the procedure before the Chamber, guidance is also sought from procedural rules established at the international level, where appropriate.⁶³⁶

As for the judges' role, for first time in an international/hybrid criminal court, there are two 'impartial' Co-Investigating Judges who conduct investigations, question suspects and victims, hear witnesses, and in general collect evidence.⁶³⁷ Additionally, they *inter alia* may 'order the provisional detention of a charged person after an adversarial hearing',⁶³⁸ and bring up investigation to a conclusion by issuing a closing order, indicating whether the suspect is charged and commits him/her for trial, or dismiss the case.⁶³⁹ In case the person is committed for trial, the Co-Investigating Judges hand over the case file, i.e., the dossier,⁶⁴⁰ containing all the documents collected during investigation to the Trial Chamber;⁶⁴¹ which differs from common law systems where parties present directly evidence to the Trial Chamber, and at the ECCC the parties have access to the case file.⁶⁴² The Co-Investigating Judges must 'ascertain the truth' and for that purpose 'they shall conduct their investigation

⁶³⁶ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 35. As for the reference to the use of international standards, see: ECCC Internal Rules, preamble, fifth paragraph (citing ECCC Agreement, article 12 (1) and ECCC Law, articles 20 new, 23 new and 33 new).

⁶³⁷ ECCC Law, article 23 new. The Co-Investigating Judges are responsible for collecting evidence to determine if the facts set out by the Co-Prosecutors constitute a crime under the ECCC's jurisdiction and if the charged person is to be indicted and sent to trial before the Trial Chamber.

⁶³⁸ ECCC Internal Rules, rule 63 (1) (a).

⁶³⁹ *Ibid.*, rule 67 (1).

⁶⁴⁰ The case file, dossier, as defined in the ECCC Internal Rules glossary 'refers to all the written records (*procès verbaux*) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers'.

⁶⁴¹ ECCC Internal Rules, rule 69 (2).

⁶⁴² *Ibid.*, rule 86.

impartially, whether the evidence is inculpatory or exculpatory'.⁶⁴³ In turn, the ECCC Pre-Trial Chamber in *Duch* decided on its own initiative to consider whether there had been any procedural irregularities before the Co-Investigating Judges.⁶⁴⁴ During trial, the Judges are granted powers to have a very tight control of what is meant to happen in the courtroom. Because of having received the dossier, the Trial Judges are in a situation to manage the proceedings and take substantive steps. At the courtroom, they are not 'clean slates' and can base their decisions at least partially on evaluations previously made by other subjects as contained in the dossier.⁶⁴⁵ The Presiding Judge conducts the trial proceedings and, together with the other judges, could under a provision (later deleted) of the original ECCC Internal Rules version ask the accused 'any questions which they consider to be conducive to ascertaining the truth'.⁶⁴⁶ In any case, the ECCC Trial Chamber 'may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth'.⁶⁴⁷ The Trial Chamber may also conduct its own 'additional investigation'.⁶⁴⁸ As examined later, the ECCC follows an inquisitorial order of witness examination.⁶⁴⁹ The level of the ECCC Trial Chamber's involvement in the conduct of proceedings evidences the civil law judge's role in trials.⁶⁵⁰ Based on wide appellate powers, there is a right to hear fresh evidence during appeals.⁶⁵¹ Thus, for example, the Supreme Court Chamber may itself examine evidence or discover new evidence to determine issues before it.⁶⁵²

As for the positions of the parties, despite the lack of explicit provisions, the ECCC system assumes that the accused may not be regarded as witness and, hence, his/her statement is not strictly speaking a 'testimony'.⁶⁵³ That an accused is not allowed to give sworn statements confirms the previous point. This reflects the French inquisitorial system where the accused should not be put in the

⁶⁴³ Ibid., rule 55 (5).

⁶⁴⁴ Kaing Guek Eav alias Duch (Case 001), Decision on Appeal Against the Provisional Detention Order of Kaing Guek Eav Alias 'Duch', Pre-Trial Chamber I, 3 December 2007, paras. 9-12.

⁶⁴⁵ See Guido Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers' (2008) 6 *Journal of International Criminal Justice* 129, 144.

⁶⁴⁶ ECCC Internal Rules, rule 90 (1) (Rev. 5). The cited phrased was later deleted on 17 September 2010 (Rev. 6).

⁶⁴⁷ ECCC Internal Rules, rule 87 (4).

⁶⁴⁸ Ibid., rule 93 (1).

⁶⁴⁹ See *infra* Chapter III 2.4.1.1.

⁶⁵⁰ See ECCC Internal Rules, rule 85. See also Combs (2013) 728.

⁶⁵¹ Petit and Ahmed (2010) 169.

⁶⁵² ECCC Internal Rules, rule 104 (1).

⁶⁵³ Acquaviva (2008) 147.

dilemma to, on the one hand, be obligated to tell the truth and, on the other one, choose not to speak at all during his/her own trial.⁶⁵⁴ Unlike the other international and hybrid criminal courts, the ECCC's legal framework provides no procedure for the acceptance of a plea guilty by an accused. The ECCC is the only forum, among the international and hybrid criminal courts examined in this thesis, at which victims can be civil parties.⁶⁵⁵ The Prosecutor is the party who initiates prosecution of crimes,⁶⁵⁶ conducts preliminary investigations,⁶⁵⁷ and prosecutes cases throughout investigative, pre-trial, trial, and appeals stages. As for evidence, its discovery is court-driven rather than party-driven.⁶⁵⁸ The ECCC Internal Rules are also of a liberal nature. Indeed, they only include a very reduced number of technicalities as for evidence admissibility and give the judges an important leeway when weighing the evidence probative value. Moreover, the existence of the dossier or case file, accessible by all parties (including the civil parties), corresponds to ECCC's work based on a single-case system. The dossier also makes that at the ECCC disclosure issues are not present,⁶⁵⁹ unlike the other international and hybrid criminal courts examined in this thesis. Other inquisitorial features include: participation of the defendants throughout the judicial investigation,⁶⁶⁰ and the original ECCC Internal Rules provided with wider appellate powers, including the right to hear fresh evidence at appeal.⁶⁶¹

With regard to the STL, a clear influence of inquisitorial system elements lies on article 28 (2) of its Statute which indicates the adoption of RPE by the Judges guided 'as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial'. Moreover, rule 3 of the RPE provides that, in interpreting them, the STL (in order of preference) after considering the Vienna Convention on the Law of the Treaties and international human rights standards, shall consider '(iii) the

⁶⁵⁴ *Ibid.*, *Loc. cit.*

⁶⁵⁵ With regard to the victims' status at the ECCC, see *infra* Chapters III, IV and V.

⁶⁵⁶ ECCC Internal Rules, rule 49.

⁶⁵⁷ *Ibid.*, rule 50.

⁶⁵⁸ E.g., ECCC Internal Rules, rules 84, 87, 90 and 91.

⁶⁵⁹ McGonigle Leyh (2011) 205.

⁶⁶⁰ Nuon Chea et al. (Case 002), Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, Pre-Trial Chamber, 22 October 2008, paras. 25-27.

⁶⁶¹ See *Ibid.*, *Loc. cit.*; ECCC Internal Rules, rule 104 (original text). The broad appeals scope, however, was later reduced as previously referred to. See *supra* Chapter II 3.4.1.

general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure’.

As for the role of the judge, although there is no official *juge d’instruction* (investigating judge), in conceiving the powers of the Pre-Trial Judge, the STL RPE drafters largely drew upon the Lebanese experience and the Lebanese Code of Criminal Procedure, i.e., from an inquisitorial system, ‘short of assisting him the powers of a *juge d’instruction*’.⁶⁶² The STL RPE have broadened the Pre-Trial Judge’s power so that (s)he can: i) expedite the pre-trial proceedings to the maximum extent feasible; ii) organize the evidentiary material in order to facilitate the task of the Trial Chamber; and iii) assist the parties to collect evidence.⁶⁶³ Concerning the last objective, the STL is vested to exceptionally gather evidence: i) at the request of a party or a victim participating in the proceedings when they demonstrate not to be in a position to collect evidence and the Pre-Trial Judge considers doing so in the interests of justice;⁶⁶⁴ ii) when a party or victim participating in the proceedings is unable to collect ‘an important piece of evidence’ and the Pre-Trial Judge considers it as indispensable for the fair administration of justice, the equality of arms and the search for truth.⁶⁶⁵ Additionally, the Pre-Trial Judge is vested with, *inter alia*, the following powers: i) evaluate the charges brought by the Prosecutor in the indictment and, if necessary, request the Prosecutor to reduce or reclassify such charge;⁶⁶⁶ ii) facilitate the communication between parties;⁶⁶⁷ iii) rule on granting victims the status of victims participating in the proceedings;⁶⁶⁸ iv) issue summonses, warrants and other orders at the request of either party;⁶⁶⁹ v) draw up a complete file for the Trial Chamber that sets out the main differences between the parties on points of law and fact, and indicates Pre-Trial Judge’s view on the main points of law and fact in the case;⁶⁷⁰ and vi) rule on the disclosure of information provided on a confidential basis.⁶⁷¹ Trial Chambers can exercise control over the mode and order of witness interrogation upon a party’s objection.⁶⁷² As for the role of the accused, this is granted a role found in an

⁶⁶² STL President (2010), para 12; STL President (2012), para. 12.

⁶⁶³ STL President (2010), para 12; STL President (2012), para. 12.

⁶⁶⁴ STL RPE, rule 92 (A).

⁶⁶⁵ *Ibid.*, rule 92 (C).

⁶⁶⁶ *Ibid.*, rule 68.

⁶⁶⁷ *Ibid.*, rule 89 (A).

⁶⁶⁸ *Ibid.*, rule 86.

⁶⁶⁹ *Ibid.*, rule 88 (A).

⁶⁷⁰ *Ibid.*, rule 95.

⁶⁷¹ *Ibid.*, rule 118.

⁶⁷² *Ibid.*, rule 150 (G).

inquisitorial system inasmuch as the accused can answer questions of the judges, parties and victim participants, without having acquired the formal status of a witness on his/her own behalf.⁶⁷³ With regard to evidence, as seen later,⁶⁷⁴ the STL can exceptionally receive written evidence. Finally, the STL Trial Chamber can commence proceedings *in absentia* after ‘all reasonable steps’ have been taken to secure the appearance of an accused before the Tribunal,⁶⁷⁵ as already applied by the STL.⁶⁷⁶

3.4.3. Unique or Hybrid Outcome

Notwithstanding the high level of inquisitorial elements in the ECCC’s procedural structure, which is arguably the most inquisitorial-oriented criminal judicial forum at the international level, the ECCC Pre-Trial Chamber when determining the validity of the ECCC Internal Rules Chamber noted that the focus of the Tribunal ‘differs substantially enough from the normal operations of the Cambodian criminal courts’ for it to warrant a ‘self contained regime of procedural law [suited to its] unique circumstances’.⁶⁷⁷ It is argued here that the ECCC has a mixed nature, arguably inquisitorial-oriented. This is indeed reflected in its legal instruments when in addition to the Cambodian (inquisitorial) procedural law, guidance from international procedural rules (of a unique or hybrid nature), where appropriate, is explicitly mentioned as already seen. The important due process safeguards contained in the ECCC legal framework,⁶⁷⁸ and applicable to the ECCC non-adversarial procedures, arguably

⁶⁷³ STL Statute, article 16 (5).

⁶⁷⁴ See *infra* Chapter III 2.4.1.2.

⁶⁷⁵ STL Statute, article 22; STL RPE, rule 106 (A).

⁶⁷⁶ Ayyash et al. (STL-11-01/I/TC), Decision to Hold Trial *In Absentia*, Trial Chamber, 1 February 2012, para. 111; Merhi (STL-13-04/1/TC), Decision to Hold Trial *In Absentia*, Trial Chamber, 20 December 2013, para. 111.

⁶⁷⁷ Nuon Chea et al. (Case 002), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Pre-Trial Chamber, 26 August 2008, para. 14.

⁶⁷⁸ In case when (1) Cambodian law does not deal with a particular matter, (2) there is uncertainty in Cambodian law, and (3) Cambodian law is inconsistent with international standards, the ECCC Constitutive Agreement provides that ‘guidance may be sought [from] procedural rules established at the international level’. ECCC Constitutive Agreement, article 12 (1).

Accordingly, the applicable ECCC procedural law must be consistent with ‘international standards of justice, fairness and due process of law’. ECCC Constitutive Agreement, article 12 (2). Moreover, the ECCC is bound by the fair trial rights under articles 14 and 15 of the ICCPR, as explicitly stated in the ECCC Law. See ECCC Law, article 33 new.

Nevertheless, the ECCC has not addressed all concerns on due process guarantees expressed in doctrine. See Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2007) 326; Acquaviva (2008) 149.

evidence that international criminal justice proceedings do not necessarily have to be predominantly adversarial. Additionally, ECCC's unique structural features include: i) a majority of national Cambodian judges,⁶⁷⁹ who also serve as Presidents of the Chambers,⁶⁸⁰ ii) it is the only court, among the international and hybrid criminal courts, with dual Co-Prosecutors and dual Co-Investigating Judges: one international and one national;⁶⁸¹ and iii) the voting system requiring supermajority since at least one international judge must vote with the simple majority,⁶⁸² which seeks to balance the majority of Cambodian judges to avoid political interference.⁶⁸³

With regard to the STL procedure, when crafted it clearly incorporated both adversarial and inquisitorial features,⁶⁸⁴ leading to an innovative procedure,⁶⁸⁵ which has been described as more inquisitorial oriented.⁶⁸⁶ As previously cited, article 28 (2) of the STL Statute and rule 3 of the STL RPE indeed refer to international criminal procedure standards and general principles which, as discussed, are of a unique or hybrid nature. Four additional examples are given herein to illustrate that mixture or uniqueness. First, the Trial Chamber is provided by the Pre-Trial Judge with a complete file so that the Trial Chamber Judges can be familiar with the evidence collected against and in favor of the defendant as well as with the legal and factual problems that arise.⁶⁸⁷ Nevertheless, the STL Pre-Trial Judge may be incapable of compiling an

⁶⁷⁹ The ECCC Chambers' composition (national/total judges) is as follows: 3/5 (Pre-Trial Chamber), 3/5 (Trial Chamber) and 4/7 (Supreme Court that hears appeals and serves as a final instance chamber). See ECCC Constitutive Agreement, article 3; and ECCC Law, articles 9 new and 11 new.

⁶⁸⁰ ECCC Law, article 9 new.

⁶⁸¹ ECCC Constitutive Agreement, articles 5 (Investigating Judges) and 6 (Prosecutors); Law on the Establishment of the ECCC, articles 16 (Co-Prosecutors) and 23 (Co-Investigators).

⁶⁸² ECCC Constitutive Agreement, article 4; Law on the Establishment of the ECCC, article 14 new.

⁶⁸³ Additionally, there is not a Registrar as the ECCC is co-administered by a Cambodian Director of the Office of Administration and a UN appointed Deputy Director. See ECCC Constitutive Agreement, article 8; Law on the Establishment of the ECCC, articles 30 and 31 new. This reflects the national predominance. There is no judge with the status of Chambers' President either. There is, hence, no officer in a position to exert leadership at the court to handle political interference.

⁶⁸⁴ STL President (2010), paras. 2-4; STL President (2012), paras. 2-4.

⁶⁸⁵ See Cécile Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1107, 1116, 1124.

⁶⁸⁶ Salvatore Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy' in Sluiter et al. (2013) 44, 52-53; Fausto Pocar and Linda Carter, 'The Challenge of Shaping Procedures in International Criminal Courts' in Linda Carter and Fausto Pocar (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013) 1, 30.

⁶⁸⁷ STL RPE, rule 95.

exhaustive file. In that situation, the Trial Chamber, hence, lacks an exhaustive file of the case and, in this scenario, the STL RPE envisage a return to the adversarial mode of conduct of proceedings.⁶⁸⁸ However, it is still left open the possibility of applying the inquisitorial conduct of proceedings. Second, the STL Pre-Trial Judge possesses the unique ability to submit to the Appeals Chamber interlocutory questions on legal issues that arise during the confirmation of the indictment.⁶⁸⁹ This procedure aims at both ensuring consistency in applicable law through the proceedings, and speeding up pre-trial and trial deliberations,⁶⁹⁰ as already done.⁶⁹¹ Third, as for statements from the accused, the civil law approach is essentially followed.⁶⁹² The accused, however, unlike most inquisitorial jurisdictions must be advised of his/her right to remain silent before judges' questioning and the STL RPE state that no adverse inference may be drawn from it.⁶⁹³ Fourth, the establishment of an independent and autonomous Defence Office is another new feature at the STL,⁶⁹⁴ and is aimed at assisting to redress the imbalance observed in adversarial systems between the Prosecution, normally well-equipped, and the defence, normally at disadvantage.

4. Chapter Conclusions

1. Victims' status in criminal proceedings has been traditionally shaped by retributive and utilitarian paradigms, according to which, they do not play a central role but only a secondary role as witnesses. Perception of victims' enhanced status as detrimental to the accused's right to a fair trial (retributive paradigm) and a focus on the society/offender rather than on the individualized victim (retributive, utilitarian paradigms) led to a victims' weak or limited status in criminal justice. An answer to this situation came from the restorative justice paradigm alongside the victims' rights movement. Restorative justice recognizes victims a central role in any justice system and seeks to redress their harm suffered as crimes are seen as committed against individuals and their communities. Hence, in order to enhance victims' status, restorative justice paradigm elements must be progressively and increasingly incorporated into

⁶⁸⁸ Ibid., rule 145 (B). See also STL President (2010), para 29; STL President (2012), para 29.

⁶⁸⁹ STL RPE, rule 68 (G).

⁶⁹⁰ STL President (2010) para. 11; STL President (2012) para. 11.

⁶⁹¹ Ayyash et al. (STL-11-01/I/TC), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011.

⁶⁹² An accused 'may make statements to the Trial Chamber at any stage of the proceedings, provided such statements are relevant to the case at any issue'. STL RPE, rule 144 (A).

⁶⁹³ Ibid., rule 144 (B).

⁶⁹⁴ STL Statute, article 13.

criminal justice systems still driven by retributive, utilitarian paradigms. Such incorporation is also justified, indeed required, by powerful philosophical, ethical arguments. The combination of those paradigms should be done as they are not diametrically opposed and a radical reform of criminal justice systems is unfeasible. This combination is more convenient for victims' status as the restorative (extra-judicial) mechanisms alone are not necessarily and/or fully satisfactory for victims.

2. International law developments have also contributed to enhance victims' status in criminal proceedings. International (UN Victims Declaration and the UN Basic Principles and Guidelines) and European instruments (Recommendation (85) 11, the EU Framework Decision on Victims and the EU Directive on Victims) contain similar victims' definitions, i.e., persons who individually or collectively suffer physical or mental harm out of serious human rights, international humanitarian law violations/crimes, including also family members. They also present similar catalogue of victims' (procedural) rights in criminal proceedings, including the rights to: information, protection and respect, participation, and reparations. The HRC, the CAT, the ECtHR and the IACtHR in applying and/or interpreting their instruments in serious human rights violations cases have put into practice and enhanced victims' rights to reparations, an effective remedy and protection. Moreover, the ECtHR and the IACtHR in applying and/or interpreting their instruments in serious human rights violations cases have recognized victims' certain participatory rights in criminal justice.

3. Whereas the common law/adversarial system is characterized by a passive judge, confrontational/dominant parties, and strict rules of evidence, the civil law/inquisitorial system is characterized by an active judge, not so dominant parties and more relaxed rules of evidence. These features impact on victims' status as in the adversarial system victims' status is narrowed down to be witness and/or a limited participation as private prosecutors. However, there is a trend consisting in empowering victims via impact/personal statements and benefiting them with compensation orders. In contrast, victims in the inquisitorial systems may be not only witnesses but also civil parties, granting them with procedural rights to, for example, call witnesses and claim reparations. Victims can also be private prosecutors although this is limited to minor offences. Victims' status is stronger in an inquisitorial system rather than in an adversarial one as in the former victims can voice their own interests and exercise procedural rights. Even when participating as witnesses, the re-victimization risk is lesser than in the adversarial system as this is based on orality and cross-examination.

4. Concerning victims' status in any national criminal system, one or more models of victims' role apply. Victims as witnesses and complainants are always present. Victim as a civil party is only available in inquisitorial system. Although victims can initiate a prosecution, participate as a party in the proceedings and claim civil damages, their status and participation are linked to and limited to the criminal proceedings outcome. Victims' participation as private prosecutor is present in common and civil law jurisdictions but limited to petty crimes and carries a heavy burden on the victims. Victims as secondary prosecutors suffer the same shortcomings. The model of victims as auxiliary prosecutors, mainly in civil law systems, is more balanced on those points. In common law jurisdictions, judges can as a penalty order compensation for victims, which is *ex officio* enforceable unlike civil damages for civil parties. Victims can mainly in common law jurisdictions participate via impact statements heard for sentencing purposes. The six presented models of victims' role underlie and can be accommodated within the three dimensions of victims' status proposed in this thesis: i) victims as witnesses (victim-witnesses); ii) victims as victim participants and/or civil parties (civil party, and, in a broad sense of 'participation': private/secondary/auxiliary prosecutor, complainant, and impact statement provider); and iii) victims as reparations claimants (civil party and, although not reparations claimants, concerning the outcome of reparations: compensation order beneficiary).

5. In transitional scenarios, i.e., contexts of massive commission of international crimes, international and hybrid criminal courts mainly driven by retributive/deterrent goals are limited by impossibilities to set proportional punishments and for all the perpetrators, and to determine whether further victimization was prevented. On the other hand, restorative mechanisms bring victims to the centre stage. Thus, the focus of TRCs and reparations programmes on victims do not lead to re-victimization, and the latter also provide tangible outcomes for victims. However, such mechanisms are also limited as victims do not necessarily regard truth-seeking as enough for their justice needs, and reparations may be disproportionate to the crimes committed. Additionally, victims' thirst for justice suggests that criminal trials cannot be excluded from transitional scenarios. The holistic transitional justice approach; strong restorative justice elements at the ICC, the ECCC complementing their retributive/deterrent mandates; international/hybrid criminal courts and TRCs as complementary forums for victims; and victims' right to truth present in both restorative mechanisms and those courts, hence, suggest that combining retributive/deterrent or utilitarian and restorative paradigms is the best

alternative for victims. Therefore, to better shape and enhance victims' status, international, hybrid and national criminal courts should incorporate and adapt some restorative-oriented justice features and goals to their retributive/deterrent goals and, thus, provide victims with participatory rights and the possibility to claim reparations.

6. When setting up international and hybrid criminal courts factors such as the access of victims, and their impact on victims are taken into account. Although those courts have contributed to the fight against impunity and at least indirectly to the re-vindication of the most serious international crimes victims, diverse nature challenges have ended up in some disappointing outcomes. However, the trend is that more recent international and hybrid criminal courts (ICC, ECCC and STL) have built on the experiences of and learnt from mistakes made by the previous ones (ICTY, ICTR and SCSL). Also, the ICTY, the ICTR and the SCSL have progressively introduced corrective measures to better implement their mandates.

7. International criminal proceedings are unique or mixed. Each court's procedural law differs not only from any national system but also from each other although there are degrees of similarities among them. Whereas one end of the scale is proceedings at the ICTY, the ICTR and the SCSL that still exhibit the highest degree of adversarial features, the other end is the ECCC proceedings with the strongest presence of inquisitorial elements. Among the examined international and hybrid criminal courts, the ECCC is arguably the only one fundamentally led by inquisitorial proceedings due to the Cambodian procedural law as complemented by international procedural rules (of a unique or hybrid nature). The ICC and the STL proceedings can be placed in the middle of the scale as they are arguably still adversarial oriented although the ICC proceedings present important and numerous inquisitorial features and the STL proceedings are partially based on the Lebanese (inquisitorial) system. Be that as it may, proceedings at international and hybrid criminal courts have been moving away from a predominantly-adversarial model to another one which has increasingly incorporated inquisitorial features.

8. As for what features and/or systems as applied at the international level may be more meaningful for victims' status, courts presenting a higher level of inquisitorial features (ECCC, STL and ICC) are in principle better judicial platforms for victims. First, the judge's more active role at the ECCC, the ICC and the STL seems to provide better guarantees for victims as the judges can intervene *proprio motu* to, for example, produce evidence, call their own witnesses, question parties' witnesses, control and intervene in witness

examination (ECCC and ICC in particular), and lead (ECCC) or supervise (ICC, STL) investigations. Such interventions are in many cases adopted in pursuance of ‘interests of justice, in particular the interests of the victims’ or to ‘ascertain the truth’. The judge’s role at the ICTY, the ICTR and the SCSL has indeed been strengthened along those lines. Judges assuming an active role may step in to guarantee principles such as justice, truth and victims’ interests so that the proceedings are not a mere adversarial two-party battle, which would exclude or undermine victims. Second, the same goes true as for the role assigned to the Prosecutor, who is regarded at international and hybrid criminal courts not only as a mere party but also as an organ of justice. This corresponds to an inquisitorial system and has increasingly percolated the originally adversarial vision of him/her at those courts. Third, rules of evidence have incorporated more victim-friendly measures, mainly from the inquisitorial system. The above-mentioned points in general set up a more propitious frame for victims’ status to fit in.

Chapter III. Victims' Status as Witnesses

1. Introduction

A victim participating as a witness qualifies as a fact witness, i.e., a victim who testifies about the events that (s)he has witnessed and, hence, provides evidence helping to establish the 'crime base' since his/her testimony is used to prove the specific crimes.⁶⁹⁵ Thus, a victim who is a witness is an ordinary witness, different from expert witnesses, and testify about facts about which (s)he possesses personal knowledge.⁶⁹⁶ His/her testimony shall then be connected through other evidence to political or military leaders, if the case is based on modes of superior authority liability.⁶⁹⁷ As Schabas points out, even if victims do not participate as civil parties or victim participants, 'their presence is virtually indispensable as witnesses'.⁶⁹⁸ The act of testifying may have a therapeutic effect on victims as they may 'find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault'.⁶⁹⁹ The victims' experience as witnesses is validated by this truth-telling process, which may help them heal.⁷⁰⁰

Victims' status as witnesses is present at all the international and hybrid criminal courts considered in this thesis. Indeed, this is also applicable to the IMT and IMTFE (not studied in this thesis) although victims' intervention as witnesses played a relatively small role at those tribunals. As for the IMT, an important reason for it was that the Allies already had in their possession detailed and voluminous self-incriminating evidence compiled by the Nazis themselves.⁷⁰¹ This evidence, alongside defendants' confessions and information

⁶⁹⁵ David Tolbert and Frederick Swinnen, 'The Protection of, and Assistance to, Witnesses at the ICTY' in Hiram Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May* (Martinus Nijhoff Publishers 2006) 193, 196.

⁶⁹⁶ Schabas (2006) 471.

⁶⁹⁷ Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003) 633.

⁶⁹⁸ Schabas (2011) 358.

⁶⁹⁹ See Jamie O'Connell, 'Gambling With the Psyche: Does Prosecuting Human Rights Violators Console their Victims?' (2005) 46 *Harvard International Law Journal* 295, 330 (quoting a telephone interview with Mary Fabri, clinical psychologist).

⁷⁰⁰ See Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience' in Dominic McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 315, 316 (quoting Carlos Nino).

⁷⁰¹ Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal' in Herbert Reginbogin and Christoph Johannes Safferling (eds.), *The Nuremberg Trials:*

given by other prosecution witnesses, made survivor testimony be largely unnecessary to achieve convictions.⁷⁰² Even though the IMTFE unlike the IMT relied on witness testimony since most documentary evidence was destroyed,⁷⁰³ the small number of prosecution victims,⁷⁰⁴ and the general legal framework and judgment outcome can be considered as not having paid due attention to the victims, in particular sexual violence victims.⁷⁰⁵

In contrast to it, victims' status as witnesses at the international and hybrid criminal courts considered in this thesis has been quite important and active as detailed later. What should be mentioned here is that to facilitate the intervention of victims and witnesses, international and hybrid criminal courts have special units or sections which are primarily responsible for assisting victims and witnesses when they testify.⁷⁰⁶ These organs are the Victims and Witnesses Section (VWS) at the ICTY, the ICTR and the SCSL;⁷⁰⁷ the Victims and Witness Unit (VWU) at the ICC and the STL,⁷⁰⁸ and the Witness and Expert Support Unit (WESU),⁷⁰⁹ and the Victims Support Section (VSS) both at the ECCC.⁷¹⁰ Thus, for example, the ICC VWU as for victims and witness has, *inter alia*, the following functions: i) providing them with adequate protective and security measures and formulating long and short-term plans for their protection; ii) recommending to the ICC organs the adoption of protection measures and also advising relevant States on such measures; and iii) assisting them in obtaining medical, psychological and other appropriate assistance.⁷¹¹ With regard to witnesses, the ICC VWU has the following additional functions:

International Criminal Law since 1945 (K.G. Saur 2006) 86, 90. For further reasons see also *Ibid.*, 91.

⁷⁰² *Ibid.*, 91. There were only thirty-three Prosecution-witnesses before the IMT and only fourteen of them were women victims (three of them were Jewish and two women). See Luke Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War' (2012) 12 *International Criminal Law Review* 245, 252.

⁷⁰³ See *Ibid.*, 265-266.

⁷⁰⁴ Out of the 419 witnesses that orally testified at the IMTFE, only 102 were Prosecution witnesses. See Philip Piccagallo, *The Japanese on Trial* (University of Texas Press 1979) 18.

⁷⁰⁵ See IMTFE, Vol. XX, pp. 49613-49620, 49632 and 49640 (referred to by Moffett (2012) 263).

⁷⁰⁶ The Prosecution holds a more general mandate in relation to protection matters in, for example, at the ICC under articles 54 (3) (f) and 68 (1) of its Statute.

⁷⁰⁷ ICTY RPE, rule 34; ICTR RPE, rule 34; SCSL RPE, rule 34. In the case of the ICTR, the exact name is Victims and Witnesses Support Unit.

⁷⁰⁸ ICC Statute, article 43 (6); ICC RPE, rules 16-19; STL RPE, rule 50. At the STL, the Victims' Participation Unit also has to be considered. See STL RPE, rule 51.

⁷⁰⁹ Referred to in ECCC Internal Rules, rule 29 (3).

⁷¹⁰ ECCC Internal Rules, rule 12 *bis*.

⁷¹¹ ICC RPE, rule 17 (2) (a).

i) advising them where to obtain legal advice to protect their rights, especially related to their testimony; ii) assisting them when they are called to testify at the ICC; and iii) adopting gender-sensitive measures to facilitate sexual violence victims' testimony during all procedural stages.⁷¹² The ICC VWU has to give due regard to the particular needs of children, elderly persons and persons with disabilities when performing its functions.⁷¹³ Generally speaking, the above-mentioned organs of the other international and hybrid criminal courts have similar functions than the ICC VWU.⁷¹⁴

As for the chapter structure, this consists of five subchapters (including this introduction and chapter conclusions). In the second subchapter, the legal framework of victims as witnesses is discussed. This includes a discussion of the most relevant points of the general legal regime applicable to victims when giving their testimonies at international and hybrid criminal courts. Dual status of victims as victim participants and witnesses is given special attention. The third subchapter examines the protective measures granted to victim witnesses. Considering that victims' status as witnesses is essentially of a protective nature, such a detailed analysis is justified. As noticed throughout this chapter, these measures are also applicable to victims who intervene as victim participants or civil parties. The fourth subchapter deals with anonymity of witnesses and victims, i.e., withholding their identity from the accused, which constitutes a controversial issue especially during trial. Each of the three subchapters begins with a general presentation of the three national systems considered, followed by an extensive analysis of the situation at international and hybrid criminal courts, and ends with comparative conclusions among these courts with some references to the national systems examined. In each subchapter, the ICTY, the ICTR and the SCSL are examined under the same section as their RPE, in most cases, are the same, which is also the case for the ICTY and the ICTR Statutes and to a lesser extent the SCSL. The ICC is examined alone due to its importance and *sui generis* procedural regime. The ECCC and the STL are grouped together under the same sections, due to their nature as hybrid criminal courts, but each one has independent subsections. The chapter ends with chapter conclusions.

Lastly, but equally important, considering the almost intrinsic tension between the exercise of the dimension of victims' status as witnesses and the

⁷¹² Ibid., rule 17 (2) (b).

⁷¹³ Ibid., rule 17 (3). It should be mentioned that the VWU has established the ICC protection program. Participation in this program must be assessed based on a referral from the Prosecution, defence or victims' legal representatives. See ICC Registry Regulations, regulations 80 and 96.

⁷¹⁴ See ICTY RPE, rule 34; ICTR RPE, rule 34; SCSL RPE, rule 34; ECCC Internal Rules, rules 29 (3) and 12; and STL RPE, rule 51.

rights of the accused, it is important to bear in mind that the instruments of the international and hybrid criminal courts provide for a catalogue of the rights of the accused. Thus, for example, article 67 (Rights of the accused) of the ICC Statute includes a complete illustrative list of the rights of the accused.⁷¹⁵ This article resembles article 14 of the ICCPR,⁷¹⁶ other human rights instruments such as the ECHR and the ACHR,⁷¹⁷ as well as other international and hybrid criminal

⁷¹⁵ '1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide'.

For a detailed analysis of this article see William Schabas, 'Article 67 – Rights of the Accused' in Triffterer (2008a) 1247. See also ICC Statute, articles 55 (Rights of persons during an investigation) and 66 (Presumption of Innocence).

⁷¹⁶ For a detailed analysis of article 14 of the ICCPR see HRC, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', UN Doc. CCPR/C/GC/32 (2007). See also Sarah, Joseph, Jenny Schultz, and Melisa Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (2nd edn., Oxford University Press 2012) 388-461.

⁷¹⁷ ECHR, article 6 (Right to a fair trial); ACHR, articles 8 (Right to a fair trial) and 25 (Right to Judicial Protection). For a detailed analysis of the ECtHR's case law on article 6 of the ECHR see

courts instruments.⁷¹⁸ Additionally, within the concept of the right to a fair trial, international jurisprudence has construed the notion of ‘equality of arms’.⁷¹⁹ The general references under this paragraph are also applicable to the analysis conducted in the following chapters, i.e., victims’ status as victim participants/civil parties and, where pertinent, victims’ status as reparations claimants.

2. Legal Framework of the Victims’ Status as Witnesses

This section discusses the general legal framework of the victims’ status as a witness. It is first presented some important issues of witness standing in the English, American and French systems. A deep discussion of the standing of the victim as a witness at the international and hybrid criminal courts follows. Attention is, *inter alia*, given to the limitations and problems of the victims’ status as witnesses, oral/written witness testimony, order and manner of cross-examination/questioning, witness credibility issues, orality in adversarial proceedings, child witnesses, proofing and familiarization of witnesses. In particular and where applicable, dual status as victim participant-victim witness at the international level is analyzed in detail. As for judges’ role relating to evidence and witnesses, it is herein mainly referred to the previous chapter discussion.

Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2006 Intersentia) 511-650. For a detailed analysis of the IACtHR’s case law on the rights to a fair trial and judicial protection see Salmón Gárate and Blanco (2012); and Burgorgue-Larsen and Úbeda (2011) 641-691.

⁷¹⁸ ICTY Statute, article 21; ICTR Statute, article 20; SCSL Statute, article 17; ECCC Law on the Establishment of the Extraordinary Chambers, article 35 new; STL Statute, article 16. See also Yvonne McDermott, ‘General Duty to Ensure the Right to a Fair and Expeditious Trial’ in Göran Sluiter et al. (2013a) 770.

⁷¹⁹ E.g., the ICTY Appeals Chamber has understood the principle of equality of arms as ‘being only a feature of the wider concept of a fair trial’. See Kordić (IT-95-14/2-A, Decision on the Application by Mario Cerkez for Extension of Time to File his Respondent’s Brief, 11 September 2001, para. 5. In turn, ICC Pre-Trial Chamber II has considered that ‘fairness is closely linked to the concept of “equality of arms”, or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding in its favour’. Situation in Uganda (ICC-02/04-01/05-20), Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Articles 58, Pre-Trial Chamber II, 19 August 2005, para. 30.

2.1. National Systems

2.1.1. English Adversarial System

In England and Wales, victims have no *locus standi* as party to criminal proceedings.⁷²⁰ Victim's status has been mainly limited to be a witness,⁷²¹ i.e., provider of factual information relating to the circumstances of the crime. Thus, victims contribute towards the determination of guilt or innocence and, normally, are called by the prosecutor. Unlike the defendant, who can choose whether or not to 'take the stand', i.e., to testify under oath, the victim has no such choice.⁷²² If the victim is called by the prosecution to testify, (s)he must do it.⁷²³ Victim's status as mainly witness but not party is imbedded in the English system. Thus, for example, upon United Kingdom's insistence, articles of the EU Framework Decision on Victims dealing with safeguards for communications, legal assistance and reimbursement of expenses were restricted to 'the victims having the status of witnesses or parties'.⁷²⁴ The United Kingdom insisted on this phrasing since '*partie civile*' is unknown in common law countries and the need for substantial legislation changes would be reduced.⁷²⁵ In any case, the ECJ has determined that a national court must interpret domestic legislation 'to attain the result' pursued by the decision, i.e., victims shall have a real and appropriate role in criminal proceedings.⁷²⁶ In England and Wales, the Domestic Violence, Crime and Victims Act 2004 sought to implement the EU Framework Decision on Victims via a statutory Code of Practice.⁷²⁷

Victims have found the experience of testifying unpleasant. Such dissatisfaction is to a large extent due to two adversarial features. First, cross-examination of the victim witness as the examining party seeks to undermine the testimony of the witness either by contesting the facts, i.e., cross-examination 'to the issue', or by casting doubt on the credibility of the witness, i.e., cross-examination 'to credit'.⁷²⁸ This situation is worsened by the fact that judges in principle intervene as little as possible during cross-examination. It should be

⁷²⁰ See Henham and Mannozi (2003) 280.

⁷²¹ See, e.g., Anthony Bottoms, 'The Duty to Understand: What Consequences for Victim Participation' in Bottoms and Roberts (2010) 17, 28.

⁷²² See Brienen and Hoegen (2000) 259.

⁷²³ *Ibid.*, *Loc. cit.*

⁷²⁴ See EU Framework Decision on Victims, articles 5-7.

⁷²⁵ See Marc Groenhuijsen and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 43, 46.

⁷²⁶ *Criminal Proceedings against Pupino* [2005] E.C.R. I-5285 ECJ. (16 June 2005).

⁷²⁷ Home Office, *Code of Practice for Victims of Crime* (2005).

⁷²⁸ Brienen and Hogen (2000) 259.

advisable that judges set some restrictions to the manipulation of witnesses via limits to the use of suggestive questioning.⁷²⁹ In theory, judges may call witnesses on their own motion,⁷³⁰ although this power has been advised to be used infrequently.⁷³¹ Judges can also play a role in encouraging parties to produce their own witnesses or other evidence items even though there are conflicting authorities as for whether a judge may force either party to call a witness.⁷³²

Be that as it may, there are few limits to adversarial examination.⁷³³ Moreover, in application of the general rule against hearsay (subject to exceptions),⁷³⁴ a victim testifying cannot mention facts relating to him/her by a third party, which makes it difficult for victim-witness to provide evidence coherently.⁷³⁵ Because of cross-examination, witnesses, including victims, are denied the opportunity to tell their own story on their own words. Indeed, the goal is to manipulate a witness to guarantee victory for the respective party. Thus, the (English and Welsh) adversarial system ‘turns witnesses into weapons to be used against the other side’.⁷³⁶ This is ironic as victim witnesses are asked to swear an oath ‘to tell the truth, the whole truth, and nothing but the truth’, and makes the historical truth (as experienced by the victim) different from the judicial truth (victim witness). Second, orality also contributes to victims’ dissatisfaction since victims as witnesses have to testify live, in open court and ‘in the formal and daunting surroundings of a criminal courtroom, often in front of the alleged perpetrator of the offence’.⁷³⁷ Those excesses have only been regulated to a limited extent by the Youth Justice and Criminal Evidence Act (YJCEA).⁷³⁸ However, these efforts have been qualified as hapless.⁷³⁹ Be that as it may, the

⁷²⁹ Doak (2008) 199.

⁷³⁰ R. v. Wallwork (1958) 42 Cr App R 153.

⁷³¹ R Auld, Review of the Criminal Courts of England and Wales (Cmnd 9376 (HMSO), [11.36]; R v Roberts (1984) 80 Cr App R 89.

⁷³² To see the contrast see R. v. Oliva [1965] 1 WLR 1028 *vis-à-vis* R. v. Sterk [1972] Crim LR 391.

⁷³³ Doak (2008) 199.

⁷³⁴ Criminal Justice Act 2003, section 114. The Criminal Justice Act sets five conditions under which a hearsay statement may be admissible in evidence. See Criminal Justice Act 2003, section 116 (2). As for case law, see R. v. Sellick [2005] EWCA Crim 651, [50], [53]; R v. Xhabri [2005] EWCA Crim 3135, [2006] 1 All E.R. 776 1. As for case law of the UK Supreme Court, see R v Horncastle & Others [2009] UKSC 14 (examining the compatibility between hearsay law and article 6 of the ECHR).

⁷³⁵ Spencer (2002) 194.

⁷³⁶ William Pizzi, *Trials Without Truth* (New York University Press 1999) 197.

⁷³⁷ Doak (2008) 250.

⁷³⁸ *Ibid.*, *Loc. cit.*

⁷³⁹ See Diane Birch (2000) ‘A Better Deal for Vulnerable Witnesses?’ (2000) 20 *Criminal Law Review* 223-249.

Home Office Witness Charter sets the standards of service by the police and additionally victim-witnesses benefit from the rights set out in the Code of Practice for Victims of Crime although the latter instrument unlike the former is not statutory and, hence, not set out in law.⁷⁴⁰

A witness's previous statement is admissible as evidence of any matter stated of which oral evidence by him/her would be admissible provided that certain conditions are met, and that to the best of his/her belief it states the truth.⁷⁴¹ Minors under 17 years, mentally impaired persons or those suffering from a mental disorder can be witnesses and are eligible for assistance.⁷⁴² A witness may not be sworn unless: i) (s)he has attained 14 years; and ii) (s)he has a sufficient appreciation of the solemnity of the occasion and of the responsibility to tell the truth involved in taking the oath.⁷⁴³ Corroboration of a child's testimony to secure conviction is no longer needed.⁷⁴⁴ Deposition of unsworn evidence may be taken as if that evidence had been given an oath.⁷⁴⁵ Every person, including witnesses, has a right not to incriminate themselves under common law, English legislation,⁷⁴⁶ and under the fair trial provisions of article 6 of the ECHR as interpreted by the ECtHR in *Saunders v. United Kingdom*.⁷⁴⁷ Communications made as part of the legal professional service are

⁷⁴⁰ See Crown Prosecution Service (CPS), Implementing and complying with the Witness Charter –Operational Guidance for CPS Staff and Managers. Available at: http://www.cps.gov.uk/legal/v_to_z/witness_charter_cps_guidance/ (last visit on 12 August 2012). Code of Practice for Victims of Crime (Home Office 2006).

⁷⁴¹ Criminal Justice Act 2003, section 120 (4).

⁷⁴² YJCEA, section 16 (1) and (2).

⁷⁴³ Ibid., section 55 (2). See also Criminal Justice Act (1988), section 33.

⁷⁴⁴ Criminal Justice Act (1988), section 34. As for case law see, e.g., *D.P.P v. M*, [1998] Q.B. 913, [1997] 2 All E.R. 749 at 753, per Lord Justice Phillips. ('The words of [the new provision] are mandatory. Care must always be taken where a question is raised as to whether a young child is capable of giving intelligible testimony. But where the child is so capable the court does not enjoy some wider discretion to refuse to permit the child's evidence to be given [...] A child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible'.).

⁷⁴⁵ YJCEA, section 56 (3).

⁷⁴⁶ Health and Safety at Work etc. Act (1974), section 20 (7); YJCEA, section 59 and schedule 3.

⁷⁴⁷ '[...] although not specifically mentioned in Article 6 of the Convention [...] the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure [...]. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'. ECtHR, *Saunders v. United Kingdom*, App. No. 19187/91, Judgment, 17 December 1996, para. 68. As for national case law, see *Brown v. Stott* [2001] 2 W.L.R. 817.

privileged.⁷⁴⁸ A person who disobeys a witness order or witness summons shall be guilty of contempt as if this had been committed in court;⁷⁴⁹ and magistrates' court can sanction a person appearing in the court who refuses to be sworn or give evidence.⁷⁵⁰ In the English system, like any adversarial system, witnesses are tightly controlled by the questions posed and the order of questioning is rigorous and follows a sequential pattern of examination in chief, cross-examination and re-examination.⁷⁵¹

The EU Framework Decision on Victims, besides the right to protection,⁷⁵² laid down that:

Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.⁷⁵³

The EU Directive on Victims contains similar provisions (although these are more detailed) as well as some new provisions. Thus, victims have among others: i) the right to be heard during criminal proceedings 'and may provide evidence'; and ii) the right to be protected from secondary victimization, 'risk of emotional or psychological harm, and [Member States shall] [...] protect the dignity of victims during questioning and when testifying'.⁷⁵⁴ It is also stated that when 'a child victim is to be heard, due account shall be taken of the child's age and maturity'.⁷⁵⁵

With regard to witness proofing, i.e., generally speaking coaching or training of witness, the testimony of a coached witness has been regarded as unfair evidence and, hence, not admitted into evidence at trial.⁷⁵⁶ The Court of

⁷⁴⁸ R. v. Derby Magistrates' Court, Ex parte B [1996] AC 487. As for ECtHR's jurisprudence see *Campbell v. United Kingdom*, App. No. 13590/88, Judgment, 25 March 1992.

⁷⁴⁹ Criminal Procedure (Attendance of Witnesses) Act (1965), section 3.

⁷⁵⁰ Magistrates' Court Act (1980), section 97.

⁷⁵¹ As for general characteristics of questioning witnesses comparing the adversarial and inquisitorial systems, see, e.g., *Kreb* (2001) 346-348; *Orie* (2002) 1443-1445; *Heikkilä* (2004) 112.

⁷⁵² EU Framework Decision on Victims, article 8.

⁷⁵³ *Ibid.*, article 3.

⁷⁵⁴ EU Directive on Victims, articles 10 (1) and 18 respectively. See also articles 19-24.

⁷⁵⁵ *Ibid.*, article 10 (1).

⁷⁵⁶ Louise Ellison, 'Witness Preparation and the Prosecution of Rape' (2007) 27 *Legal Studies* 171, 182.

Appeals in *R. v. Momodou* explicitly prohibited witness training and coaching.⁷⁵⁷ It found a ‘dramatic distinction’ between this practice and witness familiarization, i.e., making the witness generally familiar with the court’s infrastructure and procedures so as not to be totally surprised or even re-victimized.⁷⁵⁸ Based on the inherent risks of witness training, which leads to undesired influence on witness statement, the Court rejected it but welcomed familiarization upon condition that it does not involve discussions about evidence.⁷⁵⁹ A Crown Prosecution Code of Practice adds further guidance on this practice and confirms the ban on the prosecutor to ‘train, practice or coach the witness’.⁷⁶⁰ The Codes of Conducts for a Barrister acting as prosecution counsel and for a solicitor also explicitly prohibit to rehearse, practice or coach witnesses concerning their evidence or how they will deliver it.⁷⁶¹

2.1.2. American Adversarial System

Although historically victims were central to the criminal process, they were relegated to the role of witnesses and ‘even precluded from observing the trial’.⁷⁶² In the United States, victims’ status is thus mainly limited to that of (prosecution) witness both at the state and federal levels. Victims are represented by the district attorney, but when their interests in presenting the charge are in conflict with the prosecutor’s conception of the public interest, the latter is given preference.⁷⁶³ However, what is the public interest may be constituted by ‘elements that have little or nothing to do with the victim’s case-its strength or weaknesses-or the nature of the victim’s injuries or his outrage against the defendant or even his fear that the crime may be repeated’.⁷⁶⁴ Other factors such as the utility of the defendant in another case, correctional factors that make

⁷⁵⁷ *R. v. Momodou*, [2005] EWCA Crim 177, para. 61.

⁷⁵⁸ *Ibid.*, paras. 61-62.

⁷⁵⁹ *Ibid.*, Loc. cit.

⁷⁶⁰ CPS, Pre-Trial Witness Interviews: Code of Practice (December 2005), para. 7.1.

⁷⁶¹ Law Society’s Code for Solicitor Advocates, para. 6 (5); Code of Conduct (Bar Council, Br Standards Board, 8th ed. October 2004), para. 705 (a) (b).

⁷⁶² Douglas Beloof, Paul Gassel and Steven Twist. *Victims in Criminal Proceedings*, (3rd edn, Carolina Academic Press 2010) 4. See also what was mentioned by an advocate who said that ‘It is not unusual for me to hear prosecutor say to the victim, you know at this point, it’s [the State] versus so and so, so really, what I need you to be, is a witness [...]’. Christine Englebrect, ‘The Struggle for “Ownership of Conflict”: An Exploration of Victim Participation and Voice in the Criminal Justice System’ (2011) 36 *Criminal Justice Review* 129, 142.

⁷⁶³ Abraham Goldstein, ‘Defining the Role of the Victim in Criminal Prosecution’ (1982) 52 *Mississippi Law Review* 515, 518.

⁷⁶⁴ *Ibid.* Loc. cit.

abandoning the victim's case preferable than prosecuting the offender are present in prosecution's decision where victim-witness's interest is only one factor to consider.⁷⁶⁵ A person who only witnessed a crime is not a victim thereof and, therefore, not entitled to victim protection.⁷⁶⁶

Even though no state has granted victims a right to refuse evidence to the prosecution, nine states have granted victims the right to refuse an interview with the defence.⁷⁶⁷ The Sixth Amendment to the United States Constitution provides for that the accused must be 'confronted with the witnesses against him; [and] have compulsory process for obtaining witnesses in his favour [...]'. When a victim does not want to testify, prosecutors can issue a *subpoena* and use a body attachment to make sure that the victim-witness does. However, as recognized by a prosecutor, this 'should be a last resource because it is re-traumatizing to the victim'.⁷⁶⁸ Flawed evidentiary policies, e.g., destruction of rape kit evidence, or the absence of United States national, uniform regulations can defeat justice for victims and, in particular, increase reluctance of victims to testify.⁷⁶⁹

The Federal Rules of Evidence, *inter alia*: i) state that, before testifying, a witness must give an oath or affirmation to testify truthfully;⁷⁷⁰ ii) regulate the mode and order of examining and cross-examining witnesses;⁷⁷¹ iii) state that hearsay may be exceptionally admissible;⁷⁷² and iv) state that every person is in principle competent to be a witness.⁷⁷³ Indeed, child witnesses, i.e., under 18 years,⁷⁷⁴ are presumed to be competent for examination;⁷⁷⁵ however, in some states, unsworn child testimony needs to be corroborated to convict.⁷⁷⁶ The Federal Rules of Criminal Procedure lay down, *inter alia*, that: i) a *subpoena*

⁷⁶⁵ Ibid., 519.

⁷⁶⁶ Champlin v. Sargeant in and for County of Maricopa, 965 P.2d 763 (Ariz. 1998).

⁷⁶⁷ The states of Alabama, Alaska, Arizona, Idaho, Louisiana, Oregon, Pennsylvania, Tennessee, and Wyoming. See Human Rights Watch, Mixed Results. US Policy and International Standards on the Rights and Interests of Victims of Crime (2008) 28.

⁷⁶⁸ Interview cited in Ibid., Loc. cit.

⁷⁶⁹ Ibid., Loc. cit.

⁷⁷⁰ US Federal Rules of Evidence, rule 603.

⁷⁷¹ Ibid., rule 611 (b).

⁷⁷² Ibid., rule 802. As for some exceptions to this rule, regardless of whether the declarant is available as a witness, see rule 803; and when the declarant is unavailable as a witness, see rule 804. See also rule 807 (residual exception).

⁷⁷³ Ibid., rule 601.

⁷⁷⁴ 18 USC § 3509-Child victims' and child witnesses' rights, (a) (2).

⁷⁷⁵ Ibid., (c) (2).

⁷⁷⁶ E.g., New York Criminal Procedure Law, § 60.20 (3).

must command the witness to attend and testify;⁷⁷⁷ ii) the possibility to issue a deposition *subpoena* for the witness;⁷⁷⁸ iii) a witness can be held in contempt when, without adequate excuse, disobeys an order by the competent court;⁷⁷⁹ and iv) the testimony must be in principle taken in open court,⁷⁸⁰ but it is possible to produce a witness's written statement.⁷⁸¹ A witness may refuse to answer questions or give documentary evidence only if the answer or document would incriminate the witness; and the answer only needs to furnish a link in the chain of circumstantial evidence necessary for a conviction.⁷⁸² Moreover, the fifth amendment of the United States constitution provides for 'No person shall be compelled in any criminal case, to be a witness against himself'.⁷⁸³ Lawyer-client communications are in principle privileged.⁷⁸⁴ As for witness proofing, witness preparation is a well-spread practice and is considered to be an umbrella expression including familiarization and proofing.⁷⁸⁵ Although some case law has discussed the ethical limitations of witness preparation,⁷⁸⁶ it is generally agreed that witness preparation is an integral part of the adversarial system and even a lawyer's obligation.⁷⁸⁷

2.1.3. French Inquisitorial System

A dimension of victim's status in France is his/her situation as witness in criminal proceedings. During pre-trial proceedings, victims can be heard by the police without consideration of factors such as age or family relationships according to the *Code de Procédure Pénal* (Code of Criminal Procedure) (CPP).⁷⁸⁸ During the questioning, witnesses are obligated neither to take an oath

⁷⁷⁷ Federal Rules of Criminal Procedure, rule 17 (a).

⁷⁷⁸ *Ibid.*, rule 17 (f).

⁷⁷⁹ *Ibid.*, rule 17 (g).

⁷⁸⁰ *Ibid.*, rule 26.

⁷⁸¹ *Ibid.*, rule 26.2.

⁷⁸² *Blau v. United States*, 340 U.S. 159, 71 S. Ct. 223, 95 L. Ed. 170 (1950).

⁷⁸³ The fifth amendment in principle refers to an accused's rights. However, the term witness has been understood to include 'witnesses' in a more general sense. See Akhil Reed and Renée Lettow, 'Fifth Amendment Principles: The Self-Incrimination First Clause' (1995) 93 Michigan Law Review 857, 883-889.

⁷⁸⁴ US Federal Rules of Evidence, rules 501 and 502.

⁷⁸⁵ See John Applegate, 'Witness Preparation' (1989) 68 Texas Law Review 277, 278.

⁷⁸⁶ *State v. Earp*, 571 A.2d 1227, 1234-35 (Md. 1990); *In re Eldridge*, 37 N.Y. 161, 171 (N.Y. 1880).

⁷⁸⁷ See Applegate (1989) 282, 287, 324, 333 et seq., 342, 352; Liisa Salmi, 'Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition an Trial' (1999) 18 Review of Litigation 136, 141; Fred Zacharias and Shaun Martin, 'Coaching Witnesses' (1999) 87 Kentucky Law Journal 1001, 1010.

⁷⁸⁸ See CPP, article 62.

nor to give a statement although there are exceptions to this rule.⁷⁸⁹ Witnesses can also be heard by the investigating judge (*juge d'instruction*),⁷⁹⁰ who can hear and question witnesses and to confront them with each other, or with the suspect.⁷⁹¹ Witnesses, as a rule, are obligated to give evidence. During pre-trial proceedings, they are obligated to testify if summoned. During trial, they can also be summoned to testify in court.⁷⁹² The prosecutor, the investigating judge and the court may call on the police to force witnesses to appear.⁷⁹³ However, certain witnesses can remain silent or to be heard without having to be sworn in.⁷⁹⁴ Communications obtained out of a professional relationship are privileged.⁷⁹⁵ Witnesses shall in principle take an oath to tell the truth before the investigating judges,⁷⁹⁶ and in court. Nevertheless, children under sixteen years, the civil party, and the relatives or in-laws of the person on trial are not heard under oath.⁷⁹⁷ As witness, the victim does not have the right to lie as (s)he participates in the search for the judicial truth.⁷⁹⁸

The victim as a witness is normally summoned to give evidence during the trial, and, in general, is heard and questioned in the presence of the accused. Questioning techniques are generally speaking considerate, which is at least partially due to the fact that the court's president directs the question as (s)he is the one who in principle puts the questions, including those from the parties, to the witness.⁷⁹⁹ The prosecution and the lawyers of the accused and of the civil party can also pose questions directly to the witness, requesting the floor from the president.⁸⁰⁰ A witness summoned has the obligation to attend court, take the

⁷⁸⁹ See Case law, Reims 18 May 1994, J.C.P. 1985 II. 20422. Cited by Brienens and Hoegen (2000) 322.

⁷⁹⁰ In addition to adopting judicial decisions, the investigating judges hold a fact-finding function (*actes d'information*). See Brienens and Hoegen (2000) 322.

⁷⁹¹ CPP, articles 114, 119, and 121.

⁷⁹² *Ibid.*, articles 435, 437. Refusal to comply can lead to witness's payment of a fine and costs. As for pre-trial see: *Ibid.*, article 109; as for trial see: *Ibid.*, article 438.

⁷⁹³ *Ibid.*, article 109, 397 (5), 439, 536 and 326.

⁷⁹⁴ In this category, family members (up to the fourth degree) of the suspect or accused, including the person they live with; and persons bound by their professional vow of secrecy (e.g., doctors, CPP, article 378)

⁷⁹⁵ CPP, article 437. See also *Ibid.*, articles 226 (13) and (14).

⁷⁹⁶ *Ibid.*, articles 103 and 452.

⁷⁹⁷ *Ibid.*, articles 108, 335, 447 and 448.

⁷⁹⁸ Jérôme Bensussan, 'Quelques Réflexions sur un Barbarisme Juridique: La Place de la Victime dans le Procès Pénal' in Yves Strickler (ed.). *La Place de la Victime dans le Procès Pénal* (Bruylant 2009) 33, 34.

⁷⁹⁹ CPP, article 454.

⁸⁰⁰ *Ibid.*, article 442.1.

oath and give evidence.⁸⁰¹ Indeed, in *Serves v. France*, where the witness was fined because of having refused to take the oath, the ECtHR found no violation of article 6 of the ECHR as the fines imposed ‘did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose’.⁸⁰² As for witness proofing, this practice has not been authorized in the CPP and there is actually a standing prohibition against a counsel discussing the case with a witness prior to a hearing.⁸⁰³

According to the CPP, victims that constitute themselves as civil parties cannot be witnesses during the pre-trial or trial stages of the case ‘The person who filed a civil party petition may not be further heard in the capacity of a witness. The civil party is however assimilated to a witness in respect of the payment of expenses, unless the court otherwise decides’.⁸⁰⁴ As a consequence, civil parties can only inform the court on an informal basis as a source of information (*à titre de renseignement*) without being questioned under oath,⁸⁰⁵ i.e., civil parties provide unsworn oral statements. Since victims of crimes normally are prosecutor’s main witnesses, a practical solution is to hear the victim’s testimony as a witness and, only later, the victim is accepted as a civil party in the criminal proceedings.⁸⁰⁶ This pragmatic solution presents two advantages. First, the victim is given freedom for testifying or not and, in case (s)he does not want to testify, (s)he constitutes himself/herself in civil party and circumvents examination by the defence. Nonetheless, the latter option is not feasible when a victim’s testimony is pivotal to prove the case. If the victim desires to testify, (s)he can wait and join the proceedings as a civil party once (s)he was heard as witness. Second, victims who are civil parties prior to trial and heard by the investigating judge enjoy certain rights as parties.⁸⁰⁷ These rights include not to be questioned or confronted with other witnesses or the suspect without the presence of the victim’s lawyer unless the victim as civil party

⁸⁰¹ Ibid., article 109.

⁸⁰² *Serves v. France*, Appl. No. 82/1996/671/893, 20 October 1997, para. 47.

⁸⁰³ See Ian Meredith and Hussain Khan, *Witness Preparation in International Arbitration - A Cross Cultural Minefield* in 26 (9) MEALEY’S International Arbitration Report (September 2011).

⁸⁰⁴ ‘La personne qui s’est constituée partie civile ne peut plus être entendue comme témoin. Toutefois, la partie civile est assimilée au témoin en ce qui concerne le paiement des indemnités, sauf décision contraire du tribunal’. CPP, article 422. See also CPP, article 335 (6). As for case law see the jurisprudence of the French Cour de Cassation (Cass crim., 6 November 1956, B. 709). Cited by Brienen and Hoegen (2000) 322.

⁸⁰⁵ CPP, article 336.

⁸⁰⁶ Brienen and Hoegen (2000) 322.

⁸⁰⁷ CPP, articles 104, 114, 115 and 120.

expressly renounces to this right. Moreover, the victim's lawyer is entitled to obtain copies of the dossier.⁸⁰⁸

2.2. The ICTY, the ICTR, and the SCSL

2.2.1. The Limited Role of Victims as Witnesses

Despite to references to 'victims and witnesses' in the instruments and the jurisprudence of the ICTY, the ICTR and the SCSL, the victim as witness is the only substantial role that (s)he can formally play in those courts' proceedings. The status of victims as witnesses is of particular relevance to those courts as these forums rely much more on eyewitness testimony than their post Second World War predecessors.⁸⁰⁹ There has been, however, an increasing tendency to rely on written evidence instead of oral evidence.⁸¹⁰ Moreover, unlike some of the first cases, especially at the ICTY,⁸¹¹ the subsequent ones have focused on military and political leaders, for which other evidentiary materials must be additionally presented when using theories of liability such as command responsibility. In any case, it is undeniable the important role played by the victims as witnesses not only for the prosecution's case but also, as acknowledged by the ICTY, in helping to 'ensure that justice is done [...] get to the truth and make sure that the right judgment is rendered'.⁸¹² However, as an ICTY's former President, Judge Jorda, also made it clear the ICTY cannot 'hear the tens of thousands of victims. Only those considered useful towards the establishment of the truth are invited to testify'.⁸¹³ Accordingly, victims are only called to give evidence as witnesses at those courts provided that their testimony corroborates the arguments tried to be proved by the Prosecutor. Moreover, for example, at the SCSL, it was perceived prosecutorial insensitivity to local culture and victims,⁸¹⁴ and that the Prosecutor's approach or narrative gave a skewed

⁸⁰⁸ CPP, article 114.

⁸⁰⁹ May and Wierda (1999) 744.

⁸¹⁰ See Stephen Kay, 'The Move from Oral Evidence to Written Evidence: 'The Law is Always Too Short and Too Tight for Growing Humankind' (2004) 2 *Journal of International Criminal Justice* 495-502.

⁸¹¹ E.g., the cases of Tadić, Erdemović and Jelisić.

⁸¹² ICTY/UNICRI, *ICTY Manual on Developed Practices* (2009) 106.

⁸¹³ ICTY Press Release, *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, JL/P.I.S./591-e, The Hague, 17 May 2001.

⁸¹⁴ McGonigle Leyh (2011) 150; Chiseche Mibenge, *Show Me a Woman! Narratives of Gender and Violence in Human Rights Law and Processes of Transitional Justice* (Pennsylvania University Press 2011).

reading of the armed conflict,⁸¹⁵ which in turn increased negative reactions towards the SCSL, affected the credibility of the SCSL,⁸¹⁶ and alienated the population.⁸¹⁷

2.2.2. General Legal Regime of Victims as Witnesses

When participating as witness, the victim is subject to the general legal regime applicable to any witness. Even though witnesses are brought by the parties to the ICTY, the ICTR or the SCSL, once they begin to testify they are no longer considered witnesses of either party but only witnesses of justice.⁸¹⁸ Witnesses can also be summoned at the request of the judges themselves to complete the evidence produced by the parties.⁸¹⁹ Victims as witnesses: i) cannot demand the presence of a lawyer when giving evidence; ii) may only speak in the context of the examination and cross examination;⁸²⁰ iii) do not have a right of access to evidence presented during the trial by the Prosecutor or the defence; iv) cannot demand to be kept informed of the course taken by the proceedings although those are of personal concern to them; and v) may not be present in the court when other witnesses are testifying.

Witnesses must before testifying make a solemn declaration 'I solemnly declare that I will speak the truth, the whole truth and nothing but the truth'.⁸²¹ Children are allowed to testify without making a solemn declaration as long as the Chamber considers that the child is sufficiently mature to be able to report the facts of which the child had knowledge and also understands the duty to tell

⁸¹⁵ See James Cockayne, 'Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies' (2005b) 4 *Journal of Human Rights*, 455, 460 (referring to International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a New Model*, Africa Briefing (4 August 2003) 14).

⁸¹⁶ Cockayne (2005a) 641.

⁸¹⁷ E.g., the indictment of Hinga-Norman, who was perceived by local population as the responsible for restoring the government to power, was regarded by the Sierra Leone's population as controversial as there was a vast number of crimes perpetrated by the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) rebels. See McGonigle Leyh (2011), 150.

⁸¹⁸ Jelisić (IT-95-10-T), Decision on Communication Between Parties and Witnesses, Trial Chamber, 11 December 1998.

⁸¹⁹ ICTY RPE, rule 98; ICTR RPE, rule 98. The SCSL Judges eliminated rule 98 but left rule 85 (A) (iv), which provides for the production of 'evidence ordered by the Trial Chamber pursuant to Rule 98'. See, e.g., Blaškić (IT-95-14-T), Decision of Trial Chamber I in Respect of the Appearance of Colonel Robert Stewart, etc., Trial Chamber I, 25 March 1999.

⁸²⁰ ICTY RPE, rule 85; ICTR rule 85; SCSL RPE, rule 85.

⁸²¹ ICTY RPE, rule 90 (A); ICTR RPE, rule 90 (A); SCSL RPE, rule 90 (B). The SCSL RPE also allow for an oath on a holy book.

the truth.⁸²² This is consistent with international human rights law under which, as observed by Salmón Gárate, children have the right to participate and be heard in (criminal) proceedings.⁸²³ However, the ICTY RPE and ICTR RPE state that a judgment cannot be based on a child's unsworn testimony, which constitutes an exception to the general rule, according to which, corroboration is not required.⁸²⁴ The SCSL RPE make no exception to that general rule and, hence, it would be in theory possible to be convicted based on a child's unsworn testimony.⁸²⁵ However, during the existence of the SCSL such situation never arose.

In *Haradinaj et al.*, at the ICTY, an elderly and infirm witness testified as part of the Prosecution team via video-link connection without taking the solemn declaration although it was read to him several times.⁸²⁶ Even though the Trial Chamber agreed with the defence on that the witness 'seemed confused by the oath-taking procedure', it noted that when the witness was asked during his testimony if he would promise to tell the truth, he replied '[t]hat's what I'm telling you, the truth, what happened to me [...] Everything that happened to me, I told you the truth'.⁸²⁷ The Chamber concluded that the witness understood his obligation to tell the truth and admitted his evidence even though he never took the solemn declaration requested by the ICTY RPE.⁸²⁸ The situation in

⁸²² ICTY RPE, rule 90 (B); ICTR RPE, rule 90 (C); SCSL RPE, rule 90 (C).

⁸²³ Elizabeth Salmón Gárate, *Jurisprudencia de la Corte Interamericana de Derechos Humanos*, Vol. II: Los Derechos de los Niños y Niñas en la Jurisprudencia de la Corte Interamericana de Derechos: Estándares en Torno a su Protección y Promoción, (IDEHPUCP/Cooperación Alemana al Desarrollo-GTZ 2010a) 63-68.

⁸²⁴ ICTY RPE, rule 90 (B); ICTR RPE, rule 90 (B).

⁸²⁵ SCSL RPE, rule 90 (C).

⁸²⁶ *Haradinaj et al.* (IT-04-84-T), *Reasons for the Decision on Witness 56's Evidence*, Trial Chamber, 15 February 2008, para. 2.

⁸²⁷ *Ibid.*, para. 7. Accordingly, the witness also appeared to understand the factual questions put to him. This circumstance was cited by the Trial Chamber as a cause to find that he was not confused about his role to be a witness in a trial proceedings. However, the Trial Chamber excluded the testimony as this was never tested by cross-examination, was not on its own sufficient for a conviction, and required corroboration although the Chamber considered that not necessarily restrictions on cross-examination constitute a violation of the accused's right to a fair trial. Additionally, the Chamber noticed that aspects of the witness's testimony that were directly related to the accused's conduct and acts were entirely uncorroborated and also the presence of inconsistencies between the witness's in court testimony and his prior statements. See *Ibid.*, paras. 8-9.

⁸²⁸ *Ibid.*, para. 185.

Haradinaj et al. seems to have been anticipated by the ICC RPE as discussed later.⁸²⁹

An explicit reference to the principle of live testimony was included in the original version of the ICTY RPE,⁸³⁰ and still remains in place in the ICTR RPE and the SCSL RPE.⁸³¹ Although the ICTY, the ICTR and the SCSL have shown strong preference for testimonial evidence provided in open court, their evidentiary regime allows great flexibility.⁸³² Therefore, the witness may also testify out of court (and thus be heard) by deposition at the ICTY, the ICTR and the SCSL.⁸³³ According to the ICTY RPE, the ICTR RPE and the SCSL RPE, deposition can be ordered either *proprio motu* or at the request of one of the parties ‘where it is in the interests of justice to do so’, the Trial Chamber appoints a Presiding Officer to supervise the process and deposition happens as it were testimony in court, with examination-in-chief and cross-examination and, it can be given via video-link.⁸³⁴ Similar to other manners of evidence taken out of court, ‘deposition evidence may be accorded less weight than evidence given directly in the courtroom’.⁸³⁵

The ICTY has the power to admit witness evidence in written form in lieu of oral testimony ‘where the interests of justice allow, in written form’,⁸³⁶ and also to dispense the attendance of a witness in person, ‘and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence’ given by a witness in proceedings before the tribunal, ‘in

⁸²⁹ See *infra* Chapter III 2.31.1.

⁸³⁰ ICTY RPE, rule 90 (A) (Rev. 18 as of 2 August 2000) (‘Subject to Rules 71 and 71 *bis*, witnesses shall, in principle, be heard directly by the Chambers’).

⁸³¹ ICTR RPE, rule 90 (A) (‘Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71’); SCSL RPE, rule 90 (A).

⁸³² Schabas (2006) 470.

⁸³³ ICTY RPE, rule 71; ICTR RPE, rule 71; SCSL RPE, rule 71. Deposition can be defined as ‘an out-of-court testimony taken on oath before a court officer and with the opportunity for the opposing party to cross examine. The testimony is committed to writing for later use in court. In comparison with affidavits, depositions may be a more effective means for reconciling the interests of expediting the proceedings and the rights of the accused’. Mark Klamberg, *Evidence in International Criminal Procedure. Confronting Legal Gaps and the Reconstruction of Disputed Events* (Stockholm University 2012) 317. See also Schabas (2006) 476..

⁸³⁴ ICTY RPE, rule 71; ICTR RPE, rule 71; SCSL RPE, rule 71. See also Schabas (2006) 476; Yvonne McDermott, ‘Regular Witness Testimony’ in Sluiter et al. (2013b) 859, 863-867.

⁸³⁵ Naletilic et al. (IT-98-34-PT), Decisions on Prosecution Amended Motion for Approval of Rule 94ter Procedure (Formal Statements) and on Prosecutor’s Motion to take Depositions for Use at Trial (Rule 71), Trial Chamber, 10 November 2000.

⁸³⁶ ICTY RPE, rule 89 (F).

lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment'.⁸³⁷ 'The impact of crimes upon victims' is listed as a factor for admitting written witness evidence.⁸³⁸ Similar provisions are contained in the ICTR RPE and the SCSL RPE.⁸³⁹ These provisions have been criticized by common law lawyers.⁸⁴⁰ The ICTY has also applied the 'flexibility principle' in evidence admissibility,⁸⁴¹ for instance, when handling admission of hearsay evidence.⁸⁴² It should be remembered, as pointed out by Schabas, that hearsay:

[...] refers to any evidence that is not related by the witness who has personal knowledge of the act in question. For example, when testimony of a witness who does not attend in court is produced in writing, by means of deposition, this too constitutes hearsay or 'secondary evidence'.⁸⁴³

Although hearsay evidence (in general) and affidavit evidence (in particular) have been admissible before the tribunals,⁸⁴⁴ that evidence is less

⁸³⁷ Ibid., rule 92 *bis*. Under this rule, witness evidence given in one case may be admitted as proof in another one 'without the witness being required to attend in court'. Schabas (2006) 477.

⁸³⁸ ICTY RPE, rule 92 *bis* (A) (i) (d).

⁸³⁹ As for the ICTR, see ICTR RPE, rules 71, 90 and 92 *bis* (proof of facts other than by oral evidence). As for the SCSL, see SCSL RPE, rules 71, 85 (D) and 82 *ter* (on admission of written statements and transcripts).

⁸⁴⁰ See e.g., Patricia Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslav War Crimes Tribunal Proceedings' (2001) 42 Harvard International Law Journal 535, 548.

⁸⁴¹ Gideon Boas, 'Admissibility of Evidence under the RPE of the ICTY: Development of the 'Flexibility Principle' in Richard May et al. (eds.), Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Kluwer Law International 2001) 263, 264.

⁸⁴² See, e.g., Aleksovski, (IT-95-14/I-AR73), Decision on the Prosecutor's Appeal on the Admission of Evidence, Appeals Chamber, 16 February 1999, para. 15.

⁸⁴³ Schabas (2006) 479-480. This connotation of the term hearsay is much broader than its other meaning, i.e., cases where, e.g., the witness 'testifies to what someone else told the witness: 'And he told me that he saw...'. Schabas (2006) 479. Hearsay can also be defined as 'a statement made by some other than the declarant while testifying at a trial or hearing (or quoted in a document), offered as evidence to prove the truth of the matter asserted'. Marieke Wierda, 'Hearsay' in Cassese (2009) 342, 342.

⁸⁴⁴ Aleksovski (IT-95-14/I-AR73), Decision on Prosecutor's Appeal on Admissibility of Evidence', Appeals Chamber, 16 February 1999, paras. 15 ff; Tadić (IT-94-19), Decision on the Defence Motion on Hearsay, Trial Chamber, 5 August 1996; Bagilishema (ICTR-95-1A-A), Judgment, Appeals Chamber, 3 July 2002, para 100; Rutaganda (ICTR-96-3-A), Judgment, Appeals Chamber, 26 May 2003, para. 149; Akayesu (ICTR-96-4-A), Judgment, Appeals Chamber, 1 June 2001, para. 286; Ndahimana (ICTR-01-68-A), Judgment, Appeals Chamber, 16 December 2013, paras. 182-186.

authoritative than direct evidence as ‘the witness cannot personally attest to the subject matter of the testimony’ but this does not make hearsay intrinsically unreliable.⁸⁴⁵ It should be also noticed that the explicit rule on affidavit under the ICTY RPE was repealed.⁸⁴⁶ Hearsay evidence has been found not to be inadmissible *per se* but it has been considered with caution.⁸⁴⁷

Even though the admissibility of written witness statements depends on the relevance and ‘probative value’ of the evidence,⁸⁴⁸ hearsay evidence in writing can only be admitted if it does not directly concern the acts and conduct of the accused as charged in the indictment according to rule 92*bis* (A) of the RPE of the ICTY, the ICTR and the SCSL,⁸⁴⁹ which introduces an exclusionary rule for these issues departing from case law in favor of hearsay evidence.⁸⁵⁰ Nevertheless, under the RPE of the ICTY, the ICTR and the SCSL, if the witness can be cross-examined (or when the statement is made by an unavailable witness), the hearsay in the form of a written statement/transcript of evidence may include evidence on the accused’s acts and conducts.⁸⁵¹ Moreover, under rule 92 *quinquies* of the ICTY RPE, hearsay statements, including those concerning the accused’s acts and conduct, may be admissible if the absence of the witness in court was caused by improper interference such as threats, intimidation and coercion.⁸⁵²

The possibility of admission of testimony via depositions and video-link, witness evidence in written form and hearsay evidence should be considered as victim-friendly measures since it allows victim witnesses not to face directly the

Affidavit is a ‘form of testimony, but it is in writing and taken out of the court, and is sometimes called a sworn declaration’. Schabas (2006) 477.

⁸⁴⁵ Schabas (2006) 479.

⁸⁴⁶ ICTY RPE, rule 94 *ter* (repealed).

⁸⁴⁷ See, e.g., Kalimanzira (ICTR-05-88), Judgment, Trial Chamber, 22 June 2009, para. 75; Setako (ICTR-04-81), Judgment, Trial Chamber, 25 February 2010, para. 236, footnote 306; Munyakazi (ICTR-97-36), Judgment and Sentence, Appeals Chamber, 28 September 2011, para. 77; Gotovina et al. (IT-06-90), Judgment, Trial Chamber, 15 April 2011, para. 43.

⁸⁴⁸ ICTY RPE, rule 89 (C); ICTR RPE, rule 89 (C); SCSL RPE, rule 89 (C).

⁸⁴⁹ As for case law, see, e.g., Haradinaj et al. (IT-04-84bis-PT), Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to 92*bis*, Trial Chamber, 22 July 2011, para. 20; Karadžić (IT-95-5118-PT), Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis* (Witnesses for Sarajevo Municipality), Trial Chamber (IT-95-5118-PT), 15 October 2009, para. 5.

⁸⁵⁰ Wierda (2009) 342, 342.

⁸⁵¹ See ICTY RPE, rules 92 *ter* and 92 *quarter*; ICTR RPE, rule 92 *bis*; SCSL RPE, rules 92 *ter* and 92 *quarter*.

⁸⁵² Fergal Gaynor, ‘Admissibility of Documentary Evidence’ in Sluiter et al. (2013) 1044, 1051-1052.

accused and avoid to potentially increase the risks of re-victimization, which would be the case if oral, live testimony were always required. However, although the explicit reference to the principle of live testimony is no longer present in the ICTY RPE, a written statement (as previously mentioned) cannot be admitted to prove the individual responsibility of the accused.⁸⁵³ Hence, live testimony remains indispensable to prove the individual guilt of the accused.⁸⁵⁴ Moreover, when written evidence is admitted, it will not have the ‘same *per se* probative value’ as live testimony in court.⁸⁵⁵ The ICTY Appeals Chamber has actually ruled that the principle of cross-examination is not absolute provided that conviction is not based exclusively, or in a decisive manner, on the depositions of a witness not examined by the accused.⁸⁵⁶ Some of the points in the last paragraphs are further discussed later when examining protective measures for witnesses during trial.⁸⁵⁷

Generally speaking, examination of witness follows the order present in the adversarial system,⁸⁵⁸ i.e., the witness is first asked to testify in chief, then cross-examined by the other party.⁸⁵⁹ The cross-examination is limited to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness,⁸⁶⁰ which may be considered as a necessary provision to reduce the risks of victims’ secondary victimization via aggressive cross-examination. Once cross-examination is concluded, the party who has called the witness may re-examine. A second cross-examination has only been allowed where new matters had emerged during cross-examination.⁸⁶¹ Thus, cross-examination seeks to elicit information favourable to the cross-examining party or to cast doubt on the accuracy of the contradicting or prejudicial information provided in the

⁸⁵³ ICTY RPE, rule 92 *bis* (A).

⁸⁵⁴ Naletilić and Martinović (IT-99-34-T), Decision on the Prosecutor’s Request for Public Version of Trial Chamber’s ‘Decision on the Motion to Admit Statement of Deceased Witness [...] of 22 January 2002, 27 February 2002, considerations 8, 11 and 14.

⁸⁵⁵ Naletilić and Martinović (IT-98-34-T), Decision on the Admission of Witness Statements into Evidence, Trial Chamber, 14 November 2001, consideration 3.

⁸⁵⁶ Martić (IT-95-11-A), Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, Appeals Chamber, 14 September 2006, paras. 12-14 and 18-20. This principle was previously formulated by the ECtHR in, e.g., ECtHR, A.M. v. Italy, Appl. No. 37019/97, Judgment, 14 December 1999.

⁸⁵⁷ See *infra* Chapter III 3.2.2.

⁸⁵⁸ Schabas (2006) 472.

⁸⁵⁹ See ICTY RPE, rule 85 (A); ICTR RPE, rule 85 (A); SCSL RPE, rule 85 (A).

⁸⁶⁰ See ICTY RPE, rule 90 (H), ICTR RPE, rule 90 (G), SCSL RPE, rule 90 (F).

⁸⁶¹ Delalić et al. (IT-96-21), Decision on the Motion on Presentation of Evidence by the Accused, Trial Chamber, 1 May 1997.

adverse party's evidence-in-chief, including challenges to the witness credibility.⁸⁶² Leading or suggestive questions are in principle allowed as far as they may impact on the determination of the witness credibility.⁸⁶³ In any case, cross-examination directed at witness credibility is not a 'boundless exercise' and should be conducted 'within reasonable limits'; improper, repetitive, or unfair questions, including those which are 'an unwarranted attack on the witness' are unwelcome'.⁸⁶⁴ The ICTY RPE and the ICTR RPE explicitly limit the cross-examination matters to three categories: (i) 'the subject-matter of the evidence-in-chief'; (ii) 'matters affecting the credibility of the witness'; and (iii) 'where the witness is able to give evidence relevant to the case for the cross-examining party [...] the subject-matter of the case'.⁸⁶⁵ Questions by judges during cross-examination that test witness credibility 'fall entirely within the ambit of the Judge's duty to contribute to the discovery of the truth'.⁸⁶⁶

The ICTY has recently and consistently sustained that the use of video-conference link does not breach the accused's right to cross-examine the witness or confront the witness directly insofar as video-conferencing allows the cross-examining party to observe the witness's reactions, and also permits the Chamber to assess the testimony credibility and reliability in the same form as for a witness who is physically present in the courtroom.⁸⁶⁷ In turn, the ICTR has been somewhat more conservative when balancing the need to ensure witness testimony and the accused's rights when the testimony is to be delivered via video-link, and has sustained that hearing witness testimony is preferable unless the interests of justice require otherwise.⁸⁶⁸

⁸⁶² Delalić et al. (IT-96-21-T), Decision on the Motion on Presentation of Evidence by the Accused, Esad Lanzo, Trial Chamber, 1 May 1997, para. 22.

⁸⁶³ Prlić et al. (IT-04-74), Decision on Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-examination by the Prosecution, and Associated Notice Requirements, Trial Chamber, 4 July 2008, para. 18.

⁸⁶⁴ See, e.g., Krajišnik (IT-00-39-T), Decision on Cross-Examination of Mirolad Dadidović, Trial Chamber, 15 December 2005, paras. 9-10.

⁸⁶⁵ ICTY RPE, rule 90 (H) (i); ICTR RPE, rule 90 (G) (i).

⁸⁶⁶ Rutaganda (ICTR-96-3-A), Judgment, Appeals Chamber, 26 May 2003, para. 102.

⁸⁶⁷ See, e.g., Stanisić and Simatović (IT-03-69-T), Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, Trial Chamber, 25 February 2010, para. 9.

⁸⁶⁸ See, e.g., Bizimungu et al. (ICTR-99-50-T), Decision on Confidential Motion from Mr. Bicomumpaka to Allow Video-Link Testimony for Witness CF-1, Trial Chamber, 23 January 2008, para. 3.

Previously inconsistent statements from a witness could be admitted only for assessment of witness credibility.⁸⁶⁹ It is advisable to use oral examination-in-chief when the witness's credibility is likely to be an issue particularly interesting for the judges.⁸⁷⁰ Even though the RPE allow the cross-examining party to be involved in very broad areas of cross-examination to both support his/her case and to undermine the witness credibility, it has been suggested that the RPE should provide more power to the trial judges to request the cross-examining party to explain the relevance of a line of inquiry which is seemingly irrelevant or obscure.⁸⁷¹

Judges may always intervene to ask their own questions although they are quite restrained and respect the adversarial proceedings. However, judges of the ICTY, the ICTR and the SCSL frequently interrupt victim witnesses when victims' narratives become irrelevant for the goal of determining the accused's guilt and also due to time constraints.⁸⁷² Such an approach reflects the judicial rather than therapeutic purposes of the proceedings at these tribunals.⁸⁷³ Live testimony has been consistently encouraged,⁸⁷⁴ which corresponds to the adversarial nature of the trial and the accused's right to examine witnesses against him/her. A witness cannot refuse to answer a question just because it might incriminate himself/herself. A witness can be compelled by the tribunals to deliver self-incriminating testimony, but it is said that such testimony shall not be used as evidence in a subsequent prosecution against the witness with the exception of the offence of false testimony.⁸⁷⁵ A person can also challenge the obligation to answer a question if the revelation of a privileged communication between lawyer and client is compromised.⁸⁷⁶ However, the ICTY in *Furundžija* did not recognize the communication between the victim (witness) and her doctor as privileged.⁸⁷⁷ This can be criticized as detrimental from the victims' viewpoint.

Even though there has been some academic discussion about whether the Security Council Resolutions setting up the ICTY and the ICTR created an

⁸⁶⁹ Popović et al. (IT-05-88), Decision on Appeals against Decision on Impeachment of a Party's Own Witness, Appeals Chamber, 1 February 2008, para. 31.

⁸⁷⁰ Gaynor (2013) 1077-1078.

⁸⁷¹ *Ibid.*, 1078.

⁸⁷² For some examples from the ICTY practice see Dembour and Haslam (2004) 158-161.

⁸⁷³ See also *Ibid.*, *Loc. cit.*

⁸⁷⁴ E.g., *Aleksovski* (IT-95-14/1-A), Judgment, Appeals Chamber, 24 March 2000, paras. 62-64.

⁸⁷⁵ ICTY RPE, rule 90 (E); ICTR RPE, rule 90 (E); SCSL RPE, rule 90 (E).

⁸⁷⁶ ICTY RPE, rule 97; ICTR RPE, rule 97; SCSL RPE, rule 97.

⁸⁷⁷ *Furundžija* (IT-95-17/1-T), Decision on Motion of Defendant Anto Furundžija to Preclude Testimony of Certain Prosecution Witnesses, Trial Chamber, 16 July 1998.

international law obligation for the victims to appear before those tribunals as witnesses,⁸⁷⁸ the ICTY and the ICTR Statutes mention nothing on this point. In the case of the SCSL, even though such obligation does not exist as it was not created by a Security Council Resolution but via an agreement, national law may establish that obligation.⁸⁷⁹ As for the ICTY and the ICTR, there is a general state obligation derived from their establishment via Chapter VII Security Council Resolutions to cooperate and provide judicial assistance in, for example, taking of testimony and witness's appearance at those tribunals.⁸⁸⁰ Concerning the SCSL, the obligation to cooperate is only applicable to Sierra Leone,⁸⁸¹ but it may be extensive to other third States if they agree so.⁸⁸²

In any case, these tribunals' RPE state that any person who without just excuse fails to comply with an order to attend before Chamber commits contempt of the tribunal.⁸⁸³ The ICTY Appeals Chamber also concluded that the ICTY may summon, *subpoena* or address other binding orders to individuals who act in their private capacity, and, 'in case of non-compliance, either the relevant State may take enforcement measures as provided in its legislation, or the International Tribunal may instigate contempt proceedings'.⁸⁸⁴ Although not explicit in the tribunals' statutes, it is implicit that victims can be forced to appear as witnesses.⁸⁸⁵ Even though there is a general reference to *subpoena* in these tribunals' RPEs,⁸⁸⁶ their power to *subpoena* witnesses has been described as mainly judge-made.⁸⁸⁷ It has also been said that the ICTY and the ICTR are not

⁸⁷⁸ See, e.g., Françoise Hampson, 'The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness' (1998) 47 *International and Comparative Law Quarterly* 50 et ff; Kai Ambos, 'The Right to Non-Self-Incrimination of Witnesses before the ICC' (2002) 15 *Leiden Journal of International Law* 155, 167-169.

⁸⁷⁹ As for this point see, in particular, SCSL Agreement, articles 15 and 17. See also Heikkilä (2004) 76.

⁸⁸⁰ See ICTY Statute, article 29 (2); ICTR Statute, article 28 (2).

⁸⁸¹ SCSL Constitutive Agreement, article 17.

⁸⁸² SCSL RPE, rule 8 (D).

⁸⁸³ ICTY RPE, rule 77 (A) (iii); ICTR RPE, rule 77 (A) (iii); SCSL RPE, rule 77 (A) (iii).

⁸⁸⁴ Blaskić (IT-95-14-AR108bis), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber, Appeals Chamber, 29 October 1997, Section III (Disposition).

⁸⁸⁵ See Schabas (2006) 467.

⁸⁸⁶ ICTY RPE, rule 54; ICTR RPE, rule 54; SCSL RPE, rule 54.

⁸⁸⁷ Göran Sluiter, 'Appearance of Witnesses and Unavailability of Subpoena Powers of the Court' in Roberto Bellello (ed.), *International Criminal Justice* (Ashgate 2010) 459, 462; Klamberg (2012) 199.

eager to *subpoena* witnesses, in particular sensitive witnesses,⁸⁸⁸ as voluntary appearance has been favored.⁸⁸⁹

Finally, concerning witness proofing, at the ICTY, the ICTR and the SCSL, it has been considered as an important and useful practice ‘accepted since the inception of this tribunal’.⁸⁹⁰ Nevertheless, at the ICTY and particularly at the ICTR, various defence teams have raised concerns about the Prosecution’s lengthy proofing sessions with its witnesses which often result in new evidence being obtained for the first time during the trial process, and often only a day or so prior to the day when the witness is due to testify.⁸⁹¹ The tribunals have not turned a blind eye to the issue of manipulation of witnesses, raised by the defence, and the possible truth distortion.⁸⁹² However, the tribunals have preferred to assume that witness proofing advantages outweigh their risks and have stated that this practice neither amounts to rehearsing, practicing or coaching a witness,⁸⁹³ nor *per se* prejudices the accused’s rights.⁸⁹⁴

From a legal viewpoint, witness proofing is consistent with the fact that these tribunals legal instruments, unlike the ICC, do not contain a general re-*envoi* to the law outside their Statutes and RPE, and have applied common rule 89 (B) as legal ground to admit witness proofing.⁸⁹⁵ Moreover, the ICTY and the

⁸⁸⁸ Heikkilä (2004) 75.

⁸⁸⁹ For example, see Ntagerura (ICTR-96-10-I), Decision on the Defence Motion for Additional Protective Measures for Defence Witnesses, Trial Chamber, 4 February 2000, para. 12; Nahimana et al. (ICTR-99-52-I), Decision on the Prosecution’s Oral Motion for Leave to Amend the List of Selected Witnesses, Trial Chamber, 26 June 2001, para. 24. See also Heikkilä (2004) 75. For a *subpoena* to a witness see Akayesu (ICTR-96-4-T), Decision on the Motion to Subpoena a Witness, Trial Chamber, 19 November 1997.

⁸⁹⁰ Limaj (IT-05-87-T), Decision on the Defence Motion on Prosecution Practice of ‘Proofing Witnesses’, Trial Chamber, 10 December 2004, p. 2; Karemera et al. (ICTR-98-44-AR73.8), Decision on Interlocutory Appeal Regarding Witness Proofing, Appeal Chamber, 11 May 2007, paras. 9 et seq. See also Sesay et. al. (SCSL-04-15-T), Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, Trial Chamber, 26 October 2005, para. 33 (considering witness proofing as a legitimate practice).

⁸⁹¹ Limaj (IT-05-87-T), 10 December 2004, p. 3; Bagosora et al. (ICTR-96-7), Decision on Admissibility of Evidence of Witness DBQ, Trial Chamber, 18 November 2003, para. 14.

⁸⁹² Karemera et al. (ICTR-98-44-T), Decision on Defence Motions to Prohibit Witness Proofing, Trial Chamber, 15 December 2006, paras. 12, 15 and 21-2.

⁸⁹³ Milutinović et al. (IT-05-87-T), Decision on Ojdanić Motion to Prohibit Witness Proofing, Trial Chamber, 12 December 2006, para. 16.

⁸⁹⁴ *Ibid.*, para. 22; Karemera et al. (ICTR-98-44-T), 15 December 2006, para. 14.

⁸⁹⁵ Rule 89 (B) ‘generally confers *discretion* on the Trial Chamber to apply “rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law [emphasis added]”’. Karemera et al. (ICTR-98-44-AR73.8), 11 May 2007, para. 8. This may be contrasted with the wording under article 21 of the

ICTR have concluded that ‘discussions between a party and a potential witness regarding his/her evidence can, in fact, enhance the fairness and expeditiousness of the trial provided that these discussions are a genuine attempt to clarify a witness’ evidence’.⁸⁹⁶

2.3. The ICC

2.3.1. Witness Status

2.3.1.1. Legal Features

Although the term ‘witness’ is not defined in the ICC Statute or in the ICC RPE, a victim can without any doubt qualify to testify as a witness,⁸⁹⁷ as evidenced by the ICC practice, and by some indications of what is understood by the term in the ICC RPE.⁸⁹⁸ In any case, the ICC in an official booklet has defined witness as ‘a person who gives evidence before the Court by testimony. A witness is normally called by the Prosecutor, who is trying to prove the criminal case against an accused, or the defense’.⁸⁹⁹ A victim may hence be called as a witness by the Prosecutor, defense or the respective ICC Chamber but also by another victim who holds the status of victim participant at the ICC.⁹⁰⁰ Victims as witnesses are regarded within the ICC as a key source of information because they enable the Prosecution to know about the crimes committed so that (s)he

ICC Statute which reads as follows: ‘The Court *shall* apply: [...] falling that [ICC Statute, RPE and where applicable international treaties and international rules and principles] general principles of law derived by the Court from national laws of legal systems of the world [emphasis added]’. See corroborating *Ambos* (2009) 604.

⁸⁹⁶ *Milutinović et al.* (IT-05-87-T), 12 December 2006, para. 16; *Karemera et al.* (ICTR-98-44-T), 15 December 2006, para. 14.

⁸⁹⁷ *Kreb* (2001) 320.

⁸⁹⁸ See ICC RPE, rule 66 (2); *Kreb* (2001), at 315.

⁸⁹⁹ ICC, Booklet: *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court* (2006) 28. Available at: <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> (last visit on 12 August 2012) It is important to mention that the term ‘witness’ in the context of an investigation should be read broadly to include anyone who might be called to testify during the pre-trial proceedings or at trial, even if the Prosecutor does not call him/her. This includes persons called upon by the Prosecutor to provide ‘written or oral testimony’ pursuant to article 15 (2) of the ICC Statute and individuals whose testimony or statements simply lead to other persons who do testify or to relevant information which could be use at trial. See Christopher Hall, ‘Article 19’ in *Triffterer* (2008) 637, 664.

⁹⁰⁰ See ICC (2006) 28.

can start an investigation and then submit a sound case.⁹⁰¹ Witnesses are frequently not represented by a legal counsel, and they do not take part in all proceedings but are called at specific times in order to testify.⁹⁰² Unlike victim participants, when victims take the stand only as witnesses, they do not express their views and concerns but give evidence instead, often by answering questions posed.⁹⁰³ As determined by *inter alia* Trial Chamber I in *Lubanga*:

[...] the process of victims “expressing their views and concerns” is not the same as “giving evidence”. The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.⁹⁰⁴

Thus, whereas victims’ views and concerns (victim participants) do not constitute evidence and victims as victim participants cannot be questioned by the parties,⁹⁰⁵ victims as witnesses give evidence and can be questioned by the parties. Accordingly, when victims exercise the witness dimension of their status, the general framework on witness testimony is applicable to them. This, *inter alia*, includes that the witnesses are required to make the following statement before they testify ‘I solemnly declare that I will speak the truth, the whole truth

⁹⁰¹ Jo-Anne Wemmers, ‘Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Right to Participate’ (2010) 23 *Leiden Journal of International Law* 629, 637.

⁹⁰² McGonigle Leyh (2011) 238.

⁹⁰³ ICC Statute, articles 68 and 69. See also McGonigle Leyh (2011) 238.

⁹⁰⁴ *Lubanga* (ICC-01/04-01/06-2032-Anx), Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial, Trial Chamber I, 26 June 2009, para. 19. See also Bemba (ICC-01/05-01/08-2138), Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, Trial Chamber III, 22 February 2012, para. 19.

⁹⁰⁵ See Bemba (ICC-01/05-01/08-2220), Decision on the Presentation of Views and Concerns by Victims a/0542/08, a/0394/08 and a/0511/08, Trial Chamber III, 24 May 2012, para. 7 (‘[...] the victims [participants] will not provide evidence. Therefore, any statement that they provide will not be given under oath. Further, the victims will not be questioned by the parties and their views and concerns will not form part of the evidence of the case’). See also Bemba (ICC-01/05-01/08-T-227-Red-ENG WT), Oral Decision, Trial Chamber III, 25 June 2012, p. 20 (‘[...] victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person’).

and nothing but the truth'.⁹⁰⁶ Exceptions to this rule may be accepted regarding children and individuals whose judgment has been impaired.⁹⁰⁷ However, the ICC RPE do not appear to state that a conviction cannot stand on such testimony alone. This is an important omission insofar as, by definition, a witness excused from taking the oath is an individual whose 'judgment is impaired'.⁹⁰⁸ In principle, if an unsworn testimony is allowed, such testimony should be given less weight due to principles of a fair trial. In the particular case of child witnesses, a child who does not understand the nature of the solemn declaration may be permitted to testify without that formality if the person, i.e., an individual under 18 or a person whose judgment has been impaired and who in the Chamber's opinion does not understand the nature of a solemn undertaking, is able to meet the requirements set by the RPE 'describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth'.⁹⁰⁹ However, there is no empirical evidence to support the affirmation that children lie more often than adults,⁹¹⁰ and indeed, already from some early age, children can understand the difference between the truth and lies sufficiently to testify.⁹¹¹ In *Lubanga*, two former child soldiers, allegedly victimized, were already adults when gave testimony in person during the trial and, therefore, took the solemn undertaking.⁹¹²

Whereas the compellability rule consists in that witnesses are obligated to answer questions, there are some exceptions including the so-called confidential relationships,⁹¹³ and the right to object to making certain incriminating statements.⁹¹⁴ Thus, the ICC RPE state that the ICC shall give particular regard to recognizing as privileged communications made in the

⁹⁰⁶ ICC Statute, article 69 (1); ICC RPE, rule 66 (1).

⁹⁰⁷ ICC RPE, rule 66 (2).

⁹⁰⁸ Colleen Roham, 'Rules Governing the Presentation of Testimonial Evidence' in Kharin Khan, Caroline Buisman and Christopher Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 499 539.

⁹⁰⁹ ICC RPE, rule 66 (2). As for *travaux préparatoires* see 'Report of the Working Group on Procedural Matters', UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.6, p. 5, fn. 6.

⁹¹⁰ See, e.g., New Zealand Commission, 'The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper (October 1996), at 8.

⁹¹¹ John Myers et al., 'Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science' (2002) 65 *Law and Contemporary Problems* 3, 23.

⁹¹² See, e.g., *Lubanga* (ICC-01/04-01/06-T-230-Red2), Transcripts, 21 January 2010, p. 33, lines 13-16.

⁹¹³ ICC RPE, rule 65.

⁹¹⁴ Even though a witness may object to making self-incriminating statements, (s)he may be forced to answer questions after receiving certain assurances. See ICC RPE, rule 74. A witness may also object to making statements incriminating certain family members. See ICC RPE, rule 75.

context of the professional relationship between a person and his/her medical doctor, psychiatrist, psychologist or counselor, in particular those related to or involving victims.⁹¹⁵ From victims' viewpoint, the just mentioned provision is important as witnesses who are compellable to provide testimony and refuse to do it can be punished for refusal to comply with an ICC's direction.⁹¹⁶ With regard to the ICC's ability to require the attendance of witnesses, the Trial Chamber is under the ICC Statute empowered to '[r]equire the attendance and testimony of witnesses', and expected to do so by 'obtaining, if necessary the assistance of States as provided in the Statute'.⁹¹⁷ The ICC Statute, in turn, imposes a duty upon States Parties in facilitating 'voluntary appearance of persons as witnesses or experts before the Court'.⁹¹⁸ Therefore, the problem for the ICC is that its Statute does not contemplate the compulsory attendance of witnesses via a mechanism such as a *subpoena*.⁹¹⁹ As possible ways to sort out this limitation, it has been suggested that the ICC Statute cannot prevent the States Parties from enacting appropriate legislation to compel witnesses, whose testimony might then be taken by national authorities of the State Party, and the Trial Chamber 'may also require the production of documents and other evidence'.⁹²⁰ Additionally, the Security Council could via a Chapter VII resolution empower the ICC to request States 'to ensure the appearance of witnesses by use of compulsory means if necessary'.⁹²¹

Giving false testimony under an obligation to tell the truth is an offence against the administration of justice.⁹²² A witness may object to making any statement that might tend to incriminate him or her.⁹²³

According to article 69 (2) of the ICC Statute, the principle of live testimony 'in person' is in place at the ICC but also allowing exceptions:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in

⁹¹⁵ Ibid., rule 73 (3).

⁹¹⁶ Ibid., rules 65 (2) and 171.

⁹¹⁷ ICC Statute, article 64 (6) (b).

⁹¹⁸ Ibid., article 93 (1) (e).

⁹¹⁹ Schabas (2010) 768.

⁹²⁰ Bitti (2008) 1213.

⁹²¹ Krebs (2001) 325.

⁹²² ICC Statute, article 70 (1) (a).

⁹²³ ICC RPE, rule 74 (3) (a).

accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

The introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony may be allowed by the Chamber if the absent witness was examined by the Prosecutor and the defence.⁹²⁴ If the witness is present, the conditions are that this does not object the submission of previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.⁹²⁵ The ‘introduction of documents or written transcripts’, under article 69 (2), constitutes an important exception to the approach followed by common law tribunals.⁹²⁶ Even though article 69 (2) manifests a preference for oral witness testimony, there are some exceptions under article 68 (2), concerning protective measures, and the RPE.⁹²⁷ Hearsay has been held to be in principle admissible by the ICC’s case law since:

[...] any challenges to hearsay evidence may affect its probative value, but not its admissibility [...] The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.⁹²⁸

Some ICC Judges have used the expression ‘indirect evidence’ to refer to what might be described as hearsay in the common law system, stating that ‘indirect evidence’ generally has less probative value than direct testimony.⁹²⁹ In any case, under the amended rule 68 (‘prior recorded testimony’),⁹³⁰ the requirements and proceedings to admit prior recorded evidence have been provided in much further detail. In addition to not being prejudicial to or

⁹²⁴ Ibid., rule 68 (a) (original version); ICC RPE, rule 68 (2) (amended version). The ‘introduction of documents or written transcripts’, under article 69 (2), constitutes an important exception to the approach followed by common law tribunals.

⁹²⁵ ICC RPE, rule 68 (b) (original version); ICC RPE, rule 68 (3) (amended version).

⁹²⁶ Schabas (2010) 841.

⁹²⁷ Ibid., 839. For further discussion see *infra* Chapter III 3.3.1 and 3.3.2.

⁹²⁸ Katanga and Ngudjolo Chui. (ICC-01/04-01/07-717), Decision on the Confirmation of the Charges, Pre-Trial Chamber I, 30 September 2008, paras. 137 and 139.

⁹²⁹ Bemba (ICC-01/05-01/08-424), Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 51.

⁹³⁰ Amended via ICC Assembly of States Parties, Resolution ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, 27 November 2013.

inconsistent with the rights of the accused,⁹³¹ when the witness is not present, any of the following conditions must be met (and subject to specific requirements): i) the Prosecutor and the defence had the opportunity to examine the witness during the recording; ii) the prior recorded testimony goes to proof of a matter other than the accused's acts and conduct; iii) the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; and iv) the prior recorded testimony comes from a person who has been subjected to interference.⁹³² As for deposition, although there is no explicit provision in the ICC instruments, it may be covered by the rules on prior-recorded testimony and subject to examination of the witness by the Prosecutor and defence under rule 68.⁹³³

The exceptions to the live testimony 'in person' constitute victim-friendly measures as victim witnesses can be spared from having to face the accused directly and personally in the courtroom, which may lead to further traumatization. This point is also discussed later when dealing with special protective measures.⁹³⁴

When the Trial Chamber Presiding Judge does not provide directions to determine the mode and order of questioning witnesses,⁹³⁵ the Prosecutor and the defence shall agree on this.⁹³⁶ The ICC RPE proposes a non-mandatory order of questioning: questioning of a witness by the party who called him/her followed by questioning by the other party, and the Trial Chamber may question a witness at any time but the defence has the right to be the last to examine the witness.⁹³⁷ In practice, it has been allowed to cross-examine witnesses, adopting the adversarial approach.⁹³⁸ In principle, questioning of victims 'should be conducted in a neutral fashion. However, the Chamber may determine on a case-by-case basis that cross-examination [...] is allowed'.⁹³⁹ Cross-examination is limited to matters raised during cross-examination-in-chief and matters

⁹³¹ ICC RPE, rule 68 (1) (amended version).

⁹³² ICC RPE, rule 68 (2) (amended version).

⁹³³ Klamberg (2012) 319.

⁹³⁴ See *infra* Chapter III 3.3.2.

⁹³⁵ ICC Statute, article 64 (8); ICC Regulations of the Court, regulation 43.

⁹³⁶ ICC RPE, rule 140 (1).

⁹³⁷ *Ibid.*, rule 140 (2).

⁹³⁸ Schabas (2010) 811.

⁹³⁹ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, Trial Chamber II, 20 November 2009, para. 32.

affecting witness credibility.⁹⁴⁰ Leading, closed and challenging questions may be exceptionally allowed by the Chamber although unwarranted insinuations as well as questions concealing speeches are not permitted and cross-examination must be respectful of the witnesses' dignity.⁹⁴¹ Moreover, as emphasized by Trial Chamber II in *Katanga and Ngudjolo Chui* 'cross-examination must at all times remain civil and respectful to the witness. The Chamber will not allow parties to assault the dignity or exploit the vulnerability of witnesses during cross-examination'.⁹⁴² This constitutes a necessary guarantee to forbid an aggressive cross-examination and, thus, reduces the risks of secondary victimization of victim witnesses. Rule 69 goes along the same line as states that agreements between the parties as to evidence may be accepted but subject to a restriction 'the interests of justice, in particular the interests of the victims'.

Rule 140 (2) provides guidelines for the examination of a witness, which includes that the two parties '(b) [...] have the right to question a witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters'. The objective of this round of questioning is: i) to diminish the negative effect of the testimony on the party's case by challenging the witness credibility and bring to the surface weaknesses in his/her account of events; and ii) to elicit evidence which is favourable to the questioning party.⁹⁴³ Considering the potentially confrontational nature of questioning by the 'party not calling the witness', the Chamber is obliged to protect the psychological well-being and dignity of the witnesses and victims.⁹⁴⁴ The interpretation given to 'other relevant matters' is that it includes matters impacting on the accused's guilt or innocence such as the credibility or reliability of the evidence.⁹⁴⁵

Rule 67 (1) and (2) of the ICC RPE provides for that a Chamber may permit a witness to give oral testimony via live audio or video technology as far as such testimony allows the witness to be examined by both parties and the Chamber when (s)he testifies, in accordance with the rules on witness

⁹⁴⁰ See ICC RPE, rule 140 (2) (b); *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 69.

⁹⁴¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, paras. 74-76.

⁹⁴² *Ibid.*, para. 75.

⁹⁴³ Sergey Vasiliev, 'Structure of Contested Trial' in Sluiter et al. (2013) 543, 613.

⁹⁴⁴ ICC Statute, article 68 (1); ICC RPE, rule 88 (5). See also, e.g., *Bemba* (ICC-01/05-01/08-1023), Decision on Directions for the Conduct of the Proceedings, Trial Chamber III, 19 November 2010, para. 15.

⁹⁴⁵ *Lubanga* (ICC-01/04-01/06-1140), Decision on Various Issues Related to Witness' Testimony During Trial, Trial Chamber I, 29 January 2008, para. 32.

examination as would apply if the witness were live in court. There is a rebuttable presumption that testimony via video-link is compatible with the accused's right to examine or have examined witness against him/her, under article 67 (1) (e) of the Statute.⁹⁴⁶ Such testimony is not limited to exceptional circumstances provided that the accused's rights are not affected.⁹⁴⁷

Concerning credibility issues related to victims as witnesses, in *Lubanga*, the Trial Chamber rejected some witnesses' testimonies because of inconsistencies and found their evidence not to be reliable.⁹⁴⁸ Additionally, six individuals who previously held the victim participant-witness dual status were found to have had falsified their testimony, which resulted both in rejection of their evidence and loss of their victim participant status,⁹⁴⁹ as discussed later.⁹⁵⁰ In *Ngudjolo Chui*, the Trial Chamber also concluded that the testimonies of the prosecution's three key witnesses were too 'contradictory', 'overly inaccurate' and 'excessively imprecise' that it could not find them credible or rely on their oral evidence.⁹⁵¹ This arguably was a key factor leading to the Trial Chamber's finding of *Ngudjolo Chui* as non-guilty and shows how witness credibility issues may affect victims' interests in general.

Overall speaking, in *Lubanga* and *Ngudjolo Chui*, the Trial Chambers, having considered the entirety of the witnesses' accounts and other relevant factors,⁹⁵² concluded that: i) there was an unregulated use of intermediaries and a lack of Prosecutor's investigative oversight;⁹⁵³ ii) delayed and insufficient investigations;⁹⁵⁴ iii) a shortage of relevant witnesses;⁹⁵⁵ iv) a lack of attention to witnesses' fundamental background details;⁹⁵⁶ and v) the OTP did not physically visit all the localities relevant to the charges which would have helped to clarify

⁹⁴⁶ See, e.g., *Lubanga* (ICC-01/04-01/06-1140), 29 January 2008, para. 41.

⁹⁴⁷ *Ibid.*, para. 10.

⁹⁴⁸ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 479.

⁹⁴⁹ *Ibid.*, paras. 484 and 502.

⁹⁵⁰ See *infra* Chapter III 2.3.2.2.

⁹⁵¹ *Ngudjolo Chui* (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, 18 December 2012, paras. 159, 189, 190, 218-219.

⁹⁵² *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 102; *Ngudjolo Chui* (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, 18 December 2012, para. 53.

⁹⁵³ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 482-483.

⁹⁵⁴ *Ngudjolo Chui* (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, 18 December 2012, para. 123.

⁹⁵⁵ *Ibid.*, para. 119.

⁹⁵⁶ *Ibid.*, para. 121.

several witness testimonies.⁹⁵⁷ Similar problems, in particular the OTP's system of evidence review, which affect the credibility of witnesses and reliability of their testimonies have also been present in the ongoing *Kenyatta*.⁹⁵⁸

In order to address the above-mentioned factors, which have negatively affected the credibility of witnesses, the OTP has started a major review of its investigative practices.⁹⁵⁹ In any case, the OTP should directly assess the credibility of its witnesses via its own staff and not intermediaries as early as possible during the investigations.⁹⁶⁰ The ICC launched a Court-wide initiative to set up guidelines, a code of conduct, and a contract for intermediaries.⁹⁶¹ This is pivotal as intermediaries are not bound by the ICC operational instruments such as the Code of Professional Conduct for Counsel or the ICC Staff Rules.⁹⁶² In turn, the Draft Guidelines Governing the Relationship between the Court and Intermediaries take into consideration the findings in *Lubanga* and deals with the policy and law on the use of intermediaries including security, payment and closer monitoring of intermediaries for accountability purposes.⁹⁶³ Additionally, both the ICC and the OTP should conduct timely investigations of allegations of false testimony and also witness interference.

2.3.1.2. Witness Proofing

With regard to witness proofing, the ICC has almost unanimously rejected this practice. Pre-Trial Chamber I in *Lubanga* considered some measures proposed by the Prosecutor under the category of 'witness familiarization' as not only permissible but as part of the ICC's duty to provide for the 'safety, physical and psychological well-being, dignity, and privacy of victims and witnesses',⁹⁶⁴ but

⁹⁵⁷ *Ibid.*, para. 118.

⁹⁵⁸ *Kenyatta* (ICC-01/09-02/11-728), Decision on Defence Application Pursuant to Article 64 (4) and Related Requests, Trial Chamber V, 26 April 2013, paras. 122-123.

⁹⁵⁹ See OTP, Draft Strategic Plan for 2013-2015, p. 11.

⁹⁶⁰ See also International Bar Association, *Witnesses before the International Criminal Court* (2013) 49.

⁹⁶¹ ICC, Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, Including Reparations and Intermediaries-Annex: Draft Resolution on Victims and Affected Communities, Reparations and Trust Fund for Victims, ICC-ASP/12/38, 15 October 2013, para. 7.

⁹⁶² International Bar Association (2013) 45.

⁹⁶³ Draft Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries, April 2012. See also International Bar Association (2013) 45.

⁹⁶⁴ *Lubanga* (ICC-01/04-01/06-679), Decision on the Practices of Witness Familiarisation and Witness Proofing, Pre-Trial Chamber I, 8 November 2006, para. 21 (citing article 68 (1) of the ICC Statute). Those practices were: i) opportunity for the witness to acquaint him/herself with the

conducted by the VWU and not by the party intending to call the witness.⁹⁶⁵ However, the Chamber considered proposed measures properly constituting ‘witness proofing’ as prohibited since there was no legal basis for this practice under article 21 (1) of the ICC Statute, which lists the legal sources applicable by the ICC including ‘general principles of law’.⁹⁶⁶ Trial Chamber I largely concurred with Pre-Trial Chamber I’s findings.⁹⁶⁷ Moreover, it considered that the ICTY, the ICTR and the SCSL RPE and jurisprudence are not automatically applicable to the ICC.⁹⁶⁸ Accordingly, Trial Chamber I first held that the VWU would continue to carry out witness familiarization, but added that it should be conducted ‘in consultation with the party introducing the witness’.⁹⁶⁹ Second, unlike Pre-Trial Chamber I, Trial Chamber I ordered that copies of their statements be made available to witnesses prior to their testimony.⁹⁷⁰ Third, the Trial Chamber kept the bar against witness proofing as put forward by the Prosecutor.⁹⁷¹

Important arguments have been raised to suggest re-examining the decision of banning witness proofing, including the facilitation of fair and expeditious conduct of the proceedings and as a way to protect vulnerable witnesses.⁹⁷² Indeed, based on similar arguments, Trial Chamber V departed from ICC’s consolidated practice and authorized witness proofing or

lawyer who will examine him/her; ii) familiarize witness with the courtroom, court’s participants and its proceedings; iii) reassuring witness’s role in the proceedings; iv) discussing matters related to witness’s safety and security to determine the need of protective measures; v) reinforcing to the witness that (s)he is under the obligation to tell the truth when testifying; and vi) explaining the process of examination-in-chief, cross-examination, and re-examination. See *Ibid.*, para. 14.

⁹⁶⁵ *Ibid.*, paras. 23-27.

⁹⁶⁶ *Ibid.*, paras. 28-42.

⁹⁶⁷ Lubanga (ICC-01/04-01/06-1049), Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Trial Chamber I, 30 November 2007.

⁹⁶⁸ *Ibid.*, para. 44. See also McDermott (2013b) 867.

⁹⁶⁹ Lubanga (ICC-01/04-01/06-1049), 30 November 2007, para. 49.

⁹⁷⁰ *Ibid.*, para. 50.

⁹⁷¹ I.e., putting questions to the witness that the examining lawyer seeks to ask him/her, and in the order anticipated; and inquiring as to possible additional information about potentially incriminatory and potentially exculpatory nature. *Ibid.*, para. 57.

⁹⁷² See American University Washington College of law, War Crimes Research Office, Witness Proofing at the International Criminal Court (July 2009) 20-39; Ruben Karemaker, B. Don Taylor III, and Thomas Wayde Pittman, ‘Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence’ (2008) 21 *Leiden Journal of International Law* 683, 693-698. The contradictory testimony of the first witness at the ICC in *Lubanga*, under the pseudonym ‘Dieumerci’, raised some questions among some observers about the impact of ban on witness proofing on vulnerable witnesses, in particular children. See American University Washington College of law, War Crimes Research Office (2009) 18.

preparation in relation to the Kenya trials;⁹⁷³ however, it set some safeguards to avoid that the reliability of the evidence be affected during trial.⁹⁷⁴

Nonetheless, it is herein argued that the ICC's almost unanimous practice of banning witness proofing is justified.⁹⁷⁵ First, there is no legal basis in the ICC Statute or the ICC RPE for it and, furthermore, as Pre-Trial Chamber I by referring to both civil and common law jurisdictions determined 'the practice of witness proofing [...] is not embraced by any general principle of law',⁹⁷⁶ one of the legal sources applicable by the ICC as already said. Second, adequate and in-depth witness familiarization may make up for most of the Prosecution's concerns relating to his/her proposal of 'witness proofing'.⁹⁷⁷ Third, the risks of distorting the truth due to the 'rehearsal of in-court testimony' in advance and the consequent absence of 'helpful spontaneity' during testimony at trial,⁹⁷⁸ arguably outweigh the advantages of witness proofing.

2.3.2. Dual Status Victim Participant-Victim Witness⁹⁷⁹

2.3.2.1. Legal Features

Neither the ICC Statute nor the ICC RPE establish whether a victim who participates in the proceedings as a victim participant can also be a witness. Even though some voices, including the ICC's former Judge Claude Jorda,⁹⁸⁰ were opposed to a simultaneous victims' status as a witness and as a participant in

⁹⁷³ Trial Chamber V considered that the merits of witness preparation, namely, facilitation of a fair and expeditious trial, and protection of the well-being of witnesses outweigh potential risks of witness proofing. For further discussion, see Ruto and Arap Sang (ICC-01/09-01/11-524), Decision on Witness Preparation, Trial Chamber V, 2 January 2013, paras. 31-42 and 50. See also Kenyatta (ICC-01/09-02/11-716), Decision on VWU Submission Regarding Witness Preparation, Trial Chamber V, 11 April 2013, para. 4 (clarifying that non-substantive contact between the calling party and the witness in the 24 hours prior to the witness's testimony would be appropriate and that from the time the witness starts to testify until the end of his/her testimony, the contact would be restricted to the examination in court, unless allowed by the Chamber).

⁹⁷⁴ Those safeguards consist in: i) the use of cross-examination; ii) clear guidelines establishing permissible and prohibited conduct contained in a witness preparation protocol; and iii) video-recording of the preparation sessions. *Ibid.*, paras. 44-48 and 51 and 52.

⁹⁷⁵ See corroborating Ambos (2009); Wayne Jordash, 'The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice' (2009) 22 *Leiden Journal of International Law* 501, 520-523.

⁹⁷⁶ Lubanga (ICC-01/04-01/06-679), 8 November 2006, para. 37.

⁹⁷⁷ Ambos (2009) 614.

⁹⁷⁸ Lubanga (ICC-01/04-01/06-1049), 30 November 2007, paras. 46-52.

⁹⁷⁹ See also *infra* Chapter IV 4.3.1.2.

⁹⁸⁰ Claude Jorda and Jérôme de Hemptinne, 'The Status and the Role of Victim' in Cassese, Gaeta and Jones (2002) 1387, 1409.

order to fully safeguard the rights of the accused, this dual status has been recognized in the ICC case law. However, as the Trial Chamber did in *Katanga and Ngudjolo Chui*, it has been clarified that ‘the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth’,⁹⁸¹ and setting guarantees to fully protect the rights of the accused.⁹⁸² In any case, as pointed out by Trial Chamber III in *Bemba* victims who ‘fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person’.⁹⁸³ It should be mentioned that the detailed analysis of whether victim participants have the right to lead and challenge evidence is conducted in the next chapter.

What this sub-section deals with is two main concerns, besides testimonies that may result in delays, when a victim holds the dual status victim participant-witness. Firstly, a dual status victim participant-witness could provide evidence to the ICC after obtaining access to the confidential part of the case file and, hence, this would enable the dual status victim participant-witness to conform or even adjust his/her testimony to the available evidence that the Prosecutor intends to rely on.⁹⁸⁴ Secondly, dual status victim participant-witness’s credibility could be questioned because of his/her financial interests in the trial outcome as a reparations claimant or other interests such as conviction or certain sentence, which may in turn give an incentive for a dual status victim participant-witness to change his/her testimony.⁹⁸⁵ Bearing these issues in mind, Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo Chui*, during the pre-trial proceedings, imposed two procedural safeguards in order to preserve the admissibility and probative value of the evidence offered by dual status victim participant-witnesses.⁹⁸⁶ First, to prevent the dual status victim participant-witness from having access to the confidential part of the case record that includes the bulk of evidence upon which the parties intend to rely during the confirmation hearing, including other witnesses’ statements.⁹⁸⁷ Second, to prevent the dual status victim participant-witness from attending any hearing of

⁹⁸¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 20.

⁹⁸² *Ibid.*, paras. 21-23. See also *Bemba* (ICC-01/05-01/08-2138), 22 February 2012, para. 23.

⁹⁸³ *Bemba* (ICC-01/05-01/08-2138), 22 February 2012, para. 20.

⁹⁸⁴ McGonigle Leyh (2011) 312. See also Karim Khan and Rodney Dixon, Archbold. *International Criminal Courts: Practice, Procedure and Evidence* (Sweet & Maxwell 2009) 1152.

⁹⁸⁵ McGonigle Leyh (2011) 312; Khan and Dixon (2009) 1152; Brouwer and Heikkilä (2013) 1353.

⁹⁸⁶ See McGonigle Leyh (2011) 312.

⁹⁸⁷ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-632), Decision on the Application for Participation of Witness 166, Pre-Trial Chamber I (Single Judge), 23 June 2008, para. 31. See also McGonigle Leyh (2011) 312.

a witness in the same case, even if the hearing is public.⁹⁸⁸ Those procedural effects were to remain in effect until the moment that the dual victim participant-witness no longer remained an anonymous victim participant.⁹⁸⁹ The Single Judge also found this approach to be compatible with the initial request of the dual status victim participant-victim witness as he requested anonymity *vis-à-vis* the two suspects.⁹⁹⁰

Although Trial Chamber I in *Lubanga* did not establish the parameters for the rights of dual status victim participant-witnesses, the Chamber rejected treating victims appearing at the ICC automatically as witnesses.⁹⁹¹ Whether holding dual status would negatively affect the accused's right is also considered when revising victims' applications for participation and deciding participation modalities.⁹⁹² The Trial Chamber also left it clear that a victim who has 'dual status does not [have] rights in addition to those of someone who is only a victim or a witness'.⁹⁹³ The issue of disclosure and dual status victim participant-witness arose in *Lubanga's* trial when the defence requested the ICC to order the Registry to provide them with the un-redacted victim application forms for those dual status victim participant-witnesses. The ICC identified three issues.⁹⁹⁴ First, the ICC highlighted the accused's right to a fair hearing under article 67 (1) of the ICC Statute. Second, the ICC is required to protect the 'safety, physical and psychological well-being, dignity and privacy of victims and witnesses' pursuant to, *inter alia*, article 68 (1). Third, the ICC noted the Prosecutor's obligation to disclose to the defence exculpatory material, including copies of any statements made by those witnesses (s)he intends to call, and to disclose to the defence evidence in his/her possession or control which the Prosecutor 'believes or shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence',

⁹⁸⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07-632), 23 June 2008, para. 31. See also McGonigle Leyh (2011) 312.

⁹⁸⁹ Katanga and Ngudjolo Chui (ICC-01/04-01/07-632), 23 June 2008, para. 32. See also McGonigle Leyh (2011) 312.

⁹⁹⁰ Katanga and Ngudjolo Chui (ICC-01/04-01/07-632), 23 June 2008, para. 33.

⁹⁹¹ *Lubanga* (ICC-01/04-01/06-1119), Decision on Victims' Participation, Trial Chamber I, 18 January 2008, para. 132. See also McGonigle Leyh (2011) 312.

⁹⁹² *Lubanga* (ICC-01/04-01/06-1119), Decision on Victims' Participation, Trial Chamber I, 18 January 2008, paras. 132 and 134.

⁹⁹³ *Lubanga* (ICC-01/04-01/06-1379), Decision on Certain Practicalities Regarding Individuals who Have the Dual Status of Witness and Victim, Trial Chamber I, 5 June 2008, para. 52(b).

⁹⁹⁴ *Lubanga* (ICC-01/04-01/06-1637), Decision on the Defense Application for Disclosure of Victims Applications, Trial Chamber I, 21 January 2009, para. 9. See also McGonigle Leyh (2011) 313.

pursuant to article 67 (2). Moreover, the Chamber noted that only the Prosecutor has a positive obligation to disclose exculpatory material and that this obligation cannot be imposed on other ICC organs.⁹⁹⁵ The Trial Chamber concluded that when it comes to dual status victim participant-witnesses, the Prosecutor will likely need to disclose their prior statements,⁹⁹⁶ including their victim application forms; however, the Prosecutor first needs to notify the victim's legal representative to allow to raise any objection to the disclosure.⁹⁹⁷

In the ICC's case-law, it has been determined, via agreement between the Judges and victims, that when a legal representative becomes aware of the dual status of his/her client, the representative, after securing his/her client's authorization, should provide to the extent possible the Prosecution with the individual's name, date of birth and other identifying information.⁹⁹⁸ Then, the Prosecution should confirm in writing whether the person holds dual status and whether it is intended to apply for protective measures,⁹⁹⁹ or the victim's legal representative may alternatively ask the ICC whether his/her client is in the ICC protection programme.¹⁰⁰⁰

The Trial Chamber may order the victim participants' legal representative to transmit to the parties the application forms of dual status victim participants-witnesses although with some redactions such as victims' contact information, which happened in *Ruto and Sang*.¹⁰⁰¹ In any case, dual status victims have been allowed to testify by the ICC Judges even when they were not called by a party.¹⁰⁰²

The ICC via the Registry will communicate with a dual status victim to obtain his/her consent to share this status information with the legal

⁹⁹⁵ Lubanga (ICC-01/04-01/06-1637), 21 January 2009, para. 10.

⁹⁹⁶ Ibid., paras 12-13. See also McGonigle Leyh (2011) 313.

⁹⁹⁷ Lubanga (ICC-01/04-01/06-1637), 21 January 2009, paras. 12-13.

⁹⁹⁸ Lubanga (ICC-01/04-01/06-1379), 5 June 2008; Bemba (ICC-01/05-01/08-807-Corr), Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 12 July 2010. See also McGonigle Leyh (2011) 313.

⁹⁹⁹ Lubanga (ICC-01/04-01/06-1379), 5 June 2008, paras. 52-78; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 50-54. See also McGonigle Leyh (2011) 313-314.

¹⁰⁰⁰ Lubanga (ICC-01/04-01/06-1379), 5 June 2008, paras. 52-78; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 50-54. See also McGonigle Leyh (2011) 313-314.

¹⁰⁰¹ Ruto and Sang (ICC-01/09-01/11-919), Order Authorizing Disclosure of Victims' Applications, Trial Chamber V(A), 9 September 2013, p. 4.

¹⁰⁰² Lubanga (ICC-01/04-01/06-2032-Anx), 26 June 2009. See also Sigall Horovitz, 'The Role of Victims' in Carter and Pocar (2013) 166, 186.

representative.¹⁰⁰³ When the dual status victim participant-witness will be brought outside the court-room, and after having completed his/her testimony, (s)he and his/her legal representative may maintain contact.¹⁰⁰⁴ Any party's contact with a dual status victim participant-witness should be done via the legal representative and, if the dual status victim is the one who wants to contact a party, the VWU facilitates so.¹⁰⁰⁵ Indeed, the VWU has to be informed of all dual status victim participants-victim witnesses in order 'to advise those concerned to seek the appropriate legal advice'.¹⁰⁰⁶ In urgent situations, to preserve or collect evidence, the party who directly contacted the dual status victim, then, shall as soon as possible inform the dual status victim's legal representative.¹⁰⁰⁷ Although legal representatives may contact their dual status clients, they are forbidden to discuss their testimonies in advance, and meetings with their clients are often supervised by an ICC's agent.¹⁰⁰⁸ However, such prohibition is not necessarily fully applicable in the Kenyan trials as Trial Chamber V has allowed witness proofing, as discussed later,¹⁰⁰⁹ and in which there are dual status victims.¹⁰¹⁰ In any case, a legal representative may request access to materials related to his/her client and be present during interviews of the dual status victim participant-witness if the individual consents.¹⁰¹¹ Therefore, notice to the legal representatives must precede all contacts between the Prosecutor, the defence, and a dual status victim.¹⁰¹²

2.3.2.2. Related Legal Issues

During the trial in *Lubanga*, six victim participants testified before the Chamber as Prosecution witnesses and three as witnesses called upon request of the victim

¹⁰⁰³ Lubanga (ICC-01/04-01/06-1379), 5 June 2008, paras. 52-78; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 50-54. See also McGonigle Leyh (2011) 313-314.

¹⁰⁰⁴ Bemba (ICC-01/05-01/08), Transcripts, Trial Chamber III, 26 January 2011, p. 48, lines 11-12.

¹⁰⁰⁵ Lubanga (ICC-01/04-01/06-1379), 5 June 2008, para. 59; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, para. 53. See also McGonigle Leyh (2011) 314.

¹⁰⁰⁶ Registry and Trust Fund for Victims, Fact Sheet, March 2011, 3.

¹⁰⁰⁷ Lubanga (ICC-01/04-01/06-1379), 5 June 2008, para. 60; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, para. 53.

¹⁰⁰⁸ Abu Garda (ICC-02/05-02/09), Transcript, 20 October 2009, pp. 8-9, 95. Cited by McGonigle Leyh (2011) 314, footnote 544.

¹⁰⁰⁹ See *infra* Chapter III 2.3.1.2.

¹⁰¹⁰ Ruto and Sang (ICC-01/09-01/11-1129-Corr-Red2), Corrigendum of Prosecution's Fourth Request for In-Court Protective Measures for Trial Witnesses dated 24 December 2013, Office of the Prosecutor, 2 January 2014, paras. 25, 47 and 53.

¹⁰¹¹ McGonigle Leyh (2011) 314.

¹⁰¹² Lubanga (ICC-01/04-01/06-1379), 5 June 2008, paras. 24-27.

participants' legal representatives. Concerning the Prosecution witnesses, five of them (the sixth being the father of one of the other five) testified about their experiences as child soldiers, i.e., abducted and forced to participate in the hostilities. The Trial Chamber paid attention to the trauma and psychological impact of the events on alleged former child soldiers holding dual status, including important findings by an expert witness on the topic of children with trauma and called by the judges themselves, especially concerning child's ability to answer and remember events.¹⁰¹³ Due to contradictions, weaknesses and inconsistencies in their evidence, e.g., as for their ages and true identities,¹⁰¹⁴ the Trial Chamber in its judgment not only found their evidence unreliable but also decided to withdraw their right to participate as victim participants,¹⁰¹⁵ as 'In the view of the Majority, given the Chamber's present conclusions as to the reliability and accuracy of these witnesses, it is necessary to withdraw their right to participate'.¹⁰¹⁶ The Chamber further added that 'It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria'.¹⁰¹⁷ Consequently, alleged former child soldiers' testimonies were considered unreliable for the purposes of determining Lubanga's individual criminal responsibility.¹⁰¹⁸ Essentially, unsupervised actions of three of the Prosecutors' principal intermediaries led to an outcome characterized by evidence that 'was, at least, in part inaccurate or dishonest'.¹⁰¹⁹

It is herein agreed with the Trial Chamber's decision not to consider dual status victim participant-witnesses' testimonies obtained in such conditions. However, in agreement with Judge Odio Benito's dissenting opinion, removing those dual status victim participants-witnesses of their status as victim participants is here criticized as excessive. First, imposing on victim participants-witnesses a higher evidentiary threshold (beyond reasonable doubt) than that imposed on victims who only participate in the proceedings as victim participants and who were not subject to thorough examination can be

¹⁰¹³ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 479; Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 30.

¹⁰¹⁴ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 225, 238, 247, 268, 288, 406, 429, 477 and 479.

¹⁰¹⁵ *Ibid.*, paras. 484 and 1362.

¹⁰¹⁶ *Ibid.*, para. 484.

¹⁰¹⁷ *Ibid.*, *Loc. cit.*

¹⁰¹⁸ *Ibid.*, paras. 479 and 484.

¹⁰¹⁹ *Ibid.*, para. 482.

considered ‘unfair and discriminatory’.¹⁰²⁰ Second, not considering evidence provided by those dual status victim participants-witnesses would have been enough as, in the reparations stage, the Trial Chamber when evaluating the reparations claims can always determine whether those victims meet the respective criteria.¹⁰²¹ Third, withdrawal of the victim participant status by the Chamber may produce unnecessary psychological harm on the victims and lead to secondary victimization.

As for the three victim participants, two alleged former child soldiers and their guardian, called upon request of the victim participants’ legal representatives and who were allowed to give evidence in person during the trial in *Lubanga*, it was concluded that their evidence contained internal inconsistencies concerning abductions and military service,¹⁰²² which undermined their credibility and, therefore, their status as victim participants was withdrawn.¹⁰²³ In the case of those three individuals, however, this decision was justified as there were material doubts about the identities of the victim participants as it was shown the real possibility that two of them stole identities at the instigation of the third individual.¹⁰²⁴

It should be mentioned that concerning victim participants called to testify as witnesses by victim participants’ legal representatives in *Katanga and Ngudjolo Chui*, four victim participants were in principle allowed to do it.¹⁰²⁵ However, only two finally did so as the other two victim participants’ accounts were found not credible by their own legal representative (legal representative of the main group of victim participants), who successfully requested Trial Chamber II to remove them from the list of witnesses.¹⁰²⁶ Moreover, although the legal representative did not ask the Chamber to withdraw the victim status of

¹⁰²⁰ *Lubanga* (ICC-01/04-01/06-2842), Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 35.

¹⁰²¹ See *Ibid.*, *Loc. cit.*

¹⁰²² *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 499, 500 and 501.

¹⁰²³ *Ibid.*, paras. 502 and 1363.

¹⁰²⁴ *Ibid.*, para. 502.

¹⁰²⁵ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2517), Décision aux Fins d'autorisation de Comparution des Victimes a/0381/09, a/0018/09,a/0191/08 et pan/0363/09 Agissant au Nom de a/0363/09, Trial Chamber II, 9 November 2010.

¹⁰²⁶ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2674), Décision Relative à la Notification du Retrait de la Victime a/0381/09 de la Liste des Témoins du Représentant Légal, Trial Chamber II, 31 January 2011; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2699-Conf), Décision Relative à la Notification du Retrait de la Victime a/0363/09 de la Liste des Témoins du Représentant Légal, Trial Chamber II, 11 February 2011.

the two individuals in question, she requested to end her legal representation as for them.¹⁰²⁷ Paying attention to the serious doubts casted by the legal representative on the credibility of those two victim participants and considering that these did not provide any satisfactory clarification, Trial Chamber II withdrew their status as victim participants.¹⁰²⁸ Due to the very particular circumstances in this case, the withdrawal of victim participant status may be found as sound.

2.4. The ECCC and the STL

2.4.1. Witness Status

2.4.1.1. The ECCC

Victims' status at the ECCC includes being witnesses. Practice Direction on the Classification and Management of Case-Related Information defines witnesses at the ECCC as follows:

“Witness” means a person, other than a civil party, who: i. has given or agreed to give evidence in connection with proceedings before the Court, or ii. has been identified by a party, Co-Investigating Judges or a Chamber, as appropriate, as an individual who has been, or may be, asked to give evidence in the course of preliminary investigations or in proceedings before the Court.¹⁰²⁹

A witness ‘shall take an oath or affirmation in accordance with their religion or beliefs to state the truth’ before being interviewed by the Co-Investigating Prosecutors or testifying before the Chambers.¹⁰³⁰ According to internal rule 24 (2) (f), a child who is less than 14 years old, among other witnesses, shall make a statement without having taken an oath. The other categories of witnesses, listed under internal rule 24, who shall testify without having taken an oath include the father, mother, ascendants, sons, daughters, descendants, brothers, sisters, brother-in-laws, sister-in-laws, husband or wife of the civil parties.¹⁰³¹

¹⁰²⁷ Katanga and Ngudjolo Chui (ICC-01/04-01/07-3064), *Décision Relative au Maintien du Statut de Victime Participant à la Procédure des Victimes a/0381/09 et a/0363/09 et à la Demande de Me. Nsita Luvengika en Vue D’être Autorisé à Mettre Fin à Son Mandat de Représentant Légal Desdites Victimes*, Trial Chamber II, 7 July 2011, para. 40.

¹⁰²⁸ *Ibid.*, paras. 48-49.

¹⁰²⁹ Practice Direction ECCC/004/2009/Rev.1, Practice Direction on the Classification and Management of Case-Related Information, article 2.e.

¹⁰³⁰ ECCC Internal Rules, rule 24 (1).

¹⁰³¹ See also Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 52.

As for the right against self-incrimination, a witness may object to make any statement that might incriminate him/her and this right is applicable throughout the stages of criminal proceedings.¹⁰³² The Trial Chamber hears testimony based on a common witness list that the ECCC creates after receiving suggestions from the parties.¹⁰³³ This is explained because, due to its inquisitorial procedural influence, the ECCC works on a ‘single case’ scheme and ‘there is absent the partisan “ownership” of evidence’.¹⁰³⁴ Also, at least in theory and generally speaking, in inquisitorial systems, the witness is expected to present a coherent and uninterrupted narration of the facts, and only then the actual questioning begins.¹⁰³⁵ At the ECCC, the Chamber shall hear the witnesses in the order that it considers useful.¹⁰³⁶ In practice, for example, the Trial Chamber since the commencement of the substantive proceedings in the trial against Duch (Case 001) and then in *Nuon Chea et al.* has first questioned the witnesses, followed by the Co-Prosecutors, the civil parties and the defence.¹⁰³⁷

When a witness, among other individuals, who knowingly and willfully interferes with the administration of justice including when without just excuse fails to comply with an order to attend or produce documents or other evidence before the Co-Investigating Judges or Chambers, (s)he may be sanctioned or referred to the appropriate authorities by the ECCC.¹⁰³⁸ The Co-Investigating Judges or Chambers may *proprio motu* or at a party’s request remind a witness his/her duty to tell the truth and the resulting consequences out of breaching this duty.¹⁰³⁹ A summon can be issued to order a witness to appear before the ECCC.¹⁰⁴⁰ Witnesses can be summoned and questioned by the Co-Investigating Judges.¹⁰⁴¹ However, the obligation to cooperate on, for example, issues concerning the appearance of a witness at the ECCC, is limited to Cambodia,¹⁰⁴² unless other third States agree so.¹⁰⁴³ In case of refusal to appear, the Co-

¹⁰³² ECCC Internal Rules, rule 28 (1).

¹⁰³³ *Ibid.*, rules 80 (1), (2), and 80 *bis*.

¹⁰³⁴ Sergey Vasiliev, ‘Trial’, in Luc Redymas, Jan Wouters and Cedryc Ringaert (eds.), *International Prosecutors* (Oxford University Press 2012) 700, 764.

¹⁰³⁵ For a comparison between witness questioning under the adversarial and inquisitorial models see, e.g., *Kreb* (2001) 346-348; *Orie* (2002) 1443-1445; *Heikkilä* (2004) 112.

¹⁰³⁶ ECCC Internal Rules, rule 91 (1), (2).

¹⁰³⁷ See also Sergey Vasiliev, ‘Structure of Contested Trial’ in *Sluiter et al.* (2013) 543, 627-629.

¹⁰³⁸ ECCC Internal Rules, rule 35 (1) (b).

¹⁰³⁹ *Ibid.*, rule 36 (1).

¹⁰⁴⁰ *Ibid.*, rule 41 (1).

¹⁰⁴¹ *Ibid.*, rule 55 (5) (a).

¹⁰⁴² ECCC Agreement, article 25.

¹⁰⁴³ ECCC Internal Rules, rule 5 (2).

Investigating Judges may issue an order requesting the Judicial Police to compel the witness to appear.¹⁰⁴⁴ During the trial, each party may request the Chamber to hear any witnesses present in the courtroom who were not properly summoned to testify,¹⁰⁴⁵ and the accused has the right to summon witnesses against him/her and whom (s)he had no opportunity to examine during the pre-trial stage.¹⁰⁴⁶ In any case, communication between lawyers and their clients are privileged.¹⁰⁴⁷

As for hearsay evidence, following international practice, the Trial Chamber has found that out-of-court statements which go to proof of the accused's acts and conduct, as charged in the indictment, are not allowed unless the defence could confront them.¹⁰⁴⁸ The exception is when the absence of the witness in court is caused by 'threats, intimidation or other forms of improper interference'.¹⁰⁴⁹ Hearsay statements that go to proof of matters other than accused's acts or conduct (and found *prima facie* relevant, reliable and not excluded by the Internal Rules) have been admitted.¹⁰⁵⁰ For example, the Trial Chamber in the first trial within *Nuon Chea et al.* admitted 1114 statements and transcripts of witnesses and civil parties in place of oral testimony.¹⁰⁵¹ The absence of oral testimony and opportunity for confrontation are relevant factors when evaluating what, if any, probative value and weight may be given to statements or transcripts admitted instead of oral testimony.¹⁰⁵²

With regard to witness proofing at the ECCC, the parties were not permitted to proof witnesses and, instead, the WESU was responsible for

¹⁰⁴⁴ Ibid., rule 60 (3).

¹⁰⁴⁵ Ibid., rule 84 (3).

¹⁰⁴⁶ Ibid., rule 84 (1).

¹⁰⁴⁷ Ibid., rule 22 (3).

¹⁰⁴⁸ Nuon Chea et al. (Case 002), Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, Trial Chamber, 20 June 2012, para. 22. See also Nuon Chea et al. (Case 002), Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, Trial Chamber, 15 August 2013, para. 23. Should a given witness or civil party appear before the Chamber, prior statements and transcripts only need to satisfy the general admissibility requirements established in internal rule 87 (3) as the defence had the opportunity to confront that witness or civil party with those prior statements and transcripts. See Ibid., para. 43.

¹⁰⁴⁹ Nuon Chea et al. (Case 002), 20 June 2012, para. 33.

¹⁰⁵⁰ Ibid., para. 23.

¹⁰⁵¹ Nuon Chea et al. (Case 002), 15 August 2013, para. 26.

¹⁰⁵² Ibid., para. 19. Impact of crimes on victims has been considered as a factor when admitting evidence relevant to Democratic Kampuchea policies and crime sites outside the scope of Case 002/1. See Ibid., para. 20.

familiarizing witnesses with the proceedings as well as preparing them for their testimony.¹⁰⁵³ Nevertheless, when civil parties appeared at the ECCC, the Judges expected civil parties' lawyers to have fully prepared their clients for their testimonies as evidenced in *Duch*.¹⁰⁵⁴ Accordingly, civil parties are seemingly not only allowed but even required to proof their clients before participating at the ECCC.

2.4.1.2. The STL

At the STL, victims' status also includes the witness dimension. The Pre-Trial Judge *proprio motu*, when warranted by the interests of justice or requested by the Prosecutor or the defence, can issue a summons to appear to a witness.¹⁰⁵⁵ Before giving evidence, every witness shall make the following solemn declaration 'I solemnly declare that I will speak the truth, the whole truth and nothing but the truth'.¹⁰⁵⁶ Concerning the sequence of testimony by a witness,¹⁰⁵⁷ after the opening statements of the parties and of any victim participant, the witnesses called before the Trial Chamber shall first be examined by the Presiding Judge and any other Chamber member, then by the party that called the witness, and subsequently cross-examined by the other party, if the other party elects to exercise its right of cross-examination. The witness may also subsequently be re-examined by the calling party.¹⁰⁵⁸ In any case, the Trial Chamber, in the interests of justice, may decide to depart from the order of proceedings set in the RPE.¹⁰⁵⁹ It should be noted that the Trial Chamber in its first pre-trial conference in *Ayyash et al.* determined that during trial:

[...] the party calling the witness will question that witness first. The witness may then be cross-examined by the other parties, that is, Defence or Prosecutor, as required. The Judges of course may ask questions at any time. The Trial

¹⁰⁵³ McGonigle Leyh (2011) 207.

¹⁰⁵⁴ *Ibid.*, Loc. cit. E.g., when a civil party got confused about questions, the Judges reprimanded the civil party's lawyer for not having properly prepared the civil party in question. See Kaing Guek Eav alias Duch (Case 001), Transcripts, 6 July 2009, pp. 55-56; 9 July 2009, pp. 50-51. A Judge, in another situation, explicitly said that he would expect better preparation of civil parties in the future. See *Ibid.*, 6 July 2009, p. 56. Transcripts cited by McGonigle Leyh (2011) 207, footnotes 235 and 236.

¹⁰⁵⁵ STL RPE, rule 78 (A) and (B).

¹⁰⁵⁶ *Ibid.*, rule 150 (A).

¹⁰⁵⁷ STL Statute, article 20 (2); STL RPE, rule 145 (A).

¹⁰⁵⁸ If it is not possible to follow the above-mentioned order, a witness shall be first examined, then cross-examined and then may also be re-examined by the calling party. See STL RPE, rule 145 (B).

¹⁰⁵⁹ *Ibid.*, rule 145 (C).

Chamber has also decided that it may use Rule 145, that is, it can depart from that model of presentation of witness evidence where required by the interests of justice.¹⁰⁶⁰

Cross-examination, according to rule 150 (I) 'shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining Party, to the subject-matter of that case'. A child under 18 years who, in the Chamber's opinion, does not understand the nature of a solemn declaration, shall be permitted to testify without that formality provided that the Chamber considers that 'the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. However, a judgment cannot be based on such testimony alone'.¹⁰⁶¹ A witness who has heard the testimony of another witness shall not, for that reason alone, be disqualified from testifying.¹⁰⁶² A witness may object to making any statement that might tend to incriminate him/her. Nonetheless, the Chamber may compel the witness to answer the question.¹⁰⁶³ Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence with the exception of contempt or false testimony.¹⁰⁶⁴ A Chamber, *proprio motu* or at a party's request, may warn a witness of the duty to tell the truth and resulting consequences from a failure to do so.¹⁰⁶⁵ Being a witness and refusing or failing to answer a question without a reasonable excuse is considered contempt.¹⁰⁶⁶ Legal professional communications between a person and his/her legal counsel are privileged.¹⁰⁶⁷

The STL RPE have as a rule the presentation of evidence through the witness coming to testify before the judges and, hence, giving the possibility to the accused (and victims) to examine witnesses on the evidence brought by them.¹⁰⁶⁸ The STL can exceptionally receive written evidence 'which it deems to have probative value' as long as the accused's fair trial rights are protected.¹⁰⁶⁹

¹⁰⁶⁰ Ayyash et al. (STL-11-01/PT/T26), Transcripts, 29 October 2013, p. 4, lines 21-25; and p. 5, lines 1-2.

¹⁰⁶¹ STL RPE, rule 150 (B).

¹⁰⁶² *Ibid.*, rule 150 (C).

¹⁰⁶³ *Ibid.*, rule 150 (F). This is subject to rule 118 (E).

¹⁰⁶⁴ *Ibid.*, rule 150 (F).

¹⁰⁶⁵ *Ibid.*, rule 152 (A).

¹⁰⁶⁶ *Ibid.*, rule 60 *bis* (A) (ii).

¹⁰⁶⁷ *Ibid.*, rule 163.

¹⁰⁶⁸ *Ibid.*, rule 150.

¹⁰⁶⁹ *Ibid.*, rule 149 (D).

The Trial Chamber may admit, in lieu of oral testimony, witness's evidence in the form of a written statement, or a transcript of evidence given by a witness at the STL, which is a victim-friendly measure, provided that this evidence goes to proof of a matter other than the accused's acts and conduct as charged in the indictment,¹⁰⁷⁰ or goes to proof of the acts and conduct of the accused as charged in the indictment if in this latter case the witness is present in the court, available for cross-examination and any judge's question, and attests that the written statement accurately reflects that witness's declaration.¹⁰⁷¹ Therefore, hearsay in the form of a written statement can be admitted. In any case, the Trial Chamber must conduct a careful balancing considering the accused's rights when admitting witness statements without cross-examination.¹⁰⁷² Depositions can also be taken upon Trial Chamber's order '[w]hether it is in the interests of justice'.¹⁰⁷³ Concerning the appearance of a witness at the STL, only Lebanon has the obligation to cooperate,¹⁰⁷⁴ but this obligation can be made extensive to third states if these agree so.¹⁰⁷⁵ The STL RPE explicitly establish that the STL may issue a summons to appear to a witness.¹⁰⁷⁶

Finally, with regard to witness proofing, even though the STL RPE are silent on this matter, the Code of Professional Conduct for Counsel Appearing before the Tribunal leaves it open as it is stated that the counsel is not allowed to improperly manipulate the recollection of witnesses, 'if allowed to proof a

¹⁰⁷⁰ Ibid., rule 155 (A). This rule also lists both factors in favour of and against admitting evidence in the form of a written statement. See also Ibid., rule 155 (B) and (c). For details on statements under rule 155 as well as depositions see STL, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court Under Rule 155, STL-PD-2010-02, 15 January 2010. As for principles in deciding applications to admit into evidence, under rule 155, statements which do not comply with the above-referred Practice Direction see Ayyash et al. (STL-11-01/PT/TC), Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, Trial Chamber, 30 May 2013, para. 31. The Trial Chamber in *Ayyash et al.* found that the statements of 23 of the proposed witnesses, and, where applicable, associated exhibits, 'bear sufficient indicia of reliability and are therefore admissible under Rule 155'. Ayyash et al. (STL-11-01/PT/TC), First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, Trial Chamber, 20 December 2013, para. 33.

¹⁰⁷¹ STL RPE, rule 156 (A). For the STL first trial in *Ayyash et al.*, the Prosecutor has estimated a number of about 170 witnesses under rules 155 or 156. See Ayyash et al. (STL-11-01/PT/T26), Transcripts, 29 October 2013, p. 14, line 17.

¹⁰⁷² See Ayyash et al. (STL-11-01/PT/TC), 30 May 2013, para. 31.

¹⁰⁷³ STL RPE, rule 157.

¹⁰⁷⁴ STL Constitutive Agreement, article 15.

¹⁰⁷⁵ STL RPE, rule 21.

¹⁰⁷⁶ Ibid., rule 78.

witness'.¹⁰⁷⁷ Having said so, it remains to be seen whether the STL Trial Chamber will in practice permit witness proofing or whether it will follow the same approach than that of the ICC and the ECCC, i.e., ban on witness proofing but allowing witness familiarization, due to its similarities with those two courts, in particular with the ICC.

2.4.2. Dual Status Victims

2.4.2.1. The ECCC¹⁰⁷⁸

Similar to the national Cambodian proceedings,¹⁰⁷⁹ victims at the ECCC cannot be simultaneously civil party and formal witness. According to internal rule 23 (4) 'The Civil Party cannot be questioned as a simple witness in the same case'.¹⁰⁸⁰ As evidenced in countries where the civil party status exists, the rationale of this practice is that the civil party has something to gain, either a gain of financial or another nature, by the accused's conviction,¹⁰⁸¹ which may distort the commitment to truth expected from a witness. Thus, it is expected to preserve the accused's right to a fair trial and the integrity of the proceedings.

The Trial Chamber noticed the difference between victims as witnesses and victims as civil parties in its first trial judgment in *Duch*:

The ECCC legal framework distinguishes between the survivors who testified as witnesses and the survivors who were joined as Civil Parties and also provided evidence before the Chamber. Pursuant to Internal Rule 23(6), upon joining as a Civil Party, a victim becomes a party to the proceedings. These survivors were accordingly no longer questioned as witnesses and were exempted by the Internal Rules from the requirement to testify under an oath or affirmation.¹⁰⁸²

The legal framework, referred to by the Trial Chamber, includes the Practice Direction on the Classification and Management of Case-Related Information which, as previously cited, defines witness as a 'person, other than a civil party [...]'.¹⁰⁸³ Moreover, civil parties are not listed under internal rule 24

¹⁰⁷⁷ STL, A Code of Professional Conduct for Counsel Appearing before the Tribunal, STL-CC-2011-01, 28 February 2011, p. 3, para. 6 (h).

¹⁰⁷⁸ See also *infra* Chapter IV 4.4.1.1.

¹⁰⁷⁹ 2007 Cambodian Criminal Procedure Code, article 312 ('A civil party may never be heard as a witness').

¹⁰⁸⁰ See also ECCC Internal Rules, rule 23 (3) (a) (Rev. 5); ECCC Internal Rules, rule 23 (6) (Rev. 3). Additionally, see Brouwer and Heikkilä (2013) 1308.

¹⁰⁸¹ Brien and Hoegen (2000) 323. See also Brouwer and Heikkilä (2013) 1353.

¹⁰⁸² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 53.

¹⁰⁸³ See also Practice Direction ECCC/004/2009/Rev.1, article 2.e (previously cited).

which enumerates those witnesses who shall testify without taking an oath. Therefore, victims as witnesses and victims as civil parties constitute two distinguishable and not cumulative categories.

However, as mentioned in the above-quoted paragraph and as examined in further detail later,¹⁰⁸⁴ civil parties can provide unsworn testimony. Indeed, during the trial proceedings in *Duch*, 22 civil parties provided evidence.¹⁰⁸⁵ As noticed by the Trial Chamber in its Judgment in *Duch*, besides the persons explicitly mentioned under internal rule 24 (2), individuals exempted from the requirement of testifying under oath or affirmation ‘Included in this category are the Accused, the Civil Parties’.¹⁰⁸⁶ The Trial Chamber also added that ‘These individuals may nevertheless testify and have their statements put before the Chamber and assessed as evidence where relevant and probative’.¹⁰⁸⁷ Concerning the fact that civil party testimony is not taken under oath, it should be examined what value can be assigned to this unsworn testimony. In principle, it should be given less weight than evidence provided under sworn testimony insofar as the former is regarded as less persuasive than the latter.¹⁰⁸⁸ Thus, this may in theory be considered a disadvantage for the victim constituted in civil party since the testimony of a victim (witness) may in principle be given a heavier weight than the testimony delivered by a civil party.

Nevertheless, in practice, in, for example, *Duch*, the ECCC Judges treated civil party testimony, in particular that given by direct victims, as witness testimony.¹⁰⁸⁹ In *Duch*, the Trial Chamber stated that although civil parties are exempt from taking the oath, they ‘may testify and have their statements put before the Chamber and assessed as evidence where relevant and probative’, and acknowledged the distinctive features of civil party’s participation during trial as previously quoted.¹⁰⁹⁰ Thus, in the *Duch* Trial Judgment, the Chamber used the testimony of both civil parties and witnesses to support particular findings as appropriate. The Trial Chamber in *Nuon Chea et al.* has adopted the same approach by exercising its duty to appropriately and independently weigh all

¹⁰⁸⁴ See *infra* Chapter IV 4.4.1.1.

¹⁰⁸⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 54.

¹⁰⁸⁶ *Ibid.*, para. 52, footnote 78.

¹⁰⁸⁷ *Ibid.*, para. 52.

¹⁰⁸⁸ McGonigle Leyh (2011) 206.

¹⁰⁸⁹ *Ibid.*, *Loc. cit.*

¹⁰⁹⁰ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 52 and 53.

evidence presented and also to safeguard trial proceedings fairness.¹⁰⁹¹ Accordingly, ‘the weight to be given to Civil Party testimony will be assessed on a case-by-case basis in light of the credibility of that testimony’,¹⁰⁹² based on ‘a reasoned assessment of this evidence any doubt as to guilt will be interpreted in the Accused’s favour’.¹⁰⁹³

Moreover, the Judges and parties have often referred to civil parties as witnesses.¹⁰⁹⁴ Indeed, there was no indication in the first ECCC trial judgment (in *Duch*) that the ECCC gave less weight to unsworn testimony from civil parties,¹⁰⁹⁵ which also has seemingly so far been the case in *Nuon Chea et al.*¹⁰⁹⁶ This arguably corresponds to the fact that civil party’s testimony has been subject to adversarial argument.¹⁰⁹⁷ The outcome in the trial judgment in *Duch* was in spite of the fact that some individuals who testified acknowledged to have based some of their factual knowledge on previous testimonies heard at the ECCC.¹⁰⁹⁸ The problem with this is that these civil parties’ testimonies, knowingly or not, were tailored to fit what the civil party in question heard and/or were bolstered with facts not previously known to them.¹⁰⁹⁹ Furthermore, unlike with regard to witnesses, the ECCC Internal Rules do not prevent civil parties from viewing proceedings prior to giving their statements as they hold the right to be present in all proceedings. In fact, in *Duch*, a group of direct victims who may have given sworn testimony on the accused’s guilt chose to participate as civil parties and, therefore, testified without taking an oath, attended all proceedings and additionally could claim reparations. In turn, in

¹⁰⁹¹ Nuon Chea et al. (Case 002), Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure Concerning Civil Parties’ Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), Trial Chamber, 2 May 2013, para. 21.

¹⁰⁹² Ibid., para. 22.

¹⁰⁹³ Ibid., p. 10.

¹⁰⁹⁴ See McGonigle Leyh (2011) 206; Nuon Chea et al. (Case 002), 15 August 2013, paras. 23-30 (referring to evidence provided by both witnesses and civil parties under the sections titled ‘Statements and Transcripts of Available Witnesses Proposed in Place of Oral Testimony’ and ‘Statements of Deceased Witnesses’).

¹⁰⁹⁵ See Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 52-54. See also Case of Kaing Guek Eav alias Duch (Case 001), Transcripts, 1 July 2009, pp. 9, 73. Transcripts cited by McGonigle Leyh (2011) 206, footnote 232.

¹⁰⁹⁶ Nuon Chea et al. (Case 002), 2 May 2013, para. 21; Nuon Chea et al. (Case 002), 15 August 2013, paras. 8, 20 and 24.

¹⁰⁹⁷ Nuon Chea et al. (Case 002), 2 May 2013, para. 14.

¹⁰⁹⁸ Case of Kaing Guek Eav alias Duch (Case 001), Transcripts, 21 July 2009, p. 40. Cited by McGonigle Leyh (2011) 206, footnote 233.

¹⁰⁹⁹ McGonigle Leyh (2011) 206.

Duch's trial, for example, two direct victims testified as witnesses.¹¹⁰⁰ Even though one of them sought to participate as a civil party, he filed his application too late, and the other chose to be a witness.¹¹⁰¹

Thus, victims at the ECCC have to choose between intervening as a witness (if called by one of the parties, normally the Prosecutor or civil parties) or to participate as civil parties during trial proceedings since the deadline for the submission of civil party applications is set before the beginning of the trial, under the amended/current Internal Rules.¹¹⁰² Accordingly, unlike the Cambodian criminal procedure, a victim cannot be first a witness and then become a civil party during trial due to precisely the above-mentioned deadline. The ECCC legal framework may therefore be criticized as puts the victim in a disjunctive to choose one or other dimension of his/her status and, what is worse, with an almost irreversible effect. However, there is also the possibility for the victims to withdraw his/her civil party status,¹¹⁰³ and, later, may be called as a witness.

Based on the previous paragraphs, it is concluded that although victims cannot simultaneously be civil parties and witnesses, victims as civil parties can provide evidence via unsworn testimony and the ECCC has seemingly provided to their testimony no less weight than to sworn testimony. Furthermore, as seen later,¹¹⁰⁴ civil parties have been examined and cross-examined like witnesses in the ECCC's practice. In this regard, it may be considered that when it comes to their testimony victims may in practice hold a sort of 'dual status' at the ECCC,¹¹⁰⁵ i.e., civil party and *mutatis mutandi* relatively similar to a 'witness'. In any case, it is important to take precautions to avoid that the civil parties' testimony be 'contaminated' with what they may have learnt from previous testimonies at trial and/or the Judges need to be more attentive when examining the contents of the evidence provided.

2.4.2.2. The STL¹¹⁰⁶

As for the STL, the original version of its rule 150 (Testimony of Witnesses) (D) as a matter of principle precluded victims from holding the dual status of victim participant-witness 'A victim participating in the proceedings shall not be

¹¹⁰⁰ Ibid., Loc. cit.

¹¹⁰¹ Ibid., Loc. cit.

¹¹⁰² ECCC Internal Rule, rule 23 *bis* (2). See also *infra* Chapter IV 2.4.1.1.

¹¹⁰³ ECCC Internal Rule, rule 23 *bis* (5).

¹¹⁰⁴ See *infra* Chapter IV 4.4.1.1.

¹¹⁰⁵ See also McGonigle Leyh (2011) 206.

¹¹⁰⁶ See also *infra* Chapter IV 4.4.1.2.

permitted to give evidence unless a Chamber decides that the interests of justice so require'.¹¹⁰⁷ Accordingly, this rule provided that a victim has to decide at the outset whether (s)he wishes to be a participant in the proceedings or a witness. However, bearing in mind that the situation may change and, for example, parties may realize later in the proceedings that a victim might be important as a witness, an application could be made to the competent Chamber to solve the dilemma.¹¹⁰⁸

Be that as it may, the rule was amended by the Plenary of the STL Judges in February 2012 and, hence, its text reads now as follows 'A victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require'.¹¹⁰⁹ The position of victims holding the dual status of victim participant-witnesses was accordingly clarified and enhanced. As the Plenary stated, the previous version of rule 150 (D) according to which victim participants 'shall not be permitted to give evidence unless a Chamber decides that the interests of justice so require' was unduly restrictive.¹¹¹⁰ Moreover, this amendment seeks to reverse the presumption of not being simultaneously a victim participant and a witness in favor of allowing victims to play the role of victim participants and also appear as witnesses. Additionally, this amendment brings rule 150 (D) in harmony with article 17 of the STL Statute on victims' rights, which recognizes that victims participating in the proceedings shall be permitted or required to express their views and concerns through their legal representatives when considered appropriate by the Pre-Trial Judge or Chamber.¹¹¹¹ Accordingly, it was considered unnecessary to state that victim participants should give evidence 'under oath' as the STL RPE already require that every witness called to the witness box makes a solemn declaration before giving evidence.¹¹¹² Finally, as the Plenary of the STL Judges when adopting the amendment pointed out,¹¹¹³ the Trial Chamber will take a decision on the most appropriate ways for witnesses who also hold the status of victim participants to give evidence. Also, as mentioned in *Ayyash et al.*, in case of the

¹¹⁰⁷ STL RPE, rule 150 (D) (original text).

¹¹⁰⁸ STL President (2010), para. 21.

¹¹⁰⁹ STL RPE, rule 150 (D) (text as amended by the Fourth Plenary of Judges, February 2012).

¹¹¹⁰ STL Office of the President, Summary of the Accepted Rule Amendments and Some Key Rejected Rule Amendment Proposals. Pursuant to Rule 5 (1) of the Special Tribunal for Lebanon's Rules of Procedure and Evidence (Fourth Plenary of Judges, February 2012), p. 19.

¹¹¹¹ See also STL President, Rules of Procedure and Evidence. Explanatory Memorandum by the Tribunal's President (as of 12 April 2012), para. 21.

¹¹¹² STL RPE, rule 150 (A).

¹¹¹³ STL (2012) 19.

participation of a dual status victim participant-witness, tailored protective measures may be required and ‘it must be managed carefully in order to safeguard the rights of the accused to a fair and expeditious trial, as well as the interests of the Prosecution and the [victim participants] themselves’, which has to be determined by the competent Chamber in due course.¹¹¹⁴

2.5. Comparative Conclusions

Concerning victims’ status, the ICTY, the ICTR and the SCSL are similar to the adversarial systems of England and Wales and the United States as the status of witness is almost exclusively the only substantial role assigned to victims at those tribunals. Consequently, since victims can only be witnesses at the ICTY, the ICTR and the SCSL, they do not have the opportunity to express their own views and concerns and in their own words as their testimonies are limited to an important extent to the prosecution’s strategy although they are in theory considered witnesses of justice at the ICTY, the ICTR and the SCSL. The ICTY, the ICTR and the SCSL have adopted the typical adversarial manner and order of examination and cross-examination, i.e., the victim examined by the party who called him/her as a witness (normally the Prosecutor) and followed by cross-examination by the other party (normally the defence). Additionally, the principle of orality (live, in person testimony) when victims testify at the ICTY, the ICTR and the SCSL also follows the adversarial system.

When it comes to the ICC, the ECCC and the STL victims’ role as witnesses is just a dimension of their status, which is also the case of the French inquisitorial system. The inquisitorial system influence is also present in the manner and order in which the victim as witness is interrogated and gives his/her testimony. Therefore, only when there is no agreement between the parties, the ICC RPE suggests the adversarial order of questioning although adversarial cross-examination has been followed in the ICC’s practice. At the ECCC and the STL, Presiding Judges are normally the first to examine the witness. Indeed, judge’s more active role on questioning and gathering evidence at the ICC, the ECCC and the STL, similar to the French system, is an important factor to evaluate how victim-friendly a court may be as detailed in the previous chapter. Witnesses can be called not only by parties and complementarily by judges but also by victim participants (ICC, STL) and civil parties (ECCC) in a similar manner than in the French system. Also, under the inquisitorial system

¹¹¹⁴ Ayyash et al. (STL-11-01/PT/PTJ), Decision on the VPU’s Access to Materials and the Modalities of Victims’ Participation in Proceedings before the Pre-Trial Judge, Pre-Trial Judge, 18 May 2012, para. 61.

influence, especially at the ECCC, questioning of the witness at least in theory should only start after the witness's first narration of facts.

Be that as it may, what is common to all the examined international and hybrid criminal courts is that their rules of procedure and evidence have incorporated victim-friendly measures, mainly from the inquisitorial system, e.g., the admission of testimony via deposition and video link, witness evidence in written form and hearsay evidence, i.e., a flexible and liberal approach to evidence, not unhindered by technical rules like those especially existent in common law countries.¹¹¹⁵ The above-mentioned point constitutes a sound exception to the principles of oral, in person and live testimony and cross-examination, and is recognized in a higher or lower degree at international and hybrid criminal courts, creating better conditions to prevent a secondary victimization and encourage victims' participation. In any case, those exceptions to the principle of oral, live and in person testimony have been conducted with due regard to the right of the accused to a fair and impartial trial.

It should, however, be left clear that in spite of inquisitorial features on the examination/questioning of witnesses in a higher or lesser degree at the examined international and hybrid criminal courts, the victim as a witness, unlike victim participants, almost by definition cannot express his/her own views and concerns and on his/her own ways but has to adapt them to the prosecutorial strategy. In other words, victim's status as a witness at, on the one hand, the ICTY, the ICTR and the SCSL, and, on the other one, the ICC, the ECCC and the STL does not differ as much in the objective for which is called as how and under what circumstances the victim as a witness gives his/her testimony. Moreover, adversarial features, when questioning witnesses, in particular cross-examination, are present at the international and hybrid criminal courts, in a higher (ICTY, ICTR, SCSL) or lesser degree (ICC, ECCC and STL). In any case, cross-examination is not unrestricted as it is subject to the matter of the evidence in-chief and matters affecting the witness credibility, and should be conducted with due respect for witness's dignity in order to avoid re-victimization. Thus, cross-examination, which seeks to *inter alia* affect the witness credibility, has to be conducted within reasonable limits. Testimony via video-link ought to be taken in a venue of appropriate solemnity, where the witness's safety can be guaranteed, and which is conducive to the provision of truthful testimony.¹¹¹⁶

¹¹¹⁵ See Richard May and Marieke Wierda, 'Evidence before the ICTY' in Richard May et al. (eds.). *Essays on the ICTY Procedure and Evidence* (Kluwer 2001) 249, 251.

¹¹¹⁶ See also McDermott (2013b) 877.

Additional features common to the considered international and hybrid criminal courts, which reflect a combination of the features found in the national systems examined, include: i) the witness needs to take a solemn declaration or oath to tell the truth before testifying, with some exceptions including child witnesses; ii) a witness testifies in person; iii) out-of-court witness testimony by deposition is also admissible even though it may be given less weight; iv) the prohibition of self-incrimination and/or not to use self-incriminating evidence for further prosecution; v) sanctions to victims when, as witnesses, they give false testimony (contempt of the court); vi) the witness normally does not have a legal representative; vii) the witness testifies at a specific time; viii) hearsay evidence via a written statement can be admissible although it may have less probative weight and it cannot concern the accused's acts and conduct unless the witness can be cross-examined, or (s)he is found unavailable, and/or his/her absence in court is caused by improper interference such as intimidation; ix) certain privileged communications, e.g., legal or medical professional relationship; and x) child and mentally impaired victims can give their testimony although when this is unsworn has less weight. Even within these similarities, there are some differences. Thus, unlike the ICTY, the ICTR and the STL, at the ICC, the SCSL and the ECCC, the unsworn testimony of a child or a mentally impaired person may at least in theory be sufficient for the conviction of the accused. The just-mentioned situation might raise some concerns about some due process guarantees although conforms the principle of non-corroboration and even common law jurisdictions developments. Similar to the three considered national systems, the ICTY, the ICTR, the SCSL and the ECCC based on their instruments and/or practice may via *subpoena* obtain the compulsory attendance of witnesses. Under the ICC Statute, this is not contemplated. Concerning judicial assistance to ensure witness's appearance at court, all States shall cooperate with the ICTY, the ICTR, due to their Security Council Resolution constitution. As for the ICC, only States Parties to the ICC Statute are obligated. When it comes to the SCSL, the ECCC and the STL, that obligation is limited to the respective country. It must be noticed that at the ICC and the STL when victims take the stand only as witnesses, they give evidence unlike when victims are participants where they express their views and concerns (victim participants), which are not evidence. Moreover, victim participants, unlike witnesses, cannot be questioned by the parties.

Credibility issues of victims as witnesses, causing the rejection of the respective testimonies, were present in the ICC's first completed trials due to mainly an excessive use of intermediaries and problems with the OTP's system

of evidence review; however, the ICC and its OTP have been adopting measures to reverse this situation.

Concerning witness proofing, the ICTY, the ICTR, the SCSL and the STL (implicitly) allow this practice based on considerations of fairness, expeditiousness and in order to clarify a witness's testimony, and thus are similar to national systems like the American one. On the other hand, the ICC and the ECCC follow systems such as the English and the French ones and, hence, this practice is prohibited due to risks of truth distortion in the testimony and, in particular at the ICC, because of the lack of a general law principle allowing witness proofing as a source applicable by the ICC.¹¹¹⁷ However, at all the considered international and hybrid criminal courts, witness familiarization is permitted and encouraged, which also corresponds to the trend across the considered national systems. Moreover, ECCC's practice shows that civil parties are expected to be proofed. Be that as it may, both the ICTY and the ICC when deciding whether to allow or ban the practice of witness proofing paid a close look at national systems.¹¹¹⁸

With regard to the dual status victim, i.e., victim as a witness and as participant, it does not exist at the ICTY, the ICTR and the SCSL as victims lack the role of victim participants or that of civil parties. Even though the ICC legal framework is silent about the possibility for a victim to be simultaneously victim participant-victim witness, the ICC's case law has granted victims dual status victim participant-victim witness, i.e., a victim participant can also be a witness if his/her testimony genuinely contributes to the determination of the truth and is consistent with the rights of the accused. In granting this dual status, it has been referred to, *inter alia*, national legislation, including the French CPP,¹¹¹⁹ but it has been adopted certain procedural safeguards to preserve the admissibility and probative value of the evidence and protect the rights of the accused. These safeguards, i.e., no dual status victim's access to the confidential part of the file and prohibition to attend other witnesses' hearing in the same case, remained

¹¹¹⁷ As previously noticed, the exception to the ICC's consolidated practice of banning witness proofing is represented by Trial Chamber V's decision to allow it for the Kenya trials. See *supra* Chapter III 2.3.1.2.

¹¹¹⁸ As for the ICC, see Lubanga (ICC-01/04-01/06-679), 8 November 2006, paras. 37-40 (citing, e.g., the Code of Conduct of the Bar Council of England and Wales and *R. v. Momodou*). As for the ICTY, about the crafting of standard practices on this regard see the considerations by Minna Schräg, a Senior Trial Attorney at the ICTY Office of the Prosecution between 1994 and 1995, making reference to, for example, the practice in the United States. Minna Schräg, 'Lessons Learned from ICTY Experience' (2004) 2 *Journal of International Criminal Justice* 427, 432, footnote 9.

¹¹¹⁹ Katanga and Ngudjolo Chui (ICC-01/04-01/07-632), 23 June 2008, paras. 21 and 27.

until the dual status victim participant-witness no longer was an anonymous victim and sought to address two main concerns. First, a dual status victim once has acceded to the confidential part of the case file, (s)he may adjust his/her testimony to the available evidence that the Prosecutor intends to rely on. Second, dual status victim's credibility may be questioned as (s)he has some (financial) interests in the trial outcome, i.e., to seek reparations and/or to get accused's conviction/certain sentence. Indeed, even though former child soldiers held dual status in *Lubanga*, problems about their credibility led the Trial Chamber not only to find their testimonies unreliable, which was a justified conclusion, but also to remove their status as victim participants, which can be considered as excessively unnecessary unless there is likelihood of stolen identities (*Lubanga*) or when victim participants cannot clarify serious credibility doubts brought by their own legal representatives (*Katanga and Ngudjolo Chui*). In any case, the rights granted to dual status victims are not larger than those granted to a victim playing the role of either a participant or a witness alone. Dual status victim's legal representative or the VWU enables communication between the dual status victims and any of the parties.

Similar to the French and Cambodian systems, the ECCC does not admit the simultaneous official status of a victim as a civil party and as a witness in the same case. Concerns similar to those existent at the ICC, in particular the existence of financial interests that may make the victim as a witness change his/her testimony, underlie this civil law feature. However, the situation for victims in this point is even more difficult at the ECCC than in the French or Cambodian systems. Whereas in the French and Cambodian systems the victim as a witness during trial normally testifies first and then becomes a civil party in the same case, at the ECCC that option is not possible. This means that the victim has to choose between his/her status as a witness and his/her role as a civil party. In principle, the heavier evidentiary weight given to a witness's sworn testimony in contrast to an unsworn testimony from the civil party is the main advantage to go for the witness option. Nevertheless, in the ECCC practice, such difference in evidentiary weight has not apparently taken place and indeed some civil parties have tailored their testimonies to what they heard at court, which is criticized herein. On the other hand, the fact that witnesses' testimonies are limited to the Prosecution's strategy as opposed to freedom for victims to express their own accounts and equipped with procedural rights constitute strong advantages for the civil party option. In any case, at the ECCC, considering that civil parties can provide unsworn testimony, the fact that their testimony (in particular direct victim testimony) has been treated by the Judges as witness

testimony, that the Judges and parties have often referred to civil parties as witnesses, and that their testimony is subject to adversarial argument and has not seemingly been given less weight than witness testimony, in those aspects, civil parties at the ECCC may in practice be considered as holding a sort of ‘dual status’, i.e., civil party and *mutatis mutandi* relatively similar to a ‘witness’.

The STL has evolved from a situation very similar to that at the ECCC, i.e., need to choose between dimensions of the victims’ status, to one that is closer to the ICC. Thus, victims’ status as victim participants and witnesses simultaneously and in the same case was framed as exceptional under the original version of the STL RPE. Hence, a choice similar to that at the ECCC was in place. A new STL rule reversed this as there is currently a presumption in favor of allowing the dual status victim participant-victim witness. Therefore, victims’ status at the STL has arguably been enhanced.

3. Protective Measures

This subchapter examines the judicial measures adopted in favor of victims and witnesses at international and hybrid criminal courts. A number of particular concerns such as threat of reprisals and avoidance of further victimization brought about by criminal proceedings themselves underlie the need to protect victims and witnesses.¹¹²⁰ Since protective measures at the international level were influenced by and/or are similar to protective measures adopted at the national level, protective measures in the English, American and French systems are briefly examined. Then, a detailed discussion of the legal regime of protective measures in each of the international and hybrid criminal courts follows. It should be mentioned that the analysis is limited to judicial protective measures as they concern the criminal proceedings as such and provide the general level of protection necessary to ensure the safety and security of the immense majority of witnesses.¹¹²¹ However, it is here noticed the existence of non-judicial measures, in particular relocation of witnesses, which can be adopted by other organs of international and hybrid criminal courts in exceptional cases where victims as witnesses ‘face situations in which it is impossible to return their homes’.¹¹²² Accordingly, these non-judicial measures are considered as part of ‘long term measures’ for witnesses that testified before the respective courts and part of the functions of the respective VWUs, VWS or Registrars as explicitly laid down in

¹¹²⁰ Schabas (2011) 359.

¹¹²¹ See Tolbert and Swinnen (2006) 219.

¹¹²² *Ibid.*, Loc. cit.

the ICTR, the SCSL and the ICC RPE.¹¹²³ Although the ICTY RPE do not contain an explicit provision on this regard, its VWS has provided some post-trial protection, including relocation.¹¹²⁴ In turn, the ICC evacuated 150 refugees from Eastern Chad to a more secure location considering the issuance of arrest warrants in the Darfur situation.¹¹²⁵

3.1. National Systems

3.1.1. English Adversarial System

The YJCEA brought measures aimed at facilitating the gathering and giving of evidence by vulnerable and intimidated witnesses. These measures, collectively known as ‘special measures’, are subject to the court’s discretion and were considered as:

[...] the most radical rewriting of the orthodox rules for treatment of witnesses in the adversarial system in the common law world. Whilst other jurisdictions had experienced with some special measures for child witnesses such as pre-trial video recorded cross-examination, none had made any of them mandatory for any particular category of vulnerable witnesses [...].¹¹²⁶

Whereas vulnerable witnesses include child witnesses under 18 and any witness whose quality of evidence is likely to be diminished due to a mental disorder, a significant impairment of intelligence and social functioning or a physical disability or disorder;¹¹²⁷ intimidated witnesses are those suffering from

¹¹²³ ICTR RPE, rule 34 (A) (iii); SCSL RPE, rule 34 (A) (iii); ICC RPE, rules 16 (4) and 17 (2) (a) (i). Concerning relocations of the ICC witnesses, the ICC Appeals Chamber found that: ‘The Prosecutor cannot unilaterally “preventively relocate” witnesses either before the Registrar has decided whether a particular witness should be relocated or after the Registrar has decided that an individual witness should not be relocated. 2. In cases of disagreement between the assessment of the Victims and Witnesses Unit of the Registry (hereinafter: “VWU”) and the Prosecutor, the ultimate arbiter of whether the serious measure of relocation should be undertaken is the Chamber’. See *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-776), Judgment on the Appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I, Appeals Chamber, 26 November 2008, paras. 1 and 2. See also VWU, Considerations on Preventive Relocation (As part of the ICC Protection Program established by the VWU).

¹¹²⁴ See Tolbert and Swinnen (2006) 219-225; ICTY/UNICRI, *ICTY Manual on Developed Practices* (2009) 189.

¹¹²⁵ See Schabas (2010) 825.

¹¹²⁶ Laura Hoyano, ‘Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ (2010) 5 *Criminal Law Review* 345, 345.

¹¹²⁷ YJCEA, section 16.

fear or distress in relation to testifying in the case.¹¹²⁸ Sexual crimes complainants fall under the latter category unless they wish to opt out.¹¹²⁹ The original differentiation between child witnesses in need of special protection and those who give evidence in all other types of cases, which was an arbitrary distinction,¹¹³⁰ is no longer applicable.¹¹³¹ As a result, all child witnesses are in the same position regardless of the crime. The YJCEA provides for a set of measures including: i) screening the witness from the accused; ii) giving evidence by live link; iii) giving evidence in private; iv) removal of wigs and gowns; v) video recording the evidence-in-chief; vi) video recording the cross-examination or re-examination; vii) examining the witness through an intermediary; and viii) providing aids to communication.¹¹³² As for intimidated witnesses, the court when determining whether the witness qualifies for any of the special measures must take into account the following factors: i) the nature and alleged circumstances of the crime; ii) witness's age; iii) witness's social, cultural and ethnic background; iv) any witness's religious beliefs or political opinion; v) witness's domestic and employment circumstances; and vi) any behavior towards the witness on, *inter alia*, the accused or his/her family.¹¹³³ When a child wishes to give oral evidence in chief and/or testify in the courtroom instead of using video-link,¹¹³⁴ the court in assessing whether this would diminish the quality of the testimony has to consider certain factors.¹¹³⁵

Concerning sexual crimes, section 41 of the YJCEA provides that no evidence may be adduced or question asked by or on behalf of the accused about any sexual behavior of the complainant without judge's leave. This is applicable to the complainant's previous sexual activity, whether it is alleged to have occurred with a third party or with the accused himself. The Coroners and Justice Act (CJA) (2009) added special provisions on sexual offences tried in the Crown Court to the YJCEA.¹¹³⁶ These provisions are not applicable if the sexual

¹¹²⁸ Ibid., section 17.

¹¹²⁹ Ibid., section 17 (4).

¹¹³⁰ Laura Hoyano, 'Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses' (2000) *Criminal Law Review* 250, 251.

¹¹³¹ See Coroners and Justice Act, section 101 (amending section 21 of the YJCEA).

¹¹³² YJCEA, sections 23-29.

¹¹³³ YJCEA, sections 17 (2) and 46 (4).

¹¹³⁴ Ibid., section 21 (4).

¹¹³⁵ These factors are: i) the child's age and maturity; ii) the child's ability to understand the consequences of giving evidence in a different manner; iii) the relationship (if any) between the witness and the accused; iv) the child's social and cultural background and ethnic origins; and v) the nature and alleged circumstances of the offence. See YJCEA, section 21 (4) (c).

¹¹³⁶ CJA, section 101 (inserting a new section 22A into the YJCEA).

offence complainant is under 18 years,¹¹³⁷ to whom the provisions on child witness apply.

Whereas the original YJCEA enabled the court to make a direction allowing a witness to give evidence by live-link,¹¹³⁸ the CJA amended this by allowing the court to also direct that a person specified by the court can accompany the witness when (s)he is giving evidence by live-link, and the court must take the witness's wishes into consideration when it determines who is to accompany the witness.¹¹³⁹ In any case, the Criminal Justice Act (1988) enables the court to allow witnesses outside the United Kingdom to give evidence by link and without the need to fall in a special 'category' of witnesses, e.g., vulnerable or intimidated witnesses.¹¹⁴⁰ Section 51 of the Criminal Justice Act (2003) is applicable to witnesses who may be eligible to give evidence via video link but who are in the United Kingdom. A video recorded statement can be admitted as witness's evidence in chief,¹¹⁴¹ but the prohibition on asking a witness questions about matters considered by the court as covered adequately in the recorded statement has been removed.¹¹⁴² The Criminal Justice Act permits the admission of previous statements of a witness who would normally have been called upon to testify, but is unable to attend,¹¹⁴³ due to, for example, fear.¹¹⁴⁴ Although there are some instruments on the regulation of questioning laying down some ethical standards,¹¹⁴⁵ they are neither legally binding nor exhaustive.

The compatibility of protective measures with the accused's rights is now examined. First, the Court of Appeal has determined that the right to examine witnesses is not free-standing but merely a constitutive component of a fair trial.¹¹⁴⁶ Even though few English cases directly address the right to

¹¹³⁷ YJCEA, sections 22 (A) (1) and (3).

¹¹³⁸ *Ibid.*, section 24.

¹¹³⁹ CJA, section 102 (inserting subsections (1A) and (1B) into section 24).

¹¹⁴⁰ Criminal Justice Act, section 32 (1).

¹¹⁴¹ YJCEA, section 27. Section 103 of the CJA amended this section in order to relax restrictions on a witness giving additional evidence-in-chief after the witness's video-recorded statement has been admitted.

¹¹⁴² Coroners and Justice Act, section 103 (2) (amending section 27 of the YJCEA).

¹¹⁴³ Criminal Justice Act, section 116.

¹¹⁴⁴ *Ibid.*, section 116 (2) (e). As for case law (corresponding to its predecessor, section 23 of the Criminal Justice Act 1988 and arguably still applicable) see *R v O'Loughlin* [1988] 3 All ER 431.

¹¹⁴⁵ See *The Code of Conduct for the Bar of England and Wales*, 8th edn. (London, General Council of the Bar) reinforced by the *Written Standards for the Conduct of Professional Work* (London, General Council of the Bar).

¹¹⁴⁶ *R. v Campbell (Neville)* [2005] EWCA Crim 2078; *R. v. Xhabri* [2006] 1 Cr App R 26.

confrontation,¹¹⁴⁷ Lord Coleridge in *R. v Smellie* denied the existence of such a right at common law.¹¹⁴⁸ Indeed, there is no common law authority to suggest that this right has to involve physical confrontation.¹¹⁴⁹ Moreover, under the ECHR and ECtHR's jurisprudence, although the right to examine is recognized,¹¹⁵⁰ the right to confrontation is not part of the fair trial and, accordingly, special measures to shield vulnerable witnesses from the accused do not contravene the ECHR provided that they are strictly necessary.¹¹⁵¹

Second, the general principle of English criminal procedure is that all evidence must be given in public, with access being afforded to the press, unless a departure from the principle of open justice is strictly necessary.¹¹⁵² Granting special measures arguably falls into these exceptions. Moreover, article 6 (1) of the ECHR is more permissive and broader than domestic principles, and this is reflected in related case law.¹¹⁵³ The House of Lords has actually established that common law provides exceptions to the general principle of orality and the use of special measures does not violate article 6 of the ECHR.¹¹⁵⁴

Third, as for the restriction on evidence or questions about complainant's sexual history under the YJCEA, a majority of the House of Lords in *R. v A* considered that although it pursued desirable goals, the Parliament adopted a legislative scheme which made an 'excessive inroad' into the right to fair trial since, as Lord Steyn concluded, 'a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular decision'.¹¹⁵⁵ However, the YJCEA was found compatible with article 6 of the ECHR by referring to the Human Rights Act (1998), as it was read subject to an implied provision whereby evidence or questioning, required to ensure a fair trial, should not be inadmissible.¹¹⁵⁶ Thus, sometimes relevant

¹¹⁴⁷ Doak (2008) 87.

¹¹⁴⁸ *R. v Smellie* (1919) 14 Cr App Rep 128. Cited by Doak (2008) 87.

¹¹⁴⁹ Doak (2008) 87.

¹¹⁵⁰ ECHR, article 6 (3).

¹¹⁵¹ ECtHR, *Van Mechelen et al. v. Netherlands*, Appl. Nos. 21363/93, 21364/93, 21427/93 and 22056/93, Judgment, 23 April 1997, paras. 49 et seq.

¹¹⁵² See, e.g., *Attorney General v. Leveller Magazine Ltd* [1979] A. C. 440 (see Lord Diplock's explanation).

¹¹⁵³ European Commission of Human Rights, *X v. Austria* (1965), Appl. No. 1913/63; 2 Dig. 438 (upholding the exclusion of the public from the trial of an accused for sexual offences against children).

¹¹⁵⁴ *R. (on the application of D) v Camberwell Green Youth Court* [2005] 1 WLR 393.

¹¹⁵⁵ *R. v A (Complainant's Sexual History)* [2001] 2 W.L.R. 1546 (Opinion of Lord Steyn).

¹¹⁵⁶ Ben Emmerson, Andrew Ashworth and Alison MacDonald (eds.), *Human Rights and Criminal Justice* (2nd edn., Thomson 2007) 656.

sexual experiences between the complainant and the accused would be admitted although a judge would still be justified in excluding evidence of an isolated incident distant in time and circumstances.¹¹⁵⁷

Fourth, in, for example, cases against the United Kingdom, the ECtHR has found that the protection of witnesses' safety or privacy can limit the open and public nature of the proceedings although when it is strictly necessary and permissible under article 6 (1) of the ECHR.¹¹⁵⁸ For instance, this concerns limitations to public proceedings to protect minors as determined by the ECtHR.¹¹⁵⁹

Under the EU Framework Decision on Victims, the right to protection contained provisions on protection of privacy of victims, to avoid contact between victims and perpetrators in court criminal proceedings and stressed the need to protect vulnerable victims 'from the effects of giving evidence, in open court' and, thus, they should be able to testify in a suitable manner.¹¹⁶⁰ The EU Directive on Victims includes more detailed provisions, including: i) right to protection; ii) right to avoid contact between victim and offender; iii) right to protection during criminal investigations; iv) right to protection of privacy; v) individual assessment of victims to identify specific protection needs; vi) right to protection of victims with specific protection needs during criminal proceedings; and vii) child victims' right to protection during criminal proceedings.¹¹⁶¹

3.1.2. American Adversarial System

Since the status of victims as witnesses by definition involves a protective dimension, some states and the federal government provide for victims a right to 'reasonable protection' from the offender and, even more importantly, as established in the federal CVRA, 'the right to be treated with fairness and with respect for the victim's dignity and privacy during criminal proceedings'.¹¹⁶² Several states have actually adopted such sort of provisions as part of their state

¹¹⁵⁷ *Ibid.*, *Loc. cit.*

¹¹⁵⁸ ECtHR, *Jasper v. the United Kingdom*, Appl. No. 27052/95, 16 February 2000, para. 52 (finding no violation of article 6 (1) of the ECHR); ECtHR, *T. v. The United Kingdom*, Application No. 24724/94, 16 December 1999, paras. 83-89. (finding no need to examine article 6 (1) of the ECHR).

¹¹⁵⁹ ECtHR, *Airey v. Ireland*, Appl. No. 6289/73, 9 October 1979.

¹¹⁶⁰ EU Framework Decision on Victims, article 8.

¹¹⁶¹ See respectively EU Directive on Victims, articles 18-24.

¹¹⁶² 18 U.S.C § 3771 (a)(8).

constitutions.¹¹⁶³ The Victims' Right and Restitution Act (1990) had already recognized crime victims, *inter alia*:

- (1) The right to be treated with fairness and with respect for the victims' dignity and privacy. [...]
- (4) The right to be present at all public court proceedings related to the offence, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony.¹¹⁶⁴

To protect the privacy of victims when testifying, some judges have ordered courtrooms closed during sensitive testimony, e.g., minor victims' testimony in sexual assault cases.¹¹⁶⁵ The United States Supreme Court has concluded that although safeguarding the physical and psychological well-being of a minor constitutes a compelling interest, 'it does not justify a mandatory closure rule'.¹¹⁶⁶ A court can accordingly establish on a case-by-case basis whether the closure is necessary to protect the minor victim's welfare upon consideration of factors such as the minor victim's age, psychological maturity and understanding of the nature of the crime, victim's desires, and the interests of parents and relatives.¹¹⁶⁷ Some state case law has established that, in the case of a traumatized victim, there was more than a 'substantial likelihood' of harm if the press were allowed to be present to cover the trial and, thus, press access was denied.¹¹⁶⁸ Since closing a courtroom may have a limited effect if trial participants are free to disclose the proceedings, some courts have imposed 'gag orders' on trial participants barring discussion with the media.¹¹⁶⁹ Moreover, although a press agency could re-file its motion once a victim testified, the court could still seal the documents if the interests favoring non-disclosure outweighed the public's right to access.¹¹⁷⁰ A Circuit Court noted that using a pseudonym

¹¹⁶³ E.g., Colorado Revised Statute, § 24-4.1-302.5 ('1. In order to preserve and protect a victim's right to justice and due process, each victims shall have the following rights: (a) The right to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process'); Utah Constitution, article 1, § 28; Connecticut Constitution, amended. XXIX; Illinois Constitution, article 1 § 8.1 (7).

¹¹⁶⁴ Victims' Rights and Restitution Act, Pub. L. No. 101-647 Stat. 4820 (codified at 42 U.S.C. § 10606 (1990)) § 502.

¹¹⁶⁵ Beloof, Cassell and Twist (2010) 154.

¹¹⁶⁶ Globe Newspaper Co. V. Superior Court for the County of Norfolk, 475 U.S. 596, 603 (1981).

¹¹⁶⁷ *Ibid.*, Loc. cit.

¹¹⁶⁸ State in the Interest of K.P., 709 A.2d 315 (N.J. Super Ch. 1997).

¹¹⁶⁹ See, e.g., KPNX Broadcasting Co. v. Arizona Superior Court, 459 U.S. 1302 (1982).

¹¹⁷⁰ See, e.g., MLW, 2009 U.S. D. Ct., Lexis 3345 (D. Mass. Jan. 20 2009).

protects better than sealing the record inasmuch as a seal may be lifted after the case is over.¹¹⁷¹ State statutes have been passed prohibiting disclosure of information that might be used to locate a victim.¹¹⁷²

With regard to sexual offences, for instance, the Florida Legislature passed the Crime Victims Protection Act, which restricts disclosure of the identity of victims of sexual conduct and accordingly all court records are confidential.¹¹⁷³ For this, the state or victim must demonstrate, *inter alia*, one of the following situations: i) victim's identity is not already known in the community; or ii) the disclosure of the victim's identity would endanger the victim because of a) the likelihood of retaliation, harassment or intimidation, b) causing severe emotional or mental harm to the victim, or c) making the victim unwilling to testify as a witness.¹¹⁷⁴ Some state case law has determined that if there is sufficient proof, *in camera* hearing must be held to determine whether prior sexual conduct is 'relevant to a material issue in the case' and, during the *in camera* hearing, the parties may call witnesses, including the victim.¹¹⁷⁵ This corresponds to the compelling interest of protecting the privacy of sexual assault victims against unwarranted invasions of privacy and harassment concerning their sexual conduct as acknowledged by the United States Supreme Court.¹¹⁷⁶ Rape shield statutes have constituted efforts to impose on courts and juries the view that prior sexual behavior is generally irrelevant, which is also embodied in the Federal Rule of Evidence 412. However, this rule admits exceptions including evidence of sexual behavior between the alleged victim and the accused. Admissibility of pattern evidence has also limited the rape shield in some state case law.¹¹⁷⁷ On the other hand, the Eighth Circuit Court of Appeals determined that when there is lack of circumstances enhancing its probative value:

[...] evidence of a rape victims' unchastity, whether in the form of testimony concerning her general reputation or direct cross examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative value of her general credibility as a witness or of her

¹¹⁷¹ In re Zito, No. 09-70554 (9th Cir. Feb. 26, 2009 (order).

¹¹⁷² Texas Crim. Proc. Code. Ann., § 56.09; Utah Code Ann., § 77-38-6(1).

¹¹⁷³ Fla. Stat. § 92.56.

¹¹⁷⁴ Ibid., § 92.56 (1).

¹¹⁷⁵ People v. Bryant, 94 P.3d 630 (Colo. 2004).

¹¹⁷⁶ Michigan v. Lucas, 500 U.S. 145 (1991) 1146; The Florida Star v. B.B.J.F., 491 U.S. 524 (1989).

¹¹⁷⁷ State of North Carolina v. Summers, 302 S.E.2d 830 (N.C. Ct of App. 1983).

consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect.¹¹⁷⁸

With regard to child witnesses, they are allowed to testify on closed-circuit television or videotape if the court finds that the child could not testify in person because of fear, or that there is a substantial likelihood that the child would suffer emotional trauma.¹¹⁷⁹ Several states have allowed the prosecution to use hearsay statements recounting child victims' statements rather than requiring them to testify themselves.¹¹⁸⁰ Even though the United States Supreme Court has determined that the Confrontation Clause, i.e., the right of an accused to 'be confronted with witnesses against him' according to the United States Constitution VI amendment, requires the exclusion of hearsay that is 'testimonial',¹¹⁸¹ some hearsay statements used to admit statements by child victims will seemingly continue to be admissible.¹¹⁸² It should be mentioned that some states require that questions to children be phrased in an 'age appropriate' language,¹¹⁸³ which facilitates the search for truth by asking the prosecution and defence to formulate questions that the child can understand.¹¹⁸⁴

3.1.3. French Inquisitorial System

Unlike other national jurisdictions, the absence of special legislation on witness protection put the French system behind in this matter.¹¹⁸⁵ To a limited extent, this situation has improved by the introduction of a new title (XXI) ('On Witness Protection') to the CPP.¹¹⁸⁶ However, this title deals mainly with anonymity of a witness as a protective measure as discussed later.¹¹⁸⁷ What should be mentioned here is that the accused facing this kind of witnesses can

¹¹⁷⁸ *United States v. Kasto*, 584 F.2d 268, 271-272 (8th Cir. 1978). See also John Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, Vol. 1 (Aspen Publishers 2005) 833.

¹¹⁷⁹ 18 U.S.C. § 3509(b).

¹¹⁸⁰ *Beloof, Cassell and Twist* (2010) 556.

¹¹⁸¹ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See also *Beloof, Cassell and Twist* (2010) 563.

¹¹⁸² *Beloof, Cassell and Twist* (2010) 563. See also, *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004); and *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. City Crim. Ct. 2004).

¹¹⁸³ *Beloof, Cassell and Twist* (2010) 564 (citing, as an example, the Cal. Evid. Code, § 765).

¹¹⁸⁴ See Paul Cassell, 'Balancing the Scales of Justice: The Case for and Effects of Utah's Victim's Rights Amendment' (1994) 4 *Utah Law Review* 1373, 1412-1413.

¹¹⁸⁵ See Jean Pradel, 'La Protection du Témoin Contre les Pressions' (1996) 2 *Revue Internationale de Criminologie et de Police Technique* 160-168; Brienens and Hoegen (2000) 345.

¹¹⁸⁶ Introduced by Law No. 2001-1062 on Daily Security, 15 November 2001, as amended by Law No. 2002-1138 on Orientation and Scheduling for Justice, 9 September 2002.

¹¹⁸⁷ See *infra* Chapter III 4.1.3.

request to hear and have his/her lawyer questioning the witness but via remote-location and, hence, the witness's voice is unidentifiable.¹¹⁸⁸ In addition, the protection of persons who benefit of exemptions from or reductions in penalties due to their contribution to avoid commission of a crime, help stop it, reduce its damage or assist to identify the perpetrators or accomplices thereof can be granted pseudonyms.¹¹⁸⁹ Be that as it may, the CPP and Criminal Code contain several provisions that may afford protection to the victims.¹¹⁹⁰ During pre-trial phase, witness protection is primarily implemented via preventive detention of the accused, and the investigating judge can undertake certain security measures.¹¹⁹¹ Witnesses who are being threatened or who fear retaliation may ask public prosecutor's permission to give the address of the police station in the report instead of their own address,¹¹⁹² which can also be authorized by the investigating judge during the preliminary judicial investigation.¹¹⁹³ The court has limited powers to protect the witness during trial. The *Cour de Cassation* has determined that if the accused requests to hear a witness, the court can only refuse it when there is a risk of reprisals or intimidation, under strict conditions, and the court should provide an elaborated motivation for a decision not to hear a witness.¹¹⁹⁴ The assisted witness benefits from the right to be assisted by a lawyer who is in advance informed of the hearings and has access to the dossier.¹¹⁹⁵ The assisted witness does not take an oath.¹¹⁹⁶

In order to protect victims' dignity, article 306 of the CPP allows derogation of the principle of public hearings. Closed hearing is a right if requested by the victim participating as a civil party in criminal cases on rape, torture or barbaric acts accompanied by sexual aggression. On the contrary, accused's request to a close hearing does not proceed if the victim opposes it. Accordingly, the protection of the victim as a civil party prevails or, eventually, his/her wish to disclose the facts committed prevails over the accused's right to a public trial. The Criminal Chamber of the *Cour de Cassation* has indeed determined that 'the scope of the measure of closed hearing should be left to the

¹¹⁸⁸ CPP, article 706-61.

¹¹⁸⁹ *Ibid.*, article 706-63-1. See also Criminal Code, article 132-78.

¹¹⁹⁰ As for the Criminal Code see articles 222, 322, and 434-(15) (threatening or intimidating witnesses as an aggravating circumstance or as an offence).

¹¹⁹¹ See, respectively, CPP, articles 144 and 138.

¹¹⁹² *Ibid.*, article 62-1.

¹¹⁹³ *Ibid.*, article 153.

¹¹⁹⁴ Crim. 12 January 1989, *Bull. crim.*, n° 13, D. 1989, Somm. 174 et obs.; Crim. 6 March 1991, D. 1992, Somm. 96 et obs. Cited by Brienen and Hoegen (2000) 346.

¹¹⁹⁵ CPP, section 133-3.

¹¹⁹⁶ *Ibid.*, section 133-7.

civil party victim's decision'.¹¹⁹⁷ This extensive interpretation provides the victim broad powers to shape the publicity of the trial according to his/her own criteria, which is herein questioned from the perspective of the accused's rights. The only restriction set by the Criminal Chamber consists in that the requesting (or opposing) person has the dual situation of (direct) victim and civil party. For example, a deceased rape victim's mother was not allowed to oppose the close hearing although she already was a civil party.¹¹⁹⁸ Nor do victims participating as witnesses have the right to request a close hearing, which is only granted when a victim becomes a civil party. To sum up, the court has the authority on its own initiative or at request of the public prosecutor and/or civil party to hold the trial behind closed doors to protect the victim from unwarranted publicity.¹¹⁹⁹ For the benefit of all witnesses, there are restrictions to the disclosure of personal information and publicity before, during and after the trial including: i) police officers members are bound to secrecy like all persons involved in the criminal proceedings,¹²⁰⁰ and ii) publication of documents or evidentiary pieces is an offence, and the law emphasizes the prohibition to publish any information concerning civil parties during the process before verdict.¹²⁰¹

As for child witnesses, the CPP provides for the audiovisual recording of the testimonies of minors who are victims of one of the sexual offences envisaged under the CPP.¹²⁰² The priority of the audiovisual recording over the audio recording is guaranteed because neither the minor nor his/her legal representative can request the audio recording and, indeed, only an investigating judge or a prosecutor can order to prefer only the audio recording based on the child's interest.¹²⁰³ A minor victim of offences mentioned in the CPP is assisted by a lawyer when listened to by the investigating judge and there are also specific provisions applicable to the other stages of the proceedings.¹²⁰⁴ The presence of a psychologist, a doctor, a specialist on children, a family member or an *ad hoc*

¹¹⁹⁷ 'L'étendue de la mesure de huis clos doit être laissée à l'appréciation de la victime partie civile'. *Crim.*, 2 March 2005, *Bull. crim.* n° 75; *J.C.P.*, 2005, IV, 1905; *Dr. Pénal*, 2005, com. n° 82, note A. Maron. Cited by Nathalie Pignoux, *La Réparation des Victimes d'infractions Pénales* (L'Harmattan 2008) 292.

¹¹⁹⁸ *Crim.* 30 October 1985, *Bull. crim.* n° 337; *J.C.P.*, 1987, II, 20727, note P. Conte. Cited by *Ibid.*, *Loc. Cit.*

¹¹⁹⁹ CPP, articles 306, 400.

¹²⁰⁰ CPP, article 11.

¹²⁰¹ Act of 2 July 1931, section 2.

¹²⁰² CPP, article 706-52. See also *Ibid.*, article 706-47. Law n° 2007-291 of 5 March 2007 envisaged to generalize this practice and re-enforce the equilibrium of the criminal process.

¹²⁰³ See Pignoux (2008) 291.

¹²⁰⁴ CPP, article 706-51.

manager next to the child during the hearings and confrontations is also an important support.¹²⁰⁵

Although the Criminal Chamber of the *Cour de Cassation* has stated that the confrontation with witnesses is demanded by the ECHR,¹²⁰⁶ the investigating judge can prefer not to proceed with it if there are risks of intimidation, pressure or reprisals.¹²⁰⁷ Furthermore, the Criminal Chamber considered that the ECHR provisions are not applicable before the investigating judges as these proceedings do not constitute a confrontation between the accused and the witness. The victims, either as civil parties or witnesses, keep their status. i.e., witnesses cited by the investigating judge and obligated to appear, take an oath and testify, and civil parties hold their status rights.¹²⁰⁸ Lastly, but equally important, in *Diennet v. France*, the ECtHR concluded that although public and media may be excluded from the trial to, *inter alia*, protect the parties' private life or juvenile interests, holding proceedings, totally or partially, *in camera* must be strictly required by the circumstances of the case.¹²⁰⁹ Therefore, the ECtHR found a violation of article 6 (1) of the ECHR in this case.¹²¹⁰

3.2. Situation at the ICTY, the ICTR and the SCSL

3.2.1. Protection before Trial

To begin with, the protection of witnesses is contained in the Statutes and RPE. Thus, the ICTY and the ICTR Statutes contain a positive obligation to provide protection to victims and witnesses as they indicate that:

[...] the Tribunal shall in its Rules of Procedure and Evidence provide for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of victims' identity.¹²¹¹

The *travaux préparatoires* of the ICTY Statute, i.e., the Secretary-General's Report, do not help too much in clarifying the duty to protect the

¹²⁰⁵ Ibid., article 706-53.

¹²⁰⁶ Crim. 26 March and 4 June 1998, *Bull. crim.* n° 115 and n° 184. Cited by Lionel Dreyfuss, 'Résultats de L' Enquête Menée Auprès des Victimes' in Strickler (2009) 95, 105.

¹²⁰⁷ Crim. 8 February 1990, *Bull. crim.* n° 70, D., 1990, IR 109. Cited by Dreyfuss (2009) 105.

¹²⁰⁸ Crim. 4 January 1990, *Bull. crim.*, n° 4. Cited by Dreyfuss (2009) 105.

¹²⁰⁹ ECtHR, *Diennet v. France*, Appl. No. 18160/91, Judgment, 26 September 1995, para. 34.

¹²¹⁰ Ibid., para. 35.

¹²¹¹ ICTY Statute, article 22; ICTR Statute, article 21.

witness and refers to the (then future) elaboration of RPE by the ICTY Judges.¹²¹² Although the SCSL Statute does not contain an identical statutory provision on protection of victims and witnesses, it refers to ‘measures ordered by the Special Court for the protection of victims and witnesses’.¹²¹³ Moreover, the SCSL RPE like the ICTY RPE and ICTR RPE state that potential witnesses and victims can be granted protective measures in the pre-trial and trial phases.¹²¹⁴

The Prosecutor has to apply to a Judge or the Trial Chamber under rule 69 of the ICTY RPE, and the SCSL RPE, and to the Trial Chamber under rule 69 of the ICTR RPE, if (s)he wishes to withhold the identity of witnesses from the defence. However, full consideration needs to be given to the rights of the accused. Accordingly, the ‘full respect for rights of the accused and due regard for the protection of victims and witnesses’ are provided for in articles 20 (1) and 19 (1) of the ICTY and the ICTR Statutes respectively.¹²¹⁵ Case law has stated that when examining non-disclosure of the identity of a witness to the defence and, in general, other protective measures, first consideration has to be given to the accused’s rights.¹²¹⁶ The tension between the rights of the accused and the need to protect victims as witnesses and how to conciliate these conflicting interests requires, as the ICTY mentioned in *Haradinaj*, that the Chamber exercises its duty:

[...] to strike a fair balance between the right of the Accused to a fair trial on the one side, and the protection of victims and witnesses and the right of the public to access of information on the other side, the right of the Accused encompassing, in particular, the right to be allowed adequate time for the

¹²¹² UN Doc. S/25704, Secretary-General Report Pursuant to Paragraph 2 of Security Council 808 (1993), 3 May 1993, para. 108.

¹²¹³ SCSL Statute, article 17 (2).

¹²¹⁴ ICTY RPE, rule 69; ICTR RPE, rule 69; SCSL RPE, rule 69.

¹²¹⁵ In the case of the SCSL, the wording is slightly different: ‘The accused *shall* be entitled to a fair and public hearing, *subject to* measures ordered by the Special Court for the protection of victims and witnesses [emphasis added]’. SCSL Statute, article 17 (2).

¹²¹⁶ Musema (ICTR-96-13-A), Appeals Chamber Judgment, Appeals Chamber, 16 November 2001, para. 68. See also the separate and dissenting opinion of Judge Dolenc in Bagosora et al.: ‘The minimal guarantees under Article 21 (4) are “non-negotiable” and cannot be balanced against other interests. The use of word “minimum” demonstrates that these enumerated rights are an essential component of every trial’. Bagosora et al. (ICTR-98-41-I), Separate and Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonization and Modification of Protective Measures for Witnesses, Trial Chamber, 5 December 2001, paras. 11 and 14. See also Brdanin and Talić (IT-99-36), Decision on Motion by Prosecution for Protected Measures, Trial Chamber, 3 July 2000, para. 31.

preparation of a defence, and to cross-examine witnesses testifying against the Accused.¹²¹⁷

In order to grant protective measures for, *inter alia*, victims as witnesses, three requirements must be met by the moving party. First, the testimony is relevant and important to the party's case. This requirement is met when the elements of the proposed testimony provide some relevance and some importance to the case, taking into account that the parties are free to design their own strategy.¹²¹⁸ Second, there must be a real, objective fear for the safety of the witness. The evaluation of risk and danger has to be done on a witness-by-witness basis,¹²¹⁹ and also the party seeking protective measures carries the burden of proof of establishing 'exceptional circumstances'.¹²²⁰ Generally speaking, do not constitute 'exceptional circumstances': i) general allegations of dangerous conditions or threats to the welfare of victims and witnesses; and ii) the fear that the Prosecutor may have difficulties in finding witnesses who are willing to testify in future cases.¹²²¹ Third, only the least restrictive measures should be applied.¹²²²

Once the likelihood that a particular victim or witness may be in danger has been established, the Trial Chamber will limit the accused's right to the extent that the identity of the victim or witness will not be disclosed to the defence until such time required to provide adequate time for the defence to prepare before trial, according to the ICTY case law.¹²²³ Under rule 69 (C) of the

¹²¹⁷ Haradinaj et al. (IT-04-84), Decision on Prosecution's Application for Pre-Trial Protective Measures for Witnesses, Trial Chamber, 20 May 2005, p. 4. See also Karemera et al. (ICTR-97-24), Decision on Joseph Nzirorera's Motion for No Contact Order, Trial Chamber, 21 August 2008, para. 5.

¹²¹⁸ Nyiramasuhuko et al. (ICTR-97-21), Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, Trial Chamber, 1 March 2005, para. 23.

¹²¹⁹ Lukić and Lukić (IT-98-32/1), Order on Milan Lukic's Request for Protective Measures, 23 July 2008, pp. 3-4.

¹²²⁰ Gotovina (IT-06-90), Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, Trial Chamber, 14 July 2006, pp. 6-7.

¹²²¹ See respectively, Haradinaj et al. (IT-04-84), Decision on Second Haradinaj Motion to Life Redactions of Protected Witness Statements, Trial Chamber, 22 November 2006, para. 2; Brđanin (IT-99-36), Decision on Motion by Prosecution for Protected Measures, Trial Chamber, 3 July 2000, para. 30.

¹²²² Bagosora et al. (ICTR-96-7), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, Appeals Chamber, 6 October 2005, para. 19.

¹²²³ Tadić (IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995, para. 72.

ICTY RPE, the identity of the victim or witness 'shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence'. Under rule 69 (C) of the ICTR RPE, disclosure of identifying details can be made on a rolling basis during trial if adequate time is given to the defence to prepare cross-examination. SCSL rule 69 (C) is more specific as states that the identity of the victim or witness shall be disclosed 'in sufficient time before a witness is to be called'. The importance for the defence to be aware of the identity of a Prosecution witness sufficiently in advance of his/her testimony has been pointed out by case law as identifying information assists in in-court cross-examination.¹²²⁴ An evaluation of the context of the entire security situation affecting the witness, and not only reliance on parties' submissions, must be conducted.¹²²⁵ Also, a protective measure order may be granted based on the fear expressed by someone other than the witness.¹²²⁶ The ICTR has considered the fact that when the witness has testified openly and without pseudonym does not necessarily lead to the conclusion of lack of need of protective measures, pseudonyms included.¹²²⁷

Non-disclosure of the witness's identity is only granted if the party seeking it shows the existence of exceptional circumstances via bringing specific evidence of an identifiable risk to the security and welfare of the particular witness or his/her family, which means that broad allegations of dangerous conditions for victims and witnesses in general is not enough as a justification for the granting of non-disclosure request.¹²²⁸ Accordingly, the prevailing circumstances in the former Yugoslavia have not been considered by themselves as equivalent to exceptional circumstances as found by the ICTY in *Brdanin* 'To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule-or the prevailing (or normal) circumstances-'.¹²²⁹ Nevertheless, the SCSL adopted an approach different to that of the ICTY and the ICTR with regard to the non-disclosure of the identity of a

¹²²⁴ Bagosora et al. (ICTR-98-41-I), Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, Trial Chamber, 5 December 2001, para. 15.

¹²²⁵ Bagilishema (ICTR-95-1A), Decision on the Prosecutor's Motion for Witness Protection, Trial Chamber, 17 September 1999, para. 6.

¹²²⁶ Gatete (ITCR-00-61), Decision on Defence Motion for Protection of Witnesses, Trial Chamber, 10 April 2007, para. 2.

¹²²⁷ Karemera et al (ICTR-97-24). Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, Trial Chamber, 29 August 2005, para. 11.

¹²²⁸ Haradinaj et al. (IT-04-84), Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements, Trial Chamber, 22 November 2006, para. 2.

¹²²⁹ Brdanin and Talić (IT-99-36), 3 July 2000, para. 11.

witness. Thus, the SCSL granted witness protection measures globally to a group of persons, based on security reports from the region even where the existence of threats or fears concerning specific witnesses had not been demonstrated.¹²³⁰ The SCSL partially justified in, for example, *Sesay*, the adoption of blanket protective measures by differentiating the Sierra Leone's political and security situation from that in Rwanda and Yugoslavia.¹²³¹ Thus, for instance, the group of those witnesses living in Sierra Leone and who have not waived their right to protection received confidentiality measures.¹²³² Even though this evidences how important is that international and hybrid criminal courts adopt flexible decisions when granting protection to victims and witnesses paying attention to the security situation in the respective country or region, the location of the ICTY and the ICTR outside the places where crimes were committed should not have been the only or main reason considered by the SCSL to adopt a very broad and different approach.

In order to justify the need for non-disclosure to the accused of the identity of witness as a protective measure, the Prosecution needs to demonstrate that:

[...] there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known to the accused and his defence team [...] It is not sufficient to show that the witness is put at risk of interference resulting from disclosure of his identity to the public or the media. The likelihood of interference must be objective while the witnesses may personally feel that he or she may be at risk, any subjective fears expressed by the witness 'are not in *themselves* sufficient to establish any real *likelihood* that they may be in danger or risk'. In order to warrant an interference with the rights of the accused, those fears must be well-founded in fact.¹²³³

¹²³⁰ Brima et al. (SCSL-2004-16-T-551), Decision on Joint Defence Application for Protective Measures for Defence Witnesses Appearing from September 4, 2006 Onwards, Trial Chamber, 13 September 2006, p. 3. See also Taylor (SCSL-03-01-T-782), Decision on Urgent Defence Application for Protective Measures for Witnesses and for non-public materials, Trial Chamber, 27 May 2009, para. 31 and pp. 13-14.

¹²³¹ *Sesay* (SCSL-2003-05-PT-033), Annex to the Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure: Orders for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Trial Chamber, 23 May 2003, paras. 21-22 and 25. See also Tolbert and Swinnen (2006) 209-210.

¹²³² Norman et al. (SCSL-04-14-T), Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, Trial Chamber, 8 June 2004. See also Acquaviva and Heikkilä (2013) 825.

¹²³³ Karadžić (IT-95-5/18-I), Decision on Protective Measures for Witnesses, Trial Chamber, 30 October 2008, para. 19. See also Karadžić (IT-95-5/18-I), Decision on Accused's Motion for

The prosecution also has to bring ‘specific evidence of such a risk relating to particular witnesses’ rather than an indeterminate risk about witnesses in general.¹²³⁴ Accordingly, a witness testifying before the tribunal is evaluated according to his/her particular circumstances.¹²³⁵ It is important to mention that the general principle is that ‘applications by either party for protective measures are determined on an *ex parte* basis where the persons to be protected would otherwise be identified’.¹²³⁶ Nevertheless, the party seeking the relief on *ex parte* basis has to identify why unfair prejudice would be caused by revealing the details of the application, or the application itself, to the other party.¹²³⁷ Concerning the clause of ‘sufficient time prior to trial’ for disclosure of identity, contained in rule 69 (C),¹²³⁸ it will depend on each witness’s personal circumstances.¹²³⁹

Factors in granting an early disclosure of the identities of Prosecution’s witnesses are whether the trial date is getting closer and whether early disclosure is to the defence, including the accused only.¹²⁴⁰ Additional points concerning non-disclosure to the accused of identities of victims and witnesses are examined later when discussing anonymity.¹²⁴¹

In addition to non-disclosure to the accused, victims and witnesses can have their identities protected from the public during pre-trial and Trial Chambers have ordered the defence that, *inter alia*:

Modification of Protective Measures: Witnesses KDZ490 and KDZ492, Trial Chamber, 25 March 2010, para. 9.

¹²³⁴ Karadžić (IT-95-5/18-I), 30 October 2008, para. 19.

¹²³⁵ Gotovina (IT-06-90), Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, Trial Chamber, 14 July 2006, pp. 6-7.

¹²³⁶ Simić (IT-95-9), Decision on (1) Application by Stevan Todorovic to re-open the Decision of 27 July 1999, (2) Motion by ICRC to re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, Trial Chamber, 28 February 2000, para. 40.

¹²³⁷ Kordić and Čerkez (IT-95-14/2), Order to Prosecution to Refile its Ex Parte Filing in Response to Motion by Kordić for Disclosure in Relation to Witness AT, Appeals Chamber, 31 March 2003, para. 4.

¹²³⁸ ICTY Statute, rule 69 (c). The ICTR rule 69 (c) reads as follows: ‘within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence’. The SCSL rule 69 (c), in turn, reads as follows: ‘in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence’.

¹²³⁹ Brdanin and Talić (IT-99-36), 3 July 2000, para. 34.

¹²⁴⁰ Haradinaj et al. (IT-04-84), 22 November 2006, para. 23.

¹²⁴¹ See *infra* Chapter III 4.2.

- (1) [...] shall not divulge to the media any non public documents provided by the Prosecutor, including the witness statements or any other materials disclosed to the Defence [...]
- (2) [...] shall not disclose to the public:
 - (i) any name or information enabling witnesses to be identified, or the whereabouts of the confirmed or potential witnesses disclosed by the Prosecutor;
 - (ii) any documentary evidence, physical or otherwise, or any written statement of a confirmed or potential witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony
- (3) If the Defence deems it necessary to disclose such information in order to prepare and present its case, it shall inform each recipient of any non-public information that he or she is forbidden to copy, reproduce or publicise them, in whole or in part, or to disclose or show them to any other person [...].¹²⁴²

3.2.2. Protection during Trial

Before the beginning of the trial, a Judge or Chamber may *proprio motu* or at the request of the parties, or of the victim or witness concerned, or of the VWS order protective measures for witness when testifying during the trial under rules 75 and 79, 'provided that the measures are consistent with the rights of the accused'.¹²⁴³ A protective measure enjoyed by a witness during pre-trial under rule 69 may continue to apply during the trial, depending on the nature of the Chamber's initial order. Granting protective measures depends on the particular circumstances and merits of each case.¹²⁴⁴ Considerations will substantially differ depending on whether the application is for anonymity from the accused or only from the public and media. In the latter case, measures are often granted provided that it has been identified a legitimate fear of security threat or danger that requires protective measures, and that the effect of which on the public nature of proceedings would be justified in the circumstances.¹²⁴⁵ The anonymous witness issue, i.e., anonymity *vis-à-vis* the accused, is discussed

¹²⁴² Hadžihasanović and Kubura (IT-01-47), Order on Protective Measures, Trial Chamber, 1 February 2002, paras.1 and 2.

¹²⁴³ ICTY RPE, rule 75; ICTR RPE, rule 75; SCSL RPE, rule 75. As for case law, see, e.g., Karadžić (IT-95-5/18-T), Decision on Motion for Protective Measures for Witness KW46, Trial Chamber, 12 October 2012, paras. 7-8.

¹²⁴⁴ Furundžija (IT-95-17/1-T), Decision on Prosecutor's Motion Requesting Protective Measures for Witnesses 'A' and 'B' at Trial, Trial Chamber, 11 June 1998.

¹²⁴⁵ Slobodan Milosević (IT-02-54-30), Decision Granting Protective Measures for Individual Witnesses, Trial Chamber, 19 February 2002; Krnojelac (IT-97-25), Order on Protective Measures for Witnesses at Trial, Trial Chamber, 26 October 2000.

later.¹²⁴⁶ It should be mentioned that when deciding whether to order protective measures, a Judge or a Chamber may hold *in camera* proceedings.¹²⁴⁷

A first category of protective measures consists in the general confidentiality measures under rules 75 and 79, which aim first and foremost to prevent disclosure of the identity of the witness and any other identifying information to the public and the media. The requesting party must prove that: i) the witness has a legitimate fear of a security threat or danger; ii) the security threat or danger has been identified; iii) the security threat or danger requires protective measures; and iv) the effect of the protective measures on the public nature of proceedings would be justified in the circumstances.¹²⁴⁸ The analysis has to be conducted on a case-by-case basis and must be objectively founded.¹²⁴⁹ Also, the measure sought must be the least restrictive of the accused's rights.¹²⁵⁰

There is a wide range of confidentially measures including the use of pseudonyms, screening of witnesses from the public gallery, the use of one-way closed-circuit television, facial or voice distortion, permitting testimony by an away-video link, the redaction of information from the broadcast and transcripts, and testimony in closed sessions.¹²⁵¹ It is important to bear in mind that the right to a public trial is recognized in international human rights instruments as an important component of the right to a fair trial.¹²⁵² The Statutes of the tribunals reflect this consensus 'The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence'¹²⁵³ as complemented by this provision 'In the determination of charges against him, the accused shall be entitled to a fair and

¹²⁴⁶ See *infra* Chapter III 4.2.2.

¹²⁴⁷ ICTY RPE, rule 75 (B); ICTR RPE, rule 75 (B); SCSL RPE, rule 75 (B).

¹²⁴⁸ See, e.g., Slobodan Milošević (IT-02-54), Decision Granting Protective Measures for Individual Witnesses, Trial Chamber, 19 February 2002; Krnojelac (IT-97-25), Order on Protective Measures for Witnesses at Trial, Trial Chamber, 26 October 2000.

¹²⁴⁹ See, e.g., Slobodan Milošević (IT-02-54-30), Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), Trial Chamber, 30 July 2002, paras 3 and 5; Ngirabatware (ICTR-05-86), Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, Trial Chamber, 6 May 2009, para. 4; Mladić (IT-95-5/18-T), Decision on Prosecution Motion on Urgent Protective Measures and Conditions for Witness RM-377 Pursuant Rule 70, Trial Chamber, 18 October 2013, paras. 8-11.

¹²⁵⁰ See Acquaviva and Heikkilä (2013) 822 (referring to case law).

¹²⁵¹ ICTY RPE, rules 75 and 79; ICTR RPE, rules 75 and 79; SCSL RPE, rules 75 and 79.

¹²⁵² ICCPR, article 14 (1); ECHR, article 6 (1); and ACHR, article 8 (5).

¹²⁵³ ICTY Statute, article 20 (4); ICTR Statute, article 19 (4).

public hearing, subject to article [21 (ICTR)/22 (ICTY)] of the Statute'.¹²⁵⁴ Articles 21 (ICTR Statute) and 22 (ICTY Statute) introduce, as an exception to the right to public trial, protective measures for victims and witnesses and read as follows:

[The ICTY/ICTR] shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 17 of the SCSL similarly establishes that 'The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses'. In turn, rule 78 of the ICTY RPE, the ICTR RPE and the SCSL RPE establishes that 'all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided'. Public trials are not only of the interest of the parties but also of the general public and the international community, as they have 'an educational function and the publication of its activities helps to achieve this goal'.¹²⁵⁵

Like during pre-trial, when the Prosecutor requests non-disclosure of the identity of a witness under rule 69, and even with stronger reason than in the pre-trial stage, blanket requests during the trial phase have to be rejected as stated by the ICTY Trial Chamber in *Milošević* 'the Chamber must determine the legal basis for the granting of trial related measures under these Rules and whether the Prosecution has satisfied the Chamber, in respect of each individual witness, that measures sought are appropriate'.¹²⁵⁶

The existence of an ongoing armed conflict and its impact on the security of witnesses play an important role as to whether and what kind of confidentiality protective measures may be adopted as identified by the ICTY in *Tadić*.¹²⁵⁷ Although the circumstances in the former Yugoslavia, Rwanda and

¹²⁵⁴ ICTY Statute, article 21 (2); ICTR Statute, article 20 (2). The SCSL Statute states that 'The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses'. SCSL Statute, article 17 (2).

¹²⁵⁵ *Tadić* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995, para. 32.

¹²⁵⁶ Slobodan Milošević (IT-02-54-30), Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), Trial Chamber, 30 July 2002, para. 5.

¹²⁵⁷ '[T]he fear of reprisals during an ongoing conflict particularly given the mandated duty of the International Tribunal to protect victims and witness and the inability of the International Tribunal to guarantee the safety of the victim or witness due to the lack of a fully-funded and

Sierra Leone have certainly changed, political tensions and in particular in cases concerning former senior political and military leaders, which are indeed most of these tribunals' dockets, still merit granting protective measures in favor of victims participating as witnesses.¹²⁵⁸

In any case, the frequent use of closed sessions is herein criticized as a court that sits in private may create a negative impression,¹²⁵⁹ and the principal advantage of press and public access is that it helps ensure the fairness of a trial.¹²⁶⁰ Moreover, publicity of hearings is an important component of the accused's rights and, thus, guarantees the accused's right to a fair and impartial trial enshrined in the tribunals' statutes. As identified by the ICTY's case law, the denial of a public hearing to the accused cannot take place without a good reason,¹²⁶¹ or exceptional reasons.¹²⁶² These findings are also similar to the ECtHR's case law previously examined in, *inter alia*, some cases against the United Kingdom and France.¹²⁶³ The IACtHR's case law has also highlighted the importance of public criminal proceedings as a general rule.¹²⁶⁴

Furthermore, concerning a hierarchy of protective measures and maybe bearing in mind the increase in closed hearings, the ICTY in *Milosević*, among protective measures including the use of pseudonym, voice or visual distortion,

operational witness programme'. Tadić (IT-94-1-T), 10 August 1995, para. 42. Later, in the same case, the Trial Chamber stated that it had to ensure that 'any curtailment of the accused's right to a public hearing is justified by a genuine fear for the safety of the witnesses and/or members of his family'. Tadić (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Witness S, Trial Chamber, 13 August 1996, para. 6.

¹²⁵⁸ See Pascale Chifflet, 'The Role and Status of the Victim' in Gideon Boas and William Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers 2003) 75, 83; Tolbert and Swinnen (2006) 213.

¹²⁵⁹ John R. W. D. Jones, 'Protection of Victims and Witnesses' in Cassese, Gaeta and Jones. (2002) 1355, 1368.

¹²⁶⁰ Vladimir Tochilovski, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights* (Martinus Nijhoff Publishers 2008) 305.

¹²⁶¹ Delalić et al. (IT-96-21-T), Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' Trough to 'M', Trial Chamber II, 28 April 1997, para. 33.

¹²⁶² See, e.g., Blaskić (IT-95-14-R), Decision on Defence's Request for Relief with Regard to Ex Parte Filings, Appeals Chamber, 20 November 2006, p. 3; Naletilić and Martinović (IT-98-34-A), Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, Appeals Chamber, 4 May 2005, p. 3.

¹²⁶³ See respectively supra Chapter III 3.1.1 and 3.1.3.

¹²⁶⁴ See, e.g., IACtHR, Case of Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment of 22 November 2005, Series C No. 135, paras. 166-168. See also Salmón Gárate and Blanco (2012) 323-332.

considered that the use of closed sessions is the most extreme and, hence, a party seeking a closed session has to raise strong reasons for doing so:

The more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted [...]. Therefore, the Trial Chamber will, for example, only order closed session under Rule 79 in circumstances where it is shown that the risk of witness is sufficiently founded and that not other less restrictive protective measure can adequately deal with that risk.¹²⁶⁵

To complement this finding, the Trial Chamber indicated that other protective measures concealing the identity of a witness from the public, including the use of pseudonym and distortions 'are considered less of an infringement on the public nature of proceedings',¹²⁶⁶ which is similar to the SCSL's findings in *Taylor*.¹²⁶⁷

Concerning other protective measures, although the rule is that a witness should be present at the seat of the Tribunal, testimony by video-link is allowed explicitly under the ICTY RPE and the SCSL RPE,¹²⁶⁸ if the following criteria, identified by the ICTY in *Tadić* are met: i) the party must demonstrate that the testimony of a witness is sufficiently important to make it unfair to do without it; and ii) the witness is unable or unwilling to come to the tribunal.¹²⁶⁹ These criteria have been complemented by other elements added by subsequent case law, namely: i) the accused will not be prejudiced in the exercise of his/her right to confront the witness;¹²⁷⁰ and ii) practical considerations, e.g., logistics, expenses, and security risks, of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.¹²⁷¹ Under the case law of the ICTY and the ICTR, age and bad health were considered as good

¹²⁶⁵ Slobodan Milosević (IT-02-54-30), 30 July 2002, para. 5.

¹²⁶⁶ *Ibid.*, para. 7.

¹²⁶⁷ *Taylor* (SCSL-03-01-T-427), Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TFI-515, 516, 385, 539, 567, 388, and 390, Trial Chamber, 13 March 2008, p. 4.

¹²⁶⁸ ICTY RPE, rule 71 *bis*; SCSL RPE, rule 75 (B) (c).

¹²⁶⁹ *Tadić* (IT-94-1-T), Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, Trial Chamber, 25 June 1996.

¹²⁷⁰ Delalić et al. (IT-96-21-T), Decision on the Motion to Allow Witnesses K, L and M to give Their Testimony by Means of Video-Link Conference, Trial Chamber, 28 May 1997, para. 17

¹²⁷¹ Bagosora et al. (ICTR-98-41-T), Decision on Prosecutor's Motion for Deposition of Witness OW, Trial Chamber, 5 December 2001, para. 14.

reasons for witnesses to be unable or unwilling to travel to the seat to the tribunal to testify.¹²⁷² However, the ICTY in *Tadić* also added that:

[...] the evidentiary value of testimony provided by video-link, although weightier than that of testimony given by deposition, is not as weighty as testimony given in the courtroom. Hearing witnesses by video-link should therefore be avoided as much as possible.¹²⁷³

Nevertheless, the ICTY later took a different approach in *Hadžihasanović and Kubura* by concluding that ‘testimony by video-conference link has as much probative value as testimony presented in the courtroom and does not infringe the rights of the accused to confront the witness directly’.¹²⁷⁴ It is herein considered that this position is more victim-friendly and more coherent as does not assume that the way of delivering a testimony necessarily determines its probative value since this has to be examined on case-by-case basis and cannot be hence determined *prima facie* or *in abstracto*.

Unlike the ICTY RPE and the SCSL RPE, the ICTR RPE does not explicitly provide for taking testimony via video-link. However, the ICTR has received video-link testimony much more often than the ICTY. In evaluating whether the video-link testimony of a crucial witness would violate the accused right’s to be present at trial and to personally confront the witness, the Appeals Chamber in an ICTR case, *Zigiranyirazo*, considered a three-pronged test ‘(1) whether ‘presence’ [...] refers to physical presence in court [...]; (2) if so, whether the right to be physically present in court is categorically inviolable; and (3) if the right may be limited in certain situations [...]’.¹²⁷⁵ The Chamber concluded that the right to be present is not absolute,¹²⁷⁶ and in reference to the principle of proportionality to restrict accused’s human rights, the Chamber considered that although security and logistics concerns are of importance, the Trial Chamber in this specific case did not properly exercise its discretion in imposing limitations on the accused’s right to be present at his/her trial.¹²⁷⁷

¹²⁷² Delalić et al. (IT-96-21-T), 28 May 1997, para. 20; Bagosora et al. (ICTR-98-41), 5 December 2001, para. 16.

¹²⁷³ Tadić (IT-94-1-T), 25 June 1996.

¹²⁷⁴ Hadžihasanović and Kubura (IT-01-47), Decision on Prosecution Motion for Receiving Testimony by Video-Conference Link, Trial Chamber II, 11 March 2004.

¹²⁷⁵ Zigiranyirazo (ICTR-01-7), Decision on Interlocutory Appeal, Appeals Chamber, 30 October 2006, para. 8.

¹²⁷⁶ Ibid., para. 13.

¹²⁷⁷ Ibid., paras. 17-19.

In any case, even though the defence's right to examine/cross-examine witnesses is stated under the ICTY, the ICTR and the SCSL Statutes,¹²⁷⁸ the ICTY has established that the accused's right to cross-examination is not absolute and that not all restrictions on cross-examination necessarily entail a violation of the right to a fair trial.¹²⁷⁹ The Chamber must indeed control the manner of questioning witnesses so that they are not harassed or intimidated.¹²⁸⁰ Additionally, the ICTY RPE and the ICTR RPE state that the 'Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case'.¹²⁸¹ This is arguably a sound provision since witnesses are in advance informed of potential negative outcomes and, therefore, the risk at surprising victims via unexpected changes or, even worse, a potential secondary victimization can be reduced.

Special measures have also been adopted to protect victims of sexual crimes. This is here considered necessary and sound as sexual violence was widespread and systematic in the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, and due to the fact that victims of sexual violence have special needs since testifying may lead to their re-traumatisation. Accordingly, the Chamber may allow testimony by one-way close circuit testimony so that victim is prevented from seeing the accused. The victim-witness, hence, testifies from a separate room and thus (s)he is prevented from confronting the accused and the public. In this way, it is expected to relieve the witness from reliving the crimes and, therefore, reduce the risk of re-traumatisation. Placement of screens that prevent the witness from seeing the accused while the accused sees the witness on the courtroom monitors may also be ordered by the Chamber.¹²⁸² Moreover, the gender of the person posing the questions may be relevant as, for instance, female victims of sexual crimes may feel more comfortable when the person questioning them is another woman.¹²⁸³

¹²⁷⁸ ICTY Statute, article 21 (4) (e); ICTR Statute, article 20 (4) (e); SCSL Statute, article 17 (4) (e) ('To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her').

¹²⁷⁹ Haradinaj et al. (IT-04-84-T), 15 February 2008, para. 8. See also Martić (IT-95-11-T), Decision on Defence Motion to Exclude the Testimony of Milan Babić, Together With Associated Exhibits from Evidence, Trial Chamber, 9 June 2006, para. 56.

¹²⁸⁰ ICTY RPE, article 75 (D), ICTR RPE, article 75 (D); SCSL RPE, article 75 (C).

¹²⁸¹ ICTY, RPE, rule 75 (C); ICTR RPE, rule 75 (C).

¹²⁸² Tadić (IT-94-1-T), 10 August 1995, para. 51.

¹²⁸³ Acquaviva and Heikkilä (2013) 848.

In addition, the ICTY RPE, the ICTR RPE and the SCSL RPE contain specific rules of evidence in cases of sexual violence,¹²⁸⁴ which *inter alia* provide the following. First, corroboration of the victim's testimony is not required, which is explicitly mentioned in rule 96 (i) of the ICTY RPE and the ICTR RPE 'In cases of sexual assault [...] no corroboration of the victim's testimony shall be required'. Nevertheless, the SCSL RPE do not contain a similar explicit provision. This may correspond to the fact that Judges may have realized that since there was in general no corroboration requirement, it was not necessary to insert a special provision.¹²⁸⁵ In any case, rule 96 (i) has been applied in the case law of the ICTY and the ICTR.¹²⁸⁶ For example, in *Tadić*, the Trial Chamber in commenting that rule concluded that it 'accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something which had long been denied to victims of sexual assault in common law'.¹²⁸⁷ In turn, the Trial Chamber in *Kunarac et al.* stated that rule 96 overrules the requirement that exists or used to exist in some domestic jurisdictions according to which evidence of a rape complainant must be corroborated.¹²⁸⁸ Rule 96 (i) is therefore a welcome addition, especially considering that, during war time, it is very unlikely that corroborative evidence such as blood, semen and other medical or physical evidence is/will be available as supporting evidence.¹²⁸⁹

Second, consent is not allowed as a defence if the victim has been subject to physical or psychological constraints, consent is thus vitiated by captivity.¹²⁹⁰ Rule 96 (ii) of the ICTY RPE and the ICTR RPE provides for that:

consent shall not be allowed as a defence if the victim
(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

¹²⁸⁴ ICTY RPE, rule 96; ICTR RPE, rule 96; SCSL RPE, rule 96. For a detailed discussion on these rules see Brouwer (2005) 260-269.

¹²⁸⁵ Schabas (2006) 497, footnote 274.

¹²⁸⁶ See, e.g., *Tadić* (IT-94-I-T), Opinion and Judgment, Trial Chamber, 7 May 1997, para. 536; *Kayishema and Ruzindana* (ICTR-95-1), Judgment and Sentence, Trial Chamber, 21 May 1999, para. 70.

¹²⁸⁷ *Tadić* (IT-94-I-T), Opinion and Judgment, Trial Chamber, 7 May 1997, paras. 535-539. See also, e.g., *Musema* (ICTR-96-13-T), Trial Chamber, Judgment and Sentence, 27 January 2000.

¹²⁸⁸ *Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, Trial Chamber, 22 February 2001, para. 566.

¹²⁸⁹ Kelly Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals' (1999) 93 *American Journal of International Law* 97, 111.

¹²⁹⁰ *Furundžija* (IT-95-17/1), Judgment, Trial Chamber, 10 December 1998, para. 271.

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

In *Kunarac et al.*, the ICTY Trial Chamber criticized rule 96 (ii) as not being consistent with the traditional legal understanding of the concept of consent in rape as in domestic systems at which consent constitutes an aspect of the legal definition of rape, the absence of consent is actually an element of the offence.¹²⁹¹ The Chamber considered that the use of the word ‘defence’, which technically speaking implies the shifting of the burden of proof to the accused, ‘is inconsistent with this understanding’.¹²⁹² It seems to be that the accused does not need to prove the existence of consent but rather the Prosecutor has to prove the lack of consent; however, this will generally speaking be quite obvious in the context of a sexual crime trial. In any case, in *Kunarac et al.*, the judges requested that the issue of absence of consent was brought up in spite of the coercive circumstances determined by the Prosecutor. Paying attention to the findings in *Kunarac et al.*,¹²⁹³ the respective provisions of the SCSL RPE were formulated differently and indeed are identical to the corresponding provisions in the ICC RPE.¹²⁹⁴ Be that as it may, the ICTY RPE and the ICTR RPE call for a special hearing or *voir dire* to be held prior to evidence of the victim’s consent is admitted. Accordingly, the accused is required to ‘satisfy the Trial Chamber *in camera* that the evidence is relevant and credible’.¹²⁹⁵ This provision was removed from the SCSL RPE and is not present in the ICC RPE. The importance of the existence of a consent rule consists in, among other reasons, the fact that questions concerning non-consent will most likely originate that victims become reluctant to come forward as witnesses, which in turn will become an obstacle to achieve justice for sexual crime victims. It should also be borne in mind that posing the question of consent may give the impression that the victim is not believed and, hence, consented.

¹²⁹¹ Kunarac et al. (IT-96-23-T and IT-96-23/1-T), Judgment, Trial Chamber, 22 February 2001, para. 463.

¹²⁹² *Ibid.*, Loc. cit.

¹²⁹³ See Schabas (2006) 497.

¹²⁹⁴ SCSL RPE, rule 96 ((i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent; (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence’).

¹²⁹⁵ ICTY RPE, rule 96 (iii); ICTR RPE, rule 96 (iii).

Third, the victim's prior or subsequent sexual conduct is inadmissible. Rule 96 (iv) of the ICTY RPE and the ICTR RPE states that 'prior sexual conduct of the victim shall not be admitted in evidence'. This rule, commonly known as the 'rape shield' provision, has been adopted in many national systems in order to prevent oppressive cross-examination of sexual crime victims.¹²⁹⁶ Thus, rule 96 (iv) addresses an unfair stereotype according to which a sexually active woman is presumed to have consented to the sexual activity upon which the prosecution is based. The inadmissibility of the victim's prior or subsequent sexual conduct, considering the nature of the crimes prosecuted before these tribunals, responds to the fact that admission of such evidence would 'lead to a confusion of the issues' essentially trying 'to call the reputation of the victim into question' and would only bring 'further distress and emotional damage to the witness'.¹²⁹⁷ For example, in *Delalić et al.*, the Trial Chamber ordered a reference to a prior sexual conduct of a witness to be removed from the record, noting the need for protection of the witnesses' privacy and the necessary balance between those considerations and the principle of public proceedings.¹²⁹⁸ Rule 96 (iv) of the SCSL RPE addresses the issue under discussion in this paragraph but in somewhat a different way. Nevertheless, it has been said to have the same practical effect than the ICTY RPE and ICTR RPE.¹²⁹⁹

An important reason to have special evidentiary rules in cases of sexual violence cases is that because of 'fear of reprisals, retraumatization and feelings of shame', victims are generally reluctant to appear as witnesses before the tribunals.¹³⁰⁰ Moreover, as Schabas points out, those rules seek 'to counteract a variety of abuses and stereotypes that have long hampered the effective prosecution of [sexual violence] crimes'.¹³⁰¹ It should be mentioned that rules 96 (ii) and 96 (iii) are seemingly more victim-friendly than the equivalent provisions in the ICC Statute as they contain a more firm language 'consent shall not be allowed as a defence if' in contrast to the Chamber 'shall be guided by principles (a) to (d)'. Indeed, rule 96 initially did not allow a defence of consent

¹²⁹⁶ Schabas (2006) 498.

¹²⁹⁷ *Delalić et al.* (IT-96-21-T), Decision on the Prosecutor's Motion for the Redaction of the Public Record, Trial Chamber, 5 June 1997, para. 48; *Delalić et al.* (IT-96-21-T), Judgment, Trial Chamber, 16 November 1998, para. 70.

¹²⁹⁸ *Delalić et al.* (IT-96-21-T), Decision on the Prosecutor's Motion for the Redaction of the Public Record, Trial Chamber, 5 June 1997.

¹²⁹⁹ Schabas (2006) 499.

¹³⁰⁰ See Khan and Dixon (2009) 802.

¹³⁰¹ Schabas (2006) 496.

at all but, due to fair trial concerns, it was amended in order not to exclude completely the possibility for the defence to raise the issue of consent.¹³⁰²

Lastly, but equally important, it should be borne in mind that protective measures can be augmented or lifted,¹³⁰³ which is important as the security situation of a victim as a witness may change throughout time. As for augmenting protective measures, the applying party must on the preponderance of probabilities demonstrate that the witness is in need of such additional protection.¹³⁰⁴ As for lifting protective measures, factors include: i) no need to maintain the original protective measures in the light of the time passed since the testimony; ii) witness's willingness; and iii) the need to use the protected information in forthcoming contempt proceedings for disclosure of protective information.¹³⁰⁵ Unlike the ICTR RPE and the SCSL RPE, the ICTY RPE explicitly establish that the competent Chamber via the VWS shall ensure that 'the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures' but on exceptional circumstances the Chamber may 'order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent'.¹³⁰⁶

3.3. The ICC

3.3.1. Protective Measures

3.3.1.1. Presentation

As a preliminary point, it should be left clear that protective and special measures at the ICC can be granted not only to victims who are witnesses but also those who take the stand before the ICC as victim participants as indicated in the text of the ICC, and the *travaux préparatoires*.¹³⁰⁷ Article 68 (1) of the ICC Statute states that:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so

¹³⁰² Brouwer (2005) 267.

¹³⁰³ ICTY RPE, rule 75 (D); ICTR RPE, rule 75 (F)-(J); SCSL RPE, rule 75 (F)-(J).

¹³⁰⁴ Taylor (SCSL-03-01-T-615), Decision on Confidential Prosecution Motion for Additional Protective Measures for Witness TF1-395, Trial Chamber, 3 October 2008, p. 3.

¹³⁰⁵ Blaškić (IT-95-14), Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. Seselj & Margetić Case, Appeals Chamber, 24 January 2006.

¹³⁰⁶ ICTY RPE, rule 75 (J).

¹³⁰⁷ See, e.g., article 68 of the ICC Statute refers to the 'Protection of the victims and witnesses'. As for the discussions at the Rome Conference on this issue see: 'Canada: proposal regarding article 68', UN Doc. A/CONF.183/C.1/WGPM/L.58/Rev.1 and A/CONF.183/C.1/WGPM/L.58/Rev.1 (6 July 1998).

doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Since article 68 (1) is broadly framed, the ICC judges are free to propose protective measures not specifically authorized under the ICC RPE.¹³⁰⁸ These measures, in general, involve an order preventing release to the public, press and information agencies of the identity of the victim or witness in question.¹³⁰⁹ As established under article 68 (2), these measures ‘[are] an exception to the principle of public hearings’ and, thus, a Chamber ‘may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means’.

As for the ICC RPE, while rules 87 and 88 deal with measures that the ICC may order to facilitate the testimony of victims and witnesses before it, they actually serve different purposes.¹³¹⁰ This delineation of functions was contained in the Australian RPE proposal,¹³¹¹ and reflected in the current ICC RPE. While protective measures (rule 87) would apply when seeking to protect the identity or location of a victim or witness or another person at risk from the public or media, special measures (rule 88) would be more flexible and, hence, allow the ICC to design measures to facilitate the testimony of certain vulnerable victims and witness. The latter is examined later. It is important, however, to mention that not only special measures but also protective measures can be ordered for the presentation of evidence of traumatized and vulnerable witnesses as determined by the ICC.¹³¹² For example, in *Katanga and Ngudjolo Chui*, 19 Prosecution witnesses and two victim participants, called as witnesses upon request of the legal representative of the main group of victim participants,

¹³⁰⁸ Schabas (2010) 824.

¹³⁰⁹ *Ibid.*, Loc. cit.

¹³¹⁰ Helen Brady, ‘Protective and Special Measures for Victims and Witnesses’ in Lee (2001a) 434, 440.

¹³¹¹ Proposal submitted by Australia, PCNICC/1999/WGRPE/DP. 19 (26 July 1999).

¹³¹² Lubanga (ICC-01/04-01/06-1140), Decision on Various Issues Related to Witness’ Testimony During Trial, Trial Chamber I, 29 January 2008, para. 35. See also Lubanga, (ICC-01/04-01/06-1119), 18 January 2008, para. 128.

received in-court protective measures pursuant to rules 87 and 88.¹³¹³ Also, when determining whether to grant protective or special measures, the ICC Chambers may hold *in camera* proceedings.¹³¹⁴

Lastly, but equally important, it should be added that once protective (and also special) measures are ordered, they ‘shall continue to have full force and effect’ concerning other ICC proceedings and ‘shall continue after proceedings have been concluded, subject to revision by a Chamber’.¹³¹⁵ Moreover, the Chamber needs to ‘seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made’.¹³¹⁶

3.3.1.2. Legal Discussion

With regard to protective measures, rule 87 (1) allows a Chamber to order them either *proprio motu* or at request of the Prosecutor, the defence, a witness or a victim or his/her legal representative, if any. During the drafting of this rule, there was some debate about the reference to legal representative of a witness.¹³¹⁷ It was finally agreed that there is no obligation to provide legal representative for a victim who appears as a witness; however, if the witness has his/her own legal representative, the legal representative may request a protective measure on the witness’s behalf.¹³¹⁸ Thus, the expression ‘a witness or a victim or his or her legal representative, if any’, in rule 87, sub-rules 1 and 2 (b)-(d) recognizes this possibility. The VWU is not mentioned explicitly as possessing a ‘standing’ to request a protective measure, but it has only a ‘consultative status’. This may be criticized as that unit is normally the best place to make such a request since it is more familiar with the witnesses’ situation and ‘not yet coloured by having a stake in the proceedings’.¹³¹⁹

The procedure to request a protective measure as set out under rule 87 (2) is clear. First, a motion or request cannot be submitted *ex parte*. Second, a

¹³¹³ Ngudjolo Chui (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber, 18 December 2012, para. 23, footnotes 43 and 44.

¹³¹⁴ See respectively ICC RPE, rules 87 (3) and 88 (2).

¹³¹⁵ ICC Regulations of the Court, regulation 42 (1).

¹³¹⁶ *Ibid.*, regulation 42 (4). As for variation of protective measures see also Banda (ICC-02/05-03/09-368), Decision on the “Prosecution’s Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81 (4) of the Rules of Procedure and Evidence”, Trial Chamber IV, 13 July 2012, paras. 6-9.

¹³¹⁷ See Brady (2001a) 441.

¹³¹⁸ See *Ibid.*, Loc. cit.

¹³¹⁹ *Ibid.*, 442.

witness or a victim applying for a protective measure serves the request on the Prosecutor and the defence, who may respond to it. Third, a motion or request affecting a particular victim or witness must be served on that person, as well as the other party, and each may respond. Fourth, there is a procedure when the Chamber proceeds on its own initiative. Fifth, the motion or request, and any responses, can be filed under seal. The prohibition on *ex parte* applications under rule 87 is explained by its nature and purpose, i.e., this rule deals with measures *vis-à-vis* the accused or his/her counsel, or, conversely *vis-à-vis* the Prosecutor. Nevertheless, it should be noticed that exceptional circumstances may make necessary to order a protective order on an *ex parte* basis. This is, for example, the case when accused's lawyers or family members threaten the victim or witness.¹³²⁰ Rule 88 on special measures is, however, flexible enough to allow the Prosecutor or witness to make an *ex parte* application to request the ICC to order, as a 'special measure', a protective measure. Such approach presents the advantage to keep the general rule, i.e., prohibition of *ex parte* applications for protective measures and, at the same time, it enables the ICC 'to engineer the most suitable measures, based on the circumstances of a case before it, including allowing an *ex parte* application in extreme cases'.¹³²¹

Requests for protective measures at the ICC have to be based on objective grounds, such as actual threats. Accordingly, personal beliefs as to the existence of threats or subjective fears may be considered by the ICC, but they are insufficient by themselves to grant protective measures.¹³²² Additionally, the ICC in *Lubanga* pointed out that decisions involving the provision of protective measures are necessarily fact-specific and, hence, no uniform model of decision-making can apply for all cases.¹³²³ In determining appropriate protective measures, the VWU assessed 'the level of any threat, the likelihood of harm and the overall risk to the particular applicant; and then [considered] each application on its individual merits, on a fact-sensitive rather than a mechanical or formulistic basis'.¹³²⁴ As for the test of a 'high likelihood of harm', applied by the VWU, the Chamber considered that it 'should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death'.¹³²⁵

¹³²⁰ Ibid., 444.

¹³²¹ Ibid., Loc. cit.

¹³²² See OSCE-ODIHR/ICTY/UNICRI, Victims & Witnesses (2011) 36.

¹³²³ *Lubanga* (ICC-01/04-01/06-1311-Anx 2), Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, Trial Chamber, 24 April 2008, para. 77.

¹³²⁴ Ibid., para. 78.

¹³²⁵ Ibid., para. 79.

According to the ICC's emerging case law, protective measures must be necessary and proportionate, as well as subject to the accused's right to a fair trial.¹³²⁶ Hence, necessity and witness security are the requirements for granting protective measures.¹³²⁷ Necessity requires the existence of an established danger of harm or death (based on evidence),¹³²⁸ and that protective measures are not 'routinely granted'.¹³²⁹ Although the ICC has considered the public character of the proceedings as fundamental,¹³³⁰ it has sometimes made exceptions to the principle of public hearings considering the witnesses' protective needs.¹³³¹

It is important to mention that both article 68 and rules 87 and 88 are open-ended. This feature takes into account the wide range of individual rights of witnesses and victims, i.e., 'safety, physical and psychological well being, privacy and dignity'; the different kinds of circumstances before the ICC; and new technological developments that may arise in the future and which the ICC may use.¹³³² Among 'appropriate' protective measures, these may first include the filing of proceedings under seal.¹³³³ Second, participants in the proceedings may be prohibited by the Chamber from disclosing information leading to the identification of the protected persons to a third party.¹³³⁴

Third, the Chamber can order that the name or other information that could lead to identification of the protected person be expunged from the

¹³²⁶ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1795-Red), *Décision Prononçant des Mesures de Protection au Profit du Témoin 323 lors de sa Déposition à l'audience - Version Publique Expurgée*, Trial Chamber II, 27 January 2010, para. 6; Katanga and Ngudjolo Chui (ICC-01/04-01/07-1667-Red), *Ordonnance Relative aux Mesures de Protection de Certains Témoins Cités à Comparaitre par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve)*, Trial Chamber II, 9 December 2009, para. 6.

¹³²⁷ Lubanga (ICC-01/04-01/06-1372), *Decision on the Prosecution's Application for an Order Governing Disclosure of Non-public Information to Members of the Public and an order Regulating Contact with Witnesses*, Trial Chamber I, 3 June 2008, para.8.

¹³²⁸ Lubanga (ICC-01/04-01/06-1557), *Decision on the Prosecution and Defence Applications for Leave to Appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters*, Trial Chamber I, 16 December 2008, para. 27.

¹³²⁹ Lubanga (ICC-01/04-01/06), *Transcripts*, 24 March 2009, p. 63.

¹³³⁰ Bemba (ICC-01/05-01/08-701), *Order on the reclassification as public of documents ICC-01/05-01/08-498-Conf and ICC-01/05-01/08-503-Conf*, Appeals Chamber, 24 February 2010; Katanga and Ngudjolo Chui (ICC-01/04-01/07-1667-Red), 9 December 2009, para. 4.

¹³³¹ Lubanga (ICC-01/04-01/06), *Transcripts*, 16 January 2009, pp. 3-4.

¹³³² Brady (2001a) 446.

¹³³³ ICC RPE, rules 87 (2) and 88 (4). See also *Situation in the Democratic Republic of the Congo (ICC-01/04)*, *Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'*, Appeals Chamber, 13 July 2006, paras. 21-23.

¹³³⁴ ICC RPE, rule 87 (3) (b).

record.¹³³⁵ In *Abu Garda*, the Pre-Trial Chamber decided that the identity of the witness could be kept confidential *vis-à-vis* the public and media by expunging the name and address of the witness from the public records.¹³³⁶ Not disclosing victims' identities to the public and media was understood in *Katanga and Ngudjolo Chui* during pre-trial as a way to minimize the risk faced by them by participating in proceedings.¹³³⁷ However, the interest of the accused's right to due process guarantees increases during the trial phase. Thus, in *Lubanga*, redactions 'were reviewed by the Chamber and some were lifted during the course of the trial' until further disclosure was no more possible 'under the present circumstances'.¹³³⁸ Due to concerns for witnesses' personal safety or that of their families, many witnesses, in the judgment in *Lubanga*, are referred to by number rather than by name and certain details that might reveal their identity were omitted.¹³³⁹ Nevertheless, the parties and participants were aware of the relevant identifying information.¹³⁴⁰ These considerations were also adopted by Trial Chamber II in *Katanga and Ngudjolo Chui*.¹³⁴¹

Fourth, a Chamber may order that the testimony be given by electronic or other special means, whereby the image or voice is distorted.¹³⁴² In *Lubanga*, three dual status victims, who testified in January 2010, were granted in-court protective measures that included voice and face distortion and pseudonyms.¹³⁴³ Also, for example, in *Katanga and Ngudjolo Chui*, Trial Chamber II determined that witnesses' images and voices were distorted before being publicly broadcast due to the harassment suffered by other witnesses upon their return to the Democratic Republic of Congo (DRC) and the fear by the witnesses benefited in

¹³³⁵ *Ibid.*, rule 87 (3) (a).

¹³³⁶ *Abu Garda* (ICC-02/05-02/09), Public Redacted Version of 'Decision on the Prosecutor's Application for Protective Measures Dated 22 September 2009', Pre-Trial Chamber I, 9 October 2009, p. 4.

¹³³⁷ *Katanga and Ngudjolo Chui* (ICC-01/047-01/07-474), Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 20-22.

¹³³⁸ *Lubanga* (ICC-01/04-01/06), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 117.

¹³³⁹ *Ibid.*, para 115.

¹³⁴⁰ *Ibid.*, *Loc. cit.*

¹³⁴¹ *Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), 18 December 2012, paras. 63 and 65.

¹³⁴² ICC RPE, rule 87 (3) (c). As for case law, see *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2663-Red), Decision on the Application for the Institution of Protective Measures for Witnesses a/0381/09, a/0018/09, pan/0363/09 and Victim a/0363/09, Issued on 27 January 2011, Trial Chamber II, 22 February 2011.

¹³⁴³ *Lubanga* (ICC-01/04-01/06), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 21.

this decision of suffering similar targeting.¹³⁴⁴ When the possibility for the ICC to use electronic means for testimony was first suggested, it was considered that such measure would be used ‘when the witness is not able to attend the Court due to illness, injury, age or other justifiable reason’.¹³⁴⁵ Rule 67 (1) establishes that such testimony can only be authorized when it permits the witness to be examined by the Prosecutor, the defence, and by the Chamber although victims or their representatives are not mentioned. It is also specified that facilities selected for that testimony must be ‘conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness’.¹³⁴⁶ The Trial Chamber in *Lubanga* has determined that evidence given via video link is ‘generally enjoined to protect the psychological well-being and dignity of its witnesses, subject to the fundamental dictates of a fair trial’.¹³⁴⁷ The ICC case law has consistently found that the determination of whether or not a witness may be allowed to give viva voce (oral) testimony through video technology is connected with the witness’s personal circumstances, including the well-being of a witness.¹³⁴⁸

Fifth, a Chamber may order that a pseudonym be used for the witness.¹³⁴⁹ Trial Chamber I, in *Lubanga*, granted a Prosecutor’s application to have the voice and images distorted as well as to employ pseudonyms for twenty protected witnesses.¹³⁵⁰

Sixth, a Chamber may order proceedings to be held *in camera*.¹³⁵¹ Measures such as proceedings *in camera* or permitting the presentation of evidence by electronic or other special means is facilitated by article 68 (2) of the ICC Statute:

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall

¹³⁴⁴ Katanga and Ngudjolo Chui (ICC-01/04-01/07-2663-Red), 22 February 2011, para. 15.

¹³⁴⁵ Preparatory Committee Final Draft, p. 109, fn. 14.

¹³⁴⁶ ICC RPE, rule 67 (3). See *Lubanga* (ICC-01/04-01/06), 29 January 2008, para. 41.

¹³⁴⁷ *Lubanga* (ICC-01/04-01/06-2285-Red), Redacted Decision on the Defence Request for a Witness to Give Evidence Via Video-Link, Trial Chamber I, 9 February 2010, para. 15.

¹³⁴⁸ *Bemba* (ICC-01/05-01/08-2101), Public Redacted Decision on the “Prosecution Request to Hear Witness CAR-OTP-PPPP-0036’s Testimony Via Video-link”, Trial Chamber III, 3 February 2012, para. 7. See also, *Lubanga* (ICC-01/04-01/06-2285-Red), 9 February 2010, para. 16.

¹³⁴⁹ ICC RPE, rule 87 (3) (d).

¹³⁵⁰ *Lubanga* (ICC-01/04-01/06), Transcripts, 16 January 2009, pp. 1-5.

¹³⁵¹ ICC RPE, rule 87 (3) (e).

be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

This provision allows a departure from the normal course of ‘public hearings’ in order to protect victims and witnesses, when it is necessary, including ‘special measures’ such as reading partially or totally a witness’s statement in open court or in private provided that, as the ICC has pointed out, ‘these steps do not detract from the fairness of the proceedings’.¹³⁵² For example, in *Katanga and Ngudjolo Chui*, the Chamber ordered closed sessions when certain witnesses would enter and exit the courtroom and when potentially identifying questions would be put to them.¹³⁵³ However, the interest of the accused’s right to a public hearing grows stronger during the trial phase. Thus, for instance, the Trial Chamber in *Lubanga* stated that it would review applications concerning protective measures, including the use of closed sessions, based on an individual analysis.¹³⁵⁴ Be that as it may, during the trial in *Lubanga*, testimony was frequently heard in ‘private session’, which the public was thus unable to follow, but also the Chamber ordered the public reclassification of any portions that do not contain information which may create a security risk.¹³⁵⁵ Trial Chamber II followed the same approach in *Katanga and Ngudjolo Chui*.¹³⁵⁶ In any case, as noticed by Schabas, instead of being an exception to the rule, ‘restriction on the principle of public hearings seems to be the rule’.¹³⁵⁷ As previously commented,¹³⁵⁸ the excessive or too frequent use of *in camera* hearings is criticized as goes in detriment of the principle of public hearings, which is an important component of the accused’s rights as acknowledged by article 67 (1) of the ICC Statute ‘In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees in full equality [...]’.

Seventh, documents pertaining to the Prosecution may be classified as confidential in order to protect, *inter alia*, the psychological well-being, dignity

¹³⁵² Lubanga (ICC-01/04-01/06), 15 January 2009, para. 17.

¹³⁵³ Katanga and Ngudjolo Chui (ICC-01/04-01/07-2663-Red), 22 February 2011, para. 15.

¹³⁵⁴ Lubanga (ICC-01/04-01/06-1140), 29 January 2008, paras. 25 and 35.

¹³⁵⁵ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para 116.

¹³⁵⁶ Ngudjolo Chui (ICC-01/04-02/12-3-tENG), 18 December 2012, para. 64.

¹³⁵⁷ Schabas (2010) 825.

¹³⁵⁸ See *supra* Chapter III 3.2.2.

and privacy of the witness, in accordance with article 68 (1) of the ICC Statute as determined in *Bemba*.¹³⁵⁹ Nevertheless, the Chamber in the same case paid special attention to strike a balance between the protection of a witness and the Chamber's duty to ensure the publicity of the proceedings as enshrined in articles 64 (7) and 67 (1) of the ICC Statute.¹³⁶⁰ Bearing in mind that the provision of non-public information is governed by the principles of necessity and witness security, this kind of information should only be shown to members of the public if it is truly necessary for the preparation and presentation of the case of a party or participant.¹³⁶¹ The Trial Chamber in *Lubanga* listed as additional examples of protective measures that 'iii) a witness should be able to control his or her testimony, and, if so, to what extent; iv) breaks in the evidence should be allowed as and when requested; v) a witness can require that a particular language is used'.¹³⁶²

It is necessary to bear in mind that although the obligation to identify, protect and respect the well-being and dignity of witnesses lies mainly with the party or participant calling the witness, the other party, participants and the ICC hold responsibilities in this regard.¹³⁶³ Indeed, the importance of protective measures for victims and witnesses definitively lies on their nature as 'the legal means by which the Court can secure participation of victims in the proceedings'.¹³⁶⁴ However, these measures shall be fact specific and, hence, no uniform model of decision-making can apply to all cases, as already mentioned.¹³⁶⁵ What it is even more important is how to reach the appropriate balance concerning the intrinsic tension between protective measures for victims/witnesses and the rights of the accused. The ICC Statute explicitly gives prevalence of the latter over the former as laid down in article 68 (1) of the ICC Statute which establishes that 'These measures shall not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial'. The ICC Statute thus reflects the trend in international criminal procedure whereby whereas adoption of protective measures in favour of victims/witnesses at

¹³⁵⁹ *Bemba* (ICC-01/05-01/08-2101), 3 February 2012, para. 12.

¹³⁶⁰ *Ibid.*, Loc. cit.

¹³⁶¹ See *Lubanga* (ICC-01/04-01/06-1372), Decision on the Prosecution's Application for an Order Governing Disclosure of Non-Public Information to Members of the Public and an Order Regulating Contact with Witnesses, Trial Chamber I, 3 June 2008, paras. 8-9.

¹³⁶² *Lubanga* (ICC-01/04-01/06-1140), 29 January 2008, para. 35.

¹³⁶³ *Ibid.*, para. 36.

¹³⁶⁴ *Prosecutor v. Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 128-129.

¹³⁶⁵ *Lubanga* (ICC-01/04/06-1311-Anx 2), Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Trial Chamber I, 24 April 2008, para. 77.

different stages of the proceedings has to be taken into account, these cannot justify (serious) restrictions to the rights of the accused as these are not only human rights of the accused but also ‘part and parcel of the epistemological mechanism for fact finding in criminal proceedings’.¹³⁶⁶

This delicate balance is also exemplified when it comes to restrictions on disclosure. Although rule 81 (4) (‘Restrictions on Disclosure’) orders the Chamber to take, *inter alia*, ‘necessary steps’ to protect witnesses and members of their families, ICC case law has appropriately emphasized that when less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.¹³⁶⁷ This evidences that protective measures should solely restrict the accused’s rights only as long as necessary.¹³⁶⁸

Redactions of victims’ applications have also being decided, for example, in the Uganda situation where the Prosecutor and the defence were given a redacted copy of the victims’ applications, expunging any information that may identify applicants.¹³⁶⁹ The use of summary evidence pursuant to article 68 (5) of the ICC Statute has been considered as primarily a witness protection measure because it allows the Prosecutor not to divulge the witnesses’ identities prior to the confirmation hearing provided that it is used in a manner not inconsistent with the rights of the accused and a fair and impartial trial.¹³⁷⁰

In any case, according to article 68 (5) of the ICC Statute and rule 81 (4) of the ICC RPE, the non-disclosure of the identity of victims or witnesses is only applicable to the proceedings prior to the commencement of the trial.¹³⁷¹ This point is examined in further detail when discussing anonymity prior to trial.¹³⁷²

¹³⁶⁶ Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’ (2010) 8 Journal of International Criminal Justice 137, 145.

¹³⁶⁷ Lubanga (ICC-01/04-01/06-773), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, Appeals Chamber, 14 December 2006, para. 33.

¹³⁶⁸ Tochilovsky (2008) 221.

¹³⁶⁹ Although this Decision adopted the 1 February 2007 is not public, references to it can be found in Situation in Uganda (ICC-02/04-101), 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, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 2 and 3.

¹³⁷⁰ Lubanga (ICC-01/04-01/06-773), 14 December 2006, paras. 44, 54 and 51.

¹³⁷¹ Article 68 (5) reads as follows: ‘Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such

3.3.2. Special Measures

As previously mentioned, special measures primarily seek to protect certain vulnerable witnesses and victims. Article 68 places a special emphasis on victims of sexual or gender violence, or violence against children. Thus, article 68 (1) states that the ICC ‘shall have regard to all relevant factors, including age, gender [...] and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children’.¹³⁷³ Thus, certain categories of victims and witnesses are identified to be in situations of extreme danger due to the nature of the crimes and their status. These two factors would assist in identifying ‘a particular group of victims, the survivors, who are always at risk of re-victimization’.¹³⁷⁴ The Prosecutor is requested to take protective measures ‘particularly during the investigation and prosecution of such crimes’.¹³⁷⁵ Such obligation is implemented by the use of personnel and investigators, who possess legal and psychological expertise on trauma and crime against women and children, as stated in other ICC Statute provisions.¹³⁷⁶

Paragraph 2 of article 68 of the ICC Statute is more specific by establishing that:

In particular, such measures [‘conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means’] shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness.

Special measures adopted in, for example, testimony of sexual violence victims constitute a limitation to the defence’s right to examine witnesses,¹³⁷⁷ which is explicitly stated under article 67 (1) as follows ‘[...] the accused shall be entitled [...] (e) To examine, or have examined, the witnesses against him or her [...]’. Protective measures for sexual violence victims, including testimony via closed-circuit television, which prevents direct visual contact between witness

measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

¹³⁷² See *infra* Chapter III 4.3.1.

¹³⁷³ See also, e.g., ICC RPE, rule 19 (g), which emphasizes the need for expertise on the elderly ‘in particular in connection with armed conflict and exile trauma’. For commentaries on the relevant factors referred to in article 68 (1), see Jones (2002) 1359-1361.

¹³⁷⁴ David Donat-Cattin, ‘Article 68’ in Triffterer (2008a) 1275, 1282.

¹³⁷⁵ ICC Statute, article 68 (1).

¹³⁷⁶ *Ibid.*, articles 42 and 36 (8) (b).

¹³⁷⁷ Schabas (2008a) 1264.

and the accused, as well as support of the witness by a person who is close to him/her in the courtroom may be given in exceptional circumstances under article 68 (2) of the ICC Statute.¹³⁷⁸

Rule 88, a descendant of article 68 (2),¹³⁷⁹ mainly enables the ICC to order ‘special measures’ including, but not limited to, ‘measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2’.¹³⁸⁰ For example, Trial Chamber II in *Katanga and Ngudjolo Chui* stated that it would be ‘particularly vigilant in preserving the psychological well-being and privacy of Victim a/0363/09, who is a minor’.¹³⁸¹ Be that as it may, the drafters of rule 88 gave enough deal of flexibility to the ICC so that this can order necessary and appropriate measures tailored to the particular circumstances.¹³⁸² Indeed, in exercise of the Trial Chamber’s powers and functions as established in article 64, ICC’s case law has reassured to ensure the adoption of appropriate steps to guarantee the protection of victims and witnesses, ‘and particularly those who have suffered trauma or who are in a vulnerable situation’.¹³⁸³

Rule 88 allows a Chamber to order a special measure either on its own initiative or at the request of the Prosecutor, the defence, a witness or a victim or his/her legal representative, if any. Similar to rule 87, when rule 88 was drafted, it was concluded that the expression ‘a witness or a victim or his or her legal representative, if any’ acknowledges that although there is no obligation to provide legal representation for a victim appearing as a witness, under certain circumstances that person may have his/her own legal representative.¹³⁸⁴

As previously mentioned, rule 88 provides for that the ICC may order a special measure such as, but not limited to, measures to facilitate the testimony of ‘a traumatized victim or witness, a child, an elderly person or a victim of

¹³⁷⁸ See also Acquaviva and Heikkilä (2013) 830. Article 68 (2) has been interpreted as introducing a presumption according to which sexual violence victims should testify *in camera*. This presumption may be overturned if they, for instance, decide to testify in public. See Brouwer (2005) 242-243.

¹³⁷⁹ Brady (2001a) 447.

¹³⁸⁰ ICC RPE, rule 88 (1).

¹³⁸¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2663-Red), 22 February 2011, para. 15. For references to in-court protective measures in favour of women and adopted under rules 87 and 88, see, e.g., *Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), 18 December 2012, para. 23, footnotes 43 and 44.

¹³⁸² *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2663-Red), 22 February 2011, para. 15.

¹³⁸³ *Lubanga* (ICC-01/04-01/06), 29 January 2008, para. 35.

¹³⁸⁴ See Brady (2001a) 447.

sexual violence'. Italy proposed adding disabled persons to this list.¹³⁸⁵ In order to avoid re-opening a number of rules to add references to these special classes, Canada proposed what became rule 86 ('general principle'),¹³⁸⁶ a rule of general applicability, that also included the special needs of persons with disabilities when they appear as victims or witnesses before the ICC:

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence.

Similar to rule 87, the subject of a special measure should consent to it. Nevertheless, under rule 88 (1) this is not an absolute obligation as it is indicated that 'The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure'. Rule 88 contains a somewhat different proceeding for making an application for a special measure than the one set in rule 87 for applying for a protective measure as rule 88 allows an application for a special measure to be made, if necessary, on a *ex parte* basis or *in camera* or both.¹³⁸⁷

According to rule 88 (2), special measures may include, 'but are not limited to, an order that a counsel, a legal representative, a psychologist or a family member is permitted to attend during the testimony of a traumatized victim or witness', which is also applicable to a child, an elderly person or a victim of sexual violence.¹³⁸⁸ Rule 88 (5) obliges the Chamber to be vigilant in controlling the manner of questioning witnesses to 'avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence'.¹³⁸⁹ This is required insofar as 'violations of the privacy of a witness or victim may create risk to his or her security'.¹³⁹⁰ In connection with this rule, the Trial Chamber may order the parties and participants to disclose in advance the questions or the topics they seek to cover during their questioning in order to

¹³⁸⁵ See Rule 6 (29) (e) in PCNICC/2000/WGRPE (6)/DP.3 (13 March 2000).

¹³⁸⁶ See Brady (2001a) 448.

¹³⁸⁷ ICC RPE, rule 88 (2). In case of an *inter partes* application for a special measure, the procedure established in rule 87 (2) (b)-(d) is applicable.

¹³⁸⁸ See Brady (2001a) 449.

¹³⁸⁹ This aspect was contained in the 1999 Paris Seminar, as part of the Preparatory Commission work on RPE. See Proposal submitted by France, Commentary on document PCNICC/1999/WGRPE/DP.19 (PCNICC/1999/WGRPE/DP.34, 4 August 1999).

¹³⁹⁰ ICC RPE, rule 88 (5).

particularly protect traumatized or vulnerable witnesses.¹³⁹¹ Trial Chamber I in *Lubanga* identified as a possible measure that the testimony of vulnerable witnesses be treated as confidential and access to it ‘is to be limited to the parties and participants in the proceedings’.¹³⁹²

Since rule 68 deals with special measures to facilitate the giving of testimony by particularly vulnerable victims and witnesses, rule 68 (‘prior recorded testimony’) may be used together with an order under rule 88.¹³⁹³ Article 69 (2) and rule 68 allow the Trial Chamber the production of a witness’s recorded audio or video testimony, even when the Pre-Trial Chamber has not authorized this. Such exception to the principle of testimony in person is applicable when: i) the Prosecutor and the defence had the opportunity to examine the witness when the recording was made; ii) the prior recorded testimony goes to proof of a matter other than the accused’s acts and conduct; iii) the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; iv) the prior recorded testimony comes from a person who has been subjected to interference; v) or if that witness is present before the Trial Chamber and does not object, subject to the right of the Prosecutor, the defence, and the Chamber to examine the witness.¹³⁹⁴

Previously recorded testimony may be introduced in lieu of ‘live’ evidence if there are some factors including that: i) the testimony relates to issues not materially in dispute; ii) it is not central to core issues in the case; and iii) it is corroborative of other evidence.¹³⁹⁵ Additionally, measures adopted by the Chamber must not be prejudicial to or inconsistent with the accused’s rights.¹³⁹⁶ Be that as it may, Trial Chamber I in *Lubanga* as for rule 68, adopted pursuant to article 69 (2) of the ICC Statute, said that it is:

[...] directed at the ‘testimony of a witness’ in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts or other documented evidence of ‘such’ testimony

¹³⁹¹ *Lubanga* (ICC-01/04-01/06), 29 January 2008, para. 33.

¹³⁹² *Ibid.*, para. 35.

¹³⁹³ Brady (2001a) 455.

¹³⁹⁴ ICC RPE, rule 68 (amended version). See also ICC RPE, rule 68 (original version).

¹³⁹⁵ Katanga and Ngudjolo Chui (ICC-01/04-07-2289), Corrigendum to the Decision on the Prosecution Motion for Admission of Prior Recorded Testimony of Witness P-02 and Accompanying Video Excerpts, Trial Chamber II, 27 August 2010, para. 14.

¹³⁹⁶ *Ibid.*, Loc. cit.

[...] the ambit of Rule 68 permits the introduction of witness statements, in addition to video- or audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the 'documented evidence' of a witness's testimony.¹³⁹⁷

The live questioning of a witness in open court has undeniable importance. However, under rule 68, which also permits the introduction of written statements,¹³⁹⁸ having evidence read can also present important advantages as concluded by the ICC:

21. [...] since oral testimony is, for obvious reasons, of a different nature to a written statement: most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part observing the demeanour of the witness.

22. However, there can be equal material advantages in having evidence read, in whole or in part [...] relevant examples are that it avoids witnesses unnecessarily repeating their evidence once it has been recorded. Furthermore, there is a real potential for war crimes trials to last an excessive period of time and the court is entitled to bear this issue in mind when weighing the possibility of receiving non-oral evidence.¹³⁹⁹

Rule 68 also connects with rule 112 (4) ('recording of questioning in particular cases'), which establishes that:

the Prosecutor may choose to follow the procedure [of audio or video-recording the questioning of a person] [...] when questioning other persons, in particular where the use of such procedures would assist in reducing any subsequent traumatising of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence. The Prosecutor may make an application to the relevant Chamber.

¹³⁹⁷ Lubanga (ICC-01/04-01/06-1603), Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of two Witnesses, Trial Chamber I, 15 January 2009, para. 18. See also Lubanga (ICC-01/04-01/06-1399), Decision on the Admissibility of Four Documents, Trial Chamber I, 13 June 2008, para. 22.

¹³⁹⁸ Lubanga (ICC-01/04-01/06-1603), 15 January 2009, para. 18.

¹³⁹⁹ Ibid., paras. 21 and 22; Bemba (ICC-01/05-01/08-886), Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108, Trial Chamber III, 16 September 2010, para. 5.

At this point, it should be added that the VWU in *Bemba* adopted a 'Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses' to be able to consider vulnerable witnesses' needs,¹⁴⁰⁰ which has been followed in other cases.¹⁴⁰¹ Vulnerable witnesses are defined as those who face an increased risk to: 'a. Suffer psychological harm through the process of testifying and/or b. Experience psychosocial or physical difficulties, which affect their ability to testify'.¹⁴⁰² This Protocol also notes that witness' vulnerability can be determined by factors relating to the nature of the crime, i.e., sexual violence, violence against children, and crimes involving excessive violence.¹⁴⁰³

It is necessary to mention that protective, and arguably special measures, remain in force in relation to other ICC proceedings and continue after they have been concluded, subject to revision by a Chamber.¹⁴⁰⁴

Special evidentiary rules applicable in sexual violence crimes are also included in the ICC RPE. First, under rule 63 (4), the general principle of non-corroboration is complemented with a specific emphasis on sexual crimes as follows 'a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'.¹⁴⁰⁵ This emphasis was added considering that victims of sexual violence in many national systems were often treated differently from victims of other crimes.¹⁴⁰⁶ Rule 63 (4) highlights the point that a sexual crime victim is as reliable a witness as any other crime witness, which is coherent with the equality and principle of non-discrimination stated under article 21 (3) of the ICC Statute. Rule 63 (3) has to be read and applied in connection with rules on relevance or admissibility of evidence, especially, article 69 (4) of the ICC Statute. Thus, when there is relevant, credible and probative

¹⁴⁰⁰ Bemba (ICC-ICC-01/05-01/08-974-Anx2), Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses, Registrar, 25 October 2010.

¹⁴⁰¹ E.g., Gbagbo (ICC-02/11-01/11-93-Anx2), Protocol on the Vulnerability Assessment and Support Procedure Used to Facilitate the Testimony of Vulnerable Witnesses, Registrar, 16 April 2012.

¹⁴⁰² Bemba (ICC-ICC-01/05-01/08-974-Anx2), 25 October 2010, para. 5.

¹⁴⁰³ Ibid., para. 6. See also Acquaviva and Heikkilä (2013) 849.

¹⁴⁰⁴ ICC Regulations of the Court, regulation 42.

¹⁴⁰⁵ ICC RPE, rule 63 (4).

¹⁴⁰⁶ See Donald Piragoff, 'Evidence' in Lee (2001) 349, 355. Rule 63 (4) came from the Australian proposal. See PCNICC/1999/DP.1 (26 January 1999), rule 101 (i). See also a proposal by Costa Rica, PCNICC/1999/WGRPE/DP.3 (24 February 1999).

evidence on a sexual crime from a single victim, an accused may be convicted as corroboration is not required.

Second, under rule 70 of the ICC RPE:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

This evidentiary rule is quite important insofar as seeks to prevent any misinterpretation of certain actions by victims and witnesses of sexual crimes, which took place in oppressive and extreme circumstances ever present in sexual violence scenarios. In turn, rule 72 provides for that in case a party wants to introduce or elicit, including by means of the questioning of the victim or witness, evidence that the victim consented to an alleged crime of sexual violence, an *in camera* procedure will be held to establish whether that evidence is relevant or admissible.¹⁴⁰⁷ The victim is not present during the *in camera* procedure, which protects the victim from confrontation with painful statements that have not been previously tested.¹⁴⁰⁸ Moreover, this rule seeks to protect sexual crime victims from a painful examination when consent should not be an

¹⁴⁰⁷ ICC RPE, rule 72 ('1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case. 2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear *in camera* the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim. 3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70').

¹⁴⁰⁸ Brouwer (2005) 266-267.

issue at all and, at the same time, allows the accused's right to bring evidence of consent in cases where consent is relevant. When it is intended to introduce or elicit victim's consent of an alleged sexual crime, the Chamber must hear *in camera* the views of the Prosecutor, the defence, the witness and the victim or his/her legal representative, if any, and has to take into consideration 'whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause'.¹⁴⁰⁹ Even if the Chamber determines the evidence as admissible, it 'shall state on the record the specific purpose for which the evidence is admissible'.¹⁴¹⁰ It should also be mentioned that since the ICC has not included consent as an element of the crime of rape or any of the other sexual crimes, the Prosecutor can focus on the coercive environment and also prevent the issue of consent from being raised.¹⁴¹¹

Third, subject to article 69 (4),¹⁴¹² under rule 71 of the ICC RPE, evidence of prior or subsequent sexual conduct of a victim or a witness shall not be admitted by the Chamber.¹⁴¹³ Additionally, rule 70 of the ICC RPE reads as follows 'Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness'. Rule 71 acknowledges the presumption that prior or subsequent sexual conduct cannot be admitted into evidence, which is in accordance with the equality and principle of non-discrimination under article 21 of the ICC Statute.¹⁴¹⁴ Unlike the ICTY RPE and the ICTR RPE, the ICC RPE do not completely prohibit the introduction of evidence of prior or subsequent sexual conduct. Thus, the reference to article 69 (4) in rule 71, i.e., the potential, exceptional admission of previous or subsequent sexual conduct of the victim, may be considered as not fortunate as that sort of evidence should never be admissible.¹⁴¹⁵

Those special evidentiary rules and, in general, special, protective measures in cases of sexual violence at the ICC and the other international and hybrid criminal courts arguably constitute an area in international criminal justice at which international human rights law has influenced in order to

¹⁴⁰⁹ ICC RPE, rule 72 (2).

¹⁴¹⁰ *Ibid.*, rule 72 (3).

¹⁴¹¹ Brouwer (2005) 266.

¹⁴¹² 'The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness [...]'.
¹⁴¹³ ICC RPE, rule 71.

¹⁴¹⁴ Brouwer (2005) 268.

¹⁴¹⁵ *Ibid.*, 269.

protect those victims from re-victimization or secondary victimization. Indeed, the case law of the IACtHR, applying the ACHR and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem Do Para'), in the context of serious human rights violations, has drawn particular attention to the sexual violence victims' right to be heard in criminal proceedings. As noticed by Salmón Gárate, under the approach adopted by the IACtHR, sexual violence victims have been given a differentiated treatment when being heard by a public authority in criminal proceedings.¹⁴¹⁶ Thus, the IACtHR, taking into account the Guidelines for Medico-Legal Care for Victims of Sexual Violence adopted by the World Health Organization and the Istanbul Protocol adopted by the UN Human Rights Commissioner according to which States have an enhanced obligation to investigate cases of violence against women with due diligence,¹⁴¹⁷ has identified *inter alia* the following guidelines and requirements in the course of sexual violence criminal proceedings:

[...] i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence; ii) the victim's statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary; iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape; iv) a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes; [...] and vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.¹⁴¹⁸

The delicate balance between the rights of the accused and special measures ordered for vulnerable victims and witnesses as seen in this sub-section characterizes the ICC's legal framework and practice. It is herein concluded that the adoption of special measures has to be adopted following a thorough case-

¹⁴¹⁶ Salmón Gárate and Blanco (2012) 117.

¹⁴¹⁷ IACtHR, Case of Fernández-Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 30 August 2010, Series C No. 215, para. 193.

¹⁴¹⁸ Ibid., para. 194. See also IACtHR, Case of Rosendo Cantú et al. V. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 31 August 2010, Series C No. 216, para. 178.

by-case analysis and taking procedural safeguards related to the rights of the accused.

3.4. The ECCC and the STL

3.4.1. Obligation to Protect Witnesses and Victims and Requesting Protective Measures

3.4.1.1. The ECCC

With regard to the ECCC, both the Agreement between the ECCC and the UN and the ECCC Constitutive Law state that the ECCC, i.e., the Co-Investigating Judges, the Co-Prosecutors and the Chambers, ‘shall provide for the protection of victims and witnesses. Such protective measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity’.¹⁴¹⁹ Internal rule 29 (1) also reflects this general obligation as ‘The ECCC shall ensure the protection of Victims who participate in the proceedings, whether as complainants, or Civil Parties, and witnesses’.

Accordingly, protective measures are applicable to victims participating as complainants, civil parties or witnesses, and in the particular case of a civil party these protective measures are afforded as a matter of ‘procedural right’.¹⁴²⁰ Moreover, internal rule 29 (2) provides for that the Co-Investigating Judges or the Chambers when issuing an order ‘shall take account of the needs of victims and witnesses’.¹⁴²¹ Furthermore, in cases when direct communication could place the person’s life or well being in danger, the Co-Investigating Judges or the Chambers may communicate with the lawyers of victims, witnesses, complainants or civil parties, or victims’ association.¹⁴²² The ECCC Practice Direction on Protective Measures pays especial attention to reach a balance between, on the one hand, the security of victims or witnesses and, on the other one, the rights of the accused, stated under the Law on the Establishment of the Extraordinary Chambers,¹⁴²³ as those measures have to respect the fundamental principles applicable to the ECCC, ‘in particular: a) the needs of victims and witnesses; b) the rights of the suspect, charged person or accused; and c) the

¹⁴¹⁹ ECCC Agreement, article 23 (‘Protection of Victims and Witnesses’); ECCC Law, article 33 new.

¹⁴²⁰ See Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488.

¹⁴²¹ ECCC Internal Rules, rule 29 (2).

¹⁴²² *Ibid.*, Loc. cit.

¹⁴²³ ECCC Law on the Establishment of the Extraordinary Chambers, article 35 new.

fairness of the proceedings'.¹⁴²⁴ This same Direction in its article 4 (2) provides that the Co-Prosecutors when discharging their disclosure obligations under the Internal Rules 'shall respect the protective measures as previously ordered by the Co-Investigating Judges or the Chambers [...]'. The ECCC has established that a protective measure request has to be justified by a specified risk and demonstration of why the lack of protective measures would imperil the safety and/or well-being of the person in question.¹⁴²⁵

Concerning the mechanism to request protective measures, the ECCC Co-Investigating Judges and the Chambers on their own initiative or upon request, and after consultation with the Victims Support Section or the WESU, may 'order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger'.¹⁴²⁶ In case of *proprio motu* measures, the existence of 'indications in the case file of such risk' is the factor to be considered.¹⁴²⁷ Internal rule 29 (9) clarifies that appeals against decisions relating to protective measures do not have suspensive effect, with the exception of decisions lifting such measures. Requests for protective measures are in writing.¹⁴²⁸ According to article 2 (4) of the Practice Direction on Protective Measures:

The Co-Investigating Judges or the Chambers may, on their own motion or on the request of the parties or their lawyers, hold an *in camera* hearing to determine whether to order protective measures. They may decide to use remote means to permit the participation of the interested party or parties.

As part of the proceedings in *Duch*, civil party group 1 filed a request to withdraw protective measures, i.e., pseudonym, concealing identity from the public, remote participation and distortion of voice and physical features, which

¹⁴²⁴ ECCC/03/2007/Rev.1, Practice Direction on Protective Measures, Amended on 29 April 2008, article 1.3.

¹⁴²⁵ Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Civil Parties, Trial Chamber, 2 June 2009.

¹⁴²⁶ ECCC Internal Rules, rule 29 (3).

¹⁴²⁷ *Ibid.*, Loc. cit. This rule additionally states that 'Protective measures for victims shall be requested no later than 15 days after the indictment becomes final. Protective measures for witnesses shall be requested no later than the date for the filing of the witness list referred to in Rule 80. On an exceptional basis, later applications may be considered by the Chamber'.

¹⁴²⁸ ECCC/03/2007/Rev.1, Practice Direction on Protective Measures, Amended on 29 April 2008, article 1.3.

the Supreme Court Chamber granted.¹⁴²⁹ In adopting this decision, the Supreme Court Chamber took note of article 4 (4) of the Practice Direction on Protective Measures, which establishes that to vary a protective measure, the Co-Investigating Judges or competent Chamber ‘shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to cancel or vary the protective measures has been made’ and it was also noted article 4 (1) of the Practice Direction which states that:

Protective measures once ordered shall continue to apply *mutatis mutandis* throughout the entire proceedings in the case concerned and in relation to any other proceedings before the court and shall continue until they are cancelled or varied pursuant to the provisions of this Practice Direction.¹⁴³⁰

It must be mentioned that the ECCC Internal Rules explicitly state that civil parties may appeal: i) decisions on protective measures issued by the Co-Investigating Judges (before the Pre-Trial Chamber);¹⁴³¹ and ii) decisions ‘on protective measures under rule 29(4)(c)’ by the Trial Chamber (before the Supreme Court Chamber).¹⁴³²

3.4.1.2. The STL

Unlike other international and hybrid criminal courts, the STL Statute contains no specific regulation on the issue of protection of witnesses and victim participants, referring only to the contents of the STL RPE ‘The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for [...] the protection of victims and witnesses [...] and may amend them, as appropriate’.¹⁴³³

Thus, the matter of protection of witnesses and victim participants is absent in the STL Statute even though the UN International Independent Investigation Commission set up to investigate the assassination of the former Lebanese Prime Minister Rafik Hariri and 22 other individuals, continuously pointed out that there are important challenges to guarantee the security of

¹⁴²⁹ Kaing Guek Eav alias Duch (Case 001), Decision on Group 1- Civil Parties’ Co- Lawyers’ Request to Cancel Protective Measures (F23/1), Supreme Court Chamber, 25 March 2011.

¹⁴³⁰ Ibid., pp. 2 and 3.

¹⁴³¹ ECCC Internal Rules, rule 74 (4).

¹⁴³² Ibid., rule 104 (4). See also ECCC Internal Rules, rule 105 (2).

¹⁴³³ STL Statute, article 28.

witnesses and persons cooperating with the STL.¹⁴³⁴ However, as analyzed later, the STL RPE filled that gap since they contain quite detail regulations on protective measures for witnesses and victims participants and, therefore, follow the standards established in previous international and hybrid criminal courts.

At the STL, the Trial Chamber, either *proprio motu* or at the request of a party, the victim or witness concerned, as well as the Victims' Participation Unit or the VWU, may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused,¹⁴³⁵ which are stated in the STL Statute.¹⁴³⁶ It is also added that a party requesting the Trial Chamber the adoption of protective measures 'shall seek to obtain the consent of the person in respect of whom the protective measures are sought'.¹⁴³⁷ Considering the accused's rights, protective measures are granted on exceptional basis.¹⁴³⁸ As established in the STL's emerging case law, which referred to jurisprudence of other international/hybrid criminal courts, protective measures can only be granted under specific conditions, namely, there must be a real, objective fear for the security of the witness or victim participant, the measure should be strictly necessary, and the measure should be the least restrictive one necessary to provide for the applicant's protection.¹⁴³⁹

In *Ayyash et al.*, the STL Prosecutor has been working with witnesses in order to address whether, and if so, what protective measures may be required at trial pursuant to the STL RPE.¹⁴⁴⁰ This certainly constitutes an important step to establish later what protective measures should be granted during trial and on a timely basis so that the trial is not delayed and the protective measures adopted can appropriately meet concerns of victims and witnesses. Moreover, as the Pre-Trial Judge noted, the preparation of the case for trial has actively been pursued

¹⁴³⁴ See, e.g., UN Document S/2007/424, Eighth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007) para. 58 (Jul. 12, 2007).

¹⁴³⁵ STL RPE, rule 133 (A).

¹⁴³⁶ STL Statute, article 16 (Rights of the Accused). See also STL Statute, article 15 (Rights of Suspects During Investigation).

¹⁴³⁷ STL RPE, rule 133 (B).

¹⁴³⁸ STL Statute, article 16 (2) ('The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses').

¹⁴³⁹ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision on the Legal Representative of Victims' First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, Pre-Trial Judge, 19 December 2012, para. 19.

¹⁴⁴⁰ See STL, Fourth Annual Report (2012-2013), p. 29; STL, Third Annual Report (2011-2012), p. 33.

and most of the pending issues have been (or are being resolved), which includes the fact that the Appeals Chamber already ruled on the appeal of the victim participants' legal representative concerning protective measures for certain victim participants.¹⁴⁴¹

Even though protective measures ordered in favor of a victim or a witness continue until they are rescinded, varied or augmented,¹⁴⁴² they cannot:

[...] prevent the Prosecutor from discharging any disclosure obligation [...] in the subsequent proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.¹⁴⁴³

The STL RPE also state that:

[...] the party to the subsequent proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings, after having sought the consent of the witness in respect of whom the submission is made, must apply to the Chamber seized of the subsequent proceedings.¹⁴⁴⁴

Via 2013 amendment, the STL RPE now establish that the Chamber must ensure that 'the protected victim or witnesses has consented to the rescission, variation or augmentation of the protective measures', and only exceptionally, 'the Chamber may *proprio motu* order the rescission, variation or augmentation of protective measures without this consent'.¹⁴⁴⁵ As determined by the Plenary of Judges amending the STL RPE, the amended rule follows a similar ICTY RPE provision.¹⁴⁴⁶

Lastly, but equally important, as discussed later,¹⁴⁴⁷ victim participants can appeal protective measures for victim participants and the variation of such measures.

¹⁴⁴¹ Ayyash et al. (STL-11-01/PT/PTJ), Order Setting a New Tentative Date for the Start of Trial Proceedings, Pre-Trial Judge, 2 August 2013, para. 46. See also Ayyash et al. (STL-11-01/PT/PTJ), Decision on the Legal Representative of Victims' Request for Leave of Eleven Weeks to Comply with the Pre-Trial Judge's Decision on Protective Measures, Pre-Trial Judge, 10 May 2013.

¹⁴⁴² STL RPE, rule 133 (G) (i).

¹⁴⁴³ Ibid., rule 133 (G) (ii).

¹⁴⁴⁴ Ibid., rule 133 (H).

¹⁴⁴⁵ Ibid., rule 133 (J).

¹⁴⁴⁶ STL Office of the President, Summary of the Accepted Rule Amendments and Some Key Rejected Rule Amendment Proposals. Pursuant to Rule 5 (1) of the Special Tribunal for Lebanon's Rules of Procedure and Evidence (Fifth Plenary of Judges, February 2013), p. 33.

¹⁴⁴⁷ See *infra* Chapter IV 6.4.2.2.

3.4.2. Set of Specific Protective Measures

3.4.2.1. The ECCC

Under the ECCC legal framework, protective measures shall include, *inter alia*, the conduct of *in camera* proceedings and the protection of the victim's identity.¹⁴⁴⁸ As a first possible protective measure, declaring that the contact address of the person to be protected is that of his/her lawyer or Victims' Association is mentioned in the Internal Rules.¹⁴⁴⁹ Second, a pseudonym can be used when referring to the protected person.¹⁴⁵⁰ Third, the Co-Investigating Judges or the Chambers can authorize 'recording of the person's statements without his/her identity appearing in the case file'.¹⁴⁵¹ Thus, Pre-Trial Chamber can keep names confidential, for example, in *Ieng Sary* (Case 002) the lawyers of some civil parties requested and were granted protective measures consisting in their clients' names not being mentioned in public and that they be redacted from the record for the purposes of the hearing and decision on the appeal against the accused's provisional detention.¹⁴⁵² However, internal rule 29 (6) also establishes that 'No conviction may be pronounced against the Accused on the sole basis of statements taken under [those] conditions'.

Fourth, when a charged person or accused requests to be confronted with a protected person, 'technical means may be used that allow remote participation or distortion of the person's voice and or physical features,'¹⁴⁵³ if such technology allows 'the witness to be interviewed by the Co-Investigating Judges or the Chambers, and the parties, at the time the witness so testifies'.¹⁴⁵⁴ Moreover, not only the principle of testimony in person is explicit in the Internal Rules but also audio video-link technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights.¹⁴⁵⁵ In *Nuon Chea et al.* (Case 002), a witness testified through video-link from France.¹⁴⁵⁶ Also, in *Nuon Chea et al.*, ill-health of those testifying, which is directly related to the

¹⁴⁴⁸ ECCC Law, article 33 new; ECCC Agreement, article 23.

¹⁴⁴⁹ ECCC Internal Rules, rule 29 (4) (a).

¹⁴⁵⁰ *Ibid.*, rule 29 (4) (b).

¹⁴⁵¹ *Ibid.*, rule 29 (4) (c).

¹⁴⁵² *Ieng Sary* (Case 002), Decision on Civil Party Request for Protective Measures Related to Appeal Against Provisional Detention Order, Pre-Trial Chamber, 8 July 2008, p. 2.

¹⁴⁵³ ECCC Internal Rules, rule 29 (4) (d).

¹⁴⁵⁴ *Ibid.*, rule 26 (1).

¹⁴⁵⁵ *Ibid.*, Loc. cit.

¹⁴⁵⁶ See *Nuon Chea et al.* (Case 002), Information on Witnesses. Available at: <http://www.eccc.gov.kh/en/case/topic/2?page=9> (last visit on 12 August 2012).

advanced age and physical frailty of many civil parties and witnesses, prompted the Trial Chamber to authorize video-link evidence in some cases.¹⁴⁵⁷

Fifth, as an exception to the public hearings principle, the Chambers may conduct any part of the proceedings *in camera* or permit the presentation of evidence via electronic or other special means.¹⁴⁵⁸ Internal Rule 79 (6) (c) establishes that the trial chamber hearings ‘shall be conducted in public’ but it also adds that ‘to give effect to protective measures ordered [...] it may, by reasoned decision, order that all or part of the hearing be held *in camera*’. In any case, when it comes to judicial investigations, ‘[i]n order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public’,¹⁴⁵⁹ and Pre-Trial Chamber hearings shall be generally conducted *in camera*.¹⁴⁶⁰ The internal rules on *in camera* pre-trial hearings are criticized herein as they transform the principle of public hearings into an exception.

The importance of public hearings and their intrinsic connection with the accused’s right to a fair trial is reflected in a decision on protective measures by the ECCC Trial Chamber where it was established that:

The OCIJ [Office of the Co-Investigating Judges] itself did not envisage that measures adopted by it would continue in effect throughout the trial phase. Instead it stressed that it is for the Trial Chamber and the Trial Chamber alone to determine whether to impose limits on the right to a public hearing at the trial stage, in accordance with the adversarial principle and with respect for defence rights.¹⁴⁶¹

In the five above-examined protective measures, the person’s request and identity shall be recorded in a classified register separate from the dossier.¹⁴⁶² The Co-Investigating Judges or the Chambers can accordingly order that the identity of the witness is not disclosed.¹⁴⁶³ Additionally and where necessary, the Co-Investigating Judges and the Chambers may order appropriate judicial

¹⁴⁵⁷ Nuon Chea et al. (Case 002), Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, Trial Chamber, 26 April 2013, para. 133, footnote 230.

¹⁴⁵⁸ ECCC Internal Rules, rule 29 (4) (e).

¹⁴⁵⁹ *Ibid.*, rule 56.

¹⁴⁶⁰ *Ibid.*, rules 71 (4) and 72 (4). See also Acquaviva and Heikkilä (2013) 832.

¹⁴⁶¹ Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Civil Parties, Trial Chamber, 2 June 2009, para. 9; citing Kaing Guek Eav alias Duch (Case 001), Order on Protective Measures (Document D98), Office of the Co-Investigating Judges, 8 August 2008, paras. 2-7.

¹⁴⁶² ECCC Internal Rules, rule 29 (5).

¹⁴⁶³ *Ibid.*, rules 28 (7) (b) and (e).

guarantees as provided in the ECCC Internal Rules and/or the physical protection of a victim or witness in safe residence in Cambodia or abroad.¹⁴⁶⁴

The Office of the Co-Investigating Judges and the ECCC Trial Chamber have emphasised a case-by-case analysis when deciding to grant protective measures for victims and witnesses and, thus, ‘indiscriminate measures in relation to an unlimited number of individuals, absent a clear justification, jeopardised the fundamental rights of the accused in a criminal trial’.¹⁴⁶⁵ The Co-Investigating Judges indeed clarified that in order to support such a request, the application must: i) include the identity of the parties or individuals benefiting from them; and ii) indicate how, absent those measures, the lives and wellbeing of those victims and witnesses or their families would be imperiled.¹⁴⁶⁶ A genuine fear from the applicant or his/her family and an objective justification for this fear have also been pointed out by the Trial Chamber in *Duch* as required and in accordance with jurisprudence of the ICTY and the ICTR, cited by the Chamber.¹⁴⁶⁷ A specific risk hence underlies granting protective measures in favour of designated persons. Accordingly, the Co-Investigating Judges rejected protective measures requested that did not reach ‘the required level of specificity and failed to show how the absence of protective measures would place the life or security of each applicant in danger’.¹⁴⁶⁸ In any case, the Co-Investigating Judges and Trial Chamber in *Duch* also considered the objective criteria applied by the UN when evaluating the current security situation in Cambodia, and the length of time elapsed since the commission of alleged crimes.¹⁴⁶⁹ Concerning security issues for victims and witnesses who want to testify in court, the Cambodian scenario is different from the situations in countries related to investigations and prosecutions at other international and hybrid criminal courts. In the latter, victims as witnesses were called to testify within a much shorter period after crimes were committed than at the ECCC. Also, the security situations in those

¹⁴⁶⁴ Ibid., rule 29 (7).

¹⁴⁶⁵ Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures (Document D6), Office of the Co-Investigating Judges, 30 July 2007, p.1 (noting that the request did not specify the names of the individuals concerned, or how the failure to provide protective measures would endanger the lives and security of hundreds of individuals references in the request); Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Civil Parties, Trial Chamber, 2 June 2009, para. 7.

¹⁴⁶⁶ Kaing Guek Eav alias Duch (Case 001), Document D6, 30 July 2007, p. 1.

¹⁴⁶⁷ Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Civil Parties, 2 June 2009, para. 7.

¹⁴⁶⁸ Kaing Guek Eav alias Duch (Case 001), Additional Decision on Motion for Protective measures (Document D12/VI), 9 October 2007, para. 7.

¹⁴⁶⁹ Ibid., para. 13; Kaing Guek Eav alias Duch (Case 001), 2 June 2009, para 8.

countries were/are still (much) more precarious than in Cambodia when witnesses took the stand at trial.

Moreover, both the ECCC Co-Investigating Judges and the Trial Chamber found that alleged fear and reluctance on the part of some witnesses and victims to testify as inconclusive and, indeed, ‘a number of witnesses were ready to testify publicly and that for the majority, the risk level was low’.¹⁴⁷⁰ It was noted that many potential witnesses were already well-known to the public via earlier declarations in the media, and that the inclusion of their names in the case file as potential witnesses was unlikely to create additional risk for them.¹⁴⁷¹ All of this may explain why, in the first completed ECCC trial, i.e., in *Duch*, protective measures were afforded in a limited number of cases.¹⁴⁷² Be that as it may, when granting protective measures, the ECCC Trial Chamber, for example, ordered the non-disclosure of Civil Party applicant E2/62’s identity and identifying information to the public, ruling:

- (a) That Parties to the proceedings shall refer to this Civil Party by the pseudonym E2/62;
- (b) That the identity of Civil Party E2/62 and any other information that could identify her as a party to the proceedings shall not be disclosed to the public or the media;
- (c) That technical means be used to allow remote participation or the distortion of Civil Party’s E2/62’s voice and physical features should the Accused or a Charged Person before the ECCC request a confrontation with Civil Party E2/62.¹⁴⁷³

On the other hand, provisional detention has been found by the Pre-Trial Chamber in *Duch* and *Ieng Thirith* (Case 002) as ‘a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying

¹⁴⁷⁰ Kaing Guek Eav alias Duch (Case 001), 2 June 2009, para. 8. See also: Kaing Guek Eav alias Duch (Case 001), 9 October 2007, para. 15.

¹⁴⁷¹ Kaing Guek Eav alias Duch (Case 001), 9 October 2007, para. 15; Kaing Guek Eav alias Duch (Case 001), 2 June 2009, para. 8.

¹⁴⁷² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 54. As for protective measures decisions see: Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, Trial Chamber, 7 August 2009. See also Kaing Guek Eav alias Duch (Case 001), Decision on Protective Measures for Witnesses and Experts and on Parties’ Request to Hear Witnesses and Experts – Reasons, E40/1, Trial Chamber, 10 April 2009.

¹⁴⁷³ Kaing Guek Eav alias Duch (Case 001), Confidential Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24 (E135), 7 August 2009, p. 3, para. 4. Cited by Kaing Guek Eav alias Duch (Case 001), 25 March 2011, p. 2, footnote 2.

any evidence'.¹⁴⁷⁴ It was actually considered to be essential that witnesses are not in any fear or suffering from any pressure preventing them from testifying.¹⁴⁷⁵

It is important to mention that the Practice Direction on the Classification and Management of Case-Related Information states that:

7.1. In order to allow effective protection of witnesses in subsequent phases of proceedings, in public hearings and filings submitted prior to the testimony of each witness, he / she will be referred to by number, initial, pseudonym or other means deemed appropriate. A witness may waive the application of this sub-article in writing.

[...]

7.3. If a person who has applied to be joined as a civil party is also the subject of a request for protective measures, the civil party application will be treated as strictly confidential until a decision is made on the protective measures request.¹⁴⁷⁶

Lastly, but equally important, it should be mentioned that there are no principles of evidence for cases of sexual crimes in the ECCC Internal Rules, which is herein criticized as the ECCC has jurisdiction over, *inter alia*, rape as a crime against humanity.¹⁴⁷⁷

3.4.2.2. The STL

With regard to the STL, rule 133 of its RPE establishes a non-exhaustive list of protective measures, which may be decided *in camera* proceedings.¹⁴⁷⁸ These measures have been described by the Appeals Chamber as extensive.¹⁴⁷⁹ There are three categories of protective measures. First, those measures:

¹⁴⁷⁴ Kaing Guek Eav alias Duch (Case 001), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav aka Duch, Pre-Trial Chamber, 3 December 2007, para. 36; Ieng Thirith (Case 002), Decision on Appeal of Provisional Detention Order, Pre-Trial Chamber, 9 July 2008, para. 52.

¹⁴⁷⁵ Kaing Guek Eav alias Duch (Case 001), 3 December 2007, para. 36.

¹⁴⁷⁶ Practice Direction ECCC/004/2009/Rev.1, Practice Direction on Classification and Management of Case-Related Information, articles 7.1 and 7.3.

¹⁴⁷⁷ See ECCC Law, article 5. See also Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 361-366 (findings on rape and rape as torture).

¹⁴⁷⁸ STL RPE, rule 133 (C).

¹⁴⁷⁹ Ayyash et al. (STL-11-01/PT/AC/AR126.3), Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, Appeals Chamber, 10 April 2013, paras. 31 and 40.

[...] to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness, by means such as:

- (a) expunging names and identifying information from the Tribunal's public records;
- (b) non-disclosure to the public of any records identifying the victim or witness;
- (c) applying image- or voice- altering devices.
- (d) giving testimony through closed circuit television or video-conference link; and
- (e) assignment of a pseudonym.¹⁴⁸⁰

As an example of this first category of protective measures, in *Ayyash et al.*, the Pre-Trial Judge ordered that the transcript of a status conference should be made public but 'subject to the necessary redactions being made',¹⁴⁸¹ which was adopted taking into account, *inter alia*, the emphasis of victim participants' legal representatives on the need to maintain the anonymity of victims participants who were granted it.¹⁴⁸² The President of the STL has also highlighted that, when making public some decisions, there is the need for redactions to protect the interests sought to be safeguarded by the Registrar and the Prosecutor.¹⁴⁸³ The Pre-Trial Judge in *Ayyash et al.* has in turn reclassified as public the identity of some victim participants upon request of their legal representatives.¹⁴⁸⁴

In addition to the examples previously mentioned, the Pre-Trial Judge in a decision in *Ayyash et al.*, relying on, among other sources, jurisprudence of the ICTY and the ICTR, *inter alia*: i) recalled that the accused's counsel shall protect the confidentiality of evidence in the proceedings, as well as information relating to witnesses, and their whereabouts during and at the conclusion of the proceedings; ii) ordered the defence that, if it wishes to make contact with a witness at risk identified by the Prosecution, to give prior notice to the latter and

¹⁴⁸⁰ STL RPE, rule 133 (C) (i).

¹⁴⁸¹ *Ayyash et al.* (STL-11-01/PT/PTJ), Order to Redact the Confidential Transcript of the Status Conference of 26 July 2012 and Make Public the Redacted Version, Pre-Trial Judge, 17 August 2012, para. 12.

¹⁴⁸² *Ibid.*, paras. 9 and 11.

¹⁴⁸³ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision of President on Forum and Redactions, STL President, 25 September 2012, para. 9. Concerning redactions of victims' names see also Merhi (STL-13-04/1/TC), 20 December 2013, para. 75.

¹⁴⁸⁴ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision on the Victims' Legal Representatives Request for Reclassification as Public of Identities of Seven Victims Participating in the Proceedings, Pre-Trial Judge, 21 September 2012.

the Victims' Participation Unit, which will arrange the contact after having ensured that the witness agrees; iii) ordered the Prosecution to provide the defence, with a list of witnesses, to be updated regularly, indicating those who are at risk; iv) ordered the defence, when it discloses material, to inform all third parties of the obligation not to disseminate or copy that material, to return it to the defence after use, and of the sanctions in case of violation of those rules; v) ordered all third parties not to disseminate material in the proceedings of which they may have knowledge or any information contained therein, which may be subject to a protective measure, unless that material or information becomes public during open session proceedings; and vi) ordered the Prosecution to disclose to the defence the evidentiary materials that do not require other protective measures than those mentioned in this decision.¹⁴⁸⁵

According to rule 123 (D), 'Deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of a video-conference'. In turn, rule 124 lays down that 'At the request of either Party, the Pre-Trial Judge or a Chamber may, in the interests of justice, order that testimony be received via video-conference link'. Based on these provisions, the STL's President issued a Practice Direction to provide guidelines for the establishment of video-conference links,¹⁴⁸⁶ which *inter alia* set minimum technical requirements,¹⁴⁸⁷ and that the 'proposed location that is appropriate for the conduct of proceedings, the safety of the respective participants, and the integrity of the proceedings'.¹⁴⁸⁸

The second category of protective measures explicitly mentioned in the STL RPE corresponds to closed sessions.¹⁴⁸⁹ The principle is that all the proceedings before a Chamber, other than Chamber's deliberations, shall be held in public, unless otherwise decided by the Chamber after hearing the parties.¹⁴⁹⁰ However, the STL RPE also allow private hearings, i.e., 'Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of, *inter alia*: [...] non-disclosure of the identity of a

¹⁴⁸⁵ See Ayyash et al. (STL-11-01/PT/PTJ), Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, Pre-Trial Judge, 25 May 2012, pp. 22-24. See also Ayyash et al. (STL-11-01/PT/PTJ), Decision Authorizing the Withdrawal of the Prosecution Application of 21 December 2011 and the Modification of the Application of 15 March 2012 Requesting Protective Measures, Pre-Trial Judge, 14 June 2012.

¹⁴⁸⁶ STL, Practice Direction for Video-Conference Links at the Special Tribunal for Lebanon, STL-PD-2010-03, 15 January 2010.

¹⁴⁸⁷ *Ibid.*, article 1 (3).

¹⁴⁸⁸ *Ibid.*, article 2.

¹⁴⁸⁹ STL RPE, rule 133 (C) (ii).

¹⁴⁹⁰ *Ibid.*, rule 136.

victim or witness as provided for in Rule 133'.¹⁴⁹¹ As stated in *Ayyash et al.*, the confidentiality of the identities of the witnesses or victim participants 'vis-à-vis the public is only envisaged by Rule 133'.¹⁴⁹² In *Ayyash et al.*, status conferences during pre-trial were held in closed sessions 'in order to facilitate the exchange of participants', with summaries of the proceedings being made public afterwards.¹⁴⁹³ In any case, although the STL contemplates an exceptional interim non-disclosure of the identity of victims and witnesses to the defence until appropriate protective measures have been implemented,¹⁴⁹⁴ 'the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence'.¹⁴⁹⁵ Although this point is examined in further detail when discussing anonymity in the next subchapter,¹⁴⁹⁶ it should be mentioned here that the STL RPE explicitly allow, on exceptional basis, anonymous witnesses during not only pre-trial but also trial.¹⁴⁹⁷

A third category of protective measures endeavors 'to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television or shielding the accused from the direct view of the witness'.¹⁴⁹⁸ Additionally, when it deems necessary, the Chamber may control the manner of questioning to avoid any harassment or intimidation.¹⁴⁹⁹ The STL RPE establish that the VWU shall ensure that the witness has been informed, before giving evidence, that his/her testimony and identity may be disclosed at a later date in other proceedings before the STL,¹⁵⁰⁰ and, thus, a potential risk of re-traumatization should be reduced. Finally, the STL RPE also require the Trial Chamber, when appropriate, to state in the protective measure order whether the transcript of proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the STL.¹⁵⁰¹

It should be noticed that although when writing this thesis the first case *Ayyash et al.* has yet not reached the trial stage and, hence, it has not been yet

¹⁴⁹¹ Ibid., rule 137 (iv).

¹⁴⁹² *Ayyash et al.* (STL-11-01/PT/PTJ), 19 December 2012, para. 19. See also, *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 31.

¹⁴⁹³ *Ayyash et al.* (STL-11-01/PT/PTJ), 17 August 2012, para. 3.

¹⁴⁹⁴ STL RPE, rule 115 (A).

¹⁴⁹⁵ Ibid., rule 115 (C).

¹⁴⁹⁶ See *infra* Chapter III 4.4.1.2 and 4.4.2.2.

¹⁴⁹⁷ STL RPE, rules 93 and 159.

¹⁴⁹⁸ Ibid., rule 133 (C) (iii).

¹⁴⁹⁹ Ibid., rule 133 (E).

¹⁵⁰⁰ Ibid., rule 133 (D).

¹⁵⁰¹ Ibid., rule 133 (F).

applied judicial protective measures for this stage, the decisions and steps to guarantee the security of victims and witnesses during pre-trial already adopted (as demonstrated via some examples) should be *mutatis mutandi* considered as illustrative when the Trial Chamber has to adopt protective measures during trial.

Additionally, the Pre-Trial Judge has determined that ‘the participation of dual status victims may require tailored protective measures’, which ‘shall be determined by the appropriate Chamber in due course’.¹⁵⁰²

Last but not at least, it should be added that like in the case of the ECCC, the STL legal instruments do not contain principles of evidence in cases of sexual crimes. As for the STL, this may be justified due to the nature of the crimes under its jurisdiction which, unlike the ECCC, do not concern in principle sexual violence crimes.¹⁵⁰³

3.5. Comparative Conclusions

At international and hybrid criminal courts, protective measures, i.e., protective measures in general and special measures, granted in favor of victims and witnesses pursue four main objectives.¹⁵⁰⁴ First, to minimize serious risks to the security of victims and witnesses as they generally still live in volatile societies characterized by the presence of ongoing armed conflicts and commission of international crimes. Second, reduction of trauma associated with giving testimony, i.e., to prevent that victims suffer from secondary victimization.¹⁵⁰⁵ This objective in particular may be taken as an example of how restorative justice manifestations can be integrated into criminal justice systems, national or international, led predominantly by the retributive/deterrent justice paradigm.

¹⁵⁰² Ayyash et al. (STL-11-01/PT/PTJ), Decision on the VPU’s Access to Materials and Modalities of Victims’ Participation in Proceedings before the Pre-Trial Judge, Pre-Trial Judge, 18 May 2012, para. 61.

¹⁵⁰³ The law applicable to the STL corresponds to the Lebanese national law on acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and the penalties for sedition, civil war and interfaith struggle. See STL Statute, article 2.

¹⁵⁰⁴ These four main objectives are mentioned and discussed in further detail by Brouwer (2005) 231-235. The first three goals listed are identified in, for example, the UN Victims’ Declaration, article 6 (d); and Recommendation (85)11.

¹⁵⁰⁵ The ICTY has addressed the meaning of secondary victimisation for survivors of gender crimes as follows: ‘testifying about the event [sexual violence] is often difficult, particularly in public, and can result in rejection by the victim’s family and community. In addition, traditional court practice and procedures have been known to exacerbate the victim’s ordeal during trial. Women who have been raped and have sought justice in the legal system compare this experience to being raped a second time’. Tadić (IT-94-1-T), 10 August 1995, para. 46.

Third, prevention of serious incursions into the privacy and dignity of victims and witnesses, which is achieved via confidentiality measures and has particular relevance in sexual violence cases. Fourth, to encourage victims and witnesses to testify, otherwise they would be reluctant to go to the courts and consequently trials would not be even possible.

At international and hybrid criminal courts, protective measures benefit not only victims taking part as witnesses when testifying but also victim participants when delivering their statements (ICC, STL) or civil parties (ECCC) when delivering their statements/testimonies. There is a general obligation in the legal frameworks and practice of the international and hybrid criminal courts to protect the safety, physical, psychological well-being, dignity and privacy of victims and witnesses in general. Accordingly, this obligation, as exemplified in the American system, has as a natural and logic consequence that victims as witnesses have a right to be treated with fairness and respect (right to protection) at international and hybrid criminal courts. Granting protective measures to victim participants or civil parties can also be considered as a procedural right.

At international and hybrid criminal courts, protective measures can be ordered by the respective Judges or Chambers and, depending on the court and procedural stage, those measures may be ordered either *proprio motu* or upon the request of the parties, victims or witnesses or their legal representatives if any, or Victims and Witnesses Units. Whereas at the ICTY, the ICTR, the SCSL and the STL, the respective Victims and Witnesses Units can ask the respective Chambers the adoption of protective measures, at the ICC and ECCC, those units only hold a consultative status in this regard. At international and hybrid criminal courts, when deciding whether to order protective measures, a Judge or a Chamber may hold *in camera* proceedings. Protective measures, in particular those that keep the identity of the victim or the witness from the public and media, can be granted if certain requirements are met such as: i) a real, legitimate and objective fear for the safety of the witness, having identified the security threat and the need for protective measures, and, hence, subjective fears on their own are insufficient (necessity); ii) the effect on the public nature of the proceedings would be justified in the circumstances; and iii) the least restrictive measures should be adopted (proportionality). The analysis conducted by international and hybrid criminal courts has to be implemented on a case-by-case, individual basis, taking into account factual circumstances, and with full respect for the accused's rights. Tests like the 'high likelihood' of harm should be interpreted in a purposive and flexible manner in order to guarantee protection to victims and witnesses who are facing a serious risk.

The ongoing security situation in the country or region from which cases are investigated and prosecuted certainly has played an important role when deciding whether and what sort of protective measures should be granted. Thus, whereas the SCSL decided to grant blanket protective measures due to security concerns in Sierra Leone, the ICTY and the ICTR have always based their analysis on an individual, case-by-case basis. The latter approach has also so far been adopted by the ICC even though some of its situations involve ongoing commission of crimes and, thus, may present serious security risks for victims and witnesses. However, it is argued here that this is the best approach in consideration of other competing interests, in particular the accused's right to a fair trial. At the other end of the spectrum, the few protective measures so far adopted in the ECCC's practice corresponds to: i) its legal framework, i.e., unlike trial, non-public judicial investigations and pre-trial hearings are to be generally conducted *in camera* under the ECCC Internal Rules, which is criticized herein as the rules on *in camera* pre-trial hearings transform the public hearing principle into an exception; ii) the readiness of a number of victims to testify publicly; iii) the fact that they were already known; and iv) all of this in the Cambodian context where the crimes under the ECCC's jurisdiction occurred many years ago. Be that as it may, protective measures can be lifted or modified according to the changes in the situation of a victim and a witness through procedural stages, which is a sound and necessary approach due to the length of international criminal proceedings. The lifting and modification of protective measures are also connected with the ICTY, the ICTR and the STL RPE whereby the witness should be informed before testifying that his/her testimony and identity may be disclosed later in another case. The ICTY RPE, the STL RPE and the ICC Regulations of the Court explicitly oblige the competent Chamber to in principle obtain consent from the protected victim or witness on rescission, variation or augmentation of protective measures. Under explicit ECCC Internal Rules, civil parties can appeal decisions on protective measures.¹⁵⁰⁶ At the STL, victim participants can appeal protective measures for victim participants and the variation of such measures.¹⁵⁰⁷

In granting protective measures, the legal instruments and practice of the international and hybrid criminal courts, in a similar fashion than the considered national systems, have always paid close attention to the rights of the accused and regarded them not only as a limit to excessive or disproportional protective measures but also as the key factor in the equation where competing

¹⁵⁰⁶ For further discussion on interlocutory appeals by civil parties see *infra* Chapter IV 6.4.2.1.

¹⁵⁰⁷ See *infra* Chapter IV 6.4.2.2.

interests have to be balanced, i.e., on the one hand the protection of victims and witnesses, and on the other one, the safeguard of the rights of the accused. Protective measures, such as closed hearings, have normally been granted more easily during pre-trial rather than at trial. This approach is not surprising because it is especially during the trial phase where the protection of the rights of the accused has to be given first consideration over other competing interests. The above-mentioned point is arguably the only manner to fully guarantee the due process and fair trial guarantees that must characterize any criminal trial, where, after all, determination of individual criminal liability of the accused is at stake.

Protective measures at international and hybrid criminal courts primarily endeavor to protect the identity and privacy of the victims and witnesses from an unwarranted intromission from the public and media. In other words, protective measures are in principle directed *vis-à-vis* actors external to the criminal proceedings. Therefore, protective measures constitute an exception to the accused's right to public hearings. At international and hybrid criminal courts, protective measures that prevent a disclosure of the identity of victims and witnesses from the accused have been exceptionally accepted but during the pre-trial phase. Accordingly, prior to the trial, disclosure of the identity of victims and witnesses to the accused, but not necessarily to the public and media, has to take place. This issue will be examined in more detail under the next subchapter on anonymous victims and witnesses. What has already been noticed in detail is that non-disclosure of the identity of witnesses and victims to public and media during pre-trial becomes more restricted during trial precisely due to concerns about the rights of the accused. Be that as it may, the set of protective measures recognized and used in the legal framework and practice of international and hybrid criminal courts, which shows important similarities to those adopted in national systems and in particular the English and the American ones, includes, *inter alia*: i) filing of proceedings under seal; ii) parties and participants are prohibited to disclose identifying information of the protected person to third parties; iii) identification of the protected person is expunged from the record; iv) testimony given via electronic or other special means, whereby the image or voice is distorted; v) use of pseudonyms; vi) testimony by video-link, as an exception to give the testimony in person, and about which an anachronistic trend consisting in giving less evidentiary weight to this testimony than to live testimony has been reversed; and vi) holding *in camera* proceedings. Closed sessions have been considered by the case law of the ICTY and the SCSL as the most extreme since it compromises the principle of

public hearings, which is an important component of the accused's right to a fair trial. However, closed sessions have been adopted on regular basis in the practice of the international and hybrid criminal courts. In any case, the excessive or too frequent use of closed hearings is criticized herein as private hearings may give the wrong impression and publicity of hearings is a fundamental part of the accused's rights and, thus, guarantees his/her right to a fair and impartial trial/proceedings.

As a subcategory of the broader notion of protective measures, the legal framework and practice of international and hybrid criminal courts have included and adopted measures ('special measures' in the ICC terminology) specially but not exclusively tailored to facilitate, *inter alia*, the testimony of certain vulnerable or traumatized victims and witnesses, in particular victims of sexual violence and children. These measures inspired by and/or similar to those existent in national systems, in particular adversarial ones, seek to first and foremost to avoid re-traumatization of those victims and witnesses and constitute a limit to the defence's right to examine/cross-examine witnesses. These measures include *inter alia*: i) *in camera* proceedings; ii) the control on the manner of questioning or cross-examining a witness, which is connected with the limits to cross-examination and confrontation; iii) a person accompanying the traumatized/vulnerable victim or witness during his/her participation in court; and iv) production of a witness's recorded audio, video testimony or written statements in lieu of live evidence, being that submitting written statements may offer certain advantages although live questioning of a witness in open court is undeniably important. There are also in the legal framework of the international and hybrid criminal courts, the ECCC and the STL being the exceptions, explicit special evidentiary principles applicable to sexual violence crimes. These include the principle of non-corroboration complemented with a specific emphasis on sexual crimes, the non-inference of consent from words and behavior of the sexual crime victim or when this did not resist or kept silent in oppressive and coercive environments. Moreover, past or subsequent sexual behavior of the sexual violence victim at international and hybrid criminal courts is in general inadmissible and, in this aspect, these provisions are more protective than similar English and American rules/case law arguably due to the nature of international crimes. Developments on the protection of sexual violence victims, alongside other vulnerable victims, have been present not only in international and hybrid criminal courts but also *mutatis mutandi* under and been influenced by international human rights law. As for child witnesses, the adoption of special measures to facilitate the child witness's needs has reported,

or at least tries to put forward, important improvements to reduce the trauma and stress experienced by children when testifying. At international and hybrid criminal courts, measures such as dispensation of taking solemn declaration to children who do not understand it but still are able to provide a comprehensible account of the events and admittance of child witnesses' videotaped evidence instead of direct testimony may go on that direction.

The influence, in particular, of the American and English systems on the design of protective measures at the international and hybrid criminal courts is strong. This is especially evident in the early practice of the ICTY. This tribunal as the first among the new generation of international and hybrid criminal courts had to pay close attention to national practice to fill gaps in a novel international criminal procedural law. Thus, the ICTY in its first Decision on Protective Measures in *Tadić* approvingly cited, for example, United States Supreme Court jurisprudence, to conclude that one-way closed circuit television can be used without violating the right to confrontation 'when the court finds it necessary to protect a child witness from psychological harm'.¹⁵⁰⁸ In the same decision, the ICTY cited and agreed with both English and American legal sources prohibiting disclosure to the public of identifying information of a complainant in a sexual assault case, including still or moving pictures, except at the court's discretion;¹⁵⁰⁹ and limitations to the press to disclose the identities of sexual assault victims.¹⁵¹⁰

¹⁵⁰⁸ *Tadić* (IT-94-1-T), 10 August 1995, para. 47 (Citing *Maryland v. Craig*, 497 U.S. 836 (1990)).

¹⁵⁰⁹ *Ibid.*, para. 39 (Citing the Sexual Offences (Amendment) Act 1976 section 4).

¹⁵¹⁰ *Ibid.*, para. 40 ('Even the United States of America, with its constitutionally-protected rights to a public trial and free speech - which thus places great importance on the right of public disclosure - is more amenable than in the past to measures to protect victims and witnesses. The Supreme Court of the United States has held that state sanctions imposed on the press for disclosing the identities of sexual assault victims before trial may be constitutional, and three state statutes provide for such sanctions. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) [...] In this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a "substantial reason" for such closure, whereas a full closure to the public and press requires an "overriding interest." [...] Partial closures of the courtroom have been justified on the grounds of a witness' fear of retribution from perpetrators still at large (*Nieto v. Sullivan*, 879 F.2d 743 (10th Cir.), *cert. denied*, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied* 434 U.S. 1076 (1977), *see also Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir.), *cert. granted* 468 U.S. 1206 (1983), *vacated and remanded*, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (*U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) *see also Geise v. United States*, 262 F.2d 151, 155 (9th Cir. 1958), *cert. denied*, 361

The influence of Anglo-American legal sources goes beyond the ICTY as the subsequent instruments and practice of international and hybrid criminal courts have incorporated with higher or lower degrees of intensity the protective measures contained in the ICTY RPE and practice, which in turn were influenced by Anglo-American legal sources. Protective measures which, at the end of the day, have to be applied in still adversarial-oriented, hybrid procedural frameworks. The relatively lower attention to protective measures in the legal framework and practice of the ECCC, excepted some measures applicable during judicial investigations/pre-trial hearings, in comparison with those of the other international and hybrid criminal courts may be partially explained by the influence of the French inquisitorial system. Thus, findings in a report on implementation of the EU Framework Decision on Victims (2009), which followed the methodology employed by Brienen and Hoegen in its 2000 study on implementation of the CoE Recommendation 85 (11), reveal generally speaking a more robust practice on treatment and protection of witnesses in England (United Kingdom) than in France.¹⁵¹¹ This general outcome seems to confirm the conclusions in the study by Brienen and Hoegen where, based on legislature initiatives, England and Wales ranked higher than France in treatment and protection of victims. Indeed, while the former was overall among the highest

U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full courtroom justified closure of the courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family (*United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (*United States ex. rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975)) [...] Twenty-six state statutes allow for closure of trials to protect witnesses’).

¹⁵¹¹ As for hearings in ‘camera’, whereas in England (United Kingdom) this is a protective measure given on court’s discretion and based on the vulnerability of certain witnesses, in France hearings ‘*in camera*’ are reserved for certain types of offences and victims and upon their request. While in England (United Kingdom) unlike France revealing identity of victims of certain offences in open court is prohibited, in both countries there is a prohibition revealing the identity of victims of certain offences to the press. Indeed in the United Kingdom, unlike France, the court may impose restrictions on press coverage of the proceedings. Concerning questioning, in England (United Kingdom) there are limits to repetitive questioning unlike France although in the latter repetitive questioning is limited for certain vulnerable victims. In both England (United Kingdom) and France, television-link and/or video recording are allowed for questioning of child-witnesses and in both there is a trusted adult present or a child-friendly environment. In England and Wales, unlike France, there are specialized rape or domestic violence teams questioning victims of sexual and domestic violence although both countries failed to allow such questioning to be conducted in the presence of a companion. See Associação Portuguesa de Apoio à Vítima, Project Victims in Europe, Implementation of EU Framework Decision on the Standing Victims in the Criminal Proceedings in the Member States of the European Union (2009) 49, 51, 54, 89-93.

ranked in Europe, France obtained poor records in the treatment and protection of victims.¹⁵¹² Moreover, the explicit consideration of provisional detention and having the contact address of a person other than the witness's, e.g., a lawyer, as protective measures under the ECCC are very similar to the French system, in which the situation of civil party as beneficiary of protective measures is much stronger than when the victim is only a witness. The important and relatively recent developments in the adversarial systems examined arguably seek to address the traditionally unfriendly adversarial proceedings for victims, which as already discussed can more easily lead to re-traumatization.

4. Anonymity of Witnesses and Victims

Whereas protective measures, as previously analyzed, have been normally granted in order to safeguard the security and safety of victims and witnesses, and avoid secondary victimization, a much more controversial situation is when the accused and his/her counsel do not know the true identity of the victim, i.e., anonymous witnesses. In this section, witness anonymity and, where applicable, anonymous victim participants/anonymous civil parties are examined.

4.1. National Systems

4.1.1. English Adversarial System

Case law has allowed anonymity,¹⁵¹³ which follows a trend permitting it only when the evidence is important enough to make it unfair to oblige the Crown to proceed without it.¹⁵¹⁴ This has been considered as in the opposite direction of the ECtHR case law,¹⁵¹⁵ as the latter prohibits reliance on anonymous witnesses whose evidence is likely to be decisive to the outcome of the case.¹⁵¹⁶ In any case,

¹⁵¹² Brienens and Hoegen (2000) 1158-1159. Concerning the treatment of victims during questioning, the categories of analysis and comparison considered were: i) the manner of questioning concerning children, persons with disabilities and other vulnerable victims and the frequency of questioning; and ii) the protection of the victim from publicity. In these categories, the English system generally speaking scored better than the French system. See *Ibid.*, 1108-1140.

¹⁵¹³ The first anonymity cases arose in 1989 in a Northern Ireland bombing prosecution, and in 1992 the first English case permitting the witness to testify anonymously may have been based on statutory sources stating that hearsay statements may be admitted as evidence 'where a witness is too afraid to testify'. See Liza Karsai, 'You Can't Give my Name: Rethinking Witness Anonymity in Light of the United States and British Experience' (2011) 79 *Tennessee Law Review* 29, 72.

¹⁵¹⁴ See *R. v. Taylor (Gary)* [1995] *Crim. L.R.*253; Emerson, Ashworth and MacDonald (2007) 567.

¹⁵¹⁵ Emerson, Ashworth and MacDonald (2007) 567.

¹⁵¹⁶ See, e.g., ECtHR, *Doorson v. The Netherlands*, Appl. No. 20524/92, Judgment, 26 March 1996; para. 76; ECtHR, *Van Mechelen v. The Netherlands*, Appl. Nos. 21363/93, 21364/93, 21427/93, 22056/93, Judgment, 23 April 1997, para. 58.

the House of Lords held that in rare and exceptional circumstances a judge may permit a witness to conceal his/her identity entirely from the accused.¹⁵¹⁷ According to the Court of Appeal, it is the trial judge who has to determine whether those circumstances exist, and the Court also established some factors relevant to the judge's discretion in *R. v Taylor*.¹⁵¹⁸ Those factors were: i) the existence of real grounds for fear if the witness's identity is revealed; ii) the evidence must be sufficiently important to make it unfair for the Crown to proceed without it; iii) the Crown must satisfy the court that the witness's creditworthiness has been fully investigated and disclosed; iv) the court must be satisfied that there will be no undue prejudice to the accused; and v) the court should balance the need for protection of the witness against the unfairness (or appearance thereof) to the accused.¹⁵¹⁹ Nevertheless, case law permitting anonymity raised concerns related to the accused's rights, which was reflected in *R. v Davis (Iain)* where the House of Lords held that anonymous witness testimony violated the accused's right to a fair trial.¹⁵²⁰ However, the main reason for this conclusion arguably was that the three anonymous witnesses were the 'sole' or 'decisive' evidence against the accused.¹⁵²¹ Be that as it may, the House of Lords invited the legislature to develop witness anonymity rules to change the common law.¹⁵²²

The answer came first via the (provisional) 2008 Criminal Evidence (Witness Anonymity) Act and later largely 're-enacted' by the CJA (2009).¹⁵²³ Section 88 (3) lays down three conditions to make a witness anonymity order: i) the necessity to protect the safety of the witness or of another person or a serious property damage; ii) having regard to all circumstances, the effect of the proposed order would be consistent with the accused's right to a fair trial; and iii) the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and: a) the witness would not testify if the proposed order were not made or b) there would be real harm to the public interest if the witness were to testify without the order. Concerning the first

¹⁵¹⁷ *Attorney General v Leveller Magazine* [1979] A.C. 440, and *Scott v Scott* [1913] A.C. 417.

¹⁵¹⁸ *R. v Taylor (Gary)* [1995] Crim.L.R. 253; *The Times*, August 17, 1994.

¹⁵¹⁹ *Ibid.*, Transcript of the Decision, 17-18.

¹⁵²⁰ *R. v Davis (Iain)*, [2008] UKHL 36, paras. 35 and 61.

¹⁵²¹ *Ibid.*, paras. 61 and 96.

¹⁵²² *Ibid.*, paras. 44 and 45 (See Opinion of Lord Rodger of Earlsferry).

¹⁵²³ Section 86 (1) of the CJA defines a 'witness anonymity order' to be an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

condition, the court must have regard, in particular, to any witness's reasonable fear of suffering death, injury or serious property damage.¹⁵²⁴ Additionally, there are established relevant considerations for the court, including: i) the accused's general right to know the witness's identity; ii) the extent to which the witness's credibility would be a relevant factor when weighing his/her evidence; iii) whether the witness's evidence might be the sole or decisive evidence implicating the defendant; iv) whether the witness's evidence can be properly tested; and v) whether there is another alternative measure to protect the witness.¹⁵²⁵

Concerning the compatibility of the CJA with the ECHR and ECtHR's case law, it has been said that it dilutes the accused's right under article 6 of the ECHR by broadening the grounds based on which an anonymity order may be granted.¹⁵²⁶ Indeed, an important omission is the requirement whereby convictions shall not be solely or decisively based on anonymous testimony, being envisaged only as 'a relevant consideration' for the court.¹⁵²⁷ Since the courts are not in principle obliged to refuse to issue an order under those circumstances, an accused may at least in theory be convicted solely or decisively on the basis of an anonymous witness's testimony.¹⁵²⁸ This indeed goes against reiterated ECtHR's case law, starting with its seminal case *Kostovski v. The Netherlands*, according to which, anonymous testimony should not form the sole or decisive basis for any conviction.¹⁵²⁹ Furthermore, in *Al-Khawaja and Tahery v. United Kingdom*, the ECtHR concluded that 'Even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.¹⁵³⁰

¹⁵²⁴ CJA, section 88 (6).

¹⁵²⁵ *Ibid.*, section 89 (2).

¹⁵²⁶ Jonathan Doak and Rebecca Huxley-Binns, 'Anonymous Witnesses in England and Wales: Charting a Course from Strasbourg' (2009) 73 *Journal of Criminal Law* 508, 528.

¹⁵²⁷ CJA, section 89 (2) (c).

¹⁵²⁸ Doak and Huxley-Binns (2009) 529.

¹⁵²⁹ *Kostovski v. The Netherlands*, Appl. No. 11454/85, Judgment, 20 November 1989, para. 44; *Doorson v. The Netherlands*, Appl. No. 20524/92, Judgment, 26 March 1996; para. 76; *Van Mechelen v. The Netherlands*, Appl. Nos. 21363/93, 21364/93, 21427/93, 22056/93, Judgment, 23 April 1997, para. 55; *Krasniki v. Czech Republic*, Appl. No. 51277/99, Judgment, 28 February 2006, para. 76; *Birutis and others v. Lithuania*, Appl. Nos. 47698/99 and 48115/99, Judgment, 28 March 2002, para. 29.

¹⁵³⁰ *Al-Khawaja and Tahery v. United Kingdom*, Appl. Nos. 26766/05 and 22228/06, Judgment, 20 January 2009, para. 37. (Citing *Doorson v. The Netherlands*, Appl. No. 20524/92, Judgment, 26 March 1996, para. 76). See also *Al-Khawaja and Tahery v. United Kingdom*, Application Nos. 26766/05 and 22228/06, Judgment (Grand Chamber), 15 December 2011, para. 119.

As for the conditions established under the CJA to grant anonymity, they seem to establish a lower threshold than the ECtHR's 'strictly necessary' standard for measures restricting the accused's rights.¹⁵³¹ Thus, the CJA introduces a seemingly lower standard ('necessary') which is even absent in one of the conditions to grant anonymity.¹⁵³² The CJA also allows prevention of a (serious) property damage or real harm to the public interest as possible grounds for granting anonymity whereas cases before the ECtHR have invariably involved threats to the person's life or integrity. However, in other aspects, the CJA arguably meets the standards set under the ECtHR's jurisprudence. Be that as it may, in *R. v. Mayers and Others*, the Court of Appeal's first case applying the provisional Criminal Evidence Act, largely re-enacted by the CJA, the Lord Chief Justice emphasized that the judge's role involves a 'delicate balance' between the accused's right to a fair trial under article 6 of the ECtHR and the rights of the witnesses under articles 2 (life), 3 (physical security) and 8 (private life).¹⁵³³ In any case, when the Court of Appeal has been called to apply the new statutory provisions, i.e., Criminal Evidence Act, it has 'displayed little inclination to hold that the relevant criteria for the making of an anonymity order were not satisfied'.¹⁵³⁴ It remains to be seen the judicial evaluation of the exact situation of the CJA provisions on anonymous witnesses and its compatibility with human rights standards.

4.1.2. American Adversarial System

Even though the United States Supreme Court has not forbidden the use of anonymous witness, it has not specifically upheld such practice either.¹⁵³⁵ Moreover, although some state and federal laws permit the delay in disclosure of witness' names, they remain silent as to the admissibility of an anonymous witness at trial.¹⁵³⁶ In addressing anonymity, courts have in particular relied on

¹⁵³¹ *Van Mechelen v. The Netherlands*, Appl. Nos. 21363/93, 21364/93, 21427/93, 22056/93, Judgment, 23 April 1997, para. 58.

¹⁵³² CJA, section 88 (5).

¹⁵³³ *R v. Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915, para 6.

¹⁵³⁴ Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds.), *Human Rights and Criminal Justice* (3rd edn., Thomson/Sweet and Maxwell 2012) 665. Thus, for instance, in *R v. Mayers*, the Court considered only in one of the four appeals that the trial judge lacked power to issue an anonymity order. See *R v. Mayers* [2008] EWCA Crim 2989; [2009] 1 W.L.R. 1915, para. 52. See also Powar [2009] EWA Crim 594, [2009] 2 Cr. App. R. 8, p. 120. See also Emmerson, Ashworth and Macdonald (2012) 664-665.

¹⁵³⁵ Karsai (2011) 30.

¹⁵³⁶ *Ibid.*, Loc. cit.

two United States Supreme Court cases.¹⁵³⁷ In the first one, *Alford v. United States*, the Court mentioned that ‘There is a duty to protect him from questions which go beyond the bonds of proper cross-examination merely to harass, annoy or humiliate him’.¹⁵³⁸ In the second case, *Smith v. Illinois*, even though the Court found a violation of the Confrontation Clause when a trial court precluded questioning seeking a prosecution witness’s real name,¹⁵³⁹ this finding was actually reached because in this case no reason was given to excuse the witness from answering.¹⁵⁴⁰ Indeed, as Justice White explained, the result might have been different if there was an important government purpose behind non-disclosure, i.e., protection of a witness whose life was threatened.¹⁵⁴¹

In any case, complete anonymity has been authorized in state case law and Circuit Courts in response to, *inter alia*, a danger to a witness’s life.¹⁵⁴² Thus, in *Ohio v. Quintero*, the Court of Appeals of Ohio upheld a complete anonymity order where ‘revealing the name of the witness might subject the witness to harm’.¹⁵⁴³ In *People v. Los Angeles County Superior Court*, the California Court of Appeal overturned an order requesting the prosecutor to reveal a twelve-year-old witness’s identity who observed the accused to flee the homicide crime scene.¹⁵⁴⁴ In *People v. Frost*, the Court of Appeals of New York determined that the lower court had appropriately concluded that ‘the witness’s concerns for safety outweighed defendant’s interest in obtaining information concerning [witness]’s true identity for purely collateral impeachment purposes’.¹⁵⁴⁵ The accused was apparently never provided the witness’s true identity.¹⁵⁴⁶ In *United States v. Borda* and *United States v. Zelaya*, the Fourth Circuit Court of Appeals upheld a complete non-disclosure order.¹⁵⁴⁷ In the latter case, it was determined that an ‘actual threat’ to the witnesses justified non-disclosure if it would not

¹⁵³⁷ The cases referred to in this paragraph have been cited and examined in further detail by *Ibid.*, 30, 36-37.

¹⁵³⁸ *Alford v. United States* 282 U.S. 687, 694 (1931).

¹⁵³⁹ *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

¹⁵⁴⁰ *Ibid.*, 134 (White, J., concurring).

¹⁵⁴¹ *Ibid.*, 133-134 (White J., concurring).

¹⁵⁴² The cases referred to in this paragraph have been cited and examined in further detail by Karsai (2011) 39-44.

¹⁵⁴³ *Quintero*, 1990 Ohio App. Lexis 752, *1.

¹⁵⁴⁴ 40 Cal. Rptr. 2d 335, 343-44 (Cal. Ct. App. 1995).

¹⁵⁴⁵ *People v. Frost*, 790 N.E.2d 1182, 1188 (N.Y. Ct. App. 2003).

¹⁵⁴⁶ *Ibid.*, 1187.

¹⁵⁴⁷ *United States v. Borda*, No. 96-4752, No. 96-4753, No. 96-4806, No. 96-4807, No. 96-4856, 1999 U.S. App. Lexis 9031, at *1 n.1 (4th Cir. May 11, 1999); *United States v. Zelaya*, 336 F. App’x 355, 358 (4th Cir. 2009) (per curiam).

deny ‘effective cross-examination’.¹⁵⁴⁸ In turn, although the Eleventh Circuit Court of Appeals was ‘bother[ed]’ that the witness’s true name was never provided to the accused before or during the trial, it affirmed the accused’s conviction in *United States v. Ji Wu Chen*.¹⁵⁴⁹ It is important to mention that, the cases referred to herein, have generally been about drug and counterfeit good trafficking and (international) gangs. Also, the government obtained a ruling permitting a witness to testify anonymously and wear light disguise in a case on a dirty bomb plot.¹⁵⁵⁰ Indeed, it is expected that once terrorism cases are tried in federal courts, the issue concerning the need for anonymous witnesses will be discussed again.¹⁵⁵¹ The above-referred cases constitute good examples of the tension between the right to confrontation and the risks faced by some witnesses as well as the trend whereby not all ‘courts view witness anonymity as a Confrontation Clause violation, even with respect to material witnesses’.¹⁵⁵²

The Fourth Circuit Court of Appeals, in a more recent case (*United States v. Ramos-Cruz*), upheld previous case law by allowing anonymous witnesses granted on demonstration of actual danger and the defence’s capacity to effectively cross-examine the witnesses and, thus, no violation of the confrontation clause was found.¹⁵⁵³

With regard to delay in disclosure, although the accused is not granted with the right to a list of prosecution’s witnesses before the trial under the United States Constitution,¹⁵⁵⁴ Federal statutory law establishes that witnesses shall be disclosed to the accused in capital offence cases.¹⁵⁵⁵ Some states also authorize delaying disclosure of witness’s identity.¹⁵⁵⁶ Accordingly, witness’s identity may be protected until (s)he testifies at trial. However, this delay can be criticized as precludes pre-trial investigation and may make an independent investigation very difficult.¹⁵⁵⁷ In any case, the District of Columbia Circuit Court of Appeals has found that the constitutional right of cross-examination ‘has never been held to encompass a right to pre-trial disclosure of prosecution

¹⁵⁴⁸ *United States v. Zelaya*, 336 F. App’x 355, 358 (4th Cir. 2009) (per curiam), 358.

¹⁵⁴⁹ 273 F. App’x 838, 839 (11th Cir. 2008).

¹⁵⁵⁰ See Karsai (2011) 47.

¹⁵⁵¹ See *Ibid.*, 45.

¹⁵⁵² *Ibid.*, 60.

¹⁵⁵³ *United States v. Ramos-Cruz*, F.3d (4th Cir. Jan. 18, 2012) (No. 08-4647).

¹⁵⁵⁴ *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

¹⁵⁵⁵ 18 U.S.C. § 3432 (2006). Cited by Karsai (2011) 49.

¹⁵⁵⁶ See, e.g., Fla. R. Crim. Proc. R. 3.220 (West 2010). Cited by Karsai (2011) 49.

¹⁵⁵⁷ See, for further analysis, Karsai (2011) 50-54.

witness'.¹⁵⁵⁸ The focus of courts which have permitted some level of anonymity has been the existence of a genuine risk of harm to the witness and whether the accused 'can place the witness in the proper context and explore bias and credibility issues on cross-examination'.¹⁵⁵⁹

4.1.3. French Inquisitorial System

Article 706-58 of the CPP allows anonymous witness in cases of crimes punished with at least a three-year imprisonment sanction and when there is a grave risk against the life or physical integrity of the witness or of his/her family members. Accordingly, upon justified request from the Prosecutor of the Republic or the investigating judge, the judge of liberties and detention in a reasoned decision may 'authorize that this person's statements will be recorded without his identity appearing in the dossier'.¹⁵⁶⁰ It is also mentioned that the judge of liberties and detention can proceed *proprio motu* during the witness's hearing. The anonymous witness's identity and address are registered in another verbal process as part of a dossier different from that of the case. The witness's identity and address are registered in a parallel record, open to the Grand Instance Tribunal. As a necessary safeguard, article 706-62 of the CPP explicitly states that no conviction can be rendered based solely on an anonymous witness's testimony. Moreover, the *Cour de Cassation* has seemingly considered the notion of anonymous witness more restrictively and apparently under a negative approach.¹⁵⁶¹

Concerning human rights standards, it is important to mention that the ECtHR in *Rachdad v. France*, found France responsible for violation of article 6 of the ECHR since the petitioner's conviction was based only on an anonymous witness.¹⁵⁶² In French legislation, the conditions to admit anonymous witnesses are arguably less strict than the ECtHR's standards and this observation is also applicable to the modifications to the CPP, i.e., the legal frame for the

¹⁵⁵⁸ United States v. White, 116 F.3d 903, 918 (D.C. Cir. 1997); United States v. Celis, 608 F.3d 818, 831 (D.C. Cir. 2010), cert. Denied, 131 S. Ct. 620 (2010).

¹⁵⁵⁹ Karsai (2011) 60.

¹⁵⁶⁰ CPP, article 706-58 ('autoriser que les déclarations de cette personne soient recueillies sans que son identité apparaisse dans le dossier de la procédure').

¹⁵⁶¹ Cass. Crim., 17 October 1991, Dr. pénal, 1992, comm. 27. Cited by Muriel Guerrin, 'Le Témoignage Anonyme au Regard de la Jurisprudence de la Cour Européenne des Droits de l'homme' (2002) 45 Revue Trimestrielle Des Droits De L'Homme 25, 48.

¹⁵⁶² *Rachdad v. France*, Appl. No. 71846/01, Judgment, 13 November 2003, paras. 24-25.

anonymous testimony as already presented.¹⁵⁶³ In turn, the *Cour de Cassation* has assessed anonymous witness's testimony in reference to its 'decisive' character, and also verifying if, in combination with other evidentiary materials, the anonymous testimony constitutes the only evidence.¹⁵⁶⁴ Accordingly, the proceedings are often validated by establishing that the anonymous witness was not 'indispensable for the determination of the truth'.¹⁵⁶⁵ However, in *Delta v. France*, the ECtHR was relatively more severe than the *Cour de Cassation* as the former indicated that the anonymous witness is prohibited unless enough safeguards are taken, not only when such witness alone contributes to the judge's conviction but also when there is not too a decisive contribution.¹⁵⁶⁶ Be that as it may, the *Cour de Cassation* has adopted the same criterion than the ECtHR's when finding that under no circumstances can anonymous witnesses constitute the only evidence to establish the accused's guilt.¹⁵⁶⁷

4.2. The ICTY, the ICTR and the SCSL

4.2.1. Anonymity Prior to Trial

The permissibility of non-disclosure of witnesses' identities to the defendant during pre-trial proceedings as a protective measure has already been discussed and it is herein referred to the analysis previously done.¹⁵⁶⁸ Accordingly, in this subsection, some extra considerations particularly relevant to witness's anonymity are added. During the pre-trial stage, more precisely after confirmation of the indictment, the Prosecutor may request a Judge or a Chamber to order not to disclose the identity of a witness or a victim who may be at risk or in danger.¹⁵⁶⁹ The disclosure exemption is applicable until the victim or witness in danger or risk is brought under the protection of the tribunal (ICTY) or until the Chamber decides otherwise (ICTR, SCSL) as established in

¹⁵⁶³ See Clara Salomon-Corlobé, 'Le témoignage anonyme et le procès équitable' (2011). Available at: <http://m2bde.u-paris10.fr/content/le-t%C3%A9moignage-anonyme-et-le-proc%C3%A8s-%C3%A9quitable-par-clara-salomon-corlob%C3%A9> (last visit on 12 August 2012).

¹⁵⁶⁴ Cass. Crim., 24 October 1989, Bull. Crim. No. 373. Cited by Guerrin (2002) 55.

¹⁵⁶⁵ 'pas indispensable à la manifestation de la vérité'. Cass. crim., 3 February 1993, J.C.P. 1994. I. 22197, note P. Chambon; 6 March 1991, Dr. pénal 1991, comm. 213; 21 January 1991, Bull. crim. no 32, D. 1991, somm. p. 213, obs. J. Pradel; 24 October 1989, Bull. crim. no 373. Cited by Guerrin (2002) 55.

¹⁵⁶⁶ *Delta v. France*, Appl. No. 11444/85, Judgment, 19 December 1990, para. 36.

¹⁵⁶⁷ See Guerrin (2002) 58.

¹⁵⁶⁸ See supra Chapter III 3.2.1.

¹⁵⁶⁹ See, e.g., Tadić (IT-94-1-T), 10 August 1995, para. 15.

rule 69 (A).¹⁵⁷⁰ Additionally, rule 69 (C) lays down that, subject to rule 75 (protective measures), ‘the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence’ (ICTY) or ‘shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence’ (ICTR, SCSL). The standard of ‘until such person is brought under the protection of the tribunal’ has been qualified by some scholars as troublesome due to the fact that ‘the Tribunal is unable to maintain such protection’.¹⁵⁷¹ Rule 69 hence permits the Prosecutor to request temporal exemptions from the general rules on disclosure during pre-trial proceedings.¹⁵⁷²

Importantly for the admissibility of anonymous testimony, the ICTY in *Blaskić* differentiated the period prior to trial from the period after the beginning of trial.¹⁵⁷³ Thus, during preliminary proceedings and continuing for ‘a reasonable time’ before the commencement of the trial, ‘victims and witnesses merit protection, even from the accused’.¹⁵⁷⁴

4.2.2. Anonymity During Trial

4.2.2.1. Presentation

Witness anonymity, i.e., non-disclosure of the witness’ identity to the accused, in trial is not explicitly provided under the legal frameworks of the ICTY, the ICTR and the SCSL. However, the ICTY has so far allowed only once witness anonymity during trial proceedings.¹⁵⁷⁵ In *Tadić*, Trial Chamber II stated conditions to grant anonymity to witnesses:

First and foremost, there must be real fear for the safety of the witness or her or his family [...].

¹⁵⁷⁰ The SCSL rule 69 (A) wording is slightly different from that of the ICTR as reads as follows: ‘until the Judge or Chamber decides otherwise’. As for relevant case law on rule 69 see *supra* Chapter III 3.2.1.

¹⁵⁷¹ Christine Chinkin, ‘The protection of Victims and Witnesses’ in Gabrielle McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. 1 (Kluwer Law International 2000) 451, 461.

¹⁵⁷² In addition, see rule 66 of the ICTY, ICTR and SCSL RPE which deals with the Prosecutor’s disclosure obligations.

¹⁵⁷³ *Blaskić* (IT-95-14-T) Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Trial Chamber I, 5 November 1996.

¹⁵⁷⁴ *Ibid.*, para. 24.

¹⁵⁷⁵ See, e.g., OSCE-ODIHR/ICTY/UNICRI, *International Criminal Law and Practice Training Materials: Witnesses and Victims* (2011a) 24.

Secondly, the testimony of the particular witness must be important to the Prosecutor's case [...].

Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy [...].

Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that [...] has considerable bearing on any decision to grant anonymity [...].

Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied [...].¹⁵⁷⁶

This decision additionally laid down four guidelines:

Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness.¹⁵⁷⁷

Other ICTY Chambers have applied these guidelines in later cases.¹⁵⁷⁸ The Chamber in *Tadić* reserved the right to exclude the evidence brought by anonymous witness later if it eventually turned out that the accused's right to cross examination (article 21 (4) of the ICTY Statute) had been unfairly limited.¹⁵⁷⁹ Even though the Trial Chamber concluded that the knowledge of the witness's identity is not necessarily essential for the principle of due process,¹⁵⁸⁰ it also stated that the accused or his/her counsel should at least be given the opportunity to question the witness on issues not related to his/her identity.¹⁵⁸¹

¹⁵⁷⁶ *Tadić* (IT-94-1), 10 August 1995, paras. 62-66.

¹⁵⁷⁷ *Ibid.*, para. 71.

¹⁵⁷⁸ *Delalić et al.* (IT-96-21-T), Decision on the Motion by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' through 'M', Trial Chamber, 28 April 1997, para. 60; *Blaskić* (IT-95-14-T), Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 5 November 1996, para. 41.

¹⁵⁷⁹ *Tadić* (IT-94-1), 10 August 1995, para. 84.

¹⁵⁸⁰ *Ibid.*, para. 68.

¹⁵⁸¹ *Ibid.*, para. 71.

Factors that strongly influenced the Trial Chamber's decision in *Tadić* were: i) the lack at the ICTY of any kind of police force which could protect witnesses from intimidation or reprisals, unlike a national court working under normal conditions; ii) the Serb-controlled regions of Bosnia and Herzegovina, where the crimes happened, were still lawless and covered with impunity, which made the witnesses not able to rely on local police officers who were actually themselves participants in the Serb ethnic cleansing campaign; and iii) the absence of arrangements to re-locate witnesses, i.e., lack of witness protection programmes.¹⁵⁸² Considering these circumstances, anonymity was considered as the only means available to protect certain witnesses.¹⁵⁸³

Nevertheless, in the strong dissent by Justice Stephen (Australia), granting full witness anonymity was considered as opposed to proceedings conducted with the full respect of the accused's rights as laid down in article 20 (1) of the ICTY Statute.¹⁵⁸⁴ Be that as it may, the ICTY has no longer allowed full anonymous witnesses during trial. Thus, for example, in the later *Blaskić* decision referred to in the previous subsection, the Trial Chamber seemingly adopted some of Judge Stephen's considerations.

4.2.2.2. Legal Discussion

Important arguments may be raised in favor of the *Tadić* decision allowing anonymous witnesses.¹⁵⁸⁵ First, the ICTY did not provide blanket anonymity but the Trial Chamber subjected it to requirements as complemented by specific guidelines and given when it was demonstrably necessary.¹⁵⁸⁶ Second, in practice witness anonymity was not as onerous as originally thought. Only two out of the four persons benefited were called to testify and one of those two agreed to give evidence in public without protection. Concerning the only witness who testified anonymously, the defence counsel could see him and, although the accused

¹⁵⁸² See John R. D. Jones (2002) 1365.

¹⁵⁸³ See Christine Chinkin, 'Due Process and Witness Anonymity' 91 *American Journal of International Law* (1997) 75-79.

¹⁵⁸⁴ *Tadić* (IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses of 10 August 1995.

¹⁵⁸⁵ In favour of the ICTY decision on allowing anonymous witnesses see, e.g., Mercedeh Momeni, 'Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victim and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal of the Former Yugoslavia' (1997) 41 *Howard Law Journal* 155, 178; Chinkin (1997) 78; Brouwer (2005), 252-253.

¹⁵⁸⁶ See Olivia Swaak-Goldman, 'The ICTY and the Right to Fair Trial: A Critic of the Critics' (1997) 10 *Leiden Journal of International Law* 215, 220.

could not, he could still hear the witness's undistorted testimony in the original language. Third, the judges knew the witness's identity, limiting the cross-examination and that was taken into account when assessing the value of that witness's evidence.¹⁵⁸⁷ Fourth, the nature of crimes,¹⁵⁸⁸ the high security risks and on-going hostilities, as remarked by the Chamber, arguably justified the admission of testimony by an anonymous witness. In other words, anonymous witness's testimony could be admissible as an exceptional measure in exceptional circumstances. Fifth, many of the arguments in favor of anonymous witnesses were related to sexual violence victims, group whose protection was emphasized by the UN Secretary-General,¹⁵⁸⁹ which is connected with the efforts to avoid potential re-traumatization.¹⁵⁹⁰

Sixth, as the Trial Chamber considered, article 6 of the ECHR could have only limited relevance since it, like article 14 of the ICCPR, does not specify witness protection as among its primary objectives.¹⁵⁹¹ Indeed, the ECtHR in *Kostovski v. The Netherlands* concluded that the disadvantages that an accused must face when addressing the evidence of an anonymous witnesses can be counterbalanced by safeguards provided by the trial court.¹⁵⁹² Likewise, as already examined, while domestic courts normally emphasize the importance of protecting the accused's right to a fair trial, including knowing the prosecution witnesses' identities, it has been acknowledged that exceptions may be justified by the need to adjust the balance of fairness.

Seventh, paying attention to the standards identified in *Kostovski v. The Netherlands*, the ICTY adopted the four above-mentioned guidelines due to:

[...] the need to provide for guidelines to be followed in order to ensure a fair trial when granting anonymity. It believes that some guidance as to what

¹⁵⁸⁷ Ibid., 221.

¹⁵⁸⁸ Ibid., 218.

¹⁵⁸⁹ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 (1993), para. 108.

¹⁵⁹⁰ Chinkin (1997) 78.

¹⁵⁹¹ The Chamber, concerning case law surrounding article 6 of the ECHR and corresponding article 14 of the ICCPR, noticed that neither convention 'lists the protection of victims and witnesses as one of its primacy concerns. As such, the interpretation given by the other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Rules and Statute of the [ICTY] as these bodies interpret their provisions in the context of their legal framework, which do not contain the same provisions'. Tadić (IT-94-1), 10 August 1995, para. 27.

¹⁵⁹² *Kostovski v. The Netherlands*, Appl. No. 11454/85, Judgment, 20 November 1989, paras. 37-45.

standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law.¹⁵⁹³

Furthermore, the ICTY also added that ‘these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses. The following guidelines achieve that purpose’.¹⁵⁹⁴

However, due to important and legitimate concerns mainly relating to the accused’s right to a fair and impartial trial by allowing an anonymous witness during trial, it is here argued that the best option is not allowing anonymous witnesses during trial proceedings based on the following arguments.¹⁵⁹⁵

First, as identified by Judge Stephen in his dissent in *Tadić*, there is no ICTY legal framework provision that allows for withholding the witness’s identity during trial.¹⁵⁹⁶ Moreover, rule 69 (B), relating to protection of victims and witnesses, requires that the witness’s identity ‘shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence’. Additionally, rule 75 (A) requires that whatever measures are adopted for the protection of victims and witnesses must be ‘consistent with the rights of the accused’. Furthermore, also in agreement with Judge Stephen, whereas the ICTY Statute requires ‘that proceedings are conducted with full respect for the rights of the accused’, the ICTY only refers to ‘with due regard for the protection of victims and witnesses’ and, hence, the only one of the accused’s rights subject to concerns of victims and witnesses is the right to a public trial.¹⁵⁹⁷

Second, minimum guarantees provided to the accused to confront witnesses would be violated by anonymous witnesses, as an extreme protective measure, since the defence would be only able to conduct an effective cross-examination if the witness’s identity is known by him/her.¹⁵⁹⁸

Third, as identified by the ICTY Trial Chamber in *Blaskić*:

¹⁵⁹³ *Tadić* (IT-94-1), 10 August 1995, para. 70.

¹⁵⁹⁴ *Ibid.*, Loc. cit.

¹⁵⁹⁵ Against anonymous witnesses see, e.g., Salvatore Zappalà, ‘The Rights of the Accused’ in Cassese et al. (2002) 1319, 1333; M. Leigh, ‘Witnesses Anonymity is Inconsistent with Due Process’ (1997) 91 *American Journal of International Law* 80, 83; Julian Nicholls, ‘Evidence Hearsay and Anonymous Witnesses’ in Roelof Haveman, Olga Kavran and Julian Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (Intersentia 2003) 239, 286-288.

¹⁵⁹⁶ *Tadić* (IT-94-1), Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses of 10 August 1995.

¹⁵⁹⁷ *Ibid.*

¹⁵⁹⁸ *Ibid.*

[...] from that time forth [the start of the trial] [...] the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.¹⁵⁹⁹

The ICTY in *Blaskić*, by distinguishing between pre-trial and trial rights of the accused relative to those of the witness, lifted the ‘veil of anonymity’ in time for the defense to adequately prepare for cross-examination. The ICTY in *Blaskić* specifically recognized the interconnection of the accused’s right to ‘reasonable time’ for preparation of his/her case and the time when witnesses must disclose their identities to the defense.¹⁶⁰⁰ Thus, even though the Judges in *Blaskić* considered that victims and witnesses deserve protection not only from the media and public but also from the accused prior to trial, they concluded that the accused’s right to a fair trial shall prevail and, hence, the veil of anonymity has to be lifted.¹⁶⁰¹ Moreover, in *Brdanin and Talić*, the ICTY stated that ‘the rights of the accused are made the first consideration and the need to protect victims and witnesses is a secondary one’.¹⁶⁰² This case also raised the parameters for what could be regarded as exceptional circumstances as for witness anonymity, concluding that a general climate of intimidation is an insufficient justification.¹⁶⁰³

Fourth, the ineffectiveness or non-existence of a witness protection programme at the ICTY as a factor given considerable bearing on granting anonymity in *Tadić* was later no longer applicable. The ICTY progressively entered into bilateral framework relocation arrangements with States to facilitate the relocation of witnesses and their families who could not return to the region.¹⁶⁰⁴ Thus, the ICTY refused in *Blaškić* to force the defence to waive sufficient cross-examination preparation to provide protection for a witness via shielding his/her identity after the beginning of the trial.

Fifth, the ICTY itself in *Tadić* paid very close attention to the ECtHR’s jurisprudence, in particular *Kostovski v. The Netherlands*. Thus, the ICTY

¹⁵⁹⁹ *Blaškić* (IT-95-14-T), 5 November 1996, para. 24.

¹⁶⁰⁰ *Blaškić* (IT-95-14-T), Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in Respect of the Protection of Witnesses, Trial Chamber I, 2 October 1996, para. 5.

¹⁶⁰¹ *Blaskić* (IT-95-14-T), 5 November 1996, para. 24.

¹⁶⁰² *Brdanin and Talić* (IT-99-36), Decision on the Motion by the Prosecution for Protective Measures, Trial Chamber, 3 July 2000, para. 20.

¹⁶⁰³ *Ibid.*, paras. 22 *et seq.*

¹⁶⁰⁴ UNICRI-ICTY (2009) 202.

approvingly cited the general rule in *Kostovski v. The Netherlands* according to which ‘In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument’.¹⁶⁰⁵ The ICTY reached this conclusion as a direct result of the following standard laid down in *Kostovski v. The Netherlands*:

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.¹⁶⁰⁶

Sixth, although the majority opinion in *Tadić* considered that ECtHR's decisions regarding the accused's fair trial rights were of little relevance, the ECHR and the ICCPR actually served as basis and were the antecedents of article 21 (2) and (4) of the ICTY as identified by Judge Stephen referring to the UN Secretary-General's Report.¹⁶⁰⁷

Lastly, but equally important, it is significant to notice that witness L, who testified anonymously in *Tadić*, was discovered to have lied under oath during the course of the trial proceedings.¹⁶⁰⁸ This constitutes a good example of the inherent risk of allowing anonymous witnesses at international and hybrid criminal courts.

As previously discussed,¹⁶⁰⁹ although the ICTR and the SCSL adopted the ICTY guidelines when taking far-reaching protective measures, they have not so far granted full anonymity to witnesses.¹⁶¹⁰ Nevertheless, Trial Chamber III of the ICTR in *Bagosora* pointed out the following:

There is nothing within the statute that indicates that an accused right to a fair trial is somehow hampered or compromised in service of witness protection. The concepts of protective measures for witnesses, including delayed disclosure of identity, did not streak like a meteor across the existing statutory and

¹⁶⁰⁵ *Kostovski v. The Netherlands*, Appl. No. 11454/85, Judgment, 20 November 1989, para 41 (cited in *Tadić* (IT-94-1), 10 August 1995, para. 54).

¹⁶⁰⁶ *Ibid.*, para. 42 (cited in *Tadić* (IT-94-1), 10 August 1995, para. 54).

¹⁶⁰⁷ Judge Stephen referred to the Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704 (3 may 1993).

¹⁶⁰⁸ Referred to by Swaak-Goldman (1997) 221.

¹⁶⁰⁹ See *supra* Chapter III 3.2.

¹⁶¹⁰ See, e.g., OSCE-ODIHR/ICTY/UNICRI (2011a) 24.

regulatory landscape of the accused right to a fair trial and effective cross-examination.¹⁶¹¹

Accordingly, whilst not permitting anonymous witnesses, the ICTR and also the SCSL have in several cases authorized that disclosure of the witnesses' identities to be delayed beyond the beginning of the trial, in application of a 'rolling disclosure' system. Under this system, individual witnesses' identities are required to be revealed within sufficient time prior to the witness giving evidence to permit the accused to adequately prepare his/her defence. Therefore, the timing of disclosure is measured back from the date on which the particular witness is expected to testify. For example, while in *Bagosora* the ICTR Chamber allowed the Prosecutor not to disclose the identities of the witnesses until 35 days before the witness was called to give evidence,¹⁶¹² the SCSL ruled in *Gbao* to disclose witness's identity only 42 days prior to that particular witness's testimony.¹⁶¹³ Nevertheless, these measures are here questioned as they jeopardize the defendant's right to a fair trial by significantly reducing the amount of time the defence has to prepare its case.¹⁶¹⁴ It should, however, be mentioned that when the ICTR adopted the decision in *Bagosora*, the ICTR RPE also specified that disclosure must be made prior to trial even though rule 69 (C) was later amended to confirm the basis for such decisions.

4.3. The ICC

4.3.1. Anonymity Prior to Trial

As already discussed,¹⁶¹⁵ whereas protective measures seek first and foremost the non-disclosure of identity of victims and witnesses to the public and media, some measures have also been granted to protect their identity *vis-à-vis* the defence. This section examines this point in further detail.

¹⁶¹¹ *Bagosora et al.* (ICTR-48-91-I), Decision and Scheduling Order on the Prosecution Motion for Harmonization and Modification of Protective Measures for Witnesses, Trial Chamber, 5 December 2001, para. 16.

¹⁶¹² *Ibid.*, para. 2.

¹⁶¹³ *Gbao*, (SCSL-2003-09-PT), Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, Trial Chamber, 10 October 2003, para.58.

¹⁶¹⁴ See, corroborating, *Bagosora et al.* (ICTR-98-41-I), Separate Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001; Joanna Pozen, 'The Non-Disclosure of Witnesses' Identities in ICTR Trials' (2006) 38 *New York University Journal of International Law and Politics* 281, 298.

¹⁶¹⁵ See *supra* Chapter III 3.3.

Article 68 (5) of the ICC Statute establishes that:

Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

In turn, rule 81 (4), which details article 68 (5), states that:

The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, *including by authorizing the non-disclosure of their identity prior to the commencement of the trial* [emphasis added].¹⁶¹⁶

Accordingly, as previously examined, non-disclosure of the identity of a witness is limited to pre-trial proceedings since his/her identifying information has to be disclosed to the defence prior to trial. Keeping the identity of the victim or witness undisclosed to the defence during the pre-trial stage can be grounded on the general consideration that, at this stage, it is neither necessary nor wise for the Prosecutor to supply all evidence collected by him/her, which would not undermine the accused's rights.¹⁶¹⁷ Otherwise, the Prosecutor's duty to guarantee confidentiality and protection of victims and witnesses would be conflicted.¹⁶¹⁸ Hence, the Prosecutor has to be able to submit necessary evidence in a manner to preserve confidentiality, and, if possible, the anonymity of witnesses during the pre-trial stage.¹⁶¹⁹ Nevertheless, the Prosecutor's obligation to disclose exculpatory information, as provided for in article 67 (2) of the ICC Statute, shall be borne in mind on this regard. The same article states that in 'case of doubt as to the application of this paragraph, the Court shall decide' as determined in the ICC's case law already examined.¹⁶²⁰ In application of article 68 (5) together with

¹⁶¹⁶ See also Acquaviva and Heikkilä (2013) 842-843.

¹⁶¹⁷ See Donat-Cattin (2008a) 1293.

¹⁶¹⁸ See ICC Statute, article 54 (1) (b), (c) and 3 (f).

¹⁶¹⁹ See Women's Caucus for Gender Justice in the ICC, Proposal for Rome Diplomatic Conference. Cited in Donat-Cattin (2008a) 1293.

¹⁶²⁰ See *supra* Chapter III 3.3.1.

article 61 (5) of the ICC Statute and rule 81 (4), Pre-Trial Chamber I (Single Judge) in *Lubanga* allowed the:

Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation of charges hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators' notes and reports of their interviews.¹⁶²¹

Therefore, the Court can order the non-disclosure of witnesses' identities *vis-à-vis* the defence for the purposes of the confirmation of charges hearing to protect the safety of Prosecution witnesses.¹⁶²² Thus, the non-disclosure of the identity of witnesses on whom the Prosecutor intends to rely during the confirmation of charges hearing or portions of their prior statements constitutes an exception to the rule whereby the identity of them and their prior statements need to be disclosed.¹⁶²³ The Pre-Trial Chamber has determined that even if prejudice were to result from the authorized redactions, it would not be inconsistent with a fair and impartial trial due to the fact that the redactions are only for the proceedings leading up to the confirmation charges hearing, which is an early stage of the case proceedings.¹⁶²⁴ The Appeals Chamber has established, in the course of pre-trial proceedings, that three of the most important considerations when a Chamber has to decide whether to authorize non-disclosure of the identities of witnesses are: i) the danger to the witness or his/her family that disclosure may entail; ii) the necessity for the protective measures; and iii) an assessment of whether the measures will be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.¹⁶²⁵ It was further pointed out that there should be an examination as to whether less restrictive protective measures are sufficient and feasible in those

¹⁶²¹ *Lubanga* (ICC-01/04-01/06-437), First Decision on Rule 81, Pre-Trial Chamber I (Single Judge), 15 September 2006, p. 9.

¹⁶²² *Ibid.*, p. 7. See also *Lubanga* (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, Pre-Trial Chamber I, 22 September 2006.

¹⁶²³ *Lubanga* (ICC-01/04-01/06-568), Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, Appeals Chamber, 13 October 2006, paras. 1, 34, 35.

¹⁶²⁴ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-160), Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, Pre-Trial Chamber I (Single Judge), 23 January 2008, para. 31.

¹⁶²⁵ *Lubanga* (ICC-01/04-01/06-773), 14 December 2006, paras. 21-23.

circumstances.¹⁶²⁶ Pre-Trial Chambers have followed the same criteria concerning non-disclosure of the identity of witnesses, i.e., i) it should only be granted after exhausting the possibility of employing less extreme measures (principle of necessity); ii) it must be strictly limited to exigencies of the situation (principle of proportionality); and iii) it must not infringe the right of the defendant to a fair and impartial trial.¹⁶²⁷

Be that as it may, the procedural status of anonymous victims and witnesses has been more limited than that of their non-anonymous counterparts. Thus, as determined by Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo Chui* whilst non-anonymous victim participants are, *inter alia*, granted access to the confidential part of the record of the case and the possibility to attend closed session hearings, anonymous victim participants lack it.¹⁶²⁸ It should be mentioned, however, that Pre-Trial Chamber III (Single Judge) in *Bemba* did not make that difference although it did not grant all victims in general access to *ex parte* or confidential decisions and documents.¹⁶²⁹ Even though the modalities of victims' participation are discussed in detail in the next chapter, it is herein argued that limiting the scope of participation of anonymous victim participants in contrast to non-anonymous ones constitutes an important measure to provide victims an exceptional protective measure but at the same time reducing the risks of compromising the accused's rights. In any case, under one or another approach anonymous victim participants can only access public documents. As for testimonies by anonymous witnesses, during pre-trial, the Appeals Chamber determined that consideration may be given to the fact that

¹⁶²⁶ *Ibid.*, para. 33.

¹⁶²⁷ Lubanga (ICC-01/04-01/06-108), Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, Pre-Trial Chamber I (Single Judge), 19 May 2006; Lubanga (ICC-01/04-01/06-102), Decision on the Final Disclosure and the Establishment of a Timetable, Pre-Trial Chamber I, 15 May 2006. See also Muthaura et al. (ICC-01/09-02/11-106), Decision Ordering the Victims and Witnesses Unit to Submit Observations, Pre-Trial Chamber II, 6 June 2011, para. 5; Katanga and Ngudjolo Chui (ICC-01/04-01/07-475), Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', Appeals Chamber, 13 May 2008, para. 71 (stating that there must be 'an objectively justifiable risk to the safety of a witness and/or a family member').

See also Bernhard Kuschnik, 'International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC' (2009) 9 *International Criminal Law Review* 157, 164; Acquaviva and Heikkilä (2013) 843.

¹⁶²⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, pp. 12-13.

¹⁶²⁹ Bemba (ICC-01/05-01/08-320), Fourth Decision on Victims' Participation, Pre-Trial Chamber III (Single Judge), 12 December 2008, para. 99.

the defence's alibi to challenge the evidence is affected because the defence does not know the identities of the witnesses and will only receive summaries, not the full statement or other information which could authenticate them.¹⁶³⁰ In turn, Pre-Trial Chamber I in *Katanga and Ngudjolo Chui* stated that the probative value of evidence of anonymous witnesses contained in summaries could be affected if not corroborated.¹⁶³¹ It added that even though corroboration of summary evidence of anonymous witnesses is not a requirement for its admissibility, lack thereof could affect the probative value of such summary evidence.¹⁶³²

In *Katanga and Ngudjolo Chui*, the Appeals Chamber has held that 'persons other than witnesses, victims and members of their families, may, at this stage of the proceedings [pre-trial proceedings], be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules'.¹⁶³³ However, the Appeals Chamber emphasized that this measure for persons at risk must be adopted after 'a careful assessment [...] on a case by case basis, with specific regard to the rights of the [accused]'.¹⁶³⁴

4.3.2. Anonymity During Trial

4.3.2.1. General Aspects

Neither the ICC Statute nor the ICC RPE explicitly provides the figure of anonymous witnesses. Indeed, during the Preparatory Commission negotiations on the ICC RPE, the most difficult question was relating to anonymous witnesses.¹⁶³⁵ Italy argued for the appointment of a guardian to the witness's identity exceptionally.¹⁶³⁶ However, the use of anonymous witnesses at trial was opposed by a large number of delegations, especially common law countries, due to concerns about the accused's right to a fair trial and considering that whereas non-disclosure of witness's identity to the public or media may be necessary in certain circumstances, non-disclosure of witness's identity to the defence was a very different category.¹⁶³⁷ Even though the Netherlands and Italy came up with

¹⁶³⁰ Lubanga (ICC-01/04-01/06-773), 14 December 2006, para. 51.

¹⁶³¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-717), 30 September 2008, paras. 156-160.

¹⁶³² *Ibid.*, para. 160.

¹⁶³³ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-475), 13 May 2008, para. 56.

¹⁶³⁴ *Ibid.*, para. 2.

¹⁶³⁵ Brady (2001a) 450.

¹⁶³⁶ Proposal submitted by Italy, PCNICC/1999/WGRPE/DP.20 (28 July 1999).

¹⁶³⁷ See Brady (2001a) 451.

modified proposals,¹⁶³⁸ there was no consensus and, indeed, the delegations agreed not to agree. Instead, the ‘invaluable tool of “constructive ambiguity” came to rescue’.¹⁶³⁹

Although there is no explicit mention of the possibility of granting anonymity, rule 88 (1) refers to the possibility for the Chamber to ‘order special measures, *such as, but not limited to*, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2 [emphasis added]’. In turn, article 68 (1) refers to the adoption of ‘appropriate measures’. Rules 87 (3) and 88 (1), as already examined, include non-exhaustive lists of protective measures. Accordingly, the ICC legal framework in principle does not preclude the admission of anonymous witnesses’ testimonies.

4.3.2.2. Anonymity of Victim Participants and of Victim Witnesses

Concerning the ICC practice, it is necessary to first conduct a separate analysis of anonymous victim participants and, then, to proceed with the discussion of anonymous victim witnesses since the victim participant status and the victim witness status are different in nature although the same victims can hold a dual status victim participant-victim witness.

As for victim participants, the Trial Chamber I in *Lubanga* did not rule out the possibility of victims as anonymous participants:

130. Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceeding leading up to and during the trial. However, the Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.

131. However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly

¹⁶³⁸ In order to reflect the principle of equality of arms, the Netherlands proposed adding to the Italian proposed rule that the defence should also be able to ask the ICC to withhold the defence witness’s identity from the Prosecutor at trial and use the procedure of the guardian of the witness’s identity. See PCNICC/1999/WGRPE/DP.35 (5 August 1999). In turn, Italy introduced a modified proposal whereby a Chamber could order witness anonymity in exceptional circumstances, when it considers that the witness was subjectively reliable and genuine, and the Chamber could appoint an independent guardian to assist it in this task.

¹⁶³⁹ Brady (2001a) 453.

in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.¹⁶⁴⁰

These findings, which have been followed by other Trial Chambers in *Katanga and Ngudjolo Chui* and *Bemba*,¹⁶⁴¹ are connected with the argument of the Office of Public Counsel for Victims (OPCV) in *Lubanga* whereby rules 81 and 87 were regarded as a valid ground for granting anonymity.¹⁶⁴² The Counsel referred to ECtHR's jurisprudence by sustaining that anonymous witnesses are permissible, subject to certain conditions, in particular, to strike a balance between the accused's rights and the protection of victims and witness.¹⁶⁴³ However, it was also acknowledged, as the ECtHR's did in *Doorson*, that a guilty verdict may not be founded solely on the evidence of anonymous witnesses.¹⁶⁴⁴ The Trial Chamber in *Lubanga* noted and endorsed the ECtHR's standard in,

¹⁶⁴⁰ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 130-131. See also *Lubanga* (ICC-01/04-01/06-2340), Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest - and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, Trial Chamber I, 11 March 2010, paras. 36-37.

¹⁶⁴¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, paras. 92 and 93; *Bemba* (ICC-01/05-01/08-2027), Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of the Victims, Trial Chamber III, 21 December 2011, para. 19. See also Lorraine Smith-van Lin, 'Victims' Participation at the International Criminal Court: Benefit or Burden?' in William Schabas et al. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 181, 192.

¹⁶⁴² See *Lubanga* (ICC-01/04-01/06-1020), Observations du Bureau du Conseil Public suite à l'invitation de la Chambre de Première Instance, 9 November 2007.

¹⁶⁴³ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para. 78.

¹⁶⁴⁴ *Ibid.*, Loc. cit.

inter alia, *Doorson* according to which ‘a conviction should not be based either solely or to a decisive extent on anonymous statements’.¹⁶⁴⁵

In general, when ordering redactions, as a manner to expunging identifying information of a victim or a witness that could potentially put an individual at risk,¹⁶⁴⁶ the ICC must consider its obligation to protect victims and witnesses and also fair trials.¹⁶⁴⁷ Thus, in *Lubanga*, the Trial Chamber ordered the VRPS to lift redactions in victims’ applications relating to exculpatory information or information material to the preparation to the defence.¹⁶⁴⁸ In reaching this decision, the Chamber balanced security concerns with the defence’s right to receive information, under article 67 (2) and rule 77, and determined that ‘the mere assertion that someone is in danger’ does not necessarily correspond to reality.¹⁶⁴⁹ This conclusion is a clear example of the need for a continuous revision of authorized redactions so that the accused’s rights are guaranteed.¹⁶⁵⁰

Based on the above-discussed ICC decisions, the ICC practice has so far in certain circumstances considered that anonymity may be given to victims participants in the proceedings leading up to and during the trial itself. Concerning the trial proceedings, as acknowledged by Trial Chamber I in its judgment in *Lubanga*:

Many of the victims in the case were granted protective measures and, in particular, anonymity because of their vulnerable position living in areas of

¹⁶⁴⁵ *Doorson v the Netherlands*, Appl. No. 20524/92, Judgment (Merits), 20 February 1996, para. 76. (Appropriately referred to by the ICC Trial Chamber I. See *Lubanga* (ICC-01/04-01/06), 18 January 2008, para. 131, fn. 114).

¹⁶⁴⁶ Frequently, in applications to become victim participants, it is authorised redactions, including the place and time where and when the person was victimized, and also the: i) applicant’s name; ii) parents’ name; iii) place of birth; iv) exact date of birth although year of birth shall not be redacted; v) tribe or ethnic group; vi) occupation; vii) current address; viii) phone number and email address; ix) name of other victims of, or of witnesses to, the same incident; x) identifying features of the injury, loss or harm allegedly suffered; and xi) name and contact details of the intermediary assisting the victim in filing the application to participate. See, e.g., *Bemba* (ICC-01/05-01/08-699), Decision Defining the Status of 54 Victims who Participated at the Pre-Trial Stage, and Inviting the Parties’ Observations on Applications for Participation by 86 Applicants, Trial Chamber III, 22 February 2010, paras. 27 and 33.

¹⁶⁴⁷ See ICC Statute article 57 (3) (c); ICC RPE, rules 86 and 89 (1).

¹⁶⁴⁸ See *Lubanga* (ICC-01/04-01/06-2586-Red), Redacted Decision on the Disclosure of Information from Victims’ Applications Forms (a/0225/06, a/0229/06 and a/0270/07), Trial Chamber I, 23 November 2010.

¹⁶⁴⁹ *Ibid.*, para. 6. See also McGonigle Leyh (2011) 255.

¹⁶⁵⁰ See *Lubanga* (ICC-01/04-01/06-2586-Red), 23 November 2010, para. 4.

ongoing conflict. Consequently, of 129 victims, the identities of only 23 have been disclosed to the parties and participants in the proceedings.¹⁶⁵¹

Although the Trial Chamber provided them with anonymity as a protective measure, it limited their participation rights.¹⁶⁵² This is arguably a sound solution for two reasons.¹⁶⁵³ First, had victims been forced to choose between their personal security and their participatory rights, the aim and purpose of article 68 (3) of the ICC Statute, i.e., victim participants' right to present their views and concerns, would have been affected. Second, the defence has a right not to be confronted with anonymous individuals, especially if those are numerous. On the contrary, a defence's effective right requires the disclosure of victim participants' identities when they wish to bring evidence. Accordingly, the Chamber's approach gets a good balance between the accused's rights and victim participants' interests.¹⁶⁵⁴

Therefore, victims have been allowed to preserve anonymity unless they seek to participate in such a manner that would make anonymity incompatible with the accused's rights.¹⁶⁵⁵ It has not been allowed anonymous victim participants when victim participants were engaged in adding evidence against the accused as this would violate the principle against anonymous accusations or when they sought to question witnesses.¹⁶⁵⁶ Trial Chamber III in *Bemba*, by following the same approach, concluded that for those victim participants who want to directly present their views and concerns before the Chamber, i.e., to have a more active participation, it was necessary to 'relinquish their anonymity *vis-à-vis* the parties'.¹⁶⁵⁷ Nevertheless, the Chamber appropriately added that:

[...] the identity of victims need not be disclosed to the parties unless and until the Chamber grants them permission to testify and/or present their views and

¹⁶⁵¹ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 18.

¹⁶⁵² *Ibid.*, paras. 14 xi), 18.

¹⁶⁵³ See Kai Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues' (2012) 12 *International Criminal Law Review* 115, 121.

¹⁶⁵⁴ See also *Ibid.*, *Loc. cit.*

¹⁶⁵⁵ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1788-tENG), 22 January 2010, paras. 92 and 93; Bemba (ICC-01/05-01/08-2027), 21 December 2011, para. 19.

¹⁶⁵⁶ See, e.g., Katanga and Ngudjolo Chui (ICC-01/04-01/07-1788-tENG), 22 January 2010, paras. 92 and 93.

¹⁶⁵⁷ Bemba (ICC-01/05-01/08-2027), Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of the Victims, Trial Chamber III, 21 December 2011, para. 19

concerns. This approach reflects the security concerns expressed by victims and the fact that certain victims appear to have consented to their identities being disclosed only if the Chamber grants them permission to appear.¹⁶⁵⁸

In turn, the Appeals Chamber in *Ngudjolo Chui*, corresponding to victim participants' participation during the appeals stage, has concluded that anonymity does not violate the right to a fair trial; however, 'should the anonymous victims wish to participate as individuals at a hearing or to make individual observations they would have to disclose their identities to the parties'.¹⁶⁵⁹

Thus, even though anonymity of a victim participant is admissible at the ICC, it impacts on the respective individual status. Accordingly, the modalities of participation granted to non-anonymous victim participants may be wider than those granted to anonymous victim participants as evidenced in ICC case law discussed later.¹⁶⁶⁰ Indeed, as previously exemplified, as an anonymous participant or witness, the victim's status is more limited than that of a non-anonymous individual even during the pre-trial proceedings. Hence, it is herein argued that these differentiations constitute pragmatic manners to implement a necessary balance between the participation of anonymous victims *vis-à-vis* minimum rights of the accused and due process guarantees, especially during the trial phase of a case. Also, as Trial Chambers indicated in *Lubanga* and *Bemba*, although anonymous victims should not be precluded from participation, the Registry should remind them of the availability of protective measures rather than complete anonymity.¹⁶⁶¹ This suggestion is arguably *mutatis mutandi* applicable to victims seeking to provide testimony as anonymous witnesses. Furthermore, as indicated by the Trial Chamber in *Lubanga*, victims are often able to give direct evidence on the alleged offences and, as a result, a general ban on their participation in the proceedings if they may be called as witnesses would

¹⁶⁵⁸ *Ibid.*, *Loc. cit.* See also *Bemba* (ICC-01/05-01/08-2220), Decision on the Presentation of Views and Concerns by Victims a/0542/08, a/0394/08 and a/0511/08, Trial Chamber III, 24 May 2012, para. 12.

¹⁶⁵⁹ *Ngudjolo Chui* (ICC-01/04-02/12-140), Decision on the Participation of Anonymous Victims in the Appeal and on the Maintenance of Deceased Victims on the List of Participating Victims, Appeals Chamber, 23 September 2013, para. 19.

¹⁶⁶⁰ See *infra* Chapter IV 3.3.3 and 4.3.1.

¹⁶⁶¹ *Lubanga* (ICC-01/04-01/06-1556-Con-Anxl), Corrigendum to 'Decision on the Applications by Victims to Participate in the Proceedings', Trial Chamber I, 13 January 2009, paras. 126-133; *Bemba* (ICC-01/05-01/08-807), Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 30 June 2010, para. 70.

be contrary to the aim and purpose of article 68 (3) and the Chamber's obligation to establish the truth.¹⁶⁶² Nevertheless, the Trial Chamber also noticed that:

[...] when [...] [considering] an application by victims who have this dual status, [the chamber] will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.¹⁶⁶³

One possible safeguard, concerning victims as anonymous participants, can consist in an innovative suggestion brought up by the legal representative of a victim whereby the identity of a 'key' person for each group of victims wishing to participate may be revealed.¹⁶⁶⁴ Bearing in mind the large groups of victims participating and that victims of the same group normally come from the same area and suffered the same crimes, that proposal may be sound. It would also allow the VWU to maximize its resources and enhance the effectiveness of the proceedings by focusing on one individual who accepted to disclose his/her identity on behalf of the other victims of the group.¹⁶⁶⁵

With regard to anonymous victim witnesses, Trial Chamber I in the ICC's first judgment in *Lubanga* noticed that:

Measures to protect the identity of many of the witnesses in this case were ordered by the Chamber due to concerns for their personal safety or that of their families. For similar reasons, many witnesses are referred to in this Judgment by number rather than by name and certain details that might reveal their identities have been omitted. *It is to be emphasised that whenever the Chamber ordered protective measures for witnesses, the parties and participants were aware of the relevant identifying information* [emphasis added].¹⁶⁶⁶

¹⁶⁶² Lubanga (ICC-01/04-01/06), 18 January 2008, para. 133.

¹⁶⁶³ Ibid., para. 134.

¹⁶⁶⁴ See Lubanga (ICC-01/04-01/06-T-57), Transcripts, Trial Chamber I, 29 October 2007, pp. 31-32. The VWU also formulated a similar proposal. See Lubanga (ICC-01/04-01/06-1078), Lubanga Registry Report, Registry, 12 December 2007, para. 25.

¹⁶⁶⁵ See also Anne-Marie de Brouwer and Marc Groenhuijsen, 'The Role of Victims in International Criminal Proceedings' in Sluiter and Vasiliev (2009) 149, 181.

¹⁶⁶⁶ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 115.

Accordingly, even though the identity of an important number of witnesses in the Lubanga's trial was not disclosed to the public and media, the general rule was that the defence knew of witnesses' relevant identifying information. The same approach was followed by Trial Chamber II as explicitly stated in the ICC's second judgment in *Ngudjolo*.¹⁶⁶⁷

Trial Chamber I in *Lubanga* authorized:

[...] three victims to give evidence as witnesses during the trial and evidence was presented on behalf of a school. These three witnesses, who testified in January 2010, were granted incourt protective measures that included voice and face distortion and pseudonyms.¹⁶⁶⁸

ICC Trial Chambers have established as one of the requirements for the presentation of evidence by victims that 'Under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence',¹⁶⁶⁹ and that 'Victims are not allowed to testify anonymously'.¹⁶⁷⁰ In *Bemba*, the Trial Chamber established that 'the identity of victims need not be disclosed to the parties unless and until the Chamber grants them permission to testify'.¹⁶⁷¹

As mentioned in the previous sub-section, the considerations for non-disclosure of the identity of certain witnesses to the defence originally established in the course of pre-trial proceedings were found by Trial Chamber I as 'equally applicable to the trial stage of the case'.¹⁶⁷² In arriving to this conclusion, the Chamber has held that its responsibility under article 64 (6) (e) to 'provide for the protection of the accused, witnesses and victims' includes protection for all those at risk, in the context of trial, on account of the ICC's activities.¹⁶⁷³ If the

¹⁶⁶⁷ Trial Chamber II emphasised that 'whenever the Chamber ordered protective measures for witnesses, the parties and participants were always aware of the relevant particulars'. *Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), 18 December 2012, para. 63.

¹⁶⁶⁸ *Ibid.*, para. 21. (Referring to the Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2002-Conf paras 39-40; public redacted version filed on 9 July 2009, ICC-01/04-01/06-2032-Anx.)

¹⁶⁶⁹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 22.

¹⁶⁷⁰ *Bemba* (ICC-01/05-01/08-2138), 22 February 2012, para. 23.

¹⁶⁷¹ *Bemba* (ICC-01/05-01/08-2027), 21 December 2011, para. 19.

¹⁶⁷² *Lubanga* (ICC-01/04-01/06-2206-Red), Decision on the Prosecutor's Applications to Vary Protective Measures under Regulation 42 of 14 July and 17 August 2009, Public Redacted Version, Trial Chamber I, 22 February 2010, para. 15.

¹⁶⁷³ *Lubanga* (ICC-01/04-01/06-1924-Anx2), Decision on 'Prosecution Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information' of 5 December 2008, Public Redacted Version, Trial Chamber, 9 April 2009, para. 2.

individual's identity is relevant to the case, the witness's unwillingness to have his/her identity revealed 'cannot alone justify non-disclosure'.¹⁶⁷⁴ It was thus ordered the disclosure of the identities of two witnesses to the defence but not to the public during trial as 'although the witness suggests that disclosure would jeopardize his security and that of his family, the prosecution has not provided any reasons in support of his contention'.¹⁶⁷⁵

Pursuant to article 64 (6) (e) of the Statute and rule 81 (4), Trial Chamber I has considered redactions to the witnesses' whereabouts within the ICC Protection Program to be necessary and fair as 'disclosure would put the witness, and possibly others, at risk, on account of the activities of the Court; the information is irrelevant to known issues in the case; and the redactions do not render the material unusable or unintelligible'.¹⁶⁷⁶

Similar to the situation at the ICTY, important arguments can be brought concerning the exceptional admissibility of anonymous witnesses during trial in certain circumstances and taking appropriate safeguards for the rights of the accused. Four arguments are raised as follows.¹⁶⁷⁷ First, as already analyzed, there is no explicit prohibition of anonymous witnesses in the ICC legal framework, which indeed provides the ICC with the necessary leeway on this issue. Second, for disclosure-purposes, the witness testimony cannot be considered as a mere piece of 'information' in the sense of article 68 (5). Additionally, this article only regulates the Prosecutor's pre-trial powers. Therefore, it has been sustained that it does not restrict the judges' power who can decide to withhold information provided to them by the Prosecutor from the accused.¹⁶⁷⁸ Third, in addition to examined domestic systems as complemented by international developments,¹⁶⁷⁹ national criminal codes provide support for total anonymity, being that in certain jurisdictions anonymous testimony is allowed in court whereas in others it is only permissible as hearsay evidence and

¹⁶⁷⁴ Lubanga (ICC-01/04-01/06-2209-Red), Public Redacted Decision on Variation of Protective Measures under Regulation 42 on Referral from Trial Chamber II on 22 July 2009, Trial Chamber I, 16 March 2010, para. 36.

¹⁶⁷⁵ *Ibid.*, Loc. cit.

¹⁶⁷⁶ Lubanga (ICC-01/04-01/06-2465-RED), Public Redacted Decision on the 'Prosecution's Request for Non-Disclosure of Information in Transcripts of Re-Interviews with Prosecution Witnesses, Trial Chamber I, 7 June 2010, para. 16.

¹⁶⁷⁷ In favour of the exceptional use of anonymous witnesses, see Anne-Marie de Brouwer and Marc Groenhuijsen, 'The Role of Victims in International Criminal Proceedings' in Sluiter and Vasiliev (2009) 149, 180; Krebs (2001) 378-379.

¹⁶⁷⁸ Krebs (2001) 378-379. See also Brady (2001a) 453 (not denying the possibility to use anonymous witness).

¹⁶⁷⁹ See *infra* Chapter III 4.1.

in some others under both options.¹⁶⁸⁰ Actually, admissibility of evidence originating from anonymous hearsay has not been completely ruled out in the ICC's case law.¹⁶⁸¹ Furthermore, due to the nature of the crimes under the ICC's jurisdiction and the limitations faced by the ICC to guarantee witness security as opposed to national systems, it would be at least *de lege ferenda* advisable and with stronger reason than in national systems not to rule out completely the exceptional admissibility of anonymous witnesses at the ICC. Fourth, in some cases a fair and impartial trial cannot be possible and, therefore, justice is denied since crucial witnesses would be unable to testify unless the ICC has the discretion to order anonymity for witness but of course adopting the necessary safeguards for the accused's rights.¹⁶⁸²

Nevertheless, like it was done at the ICTY, it is herein argued that the best approach is not to admit anonymous witnesses during trial at the ICC based on the following reasons.¹⁶⁸³ First, although the ICC Statute lacks any reference to witness anonymity, article 68 (5) of the ICC Statute indeed explicitly lays down that disclosure of evidence or information leading to witness/his family's grave endangerment authorizes the Prosecutor to 'withhold such evidence or information prior to the commencement of the trial'. The ICC RPE also supports the restriction on anonymous witnesses during trial as rule 81 (4) establishes that as protective measure in favor of the witnesses (and also victims) the Chamber can authorize 'the non-disclosure of their identity prior to the commencement of

¹⁶⁸⁰ See, e.g., the Protection of Witness Act 1993 (The Netherlands); Code of Criminal Procedure (The Netherlands) article 226 (a)-(f); the Evidence (Witness Anonymity) Amendment Act 1997 (New Zealand); Code of Criminal Code 1997 (Poland), article 184 (1) and (4); Code of Criminal Procedure 1987 (Germany), and article 68 (3). Cited by Brouwer and Groenhuijsen (2009) 180 (fn. 107).

¹⁶⁸¹ Trial Chamber II stated that: '[it] took a cautious approach in assessing evidence originating from anonymous hearsay. It did not rule out such evidence *ab initio*, instead assessing its probative value on the basis of the context and conditions in which such evidence was obtained, and with due consideration of the impossibility of cross-examining the information source'. Ngudjolo Chui (ICC-01/04-02/12-3-tENG), Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 56.

¹⁶⁸² See Women's Caucus for Gender Justice, Recommendations and Commentary for the Rules of Procedure and Evidence, Part I, Siracusa Paper and Paris Recommendations on Participation and Protection Submitted to the Second Session of the Preparatory Commission for the ICC, 26 July – 13 August 1999, 28-30.

¹⁶⁸³ Against anonymous witnesses at trial before the ICC, see, e.g., Michael Kurth, 'Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits' in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 615, 630-631; Zappalà (2010) 150-151; Nicholls (2003) 298-299.

the trial'.¹⁶⁸⁴ Rule 81 (5) explicitly requires that all material that is withheld during pre-trial in order to protect victims and witnesses 'may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused'. Additionally, rule 76 requires the Prosecutor to 'provide the defence with the names of witnesses whom the prosecutor intends to call to testify and copies of any prior statements made by those witnesses' in time for the defence to prepare for trial. An important number of commentators have actually referred to one or more of these sets of provisions to conclude the inadmissibility of anonymous witnesses during trial at the ICC under the ICC legal instruments.¹⁶⁸⁵ Furthermore, even though there is not as such an explicit provision prohibiting anonymous witnesses, as previously examined, an important number of delegations strongly opposed proposals allowing anonymous witnesses during trial when negotiating and drafting the ICC RPE.

Second, the ICC has far-reaching obligations to protect victims and witnesses, which include less restrictive measures than full anonymity for witnesses during trial. Indeed, the ICC has a mandate to set a long-term and complex protection program including allocation of new identities, re-locations, etc., under the ICC VWU's mandate,¹⁶⁸⁶ in order to prevent any risk of reprisal. Therefore, these options are not only less restrictive than full anonymity but also preserve the right of the accused to due process, which is a minimum or core human right. Furthermore, as presented,¹⁶⁸⁷ an important argument claimed by the ICTY to grant full anonymity was the lack of funding for a sophisticated witness protection program which is not, at least to an important extent, applicable to the ICC.

Third, the special measures listed as examples under rule 88 are not similar to orders for anonymous witnesses. Moreover, rule 88 has to be read together with the other previously detailed provisions in the ICC Statute and

¹⁶⁸⁴ See also Human Rights Watch, *Commentary to the Preparatory Commission on the ICC, Elements of Crimes and Rules of Procedure and Evidence* (July 1999) 44.

¹⁶⁸⁵ See e.g., Cryer, Friman, Robinson and Wilmshurst (2010) 483; Kurth (2009) 630; Nicholls (2003) 298, 299; John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 377, footnote 47; David Donat-Cattin (2008a) 1293 ('During the Pre-Trial [...] it is neither necessary nor wise that the Prosecutor be required to supply all the evidence she/he has collected').

¹⁶⁸⁶ See ICC Statute, article 43 (6); ICC RPE, rules 16-19.

¹⁶⁸⁷ See *supra* Chapter III 4.2.2.1.

RPE. Out of this combined reading, the better interpretation is that an anonymous witness order can only exist prior to the commencement of trial.¹⁶⁸⁸

Fourth, although the ICC has allowed anonymity of victim participants to a notable extent, one thing is victims' participation as anonymous victim participants and another quite different thing is their intervention as anonymous victim witnesses.¹⁶⁸⁹ The difference between victim participants and victim witnesses as for expressing their views and concerns in one case and giving evidence in the other has been identified by Trial Chambers as previously cited.¹⁶⁹⁰ Even though the victim participants could at least sometimes be considered as 'accusers',¹⁶⁹¹ a victim who can be dual status victim participant and victim witness when takes the stand as a witness has at least formally a different role. On the one hand, victim participants: i) participate voluntarily, ii) communicate the ICC their own interests and concerns; and iii) can say what they want to say.¹⁶⁹² On the other hand, victim witnesses: i) are called by the defence, the Prosecution, other victims participating in the proceedings or the Chamber; ii) serve the interests of the ICC and the party that calls them; and iii) give evidence in testifying and answering related questions.¹⁶⁹³ In any case, if the victim does not meet the threshold necessary to provide evidence as witness, which as determined by ICC Trial Chambers includes respect of the accused's rights to a fair and impartial trial and not anonymous testimony,¹⁶⁹⁴ the victim can still present their views and concerns as victim participants.¹⁶⁹⁵

Sixth, the potential risks if victim participants are allowed to give evidence as anonymous witnesses are exemplified in *Lubanga*. Thus, for example, three victim participants authorized to give their testimonies directly before Trial Chamber I during the trial lost their right to participate as victim participants and their testimonies were dismissed due to internal inconsistencies and especially because of the real possibility of two of those victims having stolen identities at the request of the third witness.¹⁶⁹⁶

¹⁶⁸⁸ See Brady (2001a) 453.

¹⁶⁸⁹ Cryer, Friman, Robinson and Wilmshurst (2010) 484.

¹⁶⁹⁰ See supra Chapter III 2.3.1.1.

¹⁶⁹¹ Cryer, Friman, Robinson and Wilmshurst (2010) 484.

¹⁶⁹² See Thomas Funk, *Victims' Rights and Advocacy* (Oxford University Press 2010) 103.

¹⁶⁹³ See *Ibid.*, Loc. cit.

¹⁶⁹⁴ See Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 22; Bemba (ICC-01/05-01/08-2138), 22 February 2012, para. 23.

¹⁶⁹⁵ See Bemba (ICC-01/05-01/08-2138), 22 February 2012, paras. 20 and 23. See also Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 22.

¹⁶⁹⁶ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 499, 500 and 501. See also supra Chapter III 2.3.2.2.

Seventh, as for the national systems examined, some of their legislative and jurisprudential practices allowing anonymous witnesses have not lived up to the ECHR and ECtHR's standards in relation to the right of the accused to a fair and impartial trial.

Withholding the identity of the witness from the accused but not from his/her counsel may be considered as a half-way solution; however, this does not work when the accused represents himself, and this measure would violate the Code of Professional Conduct for Counsels before the ICC, which requires the defence counsel to put his/her client's interests before other interests.¹⁶⁹⁷

4.4. The ECCC and the STL

4.4.1. Anonymity Prior to Trial

4.4.1.1. The ECCC

With regard to the ECCC, there is no explicit provision about the admissibility of anonymous witnesses during pre-trial or trial phase, which is related to the use of the dossier or case file. However, as previously referred to,¹⁶⁹⁸ concerning the right against self-incrimination of witnesses, the Co-Investigating Judges or the Chambers may 'Order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanctions under Rules 35 to 38'.¹⁶⁹⁹

In addition, it is also allowed for the Co-Investigating Judges or the Chamber to 'Use protective measures, as foreseen in Rule 29 to ensure that the identity of the witness and the content of the evidence given are not disclosed'.¹⁷⁰⁰ The Co-Investigating Judges and the Chambers, under rule 29 (4) (c), 'may make a reasoned order adopting measures to protect the identity appearing in the case file'.

Furthermore, the Practice Direction on Classification and Management of Case-Related Information defines strictly confidential material as that material which can only be accessed by the judges and other persons expressly given by the ECCC.¹⁷⁰¹ Protective measures requests and associated documents

¹⁶⁹⁷ Code of Professional Conduct for Counsels before the ICC, article 16 (1). See for further details articles 14-18. In addition, see Kurth (2008) 625.

¹⁶⁹⁸ See supra Chapter III 2.4.1.1.

¹⁶⁹⁹ ECCC Internal Rules, rule 28 (7) (b).

¹⁷⁰⁰ Ibid., rule 28 (7) (e).

¹⁷⁰¹ Practice Direction ECCC/004/2009/Rev.1, Practice Direction on Classification and Management of Case-Related Information, article 2.

as well as documents and information subject to protective measures are in principle strictly confidential.¹⁷⁰²

4.4.1.2. The STL

The STL RPE, unlike instruments of the other international and hybrid criminal courts, explicitly recognize the use of anonymous witness evidence. Moreover, rule 93 lays down a specific proceeding to question anonymous witnesses conducted by the Pre-Trial Judge although that questioning may be conducted ‘at any stage of the proceedings’, and this can be requested by the Prosecutor, the defence, or a victim participant’s legal representative.¹⁷⁰³ There are two possible grounds based on which the Pre-Trial Judge shall question the witness in the absence of the parties or a victim participant’s legal representative. In addition to a serious risk that imperative national security might be jeopardized,¹⁷⁰⁴ the other ground consists in:

[...] a serious risk that a witness or a person close to the witness would lose his life or suffer grave physical or mental harm as a result of his identity being revealed, and measures for the protection of witnesses as provided for in Rule 133 would be insufficient to prevent such danger.¹⁷⁰⁵

The admissibility of anonymous testimonies hence constitutes a truly exceptional measure to be adopted only when the set of (other) protective measures does not provide enough protection and in cases of serious risk at the life or grave physical or mental harm of the witness if his/her identity is revealed. In addition, there are other safeguards to balance the adoption of this exceptional measure. Accordingly, the Prosecutor, the defence or a victim participant’s legal representative are given the opportunity to ‘convey questions to the witness without revealing his identity’.¹⁷⁰⁶ These questions shall be transmitted by the Pre-Trial Judge to the witness, and (s)he may also question the witness *proprio motu*.¹⁷⁰⁷ Moreover, the Pre-Trial Judge shall give to the Prosecutor, the defence and victim participants’ legal representatives ‘a provisional transcript of the witness’s answers’, and they shall also be given ‘the

¹⁷⁰² Ibid., article 5.1. See also also Acquaviva and Heikkilä (2013) 844.

¹⁷⁰³ STL RPE, rule 93 (A).

¹⁷⁰⁴ Ibid., rule 93 (A) (ii).

¹⁷⁰⁵ Ibid., rule 93 (A) (i).

¹⁷⁰⁶ Ibid., rule 93 (B).

¹⁷⁰⁷ Ibid., rule 93 (B).

opportunity to submit additional questions to the Pre-Trial Judge for transmittal to the witness'.¹⁷⁰⁸ Furthermore, the Pre-Trial Judge:

[...] shall provide a copy of the final transcript to the Prosecutor, the Defence, and the legal representatives of victims participating in the proceedings. He shall also provide them with a copy of a declaration stating his opinion as to the veracity of the witness's statement, as well as the potential for any serious risk resulting from the witness's identity or affiliation being revealed.¹⁷⁰⁹

With regard to victims applying to become victim participants, the Pre-Trial Judge in *Ayyash et al.* has stated that withholding the applicants' identities and their applications is justified to protect their interests during pre-trial proceedings.¹⁷¹⁰ However, the Pre-Trial Judge also emphasized that, subject to a Chamber's authorization, the parties may either be provided with some or all of the victim participants' identities, or be granted access to some or all of their applications.¹⁷¹¹ Nevertheless, the Pre-Trial Judge concluded by saying that 'At this stage of proceedings [...] withholding the identity of the applicants and their Applications does not prejudice the rights of the Accused or the interests of the Prosecution'.¹⁷¹² In case persons who have been granted the victim participant status 'wish to remain anonymous or seek other protective measures, a request to that end should be submitted to the Pre-Trial Judge as soon as possible, pursuant to Rule 133 (A) of the Rules'.¹⁷¹³ Thus, concerning anonymous victim participants, under the Pre-Trial Judge's practice, upheld by the Appeals Chamber,¹⁷¹⁴ anonymity has been allowed during pre-trial proceedings in *Ayyash et al.* as this is compatible with balancing the accused's rights against the victim participants' interests, but subject to some stringent limitations.¹⁷¹⁵ Furthermore, even if one or more victims are permitted to participate anonymously, 'they will do so through the same common legal representative as the other participating

¹⁷⁰⁸ Ibid., rule 93 (C).

¹⁷⁰⁹ Ibid., rule 93 (D).

¹⁷¹⁰ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision on Victims' Participation in the Proceedings, Pre-Trial Judge, 8 May 2012, para. 130.

¹⁷¹¹ Ibid., Loc. cit.

¹⁷¹² Ibid., Loc. cit.

¹⁷¹³ Ibid., para. 131.

¹⁷¹⁴ *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, paras. 28 and 39.

¹⁷¹⁵ *Ayyash et al.* (STL-11-01/PT/PTJ), 19 December 2012, paras. 28-31.

victims'.¹⁷¹⁶ Such a disposition is necessary as, otherwise, the anonymous victim participants would be in a better standing than the non-anonymous victim participants.¹⁷¹⁷

As previously noticed, in ordering redactions of confidential transcripts of a status conference, the Pre-Trial Judge in *Ayyash et al.* took into account, *inter alia*, the emphasis of victim participants' legal representatives on the need to maintain the anonymity of victim participants who were granted such anonymous status.¹⁷¹⁸

In cases of applicants who were denied the status of victim participants, the Pre-Trial Judge has correctly reached the following conclusion:

[...] a degree of anonymity is required in order to ensure that their personal information is protected and not disclosed to the Parties, since they would not be participating in the proceedings at any stage. Having been deprived of the entitlements and protections that the Tribunal has made available to ensure the security of VPPs [victims participating in the proceedings], these applicants would have no remedy should their interests be prejudiced. The Pre-Trial Judge therefore considers that all of the Applications should remain confidential and *ex parte* for the time being.¹⁷¹⁹

The Pre-Trial Judge has stated that withholding the victim participant applications from the parties is also consistent with other international criminal courts' practice, in particular the ICC.¹⁷²⁰ However, the Pre-Trial Judge paid also a close attention to the accused's rights by emphasizing that:

[...] withholding the Applications from the Parties at this stage of proceedings (namely the determination of VPP [victims participating in the proceedings] status) does not amount to barring the Parties *ad infinitum* from accessing information related to VPPs. Rule 87 of the Rules recognises that a degree of such access is in fact anticipated in the interests of transparency, in a manner consistent with the rights of the accused, the VPPs, and the Rules. The effect of

¹⁷¹⁶ Ayyash et al. (STL-11-01/PT/PTJ), Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, Pre-Trial Judge, 18 May 2012, para. 80.

¹⁷¹⁷ Ibid., Loc. cit.

¹⁷¹⁸ Ayyash et al. (STL-11-01/PT/PTJ), 17 August 2012, para. 11.

¹⁷¹⁹ Ayyash et al. (STL-11-01/PT/PTJ), Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, Pre-Trial Judge, 5 April 2012, para. 44.

¹⁷²⁰ Ibid., para. 51.

the decision not to order the VPU [Victims' Participation Unit] to re-file its Transmission of Application to include the Parties as recipients is therefore limited to the determination of VPP status.¹⁷²¹

Nevertheless, as the Pre-Trial Judge acknowledged, this does not prejudice any future determination on whether the parties should have access to the applications or the information contained therein and, if it is the case, to what extent and under which modalities.¹⁷²² Furthermore, the Pre-Trial Judge introduced the necessary clarification whereby he stated that his finding is:

[...] without prejudice to any future determination on whether or not the Parties should have access to the Applications or the information contained therein, and if so, to what extent and subject to which modalities. It is also without prejudice to such decisions as the Trial or Appeals Chambers may make in the future regarding the modes of participation of victims in the proceedings, which are the subject of Rule 87 of the Rules.¹⁷²³

Accordingly, the Pre-Trial Judge ordered 'that the annexes to the Transmission of Applications remain confidential and *ex parte* until further notice'.¹⁷²⁴

4.4.2. Anonymity During Trial

4.4.2.1. The ECCC

With regard to the ECCC, the legal framework does not contain an explicit provision about anonymous witnesses. However, an implicit permission of anonymous witnesses and civil parties may be deduced from some ECCC Internal Rules, which are absent in the RPE of other international and hybrid criminal courts and also connected to the use of the dossier in the ECCC in contrast to disclosure proceedings in other courts. The ECCC Internal Rules on non-disclosure of the witness's identity and referred to in the previous subsection are not only limited to pre-trial proceedings as there is always a reference to 'Chambers', i.e., Trial Chambers included, in general and not only to Co-Investigating Judges. Thus, when rule 29 (4) (c) provides as a protective measure 'a reasoned order adopting measures to protect the identity appearing in the case file', the reference to the decision-making judicial body is once again

¹⁷²¹ Ibid., para. 53.

¹⁷²² Ibid., Loc. cit.

¹⁷²³ Ibid., Loc. cit.

¹⁷²⁴ Ibid., p. 21.

not only limited to Co-Investigating Judges but also includes Chambers, i.e., Trial Chambers included. This reading is also confirmed by the explicit and necessary safeguard under rule 29 (6), according to which ‘No conviction may be pronounced against the Accused on the sole basis of statements taken under the conditions set out in sub-rule 29(4) (c) above’. Indeed, concerning protective measures, it is established that the person’s request and identity shall be recorded in a classified register separate from the dossier.¹⁷²⁵ Moreover, the Co-Investigating Judges or the Chambers (once again a general reference, arguably including the Trial Chamber) can order that the identity of the witness is not disclosed.¹⁷²⁶ This holds a close similarity with the French system. As previously examined, under article 706-58 of the French CPP, the anonymous witness’s identity and address are registered in another verbal process as part of a dossier different from that of the case. Thus, the witness’s identity and address are registered in a parallel record, open to the French Grand Instance Tribunal. This similarity is better understood if it is borne in mind that the procedural criminal law of Cambodia is based on the French civil law system.

Lastly, but equally important, concerning the witness’s right against self-incrimination, under rule 28 (7) (b), it is established that not only the Co-Investigating Judges but also Chambers, i.e., Trial Chamber included, can ‘order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanctions under Rules 35 to 38’.¹⁷²⁷ Additionally, internal rule 80 (1) lays down that:

The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses [...] they intend to summon 15 (fifteen) days from the date the Indictment becomes final. The Greffier shall place the list on the case file and, *subject to any protective measures*, forward a copy of the list to the parties [emphasis added].

¹⁷²⁵ ECCC Internal Rules, rule 29 (5). See also Practice Direction ECCC/004/2009/Rev.1, Practice Direction on the Classification and Management of Case-Related Information, article 6. Strictly Confidential Section of the Case File (‘[...] the following categories of documents and information are in principle strictly confidential: a. Requests for protective measures and associated documents (including Witness and Expert Support Unit risk assessments) b. Documents and information subject to protective measures [...]’).

¹⁷²⁶ ECCC Internal Rules, rules 28 (7) (b) and (e).

¹⁷²⁷ See, in particular, ECCC Internal Rule, rule 35 (Interference with the Administration of Justice).

Also, as previously mentioned,¹⁷²⁸ the Practice Direction on Classification and Management of Case-Related Information defines strictly confidential material as that material which can only be accessed by the judges and other persons expressly given by the ECCC.¹⁷²⁹ Protective measures requests and associated documents as well as documents and information subject to protective measures are in principle strictly confidential.¹⁷³⁰

Accordingly, the ECCC legal framework implicitly foresees the possibility of anonymous witnesses and civil parties during trial.¹⁷³¹ Be that as it may, the Trial Chamber in the first completed ECCC trial in *Duch* heard testimony from 24 witnesses,¹⁷³² and none of them was anonymous. In addition, the records of interviews of a number of witnesses were read out.¹⁷³³ There was no anonymous civil party either. Moreover, 22 civil parties, out of a total of 93 civil parties,¹⁷³⁴ were heard during the trial and civil parties' names were listed in an annex to the judgment,¹⁷³⁵ with only one witness's name redacted but which appears in the Appeals Judgment,¹⁷³⁶ as civil party group 1 filed a request to withdraw protective measures for Civil Party Appellant E2/62, which the Supreme Court Chamber granted.¹⁷³⁷ The trial judgment list also includes the identities of the three civil parties who withdrew their applications during the trial.¹⁷³⁸ In any case, not using anonymous witnesses is coherent with the need to fully guarantee the accused's right to a fair trial as discussed in previous sections.

¹⁷²⁸ See supra Chapter III 4.4.1.1.

¹⁷²⁹ Practice Direction ECCC/004/2009/Rev.1, Practice Direction on Classification and Management of Case-Related Information, article 2.

¹⁷³⁰ *Ibid.*, Loc. cit.

¹⁷³¹ See also Acquaviva and Heikkilä (2013) 845.

¹⁷³² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, Annex I: Procedural History, para. 19.

¹⁷³³ The records of interviews of the following witnesses were read in court: Khieu Ches (E3/456), Pes Math (E3/457), Nhem En (E3/458), Nhep Hau (E3/460), Kung Phai (E3/461, E3/462, E3/396, E3/244), Makk Sithim (E3/484, E3/396), Tay Teng (E3/485, E3/486, E3/218, E3/242), Soam Sam Ol (E3/487), Meas Pengkry (E3/446, E3/242, E3/218), Uk Bunseng (E3/490), Horn (Hân) Iem (E3/491), Phach Siek (E3/495), Kaing Pan (E3/496), and (in summary form) Chey Sopheara (E3/488); see "Written Record of Proceedings – 4, 5, 11 and 12 August 2009," comprising documents E1/57, E1/58, E1/61 and E1/62. See *Ibid.*, Annex I: Procedural History, para. 19, fn. 34.

¹⁷³⁴ See *Ibid.*, para. 637.

¹⁷³⁵ *Ibid.*, Annex III: List of Civil Parties, pp. 258-270.

¹⁷³⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, p. 321.

¹⁷³⁷ Kaing Guek Eav alias Duch (Case 001), Decision on Group 1- Civil Parties' Co- Lawyers' Request to Cancel Protective Measures F23/1, Supreme Court Chamber, 25 March 2011.

¹⁷³⁸ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, Annex III: List of Civil Parties, p. 270.

4.4.2.2. The STL

Similar to the analysis under the ICC sub-section, it is examined herein first anonymity of witnesses and, then, anonymity of victim participants although the same victim can hold a dual status victim participant-victim witness. Concerning anonymous witnesses, as already referred to,¹⁷³⁹ rule 115 (C) establishes that ‘the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence’. However, unlike the other international and hybrid criminal courts, the STL RPE provide for the exceptional participation of anonymous witnesses during trial proceedings. Rule 93 (A) explicitly allows anonymous witnesses, on exceptional basis, ‘at any stage of the proceedings’. Nonetheless, the Trial Chamber cannot convict solely on an anonymous witness’s statement under rule 159 of the RPE. The Guide on the Procedure of the STL, prepared by the STL Chambers, in commenting those two provisions, establishes that:

Given the specific nature of terrorist cases, the RPE allow exceptionally for a witness (be it, for example, an intelligence officer or an individual whose life, or that of his close family, is in danger) to give evidence, at any stage in the proceedings, anonymously, i.e., without his identity being revealed to the Parties or even to the Trial Chamber. His deposition is then recorded by the Pre-Trial Judge, who is the only person to have knowledge of his identity and who can ask him any questions he considers necessary, including those sent to him in writing by the Parties or the legal representatives of the victims. He should then send a record of the witness’s deposition (if appropriate, in redacted form so as not to reveal the identity of the witness), giving an assessment as to the credibility of the deposition. The Trial Judges cannot, under any circumstances, convict solely on the basis of the evidence of an anonymous witness [emphasis added].¹⁷⁴⁰

Some related comments follow. First, as referred to, rule 93 (A) clearly states that questioning of anonymous witnesses may be conducted ‘at any stage of the proceedings’. Although this provision is under Part 5 (Confirmation of Charges and Pre-Trial Proceedings) of the STL RPE and it is the Pre-Trial Judge who interviews the anonymous witness, according to rule 149 (F) under Part 6 (Proceedings before the Trial Chamber), a Chamber, i.e., the Trial Chamber, ‘may receive the evidence of a witness orally or, pursuant to Rules 93

¹⁷³⁹ See supra Chapter III 4.4.1.2.

¹⁷⁴⁰ STL Chambers, The Procedure of the Special Tribunal for Lebanon. A Snapshot, January 2010a, para. 101.

[anonymous witnesses written statements] [...] in written or other form'. The explicit reference to 'any stage of proceedings' used in rule 93 (A) contrasts with the language used in other STL RPE under Part 5 where it is normally mentioned 'during pre-trial phase',¹⁷⁴¹ or just 'proceedings'.¹⁷⁴² Moreover, when Antonio Cassese, as former President of the STL, commented this category of evidence in the STL RPE Explanatory Memorandum, explicitly said that 'concerning anonymous witnesses [...] who may be crucial in *trials* of terrorism [...] Rule 93 provides for a procedure [...] [emphasis added]'.¹⁷⁴³ Therefore, the previous considerations confirm that anonymous witnesses' written statements are not only admissible during pre-trial but also trial proceedings if the requirements and safeguards detailed previously are met and adopted respectively. Indeed, both the Pre-Trial Judge and the Appeals Chamber in *Ayyash et al.* have already explicitly referred to the application of rule 93 to the trial proceedings, i.e., a witness may be granted anonymity during trial if the exceptional and stringent requirements under rule 93 are met.¹⁷⁴⁴ Additionally, as Cassese noticed, the STL RPE 'create a careful distinction between the various categories of written probative value'.¹⁷⁴⁵ Accordingly, although anonymous testimony is arguably allowed during trial, its probative value may be considered not as strong as other evidence.

Second, due to the nature of crimes that the STL has jurisdiction over, i.e., primarily terrorism, granting anonymity to witnesses may be necessary due to high concerns of risk against the life and limb of those who will testify. As Antonio Cassese, in his position as the first STL President explained:

[...] concerning anonymous witnesses [...], who may be crucial in trials of terrorism (either because they are persons who fear for their lives or those of persons close to them or because they are intelligence officials not prepared, or allowed, to disclose their identities), Rule 93 provides for a procedure whereby, the anonymous witness *in camera* before the Pre-Trial Judge alone, so that only that judge is in a position to know his identity.¹⁷⁴⁶

¹⁷⁴¹ See, e.g., STL RPE, rules 89 (A) and 91 (A).

¹⁷⁴² See, e.g., *Ibid.*, rule 91 (H).

¹⁷⁴³ STL President (2010), para. 36. See also STL President (2012), para. 36.

¹⁷⁴⁴ See, respectively, *Ayyash et al.* (STL-11-01/PT/PTJ), 19 December 2012, para. 26; *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 36.

¹⁷⁴⁵ STL President (2010), para. 35. See also STL President (2012), para. 35.

¹⁷⁴⁶ STL President (2010) para. 36. See also STL President (2012), para. 36.

The Appeals Chamber in *Ayyash et al.* has highlighted that a witness ‘would receive this protection [anonymity] only because of risks related to their giving of evidence, which may be involuntary’.¹⁷⁴⁷

Third, according to rule 159 (A), the statements of anonymous witnesses, made under rule 93 and before the Pre-Trial Judge shall be subject to rule 149 (D), which reads as follows:

A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules.

Even more importantly, a necessary safeguard for the accused’s right to a fair trial is included explicitly in rule 159 (B), which lays down that ‘A conviction may not be based solely, or to a decisive extent, on the statement of a witness made pursuant to Rule 93 [statements of anonymous witnesses]’. This safeguard was qualified as fundamental by Cassese.¹⁷⁴⁸ Be that as it may, it is yet to be seen whether and to what extent the STL Trial Chamber will allow the intervention of anonymous victim witnesses. It is herein argued that similar and previously discussed reservations to anonymous witnesses during trial can be raised.

In any case, the identities of 24 out of 29 Prosecution witnesses, about whom the defence had asked disclosure for trial, were disclosed and, as for the other five Prosecution witnesses, the Prosecution withdrew them in *Ayyash et al.*¹⁷⁴⁹ It should be also remembered that, in application of rule 110 (A) (ii), for the witness who will be called to testify at trial, it is required disclosure of all statements in Prosecution’s possession regardless of their form and source.¹⁷⁵⁰ However, under rule 116 (A) (ii) and (iii), redactions of information that would threaten the safety of witnesses may be allowed provided that the Prosecution adopts counterbalancing measures as determined in *Ayyash et al.*¹⁷⁵¹

¹⁷⁴⁷ *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 36.

¹⁷⁴⁸ STL President (2010), para. 36. See also STL President (2012), para. 36.

¹⁷⁴⁹ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision on the Motion by the Ayyash Defence to Compel the Disclosure of the Identities of 29 Proposed Prosecution Witnesses, Pre-Trial Judge, 4 September 2013, para. 11.

¹⁷⁵⁰ *Ayyash et al.* (STL-11-01/PT/PTJ), Public Redacted Version of “Decision on the Prosecution Application for Non-Disclosure of Certain Statements of Witnesses Pursuant to Rule 116” Dated 20 December 2012, Pre-Trial Judge, 28 May 2013, para. 16.

¹⁷⁵¹ *Ibid.*, paras. 17, 21 and 22. See also *Ayyash et al.* (STL-11-01), Annex E Submissions of the Prosecution, Guidelines and Memorandums in Relation to the Application for Redactions to the Statements of 14 Witnesses, Confidential and *Ex Parte*, Office of the Prosecutor, 13 February 2013;

Concerning anonymous victim participants, the Appeals Chamber, upholding a Pre-Trial Judge's previous decision,¹⁷⁵² has banned anonymous victim participation during trial proceedings in *Ayyash et al.* by considering *inter alia* that:

[...] anonymous participation by victims is inherently prejudicial to the accused, regardless of how active or passive their desired method of participation and even for victims who do not seek to give or tender evidence.

[...] If VPPs [victim participants] are not required to disclose their identity at all, this would amount to an anonymous accusation against the accused, in breach of fair trial guarantees under Article 16 of the Statute.

[...] anonymity is so prejudicial to the rights of the accused and the fair conduct of the trial that this exceptional measure should not be available in these proceedings, especially in consideration of the fact that extensive protective measures are otherwise available [...].¹⁷⁵³

Accordingly, the Appeals Chamber concluded and ordered that:

[...] anonymous participation of VPPs [victim participants] in the proceedings is generally prejudicial to and inconsistent with the rights of the accused and the fairness of the trial and is not a valid form of victim participation within the meaning of Article 17 of the Statute. This includes “passive” or “silent observer” VPPs. The Pre-Trial Judge was therefore correct in finding that [...] anonymous participation by victims is inherently prejudicial in the present proceedings and that the identities of VPPs should be disclosed sufficiently in advance to give the Defence adequate time to prepare.¹⁷⁵⁴

This absolute prohibition of anonymous victim participants during trial is herein criticized for five reasons. First, neither the STL Statute nor the STL RPE explicitly prohibit anonymous victim participants during trial. Second, if a victim as witness can exceptionally be authorized under the STL RPE to give evidence anonymously, *a fortiori* (with stronger reason) a victim should be exceptionally allowed to participate as victim participant anonymously during

Ayyash et al. (STL-11-01/PT/PTJ), Decision on Prosecution's Applications to Authorise Necessary Redactions Dated 8 and 18 March 2013, Pre-Trial Judge, 25 July 2013, para. 22; Ayyash et al. (STL-11-01/PT/PTJ), Reconsideration of the Decision on Prosecution's Applications to Authorise Necessary Redactions Dated 8 and 18 March 2013, of 25 July 2013, Pre-Trial Judge, 9 August 2013, para. 31.

¹⁷⁵² See Ayyash et al. (STL-11-01/PT/PTJ), 19 December 2012, paras. 22-27 and 38-39.

¹⁷⁵³ Ayyash et al. (STL-11-01/PT/AC/AR126.3), 10 April 2013, paras. 27, 28 and 31.

¹⁷⁵⁴ *Ibid.*, para. 39.

trial. This argument is directly related to the different nature of the status of victims as witnesses *vis-à-vis* victims as victim participants. Thus, by definition victims' status as witnesses is more clearly oriented to affect the accused than victims' status as victim participants as whereas the former provides testimony, i.e., evidence, the latter provides views and concerns that are not evidence. This argument was acknowledged by Judge Baragwanath who, in his concurring opinion to the Appeals Chamber decision, mentioned that '[Witness] status is more obviously calculated to prejudice an accused than a mere second-stage victim, whose identification may or may not allow the Defence to embark on a process of enquiry whether that is to go'.¹⁷⁵⁵ Indeed, even though the Appeals Chamber correctly determined that victim anonymity and witness anonymity have to be treated as separate and distinct matters, it by referring to rule 93 explicitly stated that a victim participant who also testifies as a witness may be granted anonymity provided that the exceptional and stringent requirements under rule 93 are met.¹⁷⁵⁶

Third, although the Appeals Chamber paid closed attention to the ICC's practice whereby anonymous victim participants are neither explicitly prohibited nor banned altogether, the Appeals Chamber did not find it persuasive since, as understood by the Chamber, such practice does not fully consider the potential prejudice against the accused.¹⁷⁵⁷ This finding is particularly striking as the legal framework of the victim's status as victim participant at the STL was precisely modeled upon the ICC's legal framework and practice.

Fourth, the approach adopted by both the Appeals Chamber and the Pre-Trial Judge regards the inherent prejudice of the accused's rights brought by anonymous victim participants during trial as an irrebuttable presumption. This goes against the advisable case-by-case analysis which should be present when deciding to grant or not anonymity to victim participants.

Fifth, the *ratione personae* scope of this decision is too broad as not only victim participants interested in presenting their views and concerns before the Chamber but also 'passive' or 'silent' victim participants are not allowed to be anonymous victim participants.

Therefore, it is herein concluded that although the accused's right to a fair trial must prevail over the victim participants' entitlement to participate in

¹⁷⁵⁵ Ayyash et al. (STL-11-01/PT/AC/AR126.3), Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, Appeals Chamber, Concurring Opinion of Judge Baragwanath, 10 April 2013, para. 23.

¹⁷⁵⁶ Ayyash et al. (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 36.

¹⁷⁵⁷ Ibid., para. 26.

the trial proceedings in case of conflict,¹⁷⁵⁸ the absolute, irrebuttable and complete exclusion of anonymous victim participants during trial is excessive. A more balanced approach is to allow anonymous victim participation but limiting victims' modalities of participation in order to protect the accused's rights.

4.5. Comparative Conclusions

With the exception of the STL, which explicitly allows (on exceptional basis) anonymous testimony during pre-trial and trial, the legal instruments of international and hybrid criminal courts do not contain explicit provisions on anonymous witnesses and/or anonymous victim participants or civil parties. This contrasts with the specific legal provisions in the English and French systems, which explicitly allow the exceptional participation of anonymous witnesses, including during the trial stage of the proceedings although some of this national practice has not met the ECtHR's standards. When it comes to pre-trial proceedings, the possibility of non-disclosure of the identities of witness and victims to the defence is a feature common to the legal instruments of international and hybrid criminal courts and understood as an exceptional protective measure. With regard to trial proceedings, the disclosure of identities of witnesses and victims either before the trial begins (ICTY, ICC, STL) or before the witness in question testifies (ICTR, SCSL) but in any case during the trial is the common and general rule. The 'rolling disclosure' system at the ICTR and the SCSL, existing also in the American System, has been criticized as goes in detriment of the accused's right to a fair and impartial trial. At the ECCC, the disclosure of identities of witnesses and civil parties is implicit under the case-file or dossier. Precisely, due to the possibility to exclude their identities from the case file, there is arguably an implicit anonymity permission, which is similar at least concerning witnesses to the French system. However, there was no anonymous civil party or witness during the ECCC first completed trial/case.

In shedding light on whether anonymous witnesses (ICTY, ICC) and/or anonymous victim participants (ICC) are admissible, the ICTY and the ICC have considered the possibility of granting anonymity as an exceptional measure during trial. Although the ICC's practice has so far been relatively generous in granting anonymity in the case of anonymous victim participants via, for example, redactions, it has adopted necessary safeguards. A very important safeguard when assessing whether to grant anonymity to a witness as adopted in the international and hybrid criminal courts (explicit in the ECCC and the STL instruments) consists in not considering his/her testimony as the decisive or sole

¹⁷⁵⁸ Ibid., para. 38.

evidence to establish criminal liability. This pivotal provision is also present in legislation and/or case law of the examined national systems as complemented by the ECtHR's case law.

When identifying the criteria to follow for the adoption of anonymity measures during trial, the dialogue between international, hybrid criminal courts and domestic case law, and in particular the English one, has been reciprocal. Thus, on the one hand, the ICTY in *Tadić*, in determining and applying the conditions for granting anonymity to the witness, relied largely on the criteria laid down by the English Court of Appeal in *R. v. Taylor*.¹⁷⁵⁹ The strong dissent to the *Tadić* decision by Judge Stephen also referred to, *inter alia*, English and American legal authorities. The (back then) novel nature of the ICTY explains why it had to search in long-standing national legal traditions to interpret its provisions and to fill the gaps of its own legal instruments, which is the case of anonymous testimony. On the other hand, Lord Brown in *R. v. Davis* before the House of Lords referred to, *inter alia*, the analysis conducted by the ICTY in *Tadić* (both the majority and separate opinions) and *Blaskić*, when assessing the admissibility of anonymous witnesses.¹⁷⁶⁰ Additionally, for example, the ICTY, the ICC, the STL and domestic courts, as examined in English and French case law, have paid close attention to the ECtHR's jurisprudence and standards when adopting a decision to allow anonymous witnesses and/or victims in order to strike a balance between the accused's right to a fair trial and the protection of victims testifying as anonymous witness or, at the ICC, intervening as anonymous victim participants as well.

There is no trend consisting in explicitly including the exceptional admission of anonymous witnesses during trial in the legal instruments of international and hybrid criminal courts unlike some national developments, e.g., England and Wales. Thus, whereas the ICTY, the ICTR, the SCSL and the ICC legal instruments keep silence on the anonymous (witness) issue and the ECCC arguably incorporates an implicit permission, the STL explicitly allows it during trial. Certainly, arguments such as protection of the security and safety of the victims and witnesses, importance of witness's testimony, reduction of the risk of their re-victimization would in principle justify anonymity of witnesses during trial. However, in the particular cases of the ICTY, the ICTR, the SCSL and the ICC, a more coherent interpretation of their legal instruments, which differ from the ECCC and the STL legal frameworks on this particular issue, constitutes a powerful argument to be reluctant to the admission of anonymous

¹⁷⁵⁹ *Tadić* (IT-94-1), 10 August 1995, paras. 62-66. (citing *R. v Taylor*).

¹⁷⁶⁰ *R. v. Davis* (Iain), [2008] UKHL 36, paras. 91-95.

witnesses during trial. The full protection of the accused's right to a fair trial, its prevalence over the use of anonymity to protect victim witnesses, the development of protection programmes for victims and witnesses, and alternative less restrictive protective measures support such approach. Accordingly, the approach adopted by the ICTY (*Tadić* excepted), the ICTR, the SCSL, the ICC and the ECCC Trial Chambers consisting in not allowing victims to testify anonymously during trial is found herein coherent. Moreover, even in the case of the STL RPE, which explicitly allow anonymous witnesses during trial, similar reservations should be raised when the first STL trial begins.

Be that as it may, the possibility for victims to intervene as anonymous victim participants (ICC, STL) or anonymous civil parties (ECCC) constitutes an important avenue for anonymity as an exceptional measure to protect victim participants or civil parties in international criminal justice trials. Therefore, although it is undeniably preferable that the identities of victim participants and civil parties are known by the accused at trial, international and hybrid criminal courts should authorize their anonymity exceptionally. *Inter alia*, the difference in nature between the victim participant or civil party status and the victim witness status underlines and justifies this finding. Thus, whereas the ICC's practice of not completely prohibiting anonymous victim participation during trial is advisable, the STL's emerging approach according to which under no circumstances are anonymous victim participants allowed in trial is herein criticized. Therefore, the ICC's approach is a more balanced one as it allows anonymous victim participation but it limits victims' modalities of participation to protect the accused's rights.

5. Chapter Conclusions

1. The witness dimension of the victims' status is present at all international and hybrid criminal courts either as the almost exclusive dimension of their status (ICTY, ICTR and SCSL), i.e., similar to adversarial systems, or just as dimension thereof (ICC, ECCC, STL), i.e., similar to inquisitorial systems. However, when victims as witnesses give testimony, adversarial features such as cross examination and orality are applicable at these courts in a higher (ICTY, ICTR, SCSL) or a lesser lever (ICC, ECCC, STL). The adversarial order to call witnesses is present because of the instruments (ICTY, ICTR, SCSL) or practice (ICC). At the ECCC and the STL, after the Judges question the witness, an adversarial order can be followed. In any case, victims as witnesses cannot express their own views and concerns, which correspond to the victim participant status, and those views and concerns do not constitute evidence. Instead, victims as witnesses are

called to give evidence normally under oath and viva voce although submission of written statements has been increasingly accepted, which reflects inquisitorial system influence. Victim participants, unlike witnesses, cannot be questioned by the parties. Testimonies by victims as witnesses are limited to an important extent by the prosecutorial strategy although they are expected to tell the truth. Therefore, the international and hybrid criminal courts where victims are almost exclusively witnesses limit the victims' status as they cannot express their own views and concerns.

2. The legal regime for victims as witnesses when testifying at international and hybrid criminal courts includes both similar and different features. On the one hand, testifying in person after having taken a solemn declaration or oath to tell the truth at a specific time and normally without a legal representative constitute important common features. Additionally, the prohibition of self-incrimination, the possibility for children and mentally impaired victims to testify even unsworn, certain privileged communications, and witness familiarization are also common features. Moreover, these common features reflect certain consensus in the examined national systems. On the other hand, the unsworn testimony of a child or mentally impaired person in theory may be enough to convict the accused in some international and hybrid criminal courts (ICC, SCSL, ECCC), unlike the other courts' instruments and/or case law the ICC Statute does not contemplate a *subpoena* mechanism, and the scope of the States' obligation to cooperate for witness attendance varies. Victim-friendly provisions and/or practices have included testimony via depositions and video link, admission of witness evidence in written form and hearsay evidence as exceptions to the principle of oral, live and in person testimony and, hence, it is reduced the risk of secondary victimization but with due regard to the accused's rights. Moreover, cross-examination is not unlimited and needs to be conducted respecting victim witness's dignity. To avoid serious issues concerning witness credibility similar to those present in the ICC's first completed trials, the ICC and its OTP have been undertaking measures. Whereas witness proofing is allowed in some courts (ICTY, ICTR, SCSL, STL (implicitly) and the ECCC as for civil parties) and thus similar to the American system, it is prohibited in the ICC and the ECCC.¹⁷⁶¹ This prohibition is similar to the situation in the English and French systems.

3. Victims can assume a dual official status as witnesses and as victim participants at the ICC and the STL only. However, concerns as for this dual role

¹⁷⁶¹ The exception is given by ICC Trial Chamber V in the Kenya trials. See supra Chapter III 2.3.1.2.

including witness's testimony being adjusted after his/her access to the confidential part of the case file and his/her credibility questioned because of the existence of (financial) interests have been addressed by the ICC via safeguards such as restricting access to the confidential part of the case file and prohibiting witnesses from attending witness's hearing at least while they remain anonymous. The ICC indeed has not only dismissed testimonial evidence by dual status victims but also withdrawn their victim participant status when serious credibility problems arose, being the latter in some cases excessive as dismissal of the testimony could have been enough. At the ECCC, similar to the French system, the victim has to choose between being a civil party or a witness with the respective advantages and disadvantages of one or the other. On the one hand, in theory sworn witness testimony should be given heavier weight than unsworn testimony although this has not been the case in the ECCC practice. Indeed, civil parties providing testimonies have acknowledged to base them on what they heard at court, which is criticized here. On the other one, the civil parties' testimonies/statements are not limited to the prosecutorial strategy unlike witnesses' testimony. This need to choose (unlike the French system where the victim can be first witness and then civil party) can be criticized as may weaken victims' status. Accordingly, civil parties cannot be simultaneously witnesses at the ECCC. In any case, at the ECCC, considering that civil parties can provide unsworn testimonies during trial, the fact that those testimonies are subject to adversarial argument and have not been seemingly given less weight than witness testimony, that the Judges/parties have referred to civil parties as witnesses, and that the Judges have treated civil party testimony (in particular direct victim testimony) as witness testimony, in those aspects, civil parties at the ECCC may in practice be considered as holding a sort of 'dual' status, i.e., civil party and *mutatis mutandi* relatively similar to a 'witness'. At the STL, a disjunctive scheme similar to the ECCC's, i.e., need to in principle choose between dimensions of the victims' status at the STL, has been replaced by a RPE provision in favor of allowing dual status as a rule (and not only exceptionally), which arguably enhances victims' status.

4. Protective measures at international and hybrid criminal courts can be granted by a Judge or Chamber and, depending on the court and procedural stage, those measures can be ordered *motu proprio*, or upon request of the parties, victims, witnesses or Victims and Witnesses Units. Protective measures at international and hybrid criminal courts granted to victims and witnesses endeavor to minimize serious risks for their security, prevent serious incursions in their privacy and dignity, reduce trauma related to give testimony by avoiding

or reducing secondary victimization risks, and encourage witnesses to testify. All of this corresponds to the logics of incorporating restorative justice measures in international criminal justice primarily led by retributive/deterrent or utilitarian justice paradigms. Protective measures, granted not only to victims as witnesses but also to victim participants (ICC, STL) and civil parties (ECCC), are manifestations of both an obligation for the international and hybrid criminal courts to protect victims and witnesses and a correlative right of victims and witnesses to be protected when giving their testimony as a witness or participating as a victim participant or civil party, which is similar to the national systems examined.

5. To order protective measures, it must be met certain conditions such as a real, legitimate and objective fear for the witness's security based on an identified security threat or danger and not only the witness's subjective fear (necessity); the effect on the public nature of the proceedings would be justified in the circumstances; and proportionality. These conditions have to be examined by international and hybrid criminal courts on case-by-case and individual basis, using factual analysis; and with full respect for the accused's rights. This exercise is *mutatis mutandi* similar to the one conducted by the analyzed national systems. In carefully balancing, on the one hand, the protection of victims and witnesses and, on the other one, the accused's rights, the international and hybrid criminal courts tend to give special primary consideration to the latter during the trial phase while during pre-trial those judicial forums tend to be more flexible. Moreover, the adoption of blanket protective measures regardless of specific security considerations has to be criticized based on the above-mentioned considerations. In any case, protective measures can be augmented or lifted according to the changes, throughout time, in the security situation of a particular victim or witness. Under the ICC, the ICTY and the STL instruments, Chambers when deciding to vary a protective measure shall in principle seek the protected person's consent. Civil parties can appeal decisions on protective measures at the ECCC, and victim participants can do so at the STL.

6. The international and hybrid criminal courts instruments and practices have considered an open-ended list, set of protective measures for victims and witness, which has been influenced by and/or keeps a strong similarity with those adopted in national jurisdictions, especially Anglo-American systems. Accordingly, protective measures at international criminal justice forums have included sealed proceedings, prohibition to disclose protected person's identifying information to third parties, expunging protected person's identifying information from the judicial records, use of pseudonyms,

video-link testimony, distortion of voice and image, and *in camera* or closed proceedings. Even the most extreme of these measures, closed sessions, have become a regular practice at the international and hybrid criminal courts. The excessive frequency of closed hearings is criticized as public hearings is an important component of the accused's rights and guarantees the accused's right to a fair and impartial trial/proceedings, and indeed courts sitting in private may give the wrong impression. Additionally, protective measures specially tailored to protect vulnerable groups of victims and witnesses such as sexual violence victims and children have been adopted at international and hybrid criminal courts, holding similarities with the national systems examined although in some cases the former have been more generous arguably due to the mixed or *sui generis* nature of international criminal proceedings. Control of cross-examination or questioning of the witness; *in camera* or closed proceedings; someone accompanying the victim or witness; production of a witness's recorded video or audio testimony and written testimony; and the possibility for children and mentally impaired people to give unsworn testimony and/or video-taped evidence are examples of these special measures. There are also special evidentiary principles applicable to sexual crimes, including the principle of non-corroboration as complemented with a specific emphasis on sexual crimes, the restrictions to infer victim's consent in oppressive environments, and irrelevance of victim's previous or subsequent sexual behavior. Protection of sexual violence and other vulnerable victims has also taken place *mutatis mutandi* under and been influenced by international human rights law. Be that as it may, the international and hybrid criminal courts when examining whether and to what extent to grant special measures have considered other competing interests such as the principle of live questioning and the rights of the accused, including the right to examine/cross-examine witnesses, which leads to the conclusion that those measures must in principle be regarded as exceptional. Moreover, protective and special measures on concealing the identity of victims and witnesses during trial should be limited to protect their identities *vis-à-vis* the public and media rather than *vis-à-vis* the defence. Protective and special measures constitute an exception to the principle of public hearings.

7. The legal instruments of the international and hybrid criminal courts do not contain explicit provisions on anonymous witnesses, with the exception of the STL, which explicitly allows anonymous witnesses during pre-trial and trial on exceptional basis. Nevertheless, provisions common to the legal instruments contemplate the possibility of non-disclosure of the identity of victims and witnesses to the defence during pre-trial proceedings, i.e., before

beginning of the trial (ICTY, ICC, STL) or prior to a particular witness's testimony (ICTR, SCSL), as an exceptional protective measure. The 'rolling disclosure' system at the ICTR, the SCSL, also applied in the American system, can be criticized as affects the accused's rights. Concerning the ECCC, the use of the dossier, similar to the French system, differs from the other courts' disclosure proceedings and, indeed, the respective ECCC provisions arguably may be interpreted as an implicit authorization for anonymous witnesses even during trial.

8. Granting anonymity to witnesses during trial at international and hybrid criminal courts which do not contain, in their legal frameworks, an explicit prohibition or permission thereof, i.e., the ICTY, the ICTR, the SCSL and the ICC, might be in principle acceptable as an extraordinary protective measure. Concerns about security and safety of witnesses, courts' obligation to protect them, importance of their testimony, and reduction of the risk of re-victimization constitute some of the most important grounds to justify anonymity not only for victim witnesses but also for victim participants. However, at those courts which keep silence/ambiguity about permission of anonymous witnesses, the best approach would consist in not granting anonymity to victim witnesses during trial based on a more coherent and systematic reading of their respective legal instruments, which refer to the need to disclose relevant identifying information of the witnesses prior to trial (ICTY, ICC) or before the witness in question testifies (ICTR, SCSL). The reasons underlying these dispositions are undoubtedly the full respect for the right of the accused to a fair and impartial trial, which grows in strength during trial in contrast to pre-trial proceedings insofar as the trial proceedings directly lead to the determination of criminal responsibility of the accused. Additionally, the development of witness protection programmes and the adoption of other protective measures, which are less restrictive for the rights of the accused, support this conclusion. Furthermore, although the examined national systems allow the exceptional intervention of anonymous witnesses, some of their legislative and jurisprudential practices have not met the standards set in the ECtHR's case law as for the rights of the accused.

9. Even though it is herein agreed with the practice of exceptionally granting anonymity to victim participants (ICC) or civil parties (ECCC), this should not be considered as an argument to extent anonymity to victim witnesses during trial at courts whose legal instruments keep silence on this issue. This corresponds to a basic difference in nature between the role of the victim as witness, i.e., as a provider of evidence, and his/her role as victim

participant or civil party, i.e., as an individual expressing his/her own views and concerns. It is absolutely pivotal to keep this distinction in mind since the same victim can hold an official/formal dual status as victim witness and as a victim participant (ICC, STL) and, therefore, attention should be drawn to which specific role anonymity is sought for. Thus, the ICC's case law on not allowing anonymous victim witnesses during trial is consistent with the above-mentioned consideration and also coherent with the practice of the ICTY (*Tadić* excepted), the ICTR, the SCSL and the ECCC. Moreover, granting anonymity to victims when they participate as victim participants providing their statements in the particular case of the ICC's practice (not only during pre-trial but also during trial) may be considered as a manner to indirectly 'compensate' the inadvisability of allowing them to be heard as anonymous witnesses. Even at the courts whose instruments explicitly (STL) or implicitly (ECCC) allow anonymous witnesses during trial, a necessary guarantee contained in their legal instruments is not to consider anonymous testimony as the sole or main evidence for conviction. This safeguard reflects similar developments in the examined national systems and in the light of the ECtHR's jurisprudence. In any case, even in the STL, reservations as for anonymous witnesses should be raised when its first trial begins based on the discussed arguments. However, the STL's emerging approach consisting in completely and irrebuttably prohibiting anonymous victim participants during trial is criticized herein as *inter alia* it does not appropriately take into account the difference in nature between victim witness and victim participant. In contrast, the ICC's approach is more balanced as it allows anonymous victim participation but it limits victims' modalities of participation to protect the accused's rights. Be that as it may, the dialogue between national and international criminal jurisdictions on the issue of anonymous witnesses has been active.

Chapter IV. Victims' Status as Victim Participants/Civil Parties

1. Introduction

This chapter deals with the status of victims as victim participants (ICC, STL) and as civil parties (ECCC) and consists of seven subchapters (including this introduction). Although as established by the ECCC Supreme Court Chamber 'unlike at the ICC and STL, victims before the ECCC have the status of a party',¹⁷⁶² victims' status as participants (ICC, STL) and as civil parties (ECCC) are studied together since they properly speaking constitute the participatory dimension of the victims' status at international and hybrid criminal courts. As for the ICTY, the ICTR and the SCSL, even though victims lack the status of victim participants or civil parties, references to specific limited instances of victim's 'participation' during some particular procedural stages are examined. It is important to mention that although in the Anglo-American systems victims are not civil parties (unlike the ECCC and the French inquisitorial system) or formally speaking victim participants (unlike the ICC and the STL), some specific procedural rights in particular procedural stages can be exercised and, thus, they are considered here. It is important to remember, as indicated in the general introduction to this thesis, that although certain legal entities may qualify as victims at the ICC and the ECCC, the analysis is only focused on natural persons. Concerning some general references to the rights of the accused, it is herein referred to those included under the introduction to the previous chapter.¹⁷⁶³

In the second subchapter, legal definitions of victims and especially the legal requirements to be granted either the official victim participant status or civil party status and then properly speaking to participate in the criminal proceedings at the ICC, the ECCC and the STL are examined in detail. The following four subchapters analyze and discuss in detail the modalities of participation or procedural rights of victims, either as victim participants (ICC, STL) or as civil parties (ECCC). These subchapters follow the sequence of procedural stages in criminal proceedings. Accordingly, these subchapters examine respectively investigation/pre-trial, trial, sentencing and appeals

¹⁷⁶² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488.

¹⁷⁶³ See supra Chapter III 1.

proceedings. The analysis of victims' status during investigation/pre-trial and trial is particularly detailed due to not only a larger amount of available sources but also bearing in mind the importance of these stages (especially trial). In each and every subchapter, a general presentation of the three national systems considered is followed by the detailed analysis of victims' status as victim participants or civil parties at the ICC, the ECCC and the STL. The modalities of victims' participation/victims' procedural rights are presented and discussed, normally followed by an additional analysis of relevant legal issues. Each subchapter contains comparative conclusions where the status of victims at the ICC, the ECCC and the STL is analytically and comparatively summarized and, where pertinent, compared with the ICTY, the ICTR and the SCSL and the presented national systems. This chapter ends with general conclusions.

At this point, it is relevant to mention that the ICC, the ECCC and the STL have specific sections devoted to providing support to victim participants/civil parties and with similar mandates. Accordingly, the ICC has two distinct bodies, both within the Registry, devoted to providing support to victims and which interact with each other, namely, the Victims Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV). The VPRS, as a specialized unit dealing with victims' participation and reparations and assistance to victims,¹⁷⁶⁴ has, *inter alia*, the following obligations: i) receiving applications for victim participation and transmit them to the relevant Chamber, and subject to the ICC Statute, in particular article 68 (1),¹⁷⁶⁵ to provide a copy of them to the Prosecution and defence who are entitled to reply them;¹⁷⁶⁶ ii) assisting victims 'in obtaining legal advice and organize their legal representation',¹⁷⁶⁷ including, where necessary, common legal representation;¹⁷⁶⁸ and iii) providing 'notice or notification to victims or their legal representative'.¹⁷⁶⁹ In turn, the OPCV has the mandate to 'provide support and assistance to the legal representative[s] for victims and to victims, including, where appropriate: (a) Legal research and advice; and (b) Appearing before a

¹⁷⁶⁴ ICC Regulations of the Court, regulation 86 (9).

¹⁷⁶⁵ 'The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims [...]'.
¹⁷⁶⁶ ICC RPE, rule 89 (1).

¹⁷⁶⁷ Ibid., rule 16 (1) (b).

¹⁷⁶⁸ Ibid., rule 90 (2)-(4).

¹⁷⁶⁹ Ibid., rule 16 (1) (a).

Chamber in respect of specific issues'.¹⁷⁷⁰ Additionally, the OPCV can be appointed by a Chamber as the legal representative for victims.¹⁷⁷¹

As for the ECCC, the Victims Support Section (VSS) (previously called Victims Unit) has the mandate to, *inter alia*: i) assist lodging complaints and assist victims in submitting civil party applications, under the supervision of Co-Prosecutors and Co-Investigating Judges respectively; ii) maintain a list of lawyers who wish to represent victims; iii) provide general information to victims, especially civil parties; and iv) assist and support civil parties and complainants' attendance in court proceedings.¹⁷⁷² It also receives, processes and transfers the applications for becoming civil parties to the Co-Investigating Judges or Trial Chamber.¹⁷⁷³ With regard to the STL, the Victims' Participation Unit (VPU), which is part of the Registry, has the mandate to assist victims participating in the proceedings and, hence, their functions include, *inter alia*: i) inform the victims of their rights; ii) receive applications from victims who want to participate, review that they are complete, and once this has been done transmit them to the Pre-Trial Judge; iii) ensure that the victims and their legal representatives receive documents filed by the parties and files submitted by the Pre-Trial Judge subject to confidentiality/justice interests; iv) provide administrative and logistical assistance to victim participants; and v) draw up and maintain a list of counsel for victim participants' representation.¹⁷⁷⁴

A last preliminary point concerns legal aid for victim participants and civil parties, who in most of the cases do not have economic means to, *inter alia*, afford legal representation expenses. Rule 90 (5) of the ICC RPE lays down that 'A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance', and the ICC in practice has tried to do so, existing an specific budget for this aim.¹⁷⁷⁵ In turn, at the STL, the VPU, under the Registrar's authority, has the function to 'in accordance with the applicable Legal Aid Policy, administer and monitor the provision of funds to the legal representatives of indigent victims'.¹⁷⁷⁶ In contrast to the ICC and the STL, the ECCC lacks a formal legal aid system for civil parties and although

¹⁷⁷⁰ ICC Regulations of the Court, regulation 81 (4).

¹⁷⁷¹ *Ibid.*, regulation 80 (2).

¹⁷⁷² ECCC Internal Rules, rule 12 *bis*.

¹⁷⁷³ Practice Direction on Victim Participation (Rev.1), Practice Direction 02/2007/Rev.1, article 3 (6) and (7).

¹⁷⁷⁴ STL RPE, rule 151 (B) and (C).

¹⁷⁷⁵ See, for further details, McGonigle Leyh (2011) 329-330.

¹⁷⁷⁶ STL RPE, rule 51 (C) (ii).

some efforts have been taken to provide civil parties with legal representation even when they cannot afford it, the responsibility is still primarily assumed by civil society groups.¹⁷⁷⁷ In any case, it should be borne in mind the pivotal importance of the existence and appropriate functioning of a legal aid system for victims so that they are able to fully exercise their procedural rights.¹⁷⁷⁸ The above-mentioned consideration results of the highest value to fulfill in practice what has been provided for victims as modalities of participation/procedural rights under the respective legal instruments and/or case law of the ICC, the ECCC and the STL.

2. Legal Definitions of Victims and Requirements to Participate as Victim Participants/Civil Parties

This sub-chapter deals with a presentation of victims as victim participants (ICC, STL) or civil parties (ECCC). Accordingly, after a general survey of the three considered national systems, the analysis at the level of the international and hybrid criminal courts is conducted. First, some general remarks about the status as victim participants or civil parties and respective definitions are discussed. References to the situation at the ICTY, the ICTR and the SCSL are incorporated. Second, a detailed analysis of the legal requirements to be granted the status of and participate as victim participants or civil parties follows.

2.1. National Systems

2.1.1. English Adversarial System

Victims in England and Wales do not have the official status of civil parties or victim participants in criminal proceedings. However, due to some domestic law developments, the EU Framework Decision on Victims and the ECtHR's case law, it has been said that victims have acquired certain procedural rights,¹⁷⁷⁹ as recognized by the Law Commission.¹⁷⁸⁰ In other words, as detailed later, victims can participate at certain specific procedural stages especially during pre-trial proceedings (via private prosecutions) or sentencing (via victims' statements). Although the Code of Practice for Victims of Crime is not statutory, i.e., not set out in law, it establishes the services a victim can expect to receive from criminal

¹⁷⁷⁷ See, for further details, McGonigle Leyh (2011) 219-220.

¹⁷⁷⁸ See ICC, Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims' Legal Representatives before the Court, Eight Session, ICC-ASP/8/25, 18-26 November 2009, p. 2.

¹⁷⁷⁹ Doak (2008) 245.

¹⁷⁸⁰ Law Commission of England and Wales, Evidence in Criminal Proceedings: Hearsay and Related Topics (Paper No 245) (1997) [5.22]. Cited by Doak (2008) 245.

justice agencies and is important for the definition of victims. Victim's definition is in principle limited to direct victims:

The person who has made the allegation (or on whose behalf the allegation has been made) must be the *direct* victim of the criminal conduct. This Code does not require services to be provided to third parties or indirect victims such as witnesses of violent crimes.¹⁷⁸¹

Nevertheless, indirect victims are also admitted in the following cases:

Where a person has died as a result of criminal conduct, or is unable to receive services as a result of disability, the victim's family spokesperson is entitled to receive services under this Code. A family spokesperson should be nominated by the close relatives of the person who has died.¹⁷⁸²

Accordingly, besides direct victims, family members of the deceased or disabled person can also be considered as indirect victims. Moreover, when a person is under the age of 17, his/her parent or guardian is entitled to receive services as well as the young person unless the former is investigated/charged for criminal conduct that victimized the latter or when does not represent the young person's best interests.¹⁷⁸³ A person is entitled to receive services provided that there is an allegation of a criminal conduct.¹⁷⁸⁴ The Code refers to categories of vulnerable and intimidated victims based on the definitions given by sections 16 and 17 of the YJCEA,¹⁷⁸⁵ as detailed in the previous chapter.¹⁷⁸⁶

The definition of victims under article 2 (1) (a) of the EU Directive on Victims, which is quite similar to that contained under the EU Framework Decision on Victims,¹⁷⁸⁷ reads as follows '(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence'. Also, this article has explicitly added family members of a victim whose death is caused by a crime under the category of victims:

¹⁷⁸¹ Code of Practice for Victims of Crime, section 3.2.

¹⁷⁸² *Ibid.*, section 3.4.

¹⁷⁸³ *Ibid.*, section 3.5.

¹⁷⁸⁴ *Ibid.*, section 3.11.

¹⁷⁸⁵ *Ibid.*, section 4.

¹⁷⁸⁶ See *supra* Chapter III 2.1.1 and 3.1.1.

¹⁷⁸⁷ EU Framework Decision on Victims, article 1 ('[...] 'victim' shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State').

- (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;
- (b) 'family members' means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim;

The ECJ considered that 'victim', for purposes of the EU Framework Decision on Victims, does not include legal persons as this only applies to natural persons who have suffered harm directly caused by acts or omissions in violation of the criminal law of a member state.¹⁷⁸⁸

2.1.2. American Adversarial System

Besides witnesses, victims do not have an official status as civil parties or victim participants in American criminal proceedings. However, some legal definitions of victims and corresponding case law are examined here as during specific procedural stages, especially sentencing, victims can participate. The CVRA is particularly important as intends 'to transform the federal criminal justice system's treatment of crime victims and to serve as a model for reform of the criminal justice legal culture in the fifty states'.¹⁷⁸⁹ The CVRA begins with the statement that 'a crime victim has the following rights', some of which can be considered as participatory rights.¹⁷⁹⁰ The definition of 'crime victim' reads as follows:

[...] the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights

¹⁷⁸⁸ ECJ, *Criminal Proceedings Against Dell'Orto* (C-467/05), 28 June 2007, paras. 48, 52-60.

¹⁷⁸⁹ Jon Kyl, Steven Twist and Stephen Higgins, 'On the Wings of their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act' (2005) *Lewis & Clark Law Review* 581, 593.

¹⁷⁹⁰ '(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused [...] (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding [...] (5) The reasonable right to confer with the attorney for the Government in the case [...] (6) The right to full and timely restitution as provided in law'. 18 U.S.C. § 3771 (a).

under this chapter, but in no event shall the defendant be named as such guardian or representative.¹⁷⁹¹

This definition is grounded on the federal restitution statutes,¹⁷⁹² and is broader than the definition contained in rule 32 (a) of the Federal Rules of Criminal Procedure, which limits the meaning of victim to the ‘individual against whom the defendant committed an offence for which the court will impose a sentence’.¹⁷⁹³ Accordingly, the CVRA could be applied to victims of counts dismissed in, for example, a plea agreement.¹⁷⁹⁴ ‘Harm’ under the CVRA is limited to harm which is ‘directly and proximately’ caused by the offence. Such terms necessarily resort to ‘foreseeability’, concept interpreted in a liberal manner under other victims’ statutes.¹⁷⁹⁵ Crime foreseeability presents far-reaching consequences, as highlighted by the United States Supreme Court Justice David in his concurring opinion in *Payne v. Tennessee* ‘Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind’.¹⁷⁹⁶ The CVRA, paying attention to victims ‘left behind’, defines who can serve as a victim’s representative and, thus, does not limit it to a single member of the family but allows ‘family members’ to do it. Surviving family members are included in the protection of most victims’ rights enactments, either some states authorize family members to appear as victims’ representatives or other states incorporate family members explicitly as ‘the victim’ in homicide cases.¹⁷⁹⁷ In *United States v. Hunter*, the Federal District Court of Utah interpreting the term ‘crime victim’ under the CVRA found that ‘a person must be directly harmed as a result of the offense and the harm must be proximate to the crime’ and also established that ‘proximate’ means:

[...] lying very near or close [...] (1) “soon forthcoming; imminent”; (2) “next preceding” <proximate cause>; and (3) “nearly accurate, approximate” [...].

¹⁷⁹¹ 18 U.S.C. § 3771 (e).

¹⁷⁹² See *Ibid.*, §§ 3663 (a) (1) (A), 3663A (2004).

¹⁷⁹³ See also *Kyl, Twist and Higgins* (2005) 594.

¹⁷⁹⁴ *Ibid.*, *Loc. cit.*

¹⁷⁹⁵ See, e.g., *United States v. Metzger*, 233 F.3d 1226, 1227-28 (10th Cir. 2000); *United States v. Moore*, 178 F.3d 994, 1001 (8th Cir. 1999).

¹⁷⁹⁶ *Payne v. Tennessee*, 501 U.S. 808, 838-39 (1991) (Scouter, J. Concurring).

¹⁷⁹⁷ See respectively, e.g., Florida Constitution, article I, § 16 (b); Georgia Code Annotated, § 17-17-3 (11).

“Proximate cause” [...] emphasizes “the continuity of the sequence that “produces an event and refers to a cause of which the law will take notice”.¹⁷⁹⁸

In *In re Antrobus*, Judge Tymkovich of the Tenth Circuit concurred to note that “The harm must “proximately” result from the crime’.¹⁷⁹⁹ Whereas some state constitutions and statutes refer only explicitly to the person directly affected, others also include (immediate) family members if the direct victim is dead, incapacitated or a minor.¹⁸⁰⁰ Moreover, in *Beck v. Commonwealth*, a capital murder case, the Supreme Court of Virginia determined that the victim impact testimony, for sentencing purposes, from non-family members is allowed if the declarant is not ‘so far removed from the victims as to have nothing of value to impart to the court’.¹⁸⁰¹ In turn, in cases of child victims, the Victims’ Rights Statute of Wisconsin states that ‘a parent, guardian, or legal custodian, is also a victim’.¹⁸⁰² However, there are some important gaps as, for instance, in some state laws the designation of victim is left up to the discretion of prosecutors or police officers or the status is only acknowledged once the suspect is arrested and charged.¹⁸⁰³ Indeed, some states explicitly include an ‘alleged victim’ within the statutory definition of ‘victim’ and others do it implicitly.¹⁸⁰⁴ As for case law, sometimes references to the complainant as ‘victim’ has been found as not violating an accused’s right to fair trial unlike some other case law.¹⁸⁰⁵

2.1.3. French Inquisitorial System

In the French system, victims can participate as civil parties in criminal proceedings, i.e., as parties like the prosecutor and the defence. If the victim has undergone personal and direct damage under article 2 of the CPP,¹⁸⁰⁶ (s)he may

¹⁷⁹⁸ *United States v. Hunter*, 2008 WL 53125 (D. Utah 2008).

¹⁷⁹⁹ *In re Antrobus*, 519 F.3d 1123, 1225 (10th Cir. 2008) (Judge Tymkovich concurring).

¹⁸⁰⁰ As for the first category, see, e.g., California Constitution, article 1 § 28. As for the second category, see, e.g., Arizona Constitution, article 2 § 2.1; Massachusetts Statute, 258 B § 1; Oregon Revised Statutes, § 131.007. See also Beloof, Cassell and Twist (2010) 41-43.

¹⁸⁰¹ *Beck v. Commonwealth* 484 S.E.2d 898, 906 (Va. 1997), cert denied, 522 U.S. 1018.

¹⁸⁰² Wisconsin Statutes § 950.02(4)(a)(1).

¹⁸⁰³ See, e.g., Delaware Code, Title 11, § 9410 (5); Ohio Revised Code Annotated, § 2930. 01 (H), Utah Code Annotated, § 77-38-2 (9) (a).

¹⁸⁰⁴ Beloof, Cassell and Twist (2010) 68.

¹⁸⁰⁵ See respectively, *State v. Robinson*, 838 A.2d 243 (Conn. App. 2004); *State v. Cortes*, 851 A.2d 1230 (Conn. App. 2004).

¹⁸⁰⁶ ‘Civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanor or a petty offence is open to all those who have personally suffered damage directly caused by the offence’. (‘L’action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement

come at the criminal court as a *partie civile* (civil party), in cases concerning *crimes* (felonies),¹⁸⁰⁷ *délits* (misdemeanors),¹⁸⁰⁸ and *contraventions* (petty offences).¹⁸⁰⁹

There are two manners to become civil parties, either by joining in a prosecution already started, or by starting a new one.¹⁸¹⁰ Under the first manner, the victim may join the criminal proceedings (*par voie d'intervention*) and this is not subject to formalities.¹⁸¹¹ The victim may intervene before or during the court proceedings (*audience*). Additionally, the victim may become a civil party before the investigating judge as established in accordance to article 85 of the CPP 'Any person claiming to have suffered harm from a felony or misdemeanor may petition to become a civil party by filing a complaint with the competent investigating judge'.¹⁸¹² In this case, the admissibility of the civil action is subordinated to the prosecution's inaction.¹⁸¹³

During criminal proceedings, the victim may join the proceedings at any moment leading up to the close of argument, via a statement recorded at the clerk's office, by filing a submission with the court or verbally.¹⁸¹⁴ It is also possible to oneself apply for civil party constitution if the offender is sentenced by default.¹⁸¹⁵ Under the second manner to become civil party, the victim may bypass the public prosecutor's decision not to bring an action, either by complaining of a crime and becoming civil party before the most senior investigating judge, or by directly denouncing the offender before the *tribunal correctionnel* or the *tribunal de police* (via direct citation in *matière délictuelle*, as provided in articles 388 *et seq.* of the CPP). In any case, the victim is obligated to deposit a monetary sum in advance.¹⁸¹⁶ Victim's compensation depends on the accused's conviction. This rule and its exceptions are discussed later.¹⁸¹⁷ To avoid

causé par l'infraction'). As for case law of the Criminal Chamber of the *Cour de Cassation* see *inter alia* Crim., 4 April 2012, Arrêt n° 2066 (11-81.124).

¹⁸⁰⁷ See CPP, articles 85-87.

¹⁸⁰⁸ See *Ibid.*, articles 85-87 and 418.

¹⁸⁰⁹ See *Ibid.*, article 2.

¹⁸¹⁰ Dervieux (2002) 226.

¹⁸¹¹ CPP, article 3.

¹⁸¹² 'Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d'instruction compétent'. See also CPP, article 87.

¹⁸¹³ *Ibid.*, article 85.

¹⁸¹⁴ *Ibid.*, articles 419 and 420.

¹⁸¹⁵ *Ibid.*, articles 419 and 420.

¹⁸¹⁶ As for direct citation, see *Ibid.*, articles 392 and 533. As for constitution before the investigating judge, see *Ibid.*, article 88.

¹⁸¹⁷ See *infra* Chapter V 2.1.3.

abusive or dilatory civil party constitutions, some limitations have been introduced.¹⁸¹⁸ Thus, the civil party has to wait in *matière délictuelle* three months before (s)he can do it.¹⁸¹⁹

The two objectives for bringing a civil action/civil party constitution before a criminal court are to obtain a ruling on the accused's guilt and to obtain compensation for the damage suffered.¹⁸²⁰ Nevertheless, the Criminal Chamber of the *Cour de Cassation* has determined that the claim for damages is not a necessary condition to constitute civil parties.¹⁸²¹ Moreover, in interpreting and applying articles 418 and 2 of the CPP, the Criminal Chamber of the *Cour de Cassation* has also determined that once a victim has become a civil party, (s)he is free not to request reparations for his/her harm.¹⁸²² In any case, the Criminal Chamber of the *Cour de Cassation* has often established that although civil party constitution can have as a unique object to corroborate the public action, the conditions under article 2 of the CPP cannot be disregarded.¹⁸²³ Accordingly, the faculty to prompt the repression is only separated from the right to financial reparation in order to serve this right better.¹⁸²⁴ Therefore, neither the civil party constitution depends on a claim for damages nor does the civil action admissibility automatically mean that the respective damages will be awarded to the claimant.¹⁸²⁵ With regard to the non-dependence of the civil party constitution on claiming damages, the Criminal Chamber of the *Cour de Cassation* has established that the claim for damages is not a requirement to become civil parties.¹⁸²⁶ Also, the *Cour de Cassation*, interpreting and applying

¹⁸¹⁸ Law n° 2007-291, 5 March 2007 Concerning the Equality of Arms in the Criminal Procedure, *JO*, 6 March 2007. See also Sophie Corioland 'Statut de la Victime et Perspectives Législatives' in Strickler (2009) 125, 132.

¹⁸¹⁹ CPP, article 85.

¹⁸²⁰ See Dervieux (2002) 227.

¹⁸²¹ Crim., 10 October 1968, *Bull. crim.* n° 248; Crim., 15 October 1970, *Bull. crim.* n° 268; D., 1970, *jurisp.*, pp. 733-734, note J.-L. Costa; Crim., 8 June 1971, D., 1971, *jurisp.*, pp. 594-597, note J. Maury; R.T.D.Civ., 1971, pp. 884-885, obs. P. Hébraud; Crim., 7 October 1987, unpublished, appeal n° 86-93027. Cited by Pignoux (2008) 253.

¹⁸²² Crim., 26 October 1982, *Bull. crim.* n° 233. Cited by Pignoux (2008) 253.

¹⁸²³ Crim., 4 July 1990, unpublished, appeal/pourvoi n° 90-80372; Crim., 7 May 1996, unpublished, appeal n° 95-81384. Cited by Pignoux (2008) 262.

¹⁸²⁴ Pignoux (2008) 262.

¹⁸²⁵ *Ibid.*, 227. See also *infra* Chapter IV 2.1.3.

¹⁸²⁶ Crim., 10 October 1968, *Bull. crim.* n° 248; Crim., 15 October 1970, *Bull. crim.* n° 268; D., 1970, *jurisp.*, pp. 733-734, note J.-L. Costa; Crim., 8 June 1971, D., 1971, *jurisp.*, pp. 594-597, note J. Maury; R.T.D.Civ., 1971, pp. 884-885, obs. P. Hébraud; Crim., 7 October 1987, unpublished, appeal n° 86-93027. Cited by Pignoux (2008) 253.

some CPP provisions,¹⁸²⁷ has concluded that upon civil party constitution, it is up to him/her to request reparation for the harm inflicted.¹⁸²⁸

The Criminal Chamber of the *Cour de Cassation* has found that, in cases of civil party constitution before the investigating judge, its admissibility is not precluded by the fact that the damage has been compensated before the civil jurisdiction since civil party constitution can be motivated by the aim at corroborating the public action.¹⁸²⁹ However, in a decision that went against the rest of its case law, the Criminal Chamber, in a case before the *tribunal correctional*, determined the inadmissibility of civil party constitution for a victim previously compensated in the civil jurisdiction.¹⁸³⁰ Be that as it may, the admissibility of the civil action does not automatically imply that damages will be awarded to the victim.¹⁸³¹

At this point, it is important to make some precisions about two concepts that although directly related are autonomous: the civil action and civil party constitution. Concerning the nature of the civil action, the Criminal Chamber of the *Cour de Cassation* had never granted a criminal character to it.¹⁸³² It has stated that ‘the civil action exercised before the repressive jurisdiction has for only object the reparation of damages’.¹⁸³³ With regard to civil party constitution, the Chamber has affirmed that ‘the victim of the offence can be constituted as a civil party even when (s)he has for only object setting in motion the public action to determine the accused’s culpability’,¹⁸³⁴ or that ‘victim’s intervention may be only motivated by the desire to corroborate the public action and obtain the accused’s culpability’.¹⁸³⁵ The Chamber also affirmed that ‘the right to civil party constitution has for essential object to put in motion the public action to establish the culpability’ and ‘constitute a prerogative attached to

¹⁸²⁷ CPP, articles 2 and 418 (on civil party constitution).

¹⁸²⁸ Crim., 26 October 1982, *Bull. crim.* n° 233. Cited by Pignoux (2008) 253.

¹⁸²⁹ Crim., 30 October 2001, unreported, appeal n° 01-81530. Cited by Pignoux (2008) 263.

¹⁸³⁰ Crim., 17 June 1998, unreported, appeal n° 96-81099. Cited by Pignoux (2008) 261.

¹⁸³¹ Dervieux (2002) 237.

¹⁸³² Pignoux (2008) 269.

¹⁸³³ Crim., 5 December 1989, *Bull. crim.* n° 462. (‘l’action civile exercée devant la juridiction répressive a pour seul objet la réparation des dommages’.). Cited by Pignoux (2008) 269.

¹⁸³⁴ Crim., 18 July 1999, unreported, appeal n° 88-86594; Crim., 16 December 1980, *Bull. crim.* n° 348 (‘la constitution de partie civile de la victime de l’infraction est recevable, alors même qu’elle a pour seul objet la mise en mouvement de l’action publique en vue d’établir la culpabilité du prévenu’.). Cited by Pignoux (2008) 254.

¹⁸³⁵ See, e.g., Crim., 21 March 2000, *Bull. crim.* n° 123 (‘l’intervention de la victime peut n’être motivée que par le souci de corrober l’action publique et d’obtenir que soit établie la culpabilité du prévenu’.). Cited by Pignoux (2008) 254.

the person'.¹⁸³⁶ Even the determination of truth as a sole interest has been found admissible.¹⁸³⁷ Accordingly, civil party constitution should not be confused with civil action as such. In any case, there is doctrinal consensus of the double finality of the victim's action/civil party constitution, i.e., reparative and repressive.¹⁸³⁸ It should be noticed that the ECtHR has evolved concerning the applicability of article 6 (1) of the ECHR guarantees to civil parties. Unlike previous cases,¹⁸³⁹ in *Perez v. France*, the ECtHR did not require a financial reparation claim for the applicability of article 6 (1) as the mere civil party constitution should be enough to show 'the importance they [victims] attach not only to the criminal conviction of the offender but also to securing financial reparation for the damage sustained'.¹⁸⁴⁰

The Criminal Chamber of the *Cour de Cassation* has considered that the next of kin of the direct victim suffer a direct and personal harm caused by the crime and, accordingly, they can constitute themselves civil parties even if the direct victim is still alive.¹⁸⁴¹ Accordingly, the next of kin suffer a personal harm, understood as own harm distinct from direct victim's harm, and the next of kin undergo a direct harm out of the damaging fact suffered by the direct victim.¹⁸⁴² Losses and injuries may be material, moral or both, and the victim's right may be transferred to his/her heirs, assignees, creditors and also third parties.¹⁸⁴³ Due to his/her incapacity, the minor cannot apply him/herself for civil party constitution and, thus, his/her legal representatives should do it on his/her behalf.¹⁸⁴⁴ Certain associations, e.g., associations fighting against discrimination

¹⁸³⁶ Crim., 16 December 1980, *Bull. crim.* n° 348. ('le droit de se constituer partie civile a pour objet essentiel la mise en mouvement de l'action publique en vue d'établir la culpabilité [...] une prérogative attachée à la personne'). Cited by Pignoux (2008) 269.

¹⁸³⁷ Crim., 10 May 1984, *J.C.P.*, 1985, II, 20413, note C. Roca. Cited by Pignoux (2008) 254.

¹⁸³⁸ See Pignoux (2008) 265-269 (discussing the dual and unitary conceptions of civil action/civil party constitution).

¹⁸³⁹ See, e.g., ECtHR, *Tomasi v. France*, Appl. No. 12850/87, Judgment, 27 August 1992; ECtHR, *Acquaviva v. France*, Appl. No. 19248/91-19248/91, Judgment, 21 November 1995. For further discussion see Judith Levy-Amsellem, 'L'action Civile «à la Française» et la Convention EDH. Exercice d'un «Droit à la Vengeance Privée» ou Compensation Morale de la Souffrance Éprouvée?' in Strickler (2009) 135-156.

¹⁸⁴⁰ ECtHR, *Perez v. France*, Appl. No. 47287/99, Judgment, 12 February 2004, para. 64.

¹⁸⁴¹ Crim., 9 February 1989, arrêt Latil-Janet, *D.*, 1989, somm. comm., p. 389, note J. Pradel; Crim., 23 May 1991, *Bull. crim.* n° 220; *D.*, 1992, somm. comm., p. 95, note J. Pradel; Crim., 11 July 1994, *Bull. crim.* n° 269; *J.C.P.*, 1995, II, 22441, note F. Eudier. Cited by Pignoux (2008) 250-251.

¹⁸⁴² Pignoux (2008) 250-251.

¹⁸⁴³ Brienens and Hoegen (2000) 319.

¹⁸⁴⁴ Pignoux (2008) 244.

or sexual abuse, may join the criminal proceedings as a civil party, if established by law.¹⁸⁴⁵

2.2. The ICTY, the ICTR and the SCSL

2.2.1. Preliminary Considerations

At the ICTY, the ICTR and the SCSL, victims lack the status of victim participants or civil parties as already said. Thus, victims' status at the ICTY, the ICTR and the SCSL is limited to that of being witnesses. Nevertheless, when the ICTY Statute was being discussed, there was a proposal to allow the appointment of a separate counsel for victims that would be 'similar to the concept of *partie civile* employed in many civil law countries'.¹⁸⁴⁶ However, this was later rejected mainly by United States delegates due to a large extent the fear that third-party participation would cause conflicts with the Prosecution's case and since victims' interests were considered to be represented adequately by the Prosecutor.¹⁸⁴⁷ Accordingly, the reasons for limiting victims' status to almost exclusively the role of witnesses in the ICTY, the ICTR and the SCSL and, thus, to deny them a civil party or victim participant status were basically four.

First, the mandate given to these tribunals, i.e., more concerned to punish criminal acts perpetrated in the respective countries rather than to satisfy the victims' personal interests. Thus, for example, Security Council Resolution 827 (1993) stated the ICTY was established 'for the sole purpose of prosecuting persons responsible for serious violations of international law [...]'.¹⁸⁴⁸ Second, the adversarial structure of these international criminal proceedings is also a factor for having limited victims' status at the ICTY, the ICTR and the SCSL mainly to that of witnesses. Third, since the Prosecutor is entrusted to protect the interests of the international community, it is assumed that 'victims' interests would be co-extensive with those of the international community and would be adequately protected by the Prosecutor'.¹⁸⁴⁹ Fourth, victims' role as a sort of third

¹⁸⁴⁵ CPP, article 2 (1)-(21).

¹⁸⁴⁶ Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I (Transnational Publishers 1995) 167.

¹⁸⁴⁷ *Ibid.*, Loc. cit.

¹⁸⁴⁸ UN Doc. S/RES/827 (1993). However, this resolution also stated that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.

¹⁸⁴⁹ Morris and Scharf (1995) 167.

parties was considered to eventually interfere in the Prosecutor's case and lead to delay in the proceedings.¹⁸⁵⁰

Nevertheless, it is herein taken issue with the assertion or assumption related to the necessary coincidence between victims' interests and Prosecutor's interests. This is illustrated by cases at the ICTY, the ICTR and the SCSL where, for example, there was available evidence of the accused's responsibility for sexual crimes but corresponding charges were absent,¹⁸⁵¹ when the Prosecutor did not file appeals for rape acquittals,¹⁸⁵² or when a rape count was dropped in exchange for a guilty plea on the other counts.¹⁸⁵³ These cases demonstrate that the Prosecutor may consider other understandable and/or legitimate interests and priorities over the also legitimate interests of the victims. The argument about delay in the proceedings if the victims were granted a role beyond their mere participation as witnesses is contradicted by practice of civil law countries where there is no important delays caused by civil party status.¹⁸⁵⁴ Moreover, victim participation can contribute to establish the truth and make the proceedings more transparent and without disrupting the tranquility of proceedings.¹⁸⁵⁵

Therefore, the exclusive focus on the Prosecution's interest and the disregard for victims' interests can be qualified as a very narrow approach.¹⁸⁵⁶ Even though the former ICTY/ICTR Prosecutor Carla del Ponte put forward the issues of victim participation and compensation before the Security Council in November 2000, inviting any change in the legal instruments of the tribunals,¹⁸⁵⁷

¹⁸⁵⁰ Ibid., Loc. cit.

¹⁸⁵¹ E.g., in *Butare* (Kanyabashi, Ndayambaje, Ntzeriyayo and Nsabimana). See Coalition for Women's Human Rights in Conflict Situations, Rights and Democracy, and International Centre for Human Rights and Democratic Development, Letter to Carla del Ponte (12 March 2003).

¹⁸⁵² For example, in *Kajelijeli* and *Kamuhanda* at the ICTR.

¹⁸⁵³ Serushago (ICTR-98-39-S), Sentence, Trial Chamber, 5 February 1999, para. 4; Banović (IT-02-65/1-S), Sentencing Judgment, Trial Chamber, 28 October 2003, paras. 9-19.

¹⁸⁵⁴ See, in general, Brienen and Hoegen (2000).

¹⁸⁵⁵ Brouwer (2005) 286.

¹⁸⁵⁶ See, e.g., David Donat-Cattin, 'Article 68' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Nomos 1999a) 869-888; Brouwer (2005) 286.

¹⁸⁵⁷ Prosecutor Del Ponte stated that 'Nor should we forget the role of victims in the justice process. The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. And those remarks apply equally to the Yugoslav Tribunal, where the position of victims is no better, and where the accused have also amassed personal fortunes at the expense of their country and its citizens [...] I would therefore respectfully suggest to the Council that present system falls short of delivering justice to the people of Rwanda and the

no amendment has been introduced. Despite all these constraints, there are some forms of ‘participation’ of victims, such as submission of *amicus curiae* briefs (in the trial proceedings) and victims’ impact statements for sentencing purposes, discussed later in this chapter.

2.2.2. Definition of ‘Victims’

Rule 2 (A) of the ICTY RPE and the ICTR RPE defines ‘victim’ as ‘A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed’. Rule 2 (A) of the SCSL RPE definition is quite similar as it establishes that ‘A person against whom a crime over which the Special Court has jurisdiction has allegedly or has been found to have been committed’. The ICTY, the ICTR and the SCSL RPE definition of victims is ‘strictly limited to “direct victims”’,¹⁸⁵⁸ excluding dependants of the victims and their relatives. This definition is more limited than the one in the UN Victims Declaration, which in spite of its non-binding nature has been considered as a kind of international standard definition since it was adopted unanimously by all States Members of the UN.¹⁸⁵⁹ That definition is also more limited than those contained in international and regional instruments on victims previously referred to.¹⁸⁶⁰ Moreover, at the ICTY, the ICTR and the SCSL RPE victim definitions seemingly only recognize a victim from the moment the accused’s guilt has been established and not since (s)he reported it.¹⁸⁶¹ The ICTY and the ICTR RPE definition (also applicable to the SCSL) has indeed been considered as ‘insufficient by many observers and has generated interesting criticism about the ad hoc tribunals’ procedure by experts and non-governmental organisations, especially those based in the so-called civil law countries’.¹⁸⁶²

Furthermore, although the ICTY, the ICTR and the SCSL RPE have been amended several times by frequently adopting civil society’s suggestions, the definition of ‘victim’ has remained unchanged. An important reason for such

former Yugoslavia, and I would give you to give serious and urgent consideration to any change that would remove this lacuna in our process’. ICTY Press Release, Address to the Security Council by Carla del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, to the UN Security Council, JL/P.I.S./542-E, The Hague, 24 November 2000.

¹⁸⁵⁸ David Donat-Cattin, ‘The Role of Victims in ICC Proceedings’ in Flavia Lattanzi and William Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (II Sirente 1999c) 251, 260.

¹⁸⁵⁹ Donat-Cattin (1999a) 884; Heikkilä (2004) 16.

¹⁸⁶⁰ See supra Chapter II 2.1.7.

¹⁸⁶¹ It should be, however, mentioned that article 2 (25) of the IACtHR’s Rules of Procedure uses the expression ‘alleged victim’.

¹⁸⁶² Donat-Cattin (1999c) 260-261.

judges' inaction may consist in the lack of victim participant status at these tribunals and, hence, a lack of practical relevance for amending the definition of victim. This reflects the predominant focus of these tribunals on retributive justice.¹⁸⁶³

2.3. The ICC

2.3.1. General Considerations

In spite of the major and distinctive role assigned to victims at the ICC, as victim participants, a definition of victims was not specifically discussed during the ICC Statute elaboration.¹⁸⁶⁴ However, during the negotiation and drafting of the ICC RPE, discussions about definition of victims took place. Victim definition was in particular discussed in the so-called Paris Seminar which, in contrast to the UN Victims Declaration, considered organizations as potential victims and did not enumerate the included indirect victims.¹⁸⁶⁵ During the Preparatory Commission Sessions in 2000, the vast majority of delegations supported in principle a broad definition based on the UN Victims Declaration,¹⁸⁶⁶ which had been on the table of negotiations for years. Nevertheless, this definition did not pass the test of debates as raised many difficulties to agree on terms including 'collectively', 'emotional suffering', and 'family'.¹⁸⁶⁷ A group of Arab States brought a simple and straightforward definition that mostly eliminated the sources of conflict.¹⁸⁶⁸ This proposal would later lead to the current definition of 'victims' under rule 85 of the ICC RPE, which reads as follows:

- (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

¹⁸⁶³ See Brouwer and Groenhuijsen (2009) 156.

¹⁸⁶⁴ Silvia Fernández de Gurmendi, 'Definition of Victims and General Principle' in Lee (2001b) 427, 428. However, already at the Preparatory Committee attention was drawn to the UN Victim Declaration. See 1996 Report of the Preparatory Committee, Vol. I, at 59.

¹⁸⁶⁵ Paris Draft Rule X (Workshop 1), in UN Doc. PCNICC/1999/WGRPE/INF/2, p. 3.

¹⁸⁶⁶ The respective proposal was reproduced as Rule Q in the Mont Tremblant Document, at 74. See Fernández de Gurmendi (2001b) 430.

¹⁸⁶⁷ *Ibid.*, 432.

¹⁸⁶⁸ PCNICC/2000/WGRPE(2)/DP.4 (13 June 2000).

Unlike the Paris definition, rule 85 definition does not differentiate between individual and collective victims, nor between direct and indirect victims. Nevertheless, as it is not required that victims are the direct targets, it can also include indirect victims.¹⁸⁶⁹ At a more general level, the ICC definition of victims is coherent with international law under which, as observed by Salmón Gárate, the notion of victim is not subject to discriminatory restrictions or special personal characteristics.¹⁸⁷⁰ Rule 85 like the Paris definition considers also organizations or institutions as victims. Moreover, the ICC definition of victims is broader than that provided under the ICTY, the ICTR and the SCSL RPE on three grounds. First, whereas the latter limits 'victim' definition to direct victims, the former includes all those who have suffered harm, i.e., immediate family members or dependants of those who suffered harm may be included. Second, the ICC definition includes not only natural persons but also certain organizations and institutions. As for the latter, in order to be granted victim participant status, they have to meet the rule 85 (b) criteria, i.e., demonstrate that direct harm was inflicted to their property and that such property was dedicated to any of the listed purposes. Thus, in the DRC situation, a headmaster of a school was accepted to act on behalf of the school and the school was granted the victim participant status.¹⁸⁷¹ Moreover, Trial Chamber I in *Lubanga* determined that he could participate in the proceedings on his own behalf and on behalf of the school,¹⁸⁷² and indeed he was authorized to testify before the Chamber.¹⁸⁷³ In the next sub-section, the requirements under rule 85 (a) concerning natural persons are discussed in detail as this category constitutes by far and almost by definition the most numerous, indeed virtually exclusive, component of victims at the ICC. Third, the ICC definition recognizes a victim as such from the moment (s)he reports the crime unlike the ICTY, the ICTR and the SCSL.

Accordingly, the ICC victim definition under rule 85 provides a sound and comprehensive option in order to protect victims' interests in or rights to,

¹⁸⁶⁹ See Birte Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence' in Fischer, Kreß and Lüder (2001) 289, 303-304.

¹⁸⁷⁰ Elizabeth Salmón Gárate, 'La Sentencia del Penal Castro Castro de la Corte Interamericana de Derechos Humanos y sus Aparentes Efectos Controversiales en el Ordenamiento Jurídico Peruano' in Edgar Carpio and Camilo Suárez (eds.), *El Estado Contra los Derechos. Pena de Muerte, Violencia de Género y Autoamnistía* (Palestra 2007b) 13, 30-31.

¹⁸⁷¹ Situation in DRC (ICC-01/04-423-Corr-tENG, 31 January 2008, paras. 139-143. See also McGonigle Leyh (2011) 242.

¹⁸⁷² *Lubanga* (ICC-01/04-01/06-1556), Decision on the Applications by Victims to Participate in the Proceedings, Trial Chamber I, 15 December 2008, paras. 105-111.

¹⁸⁷³ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 21.

inter alia, participate in the proceedings, be informed of their rights and opportunities, and seek reparations. It is important to mention herein that participatory rights are contained under several provisions of the ICC Statute and the ICC RPE, which allow the identification of two participation schemes.¹⁸⁷⁴ These schemes and the respective modalities of participation, which are discussed in detail later,¹⁸⁷⁵ can be summarized as follows. First, submission of ‘representations’ by victims as part of the authorization of investigations initiated by the Prosecutor *ex proprio motu* (article 15 (3) of the ICC Statute) and submission of ‘observations’ (article 19 (3) of the ICC Statute) in the proceedings related to challenges to the jurisdiction of the ICC or the admissibility of a case. It is not necessary a formal application for this kind of participation,¹⁸⁷⁶ i.e., it is not required to apply for the official or formal victim participant status. However, it is necessary to fulfill the victim definition under rule 85.¹⁸⁷⁷ Second, a more complex participation scheme, under article 68 (3) of the ICC Statute and rules 89 *et seq.* Article 68 (3) of the ICC Statute constitutes the legal ground for victim participation *sensu stricto*,¹⁸⁷⁸ or article 68 (3) victim participation.¹⁸⁷⁹ Article 68 (3) reads as follows:

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

As said, this scheme constitutes *sensu stricto* the participation regime under the ICC legal instruments and is triggered by individuals who apply to become victim participants. In order to hold the victim participant status and

¹⁸⁷⁴ See Brouwer and Groenhuijsen (2009) 158; Baumgartner (2008) 412-413.

¹⁸⁷⁵ See *infra* Chapter IV 3.3, 4.3 and other sub-sections dealing with the ICC in this chapter.

¹⁸⁷⁶ See Baumgartner (2008) 413.

¹⁸⁷⁷ See Situation in the Republic of Côte d’Ivoire (ICC-01/11-9), Decision on the VPRS Request for an Extension of Time to Report on Victims’ Representations Pursuant to Regulation 35 of the Regulations of the Court, Pre-Trial Chamber III, 28 July 2011.

¹⁸⁷⁸ See Baumgartner (2008) 413.

¹⁸⁷⁹ See Sergey Vasiliev, ‘Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC’ in Sluiter and Stahn (2009) 635, 688; Christoph Safferling, *International Criminal Procedure* (Oxford University Press 2012) 310; Brouwer and Heikkilä (2013) 1314, 1316, 1324 and 1330.

participate as such, under the participation regime *sensu stricto*, applicants shall meet the respective requirements laid down under rule 85 (victim definition) and article 68 (3) as discussed in the next subsection. What should be remarked now is, as highlighted by Schabas, that when the ICC Statute was being drafted, 'few could have imagined the importance that [article 68 (3)] [...] would have upon the proceedings at the Court'.¹⁸⁸⁰

It should be again noted that references to victim participant status in this thesis and, in particular, in this chapter, concern individuals who upon application are granted the victim participant status, i.e., what it may be called an 'official' or 'formal' victim participant status, unless otherwise indicated.¹⁸⁸¹ The legal regime of a victim as a participant generally speaking means for the victim participants the following: i) their participation is voluntary; ii) they can communicate to the ICC their own interests and concerns; iii) they decide what they desire to say; iv) their participation is feasible at all proceedings stages when considered appropriate by the Judges; v) they are always entitled to be represented at the ICC by a legal representative; and vi) they normally participate via a legal representative, and they do not need to appear in person.¹⁸⁸² As examined in the previous chapter, it is also important to remember that, according to the ICC's case law, expressing views and concerns (victims as victim participants) is different from 'giving evidence' (victims as witnesses).¹⁸⁸³

2.3.2. Requirements to Become and Participate as Victim Participants

2.3.2.1. Applying for the Victim Participant Status

Under rule 89 (1), victims must apply in writing to participate in the proceedings, i.e., for leave to present their 'views and concerns' according to the following proceeding:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. 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

¹⁸⁸⁰ Schabas (2010) 827.

¹⁸⁸¹ In the Kenyan trials, under the Trial Chamber V's approach, victims can be granted the 'official' victim participant status via registration. This registration option is applicable if the victims only want to participate via their legal representatives, i.e., not appearing directly before the Chamber. For a critical discussion on this option, see *infra* Chapter IV 2.3.2.1.

¹⁸⁸² ICC (2006) 10; Funk (2010) 103.

¹⁸⁸³ See, e.g., Lubanga (ICC-01/04-01/06-2032-Anx), 26 June 2009, para. 19; Bemba (ICC-01/05-01/08-2138), 22 February 2012, para. 19.

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, which may include making opening and closing statements.

The rejection of the application is regulated under rule 89 (2):

The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

In any case, victim participants cannot initiate proceedings against the accused. The time invested by the ICC to process the applications for victim participation has raised concerns. Indeed, whereas the Trial Chamber in *Bemba* set the period prior to the beginning of trial as a deadline for applications, the Trial Chamber in *Lubanga* set the deadline after the start of the trial.¹⁸⁸⁴ Since the ICC Statute/RPE keep silence on standards of review of applications, the Chambers have exercised broad discretion. Thus, whereas Pre-Trial Chamber I in the DRC situation applied the ‘grounds to believe’ standard to review applications,¹⁸⁸⁵ Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo* applied a ‘intrinsic coherence’ test,¹⁸⁸⁶ accepting that ‘indirect proof (i.e., inferences of fact and circumstantial evidence) is admissible’ provided that the applicant can show how (s)he was impeded from finding direct proof for his/her claim.¹⁸⁸⁷

The Appeal and Trial Chambers adopted similar approaches and carried out only *prima facie* assessments.¹⁸⁸⁸ It should be mentioned that a decision to grant victim participant status during pre-trial continues to apply during trial, i.e., the victim is not requested to reapply provided that (s)he wishes to

¹⁸⁸⁴ McGonigle Leyh (2011) 243.

¹⁸⁸⁵ Pre-Trial Chamber I considered that the ‘grounds to believe’ standard of article 55 (2) related to the persons’ rights during an investigation represents a less demanding standard, which is appropriate to examine the victim applications for the investigation stage of a situation. Situation in the DRC (ICC-01/04-101-tEn-Corr), 17 January 2006, paras. 99-100.

¹⁸⁸⁶ Situation in Uganda (ICC-02/04-101), 10 August 2007, para. 14.

¹⁸⁸⁷ *Ibid.*, para. 15. See also McGonigle Leyh (2011) 256.

¹⁸⁸⁸ *Katanga and Ngudjolo* (ICC-01/04-01/07-1491-Red), Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, Trial Chamber II, 23 September 2009, para. 32; *Lubanga* (ICC-01/04-01/06-2659-Corr-Red), 8 February 2011, para. 29.

participate in all the proceedings stages.¹⁸⁸⁹ Nevertheless, since at pre-trial just a preliminary assessment is conducted, Trial Chambers have followed different approaches. Thus, whereas Trial Chamber I in *Lubanga* reassessed the applications,¹⁸⁹⁰ Trial Chambers II, III and IV did not review them unless requested by the parties based on new material or information,¹⁸⁹¹ which is quite time-consuming for the parties.¹⁸⁹² Under either approach, victims' applications must go through up to a four-tiered review process, depending on the stage of proceedings when the application was first examined.¹⁸⁹³

Although there is no explicit provision about what evidentiary standard should be used when assessing the victims' applications, the ICC has evaluated them under a *prima facie* review standard as mentioned. The victim participant status is neither automatic nor unconditional. The lower standard of proof, i.e., *prima facie*, in contrast to a more demanding standard, e.g., 'beyond reasonable doubt', corresponds to the situation at that stage when it is not yet clear whether the crimes have actually been committed by the defendant. No final determination could have been conducted as this would have violated the principle of presumption of innocence (article 66 of the ICC Statute).¹⁸⁹⁴ Trial Chamber I noticed that it would be untenable to conduct a substantive assessment of reliability of a victim's application before the beginning of the trial.¹⁸⁹⁵ Nevertheless, as soon as a Chamber notices that its *prima facie*

¹⁸⁸⁹ ICC Regulations of the Court, regulation 86 (8). Nevertheless, a Chamber can modify a previous ruling under rule 91 (1).

¹⁸⁹⁰ See, e.g., *Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, paras. 54-59.

¹⁸⁹¹ *Bemba* (ICC-01/05-01/08-699), 22 February 2010, paras. 17-18; *Katanga and Ngudjolo* (ICC-01/04-01/07-933-tEng), Decision on the Treatment of Applications for Participation, Trial Chamber II, 26 February 2009, paras. 10-11; *Banda and Jarbo* (ICC-02/05-03/09-231), Decision on the Registry Report on Six Applications to Participate in the Proceedings, Trial Chamber IV, 17 October 2011, paras. 15-16 (establishing that the Pre-Trial Chamber's analysis remains valid in principle and does not need to be revisited at subsequent stages of the proceedings, unless: i) a victim concerned was authorized to participate uniquely on the basis of the commission of a crime corresponding to a charge not confirmed; or ii) new information has emerged.).

¹⁸⁹² McGonigle Leyh (2011) 257.

¹⁸⁹³ Thus, victims in a situation, e.g., the DRC situation, could have their applications reviewed by the Pre-Trial Chamber in the context of this situation. Then, the Pre-Trial Chamber can review their application in the case context. Following to the confirmation of charges, and considering the Trial Chamber's approach, they could have their application reviewed once again. See McGonigle Leyh (2011) 257.

¹⁸⁹⁴ *Lubanga* (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, Trial Chamber I, 26 February 2008, para. 24.

¹⁸⁹⁵ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para. 99.

evaluation is not correct, it withdraws the individual's right to participate as Trial Chamber I did in *Lubanga*.¹⁸⁹⁶ Such procedure reaches a balance between unduly restricting victims' admission and the defence interest not to be confronted with 'false' victims.¹⁸⁹⁷ However, the practical application of this approach whereby inconsistencies of dual victim participants-victim witnesses' evidence led to stripping them off from their status as victim participants may be criticized as a disproportional decision as previously discussed.¹⁸⁹⁸

Victims' participation application procedure has demanded an important amount of time and resources from the ICC, parties and the victims. Completing application forms, still complicated for the victims, and the observations on the applications filed by the Prosecution and defence and then considered by the Chamber underlie this situation, as evidenced in *Lubanga*.¹⁸⁹⁹ Moreover, this problematic context can be exacerbated in cases presenting a much higher number of applicants, e.g., in *Bemba* at which victim participant status was granted to more than 4000 applicants. Furthermore, since victims are afraid of being identified publicly, almost in all cases they ask for redaction of identifying information, i.e., their names and any passage that may lead to their identification is blackened,¹⁹⁰⁰ which has to be in principle checked by the competent Chamber. As warned by the ICC Judge Van den Wyngaert, the ICC 'may soon reach the point where [the] individual case-by-case approach becomes unsustainable'.¹⁹⁰¹ In order to make the application procedure more efficient, Pre-Trial Chamber I (Single Judge) in *Gbagbo*, then followed by Pre-Trial Chamber II (Single Judge), have introduced collective application forms, i.e., victims can apply collectively, and individual victims can provide their consent for a third person to make a joint single application for all of them, but the victim participation is individual provided that they meet the requirements.¹⁹⁰² In *Ntaganda*, Pre-Trial Chamber II, upon consultation with the

¹⁸⁹⁶ *Lubanga* (ICC-01/04-01/06-2482), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 484.

¹⁸⁹⁷ *Ambos* (2012) 118.

¹⁸⁹⁸ See *supra* Chapter III 2.3.2.2.

¹⁸⁹⁹ See Lucia Catani, 'Victims at the International Criminal Court. Some Lessons Learned from the *Lubanga* Case' (2012) 10 *Journal of International Criminal Justice* 905, 917-918.

¹⁹⁰⁰ See for further details *supra* Chapter III 3.3.1.2.

¹⁹⁰¹ Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475, 483.

¹⁹⁰² *Gbagbo* (ICC-02/11-01/11-86), Second Decision on Issues Related to the Victims' Application Process, Pre-Trial Chamber I (Single Judge), 5 April 2012, paras. 27, 34 and 35; *Gbagbo* (ICC-02/11-01/11-138), Decision on Victims' Participation and Victims' Common Legal Representation

Registry, which included a review of the lessons learnt in *Gbagbo*,¹⁹⁰³ did not follow a collective approach but instead ordered a simplified victim application process with a one-page application form, for the VPRS to implement.¹⁹⁰⁴

Additional actions to speed up the application process may include: i) the VPRS staff members should in the field assist victims when filing the application forms and if there is reliance on intermediaries, it is necessary to control them to avoid that intermediaries manipulate victims and witnesses, i.e., giving false testimony, as severely criticized by Trial Chamber I in the judgment in *Lubanga*,¹⁹⁰⁵ ii) unlike Trial Chamber I in *Lubanga*, which allowed applications until the end of the presentation of evidence, other Chambers' approaches to set the deadline for it at the time before the beginning of hearings or after the commencement of trial should be followed,¹⁹⁰⁶ and iii) not to permit parties to file submissions on every application, as established under rule 89, but only to hear them on pertinent legal issues relating to their admission although this has the drawback of depriving the Chamber from parties' input when the Chamber has to decide on the applications.¹⁹⁰⁷

It must be mentioned that Trial Chamber V, in the two Kenya-related cases, i.e., *Ruto and Sang* and *Muthaura and Kenyatta*, issued two identical decisions setting a new application procedure for victims who want to participate in the respective trials of these cases and which departs significantly from the previous ICC practice in an attempt to make the process simpler. The Chamber distinguished two categories of victims. First, victims who wish to

at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber I (Single Judge), 4 June 2012, para. 4; *Gbagbo* (ICC-02/11-01/11-33), Decision on Issues Related to the Victim's Application Process, Pre-Trial Chamber I (Single Judge), 6 February 2012, paras. 7-8; Situation in Uganda (ICC-02/04-191), Decision on Victims' Participation in Proceedings Related to the Situation in Uganda, Pre-Trial Chamber II (Single Judge), 9 March 2012.

¹⁹⁰³ Although the Registry mentioned some benefits from the *Gbagbo* collective application approach such as improvement in victims' well-being and in the application process, the Registry did not advise its application in *Ntaganda* as, *inter alia*, in some cases it may not be feasible/advisable to physically bring together victims groups for the application process because of victims' discomfort or security concerns. See *Ntaganda* (ICC-01/04-02/06-54), Observations in Compliance with the Decision ICC-01/04-02/06-54-Conf, Registry, 6 May 2013, paras. 7-10.

¹⁹⁰⁴ See *Ntaganda* (ICC-01/04-02/06-67), Decision Establishing Principles on the Victims' Application Process, Pre-Trial Chamber II, 28 May 2013.

¹⁹⁰⁵ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 482-483.

¹⁹⁰⁶ Whereas in *Katanga and Ngudjolo* the deadline for victims to submit their applications was set before the commencement of the trial, in *Bemba* the deadline was set to be during the presentation of evidence by the Prosecutor.

¹⁹⁰⁷ Catani (2012) 919.

appear directly before the Chamber, in person or via video-link, to present their views and concerns need to follow the procedure under rule 89,¹⁹⁰⁸ i.e., application individually assessed by the Chamber and subject to parties' observations, as previously quoted and explained. Second, victims who wish to participate under the common legal representation system, i.e., to express their views and concerns through a legal representative, can register with the Registry via a less detailed process by sending their personal data and this registration is not subject to the Chamber's individual assessment or the parties' observations.¹⁹⁰⁹ Moreover, unregistered (or unidentified) victims shall 'nevertheless be voiced, in a general way, through common legal representation'.¹⁹¹⁰

This mechanism is only applicable to the trial proceedings in the two above-mentioned Kenyan cases. Whether or not some other Chamber would decide to adopt those proceedings remains to be seen. What must be mentioned is that, according to rule 89, victim participant status is granted upon application judicially assessed, as applied in ICC's consistent practice, and not based on mere 'registration' as suggested by Trial Chamber V. Furthermore, article 68 (3) of the ICC Statute refers to the RPE procedure.¹⁹¹¹ Therefore, the proceedings to become victim participants and the categories of victims detailed by Trial Chamber V are not foreseen under the ICC legal framework and do not correspond to the ICC's consolidated practice. Considerations concerning the victims' interests (due to, *inter alia*, security concerns), the large number of victims, efficient proceedings, the accused's rights, and a fair and impartial trial

¹⁹⁰⁸ Ruto and Sang (ICC-01/09-01/11-460), Decision on Victims' Representation and Participation, Trial Chamber V, 3 October 2012, paras. 25, 56-58; Muthaura and Kenyatta (ICC-01/09-02/11-498), Decision on Victims' Representation and Participations, Trial Chamber V, 3 October 2012, paras. 24, 55-57.

¹⁹⁰⁹ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 25, 48-50; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras. 24, 47-49.

¹⁹¹⁰ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 52; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 51.

¹⁹¹¹ See also Tatiana Batchvarova, 'Comment on the Victims Decision of Trial Chamber V' in William Schabas, PhD Studies in Human Rights Blog (15 October 2012). Available at: <http://humanrightsdoctorate.blogspot.fi/search?updated-max=2012-10-28T07:47:00Z&max-results=10&start=30&by-date=false> (last visit on 20 October 2012).

In justifying its decision, Trial Chamber V stated that 'in conducting its analysis of the Rules, and Rule 89(1) in particular, the Chamber has placed primary importance on the letter as well as the object and purpose of Article 68(3) of the Statute [...] [and it] will apply Rule 89(1) of the Rules in the manner that it considers to be most consistent with the norms indicated in Article 68(3) of the Statute'. Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 22; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 21.

were taken into account by the Chamber to make the application procedure 'simpler'.¹⁹¹² However, these considerations also existent in the other ICC cases have not led the other Chambers to adopt similar steps which arguably go beyond what is laid down in the ICC instruments. Moreover, the practical benefits aimed by Trial Chamber V by implementing these too 'creative' application proceedings remain to be fully seen and they may be even counter-productive,¹⁹¹³ although victims have seemingly and so far expressed their general satisfaction with the registration alternative.¹⁹¹⁴ In any case, Trial Chamber V made it explicit that the principles contained in their two identical decisions are not applicable to reparations proceedings.¹⁹¹⁵

2.3.2.2. Analysis of the Requirements

Under this sub-section, it will be analyzed the requirements or eligibility conditions to be granted the victim participant status, which corresponds to the definition of (natural person) victims under rule 85 (a): '[...] natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. This is examined under requirements i)-iv) below. Then, it is examined the requirements to determine whether victim participants should be allowed to participate, when and how. This corresponds to article 68 (3):

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.

¹⁹¹² Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 23-24, 30-38; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras. 22-23, 29-37.

¹⁹¹³ See also Batchvarova (2012).

¹⁹¹⁴ Ruto and Sang (ICC-01/09-01/11-566-Anx), Periodic Report on the General Situation of Victims in The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative, Registry, 23 January 2013, para. 11. The VPRS has been in regular contact with victim communities in both Kenyan cases and in 2013 filed five reports to the Chamber concerning victims' general situation. See, e.g., Ruto and Sang (ICC-01/09-01/11-980-AnxA), Fifth Period Report on the General Situation of Victims in the Case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang and the Activities of the VPRS and the Common Legal Representative in the Field, VPRS, 24 September 2013. See also ICC, Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims, ICC-ASP/12/41, 11 October 2013, para. 31.

¹⁹¹⁵ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 2; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 2.

Article 68 (3) conditions are examined under requirement v) below in this sub-section. It must be noticed that only after the applicant has been granted the victim participant status (requirements i)-iv) below)), the assessment of whether the victim participants' personal interests are affected (requirement v) below) is conducted in order to decide whether the victim participants can participate, during which stages and under what modalities. This has been the consistent practice at the ICC in conformity with the ICC legal instruments.¹⁹¹⁶

i) *The Applicant must be a Natural Person and Prove his/her Identity.* As for natural person, rule 89 (3) states the possibility for a victim who is a child or disabled to have his/her application made by a person acting with his/her consent on his/her behalf. Trial Chamber I in *Lubanga* determined that the person acting on behalf of someone else does not necessarily have to be his/her relative or legal guardian since rule 89 (3) does not include such restriction.¹⁹¹⁷ Nevertheless, the Chamber retains the right to disallow participation under rule 89 (3) if it is determined, on a case-by-case analysis, the unsuitability of the arrangement for participation.¹⁹¹⁸ Whereas Pre-Trial Chamber I (Single Judge) in *Lubanga* has not allowed minors to apply on their own behalf,¹⁹¹⁹ Trial Chamber I in *Lubanga*, and also Trial Chamber II in *Katanga and Ngudjolo Chui*, allowed it 'depending always on their individual circumstances (viz. the age and the apparent maturity of the child) and the interests of justice overall'.¹⁹²⁰ In *Ruto et al.*, Pre-Trial Chamber III, in application of rule 89 (3), in case of a child or a disabled person, reminded that the application can be brought by a person acting on the applicant's behalf and the identity of and link between both must be proven.¹⁹²¹

¹⁹¹⁶ See McGonigle Leyh (2011) 257-258. See also Batchvarova (2012); Brouwer and Heikkilä (2013) 1301-1302. However, an exception has come from Trial Chamber V that mistakenly considered article 68 (3) requirements as somehow, to some extent, pre-conditioning the granting of the victim participant status. See *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, paras. 8-21; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, paras 9-22.

¹⁹¹⁷ *Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, para. 67.

¹⁹¹⁸ *Ibid.*, para. 72.

¹⁹¹⁹ *Situation in the DRC* (ICC-01/04-545), Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/204/06 to a/208/06, a/210/06 to a/213/06, a/215/06 to a/218/06, a/219/06, a/223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, Pre-Trial Chamber I (Single Judge), 4 November 2008, para. 33.

¹⁹²⁰ *Lubanga* (ICC-01/04-01/06-1556), 15 December 2008, paras. 94, 96. See also *Katanga and Ngudjolo* (ICC-01/04-01/07-1491-Red), 23 September 2009, para. 98. See also McGonigle Leyh (2011) 251.

¹⁹²¹ *Ruto et al.* (ICC-01/09-01/11-249), Decision on Victims' Participation at the Confirmation of Charges and in the Related Proceedings, Pre-Trial Chamber II, 5 August 2011, para. 43.

Concerning proof of identity, there was some disagreement among the ICC Chambers. Thus, whereas Pre-Trial Chamber II (Single Judge) in the Ugandan situation required victims to produce documents very difficult to obtain in the context of ongoing armed conflict and lack of security,¹⁹²² Pre-Trial Chamber I (Single Judge) considered a much broader list of documents, at the investigation stage, as proof of identity.¹⁹²³ However, bearing in mind the above-mentioned difficulty, Pre-Trial Chamber II (Single Judge) in *Kony et. al* reconsidered his decision and became more flexible to accept documents to prove identity.¹⁹²⁴ On the other hand, Trial Chamber I has pointed out that in establishing the proof of identity for a victim applicant, it will ‘seek to achieve a balance between the need to establish an applicant’s identity with certainty, on the one hand, and the applicant’s personal circumstances, on the other’.¹⁹²⁵ The list of documents accepted as proof of identity by Trial Chamber I, is similar to Pre-Trial Chamber I’s,¹⁹²⁶ including official, non-official and other documents,¹⁹²⁷ which has been also the case of other Trial Chambers,¹⁹²⁸ and of

¹⁹²² Situation in Uganda (ICC-02/04-101), 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, Pre-Trial Chamber II (Single Judge), 10 August 2007, para. 16. See also McGonigle Leyh (2011) 244.

¹⁹²³ Situation in the DRC (ICC-01/04-423-Corr-tENG), Corrigendum to the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by 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 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/209/06, a/0214/06, a/0220/06 to a/022/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, Pre-Trial Chamber I (Single Judge), 31 January 2008, para. 27.

¹⁹²⁴ Prosecutor v. Kony et al., (ICC-02/04-5-282), Decision on victim’s application for participation a/0010/06, a/0064/06 to a/00070/06, 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, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 6.

¹⁹²⁵ Prosecutor v. Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 87.

¹⁹²⁶ Situation in the DRC (ICC-01/04-423-Corr-tENG), 31 January 2008, para. 27.

¹⁹²⁷ Trial Chamber I considered, *inter alia*, i) official identification documents, e.g., a national identity card, a passport, a birth certificate, a death certificate, a marriage certificate, a family registration booklet, a will, a driving license or a humanitarian agency card; ii) non-official documents, e.g., a voting card, a local authority letter, a camp registration card, documents relating to medical treatment, an employee identity card, a pupil identity card or a baptism card; or iii) other documents, e.g., a certificate or attestation of loss of specified official documents, school documents, a church membership card, an association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, nationality certificates or pension booklets. See Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 87-89. See also Situation in the DRC (ICC-01/04-374), Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal

Pre-Trial Chambers (Single Judges) in more recent cases such as *Gbagbo* and *Ruto et al.*¹⁹²⁹

Moreover, when an applicant is unable to produce any of the listed documents, ‘a statement signed by two credible witnesses attesting to the identity of the applicant’ and, where relevant, including their relationship with one another, and accompanied by the two witnesses’ proof-of-identity were also considered.¹⁹³⁰ Absent this, the applicant could still explain the absence of identifying documents.¹⁹³¹ As for organizations or institutions applying to participate as victims, it has been accepted any document setting it up under the respective country’s legislation.¹⁹³² Trial Chamber I in *Lubanga* determined that it would consider the ‘overall picture provided by the applicant’, including the applicant’s own account and any document submitted.¹⁹³³

A flexible approach when assessing proof of identity is herein considered as advisable due to the unstable contexts where individuals applying for victim participant status come from. Such flexibility should be higher for purposes of participation during pre-trial proceedings than during the trial stage as in the latter the right of the accused to a fair trial is particularly sensitive. Thus, during trial such control must be especially strict. This is illustrated, as discussed in the previous chapter, concerning the situation of three individuals who held the victim participant status and were allowed to give their testimonies directly before Trial Chamber I in *Lubanga*. The Chamber found that there was a real possibility that two of them stole identities at the instigation of the third victim participant in order to claim that they had been abducted and used as child soldiers.¹⁹³⁴

Accordingly, a more strict screening bearing in mind victims’ participation at trial is not only necessary for the accused’s rights but also for the (alleged) victims themselves, as Trial Chamber I in *Lubanga* understandably not

Representation, Pre-Trial Chamber I, 17 August 2007, para. 15. See also McGonigle Leyh (2011) 245.

¹⁹²⁸ Bemba (ICC-01/05-01708-699), 22 February 2010, paras. 35-36; Katanga and Ngudjolo (ICC-01/04-01/07-933-tENG), 26 February 2009, para. 30.

¹⁹²⁹ Gbagbo (ICC-02/11-01/11-138), 4 June 2012, para. 25; Ruto et al. (ICC-01/09-01/11-249), 5 August 2011, para 42.

¹⁹³⁰ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 88. See also Situation in the DRC (ICC-01/04-374), 17 August 2007, para. 15.

¹⁹³¹ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 88.

¹⁹³² Ibid., para. 113.

¹⁹³³ Lubanga (ICC-01/04-01/06-2659-Corr-Red with AnxA-red2), 8 February 2011, para 28.

¹⁹³⁴ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 499-502.

only dismissed the evidence provided by those three individuals but also withdrew their status as victim participants.¹⁹³⁵ Actually, although the defence teams have been unable to challenge most of victims' applications on grounds of insufficient or unreliable proof of identity, defence teams have been able to do it during trial after victims were allowed to participate.¹⁹³⁶ This shows the need to implement a better screening process before individuals are granted victim participant status by the Judges or permit challenges to applications prior to the beginning of trial, which also benefits applicants who can legitimately offer identity proof.¹⁹³⁷ To avoid delays, it would be convenient that the ICC Judges give additional guidelines on this issue to the ICC Registry as this receives victims' applications to participate and, thus, serves as a first filter to guarantee efficiency.

ii) *Crimes under the Jurisdiction of the ICC*. By jurisdiction, for example, Pre-Trial Chamber I,¹⁹³⁸ has understood that the crimes must be part of article 5 of the ICC Statute, i.e., *ratione materiae* jurisdiction constituted by genocide, crimes against humanity, war crimes and the crime of aggression, as well as meet the *ratione temporis*, i.e., the crime must have been committed after the 1 July 2002, *ratione loci* and *ratione personae* jurisdiction criteria.¹⁹³⁹

iii) *Harms Suffered*. Although neither the ICC Statute nor the ICC RPE define the term 'harm', for example, Pre-Trial Chamber I has found that 'harm' includes economic loss, physical suffering and emotional suffering,¹⁹⁴⁰ making express references to the 2005 UN Basic Principles and Guidelines and jurisprudence of the IACtHR and the ECtHR.¹⁹⁴¹ Trial Chamber I referring to

¹⁹³⁵ Ibid., para. 502.

¹⁹³⁶ McGonigle Leyh (2011) 246.

¹⁹³⁷ Ibid., Loc. cit.

¹⁹³⁸ Lubanga (ICC-01/04-01/06-228), Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 28 July 2006, p. 14. See also Situation in the DRC (ICC-01/04-101), 17 January 2006, paras. 83-93; Gbagbo (ICC-02/11-01/11-138), 4 June 2012, para. 27.

¹⁹³⁹ See ICC Statute, articles 11 and 12.

¹⁹⁴⁰ Situation in Darfur, Sudan (ICC-02/05-111-Corr), 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, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 30, 38-50.

¹⁹⁴¹ See, e.g., Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, paras. 115-116 (*inter alia*, citing as for the IACtHR: Case of Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment of 10 September 1993, Series C No. 15, para. 52; Case of El Amparo v. Venezuela, Reparations and Costs, Judgment of 14 September 1996, Series C No. 28, paras. 28-63. As for the ECtHR: Selmouni v. France, Appl. No. 25803/94, Judgment, 28 July 1999, para. 123; Ayder and

Principle 8 of the 2005 UN Basic Principles and Guidelines,¹⁹⁴² and also in line with jurisprudence of the IACtHR and the ECtHR,¹⁹⁴³ concluded that harm may be suffered individually or collectively, and may include physical, mental, emotional, and economic harm or may consist in a substantial impairment of victim's fundamental rights.¹⁹⁴⁴ On the other hand, the Appeals Chamber considered that the collective nature of the harm 'does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court' considering it as not relevant or determinative.¹⁹⁴⁵ In any case, the Appeals Chamber and Trial Chamber I have considered that the harm must be personal to the victim, i.e., the harm must be suffered personally but harm/victims may be direct or indirect ones.¹⁹⁴⁶ The Appeals Chamber also found that harm may include 'material, physical, and psychological harm'.¹⁹⁴⁷

The Appeals Chamber, confirming Trial Chamber I's findings, considered that the harm suffered by one victim as a consequence of a crime under the ICC's jurisdiction can originate harm suffered by other victims, e.g., when there is a close personal relationship between the direct and indirect victims which is the case of the relationship between a child soldier and his/her parents.¹⁹⁴⁸

It has been presumed that close family members or next of kin have suffered on account of the direct victim's harm.¹⁹⁴⁹ The ICC's findings on

Others v. Turkey, Appl. No. 23656/94, Judgment, 8 January 2004, paras. 141 et. seq.). See also Gbagbo (ICC-02/11-01/11-138), 4 June 2012, para. 28.

¹⁹⁴² Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 92.

¹⁹⁴³ As for the IACtHR, see Case of Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2006, Series C No. 148, para. 386; Case of 'Las Dos Erres' Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of 24 November 2009, Series C No. 211, para. 226. As for the ECtHR, see Bazorkina v. Russia, Appl. No. 69481/01, Judgment, 27 July 2006, paras. 178-180 (2006); Ayder v. Turkey, Appl. No. 23656/94, Judgment, 8 January 2004, paras. 110-111, 141.

¹⁹⁴⁴ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1119, 18 January 2008, paras. 91-92.

¹⁹⁴⁵ Lubanga (ICC-01/04-01/06-1432), Judgment on the Appeals of the Prosecutor and The Defense against Trial Chamber I's Decision, on Victims' Participation of 18 January 2008, Appeals Chamber, 11 July 2008, para. 35.

¹⁹⁴⁶ See, respectively, Lubanga (ICC-01/04-01/06-1432), 11 July 2008, paras. 1, 107; Lubanga (ICC-01/04-01/06-2904), Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, 7 August 2012, para. 228.

¹⁹⁴⁷ Lubanga (ICC-01/04-01/06-1432), 11 July 2008, para. 32.

¹⁹⁴⁸ Ibid., Loc. cit.

¹⁹⁴⁹ Prosecutor v. Joseph Kony et al. (ICC-02/04-01/05-371), Judgment on the Appeals of the Defence Against the Decisions Entitled 'Decision on Victims' Applications for Participation a/0010/06, a/0064/06, 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,

indirect victims are consistent with the robust jurisprudence of the IACtHR and the ECtHR in cases of enforced disappearance, torture and extrajudicial executions.¹⁹⁵⁰ Trial Chamber I also considered, under the category of indirect victims, persons who suffered harm when intervening to assist victims and those who prevented potential direct victims from being victimized and, thus, they were granted victim participant status.¹⁹⁵¹ Additionally, persons who witnessed extremely violent nature crimes and consequently suffered psychological harm were granted victim participant status.¹⁹⁵² Moreover, although an application based on friendship has not been granted,¹⁹⁵³ victim participant status has been given to extended family members, e.g., a direct victim's nephew,¹⁹⁵⁴ but requiring additional information or evidence to support an emotional harm claim resulting from the direct victim's death.¹⁹⁵⁵ Be that as it may, considering extended family members is important due to the socio-cultural contexts of the countries where notions of extended families are accepted. Indeed, the HRC has concluded that 'cultural traditions should be taken into account when defining the term "family" in a specific situation'.¹⁹⁵⁶

As for submission of applications on behalf of deceased persons, neither the ICC Statute/RPE nor the *travaux préparatoires* deals with this issue.¹⁹⁵⁷ Pre-Trial, Trial and Appeals Chambers have determined that victims cannot submit

a/120/06, a/021/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II, Appeals Chamber, 23 February 2009, para. 36.

¹⁹⁵⁰ As for the IACtHR's case law see, e.g., Case of La Cantuta v. Peru, Merits, Reparations and Costs, Judgment of 29 November 2006, Series C No. 162, para. 218; Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment of 19 November 1999, Series C No. 63, paras. 156, 157, 238. As for the ECtHR's case law see, e.g., Kurt v. Turkey, App. No. 15/1997/799/1002, Judgment, 25 May 1998, paras. 130-134. More generally, the right to be heard in serious human rights violations cases held by the direct victims' relatives has been recognized by the IACtHR. See Salmón Gárate and Blanco (2012) 114-116.

¹⁹⁵¹ Lubanga (ICC-01/04-01/06-1813), Redacted version of 'Decision on "indirect victims"', Trial Chamber I, 8 April 2009, paras. 50-51. See also McGonigle Leyh (2011) 249.

¹⁹⁵² Kony et al. (ICC-02/04-01/05-324), Decision on the Participation of Victims in the Appeal, Appeals Chamber, 27 October 2008, paras. 11-14.

¹⁹⁵³ Nevertheless, in Abu Garda, it was seemingly accepted that a direct victim's friend could in principle be indirect victims. See Abu Garda (ICC-02/05-02/09-255), Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), 19 March 2010, paras. 26-32.

¹⁹⁵⁴ Situation in DRC (ICC-01/04-423-Corr-tENG), 31 January 2008, para. 15.

¹⁹⁵⁵ Abu Garda (ICC-02/05-02/09-255), 19 March 2010, paras. 26-32.

¹⁹⁵⁶ HRC, Hopu and Bessert v. France, Comm. No. 549, 29 July 1997, para. 10.3.

¹⁹⁵⁷ See McGonigle Leyh (2011) 251.

participation applications on a deceased person's behalf.¹⁹⁵⁸ Therefore, deceased person's relatives may solely submit applications for participation in their own names for mental or material harm suffered as a result of their relative's death.¹⁹⁵⁹ Nonetheless, when a victim participant or a victim applicant dies, their successors have been permitted to continue their participation.¹⁹⁶⁰ Pre-Trial Chamber III and Trial Chamber III taking into account IACtHR's case law, and Trial Chamber II have concluded that a deceased victim's close relative can take over the application on the deceased person's behalf but solely limited to the views and concerns expressed by the deceased victim.¹⁹⁶¹ Thus, in case of victim applicant's death, his/her successors and 'appropriate individuals' (including non-relatives), as Trial Chamber III determined in *Bemba*, can continue with the participation to reflect the deceased victim's views and concerns and, hence, a victim's death 'should not extinguish the opportunity for the Chamber to consider his or her views and concerns'.¹⁹⁶² Both the deceased applicant and the person acting on his/her behalf, who also alleged personal harm to himself/herself either as a direct consequence of the alleged crimes or on account of crimes perpetrated against the deceased, have been treated as victims who suffered personal harm.¹⁹⁶³

In *Muthaura et al.*, Pre-Trial Chamber II (Single Judge) concluded that the deceased cannot present his/her own views and concerns on the particular matters arising *in concreto*, during proceedings that have started and are conducted after his/her death.¹⁹⁶⁴ However, Pre-Trial Chamber II (Single Judge),

¹⁹⁵⁸ See, respectively, Situation in the DRC (ICC-01/04-545), 4 November 2008, para. 19; Katanga and Ngudjolo Chui (ICC-01/04-01/07-1491-Red), 23 September 2009, para. 52; Lubanga (ICC-01/04-01/06-1432), 11 July 2008, para. 38.

¹⁹⁵⁹ McGonigle Leyh (2011) 252.

¹⁹⁶⁰ *Ibid.*, Loc. cit.

¹⁹⁶¹ See respectively Bemba (ICC-01/05-01/08-320), 12 December 2008, paras. 44 and 47; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 82 and 83; Katanga and Ngudjolo (ICC-01/04-01/07-1737), Motifs de la Deuxième Décision Relative aux Demandes de Participation de Victimes à la Procédure, Trial Chamber II, 22 December 2009, para. 30. See also Katanga and Ngudjolo Chui (ICC-01/04-01/07-3018), 14 June 2011.

¹⁹⁶² Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 83 and 85.

¹⁹⁶³ *Ibid.*, para. 84.

¹⁹⁶⁴ Muthaura et al. (ICC-01/09-02/11-267), Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber II (Single Judge), 26 August 2011, para. 51 (stating that the IACtHR's case law invoked by other ICC Chambers to justify the successors' participation on behalf of a deceased person cannot be transposed to the case in question due to: i) human rights institutions, unlike criminal courts, do not deal with individual criminal responsibility, but with State responsibility; and ii) the IACtHR's case law relates to

following ICC's consistent case law, determined that a deceased person's relatives 'may be admitted as victims themselves, to participate in the proceedings on their own behalf if they prove that they have personally suffered mental or material harm as a result of the death of the said person'.¹⁹⁶⁵

Concerning the appeals stage, the Appeals Chamber has considered that 'resumption of a deceased victim's participation by an heir/successor is not deemed appropriate', and, hence, it rejected a request to resume participation on behalf of the deceased victim.¹⁹⁶⁶ Nevertheless, this does not mean 'that the views and concerns expressed by the victims prior to their death are now disregarded [...]. These views and concerns remain a part of the case record under review even if the deceased victim is no longer participating'.¹⁹⁶⁷

iv) Causal Link. Pre-Trial Chamber I established that the victim applicants 'must demonstrate that a sufficient link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe [the suspect] bears criminal responsibility and for which the Chamber has issued an arrest warrant'.¹⁹⁶⁸ Pre-Trial Chambers have stated that, in an application for participation during the case stage, the harm suffered by the applicant must appear to have arisen 'as a result' of the crime charged.¹⁹⁶⁹ Trial Chamber I had determined that rule 85 does not have the effect of restricting victims' participation to crimes contained in the Charging Document confirmed by a Pre-Trial Chamber insofar as the causal link could be established between the harm and any crime under the ICC's jurisdiction.¹⁹⁷⁰ Nevertheless, the Appeals Chamber appropriately overruled the Trial Chamber's finding as the former determined that the harm, for purposes of participation in the trial, must be linked not to any crime under the ICC's jurisdiction but only to the charges confirmed against the accused.¹⁹⁷¹ Accordingly, only victims able to demonstrate

successors' right to receive reparation for the harm suffered by the deceased person while at the ICC there is a clear distinction between participation and reparations.).

¹⁹⁶⁵ Ibid., para. 57.

¹⁹⁶⁶ Ngudjolo Chui (ICC-01/04-02/12-140), 23 September 2013, para. 26.

¹⁹⁶⁷ Ibid., para. 25.

¹⁹⁶⁸ Lubanga (ICC-01/04-01/06-172-tENG), Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6, Pre-Trial Chamber I, 29 June 2006, pp. 6-8.

¹⁹⁶⁹ Banda and Jerbo (ICC-02/05-03/09), Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, Pre-Trial Chamber I, 29 October 2010, para 2; Bemba (ICC-01/05-01/08-320), Fourth Decision on Victims' Participation, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 62-63.

¹⁹⁷⁰ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 93-94.

¹⁹⁷¹ Lubanga (ICC-01/04-01/06-1432), 11 July 2008, paras. 2 and 64. See also Banda and Jarbo (ICC-02/05-03/09-231), 17 October 2011, para. 20.

a causal link between their harm suffered and the confirmed charges against the accused will be permitted to participate in the trial proceedings,¹⁹⁷² which has been applied in the ICC's consistent case law.¹⁹⁷³ Such findings are considered herein as coherent with the flow of sequential stages in a criminal case and also bearing in mind that reparations have to be connected with crimes for which the accused was found guilty and not any ICC's crime. The confirmation of charges precisely narrows down the universe of crimes to be proved during trial. In any case, as determined in *Gbagbo*, the causal link cannot be determined *in abstracto* but instead has to be assessed on a case-by-case basis, considering the application form information and, when available, supporting material.¹⁹⁷⁴

Trial Chamber I confirmed the existence of two categories of victim participants: i) direct victims, whose harm is the result of the commission of a crime under the ICC's jurisdiction; and ii) indirect victims who suffer harm as a result of the harm suffered by direct victims.¹⁹⁷⁵ Indirect victims need to prove that, as a result of their relationship with the direct victim, the loss, injury or damage suffered by the latter, harm to them was inflicted.¹⁹⁷⁶ However, Trial Chamber I excluded from the category of indirect victims 'those who suffered harm as result of the (later) conduct of direct victims',¹⁹⁷⁷ e.g., individuals victimized by child soldiers.¹⁹⁷⁸ It is herein considered that although such decision does not necessarily reflect victimization in a broader spectrum, it was necessary to avoid an overflow of potential victims.¹⁹⁷⁹ The above-mentioned findings actually stemmed from a consultation by the Registry as to whether applicants who allegedly suffered crimes by child soldiers (direct victims) might be considered as indirect victims,¹⁹⁸⁰ to which the Trial Chamber answered appropriately in negative. The already existing backlog in the ICC cases would have been worsened by too many additional potential victims had Trial Chamber

¹⁹⁷² McGonigle Leyh (2011) 251-252.

¹⁹⁷³ See, e.g., Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 47; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 46.

¹⁹⁷⁴ *Gbagbo* (ICC-02/11-01/11-138), 4 June 2012, para. 29.

¹⁹⁷⁵ *Lubanga* (ICC-01/04-01/06-1813), 8 April 2009, para. 44.

¹⁹⁷⁶ *Ibid.*, para. 49.

¹⁹⁷⁷ *Ibid.*, para. 52.

¹⁹⁷⁸ *Ibid.*, Loc. cit.

¹⁹⁷⁹ *Ibid.*, para. 51.

¹⁹⁸⁰ *Lubanga* (ICC-01/04-01/06-1501-Conf-Exp), Second Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court, Registry, 21 November 2008, para. 14.

I decided otherwise. In deciding so, Trial Chamber I avoided to seriously compromise ICC's efficiency and scarce resources.¹⁹⁸¹

Therefore, it is important for the Prosecution to appropriately select what crimes to charge in order not to leave out important incidents of violence against victims. Otherwise, important limitations similar to those in *Lubanga* may arise. In *Lubanga*, the charges were confined to the enlistment, recruitment and use of child soldiers although it was well-known that the armed forces under Lubanga's control, child soldiers included, perpetrated other serious international crimes under the ICC's jurisdiction.¹⁹⁸²

Finally, it should be mentioned that the deceased person's relatives have to demonstrate the existence of a harm directly linked to them.¹⁹⁸³

v) *Victim Participants' Personal Interests Are Affected and Others*. Once an applicant meets the criteria corresponding to the definition of victims under rule 85 (a) to become a victim participant, the Chambers have to establish whether his/her participation is consistent with article 68 (3) of the ICC Statute, which refers to both victim's personal interests being affected and whether his/her participation is appropriate and consistent with the accused's rights and a fair and impartial trial. The 'personal interests' concept is examined here in detail whereas the tension with the accused's rights is examined in the several procedural stages under later sub-sections.

Pre-Trial Chamber I when examining whether victims' personal interests are affected has adopted an approach called systematic, i.e., reassessment of personal interests in relation to a whole procedural stage.¹⁹⁸⁴ Pre-Trial Chamber I in its first decision on victims' participation concluded that the assessment of whether victims' personal interests are affected is relating to stages of the proceedings rather than to each specific procedural activity or evidence and also found that the victims' personal interests are affected in general during the investigation stage of a situation, i.e., prior to the naming of a suspect, since victims' participation during this phase can serve to clarify the facts, to punish perpetrators of crimes and to request reparations for the harm suffered.¹⁹⁸⁵ In a

¹⁹⁸¹ For a critical view of limiting indirect victims in this manner, see Valentina Spiga, 'Indirect Victims Participation in the Lubanga Trial' (2010) 8 Journal of International Criminal Justice 183, 198.

¹⁹⁸² See Mark Drumbl, 'Prosecutor v. Thomas Lubanga Dyilo. Décision sur la Confirmation des Charges. Case no. ICC-01/04-01/06' (2007) 101 American Journal of international Law 841-848.

¹⁹⁸³ Situation in the DRC (ICC-01/04-423-Corr-tENG), 31 January 2008, para. 25.

¹⁹⁸⁴ McGonigle Leyh (2011) 258-259; Van den Wyngaert (2011) 482.

¹⁹⁸⁵ Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 63. See also McGonigle Leyh (2011) 269.

subsequent decision, corresponding to the pre-trial stage of a case, Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo Chui* found that victims present a personal interest in the result of the pre-trial phase of the case, i.e., whether there is enough evidence supporting substantial grounds to believe that the suspect(s) are responsible for the charged crimes.¹⁹⁸⁶ Pre-Trial Chamber III in *Bemba* has followed the systematic approach, and Trial Chamber II in *Katanga and Ngudjolo Chui* to a certain degree recognized it.¹⁹⁸⁷

Trial Chamber I in *Lubanga* adopted a different approach, the so-called piecemeal or casuistic approach, i.e., personal interests examined in each specific procedural issue within the same procedural stage.¹⁹⁸⁸ Thus, Trial Chamber I found that article 68 (3) demands that the victim has to show the reasons why his/her interests are affected by the evidence or an specific issue and, hence, a general interest in the outcome of the trial is likely to be insufficient.¹⁹⁸⁹ The Appeals Chamber seemingly endorsed the approach followed by Trial Chamber I by qualifying it as the correct proceeding to determine victim participation in accordance with article 68 (3).¹⁹⁹⁰ In turn, Trial Chambers have implemented this approach by asking victims to show in discrete written applications and giving notice to the parties, how their personal interests are affected by a specific evidentiary piece or witness before allowing their participation as well as to requesting them to abide by disclosure obligations and protection orders.¹⁹⁹¹ In some Pre-Trial Chambers' decisions, concerning victims' participation during the investigation stage of a situation, the casuistic approach has been followed as seen later.¹⁹⁹²

Even though the re-evaluation of 'personal interests' at each specific procedural instance is a better approach from the accused's right perspective as requested by article 68 (3), it may be considered as inefficient and burdensome. Accordingly, this approach may be problematic, with the arguable exception of the investigation stage of a situation due to the particular nature of this early

¹⁹⁸⁶ *Katanga and Ngudjolo* (ICC-01/04-01/07-474), 13 May 2008, para. 43.

¹⁹⁸⁷ *Bemba* (ICC-01/05-01/08-320), 12 December 2008; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), 22 January 2010. See also McGonigle Leyh (2011) 259.

¹⁹⁸⁸ McGonigle Leyh (2011) 259-261; Van den Wyngaert (2011) 482-483; Solange Mouthaan, 'Victim Participation at the ICC for Victims of Gender Based-Crimes: A Conflict of Interest?' (2013) 21 *Cardozo Journal of International and Comparative Law* 619, 628.

¹⁹⁸⁹ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para 96.

¹⁹⁹⁰ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 104.

¹⁹⁹¹ See, e.g., *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 96, 98. The piece-meal approach has been followed *de facto* in *Katanga and Ngudjolo Chui* and *Bemba*. McGonigle Leyh (2011) 261.

¹⁹⁹² See *infra* Chapter IV 3.3.2.2.

stage as discussed later.¹⁹⁹³ Indeed, the backlog experienced by the ICC indicates that the piecemeal approach is substantially hindering the efficiency of proceedings. It may also be regarded as not completely necessary because while victims who meet the standard for participation under the ICC Statute/RPE cannot be deprived of that right, the ICC may handle victims' exercise of their status as participants by limiting at what stage and in what manner victims may exercise that participatory status,¹⁹⁹⁴ instead of a highly time and resource-consuming re-evaluation of the 'personal interests'. Nevertheless, the problem with the systematic approach is that 'essentially invalidates the personal interest precondition found in Article 68 (3)'.¹⁹⁹⁵ Therefore, the casuistic approach can be considered as more consistent with the article 68 (3) requirements, including the accused's right to a fair trial.¹⁹⁹⁶

A deeper question which has yet to be clearly delimited by the ICC Chambers is to exactly identify what personal interests stand for to trigger victims' participation in the ICC proceedings. This lack of clarity originated, to an important extent, out of the direct importation and incorporation of the 'personal interests' criterion from the obscure language contained in article 6 (b) of the 1985 UN Victims Declaration without further precision as to its meaning and objective.¹⁹⁹⁷ A primary task for the ICC would therefore consist in delineating the sphere of personal interests recognized by it as suitable to be legitimately pursued by the victims as participants. This is connected with the concept of 'judicially recognizable personal interests', i.e., not all personal interests can trigger victims' participation but only those which explicitly are recognized by the ICC.¹⁹⁹⁸ The practical consequences of an accurate delimitation arguably would directly impact on the number of victim applicants and reshape the scale of victims' participation at a macro-level.¹⁹⁹⁹

Unfortunately, the ICC Chambers have not standardized completely their approaches. On the one hand, Pre-Trial Chamber I and Trial Chamber I considered reparations, protection, contribution to clarification of facts and

¹⁹⁹³ See *infra* Chapter IV 3.3.2.

¹⁹⁹⁴ See American University Washington College of Law, War Crimes Research Office, *Victim Participation before the International Criminal Court* (2007) 61-62.

¹⁹⁹⁵ McGonigle Leyh (2011) 259.

¹⁹⁹⁶ See Lubanga (ICC-01/04-01/06-1119), 18 January 2008; Lubanga (ICC-01/04-01/06-1432), 11 July 2008.

¹⁹⁹⁷ See Vasiliev (2009) 688.

¹⁹⁹⁸ Haslam (2004) 326.

¹⁹⁹⁹ Vasiliev (2009) 689.

offenders' punishment as victims' personal interests.²⁰⁰⁰ Moreover, in *Katanga and Ngudjolo Chui*, Pre-Trial Chamber I (Single Judge) determined that victims' interests are not only limited to find what occurred, which was linked to the victims' right to truth,²⁰⁰¹ but also to secure a certain level of punishment for those found criminally responsible.²⁰⁰² In *Abu Garda*, Pre-Trial Chamber I concluded that a victim's personal interest 'flows from the (i) the desire to have a declaration of truth by a competent body (right to truth); (ii) their wish to have those who victimized them identified and prosecuted; and (iii) the right to reparation'.²⁰⁰³ On the other hand, although the Appeals Chamber agreed on reparations and protection as victims' personal interests, it considered that victims' interests may not intersect with the prosecutorial function.²⁰⁰⁴ This finding was buttressed by Judge Pikis who concluded that, according to the ICC Statute, 'The burden of proof of the guilt of the accused lies squarely with the Prosecutor' and 'It is not the victims' domain either to reinforce the prosecution or dispute the defence'.²⁰⁰⁵

The Pre-Trial Chamber I/Trial Chamber I's position is found here in principle as more coherent with the underlying concept of restorative-oriented justice approach and not a purely restorative justice approach, i.e., limiting personal interests only to reparations. This was actually remarked by Judge Song's dissent to the Appeals Chamber's decision when he pointed out that personal interests also encompass the interest 'to see justice is done'.²⁰⁰⁶ Such finding was grounded on some ICC Statute and RPE provisions,²⁰⁰⁷ and also

²⁰⁰⁰ See respectively: Situation in the DRC (ICC-01/04-101-tEn-Corr), 17 January 2006, para. 63; Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 98.

²⁰⁰¹ *Katanga and Ngudjolo* (ICC-01/04-01/07-474), 13 May 2008, paras. 32-36.

²⁰⁰² *Ibid.*, para. 38.

²⁰⁰³ *Abu Garda* (ICC-02/05-02/09-121), Decision on Victims' Modalities of Participation at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), 25 September 2009, para. 3.

²⁰⁰⁴ Lubanga (ICC-01/04-01/06-925), Decision on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Appeals Chamber, 13 June 2007, para. 28.

²⁰⁰⁵ Lubanga (ICC-01/04-01/06-925), Separate Opinion of Judge Georghios M. Pikis, Decision on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, para. 16.

²⁰⁰⁶ Lubanga (ICC-01/04-01/06-925), Separate opinion of Judge Sang-Hyun Song, Decision on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, paras. 10-12.

²⁰⁰⁷ See ICC Statute, article 65 (4) and ICC RPE, rule 69 (providing for that when the parties agreed on an alleged fact, a Chamber may still decide that 'a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims'); and ICC RPE, rules 93 and 191 (laying down that a Chamber may seek the views of victims when deciding the

jurisprudence of the IACtHR and the ECtHR, which may be interpreted as recognizing the victims' interest that justice is done,²⁰⁰⁸ although this case law has not explicitly dealt with the notion of 'personal interests of victims' as a criterion for their admission into criminal proceedings.²⁰⁰⁹ Be that as it may, attention also needs to be drawn to the Appeals Chamber's majority position as this arguably constitutes a more balanced and careful approach to craft victims' participation before the ICC.²⁰¹⁰ The ICC legal instruments do not provide ground to equate victims' participation with the prosecutorial function, i.e., the absence of those entitlements has been interpreted as exclusion thereof.²⁰¹¹ The Appeals Chamber's approach would actually fit better within the ICC's mandate which is first and foremost 'to put an end to impunity for the perpetrators of these crimes'.²⁰¹²

Accordingly, the fact that victims' personal interests may arguably include the 'special interest' of victims that the alleged perpetrators should be brought to justice should not re-configure victims' role to the point of undertaking prosecutorial functions. Nor should the fact the ICC may be considered as a 'victim-oriented' or 'victim-friendly' court be misrepresented to consider the ICC as a (pure) restorative justice mechanism.

2.4. The ECCC and the STL

2.4.1. General Considerations and Joining the Proceedings

2.4.1.1. The ECCC

With regard to the ECCC, it is first necessary to mention that the text of Internal Rules has suffered several changes, including the legal regime of civil parties. As a result, although the references to the Internal Rules herein employed (unless otherwise indicated) correspond to their current version (Rev. 8), the ECCC in

granting of an assurance to a witness or an expert 'that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom'. Cited by Lubanga (ICC-01/04-01/06-925), Separate Opinion of Judge Sang-Hyun Song, 13 June 2007, para. 13. For a critical view of Judge Song's interpretation see Vasiliev (2009) 672-674.

²⁰⁰⁸ IACtHR, Case of Blake v. Guatemala, Merits, Judgment of 24 January 1998, Series C No. 36, para. 97; ECtHR, Kilic v. Turkey, Appl. No. 22942/93, Judgment, 28 March 2010, para. 91. Cited by Lubanga (ICC-01/04-01/06-925), Separate Opinion of Judge Sang-Hyun Song, 13 June 2007, paras. 14-16.

²⁰⁰⁹ Vasiliev (2009) 673.

²⁰¹⁰ It should be mentioned that the contents and scope of 'personal interests' as interpreted by the Appeals Chamber in this decision constituted *obiter dictum* rather than *ratio decidendi* to dismiss victims' applications. See Vasiliev (2009) 675.

²⁰¹¹ *Ibid.*, 671.

²⁰¹² ICC Statute, preamble, fifth paragraph.

Duch (Case 001) applied previous versions, in particular Rev. 3 and Rev. 5.²⁰¹³ However, as the Supreme Court Chamber noticed in its Appeal Judgment in *Duch*, ‘notwithstanding [...] numerous revisions to that regime, the definition of a civil party as envisaged in the original version of Internal Rule 23(2) has remained essentially unchanged, thus confirming its lasting validity before the ECCC’.²⁰¹⁴

The ECCC Internal Rules glossary defines ‘victim’ as ‘a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC’. Besides their constitution as civil parties, victims can be victim complainants, i.e., may file a complaint with the ECCC in order to make the Co-Prosecutors aware of specific crimes as detailed later.²⁰¹⁵ What can be mentioned here is that victim-complainants tick a box on an application form, providing details about their complaints and also prompting the Co-Prosecutors to be informed of alleged crimes, and complaints do not need to be specific as may contain general statements.²⁰¹⁶ Victim-complainants are not granted as many rights and safeguards as when they become civil parties.²⁰¹⁷

As previously said, the ECCC, due to the influence of the French inquisitorial system via the Cambodian procedural law as reflected in the ECCC Internal Rules, is the first institution among the international and hybrid criminal courts considered in this thesis where victims can participate as civil parties and once admitted in the proceedings acquire a number of procedural rights, which was pointed out by the Supreme Court Chamber in *Duch*.²⁰¹⁸ Indeed, internal rule 23 (1) details that the dual purpose of civil party action is to ‘a) Participate in criminal proceedings against those responsible within the jurisdiction of the ECCC by supporting the prosecution; and b) Seek collective and moral reparations’. The expression ‘by supporting the prosecution’

²⁰¹³ See, e.g., Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 35, footnote 52; Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 11, footnote 22.

²⁰¹⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 412.

²⁰¹⁵ Victims Associations are authorised to lodge complaints with the Co-Prosecutors on behalf of a Victim. See Victims associations, General Information. Available at: <http://www.eccc.gov.kh/en/victims-support/victims-association> (last visit on 20 October 2012).

²⁰¹⁶ See Practice Direction on Victim Participation (Rev.1), Practice Direction 02/2007/Rev.1, article 2 (3); McGonigle Leyh (2011) 174.

²⁰¹⁷ McGonigle Leyh (2011) 174. See also Brouwer and Heikkilä (2013) 1304.

²⁰¹⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488.

presumes and requires that civil parties must be on the same side as the Prosecutor, i.e., trying to obtain the conviction of the accused. Thus, should do a victim call for a dismissal of charges due to, for example, national reconciliation aims, (s)he would in principle be outside that purpose.²⁰¹⁹ Although not necessarily all civil parties seek reparations, those who do so need to join the ECCC proceedings as civil parties.

Additionally, the Pre-Trial Chamber in *Ieng Sary* (Case 002), found that ‘a victim’s interest in participating in pre-trial proceedings stems from two core rights- the right to truth and the right to justice’.²⁰²⁰ Neither of these rights is explicitly stated in the ECCC legal instruments nor have the Judges fleshed out the contents of these rights. Nonetheless, the specific dual purposes alongside the recognition of a victim’s right to truth and justice have been used by civil party lawyers to argue about participation scope.²⁰²¹ Victim’s status as an actual party, and not only as a victim participant, to the ECCC proceedings is actually reflected in the requirements for a victim to become and participate as a civil party. Accordingly, as determined by the ECCC, unlike the ICC and the STL, victims do not have to demonstrate how their personal interests are affected in order to participate as civil parties, and there is no special requirement to demonstrate any special interest in any procedural stage,²⁰²² as also seen later.

With regard to the proceedings to join as civil party, originally, internal rule 23 (3) and (4) (Rev. 3) provided the opportunity for victims to apply in writing to be joined as a civil party before the Co-Investigating Judges or before the Trial Chamber. However, an amended version of the Internal Rules, i.e., internal rule 23 (5) (Rev. 4), removed from the Trial Chamber the competence to decide on civil party admissibility. This amended regime also corresponds to the current internal rule 23 *bis* (2) (Rev. 8), which establishes that a victim who wishes to be joined as a civil party shall submit his/her application in writing not later than 15 days after the Co-Investigating Judges notify the parties of the judicial investigation conclusion and, subject to victim protection, the Co-Investigating Judges must notify the Co-Prosecutors and the charged person.²⁰²³ Thus, under the amended Internal Rules, as determined by the Supreme Court

²⁰¹⁹ McGonigle Leyh (2011) 175.

²⁰²⁰ *Ieng Sary* (Case 002), Directions on Unrepresented Civil Parties’ Rights to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 29 August 2008, para. 5.

²⁰²¹ McGonigle Leyh (2011) 175.

²⁰²² Nuon Chea (Case 002), Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, para. 49. See also McGonigle Leyh (2011) 182.

²⁰²³ See also, Practice Direction on Victim Participation (Rev.1), Practice Direction 02/2007/Rev.1, article 3 (1) and (3).

Chamber in *Duch* ‘the power to decide civil party admissibility is vested in the Co-Investigating Judges, subject to appeal to the Pre-Trial Chamber’.²⁰²⁴ In addition, the glossary of the Internal Rules defines civil party as ‘a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these IRs [Internal Rules]’. According to internal rule 23 *bis* (4), the civil party applications ‘must contain sufficient information to allow verification of their compliance with these IRs [Internal Rules]’.²⁰²⁵ Moreover, under internal rule 23 *bis* (5), the civil party may expressly abandon his/her civil party action at any moment during the pre-trial stage but this does not ‘stop or suspend the criminal prosecution’, and during the trial and beyond, the civil party may withdraw from the consolidated group.

Concerning the standard of review of civil party applications, since the original text of the Internal Rules did not provide guidance on how to review the civil party applications, the Co-Investigating Judges, who were the first to review those applications, applied a *prima facie* standard.²⁰²⁶ Since the Co-Investigating Judges are not in a situation to make final determinations on the harm suffered, which is finally determined in the Trial Chamber’s judgment, the Co-Investigating Judges make only a *prima facie* determination granting or denying civil party status.²⁰²⁷

Concerning the standard of review, the current text of rule 23 *bis* (1) reads as follows ‘When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true’. In *Duch*, the Co-Investigating Judges referred to rule 23 *bis* (1) (Rev. No. 5) which states that they shall be ‘satisfied that facts alleged in support of the [civil party] application are more likely than not to be true’. The Judges stated explicitly that the level of proof is particular to the admissibility of civil party applications and different from sufficiency of evidence criteria under internal rule 67,²⁰²⁸ which concerns closing orders by the Co-Investigating Judges.

²⁰²⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 511.

²⁰²⁵ It is also established, *inter alia*, that ‘[...] In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator [...]’.

²⁰²⁶ McGonigle Leyh (2011) 182.

²⁰²⁷ Nuon Chea et al. (Case 002), Order on the Admissibility of Civil Party Applicants from Current Residents of Prey Veng, Co-Investigating Judges, 9 September 2010, para. 10.

²⁰²⁸ *Ibid.*, para. 9.

In *Duch*, the Supreme Court Chamber recalling what Judge Lavergne said at the initial trial hearing, noticed ‘that the initial *prima facie* assessment of civil party applications was distinct from the determination of the merits of such applications [...] a more rigorous standard of proof would be applied to finally determine civil party admissibility’.²⁰²⁹ This more rigorous standard, as determined by the Trial Chamber and confirmed by the Supreme Court Chamber is ‘more likely than not to be true’ or ‘preponderance of evidence’ as this ‘standard is common to civil claims across the world’,²⁰³⁰ and ‘the ultimate finding on eligibility of the civil party applicant for reparation is established at a level higher than *prima facie*’.²⁰³¹

In *Nuon Chea et al.* (Case 002), it was stressed that when considering admissibility of civil party applications, it must be satisfied that facts supporting the application are ‘more likely than not to be true’.²⁰³² It is suggested herein, in accordance with the ECCC’s practice and the practice of the ICC and the STL, that although the current text of the Internal Rules says explicitly ‘more likely than not to be true’, the assessment of civil party applications should be evaluated with a *prima facie* consideration as arguably implied by the Supreme Court Chamber in establishing that:

[...] significant differences may occur between the pretrial and reparations stages of a case, including the quantity and quality of evidence affecting a civil party’s standing and reparation claims, resulting from evidence adduced by the civil party and from the findings as to the criminal responsibility of the accused person. Therefore, the Supreme Court must adapt a standard appropriate to the reparations stage of proceedings.²⁰³³

Although the Supreme Court Chamber in *Duch* has interpreted the ‘more likely than not to be true’ standard as more demanding since it was applied during the reparations stage in *Duch*, the high number of civil parties (almost 4000) admitted as civil parties in *Nuon Chea et al.*, evidences that admissibility of civil party applicants has not been affected by the ‘more likely than not to be true’ standard.

²⁰²⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 511.

²⁰³⁰ *Ibid.*, para. 531.

²⁰³¹ *Ibid.*, para. 519.

²⁰³² Nuon Chea et al. (Case 002), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Pre-Trial Chamber, 24 June 2011, para. 94.

²⁰³³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 512.

Accordingly, it can be concluded that when deciding the admissibility of civil party applicants in *Nuon Chea et al.*, the ‘more likely than not to be true’ standard has been applied in a flexible manner that, for practical effects, can be considered similar to a *prima facie* standard. In other words, it may be argued that the ‘more likely than not to be true’ standard can be applied in a more relaxed manner, i.e., similar to the *prima facie* standard when determining the admissibility of civil party applications and, in a more demanding manner, in a later stage when reparations are ordered. Indeed, Co-Investigating Judges in *Nuon Chea et al.* have applied a *prima facie* assessment, under the ‘more likely than not to be true’ standard of the amended Internal Rules, when determining the admissibility of civil party applications since they are not in a position to make final determinations,²⁰³⁴ which are to be made in the Trial Chamber’s judgment. In any case, the Supreme Court Chamber (or the ECCC’s case law in general) should clarify the exact interpretation to be given to the ‘more likely than not to be true’ standard in different procedural stages.

Be that as it may, the Trial Judgment in *Duch* summarized its two-step determination of applications for civil party status in the following terms:

Initial decisions on the admissibility of Civil Party applications ascertained that the criteria for participation as a Civil Party were satisfied. In common with the practice before comparable tribunals, the Chamber undertook a *prima facie*, assessment of the credibility of the information provided by the applicants. *This process is distinct from the Chamber’s determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings* [emphasis added].²⁰³⁵

[...]

Once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.²⁰³⁶

This two-step determination, later adopted by the Co-Investigating Judges in *Nuon Chea et al.*,²⁰³⁷ presents the advantage to allow the ECCC to conduct fast initial examination of applications, which was needed due to the

²⁰³⁴ Nuon Chea et al. (Case 002), 9 September 2010, para. 10.

²⁰³⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 636.

²⁰³⁶ Ibid., para. 639.

²⁰³⁷ Between 25 August 2010 and September 2010, the Co-Investigating Judges issued 25 orders on the admissibility of victims who had submitted applications to become civil parties in Case 002. See Nuon Chea et al. (Case 002), 24 June 2011, para. 19.

backlog of applications.²⁰³⁸ Nonetheless, this generated civil parties' disillusionment and frustration as they can have their status revoked in the trial judgment after having participated in the whole trial proceedings, which happened in *Duch* as discussed later.²⁰³⁹ Additionally, the costs for the ECCC to review the applications twice and the time invested by team members to face at trial individuals who did not have real standing constitute important problems under this approach.²⁰⁴⁰

The Supreme Court Chamber concluded that although the Trial Chamber did not act outside the Internal Rules, the legal framework for deciding civil parties' inadmissibility 'was patently obscure.'²⁰⁴¹ Moreover, the Supreme Court Chamber concluded that the Trial Chamber did not commit an error of law by assessing whether victimhood had been sufficiently demonstrated since any ambiguity that may have been caused by the ECCC concerning the civil party's standing at the start of the trial did not prejudice civil parties' access to trial proceedings.²⁰⁴² However, the Supreme Court Chamber noticed a 'fundamental misunderstanding between the Trial Chamber and the Civil Party Appellants as to the merits and legal effect of the initial review of the applications'.²⁰⁴³ This observation was necessary as no decision granting the civil party status informed victims that these were only conditionally given the civil party status and pending the satisfaction of additional criteria to be learnt by them later.²⁰⁴⁴ The Supreme Court Chamber also appropriately recognized the anguish and frustration caused to the victims because of the revocation of their civil party status.²⁰⁴⁵

Furthermore, the Chamber acknowledged that some civil parties due to the novel character of the civil party at the ECCC may have confused as for

²⁰³⁸ McGonigle Leyh (2011) 184.

²⁰³⁹ See *infra* Chapter IV 4.4.2.1.

²⁰⁴⁰ McGonigle Leyh (2011) 184.

²⁰⁴¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 493.

²⁰⁴² *Ibid.*, para. 500.

²⁰⁴³ *Ibid.*, para. 501.

²⁰⁴⁴ McGonigle Leyh (2011) 199. Indeed, one of the few mentions concerning a later review of applications was given by Judge Jean-Marc Lavergne when said that 'I think it is perfectly clear that during the substantive proceedings we [the Trial Chamber Judges] shall examine each of the applications to be perfectly certain that the alleged harm did in fact occur'. Case of Kaing Guek Eav alias Duch (Case 001), Transcripts, 17 February 2009, p. 42, lines 5-10.

²⁰⁴⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber 3 February 2012, para. 501.

whether submission of evidence was still expected of them.²⁰⁴⁶ Accordingly, the Chamber appropriately decided to grant the civil party appellants' motions to submit additional evidence to remedy any missed opportunity and regardless of the availability of that evidence during the first instance proceedings.²⁰⁴⁷ Based on the analysis of evidence thus submitted, the Supreme Court Chamber in some cases reversed the Trial Chamber's decision to revoke the civil party status as seen later,²⁰⁴⁸ in application of the same evidentiary standard (higher than *prima facie*) applied by the Trial Chamber for civil party applicant eligibility for reparations, as previously examined.

It should be finally added that even though formal charges have not been yet laid in Cases 003 and 004, the Co-Investigating Judges have been receiving civil party applications, which have been placed or are in the process of being placed in the respective case files, and have rejected some of them.²⁰⁴⁹ Therefore, there are civil parties already admitted to cases 003 and 004.²⁰⁵⁰

2.4.1.2. The STL

With regard to the STL Statute, two observations are presented here as for victims' status as participants. First, article 17 provides that victims may present their 'views and concerns' at various stages of the proceedings:

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the

²⁰⁴⁶ Ibid., Loc. cit.

²⁰⁴⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 501.

²⁰⁴⁸ See *infra* Chapter IV 6.4.1.1.

²⁰⁴⁹ Case 003, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Co-Investigating Judges, 26 February 2013; Case 004, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Co-Investigating Judges, 01 April 2013. See also Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, Pre-Trial Chamber, 28 February 2012, para. 3.

²⁰⁵⁰ Case 003, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Office of the Co-Investigating Judges, 26 February 2013, para. 15; Case 004, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Office of the Co-Investigating Judges, 01 April 2013, para. 14. See also Case 003, Order on the Reconsideration of the Admissibility of the Civil Party Application of Robert Hamill, Co-Investigating Judges, 24 February 2012, paras. 36-39; Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, Pre-Trial Chamber, 13 February 2013.

rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

Second, article 25 rules out the possibility for victims to claim compensation before the STL. Accordingly, victims cannot act as civil parties. The Report of the UN Secretary General clarified this point by establishing that the fact that victims can present their views does not imply that they are recognized as civil parties, and that one of the ‘distinctive features’ of civil law, i.e., ‘the participation of victims as “*parties civiles*”’ is absent in the STL Statute.²⁰⁵¹ Indeed, as the former President of the STL, Antonio Cassese, said ‘the main *raison d’être* of “*parties civiles*”, namely their participation in criminal proceedings for the purpose of seeking compensation is removed’.²⁰⁵² In any case, article 25 (1) establishes that the STL ‘may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal’. Be that as it may, for this identification, which may lead to compensation outside the STL as examined in the next chapter,²⁰⁵³ victim participation at the STL may be quite important.²⁰⁵⁴

Concerning the STL RPE, as pointed out by the former President of the STL, Antonio Cassese, although the STL proceedings do not aim at determining compensation but rather at establishing the accused’s criminal responsibility, the STL RPE drafters ‘deemed it fair and appropriate to grant extensive participation in proceedings to victims’.²⁰⁵⁵ The STL Judges when drafting the RPE sought to limit the number of victims participating at the STL and, therefore, to avoid ‘flooding’ it.²⁰⁵⁶ Thus, rule 2 (A) distinguishes the notions of ‘victim’ and ‘victim participating in the proceedings’ since whilst the former is ‘a natural person who has suffered physical, material or mental harm as a direct result of an attack within the Tribunal’s jurisdiction’,²⁰⁵⁷ the latter consists in someone ‘who has

²⁰⁵¹ Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893 (15 November 2006), paras. 31-32.

²⁰⁵² STL President (2010), para. 15. See also STL President (2012), para. 15.

²⁰⁵³ See *infra* Chapter V 2.2.1 and 3.2.1.

²⁰⁵⁴ STL President (2010), para. 16; STL President (2012), para. 16.

²⁰⁵⁵ STL President (2010), para. 16. See also STL President (2012), para. 16.

²⁰⁵⁶ STL President (2010), para. 18; STL President (2012), para. 18.

²⁰⁵⁷ STL RPE, rule 2 (A). See also STL Directive on Victims’ Legal Representation, STL/BD/2012/04, 4 May 2012 (corrected 21 June 2012), article 1 (‘Victims who have been granted the status of victim participating in proceedings by order of the Pre-Trial Judge pursuant Rule 86(c)(i) of the Rules’ and also ‘Group of victims participating in the proceedings: Two or more victims participating in the proceedings who are grouped together for the purpose of being

been granted leave by the Pre-Trial Judge to present his views and concerns at one or more stages of the proceedings after an indictment has been confirmed'.²⁰⁵⁸ Other safeguards have included the exclusion of legal persons from the victim participant category, screening of victims conducted by the Pre-Trial Judge before they can participate, victims' participation not before the confirmation of an indictment, and designation of one legal representative to act on behalf of multiple victims.²⁰⁵⁹

A person who claims to be a victim of a crime under the STL's jurisdiction has to request the Pre-Trial Judge to be granted victim participant status.²⁰⁶⁰ Thus, (s)he can later be allowed by the Pre-Trial Judge or the competent Chamber to present his/her views and concerns provided that this 'is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial'.²⁰⁶¹ Victims who want to be granted the status of victim participants have to meet certain requirements as discussed later. The standard of evidence for it, under rule 86 (B) (i), is that 'the applicant [must] provide *prima facie* evidence that he is a victim as defined in Rule 2', which has been applied by the Pre-Trial Judge in *Ayyash et al.*²⁰⁶² The Judge has also stated that the decision on admissibility of victim participant applications should be conducted in 'non-contentious proceedings in the absence of the Parties', who are entitled to only be heard on legal issues.²⁰⁶³

2.4.2. Requirements to Participate as Civil Parties (ECCC)/Victim Participants (STL)

2.4.2.1. The ECCC

With regard to the ECCC, as applied in *Duch*, Rule 23 (2) (Rev.3) established that:

represented by a shared legal representative pursuant to a decision of the Pre-Trial Judge under Rule 86 (D)').

²⁰⁵⁸ STL RPE, rule 2 (A).

²⁰⁵⁹ STL President (2010), para. 19; STL President (2012), para. 19.

²⁰⁶⁰ STL RPE, rule 86.

²⁰⁶¹ STL Statute, article 17. See also STL President (2010), para. 5; STL President (2012), para. 5.

²⁰⁶² *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, paras. 27, 32, 51, 57, 58, 61, 62, 73, 84. See also *Ayyash et al.* (STL-11-01/PT/PTJ), Fourth Decision on Victims' Participation in the Proceedings, Pre-Trial Judge, 2 May 2013, paras. 9, 13 and 29.

²⁰⁶³ *Ayyash et al.* (STL-11-01/PT/PTJ), Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, Pre-Trial Judge, 5 April 2012, para. 33.

The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality. In order for Civil Party action to be admissible, the injury must be: a) physical, material or psychological; and b) the direct consequence of the offence, personal and have actually come into being.

The current equivalent provision, rule 23 *bis* (1) (Rev.8) reads as follows:

1. In order for Civil Party action to be admissible, the Civil Party applicant shall:
 - a) be clearly identified; and
 - b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.²⁰⁶⁴

From the joint reading of the two versions, it is clear that the requirements to become and participate as civil party remain to a large extent the same. It should be noticed that once victims are granted the civil party status, they do not need to receive a previous judicial authorization to participate.²⁰⁶⁵ This corresponds to the status of civil parties as parties unlike the victim participant status, in which case victim participants' personal interests need to be affected for them to be allowed to participate.

*i) Crimes Within the ECCC Jurisdiction.*²⁰⁶⁶ In *Duch* civil parties had to demonstrate that the events presented in their respective applications fell within the ECCC jurisdiction. The current version of the ECCC Internal Rules clarifies that within the universe of all the crimes under the ECCC's jurisdiction, 'the

²⁰⁶⁴ In addition to this rule, see also current rule 23 *bis* (2) which states that 'All Civil Party applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator'. See also Practice Direction on Victim Participation (Rev.1), Practice Direction 02/2007/Rev.1 (amended on 27 October 2008), article 3 (3) and (5).

²⁰⁶⁵ See also Valentina Spiga 'No Redress Without Justice. Victims and International Criminal Law' (2012) 10 Journal of International Criminal Justice 1376, 1386.

²⁰⁶⁶ ECCC *Ratione materiae* jurisdiction consists in genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations. See ECCC Law, articles 2, 4-8. In turn, ECCC *ratione temporis* jurisdiction covers crimes committed between 17 April 1975 and 6 January 1979. See ECCC Law, article 2. Finally *ratione personae* jurisdiction is over 'Senior leaders of Democratic Kampuchea and those who were most responsible'. ECCC Law, article 2.

crimes alleged against the Charged Person’ are those to be taken into account. This clarification is coherent with one of the already detailed purposes of civil parties’ participation, i.e., seeking ‘collective and moral reparations’,²⁰⁶⁷ in relation to the ‘commission of the crimes for which an Accused is convicted’.²⁰⁶⁸ Accordingly, civil party applicants will have to refer, within the universe of crimes under the ECCC’s jurisdiction, to the crimes allegedly committed by the accused. In *Nuon Chea et al.*, the Pre-Trial Chamber adopted an expansive interpretation of the phrase ‘the crimes alleged against the Charged Person’ to include crimes relating to policies ‘in areas other than those chosen to be investigated [by the Co-Investigating Judges]’ due to the fact that the civil party admission ‘in respect of mass atrocity crimes should [...] be seen in the context of widespread and systematic actions resulting from the implementation of nation-wide policies’ and bearing in mind that the co-accused were charged under the criminal liability modality of joint criminal enterprise.²⁰⁶⁹ In Cases 003 and 004, it was determined that since there is no charged person to be held responsible for the remedy of harms inflicted to the victims, rejecting civil party applications ‘at this stage does not infringe the rights of the victims’.²⁰⁷⁰ However, at the moment of writing this thesis and as previously mentioned,²⁰⁷¹ there are civil parties already admitted to cases 003 and 004.²⁰⁷²

ii) *The Injury Suffered by the Civil Party Applicant had to be Physical, Material or Psychological.* The Supreme Court Chamber in *Duch* determined that physical injury denotes ‘biological damage, anatomical or functional’, which can be ‘described as a wound, mutilation, disfiguration, disease, loss or

²⁰⁶⁷ ECCC Internal rules, rule 23 (1) (b)

²⁰⁶⁸ *Ibid.*, rule 23 *quinquies* (1) (a).

²⁰⁶⁹ *Nuon Chea et al.* (Case 002), 24 June 2011, paras. 77-78.

²⁰⁷⁰ Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Pre-Trial Chamber 02, Opinions of Judges Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, 24 October 2011, para. 15; Case 004, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Pre-Trial Chamber 02, Opinions of Judges Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, 14 February 2012, para. 15.

²⁰⁷¹ See *supra* Chapter IV 2.4.1.1.

²⁰⁷² Case 003, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Co-Investigating Judges, 26 February 2013, para. 15; Case 004, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Co-Investigating Judges, 01 April 2013, para. 14. See also Case 003, Order on the Reconsideration of the Admissibility of the Civil Party Application of Robert Hamill, Co-Investigating Judges, 24 February 2012, paras. 36-39; Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, Pre-Trial Chamber, 13 February 2013.

dysfunction of organs, or death'.²⁰⁷³ The Supreme Court Chamber also defined material injury as 'material object's loss of value, such as complete or partial destruction of personal property, or loss of income'.²⁰⁷⁴ As for psychological injury, the Supreme Court Chamber endorsed the definition provided by the Trial Chamber in *Duch*, which defined it as including 'mental disorders or psychiatric trauma, such as post-traumatic stress disorder'.²⁰⁷⁵ In *Nuon Chea et al.*, similar considerations have been applied.²⁰⁷⁶

iii) *The Injury had to be a Direct Consequence of the Offence, Personal and must have Actually Come into Being.* It should be noticed that the 'personal and must have actually come into being' conditions are no longer explicitly mentioned in the current rule 23 *bis*. The Supreme Court Chamber in *Duch* established that, for legal standing, it is necessary that a person sustained an injury, and, for clarity, added that its use of the term 'direct victim' refers to those persons 'whose rights were violated or endangered by the crime charged'.²⁰⁷⁷ The Supreme Court Chamber also found it not to be contentious with those persons who suffered injury as a 'direct consequence' of the crime.²⁰⁷⁸

As previously referred to, victims who wish to participate as civil parties must demonstrate that the harm suffered is not merely linked to any crime under the ECCC's jurisdiction, but more specifically, as determined in the ECCC's case law, 'the applicant must demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes alleged against the charged person(s)'.²⁰⁷⁹ This is coherent with the current text of rule 23 *bis* (1) (b) that refers to 'the crimes alleged against the Charged Person' as already examined.

Under certain circumstances, the Trial Chamber allowed the civil action to be pursued on behalf of deceased civil party applicants by their successors provided that the civil party had filed a civil party application as, otherwise,

²⁰⁷³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 415.

²⁰⁷⁴ *Ibid.*, Loc. cit.

²⁰⁷⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 641; *Ibid.*, Loc. cit.

²⁰⁷⁶ Nuon Chea et al. (Case 002), 24 June 2011, para. 83.

²⁰⁷⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 416.

²⁰⁷⁸ *Ibid.*, Loc. cit.

²⁰⁷⁹ Ieng Thirith et al. (Case 002), Decision on Appeals Against Co-Investigating Judges' Combined Orders D250/3/3 and 250/3/2 on Admissibility of Civil Party Applications, Pre-Trial Chamber, 27 April 2010, para. 28.

successors can only seek reparation in their own right.²⁰⁸⁰ However, the Supreme Court Chamber found the Trial Chamber's requirement 'to limit the scope of eligible successors to circumstances where the direct victim had personally filed a civil party application before his or her death has no basis in applicable law'.²⁰⁸¹

In any case, by interpreting this requirement and referring to the Cambodian and French Procedural Criminal Codes and the UN Basic Principles and Guidelines, the Trial Chamber stated that responsibility is not limited to persons against whom crimes were perpetrated 'but may also be the direct cause of injury to a larger group of victims'.²⁰⁸² The Trial Chamber in *Duch* acknowledged that even though immediate family members of a victim fall within the scope of internal rule 23 (2), 'direct harm may be more difficult to substantiate in relation to more attenuated familial relationships'.²⁰⁸³ Nonetheless, the Trial Chamber appropriately paying attention to the Cambodian cultural context and, hence, regarding the nature of familial relationships, considered that harm alleged by members of a victim's extended family may exceptionally 'amount to a direct and demonstrable consequence of the crime' when the applicants can show the alleged kinship and also circumstances generating special affection or dependence bonds in relation to the deceased.²⁰⁸⁴ The Cambodian cultural and social context and, in particular, the nature of extended family in Cambodia were also considered by the Pre-Trial Chamber in *Nuon Chea et al.*²⁰⁸⁵

However, requiring proof of alleged kinship and also requesting proof of circumstances originating special bonds of affection or dependence on the deceased led to revoke more than twenty civil parties' applications in *Duch* as in practice they were additional criteria not included in the Internal Rules, Practice Directives on Participation or Trial Chamber's previous practice.²⁰⁸⁶ Be that as it may, the Supreme Court Chamber endorsed Trial Chamber's reasoning and upheld approximately 60% of the revocations of civil party status,²⁰⁸⁷ as detailed

²⁰⁸⁰ Kaing Guek Eav alias Duch (Case 001), Decision on Motion Regarding Deceased Civil Party, E2/5/3, Trial Chamber, 13 March 2009, paras. 10-12. See also Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 641.

²⁰⁸¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 421.

²⁰⁸² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 642.

²⁰⁸³ *Ibid.*, para. 643.

²⁰⁸⁴ *Ibid.*, *Loc. cit.*

²⁰⁸⁵ Nuon Chea et al. (Case 002), 24 June 2011, paras. 83 and 84.

²⁰⁸⁶ McGonigle Leyh (2011) 182.

²⁰⁸⁷ For an analysis of each civil party see Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 537-622.

later.²⁰⁸⁸ In particular, concerning indirect victims who are not ‘immediate family’ members, the need for the criteria laid down by the Trial Chamber would result logic since, as stated by the Supreme Court Chamber, absent bonds tying the claimants (indirect victims, whether family or not) emotionally, physically or economically to the direct victim, ‘no injury would have resulted to them from the commission of the crime’.²⁰⁸⁹

Based on, *inter alia*, jurisprudence of the IACtHR and the ICC, the Supreme Court Chamber in *Duch* accepted the presumption whereby crimes such as ‘forced disappearance, imprisonment, torture and murder of a family member will likely bring about suffering, anguish and other kinds of injury, such as financial damage, to this victim’s close family members’.²⁰⁹⁰ As for the scope of this presumption of injury, the Supreme Court Chamber upheld the Trial Chamber’s finding by paying close attention to the Cambodian familial relationships and cultural context as families not only consist of couples and their offspring but also ‘other family members, such as ageing parents’ or ‘siblings and their families’ or ‘grandparents, cousins, uncles and aunts’.²⁰⁹¹ As for the trial judgment in *Duch*, the ECCC Internal Rules, article 13 of the Cambodian Code of Criminal Procedure and case law of the IACtHR and the ICC constituted the sources for the acceptance of both direct and indirect victims as civil parties.²⁰⁹²

Concerning indirect victims, the Supreme Court Chamber also emphasized that they need to have suffered injury as a direct consequence of the crimes perpetrated against the direct victims(s).²⁰⁹³ The Supreme Court Chamber found that indirect victims, i.e., those who personally suffered injury as a direct result of the crime, can also qualify as civil parties.²⁰⁹⁴ Moreover, indirect victims were found not to be limited to any specific class of persons such as family members and, hence, may include ‘common law spouses, distant relatives, friends, *de facto* adopters and adoptees, or other beneficiaries, provided that the injury on their part can be demonstrated’.²⁰⁹⁵ Furthermore, indirect victims’

²⁰⁸⁸ See *infra* Chapter IV 6.4.1.1.

²⁰⁸⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 447.

²⁰⁹⁰ *Ibid.*, para. 448.

²⁰⁹¹ *Ibid.*, para. 449.

²⁰⁹² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 642-643.

²⁰⁹³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

²⁰⁹⁴ *Ibid.*, para. 418.

²⁰⁹⁵ *Ibid.*, *Loc. cit.*

exercise of the rights is autonomous of the direct victims' rights and, hence, indirect victims may be granted civil party status even when 'the direct victim is alive and does not pursue the civil party action him or herself'.²⁰⁹⁶ The IACtHR has reached similar findings when discussing the autonomous right to reparations of victim's close relatives.²⁰⁹⁷

The Trial Chamber in *Duch* recognized four categories of civil parties: i) those claiming to be direct survivors of prisons S-21 or S-24; ii) those claiming to be the immediate family members of a S-21 or S-24 victim; iii) extended family members of a S-21 or S-24 victim; and iv) a deceased civil party applicant's successor.²⁰⁹⁸ In any case, it is important to bear in mind the individual identity of the victim civil party although they are put in groups and also in order to avoid some tensions between direct victims and indirect victims participating as civil parties.²⁰⁹⁹ Lastly, but equally important, Pre-Trial Chamber in *Nuon Chea et al.*, when examining the causal link, highlighted that in cases of mass atrocity, e.g., genocide and crimes against humanity, the admission as a civil party should be:

[...] seen in the context of dealing with widespread and systematic actions resulting from the implementation of nation wide policies in respect of which the individual liability alleged against each of the accused also takes collective dimensions due to allegations for acting together as part of a joint criminal enterprise.²¹⁰⁰

Indeed, the Pre-Trial Chamber in *Nuon Chea et al.*, considered that internal rule 23 *bis* (1) does not require a causal link between the harm and the investigated facts but instead 'it explicitly requires a causal link between the harm and any of the crimes alleged'.²¹⁰¹ Therefore, whereas the facts investigated are limited to certain areas, their legal characterization 'include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting

²⁰⁹⁶ Ibid., Loc. cit.

²⁰⁹⁷ See, e.g., Case of Juan Humberto Sánchez v. Honduras, Interpretation of the Judgment of Preliminary Objection, Merits, Reparations and Costs. Judgment of 25 November 2003, Series C No. 102, para. 152 (a); Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment of 19 November 1999, Series C No. 63, para. 92.b.

²⁰⁹⁸ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras 641-642.

²⁰⁹⁹ See Madhev Mohan, 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal' (2009) 9 International Criminal Law Review 733, 758-766.

²¹⁰⁰ Nuon Chea et al. (Case 002), 24 June 2011, para. 78.

²¹⁰¹ Ibid., para. 42.

in a joint criminal enterprise together and with others against the population and throughout the country'.²¹⁰²

iv) The Civil Party Applicant shall be Clearly Identified. Although this requirement was not originally present in the Internal Rules, the Trial Chamber at the initial hearing in *Duch* indicated that sufficient applicant's proof-of-identity would be required. Even though the Chamber adopted a flexible approach based on a case-by-case analysis of materials before it, it concluded that '[i]f the Chamber is to permit an Applicant to participate in criminal proceedings and to seek collective and moral reparations [...], the identity of that person must be unequivocal'.²¹⁰³ This standard is similar to the 'clearly identified' one present in the current rule 23 *bis*. Be that as it may, applicants' proof of identity during *Duch* was not particularly problematic as most victims possessed documents to prove their identities unlike African regions plagued with ongoing conflicts. However, there were problems to prove the connection between indirect and direct victims as frequently there was a lack of documents proving such relationship.²¹⁰⁴ In *Nuon Chea et al.*, the Pre-Trial Chamber stated that although the specific condition of admissibility of clear identification was not yet identified when the civil party applications were filed, the applicants were still required to submit proof of identification as indicated in the victim information form.²¹⁰⁵ It should be mentioned that, according to article 15 of the Cambodian Criminal Procedure Code, 'a civil action can be filed on behalf of a victim by his/her guardian if the victim is a minor or an adult under legal guardianship'.

Besides the above-examined four requirements, in *Nuon Chea et al.*, the Pre-Trial Chamber paid attention to whether the application of broader civil party admissibility criteria affects the balance to be maintained with the rights of the other parties involved in the proceedings.²¹⁰⁶ In examining so, the Pre-Trial Chamber noted that the purpose of the civil party action is, as detailed in the previous sub-section, to participate in the criminal proceedings by supporting

²¹⁰² *Ibid.*, Loc. cit.

²¹⁰³ Kaing Guek Eav alias Duch (Case 001), Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applicants, Trial Chamber, 26 February 2009, para. 6.

²¹⁰⁴ McGonigle Leyh (2011) 181.

²¹⁰⁵ Nuon Chea et al. (Case 002), Order on the Admissibility of Civil Party Applicants from Current Residents of Preah Sihanouk Province, Annex Concerning Civil Party Applicants Whose Applications Are in the View Majority, Inadmissible, D/404/2/4.3, Pre-Trial Chamber, 2 September 2010, p. 5.

²¹⁰⁶ Nuon Chea et al. (Case 002), 24 June 2011, paras. 96-99.

the prosecution and to seek collective and moral reparations.²¹⁰⁷ Bearing in mind this dual purpose, the Pre-Trial Chamber concluded that the admission of a large number of civil parties as such supports no concern about having ‘an adverse effect on the rights of the accused’.²¹⁰⁸

2.4.2.2. The STL

With regard to the STL, in deciding whether to grant the status of victim participants, under rule 86 (B) (i)-(iv), the Pre-Trial Judge shall consider in particular the following cumulative criteria:

- (i) whether the applicant has provided prima facie evidence that he is a victim as defined in Rule 2;
- (ii) whether the applicant’s personal interests are affected;
- (iii) whether the applicant’s proposed participation is intended to express his views and concerns; and;
- (iv) whether the applicant’s proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Although the Pre-Trial Judge in *Ayyash et al.* noticed that in principle these four criteria are cumulative requirements ‘which an applicant must satisfy in order to be granted VPP [victim participant] status’,²¹⁰⁹ he appropriately and very importantly added that:

[...] it would be unduly burdensome to require applicants to address all the criteria contained in Rule 86(B) of the Rules in their Applications. *Persons requesting VPP status are only required to provide prima facie evidence that they are victims and to indicate the reasons why they wish to participate in the proceedings. The other factors mentioned in Rule 86(B) of the Rules are matters for judicial interpretation only. Therefore, an Application may be treated as complete regardless of whether it provides evidence directly relevant to those matters, provided that the Pre-Trial Judge can derive sufficient information from the Application to rule on whether it complies with the required criteria [emphasis added].*²¹¹⁰

²¹⁰⁷ Ibid., para. 96.

²¹⁰⁸ Ibid., para. 97.

²¹⁰⁹ Ayyash et al. (STL-11-01/PT/PTJ), 8 May 2012, para. 24.

²¹¹⁰ Ibid., para. 25. See also Ayyash et al. (STL-11-01/PT/PTJ), 28 November 2012, paras. 5-9; Brouwer and Heikkilä (2013) 1306.

Accordingly, based on this judicial interpretation, to be granted the victim participant status at the STL, the applicants are fundamentally required to *prima facie* demonstrate that they are victims. Thus, the applicants do not need to provide evidence of the other factors to be granted victim participant status as they are ‘for judicial interpretation only’. As seen later in this sub-section, the consideration of those factors, especially the existence of affected personal interests, are particularly relevant for allowing participation of those who already hold the victim participant status. The interpretation provided by the Pre-Trial Judge in *Ayyash et al.* is also consistent with the requirements to become victim participant and, once this status has been granted, to be then allowed to participate at the ICC meeting the article 68 (3) requirements as previously examined.²¹¹¹

Additionally, the STL Pre-Trial Judge may also consider other criteria listed under rule 86 (B) (v)-(x).²¹¹² However, as the Pre-Trial Judge determined in *Ayyash et al.*, these factors are not even mandatory for judicial interpretation.²¹¹³

i) The Applicant is a Natural Person. Legal persons are excluded.²¹¹⁴ To bring an application, a natural person must have legal capacity, and if the victim is a minor, under 18 years within the Lebanese civil law, or otherwise lacks legal capacity, the application can be brought by a person acting on the applicant’s behalf.²¹¹⁵ Applicants must demonstrate *prima facie* proof of their identity and, when represented, proof of both the identity and the connection between the victims and his/her representative is needed.²¹¹⁶ In order to prove the applicant’s identity, the Pre-Trial Judge has considered identification documents,²¹¹⁷ and

²¹¹¹ See *supra* Chapter IV 2.3.2.2.

²¹¹² ‘(v) whether the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness; (vi) whether the legitimate personal interests of the applicant at stake in the trial are different from those of other victims participating in the proceedings, if any; (vii) whether the proposed participation by the applicant would jeopardise the appearance of integrity, dignity, decorum and objectivity of the proceedings; (viii) whether the proposed participation would cause unnecessary delay or inefficiency in the proceedings; (ix) whether the proposed participation would impact negatively on the security of the proceedings or of any person involved; and (x) whether the proposed participation would otherwise be in the interests of justice’.

²¹¹³ *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, para. 24.

²¹¹⁴ *Ibid.*, para. 30; STL President (2010), para. 19; STL President (2012), para. 19.

²¹¹⁵ *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, para. 31.

²¹¹⁶ *Ibid.*, para. 32.

²¹¹⁷ *Ibid.*, para. 33 (i) (e.g., national identity cards, individual record book extracts, passports, special passports, residence cards, driving licences).

when these cannot be provided, ‘other reliable documents whose primary purpose is not to be used as identification documents, but which nonetheless contain information identifying the applicant’.²¹¹⁸

ii) *The Harm Suffered Was a Direct Result of an Attack within the Tribunal’s Jurisdiction.*²¹¹⁹ In order to prevent the victims from being too numerous and, hence, avoid the ‘flooding’ of the STL, the STL President’s Explanatory Memorandum on RPE states it was necessary to define ‘victim’:

[...] rather narrowly so as to include only those natural persons who have suffered material, physical or mental harm *as a direct result* of an attack within the jurisdiction of the Tribunal [...] individuals who may have suffered indirect harm, are thus excluded.²¹²⁰

However, the Pre-Trial Judge pointed out that the use of the adjective ‘direct’ in rule 2 ‘refers to the requirement (“direct result”) and does not refer to the notion of harm itself’.²¹²¹

Accordingly, the Pre-Trial Judge concluded that not only ‘victims who have suffered direct harm’ (‘direct victims’) but also ‘victims who have suffered harm as a result of the harm suffered by the direct victim (‘indirect victims’) can be admitted as victim participants at the STL.²¹²² Three arguments were given to reach this conclusion. First, a teleological argument, i.e., ‘direct result’ was interpreted in the light and the spirit of the Statute, and it was noted that neither article 25 nor rule 86 (G) includes a requirement that the harm suffered by the victim be a direct result of the commission of crimes.²¹²³ Second, the exclusion of indirect victims from participation in the proceedings was found to be contrary to international practice, i.e., the ICC and in particular the ECCC as the latter has allowed participation of indirect victims as civil parties although its Internal Rules require the victim to demonstrate that (s)he suffered injury as ‘a direct

²¹¹⁸ Ibid., para. 33 (ii).

²¹¹⁹ As for STL’s jurisdiction see article 1 (establishing jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons and, potentially over attacks connected with and of gravity similar to the attack against Hariri that took place between 1 October 2004 and 12 December 2005), and article 2 (establishing jurisdiction ‘over provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences’).

²¹²⁰ STL President (2010), para. 19; STL President (2012), para. 19.

²¹²¹ Ayyash et al. (STL-11-01/PT/PTJ), 8 May 2012, para. 39.

²¹²² Ibid., Loc. cit.

²¹²³ Ibid., para. 40.

consequence' of the crime.²¹²⁴ Third, the Pre-Trial Judge found his interpretation of 'direct' and 'indirect' victims consistent with international human rights standards, in particular the UN Basic Principles and Guidelines.²¹²⁵ Fourth, the Lebanese Code of Obligations and Contract provides for the awarding of reparations for indirect harm.²¹²⁶

Although the Pre-Trial Judge found the meaning of the word 'direct' in rule 2 (A) as a 'limiting factor that restricts the recognition of victim status only where persons are closely connected to the Attack or the direct victim thereof', he added that the notion of closeness of relationships is context-dependent.²¹²⁷ Therefore, he addressed the question of how closely an indirect victim has to be related to the direct victim, and on what basis, to be granted victim participant status.²¹²⁸ Accordingly, the Pre-Trial Judge found that not only first degree relatives but also persons in relationships of like proximity to the direct victim, and other extended family members who have 'a special bond of affection with or dependence on the direct victim' can be considered to have suffered harm as a direct result of the attack.²¹²⁹ The Judge also added that the harm suffered by the indirect victims and the closeness of the relationship between them and the direct victims determine what evidence requirements are applicable to proving the indirect victims' harm.²¹³⁰ To prove the direct result and under a *prima facie* standard, while direct victims need to show at a minimum their presence at the scene of the attack at the relevant time,²¹³¹ indirect victims in addition have 'to show their kinship, close personal relationship or bond of special affection with, or dependence on, the direct victim, as appropriate'.²¹³²

It is herein agreed with the Pre-Trial Judge's findings as the STL RPE's definition of victims is in principle restrictive and a narrow interpretation would have constituted a step backwards in victims' participatory standing as evidenced in the practice of the ICC and the ECCC. This would especially be true considering the relatively low number of applicants to be victim participants before the STL as opposed to the much larger number that the ICC and the ECCC deal with. Indeed, in *Ayyash et al.*, there were originally 73

²¹²⁴ Ibid., para. 41.

²¹²⁵ Ibid., para. 43.

²¹²⁶ Ibid., para. 44.

²¹²⁷ Ibid., para. 46.

²¹²⁸ Ibid., Loc. cit.

²¹²⁹ Ibid., para. 50.

²¹³⁰ Ibid., Loc. cit.

²¹³¹ Ibid., paras. 50-51.

²¹³² Ibid., para. 52.

applications,²¹³³ and 58 applicants were allowed to participate in the proceedings as victim participants in the first decision.²¹³⁴ Additionally, the other STL RPE safeguards previously referred to are found here as enough guarantees to avoid or at least reduce considerably the risks of delay and ‘flood’ of the STL related to victim participation. These mechanisms should be enough to handle a potentially (exponential) increase in the number of victims due to the inclusion of indirect victims, which considering the STL’s very limited resources may have a major impact on its efficiency.²¹³⁵

It must be also added that the Pre-Trial Judge, in his Fourth Decision on Victims’ Participation in the Proceedings, clarified that the ‘causal link required between the harm suffered and “an attack within the Tribunal’s jurisdiction” must be read as requiring a nexus between the harm alleged and a crime specifically charged in the Indictment’.²¹³⁶ Therefore, it is required a causal nexus between harm suffered by an applicant and a relevant crime charged in the indictment,²¹³⁷ i.e., not any crime within the STL’s jurisdiction. This finding is consistent with the jurisprudence of the ICC and the ECCC previously examined. It should also be noted, as discussed in detail later,²¹³⁸ that victims can only be granted the victim participant status once the indictment is confirmed at the STL.²¹³⁹

iii) The Applicant Has Suffered Physical, Material or Mental Harm. Under rule 2, harm was understood as ‘injury, loss, damage; material or tangible detriment’.²¹⁴⁰ ‘Physical harm’ was said to encompass substantial bodily injuries, which ordinarily requires a degree of medical treatment for the victim.²¹⁴¹ ‘Material harm’ was interpreted as damage to, or destruction of property, loss of income or of means of subsistence and other financial loss forms.²¹⁴² ‘Mental harm’ was interpreted to encompass emotional, psychological or psychiatric nature harm, and emotional distress must be serious.²¹⁴³ Moreover, first-degree

²¹³³ Ibid., para. 6.

²¹³⁴ Ibid., viii. Disposition.

²¹³⁵ Jérôme de Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’ (2010) 8 Journal of International Criminal Justice 165, 168.

²¹³⁶ Ayyash et al. (STL-11-01/PT/PTJ), 2 May 2013, para. 15.

²¹³⁷ Ibid., para. 23.

²¹³⁸ See *infra* Chapter IV 3.4.1.2.

²¹³⁹ STL RPE, rule 86 (A).

²¹⁴⁰ Ayyash et al. (STL-11-01/PT/PTJ), 8 May 2012, para. 63 (citing Bryan Garner (ed.), Black’s Law Dictionary (9th edn. West 2009).

²¹⁴¹ Ibid., para. 66.

²¹⁴² Ibid., para. 72.

²¹⁴³ Ibid., para. 78.

relatives (indirect victims) are presumed to have a special bond of affection with the direct victim and, hence, the harm suffered by the former 'can be presumed in case of death of the direct victim' in line with and citing the ECCC and ICC case law.²¹⁴⁴ This presumption was also extended to persons in a similar close relationship with the deceased if the former satisfy *prima facie* the existence of a relationship with the latter.²¹⁴⁵ Extended family members' harm can exceptionally amount to a direct result of the attack in case the applicant can establish close personal relationship with the direct victim.²¹⁴⁶

iv) The Applicant's Personal Interests Are Affected. The Pre-Trial Judge correctly pointed out that as victims are not parties within the meaning of rule 2, i.e., in contrast to the Prosecutor and the defence, but only participants, they 'cannot intervene in the proceedings as of right. They must show that their personal interests are affected'.²¹⁴⁷ However, the Pre-Trial Judge added that when determining whether a person is a victim, in the sense of rule 2, the notion of 'personal interests' is of limited relevance as its existence can be presumed once it is determined that the person in question has suffered physical, material, or mental harm as a direct result of an attack within the STL's jurisdiction.²¹⁴⁸ In any case, the Pre-Trial Judge stated that "personal interests" will assume additional importance when deciding on specific the modalities for the VPPs [victims participating in the proceedings] proposed participation'.²¹⁴⁹

v) Whether the Applicant's Proposed Participation is Intended to Express his Views and Concerns. This criterion was understood as the general motivation of persons seeking to participate in the proceedings as victim participants and also the modalities to participate.²¹⁵⁰ Thus, it was required that applicants are driven to contribute to the pursuit of justice, e.g., to establish the truth or to obtain recognition of the harm suffered by them.²¹⁵¹ In this stage, the Pre-Trial Judge determined the first aspect of the notion, i.e., to determine whether those who seek to participate are motivated by a legitimate objective, to be the only relevant as the determination of the specific participation modalities becomes only relevant when establishing those modalities at the appropriate stage of the

²¹⁴⁴ Ibid., para. 84.

²¹⁴⁵ Ibid., Loc. cit.

²¹⁴⁶ Ibid., Loc. cit.

²¹⁴⁷ Ibid., para. 89.

²¹⁴⁸ Ibid., para. 90.

²¹⁴⁹ Ibid., Loc. cit.

²¹⁵⁰ Ibid., para. 96.

²¹⁵¹ Ibid., Loc. cit.

proceedings.²¹⁵² Moreover, if the applicant has not stated any specific reason for participation, ‘the Pre-Trial Judge has considered whether, taking into account the entirety of his application, his willingness to do so was demonstrated’.²¹⁵³

vi) Whether the Applicant’s Proposed Participation Would be Prejudicial to or Inconsistent with the Rights of the Accused. This requirement can be met in at least three manners.²¹⁵⁴ First, ensuring the victim participants meet the criteria above-discussed. Second, victim participants will ordinarily be represented by common legal representatives who are required to ensure the integrity and expeditiousness of the proceedings. Third, concrete measures can be taken, if necessary, so that victims’ participation does not prejudice the accused’s rights. The Pre-Trial Judge added that:

After having conducted an individual assessment of the Applications, the Pre-Trial Judge finds that, in respect of those applications that meet the other criteria in Rule 86(B) of the Rules, there are no reasons to conclude, at this stage, that the applicants’ participation in the proceedings would be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.²¹⁵⁵

vii) Other Criteria. The Pre-Trial Judge also examined some of the other criteria, which according to rule 86 (B) (v)-(x), he can deem as relevant.²¹⁵⁶ As for rule 86 (B) (v), the fact that a person may be a witness does not deprive him/her of his/her right to participate as a victim.²¹⁵⁷ As for rule 86 (B) (vi), the fact that the interests of an applicant may diverge from the other victim participants’ interests shall not serve to deprive that person of his/her right to participate as a victim. As for rules 86 (B) (vii) and (viii) on the impact of victims’ participation on the integrity, dignity, decorum, objectivity, duration of or efficiency in the proceedings, it was noted that victim participants will ordinarily be allowed to participate, not on their own account but via a common legal representative. As for rule 86 (B) (x), whether the proposed victims’ participation would otherwise be in the justice interests is to be determined at the time it arises, if at all. However, the Pre-Trial Judge added that the interests of justice and those of victims would normally be complementary as ‘victims are likely to have an interest in seeing that crimes are investigated and - where appropriate -

²¹⁵² Ibid., para. 97.

²¹⁵³ Ibid., para. 98.

²¹⁵⁴ Ibid., para. 100.

²¹⁵⁵ Ibid., para. 101.

²¹⁵⁶ Ibid., para. 102.

²¹⁵⁷ Ibid., para. 102 i).

prosecuted'.²¹⁵⁸ Like with the ICC, although victims arguably have a specific interest in that the alleged perpetrators of the crime are brought to court and justice is done,²¹⁵⁹ it is necessary not to equate victims' personal interests to a prosecutorial function nor consider the STL as a (pure) restorative justice mechanism.

In any case, 'personal interests' should not in principle be reevaluated at every point in the proceedings as it would otherwise generate delays and because once victims are determined to hold personal interests in a particular case, it may be assumed that these interests are affected in subsequent proceedings,²¹⁶⁰ at least within the same procedural stage, e.g., during trial. The identified criteria have been applied by the Pre-Trial Judge in a second decision in the same case granting victim participant status to 9 out of 15 victim participant status applicants, who had not been granted the status due to incomplete applications under the first decision.²¹⁶¹ The same criteria were again applied in two later decisions by the Pre-Trial Judge who granted an applicant the victim participant status in a third decision and denied four applicants the victim participant status as they failed to provide *prima facie* evidence that they are victims, as defined in rule 2, in a fourth decision.²¹⁶²

2.5. Comparative Conclusions

At the ICC and the STL, victims can be granted the status of victim participants to express their own views and concerns. At the ECCC, victims can participate as civil parties in criminal proceedings by supporting the prosecution and to seek reparations, which reflects the French system influence via Cambodian law. Whereas the timing and modalities of participation concerning victim participants are subject to the respective chamber's authorization at the ICC and the STL, civil parties at the ECCC do not in principle need to receive a chamber's previous authorization to participate once their civil party applications have been successful.²¹⁶³ Nevertheless, as seen later, the modalities of participation/procedural rights held by victim participants and those held by

²¹⁵⁸ Ibid., para. 102 v).

²¹⁵⁹ See also Hemptinne (2010) 172.

²¹⁶⁰ Ibid., Loc. cit.

²¹⁶¹ Ayyash et al. (STL-11-01/PT/PTJ), Second Decision on Victims' Participation in the Proceeding, Pre-Trial Judge, 3 September 2012, paras. 1-13 and p. 5.

²¹⁶² See, respectively, Ayyash et al. (STL-11-01/PT/PTJ), Third Decision on Victims' Participation in the Proceedings, Pre-Trial Judge, 28 November 2012, paras. 6-9 and p. 5; Ayyash et al. (STL-11-01/PT/PTJ), 2 May 2013, para. 29 and p. 10.

²¹⁶³ See also Spiga (2012) 1386.

civil parties are generally speaking similar and this, in practice, makes victim participants' status to get closer to that of civil parties at the examined international and hybrid criminal courts. At the ICTY, the ICTR and the SCSL, victims cannot participate as civil parties or victim participants; however, they can 'participate' in very specific procedural instances, which is similar to the Anglo-American systems. Unlike the ICTY, the ICTR and the SCSL instruments, which implicitly refer to an 'alleged' victim, similar to the American system, at the ICC, the ECCC and the STL there is not such implication. At the ICC, victims without holding the official victim participant status, i.e., without being granted the formal victim participant status upon application, can participate in very specific instances as detailed later,²¹⁶⁴ if they fulfill the victim definition (rule 85).

In order to grant the status of victim participants (ICC, STL) or civil parties (ECCC) and participate as such, the legal instruments and practice of the international and hybrid criminal courts have followed to an important extent and *mutatis mutandi* the same standards and criteria. Thus, the ICC, the ECCC and the STL have applied a *prima facie* standard of review when deciding on the admissibility of the applications for granting the victim participant or civil party status. In practical terms, the initial admissibility of the victims as victim participants or civil parties does not mean that their status cannot be reviewed again according to the progress of a case throughout different procedural stages, which at the ICC may mean up to four revisions. The *prima facie* standard of admissibility is in principle a sound approach as, when processing the admissibility of applications, it is not yet known whether the accused committed the crimes. However, some of its practical effects such as the Trial Chamber's decision to withdraw the status of victim participants in the judgment in *Lubanga* due to inconsistencies in the dual victim participant-victim witness's evidence should be criticized.²¹⁶⁵

At the ECCC, the 'more likely than not to be true standard' explicitly introduced by amendments to the Internal Rules should and have been used in a flexible manner when examining civil party applications, which in practice corresponds to a *prima facie* standard. Currently, victims can only join as civil parties before the Co-Investigating Judges (previously, they could also do it before the Trial Chamber). At the ECCC, the two-step determination of civil parties applications, i.e., first, the *prima facie* standard in the admissibility process and, second, considering all the trial evidence discussed in the merits

²¹⁶⁴ See *infra* Chapter IV 3.3.1 and 3.3.3.1.

²¹⁶⁵ See for further discussion on this issue *supra* Chapter III. 2.3.2.2.

judgment in application of a more demanding evidentiary standard, i.e., ‘more likely than not to be true’ (as applied during the reparations stage), led to revocation of status of an important number of civil parties in *Duch*. Although this two-step determination is necessary to prevent a backlog of applications, it is necessary to inform the victims of the conditional/revisable character of their civil party status in order to avoid their frustration and disillusionment. Concerning the purposes of civil party action before the ECCC, as detailed in its rules, they are to participate in the proceedings by supporting the prosecution and to seek collective and moral reparations, i.e., civil party participation includes both the right to participate as parties in the accused’s criminal trial and to pursue a related civil action for collective and moral reparations. Case law has also referred to the rights to truth and justice. In any case, not necessarily all civil parties have to seek reparations but those who want them at the ECCC have to join the proceedings as civil parties. The French system is similar as there is a double purpose for civil party constitution, i.e., reparative and repressive, civil claim for damages is not necessary for civil party constitution and a civil party is free to request reparations for his/her harm. To speed up the admissibility process, especially concerning numerous victim applicants, steps such as collective applications, simplified victim application process, earlier deadlines and court’s assistance, as mostly already implemented by the ICC, and non-contentious proceedings as adopted by the STL are advisable. However, Trial Chamber V’s decision to allow victims to become victim participants via ‘registration’, i.e., without judicial assessment of the individual applications, when they do not want to participate in person, despite its (potential) benefits, can be criticized by going beyond what it is established under the ICC legal framework and for substantially departing from the ICC’s consistent practice.

With regard to the requirements to be granted the status of victim participants or civil parties, which mainly consist in that the applicants can demonstrate that they are victims, and then participate as victim participants or civil parties, there are important similarities across the legal instruments and practices of the ICC, the ECCC and the STL but also some important differences, examined as follows. First, whereas at the ICC and the ECCC, the applicant cannot only be a natural person but also a legal one, similar to the French system, at the STL only natural persons can apply. At the three courts, the applicants have to prove their identities. However, their practice has been flexible as to the scope of identifying documents, i.e., not only official ones. This is especially relevant for the ICC taking into account the difficulties to obtain official documents in ongoing armed conflict scenarios. Nevertheless,

considering the outcome of some victim participants who were presumed to have stolen identities in *Lubanga*, it is necessary to conduct strict (earlier) controls of the provided identifying information. This is especially important bearing in mind the victim's future participation during trial and considering the right of the accused to an impartial and fair trial. Similar to the examined national systems, under the ICC, the STL and the ECCC instruments and/or practice, minors or disabled people can have their applications submitted by a representative on their behalf. Proof of the representative's identity and the link with the represented person is additionally required.

Second, in relation to the crimes for which participation is sought, these have to fall within the material, temporal, geographical and personal jurisdiction of the ICC, the ECCC or the STL.

Third, the existence of harm, about which the ICC, the ECCC and the STL (explicitly in its Statute) have found that it includes physical, material or mental harm. According to the ICC case law, direct or indirect harm must be personal to the victim. There is consensus across the three courts that the harm suffered by a 'direct' victim can give rise to harm on other individuals, i.e., 'indirect victims' such as direct victim's relatives. The ICC, the ECCC and the STL have applied presumptions of harm inflicted on close relatives, e.g., a mother with respect to her child. Persons harmed when assisting direct victims, preventing potential direct victims from being victimized and those who witnessed especially violent crimes were also considered by the ICC as having suffered harm and, thus, indirect victims. Moreover, the ICC, the ECCC and the STL have considered extended family members as victims by paying attention to the cultural contexts where victims come from (in particular the ICC and the ECCC) although it has normally been required additional information or evidence to support a harm claim resulting from the direct victim's harm. The scope of indirect victims has been extended beyond family members, including persons who by trying to assist victims suffered harm or who witnessed violent crimes (ICC) and common law spouses, friends and *de facto* adopters (ECCC) provided that the harm is demonstrated. The IACtHR and ECtHR case law, the UN Basic Principles and Guidelines were cited by the three courts to interpret the 'harms suffered' criterion, which is *mutatis mutandi* similar to some of the national practice examined.

At the ICC, deceased person's relatives may participate for their own harm suffered as a result of their relatives' death and, hence, both have been considered as having suffered personal harm. Deceased victim applicant/victim participant's relatives can take over the deceased's application and participation

but limited to the latter's views and concerns. However, during the ICC appeals stage, an heir/successor cannot reassume the deceased victim's participation. In turn, the ECCC Supreme Court Chamber has allowed indirect victims to constitute civil parties regardless of whether the direct victim is still alive and of whether (s)he pursues the civil party action himself. This is similar to some of the French *Cour de Cassation's* jurisprudence although this has been lately replaced by a condition of having the civil action triggered by the deceased person.

Fourth, concerning the existence of a causal link between the crime and harm inflicted, whereas the ICC RPE do not require a direct link, both the ECCC Internal Rules and the STL RPE demand so. However, as said, similar to the ICC, both the ECCC and the STL have recognized not only direct but also indirect victims. Accordingly, indirect victims suffer harm as a result of the harm suffered by direct victims. The ICC appropriately identified that for trial participation purposes the link has to be established only with those crimes confirmed, out of the universe of crimes under the ICC's jurisdiction, as these are the ones considered during trial, which is similar to the current version of the ECCC Internal Rules. The ECCC in applying its Internal Rules has established that the causal link is not between harm and any crime under the ECCC's jurisdiction but between harm and crimes alleged against the charged person. The STL's case law has followed the approach of the ICC and the ECCC, i.e., nexus between harm and not any crime under the court's jurisdiction but a crime charged in the indictment. The ICC excluded those individuals who suffered harm as a result of the conduct of direct victims, e.g., child soldiers' victims, from the category of victim participants, which may be justified to avoid a flood of applicants. Having said this, Prosecutors should bear in mind the importance of carefully selecting which crimes are charged so as not to leave out important groups of victims.

When it comes to indirect victims, although evidence of the existence of bonds, relationship with or dependence on the direct victim may be considered as burdensome and even as an extra requirement, it is arguably necessary to prove that the harm suffered by the indirect victims comes from the harm inflicted to the direct victim precisely due to those bonds. International human rights sources, especially regional human rights courts' jurisprudence, have been important to interpret the causal link as well as the existence of harm criteria. When it comes to the examined national practice, especially the Anglo-American one, the focus is on direct, proximate causal link, i.e., primarily direct victims, but indirect victims are also allowed mainly when the direct victim is

death, disabled or incompetent. In turn, when interpreting the causal link criterion, the ECCC referred to the French CPP.²¹⁶⁶

Fifth, under the ICC and the STL legal instruments and practice, Judges additionally have to evaluate whether victim participants should be allowed to participate considering, *inter alia*, whether the victim participants' personal interests are affected and also victim participation's consistency with the accused's rights. The STL has determined that fundamentally applicants have only to demonstrate that they are victims to be granted the victim participant status and, thus, the affected personal interests requirement (under the STL RPE) is much more relevant for modalities of participation, i.e., once victims already hold victim participant status. Thus, even though the STL has considered that personal interests are presumably affected when harm is determined to exist, it has pointed out its importance when determining participation modalities. On the other hand, at the ECCC, once a victim is admitted as civil party, there is no special requirement to demonstrate any affected personal interest during the proceedings. Civil party constitution *per se*, as established in the Internal Rules, has the dual purpose of supporting the prosecution and seeking reparations. The lack of a specific need to demonstrate affected personal interests arguably corresponds to the fact that the victim as civil party is a party and not only a participant at the ECCC. In interpreting 'personal interests', ICC Pre-Trial Chambers have followed a systematic approach, i.e., the assessment of victims' personal interests should be assessed considering whether they are affected in relation to a whole procedural stage.²¹⁶⁷ On the other hand, the ICC Trial Chambers, the Appeals Chamber, and Pre-Trial Chambers (concerning the investigation stage),²¹⁶⁸ have followed a casuistic approach, i.e., assessing whether victim's personal interest is affected by a specific issue or evidence within the same procedural stage. Although the casuistic approach better safeguards the accused's rights and is consistent with the personal interest pre-condition, it is in general inefficient, time-consuming and burdensome.

As for the content of 'personal interests', whereas ICC Pre-Trial Chambers and Trial Chambers have considered that those include not only reparations, protection and declaration of truth but also victims' wish to see those who victimized them punished, the ICC Appeals Chamber has been cautious so as that victims' personal interests do not intersect with the

²¹⁶⁶ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 642, footnote 1075 (citing article 2 of the French CPP).

²¹⁶⁷ See also *infra* Chapter IV 3.3.2.2.

²¹⁶⁸ See, for discussion, *infra* Chapter IV 3.3.2.2.

prosecutorial function. Even though the desire for justice to be done is arguably a victim's personal interest, this should not be interpreted as equating victims' personal interests to the Prosecutor's mandate nor to consider the ICC as a pure restorative mechanism. As for the STL, its emerging practice has considered interests of victims and justice as complementary since victims have an interest that crimes are investigated and prosecuted. Observations similar to those made for the ICC are applicable to the STL.

3. Victims' Participation in Investigation/Pre-Trial Proceedings

In this sub-chapter, the scope and the modalities of participation/procedural rights of victim participants/civil parties in pre-trial proceedings, i.e., *inter alia*, investigation and confirmation of charges hearing, are examined. The analysis is focused on the ICC, the STL (victim participants) and the ECCC (civil parties). As for the ICTY, the ICTR and the SCSL, victims' status is presented in a very general manner since their role at this stage is exclusively limited to that of witnesses.

3.1. National Systems

3.1.1. English Adversarial System

The victim can report the offence to the police.²¹⁶⁹ The crime victim as such does not have a right to start a prosecution; however, like any citizen (personally affected by the offence or not) holds the right to institute a private prosecution.²¹⁷⁰ Nevertheless, the right to bring a private prosecution is subject to the risk that the Director of Public Prosecutions may take it over and, if (s)he deems it appropriate, to discontinue it.²¹⁷¹ Moreover, the very residual use of private prosecution in the contemporary criminal justice system is only of a symbolic value.²¹⁷² In case of a public prosecution, the victim has no right to join in as civil party.²¹⁷³ During the investigation, the victim has no right. Although the Victim's Charter mentions that they can expect the police to keep them informed, they do not hold a legal right to information.²¹⁷⁴ English law does not make it a precondition for the prosecution of certain types of offence that the

²¹⁶⁹ Brien and Hoegen (2000) 257.

²¹⁷⁰ Prosecution of Offences Act 1985, section 6 (1). See also Spencer (2002) 153.

²¹⁷¹ Prosecution of Offences Act 1985, section 6 (2).

²¹⁷² Doak (2008) 125.

²¹⁷³ Spencer (2002) 156; Brien and Hoegen (2000) 259.

²¹⁷⁴ Spencer (2002) 169.

victim consents and, hence, the victim has no legal right to put a stop to an investigation or a prosecution.²¹⁷⁵

The victim also lacks a legal right to insist on the police to take action.²¹⁷⁶ Although the police will normally seek the victim's views about prosecution, the Crown Prosecution Service (CPS) takes the last decision on starting proceedings, i.e., to decide whether to prosecute a case. According to the Code for Crown Prosecutors, a two-fold test is applicable, i.e., a realistic prospect of conviction and whether it would be in the public interest to proceed.²¹⁷⁷ Concerning the public interest, 'prosecutors should take into account any views expressed by the victim [or his/her family] regarding the impact that the offence has had'.²¹⁷⁸ However, the Code of Crown Prosecutors also states that since the Prosecution does not act for victims or their families as solicitors, the Prosecutors have to 'form an overall view of the public interest'.²¹⁷⁹ This provision makes the link between the public interest and victim's views ambiguous and indeed the victim's consent is not necessarily required for the public interest.²¹⁸⁰

Accordingly, the victim has no right to be involved in the charging decision, but the Prosecutor is obligated to consider victims' interest to decide whether to prosecute or not.²¹⁸¹ It is the failure to prosecute cases where the taking of life or degrading, inhuman treatment happened and not the failure to give appropriate weight to victims' desires as such, which in principle is a potential violation of articles 2 or 3 of the ECHR.²¹⁸² Having said so, there is a state obligation to conduct the investigation on its own motion, and ensure effective participation of the victim or victim's family according to the ECtHR's jurisprudence.²¹⁸³ Article 3 investigative obligation was considered in *R (B) v Director of Public Prosecutions* and the claimant was awarded damages as the Prosecutor had dropped the case due to the claimant's mental problems.²¹⁸⁴

²¹⁷⁵ Ibid., 169.

²¹⁷⁶ Ibid., 170.

²¹⁷⁷ See Code for Crown Prosecutors (2010), sections 4.5-4.17.

²¹⁷⁸ Ibid., section 4-18.

²¹⁷⁹ Ibid., section 4-19.

²¹⁸⁰ See Doak (2008) 120; Joanna Shapland and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in Bottoms and Roberts (2010) 163, 165.

²¹⁸¹ Doak (2008) 122.

²¹⁸² Ibid., Loc. cit.

²¹⁸³ ECtHR, *Hugh Jordan v. United Kingdom*, Appl. No. 24746/94, Judgment, 4 May 2001, paras, 105-109. See also ECtHR, *Edwards and Lewis v. United Kingdom*, Appl. Nos. 39647/98 and 40461/98, Judgment, 27 October 2004, para. 74.

²¹⁸⁴ *R (B) v Director of Public Prosecutions* [2009] 1 WLR 2072.

Moreover, in cases against the United Kingdom, the ECtHR found violations of article 2 of the ECHR as the State had denied victims' certain participatory rights in inquest proceedings, which are independent judicial investigations set up to determine the facts surrounding a suspicious death and where victims' families can participate via their counsel.²¹⁸⁵ The ECtHR criticized the lack of reasoning provided to victims for decisions not to prosecute and for not subjecting such decisions to judicial review.²¹⁸⁶ It was also criticized that victims' families had problems obtaining copies of witness statements before that witness was called to testify,²¹⁸⁷ which puts victims' families in disadvantage to prepare and in their ability to participate in questioning.²¹⁸⁸

In any case, the prosecutors in certain cases have the obligation to inform the victims of their decisions, e.g., when they stop a case or substantially alter the charge.²¹⁸⁹ The CPS is obligated to ensure that victims are informed of charging decisions and, in some cases, the police is responsible for this; and when a Crown Prosecutor decides that there is insufficient evidence to bring any proceedings, the CPS has to notify the victim of this fact.²¹⁹⁰ Furthermore, if after an individual has been charged and following case review, the CPS takes a decision to substantially alter or drop any charge, the CPS must notify the victims, and in all other circumstances the police is responsible for notification.²¹⁹¹ The prosecutor may decide in accordance with CPS guidance that is inappropriate or unnecessary to notify the victims or that, for legal reasons, no explanation beyond setting out the tests in the Code for Crown Prosecutors can be provided, which in any case must be recorded.²¹⁹² In certain types of cases,²¹⁹³ the CPS must offer to meet the victims to explain a prosecution

²¹⁸⁵ McGonigle Leyh (2011) 107.

²¹⁸⁶ See, e.g., ECtHR, *McKerr v. United Kingdom*, App. No. 28883/95, Judgment, 4 August 2001, para. 130; ECtHR, *Hugh Jordan v. United Kingdom*, App. No. 24746/94, Judgment, 4 August 2001, para. 122.

²¹⁸⁷ See, e.g., ECtHR, *McKerr v. United Kingdom*, App. No. 28883/95, Judgment, 4 August 2001, para. 147; ECtHR, *Hugh Jordan v. United Kingdom*, App. No. 24746/94, Judgment, 4 August 2001, para. 133.

²¹⁸⁸ See, e.g., ECtHR, *McKerr v. United Kingdom*, App. No. 28883/95, Judgment, 4 August 2001, para. 148; ECtHR, *Hugh Jordan v. United Kingdom*, App. No. 24746/94, Judgment, 4 August 2001, para. 134.

²¹⁸⁹ Code for Crown Prosecutors (2010), section 4.20.

²¹⁹⁰ Code of Practice for Victims of Crime (2006), section 7.2 and 3.

²¹⁹¹ *Ibid.*, section 7.4.

²¹⁹² *Ibid.*, section 7.5.

²¹⁹³ These include cases involving a death allegedly caused by criminal conduct, such as murder, manslaughter, sexual offences, racially and religiously aggravated offences. See Code for Crown Prosecutors (2010), section 7.6.

decision when the prosecutor decides not to bring proceedings or where a decision is taken to drop or substantially alter charges in respect of relevant criminal conduct.²¹⁹⁴ The Divisional Court has highlighted the importance that if a prosecution is ‘not to follow a plausible explanation will be given’.²¹⁹⁵ However, in cases of plea negotiations, decisions lie entirely with the Crown Prosecutors and there is no statutory obligation to inform or consult with the victim.²¹⁹⁶ It should be remembered that the Committee of Ministers of the Council of Europe issued a recommendation calling for States to permit victims to challenge decisions not to prosecute or to alternatively allow private prosecutions.²¹⁹⁷

The EU Framework Decision on Victims, *inter alia*, established that ‘Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence’ and the right to receive information.²¹⁹⁸ The EU Directive on Victims contains similar provisions although these are more detailed, including: i) right to be heard, i.e., victims may be heard and may provide evidence;²¹⁹⁹ ii) right to information;²²⁰⁰ iii) right when making a complaint;²²⁰¹ and iv) rights in the event of a decision not to prosecute.²²⁰²

3.1.2. American Adversarial System

As mentioned, victims lack civil party status or an official victim participant status; however, there is some participation during pre-trial. The police is called to investigate after a crime is committed, a potential victim is interviewed by the police and gives his/her statement, the case is then given to the District Attorney who represents the state where the crime was committed, not to the victim’s lawyer.²²⁰³ The CVRA, applicable to victims of federal crimes, contains rights for

²¹⁹⁴ Code of Practice for Victims of Crime (2006), section 7.7.

²¹⁹⁵ R. v DPP ex parte Manning and Melbourne [2001] Q. B. 330, DC.

²¹⁹⁶ Although the Attorney’s 2005 Guidelines on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercises imposes an obligation to speak to the victim or victim’s family and to inform them about his/her decision, victims lack a formal input in the decision. See Doak (2008) 124.

²¹⁹⁷ See Recommendation of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System, 724th Meeting of the Ministers’ Deputies, Doc.No. R (2000) 19 (2000), para. 34.

²¹⁹⁸ EU Framework Decision on Victims, articles 3-5.

²¹⁹⁹ EU Directive on Victims, article 10.

²²⁰⁰ *Ibid.*, articles 4 and 6.

²²⁰¹ *Ibid.*, article 5.

²²⁰² *Ibid.*, article 11.

²²⁰³ DiCicco (2009) 2.

victims during pre-trial including the following.²²⁰⁴ First, right to be notified of and present during the defendant's initial appearance and, in case the bail is to be set or denied during the initial appearance, the victim holds the right to be reasonably heard.²²⁰⁵ Second, right to be reasonably heard when the court determines whether the defendant will be released before trial,²²⁰⁶ as victims have the right 'to be reasonably protected from the accused'.²²⁰⁷ Nevertheless, it is not indicated which weight the court should give to the victims' statements, i.e., this should be determined on a case-by-case basis.²²⁰⁸ This right, as a District Court determined, can be satisfied by a written statement.²²⁰⁹ Third, right to be notified and present at a waiver of indictment hearing, and when the release of the defendant becomes an issue or when the defendant refuses to waive indictment and bail must be continued or modified, a victim has the right to be heard.²²¹⁰ Fourth, right to be notified of and present at the defendant's arraignment and the victim holds the right to be heard concerning the plea and the continuation or resetting of bail.²²¹¹

The victim lacks formal authority to prevent the prosecutor from pursuing a formal charge and the latter may proceed over the victims' objection.²²¹² Individuals (victims included) cannot make out a complaint in a federal court, unlike many state procedures, where this is subject to a subsequent probable cause review by the prosecutor and/or magistrate.²²¹³ Whereas in a

²²⁰⁴ See, in general, 18 U.S.C. § 3771 (a) '(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding'.

²²⁰⁵ 18 U.S.C. § 3771 (a) (2) and (4). See also *U.S. v. Turner*, 367 F. Supp. 2d 319, 321-28 (E.D.N.Y. 2005) (detailing court's actions to correct inadequate notice to victims about a defendant's arraignment and bail hearing).

²²⁰⁶ 18 U.S.C. § 3771 (a) (4).

²²⁰⁷ 18 U.S.C. § 3771 (a) (1).

²²⁰⁸ See Jefri Wood, *The Crime Victims' Rights Act of 2004 and the Federal Courts* (Federal Justice Center 2008) 3.

Available at: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/cvra0806.pdf> (last visit on 20 October 2012).

²²⁰⁹ *United States v. Marcello*, 370 F. Supp. 2d 745, 746-50 (N.D. III. 2005).

²²¹⁰ See 18 U.S.C. § 3771 (a) (2) (3) and (4); Wood (2008) 4.

²²¹¹ See 18 U.S.C. § 3771 (a) (2) (3) and (4); Wood (2008) 4.

²²¹² *Beloof, Cassell and Twist* (2010) 205.

²²¹³ The complaint is normally sufficient for a misdemeanor but not felony prosecution. *Ibid.*, 204.

federal court the decision not to prosecute is almost absolute, some state jurisdictions allow a crime victim to seek judicial review of the prosecutor's decision not to prosecute according to statute.²²¹⁴ Most state jurisdictions permit the victim to access the grand jury,²²¹⁵ historically allowed at common law, and this access varies from state to state as some states allow access without limitation whereas others after exhausting other remedies.²²¹⁶ Although a victim may appear at a grand jury only as a witness, the court discretionally may authorize attendance beyond this, and some state constitutional amendments appear to permit a victim's presence in grand jury proceedings.²²¹⁷ While most state constitution amendments allow victims' appearance only where a defendant has the right to be present, when the formal charging mechanism is preliminary hearing, state constitutional provisions or their statutory equivalents seem to permit victim's presence as the defendant also has the right to be present at preliminary hearings.²²¹⁸

Private persons may lawfully spend any amount on a private investigation and this can be led by a private counsel.²²¹⁹ Even though private prosecutions are possible, these are limited by the law of due process,²²²⁰ excluded in cases involving serious crimes and where the public prosecutor has expressly refused to prosecute.²²²¹ Indeed, they are normally limited to petty

²²¹⁴ *Ibid.*, 239. As for the federal level see, e.g., *Younger v. Harris*, 401 U.S. 37, 42 (1971).

²²¹⁵ The grand jury is constituted by laypeople, summoned to court to review the evidence in order to establish whether an indictment should be issued against the defendant.

²²¹⁶ *Beloof, Cassell and Twist* (2010) 239. See also *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944), 264 (on the common law right of citizen to approach Grand Jury). Whereas West Virginia is the only state in declaring access to the Grand Jury to be a state constitutional right, Tennessee is among many states that have codified a procedure for a citizen's direct access to the Grand Jury. See *Beloof, Cassell and Twist* (2010) 272. Another approach to victims' access to the Grand Jury consists in the right of a private party, which does not exist absent a request from the Grand Jury or prosecutorial or judicial approval. This is exemplified by the federal laws. See *Ibid.*, 273. See also *In re New Haven Grand Jury* 604 F.Supp. 453 (D. Conn. 1985). In jurisdictions where a preliminary hearing can be a substitute for the Grand Jury, the preliminary hearing procedure has not provided private citizens access to the indictment process. See *Beloof, Cassell and Twist* (2010) 281.

²²¹⁷ *Beloof, Cassell and Twist* (2010) 284. The exception is when the victim is present via a privately funded attorney who is actively participating in the grand jury process with the permission of the Public Prosecutor. See *Ibid.*, *Loc. cit.*

²²¹⁸ See *Ibid.*, 284-285.

²²¹⁹ *Ibid.*, 196.

²²²⁰ See, e.g., *State of New Jersey v. Kinder* 701 F.Supp. 486 (D.N.J. 1988).

²²²¹ See, e.g., *State v. Harton*, 163 Ga.App. 773, 296 S.E.2d 112 (1982); *Beloof, Cassell and Twist* (2010) 239.

offences.²²²² In states where private/auxiliary prosecutions are not prohibited by statute, private prosecutors are treated as representing state interests rather than those of the victims who hired them.²²²³

Once criminal charges are filed, various pre-trial matters concerning victims may arise. First, unlike defendants, victims do not have the constitutional right to counsel appointed at state expense although in few cases courts have appointed counsel for the victim, especially when a victim of limited means needs legal representation.²²²⁴ Some states allow appointment of counsel for a victim in special circumstances, especially in cases involving children.²²²⁵ Second, victims generally do not possess a direct manner to obtain discovery, i.e., information, from the defendant in the criminal system.²²²⁶ Most states do not give victims an explicit right to discover from the state,²²²⁷ and they then rely on more general provisions, e.g., the general right to 'fairness'.²²²⁸

Third, even though a victim may not formally obtain a dismissal, (s)he may employ informal influences to try to get the state to move to dismiss charges.²²²⁹ Only some states have statutory provisions for the Prosecutor to consult with the victim concerning a contemplated dismissal.²²³⁰ Otherwise, a victim could communicate with the trial court as *amicus curiae*, normally with the permission of the court.²²³¹ In any case, the courts may reject a prosecutor's dismissal motion for several reasons, including when dismissal is contrary to the public interest and, which in turn includes victims' considerations.²²³² Fourth, concerning plea bargains, some states provide victims the state constitutional or statutory right to confer with the prosecution and others allow victims to be heard by the court prior to the court's decision on plea bargain and the

²²²² *People v. Wyner*, 270 Misc. 673, 142 N.Y.S.2d 393 (County Court, Westchester County, 1955)

²²²³ Juan Cardenas, 'The Crime Victim in the Prosecutorial Process' (1986) 9 *Harvard Journal of Law & Public Policy* 357, 381.

²²²⁴ Beloof, Cassell and Twist (2010) 323.

²²²⁵ 18 U.S.C. § 3509 (h).

²²²⁶ Beloof, Cassell and Twist (2010) 373. See also *United States v. Sacane*, 2007 WL 451666 (D. Conn. 2007).

²²²⁷ Exceptions are, e.g., South Carolina Constitution, article I, § 24; Oregon Revised Statute, § 135.857.

²²²⁸ See Beloof, Cassell and Twist (2010) 374; *State ex rel. Hilbig v. McDonald*, 839 S.W.2d 854 (Tex. 1992).

²²²⁹ Beloof, Cassell and Twist (2010) 401.

²²³⁰ E.g., Arizona Revised Statute § 8-290.09.

²²³¹ *People v. Michael M.*, 475 N.Y.S.2d 774 (N.Y.Co. Ct. 1984).

²²³² See Beloof, Cassell and Twist (2010) 405; *United States v. Cowan* 524 F.2D 504 (5th Cir. 1975); *United States v. Biddings* 416 F. Supp. 673 (D. III. 1976).

consultation with the prosecutor can be advisory or mandatory.²²³³ Although the victim has no statutory right in any jurisdiction to veto a plea offer extended by the prosecutor to the defendant, some courts have acknowledged the important role that victims may play in the plea negotiation process²²³⁴

3.1.3. French Inquisitorial System

For some crimes referred to as complainant offences, filing a complaint is an essential condition. Moreover, according to article 2 of the CPP, criminal prosecution cannot only be initiated by the public prosecutor but also by the victim as a private prosecutor and this can summon the accused to appear in court. Nevertheless, after the victim has started the criminal proceedings, the public prosecutor has to take over,²²³⁵ and actually cannot bring private action concerning all punishable acts.²²³⁶

Pre-Trial proceedings can be broadly speaking divided into two procedural stages: investigation/prosecution and *instruction préparatoire* (preparing instruction, judicial investigation or ‘information’).²²³⁷ The victim lacks an official role during the preliminary investigation stage.²²³⁸ However, like anyone else, (s)he has the right to report the crime, in which case the report is called *a plainte*, but even the police is not obligated to inform him/her of the progress of the proceedings.²²³⁹ Although the victims cannot control the acts during the preliminary investigation, the victims can control the ensuing proceedings, which is reflected in the possibility to lodge an appeal with the General Prosecutor if, following his report, it is decided to close the case without further action, with the possibility that he instructs the Prosecutor of the

²²³³ Beloof, Cassell and Twist (2010) 422. For mandatory consultation see, e.g., Michigan Compiled Laws 780.756 § 6.(3).

²²³⁴ Beloof, Cassell and Twist (2010) 422. As for case law, see *Mckenzie v. Risley* 842 F.2d 1525 (9th Cir. 1988); *State of Oregon v. McDonnell* 794 P.2d 780 (Or. 1990).

²²³⁵ Laurent-Atthalin, Cass. 8 December 1906, D.P. 1907, I, 207. Cited by Brienen and Hoegen (2000) 321.

²²³⁶ The victim can only do so, if the crime does not require a judicial investigation by the Instructing Judge, which means that the victim is not permitted to prosecute felonies. See CCP, articles 388, 392, 531 and 551.

²²³⁷ Dervieux (2008) 234-235.

²²³⁸ *Ibid.*, 238. The investigation stage is opened following the reporting of an offence, a victim’s complaint or the findings of the Police or Public Prosecutor. This stage differs according to whether it takes place in the case of a *délit* (or exceptionally *contravention*) or as for a crime, in which case it is obligatory. *Ibid.*, 234.

²²³⁹ Dervieux (2002) 238.

Republic to initiate a prosecution.²²⁴⁰ Be that as it may, once a prosecution has been formally instituted, the victim plays a more important role as (s)he is informed by the public prosecutor if the case is dropped;²²⁴¹ reparation for damage to him/her may be a condition for dropping the case; and (s)he plays a major role in the mediation process.²²⁴² Furthermore, a victim may become a civil party by filing a complaint before the investigating judge, or directly summon the accused before the *tribunal de police* or the *tribunal correctionnel*.²²⁴³

During the preparing instruction or judicial investigation, which is designed to bring the case to a point where it can be tried,²²⁴⁴ the civil party has specific rights. First, (s)he can be questioned by the investigating judge or be confronted with the accused only in presence of his/her lawyer.²²⁴⁵ Second, in the course of the instruction or judicial investigation, the parties, i.e., including the civil party, may file with the investigating judge a written and reasoned application: to be heard or interrogated, to hear a witness, to obtain a confrontation or an inspection of the scene of the offence, to order one of the other parties to disclose an element useful for the instruction, or for any other step to be taken which seems to them necessary for the discovery of the truth.²²⁴⁶ Concerning visits to places, the hearing of a witness or another civil party or an interrogation of the person under judicial examination, the civil party has the right that this be done in the presence of his/her lawyer.²²⁴⁷ The civil party can demand an expert's assessment, in particular a medical or psychological report.²²⁴⁸ In case the judge does not wish to comply with the request, motivation is required.²²⁴⁹

Third, the civil party has the right to be notified of all important procedural actions and decisions,²²⁵⁰ i.e., the victim is informed from his/her first

²²⁴⁰ CPP, article 40-3.

²²⁴¹ Ibid., article 40-1.

²²⁴² Dervieux (2002) 238-239.

²²⁴³ Ibid., 239.

²²⁴⁴ The instruction is compulsory in the case of *crimes* and has as main objectives to seek that an offence has been committed, to discover the perpetrator if not known or to verify the basis of the accusation against an individual. See Dervieux (2002) 239.

²²⁴⁵ CPP, article 114.

²²⁴⁶ Ibid., article 82-1.

²²⁴⁷ Ibid., article 82-2.

²²⁴⁸ Ibid., article 82.

²²⁴⁹ Brienen and Hoegen (2000) 320.

²²⁵⁰ CPP, articles 89, 183 and 186.

hearing of the several rights to be used during the *instruction préparatoire*.²²⁵¹ The investigating judge is obligated to inform the civil party, without any condition, every six months in cases of crimes against persons or crimes against property accompanied by attacks against persons.²²⁵² The victim should be notified of decisions on *renvoi*, indictment, and decisions against which the civil party can exercise a remedy.²²⁵³ However, the civil party can no longer be informed of the release motions from the suspect placed in provisional detention.²²⁵⁴ The civil party has to be informed at any time that the individual under instruction is subject to a judicial control accompanied by the prohibition to receive, meet or be in relation with the victim in any manner.²²⁵⁵

Fourth, (s)he has the right to be informed of the time and place of the trial.²²⁵⁶ Fifth, the public prosecutor is obligated to summon all those constituted civil parties during the pre-trial stage to appear in court.²²⁵⁷ Sixth, as a party to the proceedings, the civil party may appeal any investigating judge's decision provided that this interferes with his/her civil interests,²²⁵⁸ as detailed later.²²⁵⁹ However, the civil party cannot appeal against orders concerning custody or conditions of bail.²²⁶⁰ In addition to the rights explicitly provided in the CPP, the civil party can submit his/her own evidence, which has been favored in case law as civil parties are authorized to submit evidence obtained disloyally, even in an illicit manner.²²⁶¹ The Criminal Chamber of the *Cour de Cassation* accepts its admissibility demanding only that the evidence can lead to a contradictory discussion.²²⁶²

During the instruction or judicial investigation stage, civil parties' control is materialized via the possibility to control the duration of the instruction as (s)he can ask the investigating judge to adjourn information,

²²⁵¹ Ibid., article 89-1.

²²⁵² Ibid., article 90-1.

²²⁵³ Ibid., article 183.

²²⁵⁴ The previous article 148-2 of the CPP was derogated by law n° 93-1013, 24 August 1993. See Pignoux (2008) 288, footnote 200.

²²⁵⁵ CPP, article 138-1.

²²⁵⁶ Ibid., article 391.

²²⁵⁷ Ibid., article 420.

²²⁵⁸ Ibid., articles 81, 82, 87 and 186.

²²⁵⁹ See *infra* Chapter IV 6.1.3.

²²⁶⁰ CPP, article 186.

²²⁶¹ Pignoux (2008) 294.

²²⁶² Crim., 30 March 1999, *Bull. crim.* n° 59; *Procédures*, 1999, com. n° 215, note J. Buisson; D., 2000, pp. 391-394, note T. Garé; Crim., 19 January 1999, *Bull. crim.* n° 9; J.C.P., 1999, II, 10156, note D. Rebut; *Dr. Pénal*, 1999, com. n° 24, note C. Marsat. Cited by Pignoux (2008) 294.

either by sending it or via introducing it through the indictment before the judgment jurisdiction.²²⁶³ In addition to appealing the investigating judge's decisions, detailed later, the civil party can raise nullities.²²⁶⁴ With regard to the civil party's role during the hearings before the investigating judge, (s)he can oppose the publicity of the debates before the *Chamber de l'instruction* concerning provisional detention, or to proceed to a control hearing of the whole proceedings.²²⁶⁵ The civil party or his/her lawyer can oppose the publicity if, *inter alia*, this is of a nature to hinder the specific investigations needed by the instruction or affects the dignity of the person.²²⁶⁶ The civil party has an exclusive right to dispose of the publicity at any time and (s)he is equally entitled to ask that the judgment hearing be closed.²²⁶⁷

The civil party can ask a lawyer to be appointed during the beginning of the proceedings.²²⁶⁸ This also can take place before the investigating judge when this is informed by the victims that they want to become civil parties and request the appointment of a lawyer.²²⁶⁹ The civil party's lawyer has the right to be present during his/her client's hearings or confrontations unless the civil party has explicitly renounced it.²²⁷⁰ The consultation of the dossier takes place between the end of the instruction and the hearing date.²²⁷¹ The assistance of a lawyer is crucial since civil parties without lawyers cannot directly access the dossier as determined by the Criminal Chamber of the *Cour de Cassation*,²²⁷² which has been found by the ECtHR to be in conformity with article 6 (1) of the ECHR.²²⁷³ In addition to access to the dossier, the civil party's lawyer can be present during visits to places, the hearing of a witness or another civil party or an interrogation of the person under judicial examination.²²⁷⁴ Nevertheless, the investigating judge can oppose the presence of the lawyer via a motivated

²²⁶³ CPP, articles 89-1 and 175-1.

²²⁶⁴ *Ibid.*, articles 170 and 173.

²²⁶⁵ See respectively *Ibid.*, articles 199 and 221-3.

²²⁶⁶ *Ibid.*, article 706-73.

²²⁶⁷ Pignoux (2008) 298.

²²⁶⁸ CPP, article 40-4.

²²⁶⁹ *Ibid.*, article 80-3.

²²⁷⁰ *Ibid.*, article 114.

²²⁷¹ *Ibid.*, article 197.

²²⁷² See, e.g., *Crim.*, 12 June 1996, *Bull. crim.* n° 248; R.S.C., 1996, p. 878, obs. J.-P Dintilhac (the exclusion comprises consulting the dossier or delivering copies of a piece of the dossier). Cited by Pignoux (2008) 290.

²²⁷³ ECtHR, *Menet v. France*, App. No. 39553/02, Judgment, 14 June 2005, paras. 43-53.

²²⁷⁴ CPP, article 82-2.

decision.²²⁷⁵ It should be finally added that in *Slimani v. France*, the ECtHR determined that the dead victim's relatives should be involved in the investigation without necessarily being civil parties.²²⁷⁶

3.2. The ICTY, the ICTR and the SCSL

As already mentioned, victims lack the status of victim participants or civil parties at these courts. Accordingly, victims as such do not have a proper participatory standing in the pre-trial proceedings.²²⁷⁷ A manner to 'participate' and knock on the door at the ICTY, the ICTR and the SCSL so that these courts pay attention to special interests of victims, has been by directly contacting the Office of the Prosecutor, which has been done by, for example, some human rights NGOs (via letters).²²⁷⁸ For instance, the Coalition for Women's Human Rights in Conflict Situations requested Prosecutor's attention for sexual violence crimes in *Slobodan Milošević* and *Muvunyi* at the ICTY and the ICTR respectively.²²⁷⁹

In *Milošević*, Prosecutor Del Ponte informed the Coalition that charges of sexual violence, not originally included in the Croatia and Kosovo indictments, have been incorporated, and in the later Bosnia indictment, *Milošević* was also charged with sexual violence crimes.²²⁸⁰ In *Muvunyi*, the Coalition asked the Prosecutor to reconsider his decision to withdraw the rape charges, which was denied by the Prosecutor due to potential witnesses' refusal to testify.²²⁸¹ However, the Prosecution's motion to drop rape charges was

²²⁷⁵ Ibid., Loc. cit.

²²⁷⁶ ECtHR, *Slimani v. France*, 27 July 2004, para. 47. See also Ochoa (2013) 123-124.

²²⁷⁷ It may be noticed that during the investigation, like any other criminal forum, the Prosecution has to gather information and, hence, the Prosecutor 'can summon and question [...] victims and witnesses and record their statements, collect evidence and conduct on-site investigations to decide whether to indict individuals'. ICTY RPE, rule 39 (i). See also ICTR RPE, rule 39 (i); SCSL RPE, rule 39 (i). Therefore, surviving victims or family members of victims killed constitute an important source of information as witnesses.

²²⁷⁸ See Brouwer (2005) 298-301.

²²⁷⁹ As for *Milošević*, see Coalition for Women's Human Rights in Conflict Situations, Letter to Carla Del Ponte, Prosecutor, Regarding the Urgent Need to Include Charges of Sexual Violence in the Indictment against *Milošević*, 14 August 2001. As for *Muvunyi*, see Coalition for Women's Human Rights in Conflict Situations, Letter to Prosecutor Hassan Jallow, 8 February 2005. Letters referred to by Brouwer (2005) 299.

²²⁸⁰ *Milošević* (IT-01-50-I), Indictment (Croatia), 8 October 2001; *Milošević et al.* (IT-99-37-PT), Second Amended Indictment (Kosovo), 29 October 2001; *Milošević* (IT-01-51-I), Indictment (Bosnia), 22 November 2001.

²²⁸¹ Letter from Dr. Alex Obote-Odora, Special Assistant to the Prosecutor, to Ms. Brunet, 11 February 2005. Letter referred to by Brouwer (2005) 299.

rejected by the Trial Chamber and the Prosecutor had to continue with those charges.²²⁸² Nevertheless, it is difficult to assess the impact of the Coalition's correspondence.²²⁸³ Be that as it may, approaching the Prosecutor may constitute a way for victims, without being witnesses, to (indirectly) 'participate' in the pre-trial stage.

3.3. The ICC

3.3.1. Preliminary Considerations

Victims cannot initiate ICC proceedings.²²⁸⁴ However, similar to other individuals and organizations, victims can in a limited manner be complainants, i.e., under article 15 of the ICC Statute victims may submit communications to the Prosecutor concerning potential situations and cases under the ICC's jurisdiction, which has been characterized by the ICC as the first instance when victims can participate.²²⁸⁵ The Prosecutor is obligated to evaluate all materials received.²²⁸⁶ After a preliminary examination thereof, the Prosecutor shall decide whether to authorize the beginning of an investigation or seek authorization from the Pre-Trial Chamber to commence an investigation and then prosecution. As mentioned earlier, besides victim participation *sensu stricto*, i.e., upon being granted the status of victim participant under article 68 (3), the ICC Statute explicitly provides for two other forms of victim's participation. The first of these forms is when the Prosecutor initiates an investigation *proprio motu* as laid down in article 15 (3) of the ICC Statute:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material

²²⁸² Muvunyi (ICTR-2000-55A-PT), Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, Trial Chamber, 23 February 2005, paras. 28-31 and 34.

²²⁸³ Brouwer (2005) 301.

²²⁸⁴ It may be added that the fact that victims cannot trigger the ICC's jurisdiction, unlike the situation in national criminal proceedings, does not mean to renounce the ICC's jurisdiction but it constitutes a reasonable margin for states' action so that these can adapt and amend their internal law and also to update their judicial apparatus and Public Ministries' techniques. See Elizabeth Salmón Gárate and Giovanna García, 'El Procedimiento Ante la Corte Penal Internacional' (2005) 3 *Ius Inter Gentes* 16, 20-21.

²²⁸⁵ ICC, Report of the Court to the Assembly of States Parties on the Strategy in Relation to Victims, No. ICC-ASP/8/45, 18-26 November 2009, pp. 2 and 4; Office of the Prosecutor, Policy Paper on Victims' Participation under Article 68 (3) of the ICC Statute, April 2010, p. 8.

²²⁸⁶ ICC Statute, article 53 (1).

collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

When the Prosecutor is seeking authorization of an investigation and once the victims known to the Prosecutor or to the VWU have been notified by the Prosecutor,²²⁸⁷ victims may make representations by writing to the competent Pre-Trial Chamber, which possesses the discretion to ask any additional information from the victims who made representations and may also consider it necessary to have a hearing so as to hear their views and concerns.²²⁸⁸ Although article 15 (3) does not include the condition according to which the victims' personal interests must be affected unlike article 68 (3),²²⁸⁹ Pre-Trial Chamber I considered that the victims' personal interests are affected in general during the investigation,²²⁹⁰ as examined later. In the Kenya situation, the first investigation initiated by the Prosecutor *proprio motu*, Pre-Trial Chamber II adopted some measures oriented to give a limited participation bearing in mind the need to guarantee swift proceedings.²²⁹¹ Also, Pre-Trial Chamber II considered article 15 together with article 53 (initiation of an investigation) and in conducting the admissibility assessment, i.e., complementarity and gravity, it considered victims' representations to back up its findings.²²⁹² Therefore, the impact of the crimes on and the harm caused to victims and their families was considered as a factor when examining the gravity threshold.²²⁹³ Moreover, the victims' representations led Pre-Trial Chamber II to broaden the temporal scope of investigation beyond the Prosecutor's original request.²²⁹⁴ In the Ivory Coast situation, the second investigation initiated by the Prosecutor *proprio motu*,

²²⁸⁷ ICC RPE, rules 50 (1), (4) and 92 (2).

²²⁸⁸ *Ibid.*, rules 50 (3) and (4).

²²⁸⁹ Situation in the DRC (ICC-01/04-101-tEn-Corr), 17 January 2006, para. 62.

²²⁹⁰ *Ibid.*, para. 63.

²²⁹¹ Pre-Trial Chamber I asked the VPRS to: i) identify community leaders of the affected groups to act on behalf of victims who may want to make representations, i.e., collective representation; ii) receive victims' representations, collective or individual; iii) examine whether the conditions under rule 85 have been met; and iv) summarize victims' representations into a consolidated report with the original representations annexed thereto. See Situation in the Republic of Kenya (ICC-01/09-4), Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15 (3) of the Statute, Pre-Trial Chamber I (Single Judge), 10 December 2009, paras. 5-9.

²²⁹² Situation in the Republic of Kenya (ICC-01/09-19), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010, paras. 62, 186 (footnote 273) and 196.

²²⁹³ *Ibid.*, para. 62.

²²⁹⁴ *Ibid.*, paras. 203-207.

victims' representations were also requested by Pre-Trial Chamber III under article 15 (3) and provided accordingly.²²⁹⁵ It should be mentioned that although to participate under article 15 (3) no application for formal victim participant status is required, the VPRS (following Pre-Trial Chambers' requests) conducts assessments of whether the requirements under rule 85 (definition of victims) are met.²²⁹⁶

The second form, under the ICC Statute, whereby victims without holding the formal victim participant status can participate during pre-trial consists in submission of observations on the question of jurisdiction and admissibility according to article 19 (3). This is examined later.²²⁹⁷

Lastly, but equally important, it should be mentioned that when discussing victims' modalities of participation/procedural rights across the different procedural stages, some of them are already established under the ICC RPE. Thus, victims who have been granted the victim participant status can make opening and closing statements;²²⁹⁸ victims' legal representatives may attend and participate in the proceedings according to the terms set by the competent Chamber;²²⁹⁹ victims' legal representatives may question witnesses, experts and the accused upon Chamber's leave and subject to the Chamber's control;²³⁰⁰ and victims' right to notification.²³⁰¹ In addition to these specific provisions, each Chamber possesses discretion to determine how the 'views and concerns' of the victims are to be presented, including the exact scope and conditions of any intervention,²³⁰² according to article 68 (3) of the ICC Statute, as will be seen in this and the subsequent subchapters.

3.3.2. Victims' Participation During the Investigation Stage of a Situation

3.3.2.1. Presentation

With regard to the victim participant status and participation *sensu stricto*, article 68 (3) of the ICC Statute is unclear about whether victim participants'

²²⁹⁵ Situation in the Republic of Côte d'Ivoire (ICC-02/11-14), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 3 October 2011, para. 8.

²²⁹⁶ Situation in the Republic of Kenya (ICC-01/09-17-Corr-Red), Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5, VPRS, 29 March 2010, para. 23. See also Brouwer and Heikkilä (2013) 1315.

²²⁹⁷ See *infra* Chapter IV 3.3.3.1.

²²⁹⁸ ICC RPE, rule 89 (1).

²²⁹⁹ *Ibid.*, rule 91 (2).

²³⁰⁰ *Ibid.*, rule 91 (3).

²³⁰¹ *Ibid.*, rule 92.

²³⁰² Catani (2012) 910.

legal status is applicable in the investigation stage of a situation,²³⁰³ i.e., before the Prosecutor accuses someone. A situation is specific in pre-trial proceedings as the Prosecutor collects, examines evidence and manages the attendance and questioning of suspects, victims and witnesses to decide whether to prosecute.²³⁰⁴ Pre-Trial Chamber I in its seminal decision on victims' participation in the DRC Situation extended victims' right to participate during the investigation stage, which has as remarked by Schabas promoted 'a procedural model derived from the continental legal system whereby victims participate actively as parties in the criminal trial'.²³⁰⁵ Pre-Trial Chamber I reached its decision based upon three arguments.

First, as for a terminological argument, the Chamber concluded that the term 'proceedings' does not necessarily exclude the investigation stage of a situation, and 'on the contrary, a number of provisions include the stage of investigation of a situation within the meaning of the term "*la procédure*".²³⁰⁶ Second, as for a contextual argument, the Chamber found that even though article 68 (3) is placed in the 'Trial' section of the ICC Statute, it does not specify a stage of proceedings for victim's participation, i.e., there is no explicit exclusion of the investigation stage from the scope of application of article 68 (3) on victim's participation.²³⁰⁷ Third, as for a teleological argument, the ICC found the application of article 68 (3) to the investigation phase to be consistent with the object and purpose of the participation regime for victims set by the ICC Statute drafters, especially considering 'the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law'.²³⁰⁸ The IACtHR and the ECtHR case law was mentioned to support the Chamber's conclusion of permitting victims' participation before a suspect is named, as part of the victim's right to participate

²³⁰³ 'Situations' are 'generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of Congo since 1 July 2002'. Situation in DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 65. Each situation generates individual cases.

²³⁰⁴ William Schabas, *An Introduction to the International Criminal Court* (3rd edn., Cambridge University Press 2007) 249.

²³⁰⁵ Schabas (2010) 827.

²³⁰⁶ Situation in DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 38.

²³⁰⁷ Two additional considerations were: i) the existence of an explicit reference to investigation under article 68 (1) as for protection of victims and witnesses; and ii) that rule 92 (Notification to victims and their legal representatives) cannot limit victim's participation to the stages mentioned explicitly. See Situation in DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, paras. 45 and 47-49.

²³⁰⁸ *Ibid.*, para. 50.

in the fight against impunity.²³⁰⁹ It should be, however, mentioned that these cases were not actually relevant to the victims' right to participate during the investigation in a direct manner. Thus, ECtHR cases, cited by Pre-Trial Chamber I, establish that the victim has a right to have the conduct of criminal proceedings within a reasonable time where victims were in the first place permitted to join criminal proceedings via civil claims.²³¹⁰

Concerning the relation between victim's participation during the investigation stage of a situation and the obligation not 'to be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial' under article 68 (3), it was concluded that victim's participation at this stage 'does not *per se* jeopardize the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security'.²³¹¹ Furthermore, Pre-Trial Chamber I concluded that victims' personal interests are 'affected in general at the investigation stage, since the participation at this stage can serve to clarify the facts, to punish perpetrators of crimes and to request reparations for the harm suffered'.²³¹² It was envisaged that the modalities of victims' participation during the investigation phase would include several proceedings relating to preservation of evidence, protective measures and investigations in general.²³¹³ Since there is no explicit reference to victims' participation during the investigation stage of a situation in the ICC Statute and RPE, Pre-Trial Chamber I determined that victims may: i) present their views and concerns; ii) file documents; iii) access to public documents; and iv) request the Pre-Trial Chamber to order specific measures.²³¹⁴

3.3.2.2. Legal Discussion

Whether the decision adopted by Pre-Trial Chamber I was and to what extent appropriate is examined as follows. As a matter of principle, this decision serves restorative justice and was praised by victims' advocates as a landmark

²³⁰⁹ Ibid., paras. 51-53.

²³¹⁰ Cases cited included ECtHR, *Perez v. France*, Appl. No. 47287/99, Judgment, 12 February 2004; ECtHR, *Acquaviva v. France*, Appl. No. 19248/91, Judgment, 21 November 1995. As for the IACtHR cases, unlike the national jurisdictions which provide cases for the IACtHR's docket, the ICC does not permit victims to persist on or to begin prosecutions if the Prosecutor declines to do so. Indeed, the ICC Statute drafters did not contemplate the possibility of private prosecutions for victims. For further discussion on this point see McGonigle Leyh (2011) 269-270.

²³¹¹ Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 57.

²³¹² Ibid., para. 63. See also Situation in Darfur, Sudan (ICC-02/05-111-Corr), 14 December 2007, paras 11 and 14.

²³¹³ Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, paras. 71, 73 and 74.

²³¹⁴ Ibid., para. 42.

decision.²³¹⁵ Victims' personal interests may be affected as early as during the investigation and, hence, their participation during it seems to be coherent with a restorative goal.²³¹⁶ Victims' role at the investigation stage of a situation may have a very important impact on the heart of the ICC's substantive jurisdiction. Moreover, victims' interests as such should not be the sole factor to be considered by the ICC when deciding on their admission during this early stage. Victims' active participation is important to guarantee the viability of a further process. Their voices influence whether there is a reasonable basis for investigation and a sufficient basis for prosecuting individual(s) for specific crimes. As said, the ICC recognized that victims' participation during the investigation can serve to clarify the facts, to sanction offenders and to claim reparations.²³¹⁷ Victims' participation also enhances the legitimacy of criminal justice.²³¹⁸ This is coherent with a restorative justice paradigm which focuses on social dimensions of the crime, i.e., not only harm inflicted to victims or perpetrators but also interpersonal relationships and the community.²³¹⁹ Therefore, victims' participation at this stage is in principle justified. However, some criticism, which is similar to the Prosecution grounds when this appealed the Pre-Trial Chamber I's decision, is examined as follows.²³²⁰

First, the creation of unrealistic expectations about victims' role at the investigation stage of a situation is inconsistent with a restorative justice approach. Indeed, for example, the first six victims granted participation during the DRC situation had very limited participation later on. Moreover, once the proceedings reached the pre-trial stage of the case in *Lubanga*, the six victims failed to meet the criteria required to obtain victim participant status in the case since their harms were not linked to the charges against Lubanga.²³²¹ Indeed,

²³¹⁵ See, e.g., Statement of Mr. Antoine Bernard, International Federation for Human Rights, Second Public Hearing of the Office of the Prosecutor, Session 2: NGOs and Other Experts, The Hague, 26 September 2006.

²³¹⁶ American University Washington College of Law, War Crimes Research Office (2007) 42.

²³¹⁷ Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 63.

²³¹⁸ Doak (2008) 117.

²³¹⁹ Zehr (1990) 184.

²³²⁰ See Situation in the DRC (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, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6', 23 January 2006, paras. 10, 13-22. See also Situation in Uganda (ICC-02/04-103), Prosecution's Application for Leave to Appeal the Decision on Victims' Application 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, 20 August 2007, paras. 13-14. See also American University Washington College of Law, War Crimes Research Office (2007) 44-49; Vasiliev (2009) 646-648.

²³²¹ See *Lubanga* (ICC-01/04-01/06-172-tEN), 29 June 2006.

Pre-Trial Chamber I did not seem to regard the extension of article 68 (3) to the investigation as necessarily serving a restorative function as it in a later decision described the system of participation provided in its seminal decision as ‘very limited’.²³²² Also, without having been afforded the status of victims under article 68 (3), victims can still submit written observations when the Prosecutor seeks authorization for a *proprio motu* investigation (article 15 (3)), and also to submit observations in jurisdiction and admissibility hearings (article 19 (3)). Additionally, all victims who communicate with the ICC are entitled to notice concerning the Prosecutor’s decisions not to proceed with an investigation or prosecution.²³²³ Hence, victims would not in principle seem to lose a meaningful participatory right if the ICC does not extend the application of article 68 (3) to the investigation stage of a situation. Furthermore, the Pre-Trial Chambers’ original position proved to be problematic as even though victims would obtain the victim participant status, they would subsequently be denied participatory rights during particular proceedings leading to victims’ disappointment about the participatory system.²³²⁴

Second, the application of article 68 (3) to the investigation stage of a situation may raise some tension with the ICC’s responsibility to guarantee efficient and fair proceedings. The ICC’s practice has so far shown that the ICC lacks efficiency responding victims’ requests to participate. Lengthy waiting periods have been present across different situations at the ICC. This increases the risk of frustrating victims’ expectations and may eventually lead to a sort of ‘secondary victimization’, which was precisely sought to be prevented via the ICC participation model.²³²⁵ In addition, the mere consideration of potentially thousands of applications imposes a very heavy burden on the ICC’s scarce resources. The resulting backlog experienced by the ICC,²³²⁶ due to a growing number of victims applying for participation plus some serious practical trouble already faced by the ICC when trying to handle its policy of victims’

²³²² Situation in the DRC (ICC-01/04-135), 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, Pre-Trial Chamber I, 31 March 2006, para. 47.

²³²³ ICC Statute, article 53; ICC RPE, rule 92 (2).

²³²⁴ McGonigle Leyh (2011) 273.

²³²⁵ Vasiliev (2008) 647.

²³²⁶ For example, just by January 2008, more than 150 victims had been applied for participation in the situation in the DRC, with waiting period towards the initial decision above 15 months. See American University Washington College of Law, War Crimes Research Office, Interlocutory Appellate Review of Early Decisions by the International Criminal Court (2008) 4, 41, 42.

participation during the investigation stage of a situation are, hence, factors not to be disregarded.

Third, such participation could potentially jeopardize the Prosecutor's independence and his/her duty to establish the truth.²³²⁷ At the same time, it should be recalled that during the investigation there is yet no suspect or accused to defend his/her rights and victims' participation may eventually affect the rights of future suspects or accused.

It has also been proposed to de-link victims' participation during this stage from article 68 (3) on the ground that victims would have a better understanding of their rights during an investigation and would be aware of the potential to increase those rights over time once suspects are arrested and, hence, decrease the high risk of getting frustrated, present in the scheme for their participation in the investigation under article 68 (3).²³²⁸ Making it clear that victims mainly just need to communicate with the ICC at this stage has been claimed to notably 'ease the burden of the current victim participation scheme on the Chambers and the parties'.²³²⁹

Bearing in mind these and similar difficulties and criticism, the regime of victim participation during the investigation stage has been revisited. It should first be mentioned that Pre-Trial Chambers deciding the situations in Uganda, the DRC and Darfur followed the first decision on victims' participation in the DRC situation, concluding that victims hold a general right to participate in the investigations.²³³⁰ However, the Appeals Chamber in 2008 decided, two years after the first decision on victims' participation in the DRC situation, to grant the Prosecutor's motion to appeal the decisions on the DRC and Darfur situations agreeing partially with him. Those Pre-Trial Chamber decisions concluded that victim participants could present their views and concerns and file documents regardless of the conduct of specific judicial proceedings within the investigation. The Appeals Chamber reversed these decisions by considering that:

²³²⁷ ICC Statute, article 54 (1) (a). See also Jérôme De Hemptinne and Francesco Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of the Proceedings' (2006) 2 *Journal of International Criminal Justice* 342, 347.

²³²⁸ American University Washington College of Law, War Crimes Research Office (2007) 49.

²³²⁹ *Ibid.*, Loc. cit.

²³³⁰ Situation in Uganda (ICC-02/04-101), 10 August 2007; Situation in the DRC (ICC-02/04-423), *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 et al.*, Pre-Trial Chamber I, 24 December 2007, paras. 4 and 5; Situation in Darfur, Sudan (ICC-02/05-111-Corr), 14 December 2007, pp. 3-5, 22-23, paras. 45-47.

The article of the Statute that confers power upon a victim to participate in any proceedings is article 68 (3) [...] participation can take place only within the context of judicial proceedings. Article 68 (3) of the Statute correlates victim participation to ‘proceedings’, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.²³³¹

Since article 42 (1) of the ICC Statute vests the Prosecutor with the authority for the conduct of investigations, the Appeals Chamber concluded that a victim’s general right to participate in the investigation ‘would necessarily contravene the Statute by reading into it a power outside its ambit and remit’.²³³² In any case, the Appeals Chamber left clear that victims are not precluded from seeking participation in any judicial proceedings, proceedings affecting investigations included, as far as ‘their personal interests are affected by the issues arising for resolution’.²³³³ Pre-Trial Chamber II in the Kenya situation adopted the Appeals Chamber’s approach as the applicants were asked to link their requests to participate with an issue constitutive of the subject-matter of the judicial proceedings.²³³⁴ Also, following the Appeals Chamber’s guidance, Pre-Trial Chamber I issued a decision establishing a new framework for victims in the DRC situation and, thus, it ruled that they could participate at the investigation stage of a situation, only within the context of judicial

²³³¹ Situation in the DRC (ICC-01/04-556), Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Appeals Chamber, 19 December 2008, para. 45. See also Situation in Darfur, Sudan (ICC-02/03-177), Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, Appeals Chamber, 2 February 2009, para. 45.

²³³² Situation in DRC (ICC-01/04-556), 19 December 2008, para. 52.

²³³³ *Ibid.*, para. 56.

²³³⁴ Situation in the Republic of Kenya (ICC-01/09-24), Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, Pre-Trial Chamber II, 3 November 2010, para. 16.

proceedings.²³³⁵ The same went true in later decisions in the Libya and Uganda situations.²³³⁶

The Pre-Trial Chambers noticed that the ICC Statute and RPE envisage various judicial proceedings at the situation including those connected to: i) review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution (article 53); ii) preservation of evidence or the protection and privacy of victims and witnesses (article 57 (3) (c)); and iii) preservation of evidence in the context of a unique investigative opportunity (article 56 (3)).²³³⁷ Accordingly, victims can participate in such judicial proceedings provided that they demonstrate that their interests are affected.²³³⁸ It was also noted that, under rule 93, the Chamber may seek the views of victims or their legal representatives on any issue and, hence, victims may also participate in judicial proceedings by presenting their views at the investigation stage of a situation.²³³⁹

Thus, these Pre-Trial Chambers adopted the casuistic approach when determining article 68 (3) applications. This approach adopted by the Appeals Chamber and implemented by Pre-Trial Chambers I and II is found here as a better option concerning the investigation stage of a situation based on two reasons.²³⁴⁰ First, as for the ICC Statute legal regime, under the previous approach, the consideration of a whole stage of the proceedings, i.e., the investigation stage of a situation, in application of article 68 (3) and considering under this approach that personal interests are affected by a whole stage would arguably deprive the effects of the ‘personal interests’ provision. Second, as for victims, the previous approach was grounded on a somehow contradictory basis

²³³⁵ Situation in the DRC (ICC-01/04-593), Decision on Victims’ Participation in Proceedings Relating to the Situation in the Democratic Republic of Congo, Pre-Trial Chamber I, 11 April 2011, para. 9.

²³³⁶ Situation in Uganda (ICC-02/04-191), 9 March 2012, para 10; Situation in Libya (ICC-01/11-18), Decision on Victim’s Participation in Proceedings Related to the Situation in Libya, Pre-Trial Chamber I, 24 January 2012, p. 4.

²³³⁷ Situation in the DRC (ICC-01/04-593), 11 April 2011, para 10; Situation in the Republic of Kenya (ICC-01/09-24), 3 November 2010, para. 12; Situation in Libya (ICC-01/11-18), 24 January 2012, p. 3; Situation in Uganda (ICC-02/04-191), 9 March 2012, para. 12.

²³³⁸ Situation in the DRC (ICC-01/04-593), 11 April 2011, para 10; Situation in the Republic of Kenya (ICC-01/09-24), 3 November 2010, para. 12; Situation in Libya (ICC-01/11-18), 24 January 2012, p. 3; Situation in Uganda (ICC-02/04-191), 9 March 2012, para. 12.

²³³⁹ Situation in the DRC (ICC-01/04-593), 11 April 2011, para 10; Situation in the Republic of Kenya (ICC-01/09-24), 3 November 2010, para. 12; Situation in Libya (ICC-01/11-18), 24 January 2012, p. 3; Situation in Uganda (ICC-02/04-191), 9 March 2012, para. 12.

²³⁴⁰ See McGonigle Leyh (2011) 273.

since although victims were granted a general participatory right to participate in the investigation, they could later be deprived of participatory rights in particular proceedings. Such an outcome could raise questions about the real practical benefits of a victim's general right to participate in the entire investigation as well as some frustration and disappointment among victim participants.²³⁴¹ In conclusion, victims' participation in the investigation stage of a situation is considered as advisable but limited to judicial proceedings within this stage and not as a general right for the entire stage.

3.3.3. Victims' Participation During the Pre-Trial Stage of a Case

3.3.3.1. Modalities of Participation/Procedural Rights

Once a suspect is singled out upon the expedition of an arrest warrant or a summons to appear,²³⁴² the pre-trial stage of a case begins. The ICC in its arrest warrants issued has not referred to the victims being heard concerning the Prosecutor's applications for the arrest warrants. Indeed, as the arrest warrants are normally issued under seal, victims' participation in related hearings is unlikely. Therefore, victims have been excluded from participation in arrest warrant proceedings.²³⁴³ This can lead to some negative outcomes for victims as evidenced in *Lubanga* where victims were frustrated when they knew of the narrow charges brought against Lubanga in the arrest warrant, about which they lacked any opportunity to influence directly.²³⁴⁴ Concerning the initial appearance of the suspect(s), Pre-Trial Chamber II (Single Judge) in *Ruto et al.* denied the participation of victim applicants as they can only exercise their rights under article 68 (3) once granted victim participant status and, even then, their participation would not have been appropriate at this specific moment of the proceedings because this would go beyond the scope and purpose of initial appearance as defined by the ICC Statute and RPE, which consists in informing the suspects of the charges and their rights under the ICC Statute.²³⁴⁵

²³⁴¹ See also *Ibid.*, *Loc. cit.*

²³⁴² ICC Statute, article 58 (Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear).

²³⁴³ Situation in the Republic of Kenya (ICC-01/09-43), Decision on a Request for Leave to Appeal, Pre-Trial Chamber III, 11 February 2011, paras. 9 and 13. See also Brouwer and Heikkilä (2013) 1320.

²³⁴⁴ See McGonigle Leyh (2011) 274.

²³⁴⁵ *Ruto et al.* (ICC-01/09-01/11-14), Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, Pre-Trial Chamber II (Single Judge), 30 March 2011, para. 6. See also ICC Statute, article 60 (1) and ICC RPE, rule 121 (1).

As for modalities of victims' participation during the pre-trial stage of a case, Pre-Trial Chamber I (Single Judge) in its seminal decision in *Katanga and Ngudjolo Chui* adopted a systematic approach, consisting of a clear determination of the set of procedural rights for victims granted the right to participate in order to make their participation meaningful and not merely symbolic.²³⁴⁶ For participation in the pre-trial stage of a case, in particular and including the confirmation of charges, the specific procedural rights for victim participation were divided into six groups,²³⁴⁷ which based on the principle of proportionality,²³⁴⁸

[...] can be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules-such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations.²³⁴⁹

The analysis of and references to the Pre-Trial Chamber I's decision in *Katanga and Ngudjolo Chui* on those six groups of procedural rights follow as complemented by later developments.²³⁵⁰ The first group of procedural rights consists in the access, before and during the confirmation hearing, to the case record, including to the evidence filed by the Prosecutor and defence under rule 121.²³⁵¹ Nevertheless, this right is limited to the format, for example, un-redacted versions, redacted versions or summaries, 'in which the evidence is made available to the party which has not proposed it'.²³⁵² Although this right includes access to all filings and decisions in the case record regardless of their classification as public, it does not include the access to 'ex parte' filings and decisions.²³⁵³ Access to public and closed hearings, *ex parte* transcripts excepted, is also included.²³⁵⁴ In any case, only the non-anonymous victims' legal representatives are granted access to the confidential part of the case record and

²³⁴⁶ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, paras. 49 and 51.

²³⁴⁷ *Ibid.*, para. 127. In addition, it should be mentioned that in order for victims to participate, they and their legal representatives need to be notified of the respective decisions and proceedings. See ICC Rule 92.

²³⁴⁸ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, para. 148.

²³⁴⁹ *Ibid.*, para. 147.

²³⁵⁰ In general, see also McGonigle Leyh (2011) 282-291; Khan and Dixon (2009) 1146-1152.

²³⁵¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, para. 127.

²³⁵² *Ibid.*, para. 132.

²³⁵³ *Ibid.*, paras. 127 and 128.

²³⁵⁴ *Ibid.*, para. 130.

to attend closed session hearings but are prohibited from transmitting to their clients copies of any document or evidence in the confidential part of the case record and closed session hearing transcript.²³⁵⁵ It was also determined that non-anonymous victims shall not have access to the confidential part of the case record nor attend closed session hearings.²³⁵⁶ The right to be notified in the same manner as the Prosecution and defence of all *ex parte* decisions and documents in the case record is included;²³⁵⁷ however, as for anonymous victims, it was stated that they would only receive notification of public documents in the case record and public hearing sessions in order not to violate the principle of prohibition of anonymous accusations.²³⁵⁸

Nevertheless, in *Bemba*, Pre-Trial Chamber III (Single Judge) found that both anonymous and non-anonymous victims could have access to all public decisions, transcripts, documents and evidence in the case record but excepted those *ex parte* or confidential.²³⁵⁹ As for this set of procedural rights, non-anonymous victims' rights were affected in *Bemba* since they would no longer have access to confidential filings and closed hearings unlike victims in *Lubanga* and *Katanga and Ngudjolo Chui*. However, in *Ruto et al.*, Pre-Trial Chamber II (Single Judge), based on previous case law, allowed victims' access to confidential decisions, filings and evidence but determined on a case-by-case basis,²³⁶⁰ as access to all confidential material disclosed:

[...] would in principle violate the exceptional nature of a request to access confidential material pursuant to article 68(3) of the Statute. Such requests should be made on the basis of specifically identified material and not with a view to obtaining all material on which either party intends to rely on for the

²³⁵⁵ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-537), Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims, Pre-Trial Chamber I (Single Judge), 30 May 2008, p. 12.

²³⁵⁶ *Ibid.*, Loc. cit.

²³⁵⁷ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, para. 129.

²³⁵⁸ *Lubanga* (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, Pre-Trial Chamber I, 22 September 2006, pp. 7 and 8.

²³⁵⁹ *Bemba* (ICC-01/05-01/08-320), 12 December 2008, paras. 103-105.

²³⁶⁰ *Ruto et al.* (ICC-01/09-01/11-340), Second Decision on the 'Request by the Victims' Representative to Access to Confidential Materials', Pre-Trial Chamber II (Single Judge), 23 September 2011, paras. 9-17. See also *Ruto et al.* (ICC-01/09-01/11-249), 5 August 2011, para. 93.

purposes of the confirmation of charges hearing regardless of its pertinence to any issue at stake.²³⁶¹

In any case, making or not the distinction between anonymous and non-anonymous victim participants, the outcome reached by the Pre-Trial Chambers as for anonymous victim participants is for practical effects the same, i.e., they cannot have access to confidential filings and close hearings.

The second group of rights includes the rights to make submissions on admissibility and probative value of the evidence on which the Prosecution and the defence intend to rely at the confirmation of charges hearing and examine such evidence at this hearing.²³⁶² In *Bemba*, it was found that victims' legal representatives, without distinguishing between anonymous and non-anonymous victims, may make succinct submissions to specific issues of law and fact provided that victims prove that their interests are affected by the issue under examination and that it is considered as appropriate by the Chamber.²³⁶³ As referred to,²³⁶⁴ such finding is based on the approach adopted by Pre-Trial Chamber III (Single Judge) in *Bemba*, differing from the approach adopted by Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo Chui* and *Lubanga*, according to which 'no differentiation is made between victims whose identity is known to the Defence and those for whom anonymity has been granted by the Chamber' as 'a differentiation in participatory rights should not be to the detriment of those requesting protective measures'.²³⁶⁵ Accordingly, unlike previous decisions, anonymous victims would hold the right to make submission on law and fact. In turn, in *Ruto et al.*, Pre-Trial Chamber II (Single Judge) established the possibility for anonymous victims to make submissions on the evidential foundation of the parties since it does not *per se* prejudice the accused's right but decided case-by-case considering victims' personal interests, the scope of the right, and fairness and expeditiousness of the proceedings.²³⁶⁶

The third group of procedural rights concerns examination of witnesses, which is applicable to non-anonymous victims who have the right to examine, during the confirmation hearing, any witness called by the Prosecutor or

²³⁶¹ Ruto et al. (ICC-01/09-01/11-337), Decision on the 'Request by the Victims' Representative for Access to Confidential Materials', Pre-Trial Chamber II (Single Judge), 21 September 2011, para. 10.

²³⁶² Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 134.

²³⁶³ Bemba (ICC-01/05-01/08-320), 12 December 2008, para. 110.

²³⁶⁴ See *supra* Chapter III 2.3.2.2.

²³⁶⁵ Bemba (ICC-01/05-01/08-320), 12 December 2008, para. 99.

²³⁶⁶ Ruto et al. (ICC-01/09-01/11-249), 5 August 2011, para. 126.

defence.²³⁶⁷ In application of the principle of prohibiting anonymous accusations, anonymous victim participants are deprived of this right.²³⁶⁸ It was also stated that victims should examine witnesses after the Prosecution but before the defence and within the time allocated by the Chamber, but victims are not required to file the list of questions intended to be posed prior to the examination of witnesses.²³⁶⁹ Also, in *Abu Garda*, Pre-Trial Chamber I found that, in application of the principle of prohibiting anonymous witnesses, anonymous victim participants would not be entitled to examine witnesses.²³⁷⁰ However, in *Ruto et al.*, this option was left open to a case-by-case determination considering the factors mentioned in the previous paragraph.²³⁷¹

The fourth group of procedural rights consists in the right to attend all public and closed hearings leading up to and during the confirmation of charges hearing; however, it is not possible to attend *ex parte* hearings.²³⁷² In *Bemba*, the participation was limited to attendance at public hearings.²³⁷³ Nevertheless, in *Gbagbo*, Pre-Trial Chamber I (Single Judge) concluded that in case of holding parts of confirmation hearing or any other hearing *in camera* or *ex parte*, 'it retains the option to decide, on a case-by-case basis, whether to authorise, *proprio motu* or upon a motivated request, the Common Legal Representative to attend those sessions' and also the representative 'shall be given access to the transcripts of such hearings to which he/she has been authorised to attend'.²³⁷⁴

The fifth group includes the rights to participate via oral motions, responses and submissions in all hearings to which victim participants hold the right to attend and in relation to all matters at which their participation has not been excluded by the ICC Statute and RPE, e.g., matters relating to inter-play disclosure or any discussion of the evidence aimed at extending the factual basis of the Prosecution Charging Document.²³⁷⁵ Although Pre-Trial Chamber I in the first ICC confirmation of charges hearing in *Lubanga* established that victims' representatives during the confirmation of charges hearing could make opening

²³⁶⁷ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 137. See also McGonigle Leyh (2011) 283.

²³⁶⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, paras. 136 and 137.

²³⁶⁹ *Ibid.*, para. 138.

²³⁷⁰ Abu Garda (ICC-02/05-02/09-136), Decision on Victims' Modalities of Participation at the Pre-trial Stage of the Case, Pre-Trial Chamber I, 6 October 2009, paras. 23-24.

²³⁷¹ Ruto et al. (ICC-01/09-01/11-249), 5 August 2011, para. 126

²³⁷² *Ibid.*, para. 140.

²³⁷³ Bemba (ICC-01/05-01/08-320), 12 December 2008, para. 101.

²³⁷⁴ Gbagbo (ICC-02/11-01/11-138), 4 June 2012, para. 50.

²³⁷⁵ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 141; Gbagbo (ICC-02/11-01/11-138), 4 June 2012, paras. 51-52.

and closing statements and also request leave to intervene during public sessions, they were not able to add any point of fact or any evidence or pose questions directly to witnesses.²³⁷⁶ In their opening and closing statements, victims' legal representatives also may, *inter alia*, address any point of law, which includes the legal characterization of the liability modes used to charge the suspect.²³⁷⁷ Even though the victim's right to participate does not permit him/her the right to extend the factual basis contained in the Prosecution Charging Document, victims may try to extend the legal characterization of the facts contained in the Prosecution Charging Document to the point where the Prosecution may be asked by the Pre-Trial Chamber to consider amending the Charging Document to establish a different crime if the evidence indicates so.²³⁷⁸

In *Bemba*, Pre-Trial Chamber III (Single Judge) decided that also anonymous victim participants would be allowed to make opening and closing statements and make succinct oral submissions on issues of law and fact provided that they prove that their interests are affected by the examined issue and if considered appropriate by the Chamber.²³⁷⁹ In *Banda and Jerbo*, although the parties suggested that victims' participation could be limited to written submissions,²³⁸⁰ the Pre-Trial Chamber established that victims would be able to make oral submissions during the hearings.²³⁸¹ These, however, were completed in one day by choice of victims' legal representatives via very brief statements corresponding to the parties' approach.

The sixth and last group of procedural rights includes the right to file written motions, responses and replies under regulation 24 of the Regulations of the Court on all matters not excluded to the victims' representatives by the ICC Statute and RPE.²³⁸² Thus, it is included to make submissions on evidentiary and legal issues to be discussed at the confirmation of charges hearing and to raise objections or make observations on the proper conduct of the proceedings prior

²³⁷⁶ Lubanga (ICC-01/04-01/06-462), 22 September 2006, pp. 6 and 7.

²³⁷⁷ Lubanga (ICC-01/04-01/06-678), Decision on the Schedule and Conduct of the Confirmation Hearing, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

²³⁷⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, paras 122-123.

²³⁷⁹ Bemba (ICC-01/05-01/08-320), 12 December 2008, paras. 102, 108.

²³⁸⁰ Banda and Jerbo (ICC-02/05-03/09-80), Joint Submission by the Office of the Prosecutor and the Defense as to Agreed Facts and Submissions Regarding Modalities for the Conduct of the Confirmation Hearing, 19 October 2010, para 11.

²³⁸¹ Banda and Jerbo (ICC-01/05-03/09-13), Decision on Issues Related to the Hearing on the Confirmation of Charges, Pre-Trial Chamber I, 17 November 2010.

²³⁸² Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 142; Gbagbo (ICC-02/11-01/11-138), 4 June 2012, paras. 59-60.

to the confirmation hearing according to rule 122 (3).²³⁸³ Nevertheless, the right to make challenges to, or to raise issues relating to, ICC's jurisdiction or a case admissibility, under article 19 (2) and (3) and rule 122 (2), was excluded.²³⁸⁴ Be that as it may, as previously referred to, victims in general, i.e., without the need to hold the official/formal status of victim participants, are authorized to participate in challenges to jurisdiction of the ICC or the admissibility of a case under article 19 (3) as also evidenced in ICC practice, where victims have been allowed to file observations in proceedings of challenges to jurisdiction or admissibility.²³⁸⁵ Article 19 (3) states that:

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. 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.

Moreover, the Appeals Chamber seems to have interpreted victims' participation not only limited to article 19 (3) but in general to any proceedings under article 19.²³⁸⁶ Pre-Trial Chamber I in *Lubanga* had interpreted the defendant's application for release as a challenge under article 19 (2) and informed the victims and the DRC and invited them to file observations.²³⁸⁷ The ICC RPE extend the obligation of notification to a Prosecutor application for review of inadmissibility,²³⁸⁸ which may constitute a sort of revision or appeal of a decision under article 19 (2) out of a State challenge.²³⁸⁹ This may be considered to be a confirmation of the legitimacy of Appeal Chamber's broader approach.²³⁹⁰ Notification has to be provided to victims who have already

²³⁸³ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para 143.

²³⁸⁴ *Ibid.*, para. 144. See also McGonigle Leyh (2011) 284.

²³⁸⁵ See, e.g., Katanga and Ngudjolo Chui (ICC-01/04-01/07-1060), Observations of the Victims on the Objection to Jurisdiction raised by the Defence for Germain Katanga in its Motion of 10 February 2009, Legal Representatives of the Victims, 16 April 2009; *Lubanga* (ICC-01/04-01/06-349-tEN), Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006, 24 August 2006.

²³⁸⁶ *Lubanga* (ICC-01/04-01/06-772), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, para. 6.

²³⁸⁷ *Lubanga* (ICC-01/04-01/06-206), Decision Inviting the Democratic Republic of the Congo and the Victims in the Case to Comment on the Proceedings Pursuant to Article 19 of the Statute, Pre-Trial Chamber I, 24 July 2006, pp. 3-4.

²³⁸⁸ ICC RPE, rule 62.

²³⁸⁹ Schabas (2010) 370.

²³⁹⁰ *Ibid.*, Loc. cit.

communicated with the ICC under rule 59 (1) (b). As whether the obligation to notify established by rule 59 is applicable to the arrest warrant phase, the Appeals Chamber determined that when an arrest warrant was issued under seal and *ex parte*, no notification obligation exists.²³⁹¹

3.3.3.2. Related Legal Issues and Evaluation

Concerning investigative powers, even though the ICC allowed victim participants to challenge evidence presented at the confirmation of charges hearing, Pre-Trial Chamber I (Single Judge) in *Katanga and Ngudjolo Chui* pointed out that the Prosecution is the organ primarily in charge of conduction of investigation of the situations and cases arising from them and, hence, granting investigative powers, independent from those of the Prosecutor, to victims participants would not be consistent with the ICC Statute and RPE.²³⁹² Accordingly, when victim participants find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake those steps.²³⁹³ Additionally, it was found that:

[...] those granted the procedural status of victim at the pre-trial stage of a case (i) must confine their participation to the discussion of the evidence on which the Prosecution and the Defence [...] intend to rely at the confirmation hearing; and (ii) do not have the right to introduce additional evidence.²³⁹⁴

Moreover, the introduction of additional evidence by victim participants, not intended to be relied by either the Prosecution or the defence, i.e., not part of the case record, would:

[...] (i) distort the limited scope, as well as the object and purpose, of the confirmation hearing as defined by article 61 of the Statute and rules 121 and 122 of the Rules, and (ii) inevitably delay the commencement of a confirmation hearing that, pursuant to article 61 (1) of the Statute must be held within a reasonable period of time after the suspect's surrender or voluntary appearance before the Court.²³⁹⁵

²³⁹¹ Situation in the DRC (ICC-01-04-169-US-Exp), Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Appeals Chamber, 13 July 2006, paras. 30-31.

²³⁹² *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, paras. 82 and 83.

²³⁹³ *Ibid.*, para. 83.

²³⁹⁴ *Ibid.*, para. 17.

²³⁹⁵ *Ibid.*, para. 101.

Furthermore, it was highlighted that the introduction of additional evidence by victim participants, which is not intended to be relied on by the parties would infringe upon the defence's rights.²³⁹⁶ Finally, article 69 (3) of the ICC Statute was found to be inapplicable during the pre-trial proceedings.²³⁹⁷ Therefore, Pre-Trial Chamber I considered itself unable to authorizing victim participants to introduce additional evidence and, hence, the Trial Chamber's approach, seen later, was not applicable at the pre-trial stage of a case.²³⁹⁸ Pre-Trial Chamber I also determined that since the ICC Statute and RPE do not involve victim participants in pre-trial disclosure, these lack disclosure rights and obligations.²³⁹⁹ Having said so, a disclosure mechanism to allow victim participants to have access to materials in Prosecution's possession, was put in place by Trial Chamber I in *Lubanga* starting after the post-confirmation of charges leading up to the trial, i.e., still during pre-trial.²⁴⁰⁰ This and other disclosure issues concerning victim participants are discussed in the sub-chapter on trial due to their close relationship with specific disclosure matters during trial, evidentiary issues during trial, and the involvement of the ICC Trial Chambers.

As for the difference between anonymous and non-anonymous victim participants in *Lubanga* and *Katanga and Ngudjolo Chui*, it has been said that it had little practical impact since neither case grouped victims under common legal representatives based on their anonymity.²⁴⁰¹ Accordingly, legal representatives concurrently represent both categories of victim participants, which impedes the defence counsel to challenge the participatory rights exercised in representation of anonymous victims as they can also be legitimately raised in representation of non-anonymous victims.²⁴⁰²

The ICC legal instruments do not require explicitly that victim participants have to be represented by a legal counsel. Pre-Trial Chamber II in *Kony et al.* stated that victims could directly participate, i.e., without legal

²³⁹⁶ Ibid., para. 103.

²³⁹⁷ Ibid., para. 110. Article 69 (3) reads as follows: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth".

²³⁹⁸ Ibid., paras. 112-113.

²³⁹⁹ Ibid., para. 114.

²⁴⁰⁰ *Lubanga* (ICC-01/04-01/06-1368), Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation", Trial Chamber I, 2 June 2008, paras. 29, 31 and 35; *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008.

²⁴⁰¹ McGonigle Leyh (2011) 286.

²⁴⁰² Ibid., Loc. cit.

representatives, in, for example, opening and closing statements.²⁴⁰³ Nevertheless, as practice has shown, victims normally participate via a legal representative to fully exercise their participatory rights. According to rule 90 (1), ‘A victim shall be free to choose a legal representative’. However, bearing in mind the large number of victim participants during the investigation and the pre-trial stage of a case and in order to ensure a meaningful participation of victims and the fairness and expeditiousness of the proceedings,²⁴⁰⁴ the Chamber may request the appointment of a common legal representative(s) for victim participants, according to rule 90 (2), and paying attention to, *inter alia*, the victims’ views under article 68 (3),²⁴⁰⁵ and the presence of victims’ distinct interests.²⁴⁰⁶ Thus, a Pre-Trial Chamber ‘retains the option [...] to request the victims or particular group of victims to choose a common legal representative or representative “where there are a number of victims” and “for the purposes of ensuring the effectiveness of the proceedings” (rule 90, sub-rule 2)’.²⁴⁰⁷

Moreover, according to rule 90 (3), if victims cannot choose a common legal representative, the Chamber may ask the Registrar to choose one.²⁴⁰⁸ Therefore, a lawyer from the OPCV can be appointed as a common legal representative, which can be revisited taking into account the views expressed by the victims.²⁴⁰⁹ Rule 90 (4) requires that ‘The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims [...] are represented and that any conflict of interest is avoided’, which is a necessary guarantee to include victims participants’ interests in the decision-making process.

²⁴⁰³ Kony et al. (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, Pre-Trial Chamber II (Single Judge), 1 February 2007, para. 4.

²⁴⁰⁴ See, e.g., Kony et al. (ICC-02/04-01/05-252), 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, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras 80 and 162; Ruto et al. (ICC-01/09-01/11), 5 August 2011, para. 65.

²⁴⁰⁵ Bemba (ICC-01/05-01/08-322), Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims, Pre-Trial Chamber III (Single Judge), 16 December 2008, para. 9.

²⁴⁰⁶ Ruto et al. (ICC-01/09-01/11), 5 August 2011, para. 65.

²⁴⁰⁷ Kony et al. (ICC-02/04-01/05-134), 1 February 2007, para. 6.

²⁴⁰⁸ ICC RPE, rule 90 (3) (‘If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives’.).

²⁴⁰⁹ Gbagbo (ICC-02/11-01/11-138), 4 June 2012, paras. 44 and 45.

It should be noticed that whereas in earlier ICC cases appointed common legal representation was organized at different stages of the cases,²⁴¹⁰ in more recent cases,²⁴¹¹ appointed common legal representation has been implemented from the outset to remove potential adverse effects that might happen when an appointed common representative substitutes the victim participants' original nominee.²⁴¹² At the pre-trial stage of a case, *inter alia*, harm suffered by the victims, i.e., the specific crime allegedly suffered by the victims, has been considered concerning questions of common legal representation.²⁴¹³

Concerning victims' participation on the conditional release of a suspect, rule 119 (3) requires the Pre-Trial Chamber to 'seek the views of victims who communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed'. Although rule 119 (3) does not require to hold the victim participant status, victims' personal interests have to be affected as only victims who have already communicated with the ICC and who would be at risk as a consequence of the release or the condition imposed will be admitted.²⁴¹⁴ In *Lubanga*, three individuals holding victim participant status filed their observations.²⁴¹⁵

As for appeals of the suspect's conditional release and those holding the victim participant status, even though article 82 (1) (b) provides for that either party may appeal a decision granting or denying the release of a person investigated or prosecuted, i.e., victim participants are not mentioned, in the pre-trial detention appeal of *Lubanga* the Appeals Chamber's majority concluded that victim participants would be allowed to participate in these sorts of appeals.²⁴¹⁶ However, for victims to participate, they must apply for leave to participate in the appeal,²⁴¹⁷ i.e., it is not an automatic right, as victims have to specify how their personal interests are affected and why it would be appropriate for the Appeals Chamber to allow the presentation of their views and

²⁴¹⁰ See, e.g., *Lubanga, Katanga and Ngudjolo Chui, and Bemba*.

²⁴¹¹ See, e.g., *Ruto et al., Muthaura and Kenyatta, and Gbagbo*.

²⁴¹² See, for further details, Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 *International Criminal Law Review* 871, 880.

²⁴¹³ *Bemba* (ICC-01/05-01/08-322), 16 December 2008, paras 9 and 10. See also Haslam and Edmunds (2012) 885.

²⁴¹⁴ Safferling (2012) 313.

²⁴¹⁵ See *Lubanga* (ICC-01/04-01/06-530-tEN), Observations of Victims a/0001/06, a/0002/06 and a/003/06 in Respect of the Application for Release Filed by the Defence, 9 October 2006.

²⁴¹⁶ *Lubanga* (ICC-01/04-01/06-925), 13 June 2007, para. 23.

²⁴¹⁷ *Ibid.*, Loc. cit.

concerns.²⁴¹⁸ In his dissent, Judge Song, however, concluded that victims do not need to apply as he considered that this right is given to all participants to the proceedings that gave rise to the appeal.²⁴¹⁹ Actually, as said, rule 119 requires the Pre-Trial Chamber to seek victims' views on this specific matter. Although the Pre-Trial and Appeals Chamber would most likely have decided for the continuation of the detention of Lubanga, even absent victims' views, victims' participation had at least symbolic importance.²⁴²⁰ Moreover, victims by definition have first-hand knowledge of their security and safety situation, which justifies expressing themselves without the need of being 'represented' by the Prosecutor. Furthermore, victims' participation may have at least partially influenced the Appeals Chamber's decision. Victim participants' status during appeals proceedings is examined in further detail later.²⁴²¹

As seen, victim participation during the pre-trial stage of a case has resulted more active and significant for victims than during the investigation stage of a situation. A point that should be given extra attention is that victims generally speaking have tried to do much more than just present the harms suffered or clarify facts.²⁴²² Accordingly, victim participants have very frequently commented on the suspect's guilt and sometimes tried to induce evidence oriented to establish the existence of substantial grounds to believe that the accused was responsible for the charges presented against him.²⁴²³

Some of the observations concerning victims' participation in an investigation stage of a situation might *mutatis mutandi* be also raised in the context of the pre-trial stage of a case. Nonetheless, the main difference is that since in the pre-trial stage of a case by definition a suspect is already singled out, upon the expedition of an arrest warrant or a summons to appear, (s)he can already defend his/her rights and, accordingly, the right to due process is not as jeopardized as during investigation. It is important, however, to analyze, for example, Pre-Trial Chamber I's considerations in *Katanga and Ngudjolo Chui*

²⁴¹⁸ Ibid., Loc. cit. See also Lubanga (ICC-01/04-01/06-824), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled "Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo", Appeals Chamber, 13 February 2007, paras. 1, 2 and 38-40. See also McGonigle Leyh (2011) 277.

²⁴¹⁹ Lubanga (ICC-01/04-01/06-824), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled "Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo", Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, Appeals Chamber, 13 February 2007, paras. 3 and 4.

²⁴²⁰ McGonigle Leyh (2011) 277.

²⁴²¹ See infra Chapter IV 6.3.

²⁴²² McGonigle Leyh (2011) 291.

²⁴²³ Ibid., Loc. cit.

concerning victims' participation at the pre-trial stage of a case. Victims were found to have a right to participate in the determination of issues affecting the guilt or innocence of an accused because they have an interest in 'the truth'²⁴²⁴ which, for example, corresponds to the confirmation of charges, but the Chamber did not allow victim participants to introduce evidence on the accused's guilt as the Pre-Trial Chamber explicitly said that 'we cannot allow a second Prosecutor in this process'.²⁴²⁵ Hence, the Chamber tried to leave it clear that the role for victims is being participants and not parties.²⁴²⁶ The object and purpose of the confirmation of charges hearing, which is not a 'mini-trial' or a 'trial before the trial', was also considered.²⁴²⁷

This is coherent with the logic underlying the ICC Statute and RPE which is arguably to achieve a balance between the importance of victim participants to voice their views and concerns, similar but not identical to a civil party, and the avoidance of an excessive number thereof or of those participating being granted with quite broad rights.²⁴²⁸ Victims' participation during the pre-trial stage of a case hence needs to be guided by this necessary equilibrium.

3.4. The ECCC and the STL

3.4.1. Participation During Investigation/Pre-Trial in General

3.4.1.1. The ECCC

At the ECCC, as previously mentioned, victims can assume the role of complainants during the preliminary investigations conducted by the Co-Prosecutors when they have to determine whether there is enough evidence to potentially support a conviction and to identify potential suspects.²⁴²⁹ Hence, at this stage, victims' complaints are first used. Thus, for example, victims' general statements about what they suffered from 1975 to 1979 may lead the Co-

²⁴²⁴ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, paras. 36, 45 (iii).

²⁴²⁵ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 15 July 2008, at 70. Cited by McGonigle Leyh (2011) 284-285, footnotes 357 and 358.

²⁴²⁶ McGonigle Leyh (2011) 285.

²⁴²⁷ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 100. It was also added that: '[...] according to article 61 (7) of the Statute, at the confirmation hearing the Pre-Trial Chamber must determine "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." Therefore, the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued'. Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 109.

²⁴²⁸ See Christopher Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (2000) 94 *American Journal of International Law* 773, 783.

²⁴²⁹ ECCC Internal Rules, rule 50 (1).

Prosecutors to consider incidents or look at villages not previously taken into account.²⁴³⁰ Bearing in mind that the Co-Prosecutors only look for general information during this stage, the requirement of victims' specific statements is not as strong as when it comes to civil party applicants. This lower threshold during the investigation generates an incentive for victims to come forward instead of relying exclusively on the Co-Prosecutors, who 'cannot possibly investigate all the crimes of the Khmer Rouge's top leadership'.²⁴³¹ Even though complaints may include significant details, complaints that are acceptable may include statements of the sort of 'a massacre happened in my village, the Court should come look here'.²⁴³² In any case, victim-complainants can neither initiate prosecutions nor force the Co-Prosecutors or Co-Investigating Judges to undertake an investigation if the Co-Prosecutors decide not to adopt action concerning a complaint unlike the situation existent under the Cambodian Code of Criminal Procedure.²⁴³³

Once the ECCC Co-Prosecutors conclude that there is enough evidence to charge an individual with a crime, they prepare an 'Introductory Submission', which outlines the crimes with which an individual is charged,²⁴³⁴ and actually constitutes the procedural moment that introduces the distinction between victims and civil parties.²⁴³⁵ Whereas any victim who suffered a crime under the Khmer Rouge regime can submit complaints to the Co-Prosecutors who use such information in conducting their investigations,²⁴³⁶ only victims who suffered crimes listed in the introductory submission may apply to be joined as civil parties before the Co-Investigating Judges as previously examined.²⁴³⁷ Thus, victims from that moment can participate as civil parties during pre-trial

²⁴³⁰ Ibid., rule 49 (2).

²⁴³¹ Bair (2009) 521.

²⁴³² ECCC, Practice Direction on Victim Participation, Practice Direction 02/2007/Rev. 1 (amended on 27 October 2008), article 2 (3).

²⁴³³ Cambodian Code of Criminal Procedure (2007), articles 138-142.

²⁴³⁴ ECCC, Internal Rules, rule 53 (1). This provision additionally establishes that introductory submissions can also be sent against unknown persons and that the judicial investigation is opened by sending an introductory submission to the Co-Investigating Judges.

²⁴³⁵ Bair (2009) 521.

²⁴³⁶ ECCC Internal Rules, rule 49.

²⁴³⁷ See, in particular, Nuon Chea (Case 002), Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, para. 36 ('The Pre-Trial Chamber find that the text of Internal Rule 23(1)(a) [current rule 23 *bis* 1] is clear in its wording that Civil Parties can participate in all criminal proceedings [...] Civil Parties have active rights to participate starting from the investigative phase of the procedure').

proceedings, i.e., during judicial investigations led by the Co-Investigating Judges.²⁴³⁸

In cases 003 and 004, since judicial investigations have for a long time been going on without charges and without public information, victims were unable yet to successfully apply to become civil parties and, therefore, have not been able to effectively participate in judicial investigations.²⁴³⁹ Concerning case 004, the Co-Investigating Judges justified its secretive approach due to the existence of serious doubts concerning the suspects as the most responsible and, thus, it would be ‘inappropriate to encourage civil party applications [...] as this could raise expectations which might not be met later on’.²⁴⁴⁰ Although formal charges have not been yet laid in Cases 003 and 004, some civil parties have been already admitted to cases 003 and 004.²⁴⁴¹ Their lawyers alongside those of civil party applicants and pending civil party applicants have been accredited and recognized.²⁴⁴²

3.4.1.2. The STL

With regard to the STL, it should first be mentioned that unlike the Lebanese Code of Criminal Procedure that grants victims the civil party status and permit

²⁴³⁸ Although there is a Pre-Trial Chamber at the ECCC, its mandate mainly consists in settling disputes between the Co-Prosecutors and Co-Investigating Judges, and also hearing appeals against Co-Investigating Judges’ decisions. See ECCC Internal Rules, internal rules 73 and 74.

²⁴³⁹ Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Pre-Trial Chamber, Opinion of Judges Lahuis and Downing, 24 October 2011, para. 5; Case 004, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Pre-Trial Chamber 02, Opinion of Judges Lahuis and Downing, 14 February 2012, para. 5. See also Brouwer and Heikkilä (2013) 1322-1323.

²⁴⁴⁰ Co-Investigating Judges, Press Release, Statement by Co-Investigating Judges Regarding Civil Parties in Case 004, 8 August 2011. Available at: <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004> (last visit on 20 October 2012).

²⁴⁴¹ Case 003, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Office of the Co-Investigating Judges, 26 February 2013, para. 15; Case 004, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Office of the Co-Investigating Judges, 1 April 2013, para. 14. See also Case 003, Order on the Reconsideration of the Admissibility of the Civil Party Application of Robert Hamill, Co-Investigating Judges, 24 February 2012, paras. 36-39; Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, Pre-Trial Chamber, 13 February 2013.

²⁴⁴² Case 003, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Office of the Co-Investigating Judges, 26 February 2013, para. 15; Case 004, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Office of the Co-Investigating Judges, 1 April 2013, para. 14.

them to initiate criminal proceedings, STL RPE rule 86 (A) does not authorize victims to be granted the victim participant status and participate as such before the confirmation of an indictment, i.e., only after completing the investigation (or at least after the majority of the investigations has been finished).²⁴⁴³ Although victim participant status is not available during investigation, victims (in general) may at most transmit the Prosecutor information that (s)he considers useful to determine the truth and the Prosecutor is free to decide how this information may be used.²⁴⁴⁴

The limitation of victim participation to only after confirmation of the indictment corresponds, as the former President of the STL, Antonio Cassese, pointed out, to the aims of '(i) avoiding confusion that might somehow hamper the actions of the Prosecutor, and (ii) preventing possible delays in the proceedings'.²⁴⁴⁵ More specifically, that the Prosecutor when initiating proceedings must take into account other factors in addition to the victims' interests, the risk of 'fabricated requests' aimed to infiltrate the Prosecutor's investigation, and the fact that the Prosecutor is not an investigating judge who gathers evidence and leads the investigation have been invoked to justify the exclusion of victim participation during investigation.²⁴⁴⁶ In addition, the situation experienced by some victims at the ICC who were denied participation at the confirmation of charges after having been granted the victim participant status during the investigation, and the fact that during the investigation, no individual has not been yet identified as an accused or suspect and, hence, cannot defend his/her fundamental rights are also considered as sound arguments to exclude victim participation from investigation.²⁴⁴⁷

Although these arguments are sound, the complete exclusion of victim participation from the investigation can be criticized. First, this introduced change is a step backwards in comparison with the existent ICC legal regime. More importantly, a half-way solution such as limiting the victim participation to specific judicial instances during the investigation stage, as the ICC did by revisiting its own practice and, hence, no longer assuming a general participatory

²⁴⁴³ STL President (2010), para 20. See also STL President (2012), para. 20; Brouwer and Heikkilä (2013) 1318. It should be noticed that the Prosecutor when conducting his/her investigation may 'summon and question [...] victims and witnesses and record their statements'. STL RPE, rule 61 (i).

²⁴⁴⁴ STL Chambers, Information Guide on Victim Participation in the Proceedings of the Special Tribunal for Lebanon, December 2010b, para. 23.

²⁴⁴⁵ STL President (2010), para 20. See also STL President (2012), para. 20.

²⁴⁴⁶ Hemptinne (2010) 173.

²⁴⁴⁷ See *Ibid.*, 174.

right applicable to the whole investigation, could have been considered by the STL RPE drafters instead of forbidding completely victim participation. Second, unlike the ICC and the ECCC, the number of victim participants at the STL is comparatively low and, therefore, concerns on delays at the STL are in principle not as justified as in the other two courts. Third, victims' status is already limited because of the impossibility of not claiming reparations before the STL. Hence, the decision of excluding victim participation completely from another procedural scenario, i.e., investigation, weakens victim status at the STL even more. Furthermore, as evidenced by the practice of the ICC, victims are affected by the Prosecutor's actions during investigation and hearing victims' voice to express their personal interests during investigation would constitute an extra guarantee of fairness and justice. This guarantee is especially relevant in the context of the STL which operates under the suspicion that its actions may be dictated by political considerations.²⁴⁴⁸

3.4.2. Modalities of Participation/Procedural Rights

3.4.2.1. The ECCC

With regard to the ECCC, it should first be mentioned that Pre-Trial Chamber Judges have been reluctant to acknowledge civil parties as equal parties to the defence and the Prosecution.²⁴⁴⁹ Be that as it may, based on the ECCC Internal Rules as well as case law of the Co-Investigating Judges and Pre-Trial Chamber, it is possible to identify six main categories of civil parties' rights during pre-trial proceedings.²⁴⁵⁰ First, after victims are granted the civil party status, they have the right to consult and examine the dossier.²⁴⁵¹ Such right is of pivotal importance as the civil party and the other parties have to familiarize themselves with the contents and materials of the dossier since there is no disclosure system at the ECCC, which reflects the civil law influence.

Second, under internal rule 58 (4), the Co-Investigating Judges can call the civil parties to confront the charged person. Civil parties' lawyers may ask questions to the charged person and if the Co-Investigating Judges refuse to permit a question, this refusal 'shall be noted in the written record of the interview' according to internal rule 58 (5). The symbolic and substantial

²⁴⁴⁸ Ibid., 173.

²⁴⁴⁹ McGonigle Leyh (2011) 185.

²⁴⁵⁰ With regard to these procedural rights, in general, see Ibid., 185-192.

²⁴⁵¹ ECCC Internal Rules, rules 55 (11) and 59 (1). See also Case 003, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Co-Investigating Judges, 26 February 2013, para. 13; Case 004, Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Co-Investigating Judges, 1 April 2013, para. 12.

importance for the civil parties when confronting the charged person should be pointed out. In *Duch*, for example, confrontation interviews occurred and were subsequently referred to in the Closing Order.²⁴⁵²

Third, civil parties have the right to request the Co-Investigating Judges to carry out specific investigations on their behalf.²⁴⁵³ Since neither civil parties nor the defence has the right to have their own investigations, they have to rely on those conducted by the Co-Investigating Judges, which are in turn determined by Co-Prosecutors' submissions. Even though civil parties may ask specific judicial investigations, they still need to be related to the Co-Prosecutors' investigations, e.g., requests about to open investigations on alleged attacks on cultural property in *Nuon Chea et al.* were denied as they were not included in the Co-Prosecutors' Introductory Submission.²⁴⁵⁴ Indeed, the Pre-Trial Chamber has made it clear that although civil parties hold a right to ask certain investigative actions, the Co-Prosecutors are the only responsible 'to expand an investigation beyond the scope of initial and existing supplementary submissions'.²⁴⁵⁵ All in all, civil parties certainly may influence what crimes should be included in the Closing Order.²⁴⁵⁶ Co-Investigating Judges may be requested by a civil party to 'interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf'.²⁴⁵⁷ Investigative requests from civil parties' co-lawyers have included incidents of enforced disappearance of persons, forced marriage and forced sexual relations, and attacks against cultural property.²⁴⁵⁸ In any case, civil parties have to be

²⁴⁵² Kaing Guek Eav (Case 001), Closing Order, Co-Investigating Judges, 12 August 2008, footnotes 63, 175, 177, 200, 226, 370 and 371. Cited by McGonigle Leyh (2011) 188, footnote 116. This confrontation took place after the Co-Investigative Judges arranged for re-enactments at S-21, with the presence of Duch, his lawyers and some surviving victims.

²⁴⁵³ ECCC Internal Rules, rule 59 (5). See also McGonigle Leyh (2011) 185.

²⁴⁵⁴ Nuon Chea et al. (Case 002), Order on Civil Parties' Co-Lawyers' 7th Request for Investigative Actions Concerning the Charge of Attack Against Culture, Co-Investigating Judges, 15 March 2010, para. 3.

²⁴⁵⁵ Ieng Thirith et al. (Case 002), 27 April 2010, paras. 17-18. See also Brouwer and Heikkilä (2013) 1322.

²⁴⁵⁶ ECCC Internal Rules, rule 67 (1) ('The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions').

²⁴⁵⁷ ECCC Internal Rules, rule 59 (5).

²⁴⁵⁸ Nuon Chea et al. (Case 002), Co-Lawyers of Civil Parties' Investigative Request Concerning the Crimes of Enforced Disappearance, 30 June 2009; Nuon Chea et al. (Case 002), Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 15 July 2009; Nuon Chea et al. (Case 002), Co-Lawyers for the Civil Parties' Fourth Investigative Request

informed of the Co-Investigating Judges' closing order and receive a copy thereof.²⁴⁵⁹

Although civil parties' requests had some relative success,²⁴⁶⁰ applying internal rule 59 (5), the Co-Investigating Judges and the Pre-Trial Chamber on appeal have rejected many of them due to, *inter alia*, previous interviews of individuals by investigators and concerns about delay in proceedings.²⁴⁶¹ A high potential for delays is explained by the fact that, under internal rule 74 (4), any request to question witnesses, collect evidence, or order expertise felt by the civil party as necessary is subject to appeal, even when such evidence might not necessarily aid the Prosecution's goals.²⁴⁶² It is important to mention that, unlike victim-complainants, when interviewed by the Co-Investigating Judges, the civil parties are entitled to have a counsel present during those meetings.²⁴⁶³

Fourth, civil parties can request and propose witnesses during pre-trial, e.g., when the Co-Investigating Judges consult an expert to aid in the investigation, a civil party holds the right to request that additional experts be consulted if the first expert opinion was not favorable.²⁴⁶⁴ Although this is an important right as proposing witnesses may be connected to issues of particular relevance for the civil parties,²⁴⁶⁵ those witnesses may not necessarily fit in the Prosecutor's case, lead to confusion and, hence, be rejected by the Court as examined during the subchapter on trial.

Fifth, civil parties may attend and participate in the pre-trial proceedings via written and oral interventions. However, civil parties' right to participate is

Concerning Forced Marriages and Sexually Related Crimes, 4 December 2009; Nuon Chea et al. (Case 002), Co-Lawyers for Civil Parties' 7th Investigative Request Concerning the Charge of Attack Against Culture, 8 February 2010.

²⁴⁵⁹ ECCC Internal Rules, rule 67. See also Brouwer and Heikkilä (2013) 1322.

²⁴⁶⁰ Nuon Chea et al. (Case 002), Order on Civil Request for Investigative Action Concerning Enforced Disappearance, Co-Investigating Judges, 21 December 2009, para. 12.

²⁴⁶¹ Ieng Thirith (Case 002), Public Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, Pre-Trial Chamber 4, August 2010; Nuon Chea et al. (Case 002), Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriages and Enforced Disappearances Request for Investigative Action, Pre-Trial Chamber, 21 July 2010; Kaing Guek Eav alias Duch (Case 001), Order Concerning Requests for Investigate Actions, Co-Investigating Judges, 4 June 2008. See also McGonigle Leyh (2011) 187.

²⁴⁶² Bair (2009) 527; McGonigle Leyh (2011) 187.

²⁴⁶³ ECCC Internal Rules, rule 55 (5) (a).

²⁴⁶⁴ *Ibid.*, rules 31 (10) and 74 (4) (e).

²⁴⁶⁵ McGonigle Leyh (2011) 207.

not applicable to all the hearings during pre-trial proceedings.²⁴⁶⁶ Thus, for instance, internal rule 63 (1) (a) establishes that during a provisional detention hearing ‘the Co-Investigating Judges shall hear the Co-Prosecutors, the Charged Person and his or her Lawyers’. Nevertheless, the possibility for civil parties to participate in an appeal related to a provisional detention was discussed by Pre-Trial Chamber concerning Nuon Chea (Case 002) as follows. On 4 February 2008, the first civil parties debuted at the courtroom, being given thirty minutes each during which they presented submissions to the Pre-Trial Chamber as for the Nuon Chea’s appeal against provisional detention. Notwithstanding objections from Noun Chea’s lawyers, who sustained that civil parties’ participation was not provided by the Internal Rules and would infringe the accused’s right to a fair hearing as they had not been allowed to participate at the hearing before the Co-Investigating Judges, the Chamber permitted the civil parties to address it.²⁴⁶⁷ Even one civil party did so directly. This was Theary Seng, who did not fit the typical victim archetype insofar she is an American lawyer and a civil society leader in Cambodia and, moreover, not only made an emotional presentation but also failed to stick to the issue under discussion, even publicizing a book published by her NGO.²⁴⁶⁸

Even though civil parties are unable to participate in the adversarial hearings on provisional detention, Pre-Trial Chamber in March 2008 determined that victims/civil parties could participate in appeals against provisional detention.²⁴⁶⁹ It was found that the text of internal rule 23 (1) (a) was clear that victims can participate in all criminal proceedings, except for those in which they are explicitly barred. The Chamber indeed concluded that victims hold ‘active rights’ to participate starting from the investigate phase of the procedure.²⁴⁷⁰ The Chamber mentioned that it wished to avoid a prescriptive procedure similar to the one adopted by the ICC,²⁴⁷¹ and instead preferred flexibility so as to protect the rights of civil parties and of the charged persons. In any case, more notably, the Chamber stated that ‘the inclusion of Civil Parties in proceedings is in recognition of the state pursuit of national reconciliation’,²⁴⁷²

²⁴⁶⁶ See *Ibid.*, 188.

²⁴⁶⁷ *Ibid.*, *Loc. cit.*; Bair (2009) 544-545.

²⁴⁶⁸ See Mohan (2009) 752; McGonigle Leyh (2011) 188.

²⁴⁶⁹ Nuon Chea (Case 002), Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008.

²⁴⁷⁰ *Ibid.*, para. 36.

²⁴⁷¹ *Ibid.*, para. 43.

²⁴⁷² Nuon Chea (Case 002), Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, para. 38

which underscores the ECCC's fundamental purpose and in accordance with international practice, in particular that of the ICC.²⁴⁷³ Accordingly, this decision can be considered as a landmark as victims' right to participate not only as participants but as parties was emphasized.

In Case 002, civil parties, before the provisional detention appeals of another charged person, Khieu Samphan, were informed that only the civil parties' lawyers would be allowed to make oral submissions, in accordance with internal rule 77 (4) that provides that only lawyers for the parties may consult the case file up to the date of the pre-trial appeal hearing and those civil parties who lack legal representation will not be able to access the case file.²⁴⁷⁴ Nevertheless, one civil party addressed directly the ECCC and, after parties' agreement, she was permitted to make certain brief remarks but her comments went beyond the issues at the Chamber.²⁴⁷⁵

In the detention appeal of Ieng Thirith (Case 002), the Pre-Trial Chamber once again established that only civil parties' lawyers would be permitted to make oral observations in order to ensure the expeditiousness of the proceedings and to avoid unwarranted disruptions.²⁴⁷⁶ Additionally, the Chamber based its decision on internal rules that refer to civil parties' participation via their lawyers.²⁴⁷⁷ The Chamber added that the defence should be made aware of the contents of the oral submissions of the civil parties prior to the hearing.²⁴⁷⁸ In spite of the Chamber's decisions on restricting oral submissions to civil parties' lawyers, Theary Seng asked to speak during the Ieng Thirith hearing.²⁴⁷⁹ Seng had dismissed her lawyer and, thus, was not represented by legal counsel.²⁴⁸⁰ However, the Pre-Trial Chamber's majority ruled that the civil party was not allowed to address the Chamber in person citing internal rule 77 (10).²⁴⁸¹ Nonetheless, it should be mentioned that a previous version of internal rule 23 (7) invoked by the Chamber provided no indication that a civil

²⁴⁷³ Ibid., para. 40.

²⁴⁷⁴ Nuon Chea (Case 002), Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, para. 3. See also Khan and Dixon (2009) 1154-1155.

²⁴⁷⁵ See Khan and Dixon (2009) 1155; Bair (2009) 548.

²⁴⁷⁶ Ieng Thirith (Case 002), Directions on Civil Party Oral Submissions During the Hearing of the Appeal Against Provisional Detention Order, Pre-Trial Chamber, 20 May 2008.

²⁴⁷⁷ Ibid., para. 3 (referring to ECCC internal rules 23 (7), 77 (4) and 77 (10)).

²⁴⁷⁸ Ibid., para. 4.

²⁴⁷⁹ Ieng Sary (Case 002), Decision on the Civil Party's Request to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 1 July 2008, para. 2.

²⁴⁸⁰ Ibid., Loc. cit.

²⁴⁸¹ Ibid., para. 3.

party must be represented by counsel, as noted in a dissenting opinion,²⁴⁸² which was praised by Seng as ‘obviously and legally correct’.²⁴⁸³ Additionally, it may be considered that most victims are not lawyers and, hence, they have never been given a voice in shaping civil party’s participation. Seng requested reconsideration of the decision but this was also denied.²⁴⁸⁴

The issue then was dealt with as the unrepresented victims’ right to address the ECCC personally. Concerning the provisional detention appeals, the Pre-Trial Chamber determined that ‘procedural rights can be limited if this is necessary to safeguard other competing interests, applying the principle of proportionality’ and noted that the ICC has sometimes granted broader rights to victim participants’ legal representatives than to victim participants themselves.²⁴⁸⁵ Nevertheless, since unrepresented civil parties may be unable to afford a legal representative, the Pre-Trial Chamber decided that legitimately unrepresented civil parties may be allowed to address the ECCC in person provided that they make this request at least 10 days prior to the hearing.²⁴⁸⁶ At this point, it should be mentioned that civil parties’ status during appeals proceedings is discussed in further detail later.²⁴⁸⁷

In March 2009, revisions were introduced to the Internal Rules to consolidate Pre-Trial Chamber’s early decisions on the role of the civil parties’ lawyers and civil parties. The revisions applicable to the pre-trial and trial stages established that when civil parties are represented by a lawyer ‘it is the lawyer and not the civil parties themselves who must make legal submissions before the Court’.²⁴⁸⁸ The Internal Rules state that in order to participate in the proceedings and from the closing order issuance onwards, civil parties ‘shall at all times be represented by a Civil Party Lawyer’.²⁴⁸⁹ By the closing order, the Co-Investigating Judges put end to the judicial investigation and can either dismiss

²⁴⁸² Ieng Sary (Case 002), Decision on the Civil Party’s Request to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, Dissenting opinion of Judge Rowan Downing, 1 July 2008, para. 7. For further discussion on this point see Mohan (2009) 752-758.

²⁴⁸³ See Theary Seng’s personal web site, available at: <http://www.thearyseng.com/eccc-civil-party> (last visit on 20 October 2012).

²⁴⁸⁴ See Ieng Sary (Case 002), Decision on Application for Reconsideration of Civil Party’s Right to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 28 August 2008.

²⁴⁸⁵ Ieng Sary (Case 002), Direction on Unrepresented Civil Parties’ Rights to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 29 August 2008, para. 8.

²⁴⁸⁶ *Ibid.*, para. 10.

²⁴⁸⁷ See *infra* Chapter IV 6.4.1.1 and 6.4.2.1.

²⁴⁸⁸ ECCC, Fifth Plenary Session of Judicial Officers, Closing Press Statement, 6 March 2009.

²⁴⁸⁹ ECCC Internal Rules, rule 23 *ter* (1).

the case or send it to trial.²⁴⁹⁰ A disposition which is no longer present in the Internal Rules consisted in an explicit reference to a civil party's right to be represented, during pre-trial, by counsel and to freely choose any lawyer registered with the Cambodian Bar Association.²⁴⁹¹

In practical terms, civil parties may only address the ECCC 'through the mouth of a lawyer, rather than with their own voices'.²⁴⁹² However, such a change is seemingly and in balance positive in order to guarantee expeditious proceedings. This consideration acquires especial relevance bearing in mind the important increase in the number of civil parties. Their direct participation, i.e., without legal representatives, would be detrimental to the pace of the proceedings leading to a delay of them. Although this and other changes on civil parties' participation have been criticized as going against the 'very spirit of civil party' participation,²⁴⁹³ it is in principle agreed here with the ECCC Internal Rules Committee's justification whereby the civil parties' rights are not limited but it is instead the way whereby those rights are exercised that is modified.²⁴⁹⁴ Furthermore, by noting that the parties hold different positions in criminal proceedings and 'that these positions even vary in the different stages of the proceedings', the Pre-Trial Chamber determined that civil parties' modalities of participation do not need to be the same as those of the other parties.²⁴⁹⁵ Consequently, civil parties were not provided the same amount of time to make oral submissions in the Appeal Against Provisional Detention Order of Ieng Sary.²⁴⁹⁶ Regardless of the causes behind the ECCC's reasons to change its attitude towards the victims,²⁴⁹⁷ at least some of these restrictions to avoid too a

²⁴⁹⁰ Ibid., rule 67.

²⁴⁹¹ ECCC Internal Rules, rule 23 *ter* 2 (a) (Rev. 5).

²⁴⁹² Bair (2009) 550.

²⁴⁹³ Mohan (2009) 755.

²⁴⁹⁴ ECCC, Fifth Plenary Session of Judicial Officers, Closing Press Statement, 6 March 2009.

²⁴⁹⁵ Ieng Sary (Case 002), Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention Order, Pre-Trial Chamber, 1 July 2008, para 4. See also Ieng Sary (Case 002), Direction on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 29 August 2008, para. 5.

²⁴⁹⁶ See Khan and Dixon (2009) 1156.

²⁴⁹⁷ Some commentators have attributed this change in attitude to the ECCC's disinclination to hear from Theory Seng rather than to a (correct) reading of the ECCC Rules. See Mohan (2009) 754; Sarah Thomas, 'Civil Party's Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC', 3 July 2008, available at:

http://www.genocidewatch.org/images/Cambodia_08_07_03_Civil (last visit on 20 October 2012).

broad and unpredictable participation of civil parties, notably illustrated by Theory Seng, may be considered as necessary.

Keeping a delicate balance between civil parties' participation and other important considerations such as expeditiousness, efficiency, and fairness of the proceedings, arguably justify at least some of these safeguards. Indeed, as determined by the Pre-Trial Chamber 'preserving the balance between the procedural rights of the parties was an important and ongoing process'.²⁴⁹⁸

Sixth, civil parties have the right to support the prosecution.²⁴⁹⁹ This right, as previously seen, is one of the two purposes to join the ECCC proceedings as civil parties but does not transform the civil party in an additional Prosecutor, as later discussed under the analysis of civil parties' participation in trial.²⁵⁰⁰

Concerning legal representation, according to the ECCC Internal Rules, during the pre-trial stage, 'Civil Parties participate individually',²⁵⁰¹ and they hold the right to be represented by lawyers of their own choice. Moreover, civil parties 'may form groups and choose to be represented by a common lawyer'; however, the Co-Investigating Judges or the Chamber can also take the decision to group civil parties and organize them under common representation if the interests of justice so require.²⁵⁰² When selecting common lawyers, the Co-Investigating Judges or the Chambers and the VSS 'shall take all reasonable steps to ensure that [...] the distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided'. In *Nuon Chea et al.*, the ECCC forcibly grouped unrepresented civil parties due to the large number of civil parties, and, for example, the provinces of origin was the criterion employed to group non-represented civil parties.²⁵⁰³ Other civil parties grouped themselves on the grounds of their geographical origin, harm inflicted and ethnic origin.²⁵⁰⁴ ECCC's grouping criteria are similar to the ICC's practice, which is examined later.²⁵⁰⁵

²⁴⁹⁸ Ieng Sary (Case 002), Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 28 August 2008, para. 5.

²⁴⁹⁹ ECCC Internal Rules, rule 23 (1) (a). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (vii).

²⁵⁰⁰ See *infra* Chapter IV 4.4.1.1.

²⁵⁰¹ ECCC Internal Rules, rule 23 (3).

²⁵⁰² *Ibid.*, rule 23 *ter* (3).

²⁵⁰³ Nuon Chea et al. (Case 002), Order on the Organization of Civil Party Representation under Rule 23ter of the Rules, Co-Investigating Judges, 2 August 2010.

²⁵⁰⁴ McGonigle Leyh (2011) 218.

²⁵⁰⁵ See *infra* Chapter IV 4.3.2.1.

Victims can also group themselves together under a Victims Association, which works as a sort of an umbrella organization for a numerous group of victims under common legal representation.²⁵⁰⁶ This did not take place in *Duch* during pre-trial and trial. In *Nuon Chea et al.*, an Association of Khmer Rouge Victims, the Association of Victims of Democratic Kampuchea, ‘Ksem Ksan’, in Cambodia represents a large a number of victims.²⁵⁰⁷ Indeed, civil party group 3 in *Duch* presented a memorial proposal on behalf of this association during the appeals proceedings as seen later.²⁵⁰⁸ Although victims associations are not themselves civil parties to the proceedings, lawyers of the association represent civil parties who are members of the victims associations.²⁵⁰⁹ In Cases 003 and 004, lawyers for admitted civil parties, alongside civil party applicants and other pending civil party applicants, have already been accredited and recognized.²⁵¹⁰

3.4.2.2. The STL

With regard to the STL, the Pre-Trial Judge in *Ayyash et al.* for first time discussed modalities of victims’ participation in pre-trial proceedings, i.e., in the STL context ‘the phase of proceedings following the confirmation of an indictment and preceding the transmission of the case file to the Trial Chamber pursuant to Rule 95 [...]’.²⁵¹¹

First, concerning the participation at meetings, status conferences and hearings, the Pre-Trial Judge, in application of STL RPE, rules 89 (C), 91 (D) (E) and 94 (A), determined that the legal representative of victim participants may attend and participate in meetings, status conferences and hearings when the victim participants’ interests are affected by an issue considered in the respective

²⁵⁰⁶ ECCC Internal Rules, rule 23 *quarter* (1) (‘A group of Victims may also choose to organise their Civil Party action by becoming members of a Victims’ Association [...]’). See also Practice Direction on Victim Participation, article 5.9. Victims Association, as defined under the glossary of the ECCC Internal Rules, is ‘an association made up solely of victims of crimes coming within the jurisdiction of the ECCC, which is validly registered in the country in which it is carrying on activities at the time of its intervention before the ECCC, and has been validly authorised to take action on behalf of its members’. See also McGonigle Leyh (2011) 218; Brouwer and Heikkilä (2013) 1311.

²⁵⁰⁷ McGonigle Leyh (2011) 218.

²⁵⁰⁸ See *infra* Chapter V 4.4.2.2.

²⁵⁰⁹ ECCC Internal Rules, internal rule 23 *quarter*.

²⁵¹⁰ Case 003, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, Co-Investigating Judges, 26 February 2013, para. 15; Case 004, Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 004, Co-Investigating Judges, 01 April 2013, para. 14.

²⁵¹¹ *Ayyash et al.* (STL-11-01/PT/TC), 18 May 2012, para. 3

event.²⁵¹² Nevertheless, the legal representative cannot attend meetings, status conferences and hearings where the Pre-Trial Judge has decided so.²⁵¹³ Nor may the legal representative's attendance extend to the full event, 'and may be limited to those agenda items of concern to the [victim participants]'.²⁵¹⁴

Second, the legal representative must have access to the full transcript of public status conferences and hearings and be provided with the portions of the transcripts, status conferences and hearings held *in camera* or *ex parte* attended by the legal representative.²⁵¹⁵ The same regime was found to be applicable as for access to minutes.²⁵¹⁶

Third, concerning filings of written motions, briefs and related documents, the Pre-Trial Judge acknowledged that whereas the STL RPE establish some instances where victim participants are required to submit written filings, they are silent on whether victim participants can do so on their own initiative.²⁵¹⁷ However, the Judge concluded that to make it effective victims' entitlement to participate, the legal representative may file, in addition to responses and replies,²⁵¹⁸ 'motions or briefs on any issues that affects the victims' personal interests', which was found to be consistent with other jurisdictions, in particular the ICC.²⁵¹⁹

It should be mentioned that the legal representative for victim participants filed his observations on the defence motions challenging the

²⁵¹² Ibid., paras. 23-26. Rule 89 (c) states that 'the Pre-Trial Judge may, *proprio motu* where appropriate, hear the Parties, without the accused or the victims participating in the proceedings being present. The Pre-Trial Judge may hear the Parties and the victims participating in the proceedings in chambers, in which case minutes of the meeting shall be taken by a representative of the Registry'. In turn, rule 91 (D) and (E) provides for that 'The Pre-Trial Judge shall order the Parties to meet to discuss issues related to the preparation of the case. He may invite victims participating in the proceedings to attend. Such meetings shall be held *inter partes* or, if the Pre-Trial Judge so decides at the request of a Party, *ex parte*'. Finally, in accordance to rule 94 (A), the Pre-Trial Judge shall 'convene a status conference within a reasonable period after the initial appearance of the accused and not more than eight weeks after it and, thereafter, within eight weeks from the previous one unless otherwise ordered to: (i) organize exchanges between the Parties so as to ensure expeditious preparation for trial; and (ii) review the status of the case and allow the Parties the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused'.

²⁵¹³ Ayyash et al. (STL-11-01/PT/TC), 18 May 2012, para. 27.

²⁵¹⁴ Ibid., para. 28

²⁵¹⁵ Ibid., para. 29.

²⁵¹⁶ Ibid., para. 30.

²⁵¹⁷ Ibid., para. 31.

²⁵¹⁸ See The Practice Directive on Filing of Documents before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.1, 23 April 2012; STL RPE, rule 87 (B).

²⁵¹⁹ Ayyash et al. (STL-11-01/PT/TC), 18 May 2012, para. 31.

jurisdiction and legality of the STL and argued, during the on-going pre-trial stage, for the legality of the STL constitution before the Trial Chamber,²⁵²⁰ which after holding a hearing to allow the parties and the legal representative to develop their arguments, to respond to the opposing submissions, and to answer questions from the bench,²⁵²¹ dismissed the defence motions.²⁵²² Although probably the STL would have reached the same conclusion even without victim participants' observations, these are of at least highly symbolic importance as victims were able to present their views about the very legality of the STL constitution during the pre-trial stage. Another example is constituted by observations of the victim participants' legal representative concerning the defence's motion for stay of proceedings in *Ayyash et al.*²⁵²³

Fourth, concerning access to documents and filings, the Pre-Trial Judge interpreted rule 87 (A), which reads as follows:

Unless the Pre-Trial Judge or the Trial Chamber, *proprio motu* or at the request of either Party, determines any appropriate restriction in the interests of justice, a victim participating in the proceedings is entitled to receive documents filed by the Parties, in so far as they have been disclosed by one Party to the other as well as the file, excluding any confidential and *ex parte* material, handed over by the Pre-Trial Judge to the Trial Chamber before commencement of trial pursuant to Rule 95.

The Pre-Trial Judge found three unclear aspects in this provision. First, concerning the meaning of 'disclosed' whereas the English version of the STL RPE entitles victim participants to receive documents filed by the parties provided that they have been 'disclosed by one Party to the other', the French version establishes that '*dans la mesure où lesdits documents ont été*

²⁵²⁰ Even though *Ayyash et al.* at the time of the decision was still in pre-trial phase, the Trial Chamber decided on the defence challenges posed since according to rule 90 (A) (i) preliminary motions on challenge of jurisdiction shall be disposed by the Trial Chamber.

²⁵²¹ *Ayyash et al.* (STL-11-01/PT/TC), Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, Trial Chamber, 27 July 2012, para. 4. See also *Ayyash et al.* (STL-11-01/PT/TC), Observations of Legal Representative for Victims on Illegality Motions, Legal Representative for Victims, 6 June 2012. Even though *Ayyash et al.* at the time of the decision was still in pre-trial phase, the Trial Chamber decided on the defence challenges posed since according to rule 90 (A) (i) preliminary motions on challenge of jurisdiction shall be disposed by the Trial Chamber.

²⁵²² *Ayyash et al.* (STL-11-01/PT/TC), 27 July 2012, para. 2 and p. 31.

²⁵²³ *Ayyash et al.* (STL-11-01/PT/PTJ), Observations of the Legal Representative of Victims on the "Sabra Defence Motion for Stay of Proceedings Due to Lebanon's Failure to Cooperate with the Defence", Legal Representative of Victims, 17 October 2013.

communiqués'.²⁵²⁴ The Judge in interpreting other STL RPE provisions understood that the phrase 'disclosed by one Party to the other' to mean 'communicated to or provided by' one party to another.²⁵²⁵ Thus, "Disclosure by one Party to the other" in Rule 87(A) of the Rule does not mean "disclosure" in the technical sense'.²⁵²⁶ Second, concerning the legal representative's access to documents, the Judge noticed that although rule 87 (A) is clear in precluding victim participants from accessing confidential and *ex parte* material which includes the more sensitive category of under seal and *ex parte* with limited distribution materials, what remained to be determined was whether that rule grants the legal representative's access to documents classified as 'confidential'.²⁵²⁷ The Pre-Trial Judge concluded that the legal representatives should be granted access to all documents filed confidentially subject to certain conditions in order to 'ensure and promote the effective and efficient participation of victims in the proceedings'.²⁵²⁸ These conditions are that the security of individuals and organizations will not adversely be affected,²⁵²⁹ and that 'the access to confidential documents is limited to the Legal Representative and cannot be extended to include his clients'.²⁵³⁰ In principle, hence, (s)he cannot provide received confidential materials to the victim participants unless (s)he has received first the consent of the party who provided the material and, when there is no consent, the Pre-Trial Judge can be asked to decide on a case-by-case basis.²⁵³¹ The Pre-Trial Judge also noticed that further 'conditions of strict confidentiality' may be applicable when the legal representative seeks to transmit materials to dual status victim participant-victim witness.²⁵³² Third, concerning the meaning of 'receive' under rule 87 (A), the Pre-Trial Judge preferred the English version over the French version, which is reminiscent of 'inspection' as otherwise 'the legal representative's ability effectively to be able to represent the views and concerns of the victims and exercise his mandate' would be weakened and, hence, the legal representative is entitled to receive the materials in question.²⁵³³

²⁵²⁴ Ayyash et al. (STL-11-01/PT/TC), 18 May 2012, para. 43.

²⁵²⁵ Ibid., paras. 44-46 (referring to rules 110 and 122, especially rules 110 (A), 112 (A), 112 *bis* and 113).

²⁵²⁶ Ibid., para. 46.

²⁵²⁷ Ibid., para. 49.

²⁵²⁸ Ibid., para. 50.

²⁵²⁹ Ibid., para. 55.

²⁵³⁰ Ibid., para. 57.

²⁵³¹ Ibid., para. 57.

²⁵³² Ibid., para. 62.

²⁵³³ Ibid., para. 54.

Fifth, concerning the legal representative's access to disclosure materials, the Pre-Trial Judge noted that there is no provision in the STL RPE that explicitly entitles the victim participants' legal representatives to receive disclosure materials provided by one party to another.²⁵³⁴ He also referred to his previous finding, under rule 87 (A), according to which the legal representative is not entitled to receive disclosure materials but only public and confidential documents filed by the parties.²⁵³⁵ Under the analysis of the legal representative's access to disclosure materials, Pre-Trial Judge followed three categories: i) supporting materials; ii) remaining disclosure materials; and iii) disclosure materials and anonymous victim participants.

Concerning supporting materials, according to rule 87 (A), victim participants have access to the file transmitted by the Pre-Trial Judge to the Trial Chamber before the beginning of the trial, in application of rule 95 (A) (ii). The case file contains, according to rule 95 (A) (ii), *inter alia* 'any evidentiary material received by [the Pre-Trial Judge]', which in turn includes the material submitted for confirmation by the Prosecutor in support of his indictment.²⁵³⁶ Based on the above-mentioned and rule 87 (A), the Pre-Trial Judge concluded that legal representatives are entitled to receive indictment supporting materials, subject to any restriction that the Pre-Trial Judge or the Trial Chamber may determine in the interests of justice, at such times as they are transmitted to the Trial Chamber in accordance with rule 95 (A) (ii).²⁵³⁷ Although the Judge noticed that article 87 (A) is a novel provision, he added that the extent that victims participants (ICC) or civil parties (ECCC) have access to evidence, varies depending on the RPE and how they are interpreted.²⁵³⁸ Nevertheless, with special reference to the ICC, the Judge concluded that access to evidentiary material is 'generally treated as prerogative of the parties. Therefore, the victim's right of access to evidence tends to be narrowly interpreted'.²⁵³⁹ The Pre-Trial Judge added that the automatic access ensures victims' effective participation and serves the celerity of the proceedings as avoids *inter partes* litigation of the question, which has been present at the other courts.²⁵⁴⁰ In any case, the Judge also stated that conditions as for the security of individuals and organizations are applicable to the legal representative's access to the supporting materials and the

²⁵³⁴ Ibid., para. 70.

²⁵³⁵ Ibid., Loc. cit.

²⁵³⁶ Ibid., para. 71.

²⁵³⁷ Ibid., para. 72.

²⁵³⁸ Ibid., Loc. cit.

²⁵³⁹ Ibid., Loc. cit.

²⁵⁴⁰ Ibid., para. 73.

legal representative is bound by the same confidentiality obligations in his communications with the victim participants and/or with third parties that are applicable to confidential filings.²⁵⁴¹ As for the modalities of legal representative's access to confidential documents, the Pre-Trial Judge considered that, in order for the victim participants to produce documents required by rule 91 (H), i.e., the list of witnesses they would like the Trial Chamber to call at trial and the list of exhibits they would like the Trial Chamber to admit into evidence,²⁵⁴² and to elaborate arguments on the facts of the case, the legal representative has to be in a position to prepare the case and, hence, (s)he 'needs to receive the relevant supporting materials before the case file is handed over to the Trial Chamber, and not at the time of transmission'.²⁵⁴³

As for the remaining disclosure materials, the Pre-Trial Judge also acknowledged the legal representative's need to access to such materials in the same format as made available to the party to which they were disclosed so that victims' participation be effective and subject to the same conditions and restrictions applicable to other disclosure materials.²⁵⁴⁴

Concerning disclosure materials and anonymous victim participants, the Pre-Trial Judge concluded that even if victims are allowed to participate anonymously, they have to do it like the rest of victim participants via the same common legal representative, who 'is in principle precluded from providing such materials' to them.²⁵⁴⁵

In addition to the five broad categories of modalities of participation/procedural rights just examined, some comments follow concerning legal representation of victim participants. It is first necessary to mention that according to rule 86 (C) (ii) 'A victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial

²⁵⁴¹ Ibid., paras. 73-75.

²⁵⁴² These filings are part of the case file, according to rule 95 (A) (i) and, as part of the Pre-Trial Judge's obligations in application of rule 95 (A) (vii), (s)he has to include in the case file: 'a detailed report setting out: (a) the arguments of the Parties and the victim participating in the proceedings on the facts and the applicable law; [...] (c) the probative material produced by each Party and by the victims participating in the proceedings'. Ibid., para, 76.

²⁵⁴³ Ibid., para. 77.

²⁵⁴⁴ Ibid., para. 79.

²⁵⁴⁵ Ibid., para. 80. It is important to mention that the Pre-Trial Judge concluded that the same regime applicable to victim participants shall apply, *mutatis mutandi*, to the VPU's access to documents and disclosure of materials. However, the Pre-Trial Judge concluded that the VPU does not need to have automatic access to all confidential filings to perform this function, being sufficient that the VPU be provided with a list of all the documents filed by the parties. See Ibid., paras. 89-95.

Judge authorises otherwise'. Participation via legal representatives has been applied in *Ayyash et al.*²⁵⁴⁶ Additionally, in application of rule 86 (C), victim participants in the proceedings are presumed to be treated as a single group, which is the case in *Ayyash et al.*,²⁵⁴⁷ unless valid reasons according to rule 86 (D) (i) justifies not doing so.²⁵⁴⁸ If this is the case, the Pre-Trial Judge shall divide victim participants into groups with common legal representation, taking into account, *inter alia* '(i) any conflicting interests that may hinder common representation; (ii) any shared or similar interests that may facilitate common representation [...]'.²⁵⁴⁹ This decision may not be appealed.²⁵⁵⁰ Victim participants authorized in a second and a third decisions in *Ayyash et al.* to participate in proceedings were asked to form part of the group of victims already constituted.²⁵⁵¹ The provision on designation of one legal representative to act on behalf of multiple victims constitutes a mechanism envisioned by the STL RPE drafters to avoid the 'flooding' of the STL.²⁵⁵² It should be mentioned that matters concerning the designation by the Registrar of one legal representative, i.e., one lead legal representative for the victim participants, who is responsible for all aspects of his/her clients' participation at the STL,²⁵⁵³ and who can be assisted by one or more co-legal representatives, is fleshed out under the Directive on Victims' Legal Representation,²⁵⁵⁴ including a remedy against such designation decided by the Pre-Trial Judge, in consultation with the Presiding Judge of the Chamber if applicable.²⁵⁵⁵ In *Ayyash et al.*, the Registrar designated one lead legal representative and two co-legal representatives for the victim participants.²⁵⁵⁶

Although according to VPU's observations some victims allegedly expressed their desire not to be associated with other victims' certain political interests, the Pre-Trial Judge in *Ayyash et al.*, appropriately noticed that, if any,

²⁵⁴⁶ *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, para. 112; *Ayyash* (STL-11-01/PT/PTJ), 3 September 2012, para. 14.

²⁵⁴⁷ *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, para. 127.

²⁵⁴⁸ *Ibid.*, paras. 119 and 120.

²⁵⁴⁹ STL RPE, rule 86 (D).

²⁵⁵⁰ *Ibid.*, Loc. cit.

²⁵⁵¹ See, respectively, *Ayyash* (STL-11-01/PT/PTJ), 3 September 2012, para. 16; *Ayyash* (STL-11-01/PT/PTJ), 28 November 2012, p. 5.

²⁵⁵² STL President (2010) para. 19; STL President (2012) para. 19.

²⁵⁵³ STL Directive on Victims' Legal Representation, article 24.

²⁵⁵⁴ *Ibid.*, articles 16-17.

²⁵⁵⁵ *Ibid.*, articles 22 and 23.

²⁵⁵⁶ *Ayyash et al.* (STL-11-01/PT/PTJ), Designation of Victims' Legal Representatives, Registrar, 16 May 2012, p. 7.

such interests should not influence the decision on whether victim participants should be divided into groups.²⁵⁵⁷ This is coherent since rule 86 (D) provides legal criteria upon which that decision should be exclusively taken.²⁵⁵⁸ Indeed, to arrive to the decision in question not only victim participants' interests have to be considered but also broader interests such as the accused's right to a fair and expeditious trial, which is part of the Pre-Trial Judge's obligations.²⁵⁵⁹

As for the decision to release a provisionally detained suspect, the STL RPE only refer to the Prosecutor and defence concerning appeals of a decision on this issue.²⁵⁶⁰ Indeed, victims' exact role in appeals is not determined as rule 87 (D) only establishes that they 'may participate in a manner deemed appropriate by the Appeals Chamber'. Accordingly, the STL should determine via judicial interpretation whether victim participants can participate during the appeals proceedings on releasing a provisionally detained person. In any case, for example, Pre-Trial Chamber's decision on whether victim participants should be divided into groups is explicitly not subject to appeals according to rule 86 (D).²⁵⁶¹ Victim participants' status during appeals proceedings is examined in further detail later.²⁵⁶²

3.5. Comparative Conclusions

At the ICC and the ECCC, victims without the need of holding the victim participant or civil party status, can report crimes as complainants, which is also similar to the situation existent in the discussed national systems. At the ICTY and the ICTR, some victims' 'participation' during the investigation has taken place when, via NGOs letters, approached the Prosecutor. Unlike national

²⁵⁵⁷ Ayyash (STL-11-01/PT/PTJ), 8 May 2012, para. 124.

²⁵⁵⁸ Ibid, Loc. cit.

²⁵⁵⁹ See Ibid., para. 120; and STL RPE, rule 86 (D) (iii).

²⁵⁶⁰ STL RPE, rule 102 (C).

²⁵⁶¹ It should be added that the Pre-Trial Judge can exceptionally gather evidence at: i) the request of victim participant if this demonstrates on balance of probabilities that (s)he is not in a position to collect evidence, and the Pre-trial Judge considers that doing so is in the interests of justice (STL RPE, rule 92 (A)); or ii) where the victim participant is unable to collect 'an important piece of evidence' and the Pre-Trial Judge considers that it is indispensable to the fair administration of justice, the equality of arms and the search for truth (STL RPE, rule 92 (C)). In any case, evidence collected in this manner still needs to be introduced by the victim participant and also (s)he remains free from doing so. This constitutes a major difference from evidence collected by the French *Juge d'instruction* (Investigating Judge), which normally becomes available to a trial court without any victim's initiative. See STL President (2010), para. 12 (xi); STL President (2012), para. 12 (xi).

²⁵⁶² See infra Chapter IV 6.4.1.2 and 6.4.2.2.

systems, victims cannot initiate prosecutions at the ECCC, the ICC and the STL (and also at the ICTY, the ICTR and the SCSL). However, at the national level, the so-called private prosecutions have proven to be mainly of symbolic value and of very limited application. Under the ICC Statute, victims without holding the official victim participant status, i.e., without being granted the formal victim participant status upon application, can participate in some specific proceedings, i.e., making representations in Prosecutor's *proprio motu* investigations and submitting observations on challenges to jurisdiction of the ICC or admissibility of the case.

Unlike the STL, victims at the ICC can participate as victim participants *sensu stricto*, as early as the investigation stage of a situation based on a terminological, contextual and teleological interpretation of the ICC Statute developed by the ICC's case law. Such approach can in principle be considered as advisable due to existence of victim participants' interests during the investigation, which in a more general level reinforces the victim participants' status and is coherent with a restorative-oriented justice paradigm. However, paying attention to understandable concerns regarding the efficiency and fairness of the proceedings, problems with Prosecutor's independence as well as creation of unrealistic expectations for victim participants, the Appeals Chamber decided to revisit victims' participation during the investigation stage of a situation. The outcome, which has been implemented by the Pre-Trial Chambers, has reached a satisfactory half-way solution since victim participants can still participate during the investigation but only within the context of judicial proceedings and not, unlike the previous approach adopted by the Pre-Trial Chambers, as a matter of a general right during the investigation seen as a whole stage. At the pre-trial stage of a case, victims can normally participate in the respective proceedings, including confirmation of charges hearing, but victims participate neither in arrest warrant proceedings as they are normally issued under seal nor in the initial appearance of the suspect.

With regard to the STL and in order to handle similar concerns about victims' participation during the investigation, the STL RPE drafters decided to explicitly exclude it, i.e., victims can only participate once there is confirmation of an indictment. However, this decision can be criticized as extreme since it weakens the victims' status. A half-way solution similar to the one adopted by the ICC would have been better especially considering the lower number of victim participants at the STL compared to the ICC or the ECCC and the fact the victim participants cannot claim reparations directly at the STL.

At the ECCC (similar to the STL as for victim participants), victims do not have an official role during the preliminary investigations conducted by the Co-Prosecutors, i.e., victims cannot participate as civil parties. During preliminary investigations, victims can only have the more limited status of victim complainants. At the ECCC, victims can participate as civil parties during judicial investigations conducted by the Co-Investigating Judges. These features at the ECCC are similar to the French inquisitorial system.

As for modalities of victim participation/procedural rights for victim participants during pre-trial proceedings of a case, these present *mutatis mutandi* similarities at the ICC and the STL. The differences are mainly related to the fact that while victim participants can participate during the confirmation of charges at the ICC and, thus, the discussed rights apply mainly up to and during the confirmation of charges hearing, victims at the STL can only participate after confirmation of the indictment and, thus, the examined rights apply from that moment onwards. The victim participants' modalities of participation/procedural rights are, in a lesser degree, similar to those available to civil parties at the ECCC, where victims as civil parties hold additional procedural rights. It should be noticed that although in the Anglo-American adversarial systems, victims cannot be civil parties (ECCC, French system) or victim participants (in the sense of the ICC and the STL), they can exercise some procedural rights such as attend specific hearings and even being heard in specific proceedings, e.g., plea bargains, release of the accused, have their interests considered in prosecutorial decisions and being informed thereof, which may be considered as stronger than victims' avenues of 'participation' at the ICTY, the ICTR and the SCSL.

Following the scheme adopted by the ICC for victims' participation during the pre-trial stage of a case (in particular during confirmation of charges), it is possible to identify six main categories of modalities of participation/procedural rights at the ICC. First, access to the case record, evidence of the Prosecutor and defence included but access to *ex parte* information is excluded. Second, making submissions on admissibility and probative value of the evidence on which the Prosecution and the defence intend to rely during the confirmation of charges hearing and examine it. Third, examination of any witness called by the Prosecution or defence at the confirmation of charges hearing. Fourth, attendance at public and closed hearings leading up to and during the confirmation of charges, excepted the *ex parte* hearings. Fifth, participation through oral motions, responses and submissions in all hearings to which victim participants have the right to attend

and in matters not excluded by the ICC legal instruments. Sixth, filing of written motions, responses and replies on matters not excluded by the ICC legal instruments. It should be noticed that disclosure issues concerning victim participants after the confirmation of charges leading up to the beginning of the trial and during trial are discussed in the next sub-chapter on trial.

ICC Pre-Trial Chambers have adopted different approaches on whether anonymous victim participants and non-anonymous victim participants should be granted similar rights. Where such distinction existed, anonymous victim participants' procedural rights have been limited mainly due to the prohibition of anonymous accusations. In any case, anonymous victim participants cannot access confidential filings and close hearings. However, the differentiation between ones and the others, at the practical level, is not of a big impact as lawyers concurrently represent both kinds of victim participants. On another note, victim participants lack investigative powers, independent from the Prosecutor, and thus they have to request the Prosecutor to undertake certain investigative steps if needed. Although victim participants can challenge evidence filed by the parties during the confirmation of charges hearing, they cannot introduce evidence additional to that presented by the parties during pre-trial, which is coherent with their status of victim participants and not civil parties (ECCC). Finally, under the ICC RPE, the Pre-Trial Chamber can seek views of victims (regardless of holding the victim participant status) as for the conditional release of a suspect. The ICC Appeals Chamber, as for those holding the victim participant status, has determined that they can participate in pre-trial detention appeals but not as a matter of automatic right.

As for the ECCC, it is possible to identify the following main categories of civil parties' rights during pre-trial proceedings, i.e., during the ECCC judicial investigation. First, as a party, the right to consult and examine the dossier. Second, the Co-Investigating Judges can call civil parties in order to confront the charged person, who can be questioned by civil parties' lawyers. Third, unlike the ICC and the STL, civil parties have the right to request the Co-Investigating Judges to conduct specific investigations on behalf of the civil parties but these investigations still have to be related to the Co-Prosecutors' investigations. Civil parties may request the Co-Investigating Judges to interview them, question witnesses, go to a site, order expertise or collect evidence on the civil party's behalf. Fourth, civil parties may request and propose witnesses. Fifth, civil parties may attend and participate in the pre-trial proceedings via written and oral interventions. Nevertheless, they cannot participate in all hearings. Even though civil parties cannot participate during pre-trial hearings on provisional

detention, the Pre-Trial Chamber allowed such participation in appeals against provisional detention and even one of the civil parties participated directly. However, via amendment of the Internal Rules, civil parties who are represented can only participate via their legal representatives to avoid disruptions similar to those experienced during the detention appeals in Case 002 and considering that parties have different positions in criminal proceedings which even change through stages. Sixth, right to support the prosecution. With the exception of participation in provisional detention appeals, the other rights of civil parties at the ECCC are similar to the ones granted to civil parties during the preparing instruction stage in the French inquisitorial system.

As for the STL, it is possible (following its Pre-Trial Judge's first decision) to identify the following main groups of modalities of victims' participation, via their legal representatives, during pre-trial proceedings. First, right to attend and participate in meetings, conferences and hearings where victim participants' interests are affected. Second, right to receive public transcripts and minutes, and also transcripts/portions of status conferences/hearings and minutes of hearings *in camera* or *ex parte* corresponding to the duration for which the representative was present. Third, filing of responses, replies, motions and briefs on any issue affecting victims' personal interests. Fourth, access to documents and files, except confidential and *ex parte* material. However, for victims' legal representatives, it is possible to have access to confidential material but under security measures and if the representatives do not share the accessed information with their clients. Fifth, access to materials 'disclosed' by one party to the other, and the right to access the case file transmitted by the Pre-Trial Judge to the Trial Chamber before the beginning of the trial, except for confidential (or under seal) and *ex parte* documents. The access to disclosure materials has to be conducted under security conditions. The same regime of disclosure materials is applicable to anonymous victim participants as, alongside non-anonymous victim participants, have the same common legal representatives. In addition to the discussed modalities of participation, it should be observed that concerning participation on appeals of a suspect's release, the STL RPE only refer to the parties and, hence, it remains to be seen whether the STL will allow victim participation on this issue like the ICC and the ECCC did.

Concerning victims' legal representation, whereas the STL RPE explicitly require that victims participate through a legal representative unless otherwise determined, the ICC RPE do not contain such explicit provision although in practice victims' participation at the ICC is mostly conducted via legal

representatives. As for the ECCC, the Internal Rules only request the civil parties to be represented to participate from the closing order, which puts end to the judicial investigation and gets the case ready for trial, onwards. In the French system, intermediation exists when civil parties can have access to the dossier but via their lawyers. Under the ICC and the STL instruments, victim participants have in practice grouped themselves/been grouped together and, thus, participated via common legal representatives. Although the ECCC Internal Rules refer to civil parties' individual representation, it is provided the possibility to group civil parties under common legal representation, which has actually been the ECCC's practice. Victim participants or civil parties can constitute groups with common representation or the respective Chambers/Judges can do it because of interests of justice and effectiveness. When the ICC, the ECCC and the STL appoint common legal representatives, the interests of victim participants or civil parties need to be considered according to the instruments of those courts. At the ECCC and the ICC, when civil parties and victim participants respectively have been grouped or have grouped themselves criteria such as geographical, ethnic origin and harm have been considered.

4. Victims' Participation in Trial Proceedings

This subchapter examines in detail the modalities of participation/procedural rights of victim participants (ICC, STL) and civil parties (ECCC) in trial proceedings. Especial attention is drawn to how the practice of the ICC and the practice of the ECCC (no trial has started yet at the STL at the moment of writing this thesis) has expanded or restricted the victims' scope of participation. The most relevant legal issues arising out of the complex participation regime of victim participants/civil parties are considered in a systematic manner, taking into account its impact on the efficiency of the proceedings, accused's right to a fair and impartial trial and the benefits for the victims themselves. As for the ICTY, the ICTR and the STL the practice of *amicus curiae* briefs is examined as a sort of 'participation'. It should be mentioned that, for methodological purposes, even concerning the ECCC where the trial is not divided into trial and sentencing stages, victims' participation during trial and sentencing are discussed separately.

4.1. National Systems

4.1.1. English Adversarial System

To begin with, it should be remembered that victims still lack standing in the criminal proceedings during trial in England and Wales. In spite of recent

initiatives to place the victim in a better position in the criminal proceedings, victims' status has not changed. The current situation of victims in trial proceedings and attempts to strengthen their status but without bringing about a substantial change are captured in the Criminal Justice System Consultation Paper 'Hearing the Relatives of Murder and Manslaughter'.²⁵⁶³ Even though it was suggested the introduction of victims' advocates (qualified lawyers or lay people) in murder and manslaughter cases, it was explicitly clarified that:

[...] it is not proposed that a victim's advocate would participate in the trial as a party to it, for example, he or she would not examine or cross-examine witnesses, or make submissions or speeches which addressed the issue of guilt or innocence.²⁵⁶⁴

The English criminal system does not grant a specific procedural role to the victim either as victim participants or not to mention as a civil party. Accordingly, during the trial proceedings, the victim is not considered as such and, hence, victims have very little room to voice all the information they might wish to express during the trial stage. Therefore, the role of victims during trial is limited to that of witnesses.

Concerning witness's participation during trial, as previously discussed,²⁵⁶⁵ the manner how the principle of orality has been implemented into the English adversarial system does not pay due attention to the contemporary understanding of how victims are affected by serious crimes or how witnesses recollect and may be persuaded to recount what they remember to have happened to them.²⁵⁶⁶ Moreover, although issues concerning crimes against victims are examined during trial, victims are reduced to mere passive spectators or, in the best case scenario, called in by the prosecution but limited to provide evidence in their role as witnesses, which does not enable them to effectively voice their views and concerns or exercise procedural rights. This severe limitation at the trial stage particularly waters down the overall status of the victim as, during trial, the criminal responsibility of the accused is precisely at stake. Moreover, when victims participate as witnesses, the prosecution does not act as their legal representatives, which is explicitly stated in the Code for Crown Prosecutors 'the prosecution service does not act for victims or their families in

²⁵⁶³ Criminal Justice System//United Kingdom Home Office, Hearing the Relatives of Murder and Manslaughter Victims. Consultation Paper, September 2005.

²⁵⁶⁴ *Ibid.*, 14.

²⁵⁶⁵ See *supra* Chapter III 2.1.1.

²⁵⁶⁶ Shapland and Hall (2010) 175.

the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest'.²⁵⁶⁷

Furthermore, the lack of victim representation in England and Wales, may be considered as a notorious sign of how weak victims' situation in trial is even when compared to other adversarial systems such as the American and Irish ones.²⁵⁶⁸ Thus, although there have been some proposals to introduce some formal representation for victims, those have been rejected. Reasons for such rejections consisted in that introducing substantial changes to the procedures was not justified by their limited effect on the judge's duty to prevent oppressive or unnecessary questioning,²⁵⁶⁹ and this kind of victim's participation does not fit into the two partisan adversarial proceedings and 'care must be taken, in particular when there is an issue as to guilt, not to treat him [the accused], in a way that appears to prejudice the resolution of that issue'.²⁵⁷⁰

All in all, the Consultation Paper 'Hearing the Relatives of Murder and Manslaughter Victims', already referred to, proposed a scheme for victims to assist relatives of homicide victims. Not only did this document foresee that advocates would assist the victim at the sentencing stage, but it was also envisioned that representatives would give advice and support to the relative up to and during the trial so that they are maintained informed and more engaged in the process.²⁵⁷¹ Besides, the important caveat that the victim's advocate would not participate as a party, as already mentioned; however, when the Consultation Paper was piloted 'such a reform, at the trial stage essentially provides a translation service, rather than making the trial itself comprehensible to lay people'.²⁵⁷² In any case, victims have to be notified of the date of all criminal court hearings, which includes to 'set down for consideration of an amendment to the sentence originally passed, and any subsequent amendments to that date [...]'.²⁵⁷³ It should be mentioned that the role of *amicus curiae*,²⁵⁷⁴ in England,

²⁵⁶⁷ The Code for Crown Prosecutors (2010), 4.19.

²⁵⁶⁸ See Doak (2008) 141-143.

²⁵⁶⁹ Criminal Law Revision Committee (1984) Sexual Offences (Cmnd 1923) 2.100.

²⁵⁷⁰ Robin Auld, Review of the Criminal Courts of England and Wales (Cmnd 9376) (HSMO 2002), Chapter 11, para. 74.

²⁵⁷¹ Doak (2008) 146.

²⁵⁷² Shapland and Hall (2010) 174.

²⁵⁷³ Code of Practice for Victims of Crime, section 6.4.

²⁵⁷⁴ It should be born in mind that an *amicus curiae*, or a friend of the court, is a established institution of domestic common law courts and, its traditional role has been understood as 'A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge'. Benjamin Abbot, Dictionary of Terms and Phrases Used in American or English

continues to be of a provider of impartial information to the court.²⁵⁷⁵ Hence, a potential avenue to have the victims' interests represented at least indirectly during trial is closed.

Finally, under the EU Framework Decision on Victims, it was, *inter alia*, established that 'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence' and the right to receive information.²⁵⁷⁶ The EU Directive on Victims contains similar provisions although these are more detailed, including: i) right to be heard, i.e., victims may be heard and may provide evidence;²⁵⁷⁷ ii) right to receive information about their case;²⁵⁷⁸ iii) right to understand and to be understood,²⁵⁷⁹ and iv) right to interpretation and translation.²⁵⁸⁰

4.1.2. American Adversarial System

In the American system, victims lack the status of civil parties or the official status of victim participants. Accordingly, victims are not entitled to make any sort of statement to the jury or, in general, to participate in any manner during trial and, victims can only address the jury if the Prosecutor decides to call him/her as witness and ask questions.²⁵⁸¹ Although numerous victims' rights statutes provide victims a right to be heard, none of them provides victims the right to be heard at trial; however, those instruments 'give victims the right to be heard at other points in the process-bail hearings, plea bargain hearings, sentencing, and parole hearings'.²⁵⁸²

In the United States, some individual states have introduced the victims' right to have their legal representative present although (s)he is not involved. Other states have even allowed victims to hire their own lawyers to represent them in different criminal proceedings, mainly during parole hearings, plea bargain and sentencing, and some others have gone further by enabling victims'

Jurisprudence (Little, Brown & Co, Boston 1879). Cited by Sarah Williams and Hannah Woolaver, 'The Role of the *Amicus curiae* before International Criminal Tribunals' (2006) 6 International Criminal Law Review 151, 151.

²⁵⁷⁵ *Allen v. Sir Albert McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 266 ('the role of the *amicus curiae* [is] to help the court by expounding the law impartially').

²⁵⁷⁶ EU Framework Decision on Victims, articles 3-5.

²⁵⁷⁷ EU Directive on Victims, article 10.

²⁵⁷⁸ *Ibid.*, article 6.

²⁵⁷⁹ *Ibid.*, article 3.

²⁵⁸⁰ *Ibid.*, article 7.

²⁵⁸¹ *Beloof, Cassell and Twist* (2010) 495.

²⁵⁸² *Ibid.*, *Loc. cit.*

lawyers to intervene in rape and sexual assault trials,²⁵⁸³ as well by allowing representations from victims' lawyers when the accused claims illegal or improper conduct from the victim as part of his/her defence.²⁵⁸⁴ Additionally, it has been speculated that the real participation by victims' lawyers in the states is indeed more often than widely thought or officially provided for in state statutes.²⁵⁸⁵

As for the right to attend trial, victims when assuming their role of witnesses are traditionally excluded from court proceedings to avoid the risk that a witness's testimony is influenced or contaminated by just observing and/or listening to other witnesses' testimonies previously given. The Federal Rules of Evidence (Rule 615) re-state this general rule but including four exceptions, one of which is when 'a person [is] authorized by statute to be present'.²⁵⁸⁶ Due to criticism from advocates of victims' rights, most states and the federal government have enacted legislation laying down victims' unqualified rights for victims to attend trials (including the CVRA),²⁵⁸⁷ or qualified rights when there are possible adverse effects on criminal defendants.²⁵⁸⁸ Moreover, the Ninth Federal Circuit Court of Appeals in *In re Mikhel v. D. Ct.* concluded that the CVRA:

[...] abrogated Rule 615, at least with respect to crime victims. A mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify is therefore insufficient to justify excluding him or her from trial. Rather, a district court must find by clear and convincing evidence that it is *highly likely* not merely *possible*, that the victim-witness will alter his or her testimony.²⁵⁸⁹

²⁵⁸³ See the cases of the states of Wisconsin, West Virginia and New Hampshire. See Ellen Yaroshfsky, *Balancing Victims' Rights and Vigorous Advocacy for the Defendant* in N.Y.U. Annual Survey of American Law (1989) 135, 146. Cited by Doak (2008) 141.

²⁵⁸⁴ See Doak (2008) 142, footnote 157 (citing the South Carolina Statute, § 16-3-1510. S 3 F(2) ('A victim or witness has the right to retain counsel in court to represent him in cases involving the victim's reputation'.)).

²⁵⁸⁵ See *Ibid.*, *Loc. cit.* (citing American law literature).

²⁵⁸⁶ US Federal Rules of Evidence, rule 615 (d).

²⁵⁸⁷ 18 U.S.C. § 3771 (a) (3) ('A crime victims has the following rights: [...] The right not to be excluded from any [...] public court proceeding unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding'); Alaska Const., art. I, § 24; and Arkansas Rule Evid. 616.

²⁵⁸⁸ Kansas Constitution, article 15, § 15; LA. Evid., article 615; and Mich. Comp. Laws § 780.761 (1998).

²⁵⁸⁹ *In re Mikhel v. D. Ct.* 453 F.3d 1137, 1139-1140 (9th Cir. 2006). See also *United States v. Johnson*, 362 F.Supp.2d 1043, 1056 (N.D. Iowa 2006).

Indeed, it has been concluded that a defendant does not have ‘a constitutional right to exclude witnesses from the courtroom’.²⁵⁹⁰ Concerning the victim’s right to sit at counsel table (prosecution side), whereas there is no modern federal case on the propriety of allowing a victim who is not also a case agent to sit at counsel table, this issue is left to the state court’s discretion.²⁵⁹¹ Indeed, in some states, the prosecutor has to represent that the victim’s presence at counsel table will assist him/her in the prosecution.²⁵⁹² Moreover, under Alabama law, victims are entitled to sit at counsel table, independently from victims’ assistance to the prosecutor.²⁵⁹³ A person, i.e., a victim’s advocate, friend or relative, is allowed to accompany the victim when this attends or testify in the courtroom.²⁵⁹⁴ In general, victims’ rights legislation enables victims to, *inter alia*, be notified of criminal or juvenile proceedings, be present and heard at important hearings; however, the right to be notified and present at trial does not incorporate the right to be heard during the guilt phase of the criminal proceedings.²⁵⁹⁵ Lastly, but equally important, since the *amicus curiae* is currently perceived as a partisan advocate rather than as a neutral informer in the United States,²⁵⁹⁶ *amicus curiae* briefs enable to at least partially fill a gap to represent interests beyond the two traditional parties, i.e., victims’ interests.

4.1.3. French Inquisitorial System

As a preliminary point, it should be mentioned that who intervenes, his/her role and powers may differ based on whether the crime is: i) a *contravention* (petty offence), judged at first instance by the *tribunal de police*; ii) a *délit* (misdemeanor), judged at first instance by the *tribunal correctionnel*; iii) or a *crime* (felony), judged at first instance by the *cour d’assises*.²⁵⁹⁷ Without entering into details of each of those three jurisdictions, which would go beyond the scope of this thesis, modalities of participation/procedural rights of civil parties during trial are presented here in general.²⁵⁹⁸ Accordingly, during trial, the civil party

²⁵⁹⁰ United States v. Edwards, 526, F.3d 747 (11th Cir. 2008).

²⁵⁹¹ Beloof, Cassell and Twist (2010) 492.

²⁵⁹² Ibid., Loc. cit.

²⁵⁹³ Alabama Code, § 15-14-53.

²⁵⁹⁴ See, e.g., Colorado Revised Statutes Annotated, § 16-10-401.

²⁵⁹⁵ See, e.g., Utah Code Annotated, § 77-37-3; § 77-38-3 &-4; § 77-38-2(5); § 77-38-3; § 77-38-4(1) & (2). See also State v. Harrison, 24 P.3d 936 (Utah 2001).

²⁵⁹⁶ Supreme Court Rules, rule 37. See also Brown v. Board of Education of Topeka 347 U.S. 483 (1954); Samuel Krislov, ‘The Amicus Curiae Brief: From Friendship to Advocacy’ in (1963) 72 Yale Law Journal 694-721.

²⁵⁹⁷ Dervieux (2002) 230-231, 244.

²⁵⁹⁸ For details on this see Ibid., 244-248.

holds the right to bring his/her claim for reparation, which is examined in the next chapter. The other aspects of the civil parties' modalities of participation are examined herein as follows.

First, concerning the right to pose questions, the civil party's lawyer before the *cour d'assises* and the *tribunal correctionnel* can pose questions directly to the accused, his/her clients, witnesses and everyone called to the court, without the need for doing so via the president.²⁵⁹⁹ The same power is applicable with regard to expert witnesses.²⁶⁰⁰ However, if the civil party as such wishes to pose questions, (s)he has to do it via the president,²⁶⁰¹ which may be considered as an obstacle for the victim who desires to be involved in a direct and explanatory dialogue with the perpetrator.²⁶⁰² Accordingly, the civil party should be informed prior to the hearing in order to avoid any inconvenience when (s)he participates.

Second, at the *tribunal correctionnel*, the victim can directly summon the accused or constitute himself/herself as a *partie civile* at the hearing, (s)he then produces his/her evidence at the hearing and the rules which exclude evidence obtained irregularly are not applicable to him/her.²⁶⁰³ The *Cour de Cassation* has actually stated that criminal judges should not be allowed to disregard evidence produced by the private parties, which includes civil parties, for the only reason that it may have been obtained illegally or unfairly as their task is merely to evaluate its probative value.²⁶⁰⁴ This is due to the fact that actions taken by the civil party do not constitute part of the instruction and, thus, are exempted from the rules on nullities, letting alone the fact that the court can only act on evidence debated in adversarial proceedings.²⁶⁰⁵ The civil party is examined together with the prosecutor as they begin the proceedings, and especially bearing in mind that they share the common duty to prove the facts that may establish the accused's guilt.²⁶⁰⁶ Accordingly, the civil party has to bring evidence

²⁵⁹⁹ CPP, article 312 (before the *Cour d'Assises*); article 442-1 (before the *Tribunal Correctionnel*).

²⁶⁰⁰ *Ibid.*, article 168.

²⁶⁰¹ See the same articles cited in the two previous footnotes.

²⁶⁰² Pignoux (2008) 301.

²⁶⁰³ Dervieux (2002) 247.

²⁶⁰⁴ Cass. Crim., 6 April 1994, *Bull. crim.* n° 136; Cass. Crim., 30 March 1999, *Bull. crim.* n° 59. Cited by Dervieux (2002) 263.

²⁶⁰⁵ CPP, article 427-2. See also Dervieux (2002) 263.

²⁶⁰⁶ Emmanuel Ntoko, *The Civil Party in Criminal Trials: A Comparative Study-Guide to the Criminal Procedure Harmonization in Cameroon* (1995) Master of Law Thesis, McGill University 94. Available at:

http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=22701&local_base=GEN01-MCG02 (last visit on 20 October 2012).

to prove the existence of the facts that are material for his/her case, i.e., to get the accused found guilty so that (s)he can be granted the respective reparations. However, as examined in further detail later,²⁶⁰⁷ the civil party may still be granted reparations, for example, at state funds and courts, even if the defendant is acquitted.

Third, the civil party may speak each time before the prosecutor is given the floor.²⁶⁰⁸ Although the civil party may replicate, the accused or his/her lawyer is the last to speak.²⁶⁰⁹ During the trial, witnesses called by the prosecutor, the civil party and the defence counsel are heard separately, one after the other, and testify orally. As already mentioned,²⁶¹⁰ unlike the others, civil parties are not obligated to take an oath.²⁶¹¹ The civil party may testify on events, or on the character and the morals of the accused.²⁶¹² After his/her testimony is completed, questions may be posed to him/her by the presiding judge *motu proprio* or requested by one of the parties.²⁶¹³

Fourth, the civil party may bring his/her own lawyer.²⁶¹⁴

Fifth, the civil party may ask the court to visit the place of crime in order to find the truth and the civil party and his/her lawyer is called to assist.²⁶¹⁵

Sixth, the civil party may deposit records (*conclusions*).²⁶¹⁶

Seventh, the president of the *cour d'assises* may order the audio-recording of the hearings and, upon request of the civil party, the audiovisual recording of the hearing and deposition, eventually employed in the appeals.²⁶¹⁷ As previously discussed,²⁶¹⁸ civil parties' right to ask closed hearings is very large in scope, which may conflict with the accused's right to a public trial.

Eighth, civil parties have to be informed by all means of the date of hearing, especially in cases of proceedings in real time.²⁶¹⁹ The civil party is

²⁶⁰⁷ See infra Chapter V 2.1.3.

²⁶⁰⁸ CPP, article 460.

²⁶⁰⁹ Ibid., Loc. cit.

²⁶¹⁰ See supra Chapter III 2.1.3.

²⁶¹¹ CPP, articles 103 and 452.

²⁶¹² Ibid., articles 331, 335, 444 to 452 and 536.

²⁶¹³ Ibid., articles 312, 332, 454 and 536.

²⁶¹⁴ Ibid., article 424.

²⁶¹⁵ Ibid., article 456.

²⁶¹⁶ Ibid., article 459.

²⁶¹⁷ Cario (2010) 9.

²⁶¹⁸ See supra Chapter III 3.1.3.

²⁶¹⁹ CPP, article 393-1. Information concerning the date and location of a hearing should be given to the victim who reported the crime. See Ibid., article 391.

summoned to court,²⁶²⁰ and this summons includes the date and place of trial. Nevertheless, in practice, victims are only informed systematically if they are civil parties.²⁶²¹ Therefore, an important number of victims do not notice, unless they become civil parties, that they will be granted almost no right, which includes the right to be informed. Although informing the victim of the proceedings and of possible assistance is in practice normally passed on to the victim's lawyer, every victim should be provided with information on the general procedural rules and on the proceedings in court.²⁶²²

Ninth, civil parties who do not speak fluent French have the right to an interpreter.²⁶²³ Also, a civil party who is deaf has the right to a sign language interpreter to help him/her, or communicate with him/her by writing if (s)he can read and write, or employ any other mechanical means to make it possible to communicate with him/her.²⁶²⁴

Tenth, when there is a jury, its members have to swear that they shall not betray the victims' interests.²⁶²⁵

It is pertinent to note that the ECtHR in *Perez v. France* stated that article 6 (1) of the ECHR is applicable to civil parties who participate in trials.²⁶²⁶ As examined,²⁶²⁷ unlike previous case law, it was determined that a civil party holds the right to a fair trial even when such victim has not brought a claim for financial reparation.²⁶²⁸ The applicability of article 6 (1), as correctly concluded by the ECtHR, is under the condition of 'whether, from the moment when the applicant is joined as a civil party until the conclusion of those criminal proceedings, the civil component remains closely connected with the criminal component'.²⁶²⁹

As seen, the procedural rights granted to victims as laid down in the CPP are in principle quite strong during trial, which corresponds to their status as civil parties. However, the real impact of those procedural rights has to do more with allowing victims to express freely their views and concerns although it may be felt that they are not particularly relevant under purely strict legal

²⁶²⁰ Ibid., article 420.

²⁶²¹ Brienens and Hoegen (2000) 328.

²⁶²² Ibid., 329 (referring to Ministry of Justice, *La Politique Pénale D'Aide Aux Victimes*, Circular, 13 July 1998).

²⁶²³ CPP, article 407 (before the *Tribunal Correctionnel*); article 344 (before the *Cour D'Assises*).

²⁶²⁴ Ibid., article 408 (*délits*); article 345 (crimes).

²⁶²⁵ Ibid., article 304.

²⁶²⁶ *Perez v. France*, Application No. 47287/99, Judgment, 12 February 2004, paras. 62-63.

²⁶²⁷ See *supra* Chapter IV 2.1.3.

²⁶²⁸ *Perez v. France*, Application No. 47287/99, Judgment, 12 February 2004, paras. 64-65.

²⁶²⁹ Ibid., para. 70.

considerations.²⁶³⁰ Even if listening to victims is facultative for the judges, it is necessary for them to take the time to listen to the victims so that these, as civil parties, can express their suffering and try to get rid of it.²⁶³¹

4.2. The ICTY, the ICTR, and the SCSL

4.2.1. General Considerations

To begin with, it should be left clear herein that victims lack an official status as victim participants or as civil parties during trial at the ICTY, the ICTR and the SCSL. However, *amicus curiae* briefs may provide and have actually provided indirect avenues for victims to express some of their views and concerns. Rule 74 ('Amicus Curiae') common to the RPE of the ICTY, the ICTR and the SCSL reads as follows 'A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on an issue specified by the Chamber'.

Accordingly, *amicus curiae* submissions, to some extent, constitute some manner of victim's 'participation' due to the fact that victims and their representatives may appear as *amici* at the respective tribunals.²⁶³² However, even though the ICTY former Prosecutor Del Ponte supported the idea of victim participation indicating that she would 'discuss with the judges the idea of allowing victims to present themselves through a lawyer in an Amicus Curiae procedure',²⁶³³ the victim participant status as such during trial is inexistent at the ICTY, the ICTR and the SCSL. Having said so, rule 74 provides broad discretion to a Chamber to permit any individual or group to appear as an *amici* and can work under either invitation or spontaneous application.²⁶³⁴

Taking into account the ICTR's case law, it is possible to identify four rules on the admissibility of *amicus curiae*, namely, i) the relief sought must fall within the tribunal's jurisdiction, and not within that of the Prosecution or the defence; ii) the brief must deal with an issue which is relevant to the case at hand; iii) when the *amicus curiae* deals with legal and non-factual arguments, the *amicus curiae* applications will be granted much more readily; and iv) *amicus*

²⁶³⁰ Circulaire Du Cabinet du Garde des Sceaux, 20 May 2005, Présentation des Dispositifs Relatifs à l'Accueil des Victimes dans le Cadre du Procès Pénal, B. O Min. Just., 2005, No. 98. Cited by Pignoux (2008) 302, footnote 253.

²⁶³¹ Pignoux (2008) 302.

²⁶³² Brouwer (2005) 291; Heikkilä (2004) 155; Morris and Scharf (1995) 167.

²⁶³³ Diplomatie Judiciaire, Compensating Victims With Guilty Money, Interview with Carla del Ponte, The Hague, 9 June 2000. Cited by Brouwer (2005) 293.

²⁶³⁴ Williams and Woolaver (2006) 155.

curiae briefs must not be employed simply to advertise the views or causes of the applicants.²⁶³⁵

4.2.2. *Amicus Curiae* Briefs Practice

Amicus curiae briefs have been, for example, filed by women's organizations and individuals to the Trial Chambers of the ICTY, the ICTR and the SCSL to back up sexual violence victims. Thus, for instance, the Coalition for Women's Human Rights in Conflict Situations, applied to file *amicus curiae* briefs to the competent ICTR Trial Chamber in *Akayesu* and *Ntagerura et al.* on a similar matter. In spite of such similarity, the *amicus curiae* briefs submitted had different outcomes. Thus, in *Ntagerura et al.*, the Trial Chamber rejected the Coalition's brief and stated that granting the *amicus curiae* would equal 'to transgressing upon the independence of the Prosecutor and impugning the integrity of the Tribunal as an arbiter of international law'.²⁶³⁶ In contrast, although the competent ICTR Trial Chamber never decided on the *amicus curiae* brief submitted in *Akayesu*, it has been considered that it importantly contributed to the Trial Chamber's decision on the need that subsequent investigations into sexual violence would have to be conducted by the Prosecutor.²⁶³⁷ Moreover, based on such further investigation, the Prosecutor found additional evidence of sexual violence to which the accused was linked and, thus, the Prosecutor amended the indictment to include charges of sexual crimes.²⁶³⁸ These different results in one and the other case may be explained by particular procedural circumstances. Thus, while in *Akayesu* the Prosecutor mainly underpinned the *amicus curiae* and requested to amend the indictment to incorporate sexual violence charges, the Prosecutor in *Ntagerura et al.* opposed the *amicus curiae* and did not request an amendment.²⁶³⁹

In *Bagosora et al.*, Belgium applied for leave to submit an *amicus curiae* brief on behalf of the Belgians who were prejudiced by the massacres in Rwanda

²⁶³⁵ See *Ibid.*, 170-172 (referring to ICTR's jurisprudence) and also references to ICTR's case law under the following subsection.

²⁶³⁶ *Ntagerura et al.* (ICTR-99-46-T), Decision on the Application to File an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, Trial Chamber, 24 May 2001, para. 22.

²⁶³⁷ Brouwer (2005) 295.

²⁶³⁸ *Akayesu* (ICTR-96-4-T), Judgment, Trial Chamber, 2 September 1998, para. 417.

²⁶³⁹ *Ntagerura et al.* (ICTR-99-46), Prosecutor's Response to Application for Leave to File an *Amicus* Brief, 8 May 2001; *Ntagerura et al.* (ICTR-99-46), Prosecutor's Response to a Request for Reconsideration of the Decision of the Application to File and *Amicus Curiae* Brief by Coalition for Women's Human Rights in Conflict Situations, 7 September 2001.

to argue their right to ‘appear before the Tribunal as plaintiffs and not as mere witnesses’,²⁶⁴⁰ which was found inadmissible by the ICTR as the determination of penalties only follows after the establishment of the guilt, and it remarked that the only parties to the trial are the defence and the Prosecution.²⁶⁴¹ Likewise, the Rwandan Government in *Bagosora et al.* applied to appear as *amicus curiae* at the ICTR to argue, *inter alia*, for the restitution of stolen property to their rightful owners and call additional witnesses,²⁶⁴² which was rejected by the ICTR sustaining that there was no allegation of unlawfully taken property in the indictment and restitution claims were premature before determination of guilt.²⁶⁴³

At the ICTY, for instance, the Coalition for Women’s Human Rights in Conflicts and the Centre for Civil and Human Rights (Notre Dame Law School) submitted two *amicus curiae* briefs in *Furundžija*, challenging the Trial Chamber’s decision to re-open the case as well as to make a rape witness available for cross-examination on any medical, psychiatric or psychological treatment or counseling that she had been given.²⁶⁴⁴ Even though the *amicus curiae* briefs were submitted just prior to the re-opening of the case and admitted,²⁶⁴⁵ the Trial Chamber did not take into account the merits of the briefs since it was considered to have been filed too late.²⁶⁴⁶ Therefore, the Trial Chamber set a controversial precedent in detriment of sexual violence victims’ rights and interests on privacy, equality, security and protection without even

²⁶⁴⁰ Bagosora (ICTR-96-7-T), Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, Trial Chamber, 6 June 1998, p. 2; Bagosora (ICTR-96-7-T), Amicus Curiae: Letter from Geert Muylle to Mr. Agwu Ukiwe Okali, 10 February 1998, para. 3.

²⁶⁴¹ Bagosora et al. (ICTR-96-7-T), 6 June 1998, pp. 2-4.

²⁶⁴² Bagosora et al. (ICTR-96-7-T), Request to Appear before the Tribunal and to Testify as Amicus Curiae in the Case of Théoneste Bagosora and others, Rwandan Government, 20 April 1998.

²⁶⁴³ Bagosora et al. (ICTR-98-41-T), Decision on Amicus Curiae Request by the Rwandan Government, Trial Chamber, 13 October 2004.

²⁶⁴⁴ Furundžija (IT-95-17/1-T), Coalition for Women’s Human Rights in Conflict Situations, Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting that the Tribunal Reconsider its Decision Having Regard to the Rights of Witness ‘A’ to Equality, Privacy and Security of the Person and to Representation by Counsel, 5 November 1998; Furundžija (IT-95-17/1-T), Center for Civil and Human Rights, Notre Dame Law School, Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Event, 6 November 1998. See also Brouwer (2005) 297.

²⁶⁴⁵ Furundžija (IT-95-17/1-T), Order Granting Leave to File Amicus Curiae Brief, Trial Chamber, 10 November 1998; Furundžija (IT-95-17/1-T), Corrigendum to Order Granting Leave to File Amicus Curiae Brief, 11 November 1998.

²⁶⁴⁶ See Brouwer (2005) 298.

having examined the merits of the *amicus curiae* briefs filed.²⁶⁴⁷ However, the Coalition's *amicus curiae* briefs produced effects as the Prosecution and defence filed responses to the briefs, and the Prosecution, in turn, in responding them, filed motions seeking to protect the rights of the rape witness in question.²⁶⁴⁸ Accordingly, although the *amicus curiae* submissions were not acknowledged explicitly, they certainly impacted on the Trial Chamber's decisions. In *Tadić*, several individuals and organizations, including the International Women's Human Rights Law Clinic of the City University New York Law School, the Women Refugees Project of the Harvard Immigration and Refugee Programme and the Centre for Constitutional Rights jointly filed an *amicus curiae* brief, addressing the need to balance requirements for protective measures against the accused's right to a fair trial, and it was found admissible.²⁶⁴⁹

The SCSL was more active than the ICTY and the ICTR in inviting *amicus curiae* submissions from international organizations and leading academics rather than just accepting unsolicited briefs.²⁶⁵⁰ When there is such invitation, there is no need to apply for leave and the court neither gives reasons for its request nor demonstrates how the briefs can assist the determination of the case.²⁶⁵¹ Moreover, whereas in the ICTY and the ICTR decisions, it is difficult to find references to *amicus curiae* submissions in the judgments, when it comes to the SCSL, submissions are summarized at the beginning of the judgments in addition to those of the Prosecution and the defence.²⁶⁵² Thus, for example, in *Norman* the majority relied on a conclusion in the *amicus curiae* submitted by the University of Toronto International Human Rights Clinic to conclude that 'citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law'.²⁶⁵³

At the other international and hybrid criminal courts, where victims can intervene not only as witnesses but also as victim participants (ICC, STL) or civil parties (ECCC) and where can additionally claim and be granted reparations

²⁶⁴⁷ Ibid., Loc. cit.

²⁶⁴⁸ Furundžija (IT-95-17/1-T), 10 December 1998, para. 37.

²⁶⁴⁹ Tadić (IT-94-1), 10 August 1995.

²⁶⁵⁰ Williams and Woolaver (2006) 175.

²⁶⁵¹ SCSL Practice Direction on Filing Amicus Curiae Applications Pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, 20 October 2004, article 1 (2).

²⁶⁵² Williams and Woolaver (2006) 179.

²⁶⁵³ Norman (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber, 31 May 2004, para. 52 (citing Toronto International Human Rights Clinic brief, para. 69).

(ICC, ECCC), *amicus curiae* briefs are also admitted as provided in their respective rules of procedure and evidence.²⁶⁵⁴ Thus, for example, in its first decision setting the principles and procedures applicable to reparations, the ICC Trial Chamber I in *Lubanga* considered written observations submitted by, for instance, the International Centre for Transitional Justice, Women's Initiative for Gender Justice and certain NGOs, which had previously and successfully applied for leave to intervene.²⁶⁵⁵

The fact that victims holding the official status of participants were able to voice their own views and concerns via their own submissions and considered by Trial Chamber I when drafting principles and procedures for reparations, may lead to consider *amicus curiae* advocating for victims' interests not as necessary as at the international and hybrid criminal courts where victims' status is primarily limited to that of witness. In other occasions, *amicus curiae* have been rejected by the ICC. For example, the ICC Appeals Chamber in *Lubanga* did not consider that receiving observations from Child Soldiers International is 'desirable for the proper determination of the case [...]'.²⁶⁵⁶ It should be noticed that, unlike the ICTY, the ICTR, the SCSL and the STL, at the ICC and the ECCC, *amicus curiae* briefs can be presented at any stage of proceedings, i.e., not only during trial.²⁶⁵⁷

²⁶⁵⁴ ICC RPE, rule 103 ('*Amicus Curiae* and other forms of submission 1. At any stage of the proceedings, a Chamber may, if it considers desirable for the proper determination of the case, invite or grant leave to a State, organization, or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate [...]'); ECCC Internal Rules, rule 33 ('*Amicus Curiae* Briefs' 1. At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or a person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges, and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs [...]'); STL RPE, rule 131 ('Third Parties and *Amicus Curiae* (A) The Trial Chamber may decide, after hearing the Parties, that it would assist the proper determination of the case to invite or grant leave to a State, organization, or person to make written submissions on any issue, or to allow a State, organization, or person to appear before it as *amicus curiae* [...]').

²⁶⁵⁵ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 14; *Lubanga* ((ICC-01/04-01/06-2870), Decision Granting Leave to Make Representations in the Reparations Proceedings, Trial Chamber I, 20 April 2012.

²⁶⁵⁶ *Lubanga* (ICC-01/04-01/06-3044), Decision the Application by Child Soldiers International for Leave to Submit Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, Appeals Chamber, 16 August 2013, para. 9.

²⁶⁵⁷ Thus, for example, the Women's Initiative for Gender Justice tried to file an *amicus brief* in *Lubanga*, but the Pre-Trial Chamber rejected it and instead it was invited to re-file its request to present its observations in the record corresponding to the situation in the DRC.

Be that as it may, at international and hybrid criminal courts where victims' participation does not exist, i.e., the ICTY, the ICTR and the SCSL, the *amicus curiae* briefs have been and may be used to indirectly submit victims' views and concerns; however, this is limited by important factors such as the respective chamber's discretion to invite or admit the respective briefs or whether/when the competent Chamber considers that those submissions may be useful for its judicial functions. Moreover, as seen, in practice individual victims as such are not those who mainly submit *amicus curiae* but normally civil society organizations such as NGOs or law schools use this mechanism.

4.3. The ICC

4.3.1. Modalities of Participation/Procedural Rights

4.3.1.1. Presentation

There is consensus that article 68 (3) of the ICC Statute, which constitutes the legal ground for victims' participation *sensu stricto* before the ICC, applies to the trial stage of a case due to, *inter alia*, the location of that article under provisions of the ICC Statute relevant to the trial, i.e., Part 6 (Trial). The modalities of participation at the trial stage, however, had to be better detailed by the Trial Chambers. Trial Chamber I thus ruling in a seminal decision in *Lubanga*, in addition to some modalities explicitly provided in the ICC RPE, included other modalities which have been considered controversial as they were thought originally as only available to the two parties before the ICC, i.e., the defence and the Prosecution. The second category corresponds to the modality of participation consisting in that victims may be allowed to introduce or produce evidence;²⁶⁵⁸ the right to challenge admissibility or relevance of parties' evidence;²⁶⁵⁹ victims may be allowed to attend and to participate in closed and *ex parte* hearings;²⁶⁶⁰ witnesses may be called by the Chamber upon victims' suggestion;²⁶⁶¹ and the right to file *ex parte* or confidential written submissions.²⁶⁶² On the other hand, modalities of victims' participation explicitly provided in the ICC RPE include the right to make opening and closing statements;²⁶⁶³ victims' legal representatives right to attend and participate in the proceedings (hearings included) following the terms set by the Chamber,

²⁶⁵⁸ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para. 108.

²⁶⁵⁹ *Ibid.*, para. 109.

²⁶⁶⁰ *Ibid.*, para. 113. See also McGonigle Leyh (2011) 292.

²⁶⁶¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, paras. 45-48.

²⁶⁶² *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 114, 118.

²⁶⁶³ ICC RPE, rule 89 (1).

including the right to file written observations or submissions;²⁶⁶⁴ the right to access to documents and notification,²⁶⁶⁵ and the right to examine witnesses, experts and the accused with prior leave of the Chamber and subject to the Chamber's control.²⁶⁶⁶ The analysis of victims' modalities of participation/procedural rights during trial and how different Chambers have shaped them follows.

4.3.1.2. Legal Discussion

First, concerning the right to notification, under the ICC RPE, victims or their legal representatives have to be notified of submissions and proceedings in the respective case by the Chambers via the Registry.²⁶⁶⁷

Second, concerning the right to access documents, even though victims can access public filings, Trial Chamber I in principle limited such right to public filings unless victims' legal representatives showed that confidential filings held material that was relevant for their clients' personal interests and as long as protective measures were not breached.²⁶⁶⁸ In turn, other Chambers have plainly stated that the legal representatives' access does not include *ex parte* filings and,

²⁶⁶⁴ Ibid., rule 91 (2) ('A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims').

²⁶⁶⁵ ICC RPE, rule 131 (2) ('Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91'); ICC RPE, rule 92 (Notification to victims and their legal representatives). See also Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 105-106, 111.

²⁶⁶⁶ ICC RPE, Rule 91 (3) (a) ('When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber'). See also Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 108.

²⁶⁶⁷ ICC RPE, rule 92 (5) and (6).

²⁶⁶⁸ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 106.

hence, their access is limited to public and confidential filings.²⁶⁶⁹ Indeed, although Trial Chamber II in *Katanga and Ngudjolo Chui* allowed victims' legal representatives to access confidential materials, this was not extended to their clients, i.e., the victims themselves.²⁶⁷⁰ However, Trial Chamber V, in the Kenyan cases, following Trial Chamber III's approach in *Bemba*,²⁶⁷¹ foresees the possibility to allow victims' access to confidential materials upon Chamber's prior approval.²⁶⁷²

In its judgment in *Lubanga*, Trial Chamber I confirmed victims' right to access the case file (rule 131 (2)); however, it limited this access to only public filings as a matter of principle.²⁶⁷³ Protection of sensitive information arguably justifies this decision. Nevertheless, it should be borne in mind that victims present personal interests in the proceedings and, hence, they are in a different standing than that of the public at large. Indeed, Trial Chamber I implicitly noticed this difference when it stated that:

In principle, victims have the right to access and receive notification of all public findings and those confidential filings which concern them (as identified by the parties), insofar as this does not breach any protective measures that are in place.²⁶⁷⁴

As mentioned in the quoted excerpt, what constitutes a matter of concern for the victims is left up to the parties' decision, which may be put into question at least sometimes.²⁶⁷⁵ Another option, which presents the advantage of guaranteeing victims' status, consists in providing them with general access to confidential filings, *ex parte* filings excluded.²⁶⁷⁶ Also, provision of a full, non-

²⁶⁶⁹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, para. 121; *Bemba* (ICC-01/05-01/08-807), 30 June 2010, para. 47.

²⁶⁷⁰ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), 22 January 2010, paras. 121-123.

²⁶⁷¹ *Bemba* (ICC-01/05-01/08-807-Corr), 12 July 2010, para. 47.

²⁶⁷² *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, para. 68; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, para. 67.

²⁶⁷³ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 14 vi). See also *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 105-107.

²⁶⁷⁴ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 14 vi). See also *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 105-107.

²⁶⁷⁵ *Ambos* (2012) 119.

²⁶⁷⁶ See, in this regard, the approach employed by Pre-Trial Chamber I (Single Judge) for pre-trial proceedings: *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), 13 May 2008, paras. 105-112.

redacted version of the case record enabling victim participants to identify themselves the filings regarded as of concern for them, would constitute a sound alternative.²⁶⁷⁷ In *Katanga and Ngudjolo Chui*, victims' legal representative suggested that the system adopted by Trial Chamber I in *Lubanga*, i.e., setting up an automatic disclosure system for victims,²⁶⁷⁸ be applied by Trial Chamber II.²⁶⁷⁹ However, Trial Chamber II rejected such proposal, stating that it would consider on a case-by-case basis whether victims' access to the documents exchanged under rule 77 (Inspection of material in possession or control of the Prosecutor) is necessary in order to guarantee their effective participation according to article 68 (3) of the ICC Statute.²⁶⁸⁰

Third, victims are allowed to attend and participate in public hearings.²⁶⁸¹ In *Katanga and Ngudjolo Chui* and also in *Bemba*, the Trial Chambers have interpreted this right as including attendance at and participation in all closed sessions, *ex parte* hearings excluded.²⁶⁸² Trial Chamber I in *Lubanga* established that upon its discretion it may allow victims to attend and participate in closed and (exceptionally) in *ex parte* hearings.²⁶⁸³ In any case, this Chamber in practice allowed victims' attendance at almost all public as well as closed sessions.²⁶⁸⁴ In turn, Trial Chamber V in the Kenyan cases has determined that participation in *ex parte* hearings, via the OPCV on behalf of the

²⁶⁷⁷ Ambos (2012) 119.

²⁶⁷⁸ Lubanga (ICC-01/04-01/06-1368), Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 'Decision on victims' participation', Trial Chamber I, 2 June 2008, para. 31; Lubanga (ICC-01/04-01/06-1119), 18 January 2008.

²⁶⁷⁹ Katanga and Ngudjolo Chui (ICC-01/04-01/07-2837), Requête Conjointe Visant la communication d'un Rapport Relatif au Témoin DRC-D02-P-0176 et Visant les Modalités de Communication aux Représentants Légaux des Documents Transmis entre les Parties sous Couvert de la Règle 77 du Règlement de Procédure et de Preuve, 15 April 2011.

²⁶⁸⁰ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 21 April 2011, p. 4, lines 16-25; p. 5, lines 1-11.

²⁶⁸¹ ICC RPE, rule 91 (2).

²⁶⁸² Katanga and Ngudjolo Chui (ICC-01/04-01/1788-tENG), 22 January 2010, para. 71. Even though this matter was addressed directly in Bemba, Trial Chamber III has adopted the approach undertaken in *Katanga and Ngudjolo Chui*. See McGonigle Leyh (2011) 292, footnote 417.

²⁶⁸³ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 113. See also McGonigle Leyh (2011) 292.

²⁶⁸⁴ Lubanga (ICC-01/04-01/06-2340), Decision on the Defense Observations Regarding the Right of the Legal Representatives of Victims to Question Defense Witnesses and on the Notion of Personal Interest –and- Decision on the Defense Application to Exclude Certain Representatives of Victims from the Chamber During the Non-Public Evidence of Various Defense Witnesses, Trial Chamber I, 11 March 2010, para. 39. See also McGonigle Leyh (2011) 292.

victim participants' common legal representative, shall be established by it on a case-by-case basis.²⁶⁸⁵

Fourth, concerning the right to orally participate, victims' participation includes the ability to speak at the various hearings, including opening and closing statements, at trial.²⁶⁸⁶ During the opening statements, victims' legal representatives have pointed out different victims' rights and/or interests.²⁶⁸⁷ These have included reparations or protection,²⁶⁸⁸ victims' dignity and security seriously affected by violence,²⁶⁸⁹ harm inflicted on victims,²⁶⁹⁰ repeated victimization,²⁶⁹¹ victims' right to truth and justice and the cathartic and restorative value of including victims in the criminal proceedings,²⁶⁹² and right to an expeditious criminal process and protection from intimidation and harassment.²⁶⁹³ Although most victims' legal representatives do not talk directly about accused's criminal liability, some introduced comments on it and, thus, were similar to those brought by the Prosecutor.²⁶⁹⁴

Fifth, in addition to oral participation, victims can also file written motions,²⁶⁹⁵ which include *ex parte* filings.²⁶⁹⁶ Comments on admissibility issues

²⁶⁸⁵ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 71; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 70.

²⁶⁸⁶ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 117; Ngudjolo Chui (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 27; ICC RPE, rule 89 (1).

²⁶⁸⁷ McGonigle Leyh (2011) 293-294.

²⁶⁸⁸ Lubanga (ICC-01/04-01/06), Transcripts, 26 January 2009, pp. 59, 67; Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 24 November 2009, p. 46, footnote 430. Cited by McGonigle Leyh (2011) 294. See also Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 39, line 17.

²⁶⁸⁹ Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 38, lines 2-10.

²⁶⁹⁰ Lubanga (ICC-01/04-01/06), Transcripts, 26 January 2009, pp. 45, 47, 49, and 52-54; Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 24 November 2009, p. 40, footnote 429. Cited by McGonigle Leyh (2011) 294. See also Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 41, lines 13-20.

²⁶⁹¹ Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 38, lines 24-25.

²⁶⁹² Lubanga (ICC-01/04-01/06), Transcripts, 26 January 2009, pp. 37-41 and 47-48; Bemba (ICC-01/05-01/08), Transcripts, 22 November 2010, pp. 40-41. Cited by McGonigle Leyh (2011) 293, footnote 428.

²⁶⁹³ Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 39, lines 15-17.

²⁶⁹⁴ Lubanga (ICC-01/04-01/06), Transcripts, 26 January 2009, p. 55; Bemba (ICC-01/05-01/08), Transcripts, 22 November 2010, p. 43. Cited by McGonigle Leyh (2011) 294, footnote 431.

²⁶⁹⁵ ICC RPE, rule 91 (2). See, *inter alia*, Ngudjolo Chui (ICC-01/04-02/12-3-tEng), Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 27.

²⁶⁹⁶ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 114, 118; Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009; Bemba (ICC-01/05-01/08-807), 30 June 2010;

and relevance of the evidence and other procedural matters have been considered as part of these submissions.²⁶⁹⁷ If the intervention of the victims' legal representative does not involve the respective victims' personal interests, such participation is not allowed.²⁶⁹⁸

Sixth, in the seminal decision by Trial Chamber I in *Lubanga*,²⁶⁹⁹ upheld by Appeals Chamber,²⁷⁰⁰ and followed by other Trial Chambers,²⁷⁰¹ it was found that the right to introduce or produce evidence and make submissions on matters of admissibility or relevance of evidence is not reserved to parties and, in appropriate circumstances determined by the Chamber, victims' legal representatives may be allowed to produce evidence and challenge evidence. Therefore, victims can be allowed to lead evidence pertaining to the accused's guilt or innocence and to challenge the admissibility or relevance of evidence brought by the parties to the proceedings;²⁷⁰² and, potentially, as Schabas suggests, 'perhaps [evidence brought] by other victims'.²⁷⁰³ As stated by Trial Chamber I in the first ICC Judgment in *Lubanga*:

Victims may request the Chamber to use its broad powers to call all the material it considers relevant for the determination of the truth, in order that the evidence identified by victims concerning the guilt or innocence of the accused is introduced (to the extent appropriate). Victims may tender evidence.²⁷⁰⁴

Judge Pikis dissented from the Appeals Chamber's majority judgment, which upheld the Trial Chamber I's decision on this point, by arguing that under the ICC Statute and RPE, victims cannot adduce evidence on the accused

Ruto and Sang (ICC-01/09-01/11-1107), Decision on Common Legal Representative for Victims' Request to Participate in Hearings and Examine Witnesses, Trial Chamber V(A), 20 November 2013, para. 18.

²⁶⁹⁷ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para. 109. See also McGonigle Leyh (2011) 293.

²⁶⁹⁸ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), 22 January 2010, para. 58; *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, para. 72; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, para. 71.

²⁶⁹⁹ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 108-109.

²⁷⁰⁰ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, paras. 86-105 and 109.

²⁷⁰¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), 22 January 2010, para. 46; *Bemba* (ICC-01/05-01/08-807), 30 June 2010, paras. 30-32; *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, para. 77; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, para. 76.

²⁷⁰² *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 93.

²⁷⁰³ Schabas (2010) 833.

²⁷⁰⁴ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 14 vii).

person's guilt or innocence or challenge the admissibility or relevance of the evidence,²⁷⁰⁵ and thus stated that:

The Statute does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused. Exclusive responsibility is cast on the Prosecution for the investigation of a case, the collection of evidence, the arrest of the person, the substantiation of the charges at the confirmation hearing, and their proof at the trial.²⁷⁰⁶

Judge Kirsh also dissented, along the same lines. He additionally referred to article 69 (3) of the ICC Statute to sustain that this disposition is unambiguous in providing for that evidence at trial is presented by the parties and not by any other participant such as the victims.²⁷⁰⁷ Article 69 (3) reads as follows 'The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'. The first part of this provision would support Judge Kirsh's dissent, in addition to article 66 (2) of the ICC Statute which states that 'The onus is on the Prosecutor to prove the guilt of the accused'. As established by the Appeals Chamber in *Lubanga*, the right to present and challenge evidence on the accused's guilt or innocence 'during trial proceedings lies primarily with the parties, namely, the Prosecution and the defence'.²⁷⁰⁸ However, Trial Chamber I in *Lubanga*, as confirmed by the Appeals Chamber, found that victims also have the possibility to lead and challenge evidence during trial proceedings if it will assist the Chamber in the determination of the truth and, if in this sense, the ICC has 'requested' the evidence.²⁷⁰⁹ It was highlighted by the Appeals Chamber that:

[...] if victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from

²⁷⁰⁵ *Lubanga* (ICC-01/04-01/06-1432-Anx), Judgment on the Appeals of the Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, Partly Dissenting Opinion of Judge Pikiš, 23 July 2008, paras. 4-5.

²⁷⁰⁶ *Ibid.*, para. 6.

²⁷⁰⁷ *Lubanga* (ICC-01/04-01/06-1432-Anx), Judgment on the Appeals of the Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, Partly Dissenting Opinion of Judge Philippe Kirsch, 23 July 2008, para. 21.

²⁷⁰⁸ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 93.

²⁷⁰⁹ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, para. 108; *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, paras. 95-96.

challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.²⁷¹⁰

Additionally, the Appeals Chamber endorsed the procedure laid down by Trial Chamber I in *Lubanga* to enable victims to exercise this modality of participation/procedural right and which included the following safeguards: i) victims' discrete application, ii) notice to the parties, iii) demonstration of personal interests affected by the specific proceedings, iv) compliance with disclosure obligations and protection orders, v) Chamber's determination of appropriateness, and vi) consistency with the accused's rights and a fair trial.²⁷¹¹ Indeed, the Appeals Chamber emphasized that:

[...] the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.²⁷¹²

Moreover, the Appeals Chamber in *Katanga and Ngudjolo Chui* concluded that although victims 'do not have the right to present evidence during the trial',²⁷¹³ they may be allowed to do so subject to some conditions, namely, i) their personal interests are affected by the evidence; ii) this evidence is relevant to the issue of the case; iii) the Trial Chamber requests evidence submission as necessary for the determination of the truth; and iv) the evidence has to be submitted in a manner that does not affect the accused person's right to a fair trial.²⁷¹⁴ Furthermore, as Trial Chamber III in *Bemba* correctly added, victims are not parties and, hence, are not vested with a self-standing right to present evidence.²⁷¹⁵ It should be mentioned that this modality of participation, i.e., presenting evidence, has also been applied in more recent ICC's case law.²⁷¹⁶

²⁷¹⁰ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 97.

²⁷¹¹ *Ibid.*, para. 4.

²⁷¹² *Ibid.*, *Loc. cit.* See also Khan and Dixon (2009) 1165.

²⁷¹³ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2288), Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', Appeals Chamber, 16 July 2010, para. 48.

²⁷¹⁴ *Ibid.*, paras. 44, 48, and 112-114. See also Brouwer and Heikkilä (2013) 1325.

²⁷¹⁵ *Bemba* (ICC-01/05-01/08-2138), 22 February 2012, paras. 13-14.

²⁷¹⁶ *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, para. 77; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, para. 76; *Ruto and Sang* (ICC-01/09-01/11-847), Decision on the Conduct of Trial Proceedings (General Directions), Trial Chamber V(a), 9 August 2013, para. 21.

As discussed later in this same subsection, due to the absence of an explicit disclosure obligation on victims under the ICC Statute/RPE, in case of submission of evidence by victims, it corresponds to the Chamber the adoption of measures to guarantee the accused's rights,²⁷¹⁷ although victims have to meet certain 'disclosure obligations' when tendering evidence. This last point includes especially the need for parties to receive evidence with enough time to enable them to be prepared for the trial.²⁷¹⁸

Seventh, in accordance with rule 91 (3) of the ICC RPE, legal representatives of victims may question witnesses, including expert witnesses, and the accused, with Chamber's leave when their personal interests are engaged by the evidence under consideration.²⁷¹⁹ Questioning concerning the issue of reparations is examined in the next chapter.²⁷²⁰ As for questions on other matters, victims' legal representatives have to submit discrete written applications in advance, which are notified to the Chamber and the Prosecutor, at least seven days before the appearance of the witness in court and the proposed questions and how these are related to the victim participants' interests must be included in the applications.²⁷²¹ In case that victim participants' legal representatives request questions additional to those previously included in their applications, following examination-in-chief, the Trial Chamber may decide to put it to the witness, if 'necessary for the ascertainment of the truth or to clarify the testimony of witnesses'.²⁷²² The Chamber will pay attention to the accused's rights, witnesses' interests, the need for an impartial, fair and expeditious trial as well as the need to guarantee victims' participation according to article 68 (3).²⁷²³

Not only have the Chambers considered the time of the intervention and the question's overall effect when assessing the accused's rights, but also they have taken into account that, in case the Chamber considers it inappropriate for the representative to formulate a specific question, the Chamber can also put it

²⁷¹⁷ Lubanga (ICC-01/04-01/06-1432), 11 July 2008, para. 100.

²⁷¹⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07-2288), 22 January 2010, para. 107.

²⁷¹⁹ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, para. 108. See also, Bemba (ICC-01/05-01/08-807), 30 June 2010, paras. 33 and 36.

²⁷²⁰ See *infra* Chapter V 3.3.1.2.

²⁷²¹ Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, para. 102 h); Bemba (ICC-01/05-01/08-1023), Decision on Directions for the Conduct of the Proceedings, Trial Chamber III, 19 November 2010, para. 18; Lubanga (ICC-01/04-01/06), Transcripts, 28 January 2009, p. 15, line 2 to p. 17, line 13; Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 87.

²⁷²² Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 89.

²⁷²³ McGonigle Leyh (2011) 317.

itself.²⁷²⁴ Submitting questions in advance has enabled the Trial Chambers to prevent repetitive questions, and, hence, do not admit questions regarded as unnecessary or excessively leading.²⁷²⁵ In any case, the Chambers have shown flexibility as they have permitted victims' legal representatives to pose spontaneous and unexpected questions.²⁷²⁶

Concerning the scope of questioning, although Trial Chambers have stated that questions should be limited to clarify or complement evidence previously brought by the witness,²⁷²⁷ they have also permitted victim participants' representatives to pose questions beyond issues discussed in examination-in-chief provided that they are neither repetitive nor duplicative and circumscribed to issues in dispute between the parties or holding relevance for the victims' interests.²⁷²⁸ Questions have to be conducted neutrally and leading and closed questions should be avoided unless specifically authorized by the respective Trial Chamber.²⁷²⁹ Whereas the defence in *Lubanga* would just occasionally question the questioning scope, the defence in *Katanga and Ngudjolo Chui* did so in an often manner.²⁷³⁰

Concerning questioning witnesses about the accused's guilt, it should first be noticed that in *Lubanga* and *Bemba* victims have frequently led evidence on the accused's guilt and, hence, overlapped with the Prosecutor's mandate, which differs from the situation in *Katanga and Ngudjolo Chui* where even the victims were aware of their narrow role.²⁷³¹ Trial Chambers have followed different approaches when interpreting the relation between victims' evidence and the ICC's purpose of determining the truth.²⁷³² Trial Chambers in *Lubanga*

²⁷²⁴ *Lubanga* (ICC-01/04-01/06-2340), 11 March 2010, paras. 34-35.

²⁷²⁵ McGonigle Leyh (2011) 317 (citing transcripts); *Katanga and Ngudjolo* (ICC-01/04-01/07-1665), 20 November 2009, paras. 90-91.

²⁷²⁶ See, e.g., *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 89; *Bemba* (ICC-01/05-01/08-1023), 19 November 2010, para. 19.

²⁷²⁷ *Lubanga* (ICC-01/04-01/06-2127), Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, Trial Chamber I, 16 September 2009, para. 26; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 90; *Bemba* (ICC-01/05-01/08-1023), 19 November 2010, para. 20.

²⁷²⁸ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 108-111; *Lubanga* (ICC-01/04-01/06-2127), 16 September 2009, para. 26; *Katanga and Ngudjolo* (ICC-01/04-01/07-1665), 20 November 2009, paras. 82-91; *Bemba* (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 30-40.

²⁷²⁹ *Lubanga* (ICC-01/04-01/06-2127), 16 September 2009, paras. 27-30; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 91; *Bemba* (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 38-40.

²⁷³⁰ McGonigle Leyh (2011) 319 (citing transcripts).

²⁷³¹ *Ibid.*, 320 (citing transcripts).

²⁷³² *Ibid.*, 298.

and *Bemba*, in adopting a broad interpretation of participation scope, have frequently permitted the legal representatives of the victim participants to question witnesses about the accused's guilt, connecting this right with helping the ICC in the determination of truth.²⁷³³ Accordingly, victim participants' legal representatives not only have questioned Prosecution witnesses on matters related to the crimes context, victims' suffering or reparations, but they also have frequently tried to determine the accused's guilt in a similar fashion than the Prosecutor.²⁷³⁴ This last point in practical terms means that there are two accusers although this modality of victims' participation should in principle be objective and impartial as connects at least in theory with the idea of assisting the ICC to determine the truth. On the other hand, Trial Chamber II in *Katanga and Ngudjolo Chui* adopted a more limited participatory approach to the relation between victims' evidence and the notion of assisting the ICC in the establishment of the truth as:

The Chamber is of the view that the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened.²⁷³⁵

Accordingly, Trial Chamber II exceptionally let victims question witnesses on the accused's guilt and it actually often reminded legal representatives to stay within the representation framework of their clients' interests.²⁷³⁶ It explicitly established that questioning by victim participants' legal representatives must mainly aim the 'ascertainment of the truth' and that victims 'are not parties to the trial' and have no role to support the Prosecutor.²⁷³⁷ Thus, Trial Chamber II pointed out that the representatives neither reinforce nor supplement the Prosecutor,²⁷³⁸ even warning representatives not to pose questions which would provide some kind of assistance to the Prosecution directly or indirectly.²⁷³⁹ Although this approach prevents the accused from

²⁷³³ Lubanga (ICC-01/04-01/06-2127), 16 September 2009, para. 27.

²⁷³⁴ McGonigle Leyh (2011) 299.

²⁷³⁵ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1788-tENG), 22 January 2010, para. 60.

²⁷³⁶ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 22 March 2010, p. 4; Transcripts, 12 July 2010, p. 15. Cited by McGonigle Leyh (2011) 300, footnote 463.

²⁷³⁷ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 82.

²⁷³⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 30 November 2009, pp. 26 and 33. Cited by McGonigle Leyh (2011) 300, footnotes 465 and 466.

²⁷³⁹ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 23 June 2010, p. 20. Cited by McGonigle Leyh (2011) 300, footnote 467.

being faced by two accusers, it somehow neglects the bias that victims have when participating. However, in balance, this approach seems to better ensure the accused's right to a fair and impartial trial. In any case, as determined by Trial Chamber V in *Ruto and Sang* and *Muthaura and Kenyatta*, the victim participants' legal representative when questioning the witness or the accused 'may not formulate any new allegations against the accused'.²⁷⁴⁰

Eighth, victim participants may be allowed to testify as witness,²⁷⁴¹ as previously discussed.²⁷⁴² Nevertheless, this is subject to certain conditions set by the Chambers and which pay particular attention to the accused's rights, namely: i) the presentation of evidence needs to be consistent with the accused's right to a fair and impartial trial, including the right to an expeditious trial, according to article 67 (1) (c), and the right to have adequate time and facilities to prepare his defence according to article 67 (1) (b);²⁷⁴³ ii) the Chamber will only permit victims' legal representatives to call the witnesses provided that they are not transformed in auxiliary prosecutors;²⁷⁴⁴ iii) victims' testimony needs to be considered to make a genuine contribution to the ascertainment of the truth;²⁷⁴⁵ and iv) victims are not allowed to testify anonymously.²⁷⁴⁶ Additionally, when evaluating which victims are best placed to provide evidence by personally appearing at the ICC, Trial Chambers have considered the following factors: i) whether the proposed testimony would be repetitive of the Prosecutor's case or of evidence already tendered by the parties; ii) whether the topics of the victims' proposed testimony are sufficiently closely related to the issues to be examined when the Chamber assesses the charges against the accused; iii) whether the proposed testimony is typical of a larger group of victim participants, who possess experiences similar to the victim who desires to testify, or whether the

²⁷⁴⁰ *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012, para. 75; *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012, para. 74. See also *Ruto and Sang* (ICC-01/09-01/11-847), 9 August 2013, para. 20.

²⁷⁴¹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2288), 16 July 2010, para. 110; *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras 132-134; *Lubanga* (ICC-01/04-01/06-1379), 5 June 2008.

²⁷⁴² See *supra* Chapter III 2.3.2.

²⁷⁴³ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2288), 16 July 2010, para. 114; *Bemba* (ICC-01/05-08), 22 February 2012, para. 23.

²⁷⁴⁴ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 22.

²⁷⁴⁵ *Bemba* (ICC-01/05-08-2138), 22 February 2012, para. 23; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2288), 16 July 2010, para. 114; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 20.

²⁷⁴⁶ *Bemba* (ICC-01/05-08-2138), 22 February 2012, para. 23; *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665) 20 November 2009, para. 22. See for further discussion *supra* Chapter II 4.2.2.

victim is uniquely apt to provide evidence on a particular matter; and iv) whether the testimony will likely bring new substantial information which is relevant to Chamber's examination on issues related to the charges.²⁷⁴⁷

As previously discussed,²⁷⁴⁸ when victims give evidence, they have to give it under oath, which is directly related to their status as witnesses, and thus the defence is allowed to cross-examine him/her, which constitutes a safeguard and makes the respective victim liable to prosecution in case of giving false testimony in accordance with article 70 (1) (a) of the ICC Statute.²⁷⁴⁹ As victims' intervention as witnesses is conditional upon victims' real contribution to the search for the truth in the ICC's fact finding process, Trial Chamber in *Katanga and Ngudjolo Chui* concluded that:

[...] if there are potential doubts as to the reliability of a victim's testimony, the Chamber may decide not to authorise the victim to testify under oath. This decision is entirely independent of the Chamber's discretion under article 69 of the Statute to determine the relevance and admissibility of the evidence the victim may give during his or her testimony.²⁷⁵⁰

Ninth, concerning disclosure rights, although this in application of rules 77 and 78 only concerns the Prosecution and the defence and in principle takes place before trial,²⁷⁵¹ Trial Chamber I in *Lubanga* set a mechanism through which victim participants may be provided with any materials within the Prosecution's possession and which are relevant to victims' personal interests.²⁷⁵² First, the victims' legal representative needs to identify the personal interest and, second, the nature of the information, including information of a particular event at a specific time or location, that may be within the Prosecutor's control is material for the preparation of victims' participation.²⁷⁵³ Victims' legal representatives and the Prosecutor should deal with the provision of this material *inter se* and, only when there is disagreement, filings should be made.²⁷⁵⁴ To receive relevant material, the legal representative has to set out in a document for the Prosecutor how material under Prosecution's possession is relevant to an

²⁷⁴⁷ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 30; *Bemba* (ICC-01/05-08-2138), 22 February 2012, para. 24.

²⁷⁴⁸ See *supra* Chapter III 2.3.

²⁷⁴⁹ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1665), 20 November 2009, para. 89.

²⁷⁵⁰ *Ibid.*, para. 91.

²⁷⁵¹ McGonigle Leyh (2011) 308; Schabas (2010) 833.

²⁷⁵² *Lubanga* (ICC-01/04-01/06-1368), 2 June 2008, paras. 30-31

²⁷⁵³ *Ibid.*, para. 31.

²⁷⁵⁴ *Ibid.*, para. 34.

individual victim's personal interests, which is followed by Prosecution's identification and provision of materials under his/her possession and relevant to the victim's personal interests.²⁷⁵⁵ Upon receiving the requested documents, victims have to file a discrete application before the Chamber specifying how their personal interests are affected at a given phase of the trial in order to participate.²⁷⁵⁶

Nevertheless, under highly restricted circumstances, the Prosecution can agree not to disclose certain material, which includes documents or information (s)he has received on a confidential basis only for the purpose of generating new evidence.²⁷⁵⁷

As previously stated, Trial Chamber II in *Katanga and Ngudjolo Chui* rejected the automatic system of disclosure implemented by Trial Chamber I and considered instead a case-by-case analysis.²⁷⁵⁸

Concerning disclosure to the defence, Trial Chamber I in *Lubanga* considered that:

[...] the disclosure regime established by the Rome Statute framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court, the defence or the participants to disclose exculpatory material to the defence under Article 67 (2) of the Statute, Rule 77 or Rule 76 of the Rules.²⁷⁵⁹

Therefore, concerning dual status victim participants-witnesses, the Prosecutor has to disclose their statements, application forms included, to the defence although (s)he first has to notify victims' representative so that any objections to the disclosure can be raised.²⁷⁶⁰ In any case, it should be left clear, as stated in *Katanga and Ngudjolo Chui*, that victim participants 'cannot be part of the disclosure process [...] and thus they have neither disclosure rights nor disclosure obligations'.²⁷⁶¹ Moreover, the Appeals Chamber in *Katanga and Ngudjolo Chui* stated that there is no general obligation on victims to disclose to the accused the evidence, incriminating or exculpatory, which is in their

²⁷⁵⁵ Ibid., para. 35.

²⁷⁵⁶ Ibid., Loc. cit.

²⁷⁵⁷ Lubanga (ICC-01/04-01/06-1401), 13 June 2008, para. 71.

²⁷⁵⁸ Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 21 April 2011, p. 4, lines 16-25; p. 5, lines 1-11.

²⁷⁵⁹ Lubanga (ICC-01/04-01/06-1637), 21 January 2009, para. 10.

²⁷⁶⁰ Ibid., paras. 12-13.

²⁷⁶¹ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, para. 114.

possession.²⁷⁶² Furthermore, when a victim's application for participation suggests the possession of potentially exculpatory information, the Prosecutor has the responsibility to investigate such information, and this can be then disclosed to the defence.²⁷⁶³ The Appeals Chamber also established that in certain instances the Trial Chamber can request disclosure when, for example, there is available information which would contribute to the establishment of the truth.²⁷⁶⁴

Disclosure obligations may apply to victim participants who are given the right to lead evidence at trial according to the Appeals Chamber, and it is for a Trial Chamber to decide on the modalities for the proper disclosure of any evidence it has allowed victims to present.²⁷⁶⁵ Although neither the ICC Statute nor the RPE establish any disclosure obligations on victims, Trial Chamber I in *Lubanga* determined that victims have to meet 'their disclosure obligations'.²⁷⁶⁶ In any case, as Schabas observes, given the silence on the ICC Statute and RPE on evidence by victim participants' representatives, 'regulation of disclosure in such cases is a matter to be determined by the judges on a case-by-case basis'.²⁷⁶⁷

Tenth, victim participants' legal representatives can call their clients as witnesses to testify directly at the Trial Chamber,²⁷⁶⁸ as illustrated by the fact that three victim participants, called upon request of their legal representatives, testified in *Lubanga*, as detailed in the previous chapter.²⁷⁶⁹ In addition to their clients, victim participants' legal representatives may identify persons who they would like to provide evidence relevant to their clients' personal interests and, then, the Chamber may determine to call the witness on its own motion (under articles 64 (6) (b), (d) and 69 (3)) and may authorize the legal representative to formulate questions before or after the Chamber does.²⁷⁷⁰ For example, in *Lubanga*, victims' legal representatives successfully proposed two expert

²⁷⁶² Katanga and Ngudjolo Chui (ICC-01/04-01/07-2288), 16 July 2010, paras. 71, 72 and 75.

²⁷⁶³ *Ibid.*, para. 81.

²⁷⁶⁴ *Ibid.*, para. 71.

²⁷⁶⁵ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, paras. 100 and 104.

²⁷⁶⁶ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 14 vii). See also *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 104.

²⁷⁶⁷ Schabas (2010) 833.

²⁷⁶⁸ *Lubanga* (ICC-01/04-01/07-1665), 20 November 2009, paras. 45.

²⁷⁶⁹ See *supra* Chapter III 2.3.2.2.

²⁷⁷⁰ *Lubanga* (ICC-01/04-01/07-1665), 20 November 2009, paras. 45-48.

witnesses on the use of names in the DRC.²⁷⁷¹ Therefore, the victim participants' right to call witnesses is not unfettered.²⁷⁷² In *Bemba*, the Chamber noted that the parties and (victim) participants do not 'own' the witnesses as they are 'witnesses of the Court', and also stressed the 'obligation not to try to influence the witness's decision in any way when seeking content'.²⁷⁷³

Lastly, but equally important, as previously examined,²⁷⁷⁴ anonymous victim participants have been allowed to participate during trial but, based on the accused's right to a fair trial, whether they need to identify themselves depends on the scope and nature of the respective modality of participation/procedural right as explicitly indicated by Trial Chamber I in *Lubanga*:

[...] Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings [leading up to and during the trial] [...].

While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.²⁷⁷⁵

Accordingly, *mutatis mutandi* similar to victim participants' modalities of participation in pre-trial,²⁷⁷⁶ in principle the participation regime in trial for anonymous victim participants is more restricted than that for their non-anonymous peers. However, both kinds of victims are represented by the same common legal representatives, reducing the impact of the anonymous/non-anonymous victim participant distinction in practice.

²⁷⁷¹ *Lubanga* (ICC-01/04-01/06-1896), Observations Conjointes des Représentants Légaux des Victimes sur les Questions à Poser au(x) Experts Concernant l'attribution et les Composantes du nom en République Démocratique du Congo, Legal Representatives of the Victims, 25 May 2009.

²⁷⁷² McGonigle Leyh (2011) 315.

²⁷⁷³ *Bemba* (ICC-01/05-01/08-2293), Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", Trial Chamber III, 4 September 2012, paras. 16 and 23.

²⁷⁷⁴ See *supra* Chapter III 4.3.2.2.

²⁷⁷⁵ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras 130-131. See also *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 14 xi).

²⁷⁷⁶ See *supra* Chapter IV 3.3.3.1.

4.3.2. Related Legal Issues

4.3.2.1. Legal Representation

With regard to legal representation, although the ICC Statute and RPE do not require that victim participants have to be represented,²⁷⁷⁷ the full exercise of victims' procedural rights, as experience has shown, requires them to be legally represented.²⁷⁷⁸ In any case, Trial Chambers, excepted Trial Chamber III,²⁷⁷⁹ have not permitted individuals who are still applying to become victim participants to be represented.²⁷⁸⁰ In the trial in *Lubanga*, common legal representatives appeared in court for the 129 victim participants, who were divided into two groups represented by two teams of external counsel.²⁷⁸¹ Additionally, the OPCV was allowed to continue representing four dual status victim participants-victim witnesses,²⁷⁸² as explicitly laid down in the ICC Regulations of the Court.²⁷⁸³

Nevertheless, it may be questioned whether and to what extent victims' legal representation by the OPCV may be the best option insofar as not only does the OPCV have as a principal task the assistance of and support the victims and their legal representatives,²⁷⁸⁴ but also taking into account its limited resources. The latter may compromise the supportive role that the OCPV is mainly trusted with.²⁷⁸⁵ Be that as it may, victims via their legal representatives in *Lubanga* made opening statements,²⁷⁸⁶ examined witnesses,²⁷⁸⁷ requested leave to

²⁷⁷⁷ ICC Statute, article 68 (3) ('Such views and concerns [those of victim participants] may be presented by the legal representatives of the victims where the Court considers it appropriate [...]); ICC RPE, rules 89-93. See, in particular, ICC RPE rule 90 (1) ('A victim shall be free to choose a legal representative').

²⁷⁷⁸ McGonigle Leyh (2011) 326.

²⁷⁷⁹ Individuals who were applying to participate as victims were permitted to be represented by the OPCV and participate while waiting their status determination. See *Bemba* (ICC-01/05-01/08-1023), 19 November 2010, paras. 22-23.

²⁷⁸⁰ McGonigle Leyh (2011) 327.

²⁷⁸¹ *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 20.

²⁷⁸² *Lubanga* (ICC-01/04-01/06), Transcripts, 22 January 2009, p. 12, line 23 to p. 13, line 12; *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 20.

²⁷⁸³ ICC Regulations of the Court, regulation 80 (2).

²⁷⁸⁴ *Ibid.*, regulation 81.

²⁷⁸⁵ *Ambos* (2012) 119.

²⁷⁸⁶ *Lubanga* (ICC-01/04-01/06), Transcripts, 26 January 2009, p. 36 line 5 *et seq.*

²⁷⁸⁷ Trial Chamber I allowed the legal representatives to question 25 witnesses (the 4 Chamber witnesses, 14 Prosecution witnesses and 7 defence witnesses). See *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, footnote 62.

introduce evidence,²⁷⁸⁸ and were permitted to make written and oral submissions.²⁷⁸⁹

In cases of larger numbers of victim participants, a Chamber (in this context a Trial Chamber), under rule 90 (2), ‘may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives’. According to rule 90 (3), should victims be unable to choose a common legal representative(s), ‘the Chamber may ask the Registrar to choose one or more common legal representatives’. In turn, rule 90 (4) establishes that ‘The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims [...] are represented and that any conflict of interest is avoided’. This is a necessary guarantee to include victims participants’ interests in the decision-making process and, as indicated under Regulation of the Court 79 (2), considering ‘the need to respect local traditions and to assist specific group of victims’. Additionally, as determined in *Banda and Jerbo*, if the common legal representative receives conflicting instructions from one or more groups of victims, (s)he has to represent both positions fairly and equally unless the conflicting instructions are irreconcilable, i.e., there is a conflict of interest, and, in this case, the Chamber shall be informed to adopt appropriate measures.²⁷⁹⁰

In *Lubanga*, victim participants (around 120) had been allowed to choose their own common counsels/legal teams (a total of eight plus four victim participants represented by the OPCV); however, common legal representatives were later appointed and represented victim participants who were divided in two groups by Trial Chamber I.²⁷⁹¹ The above-referred four dual status victim participants-witnesses continued being represented by the OPCV.²⁷⁹² Due to the existence of a larger number of victim participants (more than 300) and of an increasing number of legal representatives in *Katanga and Ngudjolo Chui*, Trial

²⁷⁸⁸ Trial Chamber I authorized victims’ legal representatives to submit 13 items of evidence. See *Ibid.*, footnote 63.

²⁷⁸⁹ *Ibid.*, para. 20.

²⁷⁹⁰ *Banda and Jerbo* (ICC-02/05-03/09-337), Decision on Common Legal Representation, Trial Chamber IV, 25 May 2012, para. 42.

²⁷⁹¹ *Lubanga* (ICC-01/04-01/06), Transcripts, 22 January 2009, p. 12, lines 23-25, and p. 13, lines 1-12; *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 20.

²⁷⁹² *Lubanga* (ICC-01/04-01/06), Transcripts, 22 January 2009, p. 13, lines 3-4; *Lubanga* (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 20.

Chamber II decided to split the victim participants, who had been represented by more than 10 legal teams, into two groups.²⁷⁹³ While the first and larger group consisted of all victims with the exception of ex child soldiers, the second one was made up of child soldiers. The division based on the harm inflicted enabled the legal representative to come up with more targeted questions.²⁷⁹⁴

In *Bemba*, Trial Chamber III decided that just two common legal representatives would represent over 1000 individuals admitted as victim participants, who were divided thus into two groups.²⁷⁹⁵ Trial Chamber III also decided that the OPCV, which represented victims during the confirmation of charges, not to represent victims any more but only when called by the Chamber for particular matters.²⁷⁹⁶ In any case, Trial Chamber III did not group victim participants based on their harm but on the geographical location of the crimes. This approach may be criticized as this classification not necessarily represents victims' best interests, in particular those who suffered sexual violence crimes,²⁷⁹⁷ which was particularly endemic in the Central African Republic (CAR). The timely organization of victims' common representation is also fundamental to guarantee both the 'expeditiousness of the proceedings and the effectiveness of victim participation in the case' as emphasized by Trial Chamber IV in *Banda and Jerbo*.²⁷⁹⁸ It should also be noticed that, unlike previous cases, in *Banda and Jerbo*, it was decided to create no more than a single group of victims for representation purposes.²⁷⁹⁹ Although this corresponds to efficiency arguments, whether presumed homogeneity of victim participants' interests is really in place should be examined on case-by case basis.

Moreover, in occasions, collective participation of group victims under common legal representation has been resisted by victims since, after being represented by a legal counsel of their choosing, were later designated by the

²⁷⁹³ Katanga and Ngudjolo (ICC-01/04-01/07-1328), 22 July 2009, p. 13.

²⁷⁹⁴ McGonigle Leyh (2011) 328.

²⁷⁹⁵ Bemba (ICC-01/05-01/08-1005), 10 November 2009, para. 34.

²⁷⁹⁶ *Ibid.*, para. 29.

²⁷⁹⁷ See, e.g., Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo, Women's Initiatives for Gender Justice, 22 November 2010. Referred to in McGonigle Leyh (2011) 328.

²⁷⁹⁸ *Banda and Jerbo* (ICC-02/05-03/09-138), Order Instructing the Registry to Start Consultations on the Organization of Common Legal Representatives, Trial Chamber IV, 21 April 2011, para. 5. See also American University Washington College of Law, War Crimes Research Office, Ensuring Effective and Efficient Representation of Victims at the International Criminal Court (2011) 43.

²⁷⁹⁹ *Banda and Jerbo* (ICC-02/05-03/09-337), Decision on Common Legal Representation, Trial Chamber IV, 25 May 2012.

Judges a new counsel with little to no consultation in the selection process.²⁸⁰⁰ This has to be criticized as goes in detriment of the victim participants' status. Furthermore, the fact that due to the high number of victims and also the location thereof, i.e., far away from the ICC's premises in The Hague, victims generally do not attend the hearings in person. Such situation may raise the question of whether victims' participation via this kind of legal representation is purely symbolic and, if so, how meaningful the participatory regime is really for victims. Accordingly, to counterbalance these limitations and challenges, legal representatives should stay in permanent contact with and receive regular instructions from victims represented by them. Therefore, a potential cause for secondary victimization can be avoided.

Trial Chamber V has designed, for its two Kenyan-related cases and concerning victim participants who do not wish to appear in person, a new victim participation procedure based on common legal representation, which includes both an appointed common legal representative, i.e., common legal representative, and the OPCV acting on the common legal representative's behalf.²⁸⁰¹ Thus, whereas the common legal representative is primarily responsible for being the contact point for victims represented by him/her, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial, the OPCV's main responsibility consists in acting as the interface between the common legal representative and the Chamber in day-to-day proceedings in the court-room.²⁸⁰² Concerning the modalities of victim participation through the common legal representative under this scheme, the Chamber listed: i) access to the record, documents and filings, including confidential material (subject, in the last case, to Chamber's previous

²⁸⁰⁰ Banda and Jerbo (ICC-02/05-03/09-228), Request of Victims a/1646/10 and a/1647/10 for the Trial Chamber to Review the Registry's 'Notification of Appointment of Common Legal Representatives of Victims' in Accordance with Regulation 79(3), 30 September 2010; Ruto et al. (ICC-01/09-01/11-330), Decision on the 'Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims'. Pre-Trial Chamber II (Single Judge), 9 September 2011. See also Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 *International Criminal Law Review*, 375, 404-405.

²⁸⁰¹ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 41; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 40.

²⁸⁰² Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 42-43; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras. 41-42.

approval);²⁸⁰³ ii) filing of responses to documents;²⁸⁰⁴ iii) oral submissions at critical junctures, such as opening and closing statements;²⁸⁰⁵ and iv) presentation of evidence.²⁸⁰⁶ However, the following modalities of participation have been said to be conducted by the OPCV (on behalf of the common legal representative): i) attendance at and participation in public hearings, closed and private sessions and, participation in *ex parte* hearings (determined on case-by-case basis);²⁸⁰⁷ and ii) questioning of a witness, an expert or the accused (when allowed by the Chamber) although exceptionally the Chamber may authorize the common legal representative to appear in person.²⁸⁰⁸

This division of tasks aims that victims benefit from the OPCV's experience and with the OPCV's involvement to ensure that confidential information is handled safely and securely.²⁸⁰⁹ However, this task division may be partially criticized as the legal representatives should be the ones to exercise victims' modalities of participation/procedural rights as basic as attendance at hearings since they, unlike the OPCV, are in direct contact with victims. Moreover, the OPCV's action in some participation modalities, in contexts where victims will have a common legal representative, introduces extra intermediation between victims and the Chamber, which may make victims' participation more symbolic. Furthermore, the OPCV in practice acts as 'a representative of a representative', i.e., representative of the common legal representative of victim participants in day-to-day proceedings, i.e., in general. Regardless of the potential benefits from this mechanism, it may arguably be considered as too a 'creative' and broad interpretation of the ICC instruments. Although the OPCV has in conformity with the Regulations of the Court been

²⁸⁰³ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 64-69; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras 63-68.

²⁸⁰⁴ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 72 (in application of regulation 24 (2) of the Regulations of the Court which reads as follows 'Victims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber'); Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 71.

²⁸⁰⁵ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 73; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 72.

²⁸⁰⁶ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 77; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 76.

²⁸⁰⁷ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 70-71; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras 69-70.

²⁸⁰⁸ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, paras. 74-76; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, paras 73-75.

²⁸⁰⁹ Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 43; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 42.

appointed as legal representative for some victim participants in other cases (mainly during pre-trial),²⁸¹⁰ the Trial Chamber V's scheme whereby the OPCV can be appointed as a representative of the common legal representative also appointed by the Trial Chamber is neither explicitly stated under the Regulations of the Court nor corresponds to the ICC's practice.²⁸¹¹

A related observation, concerning victims who wish to present their views and concerns individually, is that the Chamber may ask the common legal representative to select a specified number of applications, from which the Chamber will select those eligible for personal appearance.²⁸¹² The preliminary unilateral selection by the common legal representative is unprecedented in the ICC's practice and may lead to an exponential increase in the number of victims participating personally. Finally, the two categories of victims, i.e., those who apply to participate individually and the others who 'register' to participate through common legal representation, previously mentioned,²⁸¹³ are not in the same standing as when assessing the common legal representative's submissions or requests 'the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court'. Thus, it is created a distinction not foreseen in the ICC instruments or previous ICC practice. These considerations, among others, raise serious doubts concerning the consistency of the Trial Chamber V's procedures for victim participants with the ICC instruments and practical benefits in the respective trials.²⁸¹⁴

²⁸¹⁰ ICC Regulations of the Court, regulation 80 (2) ('The Chamber may appoint counsel from the Office of Public Counsel for victims'). As for ICC's practice, see American University Washington College of Law (2011) 44-47; and Haslam and Edmunds (2012) 877-889.

²⁸¹¹ In addition to regulation 80 (2) of the Regulations of the Court, cited under the previous footnote, see also regulation 81 (4) which establishes that 'The Office of Public Counsel for victims shall provide *support and assistance* to the legal representative for victims and to victims, including, *where appropriate*: (a) Legal research and advice; and (b) Appearing before a Chamber in respect of *specific* issues [emphasis added]'. As for ICC's practice, see American University Washington College of Law (2011) 44-47; and Haslam and Edmunds (2012) 877-889.

²⁸¹² Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 57; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 56.

²⁸¹³ See *supra* Chapter IV 2.3.2.1.

²⁸¹⁴ It should be added that Kituo, a Kenyan NGO, submitted its observations via *amicus curiae* on issues relating to the implementation of the new system regarding victims' participation. See ICC Victims' Rights Working Group, ICC Victims' Rights Legal Update (December 2012-January 2013), p. 4. In turn, discussions at the ICC on division of responsibilities between the OPCV and the common legal representative followed. See *Ibid.*, p. 4.

4.3.2.2. Other Legal Issues

In addition, there are two other legal issues, namely, adding charges and withdrawal of the victim participant status by the Trial Chamber. Concerning the possibility to add new charges against the accused by the victim participants, the trial in *Lubanga* proved to be of special relevance. As already mentioned,²⁸¹⁵ due to the fact that the Prosecutor only included charges on conscription, enlistment and use of child soldiers, victims' legal representatives requested the Trial Chamber to add the legal characterization of sexual slavery as a crime against humanity and war crime as well as of cruel and/or inhuman treatment as a war crime to the facts of the case, in application of Regulation 55 of the Regulations of the Court.²⁸¹⁶ Regulation 55 (1) states that the Chamber can change the legal characterization of facts to fit new charges provided that these do not exceed 'the facts and circumstances described in the charges and any amendments to the charges'.²⁸¹⁷ In particular, regulation 55 (2) lays down that the Trial Chamber can change the legal characterization of the facts at any time during the trial proceedings and regulation 55 (3) states that the defence shall have adequate time and facilities to prepare the defence as well as, if necessary, to examine or re-examine witnesses.

Although the Trial Chamber considered that it would examine the legal re-characterization of the facts,²⁸¹⁸ it later added that the facts coming to light during the trial still need to be linked with the facts identified in the charging document.²⁸¹⁹ Be that as it may, the Appeals Chamber overruled the Trial Chamber's findings as the former concluded that the latter erred in law which had led the Trial Chamber to incorporate additional facts and circumstances not included in the charging document,²⁸²⁰ and, hence, 'Regulation 55 (2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto'.²⁸²¹ Finally, the Trial Chamber rejected the request of victims' legal representatives

²⁸¹⁵ See supra Chapter IV 3.3.3.2.

²⁸¹⁶ *Lubanga* (ICC-01/04-01/06-1891), Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, The Legal Representatives of Victims a/0001/06 to a/0003/06 et al., 22 May 2009, p. 23.

²⁸¹⁷ ICC Regulations of the Court, regulation 55 (1).

²⁸¹⁸ *Lubanga* (ICC-01/04-01/06-2049), 14 July 2009, paras. 27-35.

²⁸¹⁹ *Lubanga* (ICC-01/04-01/06-2093), Clarification and Further Guidance to Parties and Participants in Relation to the 'Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts may be Subject to Change in Accordance with Regulation 55 (2)', Trial Chamber I, 27 August 2009, para. 11.

²⁸²⁰ *Lubanga* (ICC-01/04-01/06-2205), 8 December 2009, para. 112.

²⁸²¹ *Ibid.*, para. 1.

considering that the decision on the confirmation of charges did not incorporate any fact relating to the crime of sexual slavery and that the facts included in the decision linked to possible acts of inhuman or cruel treatment were insufficient to determine the elements of those crimes.²⁸²² However, this demonstrates that victims may express their viewpoints about charges against the defendant.

Even though most of the aspects about the dual status victim participants-victim witnesses in *Lubanga* who were stripped off of their official victim participant status were already examined,²⁸²³ it is necessary herein to highlight two points. First, as examined, the Trial Chamber amended its previous decision granting the six Prosecution witnesses the status of victim participants due to their unreliable testimonies. The Chamber adopted this decision considering that victim participant status had been given on a *prima facie* assessment of the information provided in the applications. The Chamber, in general, determined that:

[...] if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.²⁸²⁴

Concerning the three victim participants who were called as witnesses upon request of the victim participants' legal representatives, they got their status removed due to internal inconsistencies in their testimonies and lack of credibility due to the real possibility of stolen identities.²⁸²⁵ As previously concluded, whereas concerning the Trial Chamber I's decision to withdraw the Prosecution witnesses' victim participant status was excessive, concerning the other three victim participants the decision was justified due to the likelihood of stolen identities.

Second, this overall situation could have been avoided if VPRS staff (and not intermediaries) in the field would have assisted applicants to fill in their forms and/or transmission of less redacted application forms to the parties so

²⁸²² Lubanga (ICC-01/04-01/06-2223), Decision on the Legal Representatives' Joint Submissions Concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, Trial Chamber I, 8 January 2010, paras. 28-38.

²⁸²³ See supra Chapter III 2.3.2.2.

²⁸²⁴ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 484.

²⁸²⁵ Ibid., para. 502.

that these could have presented the respective observations. Preventing participation of individuals who are not even real victims is important to, *inter alia*, avoid evidence against the accused and, thus, preserve his/her right to a fair trial.

With regard to the withdrawal of the victim participant status of two victim participants by Trial Chamber II in *Katanga and Ngudjolo Chui*,²⁸²⁶ as previously examined,²⁸²⁷ this decision was sound due to the particular case circumstances, namely, serious credibility doubts brought by their own legal representative and not clarified by those two individuals.

Related to *Katanga and Ngudjolo Chui*, two additional brief observations concerning victims' participation during trial follow. First, although the charges against Ngudjolo were severed, victims allowed to participate in the initial proceedings, i.e., in *Katanga and Ngudjolo Chui*, were 'authorised to continue participating in both of the severed proceedings',²⁸²⁸ i.e., in both *Katanga and Ngudjolo Chui*. Second, following up the severance of the charges, Trial Chamber II in the judgment rendered in *Ngudjolo* acquitted the accused.²⁸²⁹ Trial Chamber II tried to show sensitivity to the victims by pointing out, in its judgment, that the acquittal was not due to a doubt about the suffering of the population in question but due to uncertainty about Ngudjolo's role.²⁸³⁰ However, his acquittal understandably brought about a lot of disappointment among the victims and has been criticized by the human rights NGOs community.²⁸³¹

²⁸²⁶ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-3064), 7 July 2011, paras. 48-49.

²⁸²⁷ See supra Chapter III 2.3.2.2.

²⁸²⁸ *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-3319), Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges the Accused Persons, Trial Chamber II, 21 November 2012, para. 64. See also *Katanga* (ICC-01/04-01/07-3363), Judgment on the Appeal of Mr Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled "Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges the Accused Persons", Appeals Chamber, 27 March 2013.

²⁸²⁹ *Ngudjolo Chui* (ICC-01/04-02/12-3), Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, p. 197.

²⁸³⁰ *Ibid.*, paras. 338, 503 and 516.

²⁸³¹ See Olivia Bueno, 'Reactions to the Ngudjolo Decision: Divisions among Iturian Communities', 2 January 2013. Available at: <http://www.katangatrial.org/2013/01/reactions-to-the-ngudjolo-decision-divisions-among-iturian-communities/> (last visit on 25 October 2013); Africa Legal Aid, 'Raising the Bar-ICC Acquits Matheiu Ngudjolo Chui', 6 January 2013. Available at: <http://www.africalegalaid.com/IManager/MailingWeb/9088/HVIXyL2VcBII/129684/3435217> (last visit on 25 October 2013).

4.3.3. Evaluation of Victims' Participation Regime

Even though the Trial Chambers have followed the approach adopted by the Appeals Chamber, which confirmed to an important extent the findings by Trial Chamber I in its landmark decision on victims' participation, it is herein examined whether and to what extent this approach, i.e., victims' broad participation regime during trial, may be considered *lege ferenda* as appropriate. For this purpose, the analysis herein pays attention to the efficiency of the ICC, the rights of the accused and also considerations about victims.

With regard to efficiency, it is clear that the expansion of victims' rights already participating at the ICC is inversely proportional not only to the speediness of the proceedings but also to including more victims under a not excessively broad participatory regime for victims. Should victims' participation slow down proceedings, a lower number of trials will be held and this might lead to the paradoxical outcome of holding back the ICC's main objective, which is the fight against impunity. Moreover, as pointed out by ICC Judge Van den Wyngaert, victims take up an important proportion of time during trials.²⁸³² It is therefore legitimate to question how spending ICC's scarce human and monetary resources in a narrow number of victims with quite broad participation rights while leaving out meaningful participation of potentially a (much) higher number of victims is coherent with a restorative justice-oriented approach.²⁸³³ Reforms increasing participation rights of victims during the trial and other stages must hence be balanced against key stakeholders, for example, non-participating victims, in the international criminal justice system.²⁸³⁴ Equal access to justice for victims and its impact on reconciliation should accordingly be considered, also bearing in mind that victims of uncharged crimes will not be able to participate.

Concerning the tension between the rights of the accused and broad participation of victims, article 68 (3) clearly establishes that victims may present their views and concerns 'in a manner not prejudicial to or inconsistent with the rights of the accused'. Moreover, this provision does not require an actual conflict and, accordingly, it may be argued that the existence of a mere risk is sufficient.²⁸³⁵ The right to a fair trial may be considered as the most affected in the context of quite a broad participatory status of victims. It should be borne in

²⁸³² Van den Wyngaert (2011) 494.

²⁸³³ See American University Washington College of Law, War Crimes Research Office, Victim Participation at the Case Stage of Proceedings (2008) 50-51.

²⁸³⁴ Charles Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 Michigan Journal of International Law 777, 822.

²⁸³⁵ Zappalà (2010) 143.

mind that whilst victims enjoy several rights under international law, not necessarily all of them fully implemented at the ICC, they cannot claim an identical content of rights that are granted, under the ICC Statute, to the accused, in particular the right to a fair trial, since 'it is precisely this cluster of rights which embody the notion of a fair trial'.²⁸³⁶ That and others rights of the accused including the right to an expeditious trial, i.e., 'To be tried without undue delay',²⁸³⁷ or the presumption of innocence,²⁸³⁸ are directly or at least indirectly affected by excessively broad victim participation. In particular, permitting victim participants to submit and challenge evidence could in practice mean for the accused to face more than one accuser, i.e., to transform victim participants in *de facto* auxiliary or parallel prosecutors. A necessary and fine balance is required; however, this, as acknowledged by ICC Judge Van den Wyngaert, is not an easy task as 'victims are not neutral and forcing them to act as if they were risks alienating them from the proceedings'.²⁸³⁹

With regard to benefits that a broad participation regime supposedly reports to victim participants, attention should be drawn to some counter-arguments. First, some empirical studies have concluded that not necessarily victims who actively participate in criminal proceedings meet their expectations or even they may fall in disillusionment.²⁸⁴⁰ Additionally, other studies suggest that victims may obtain positive experiences even in criminal justice systems when they hold a more passive role.²⁸⁴¹ Therefore, treating victims before the ICC as if they were (quasi) civil parties should not be automatically taken as a better guarantee for their satisfaction and as a better manifestation of restorative-oriented justice approach. Second, besides the right to reparations, it has been said that one of the most important victims' rights in (international) criminal courts is the right to receive information,²⁸⁴² and the fact of being notified has made victims feel that they have an opportunity to express their views and

²⁸³⁶ Ibid., 149.

²⁸³⁷ ICC Statute, article 67 (1) (c).

²⁸³⁸ See Ibid., article 66.

²⁸³⁹ Van den Wyngaert (2011) 488.

²⁸⁴⁰ See Mina Rauschenbach and Damien Scalia 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 International Review of the Red Cross 441, 444-447; Andrew Sanders, Carolyn Hoyle, Rod Morgan and Ed Cape, 'Victim Impact Statements: Don't Work, Can't Work' (2001) Criminal Law Review 437-458.

²⁸⁴¹ See, e.g., Edna Erez, 'Victim Voice, Impact Statements and Sentence: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 Criminal Law Bulletin 483; Dean Kilpatrick, David Beatty and Susan Smith Howley, The Rights of Crime Victims-Does Legal Protection Make a Difference? (USA National Institute of Justice 1998).

²⁸⁴² American University Washington College of Law, War Crimes Research Office (2008) 39.

concerns. This is connected with the notion whereby victims tend to be more satisfied with the criminal justice system provided that they feel that their voices have been heard and also when they have been treated with respect to avoid secondary victimization.

The above-mentioned point does not necessarily mean that they seek ‘a role in the adjudication of their cases’.²⁸⁴³ In other words, the decision by Trial Chamber I to grant participation rights beyond what the ICC legal framework establishes and in potential detriment of the rights of the accused and the ICC’s efficiency does not seem in principle to be justified by a need to strengthen victims’ status in accordance with a restorative-oriented justice approach. It is considered, hence, that it may not have been completely necessary to go much further than the victim participants’ rights (explicitly) granted by the ICC Statute and RPE in what may have been a well-intentioned but misunderstood application of a restorative- oriented justice approach.

Having said so, the broad modalities of participation as interpreted by the ICC Chambers, especially leading and challenging evidence, can be justified by invoking the right to truth, i.e., surviving victims’ right and/or the right of the next of kin to know the truth about crimes. As previously discussed,²⁸⁴⁴ this right is recognized in international human rights law and by the ICC itself,²⁸⁴⁵ and is coherent with restorative-oriented justice and the holistic transitional justice approaches.²⁸⁴⁶ Moreover, the ICC Trial Chambers, when expanding the victim participants’ modalities of participation/procedural rights and in particular those modalities/rights not explicitly contained under the ICC legal instruments and/or modalities/rights regarded as more ‘contentious’, have grounded their decision precisely on the assistance that victim participants can provide to the ICC’s role to determine the truth in trials. Considering that victims are those who first-hand experienced and have knowledge of the specific circumstances of the case, a strengthened participation regime may result in a helpful assistance to Judges by providing insiders’ details and, thus, victims also contribute to the ICC’s most important aim, i.e., the fight against impunity in the context of the most serious international crimes.

²⁸⁴³ Strang and Sherman (2003) 24.

²⁸⁴⁴ See *supra* Chapter II 2.4.3.

²⁸⁴⁵ See respectively UN Basic Principles and Guidelines, principle 22 (b); IACtHR, *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C No. 75, paras. 47-49; ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment, 10 May 2001, para. 156; and *Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-474), 13 May 2008, paras. 34-36.

²⁸⁴⁶ See respectively Dermot Groom, ‘The Right to Truth in the Fight Against Impunity’ (2011) 29 *Berkeley Journal of International Law* 175, 187, 189 (2011); and ICTJ (2009) 1.

What is also pivotal, as has seemingly been so far the ICC Chambers' practice is that, for example, before granting a request to leading and challenging evidence, limitations under articles 68 (3) and 69 (3) must be taken into account as well as the need for a fair and expeditious trial with total respect for the accused's rights, which includes the right to have adequate time and facilities for defence preparation.²⁸⁴⁷ Be that as it may, approaches that provide better chances to fully guarantee the accused's right to a fair and impartial trial such as the one adopted by Trial Chamber II in *Katanga* and *Ngudjolo Chui*, presented when discussing the modalities of participation/procedural rights, that consisted in tendering and challenging evidence, questioning witnesses about the accused's guilt, and victim participants' attendance at/participation in *ex parte* hearings, should in principle be preferred over the more pro-victim oriented approach adopted especially by Trial Chamber I in *Lubanga*. This could arguably decrease the risk at breaching accused's rights and increase the likelihood of conducting a trial in an efficient manner.

4.4. The ECCC and the STL

4.4.1. Modalities of Participation/Procedural Rights

4.4.1.1. The ECCC

With regard to the ECCC, a large number of the modalities of participation/procedural rights to which civil parties are entitled during trial are stated in the ECCC Internal Rules. This is beneficial for the parties as they know those modalities/rights in advance, which contributes to legal certainty, and also allowed the Trial Chamber not to spend a big deal of resources and time on crafting the modalities of participation/procedural rights. Civil parties in general hold the right to participate in trial proceedings as indicated in rule 23 (1) (a) 'The purpose of Civil Party action before the ECCC is to a) Participate in criminal proceedings [i.e., trial proceedings included]; and b) Seek collective and moral reparations' and identified by the Supreme Court Chamber in *Duch*.²⁸⁴⁸ As pointed out in the Trial and the Supreme Court Chambers judgments:

Civil Party participation before the ECCC includes both a right for victims to participate as parties in the criminal trial of an Accused in support of the

²⁸⁴⁷ See *Katanga and Ngudjolo* (ICC-01/04-01/07-2288), 16 July 2010, paras. 43-48.

²⁸⁴⁸ *Kaing Guek Eav alias Duch* (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (ix).

Prosecution and to pursue a related civil action for collective and moral reparations against an Accused [...].²⁸⁴⁹

Victims' status as reparations claimants is in detailed examined in the next chapter. In any case, the precise scope of some of the civil parties' modalities of participation/procedural rights has been sharpened by the ECCC's case law. Civil parties' modalities of participation/procedural rights are examined as follows.

First, civil parties have the right to be represented by lawyers according to a previous version of the ECCC Internal Rules.²⁸⁵⁰ This was later amended and actually transformed in a sort of requirement as 'From the issuance of the Closing Order onwards, in order to participate in proceedings, Civil Parties shall at all times be represented by a Civil Party lawyer'.²⁸⁵¹ Accordingly, civil parties' participation/procedural rights during trial are exercised via their legal counsels. Moreover, civil parties have the right to be questioned in presence of their lawyers.²⁸⁵² In *Duch*, there were a total of 93 civil parties who participated in the trial proceedings, organized themselves into four groups and each represented by their own counsels.²⁸⁵³ 22 civil parties were heard before the Chamber during the course of trial.²⁸⁵⁴ The number of civil parties participating in the proceedings was low in comparison to *Nuon Chea et al.* and, thus, there was no need for forced grouping of civil parties. However, the trial proceedings in *Duch* presented difficulties to handle the representation of civil parties.

Estimating a much higher number of civil parties in *Nuon Chea et al.*, the ECCC Internal Rules were modified to provide for that:

Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as described in IR [Internal Rules] 12 *ter*. The Civil Party Lead Co-Lawyers are

²⁸⁴⁹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 660; Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 639.

²⁸⁵⁰ ECCC Internal Rules, rules 23 (7) and 83 (1) (Rev. 3). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (ii).

²⁸⁵¹ ECCC Internal Rules, rule 23 *ter* 1.

²⁸⁵² See *Ibid.*, rule 23 (4).

²⁸⁵³ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 637.

²⁸⁵⁴ *Ibid.*, Loc. cit.

supported by the Civil Party Lawyers described in IR 12 *ter* (3). Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations.²⁸⁵⁵

Thus, as referred to by Trial Chamber in *Nuon Chea et al.*, under this amended provision applicable to this case, and sub-sequent cases:

[...] Civil Parties no longer participate individually on the basis of their particular harm suffered, but instead comprise a consolidated group whose collective interests are represented by the Civil Party Lead Co-Lawyers during the trial stage and beyond.²⁸⁵⁶

It must be mentioned that the civil parties' lead co-lawyers are selected by the ECCC,²⁸⁵⁷ which is in principle detrimental of civil parties' right to freely choose their legal representatives.

The idea of balancing different converging interests at trial is captured under internal rule 12 *ter* (1) 'The Civil Party Lead Co-Lawyers shall ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context'.²⁸⁵⁸ In turn, internal rule 12 *ter* (3), referred to in internal rule 23 (3), reads as follows:

The Civil Party Lead Co-Lawyers shall first and foremost seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial. Internal procedures shall be developed by the Civil Party Lead Co-Lawyers, in consultation with Civil Party Lawyers, for this purpose.²⁸⁵⁹

The requirement explicitly stating that civil parties' lead co-lawyers shall seek the views from the civil parties' lawyers to coordinate the representation of

²⁸⁵⁵ ECCC Internal Rules, rule 23 (3) (Rev. 6). The current version of this rule has maintained the quoted text.

²⁸⁵⁶ *Nuon Chea et al.* (Case 002), Severance Order Pursuant to Internal Rule 89*ter*, E/124, 22 September 2011, para. 8.

²⁸⁵⁷ ECCC Internal Rules, rule 12 *ter* 4.

²⁸⁵⁸ See also *Ibid.*, rule 23 *ter* (2). ('The Civil Party Lead Co-Lawyers derive their powers from these IRs. They shall be obliged to promote justice and the fair and effective conduct of proceedings').

²⁸⁵⁹ See also *Ibid.*, rule 12 *ter* (5) ('The core functions of the Civil Party Lead Co-Lawyers shall include: a. Representing the interests of the consolidated group of Civil Parties, as outlined in IR [Internal Rule] 23(1) and (2); and b. Ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond').

civil parties is necessary in order not to weaken the autonomous status of victims as civil parties during trial. Additionally, the presence of lead co-lawyers in principle offers better chances for avoiding repetitions and unwarranted delays during trial since those legal counsels hold the responsibility to make filings and submissions representing the civil parties. Having said so, the referred compulsory coordination triggers two important disadvantages, which concern civil parties' right to be represented by lawyers selected by them and the ever-present difference in civil parties' interests. Concerning the latter, it should be borne in mind that not only is each individual's story separate and different from each other but also, as identified in a empirical-legal study on the civil parties at the ECCC, 'even victims who have suffered a similar plight in the same site subscribe to very different values, and have very different identities, views and desires for vindication'.²⁸⁶⁰ Therefore, the amended/new rules present the drawback that individual civil parties' ability to communicate with the Chambers, even via their own lawyers, is in principle substantially reduced, especially in cases with a large number of victims.²⁸⁶¹

Unlike the ICC RPE, the ECCC Internal Rules 'do not explicitly address victims' fears that their individual interests will be subjugated in the interest of the common consolidated group during trial'.²⁸⁶² Indeed internal rule 12 *ter* (6) only refers to the consolidated group's interests:

The Civil Party Lawyers shall endeavour to support the Civil Party Lead Co-Lawyers in the representation of the interests of the consolidated group. Such support may include oral and written submissions, examination of their clients and witnesses and other procedural actions.

In *Duch*, it was not necessary to forced grouping due to the number of civil parties (93) participating in trial and, thus, each civil party chose his/her own legal team based on advice from the VSS or Cambodian NGOs.²⁸⁶³ In application of the amended ECCC Internal Rules, all civil parties in *Nuon Chea et al.*, are under a single, consolidated group represented by lead co-lawyers who

²⁸⁶⁰ Mohan (2009) 762. See also McGonigle Leyh (2011) 218.

²⁸⁶¹ Susana SáCouto, 'Victims Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18 Michigan Journal of Gender and Law 297, 327.

²⁸⁶² Alain Werner and Daniella Rudy, 'Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?' (2010) 8 Northwestern University Journal of International Human Rights Law 301, 305.

²⁸⁶³ McGonigle Leyh (2011) 217.

are supported by civil parties' lawyers. Concerning civil parties' lawyers, civil parties 'may form groups and choose to be represented by a common lawyer'; however, the Trial Chamber can also take the decision to group civil parties and organize them under common representation if the interests of justice so require.²⁸⁶⁴ When selecting common lawyers, the Trial Chamber and the VSS 'shall take all reasonable steps to ensure that [...] the distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided'.

Second, the civil party is entitled to exercise the right of audience.²⁸⁶⁵ According to internal rule 91 (1), the Trial Chamber 'shall hear civil parties', i.e., the right of audience.²⁸⁶⁶ In *Duch*, civil parties were seated in the witness box and the accused was sitting no more than two meters from the civil parties, i.e., civil parties by turning slightly to their right could look directly at the accused.²⁸⁶⁷ In *Nuon Chea et al.*, the Supreme Court Chamber concluded that when the Trial Chamber decided to sever this case without having invited the parties' submissions (civil parties' submissions included) violated the parties' right to be heard.²⁸⁶⁸ It also noticed a violation of the right to be heard of the civil parties' lead co-lawyers following the Trial Chamber's acknowledgment of the lead co-lawyers' request for reconsideration of the severance order within its decision on reconsideration but without having specifically addressed their particular arguments.²⁸⁶⁹ These points were addressed by the Trial Chamber through

²⁸⁶⁴ ECCC Internal rules, rule 23 *ter* (3). Nevertheless, these powers have not been used fully in practice. See Christoph Sperfeldt, 'From the Margins of Internationalized Criminal Justice. Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 *Journal of International Criminal Justice* 1111, 1119.

²⁸⁶⁵ ECCC Internal Rules, rules 88 (1) ('The Greffier of the Chamber shall call the Accused, Civil Parties, witnesses and experts and verify their identity. Each party shall sit at their designated place in the courtroom'), and 91 (1) ('The Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful'). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xiv).

²⁸⁶⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xiv).

²⁸⁶⁷ See Eric Stover, Mychelle Balthazard and Alexa Koeing, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of the Cambodia' (2011) 93 *International Review of the Red Cross* 503, 526.

²⁸⁶⁸ Nuon Chea et al. (Case 002), Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, Supreme Court Chamber, 8 February 2013, para. 44.

²⁸⁶⁹ *Ibid.*, footnote 10.

hearings on the issue of severance,²⁸⁷⁰ which is found herein as a necessary step to fully respect the civil party's right of audience.

Third, related to the previous right, civil parties can provide unsworn testimony during trial proceedings.²⁸⁷¹ In *Duch*, 22 civil parties provided evidence before the Trial Chamber.²⁸⁷² As previously discussed,²⁸⁷³ it is important to recall herein that victims once became civil parties, in application of the Internal Rules,²⁸⁷⁴ considered by the Trial Chamber in *Duch*, were no longer questioned as witnesses and, hence, were exempted from the requirement to testify under an oath or affirmation.²⁸⁷⁵ Thus, for example, following requests by the civil parties to be heard at trial, the Trial Chamber agreed to hear 7 civil parties, allegedly former S-21 detainees during the trial section corresponding to the functioning of the S-21 detention centre.²⁸⁷⁶ Other 15 civil parties were heard later on,²⁸⁷⁷ making up a total of 22 civil parties heard. Direct victims, i.e., survivors of the S-21 detention centre, were first heard and then indirect victims, who had the opportunity to tell their stories and express their sorrow for the loss of their next of kin.²⁸⁷⁸ Civil parties expressed, when interviewed, that their motivations were their desire to achieve justice not only for themselves but also for their families and dead relatives.²⁸⁷⁹ Civil parties 'grounded their need to

²⁸⁷⁰ Nuon Chea et al. (Case 002), Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, Trial Chamber, 26 April 2013, paras. 41-47.

²⁸⁷¹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 52-54.

²⁸⁷² *Ibid.*, para. 54. See also, Kaing Guek Eav alias Duch (Case 001), Direction on the Scheduling of the Trial, Trial Chamber. 20 March 2009.

²⁸⁷³ See *supra* Chapter III 2.4.2.1.

²⁸⁷⁴ ECCC Internal Rules, rule 23 (4). See also ECCC Internal Rules, rule 23 (3) (a) (Rev. 5); ECCC Internal Rules, rule 23 (6) (Rev. 3).

²⁸⁷⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 54.

²⁸⁷⁶ *Ibid.*, *Loc. cit.* See also, Kaing Guek Eav alias Duch (Case 001), Decision Concerning the Scheduling of the Hearing of Civil Parties During the Substantive Hearing, E57, Trial Chamber, 30 April 2009. It should be mentioned that although 28 civil parties initially requested to be heard, this number was later reduced to 22 after 6 civil parties declined or were unavailable to be heard by the Trial Chamber.

²⁸⁷⁷ These 15 civil parties were heard between 17 and 24 August 2009. See Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, Annex I: Procedural History, para. 12. See also, Kaing Guek Eav alias Duch (Case 001), Transcripts, 06 July 2009, 11-12 August 2009, 18 August 2009, 20 August 2009 and 24 August 2009, Comprising Documents E1/43, E1/61, E1/64, E1/66 and E1/67; Transcripts, 17-20 August 2009 and 24 August 2009, Comprising Documents E1/63 to E/67.

²⁸⁷⁸ McGonigle Leyh (2011) 215.

²⁸⁷⁹ Stover Balthazard and Koeing (2011) 520. See also Phuong Pham et al., 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 *Journal of Human Rights Practice* 264, 275.

testify in personal and intrinsic terms rather than in feeling a responsibility to perform a universal good for all Cambodians or all humanity, although such sentiments were not completely absent'.²⁸⁸⁰

As a consequence of problems such as lack of understanding and problems of recollection of what happened three decades ago, some statements contradicted some of those previously given and also civil parties exceeded their time; however, the Trial Chamber showed flexibility as civil parties' testimonies were allowed to continue beyond the time originally allocated.²⁸⁸¹ Some civil parties could tell their stories in a narrative form; however, the Trial Chamber continuously interrupted them to answer questions.²⁸⁸² Moreover, the defense questioned aggressively the civil parties sometimes, which made the civil parties' lawyers request the Judges to remind the defense to show more respect.²⁸⁸³

During the trial in *Duch*, it became clear that the civil parties needed better preparation. Indeed, several civil parties' lawyers had not expected their clients to be examined and cross-examined like witnesses, and therefore were not prepared for the scrutiny.²⁸⁸⁴ Having said so, in interviews of the civil parties who participated in *Duch*, the vast majority of them said that the actual experience of testifying largely exceeded their expectations to the point that testifying constituted the most important part of their participation as civil parties.²⁸⁸⁵

In *Nuon Chea et al.*, the Trial Chamber has always distinguished between testimony on the facts at issue, which is restricted to the Case 002/01 scope, i.e., corresponding to the first mini-trial/trial within *Nuon Chea et al.*, as explained later,²⁸⁸⁶ subject to adversarial argument, and 'general statements of suffering, which the Civil Party can freely make at the conclusion of their testimony'.²⁸⁸⁷ Thus, the Chamber directed the civil parties' lead co-lawyers to structure the questioning of civil parties in a form that distinguishes between testimony on facts and statements pertaining to suffering,²⁸⁸⁸ assist civil parties in the preparation of their statements of suffering to discourage new allegations against

²⁸⁸⁰ Stover Balthazard and Koeing (2011) 520.

²⁸⁸¹ McGonigle Leyh (2011) 215.

²⁸⁸² Kaing Guek Eav alias Duch (Case 001), Transcripts, 1 July 2009, pp. 22-24. Cited by McGonigle Leyh (2011) 215, footnote 294.

²⁸⁸³ Kaing Guek Eav alias Duch (Case 001), Transcripts, 13 July 2009, p. 62. Cited by McGonigle Leyh (2011) 216, footnote 301.

²⁸⁸⁴ Stover, Balthazard and Koeing (2011) 524.

²⁸⁸⁵ *Ibid.*, 535, 536. See also Pham et al. (2013) 284 ('[...] those who provided testimony also viewed that experience positively').

²⁸⁸⁶ See *infra* Chapter IV 4.4.2.1.

²⁸⁸⁷ *Nuon Chea et al.* (Case 002), 2 May 2013, para. 14.

²⁸⁸⁸ *Ibid.*, p. 10.

the accused, and to ensure that their statements of suffering are limited to the purpose for which they are intended.²⁸⁸⁹ Should a civil party's statement of suffering introduce new factual allegations, especially if considered inculpatory to the accused, an opportunity for adversarial challenge is given to the defence 'and may warrant the recall of the Civil Party for further examination'.²⁸⁹⁰

In the first trial within *Nuon Chea et al.*, 31 civil parties provided testimony concerning: i) historical background; ii) communication and administrative structures; and iii) population movements and the Tuol Po Chrey execution site; besides the impact on civil parties.²⁸⁹¹ Thus, civil parties testified about, *inter alia*, medical experiments and forced marriage,²⁸⁹² extremely harsh living conditions,²⁸⁹³ imprisonment,²⁸⁹⁴ and torture.²⁸⁹⁵ Their lawyers have commented on evidence introduced, orally responded to defence's objections and voiced their general support for the Prosecution.²⁸⁹⁶ In the first trial within *Nuon Chea et al.*, civil parties have put themselves to examination before the Trial Chamber and, as noticed by the civil parties' lead co-lawyers, 'have provided detailed, vivid and often startling testimonies on the crimes committed in Democratic Kampuchea and their impact on the population'.²⁸⁹⁷

Fourth, civil parties have the right to support the prosecution, as laid down explicitly under internal rule 23 (1) (a), which establishes that 'The purpose of Civil Party action before the ECCC is to: [...] Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution [...]'. This right was also noted by the Supreme Court Chamber in *Duch*.²⁸⁹⁸

With regard to the exercise of this right, the defence lawyer during the trial in *Duch* sustained that questioning of witnesses by civil parties should be limited to aspects relevant for reparations and harm suffered as existent in many

²⁸⁸⁹ Ibid., paras. 17 and 18.

²⁸⁹⁰ Ibid., para. 19.

²⁸⁹¹ Nuon Chea et al. (Case 002), Civil Parties Closing Brief to Case 002/01 With Confidential Annexes 1-4, Civil Parties' Lead Co-Lawyers, 26 September 2013, para. 7, footnote 4.

²⁸⁹² Nuon Chea et al. (Case 002), Transcripts, 23 August 2012 (testimony of civil party Em Oeun).

²⁸⁹³ Nuon Chea et al. (Case 002), Transcripts, 10 January 2012 (testimonies of Roman Yun and Klan Fit).

²⁸⁹⁴ Nuon Chea et al. (Case 002), Transcripts, 7 December 2011 (testimony of Roman Yun).

²⁸⁹⁵ Nuon Chea et al. (Case 002), Transcripts, 4 June 2013 (testimony of Seng Sivutha); Nuon Chea et al. (Case 002), Transcripts, 30 May 2013 (testimony of Yin Roum Doul).

²⁸⁹⁶ Nuon Chea et al. (Case 002), Transcripts, 19 January 2012.

²⁸⁹⁷ Nuon Chea et al. (Case 002), 26 September 2013, para. 7.

²⁸⁹⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (vii).

national systems, including the French system, as the civil parties cannot become second prosecutors.²⁸⁹⁹ Thus, in *Duch*, a defence counsel quoting some French procedural textbooks argued that the civil parties' role is limited to defend their own positions and interests in connection with their own suffering and to the damage inflicted on them but not putting them in charge of prosecution.²⁹⁰⁰ Nevertheless, the Trial Chamber rejected this argumentation and based on rule 23 (1) stated that 'The Chamber allows the questionings of the civil parties' lawyers in order to support the alleged prosecution',²⁹⁰¹ but subject to some limits, as discussed later in this same sub-section. Accordingly, the civil party's procedural right to/modality of participation of tendering evidentiary material to help in the determination of the accused's guilt was confirmed and, therefore, the civil party's status was in this particular point enhanced. However, as the Trial Chamber left clear in *Duch*, the civil party's right to support the prosecution does not transform him/her in additional Prosecutors:

The Chamber considers that the Accused's right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while, the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.

Each party has a distinct role, in keeping with their particular interests and responsibilities at trial.²⁹⁰²

Although the civil parties' interests mainly concern the pursuit of reparations, criminal conviction is a pre-requisite thereof.²⁹⁰³ Accordingly, civil parties have an interest in the trial establishing the elements of the crime which, if proven, constitute the basis of their civil claims and, hence, civil parties have the right to support the prosecution to establish accused's criminal liability.²⁹⁰⁴ Additionally, since the overall goal is to determine the truth, all parties may

²⁸⁹⁹ Kaing Guek Eav alias Duch (Case 001), Transcripts, 22 June 2009, p. 92. Referred to by McGonigle Leyh (2011) 194, footnote 154.

²⁹⁰⁰ Kaing Guek Eav alias Duch (Case 001), Transcripts, 22 June 2009, pp. 94-96. Referred to by McGonigle Leyh (2011) 194, footnote 155.

²⁹⁰¹ Kaing Guek Eav alias Duch (Case 001), Transcripts, 22 June 2009, p. 98, lines 11 and 12.

²⁹⁰² Kaing Guek Eav alias Duch (Case 001), Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Trial Chamber, 9 October 2009, paras. 26 and 27.

²⁹⁰³ Ibid., para. 33.

²⁹⁰⁴ Ibid., Loc. cit.

assist on this.²⁹⁰⁵ In the particular case of the civil parties, who hold a fundamental interest in obtaining reparations, establishing the truth is limited to facts or evidence relevant to establish accused's criminal liability,²⁹⁰⁶ and thus they have the right to assist the Prosecution, who has to prove the accused's guilt, in establishing the truth.²⁹⁰⁷

Civil parties' lawyers in *Duch* in several times opposed the Prosecution directly or put forward their own theory of the case resulting in delays of the proceedings, and about that the defence lawyer argued that civil parties' lawyers were acting as substitute Prosecutors and, hence, jeopardizing the equality of arms.²⁹⁰⁸ The Trial Chamber concluded that even though civil parties hold the right to assist or support the Co-Prosecutors, they are not granted with 'a general right of equal participation with the Co-Prosecutor'.²⁹⁰⁹

In *Nuon Chea et al.*, civil parties' support of the Prosecution has been given when, for example, the Co-Prosecutors' motions requesting the Trial Chamber to consider joint criminal enterprise (JCE-III, the so-called extended form of joint criminal enterprise) as an alternative mode of liability,²⁹¹⁰ were supported by a brief filed by the civil parties' lead co-lawyers.²⁹¹¹ The Trial Chamber rejected the Co-Prosecutors' motions as JCE III was considered neither to be part of customary international law nor to be a general principle of law at the time when the crimes took place (1975-1979),²⁹¹² following ECCC's previous jurisprudence.²⁹¹³ Nevertheless, this example illustrates the importance and scope

²⁹⁰⁵ Ibid., para. 34.

²⁹⁰⁶ Ibid., Loc. cit.

²⁹⁰⁷ Ibid., para. 41.

²⁹⁰⁸ Stover, Balthazard and Koeing (2011) 523; Khmer Rouge Trial Monitor, Reports No. 7 (week ending 31 May 2009), No. 9 (week ending 21 June 2009), and No. 21 (week ending 21 September 2009).

²⁹⁰⁹ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 25.

²⁹¹⁰ Nuon Chea et al. (Case 002), Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, Co-Prosecutors, 17 June 2011.

²⁹¹¹ Nuon Chea et al. (Case 002), Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability, Civil Parties' Lead Co-Lawyers, 22 July 2011.

²⁹¹² Nuon Chea et al. (Case 002), Decision on the Applicability of Joint Criminal Enterprise, Trial Chamber, 12 September 2011, paras. 23-35.

²⁹¹³ Nuon Chea et al. (Case 002), Decision on the Appeals Against the Co-Investigative Judges Order On Joint Criminal Enterprise, Pre-Trial Chamber, 20 May 2010, paras. 78-82. See also Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 511-513 (finding that JCE-I and JCE-II were already part of customary international law when the crimes were committed (1975-1979). The judgment in *Duch* did not rule on the applicability of JCE III, which was inapplicable in that case).

of this civil parties' modality of participation/procedural right, which goes to the very core of the legal issues at stake in trial, i.e., the determination of what mode of liability should be used to attribute criminal responsibility to the accused. Be that as it may be, this civil parties' modality of participation/procedural right and, in general, concerning their participation during trial should exclude interventions not connected with the charges against the accused or when they do not (meaningfully) contribute to the determination of the truth.

Fifth, in close connection with the civil parties' support of the Prosecution, civil parties may question the accused,²⁹¹⁴ and witnesses.²⁹¹⁵ Concerning questioning of the accused:

The Co-Prosecutors and all the other parties and their lawyers shall also have the right to question the Accused. All questions shall be asked with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber and in the order as determined by him.²⁹¹⁶

The Trial Chamber has set some necessary guidelines to exercise the civil parties' right to questioning, paying particular attention to the situation of the accused and the efficient conduct of the trial proceedings:

[...] first, try to avoid repetitive questions which has already been raised and asked by the Co-Prosecutors. There is no need to recall the questions by other parties which were already posed.

The second point is try to avoid a very long-winded question, otherwise the accused will be confused [...].

Third, try to avoid questions which are not related to the current fact that is being before the Chamber [...].²⁹¹⁷

It should be mentioned that even though civil parties have a right to be heard by the Chambers,²⁹¹⁸ under internal rule 91 (2):

²⁹¹⁴ ECCC Internal Rules, rule 90 (2). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xiii).

²⁹¹⁵ ECCC Internal Rules, rule 91 (2).

²⁹¹⁶ Ibid., rule 90 (2).

²⁹¹⁷ Kaing Guek Eav alias Duch (Case 001), Transcripts, 22 June 2009, p. 98, lines 13-16, 18-19, 21-22.

²⁹¹⁸ ECCC Internal Rules, rule 91 (1) ('The Chamber shall hear the Civil Parties [...]').

The Judges may ask any questions and the Co-Prosecutors and all the other parties [civil parties included] and their lawyers shall also be allowed to ask questions with the permission of the President. Except for questions asked by the Judges, the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber.

In *Duch*, the questioning was sometimes emotional, especially when the civil parties looked for answers concerning their next of kin,²⁹¹⁹ which can be related to civil parties' quest for justice.²⁹²⁰ Additionally, civil parties posed questions which were clearly not connected to the matters and, thus, the Chamber requested to ask relevant questions.²⁹²¹ Furthermore, repetitive questions were often, thus delaying the proceedings and affecting the accused's right to an expeditious trial. Indeed, few weeks after the trial began in *Duch*, allowing each party (every civil party group included) to pose unlimited questions to both witnesses and the accused was remarkably lengthening the duration of the proceedings.²⁹²²

All this situation was faced by the Trial Chamber in *Duch* by setting new time limits, i.e., whereas the civil parties in total were granted as much time as the defense, the Co-Prosecutors were granted a slightly lower amount of time although they carry the burden of proof.²⁹²³ In some other occasions, the defence was given slightly more time than that allocated to the Prosecution and civil parties together but never as much as the two combined.²⁹²⁴ Even though the speed of the trial proceedings saw a significant increase, the adherence to the time limits impacted the trial significantly as, e.g., giving a civil party team 10 minutes to question a victim-witness alongside important translation issues led to civil party lawyers' inability to conduct a full examination of witnesses.²⁹²⁵ This arguably corresponded to the Trial Chamber's restrictive interpretation of the scope of civil parties' procedural rights.²⁹²⁶ Actually, the limits to time for questions did not provide a meaningful reduction of repetitive questioning of civil parties *vis-à-vis* the Co-Prosecutors and also civil parties *vis-à-vis* civil

²⁹¹⁹ McGonigle Leyh (2011) 208.

²⁹²⁰ Stover Balthazard and Koeing (2011) 519-521.

²⁹²¹ Kaing Guek Eav alias Duch (Case 001), Transcripts, 29 June 2009, pp. 88-90. Cited by McGonigle Leyh (2011) 209, footnote 245.

²⁹²² See Werner and Rudy (2010) 304.

²⁹²³ McGonigle Leyh (2011) 209-210.

²⁹²⁴ *Ibid.*, Loc. cit.

²⁹²⁵ *Ibid.*, 211.

²⁹²⁶ See Stover Balthazard and Koeing (2011) 523.

parties.²⁹²⁷ The lawyers of civil parties could question expert witnesses, and also contest expert witnesses' assertions.²⁹²⁸ Although civil parties' lawyers questioning normally reinforced the Co-Prosecutors' argumentation, there were some few incidents which actually undermine its strength.²⁹²⁹ Thus, as previously said, civil parties several times pushed their own theory of the case or even opposed the Co-Prosecutors.²⁹³⁰ The Trial Chamber in *Duch* permitted the civil party to ask some questions to Duch via the President of the Chamber, allowing some exchange, which constituted quite a remarkable trial highlight.²⁹³¹

In *Nuon Chea et al.*, the civil parties' lawyers have conducted questioning of, for example, a witness whose testimony focused on communication under the Khmer Rouge regime;²⁹³² an expert witness's testimony on one of the co-accused's (Ieng Thirith) fitness to stand trial;²⁹³³ a witness testifying about disappearances;²⁹³⁴ Duch, in this case as a Prosecution witness, about the connection between the co-accused (Khmer Rouge leaders) and the crimes committed in the S-21 detention centre,²⁹³⁵ and a witness, a former soldier and investigator into the atrocities during the Khmer Rouge regime.²⁹³⁶

Sixth, the civil party has the right to propose witnesses to be called by the Trial Chamber:

[...] the Chamber shall consider the lists of potential witnesses and experts submitted by the parties in accordance with these IRs [Internal Rules]. Where the Chamber considers that the hearing of a proposed witness or expert would not be conducive to the good administration of justice, it shall reject the request that such person be summoned.²⁹³⁷

²⁹²⁷ McGonigle Leyh (2011) 211.

²⁹²⁸ *Ibid.*, 211-212.

²⁹²⁹ *Ibid.*, 212.

²⁹³⁰ Stover Balthazard and Koeing (2011) 523.

²⁹³¹ Kaing Guek Eav alias Duch (Case 001), Transcripts, 1 July 2009, testimony of Bou Meng; Kaing Guek Eav alias Duch (Case 001), Transcripts, 13 July 2009, testimony of Nam Mon. Cited by McGonigle Leyh (2011) 213, footnote 271.

²⁹³² Nuon Chea et al. (Case 002), Transcripts, 4 September 2012, p. 24, line 23-p. 60, line 4.

²⁹³³ Nuon Chea et al. (Case 002), Transcripts, 30 August 2012 (testimony of Dr. Chak Tida).

²⁹³⁴ Nuon Chea et al. (Case 002), Transcripts, 30 July 2012 (testimony of witness Rochoem Ton).

²⁹³⁵ Nuon Chea et al. (Case 002), Transcripts, 2 April 2012 (testimony of Duch); Nuon Chea et al. (Case 002), Transcripts, 3 April 2012, (testimony of Duch).

²⁹³⁶ Nuon Chea et al. (Case 002), Transcripts, 4 July 2013 (testimony of Sum Alatt).

²⁹³⁷ ECCC Internal Rules, rule 80 *bis* (2). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (x).

When the consolidated group of victims wishes to summon any witnesses not included on the Co-Prosecutors' list, they shall submit an additional list.²⁹³⁸ Civil parties can also request the Trial Chamber to summon new witnesses during trial.²⁹³⁹ The risk concerning proposed witnesses is that they may not fit the Prosecutor's case, leading to confusion, and thus the Chamber has to decide what proposed witnesses are called, i.e., the Chamber and not the parties call the proposed witnesses.²⁹⁴⁰ In *Duch*, the Trial Chamber was reluctant to entertain witnesses proposed by civil parties (including an expert witness on reparations options) and, thus, the Chamber out of the civil parties' proposed witnesses was willing to accept two expert witnesses to testify about trauma but only one of these two expert witnesses testified.²⁹⁴¹ In *Nuon Chea et al.*, testimony of witnesses brought and examined by the civil parties' lawyers has sometimes been strongly emotional.²⁹⁴²

Seventh, the civil party holds the right to respond to preliminary objections.²⁹⁴³ These preliminary objections concern: i) the jurisdiction of the chamber; ii) any issue that requires termination of the Prosecution; and iii) nullity of procedural acts made after the indictment is filed.²⁹⁴⁴ For example, in *Nuon Chea et al.*, opportunity was given to the civil parties to respond to the defence preliminary objections concerning statute of limitations on domestic crimes,²⁹⁴⁵ and a preliminary objection alleging the unconstitutional character of the ECCC Internal Rules.²⁹⁴⁶ In *Nuon Chea et al.*, civil parties' lead co-lawyers

²⁹³⁸ ECCC Internal Rules, rule 80 (2).

²⁹³⁹ ECCC Internal Rules, rule 87 (4).

²⁹⁴⁰ McGonigle Leyh (2011) 207.

²⁹⁴¹ *Ibid.*, 207-208.

²⁹⁴² See, e.g., *Nuon Chea et al.* (Case 002), Transcripts, 9 August 2012, testimony of witness Ong Thong Hoeung.

²⁹⁴³ ECCC Internal Rules, rule 89 (2). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xii).

²⁹⁴⁴ ECCC Internal Rules, rule 89 (1).

²⁹⁴⁵ *Nuon Chea et al.* (Case 002), Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Courts), Trial Chamber, 22 September 2011, para. 4; *Nuon Chea et al.* (Case 002), Agenda for Initial Hearing, Trial Chamber, 14 June 2011; *Nuon Chea et al.* (Case 002), Transcripts, 29 June 2011 (Initial Hearing), E1/6.1, pp. 18.

²⁹⁴⁶ *Nuon Chea et al.* (Case 002), Decision on *Nuon Chea's* Preliminary Objections Alleging the Unconstitutional Character of the ECCC Internal Rules, Trial Chamber, 8 August 2011, para. 4; *Nuon Chea et al.* (Case 002), Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections, 7 March 2011, para. 32.

also requested (and were granted) an extension of time to respond one of the co-accused's preliminary objections.²⁹⁴⁷

Eighth, the civil party can make written submissions.²⁹⁴⁸ For example, the civil parties' co-lawyers in *Duch* presented rebuttal statements;²⁹⁴⁹ and civil parties filed submissions on forms of collective and moral reparations sought from the accused.²⁹⁵⁰ In *Nuon Chea et al.*, for instance, civil parties' lead co-lawyers filed responses to accused's objections to written statement admissibility.²⁹⁵¹

Ninth, the civil parties may examine the case file through their lawyers.²⁹⁵²

Tenth, the civil party has the right to make closing statements.²⁹⁵³ Civil parties' lead co-lawyers may make rebuttal statements,²⁹⁵⁴ however, in any case 'the accused and his or her lawyers shall always be entitled to make the final statement'.²⁹⁵⁵

Eleventh, civil parties can tender written evidence. For example, in *Nuon Chea et al.*, among all civil party applications, the lead co-lawyers specified which statements they sought to have placed into evidence in order to permit adversarial argument in relation to them.²⁹⁵⁶ In the first trial within *Nuon Chea et*

²⁹⁴⁷ Nuon Chea et al. (Case 002), Decision on Civil Party Lead Co-Lawyers' Request for Extension of Time, Trial Chamber, 9 June 2011, p. 2.

²⁹⁴⁸ ECCC Internal Rules, rule 92. See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xv).

²⁹⁴⁹ Kaing Guek Eav alias Duch (Case 001), Written Record of Proceedings – 26 and 27 November 2009, documents E1/81 and E1/82.

²⁹⁵⁰ Kaing Guek Eav alias Duch (Case 001), Civil Parties' Co-Lawyers' Joint Submission on Reparations, E159/3, 17 September 2009; Kaing Guek Eav alias Duch (Case 001), CPG3 –Mémoire Additionnel Concernant la Réparation, E159/3/1, 17 September 2009.

²⁹⁵¹ Nuon Chea et al. (Case 002), Lead Co-Lawyers' Consolidated Response to Defense Objections on the Admissibility of Written Statements in Lieu of Oral Testimony, E277/2, Civil Party Lead Co-Lawyers, 10 June 2013.

²⁹⁵² ECCC Internal Rules, rule 86.

²⁹⁵³ Ibid., rule 94 (1) (a). See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 488 (xvi).

²⁹⁵⁴ ECCC Internal Rules, rule 94 (2).

²⁹⁵⁵ Ibid., rule 94 (3).

²⁹⁵⁶ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Forthcoming Document Hearings and Response to Lead Co-Lawyers' Memorandum Concerning the Trial Chamber's Request to Identify Civil Party Applications for Use at Trial (E280/4) and KHIEU Samphan Defence Request to Revise Corroborative Evidence Lists (E223), Trial Chamber, 19 October 2012, para. 12.

al., i.e., case 002/01, 574 civil party documents were submitted to the Trial Chamber and admitted into evidence by it.²⁹⁵⁷

Participation of civil parties at the ECCC concerning submissions on sentencing, appeals and reparations are examined later.

4.4.1.2. The STL

With regard to the STL, since at the time of writing this thesis, the trial in the first STL case, *Ayyash et al.*, has not yet started, the analysis conducted herein is mainly of the STL RPE and, where applicable, of the STL Statute. In any case, the Trial Chamber in *Ayyash et al.* acknowledging that victims ‘are entitled to participate in the proceedings’,²⁹⁵⁸ added that:

The manner in which they exercise that right and participate is not specified in the Rules or the Statute. The Trial Chamber will have to decide how the victims will be allowed to participate through their legal representative [...] and his team. And we are very interested in hearing from [him] as to what his application will be, how he proposes, *what he proposes we do*, and when he’s going to file his application in respect of that [...] [emphasis added].²⁹⁵⁹

Accordingly, the victim participants’ legal representative filed their observations on victim participants’ modalities of participation at trial emphasizing that within the trial proceedings the fulfilment of the mandate of the victim participants’ legal representative ‘necessitates further and different modalities as well as a renewal of those permitted by the Pre-Trial Judge’.²⁹⁶⁰

²⁹⁵⁷ Nuon Chea et al. (Case 002), 26 September 2013, para. 7.

²⁹⁵⁸ Ayyash et al. (STL-11-01/PT/T26), Transcripts, 29 October 2013, p. 26, lines 22-23.

²⁹⁵⁹ Ibid., p. 26, lines 23-25; and p. 27, lines 1-4.

²⁹⁶⁰ Ayyash et al. (STL-11-01/PT/TC), Observations of the Legal Representative of Victims on the Modalities of Victim Participation at Trial, Legal Representative of Victims, 1 November 2013, para. 14. Victim participants’ legal representative requested the following modalities of participation/procedural rights during trial: ‘a) participate at meetings, status conferences and hearings other than the trial proceedings during the trial phase; b) file motions and briefs and make oral submissions to the Trial Chamber in relation to any issue that affects the victims’ personal interests; c) have access to public and confidential documents and filings; d) have access to the case file and other disclosure materials; e) make opening and closing statements; f) call witnesses and tender other evidence on the basis of a systematic approach of the Trial Chamber; g) question witnesses on the basis of a systematic approach of the Trial Chamber; h) proof witnesses (whether called by the LRV [legal representative of victims] or the parties) on the basis of a systematic approach by the Trial Chamber’. See Ibid., para. 58.

The modalities of participation/procedural rights that victim participants can exercise via their representatives during the trial proceedings can be grouped under the following categories.

First, victim participants may be allowed to make opening,²⁹⁶¹ as well as closing statements.²⁹⁶² Indeed, the Trial Chamber in a pre-trial conference in *Ayyash et al.* has already authorized the victim participants' legal representative to make an opening statement on behalf of the victim participants during the first trial hearing and that a small number of victim participants are present in the courtroom during the opening statements.²⁹⁶³

Second, victim participants may be allowed by the Trial Chamber, after hearing the parties, to tender evidence.²⁹⁶⁴ Victim participants' legal representative in *Ayyash et al.* submitted that, under rules 87 (b) and 146 (b), a systematic approach rather than a casuistic approach should be followed to tender evidence to ensure fairness and expeditiousness of the proceedings.²⁹⁶⁵ Otherwise, it was added, it would be required 'an individual decision on each proposed [...] evidence to be tendered'.²⁹⁶⁶ It should be remembered that the ICC Trial Chambers, endorsed by the ICC Appeals Chamber, have mainly followed a casuistic approach as previously examined.²⁹⁶⁷

Third, victim participants may request the Trial Chamber, after hearing the parties, to call witnesses.²⁹⁶⁸ The victim participants' legal representative has also requested the application of a systematic approach to call witnesses in *Ayyash et al.*²⁹⁶⁹ Concerning this victim participants' procedural right, it should be noticed that while under the English original version of rule 87 (B) victim participants were authorized by the Chambers to call witnesses, under the French version the Trial Chamber calls witnesses on behalf of victims participating in the proceedings. The STL Judges considered the latter being the correct procedure and, accordingly, the English version of rule 87 (B) has been corrected to reflect the French one.²⁹⁷⁰

²⁹⁶¹ STL RPE, rule 143.

²⁹⁶² *Ibid.*, rule 147 (A).

²⁹⁶³ *Ayyash et al.* (STL-11-01/PT/T26), Transcripts, 29 October 2013, p. 31, lines 6-10. See also *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, para. 53.

²⁹⁶⁴ STL RPE, rule 87 (B).

²⁹⁶⁵ *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, para. 37.

²⁹⁶⁶ *Ibid.*, *Loc. cit.*

²⁹⁶⁷ See *supra* Chapter IV 2.3.2.2 and 2.5.

²⁹⁶⁸ STL RPE, rules 87 (B), 146 (A), and 146 (B) (ii).

²⁹⁶⁹ *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, paras. 32-37.

²⁹⁷⁰ STL Office of the President (February 2012) 24.

It should be reminded that, at the end of the pre-trial proceedings, the Trial Chamber should receive from the Pre-Trial Judge, a case file including the following documents:

- (i) all the filings of the Parties and of the victims participating in the proceedings;
- (ii) any evidentiary material received by him [Pre-Trial Judge];
- (iii) transcripts of status conferences;
- (iv) minutes of meetings [...];
- (v) all the orders and decisions he [Pre-Trial Judge] has made;
- (vi) correspondence with relevant entities;
- (vii) a detailed report setting out: (a) the arguments of the Parties and the victims participating in the proceedings on the facts and the applicable law; (b) the points of agreement and disagreement; (c) the probative material produced by each Party and by the victims participating in the proceedings; (d) a summary of his decisions and orders; (e) suggestions as to the number and relevance of both the witnesses to be called by the Prosecutor and the witnesses that the victims participating in the proceedings intend to request the Trial Chamber to call [...].²⁹⁷¹

This procedural feature makes the STL Trial Chamber have better chances than the ICC to examine whether the witnesses called by victim participants are necessary for the determination of the truth and whether the questions asked by the victim participants' legal representatives to a witness are relevant. In *Ayyash et al.*, the Trial Chamber was officially seized of the case when it received the Pre-Trial Judge's case file and his report.²⁹⁷² The STL Trial Chamber Judges are in a better standing than their ICC peers to avoid a parallel prosecution from the victim participants, which is a scenario no few times criticized by those who object victim participants' broad procedural rights.²⁹⁷³

Accordingly, since the STL Trial Chamber Judges have access to the above-detailed information in the case-file, and because of their intervening powers,²⁹⁷⁴ they can identify the more appropriate instances during trial

²⁹⁷¹ STL RPE, rule 95 (A).

²⁹⁷² This took place the 28 October 2013. See *Ayyash et al.* (STL-11-01/PT/T26), Transcripts, 29 October 2013, p. 3, lines 6-8.

²⁹⁷³ See Hemptinne (2010) 175-176.

²⁹⁷⁴ STL RPE, rule 150 (G) ('Upon an objection raised by a Party, the Chamber may exercise control over the mode and order of questioning witnesses and presenting evidence so as to: (i) make the questioning and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time and resources').

proceedings to prevent victim participants from leading or challenging evidence which may be repetitive or lack relevance in establishing the truth. Moreover, under the STL Statute and RPE, the Prosecutor not only carries the burden of proof but (s)he is also in charge of the investigation, evaluation of evidence in connection with the charges in the indictment and submission of evidence in court.²⁹⁷⁵ Hence, it may be argued that only when the Prosecutor does not call witnesses or pose questions necessary for the determination of the truth, victims may on exceptional grounds be allowed to intervene.²⁹⁷⁶ This will, however, have to be determined in the STL's practice. Lastly, but equally important, under the STL RPE, when victims are granted the right to call evidence by the Trial Chamber, the Chamber shall decide the corresponding disclosure obligations to be imposed.²⁹⁷⁷

Fourth, victim participants may be allowed to examine or cross-examine witnesses, under the control of the Trial Chamber, and after hearing the parties.²⁹⁷⁸ It should be mentioned that, the expression 'after hearing the Parties', contained in the respective rule has been removed in both the English and French versions of the rule in order to avoid any ambiguity concerning the fact that it is the Chamber, and not victim participants, who hears the parties.²⁹⁷⁹ In *Ayyash et al.*, the victim participants' legal representative has submitted that a systematic permission to question witnesses should be given.²⁹⁸⁰

Fifth, victim participants may be allowed to pose questions to the accused via the Trial Chamber, whose Judges 'at the request of [...] a legal representative of a victim participating in the proceedings, may ask specific questions to the accused at any stage of the proceedings [trial stage included]'.²⁹⁸¹ Accordingly, the questioning of the accused can only be conducted by the Trial Chamber at the victim participants' legal request. Thus, unlike the examination of experts and witnesses, victim participants' legal representatives cannot question the accused directly. This provision constitutes a necessary judicial safeguard. Otherwise, victim participants' legal representatives directly questioning the accused would severely jeopardize the accused's right to remain silent, which is explicitly provided for under rule 144 (B) of the STL RPE. For the sake of an efficient and fair trial, victim participants' legal representatives at trial

²⁹⁷⁵ STL Statute, article 11 and 18 (1); STL RPE, rules 55 and 68.

²⁹⁷⁶ Hemptinne (2010) 176.

²⁹⁷⁷ STL RPE, rule 112 bis.

²⁹⁷⁸ *Ibid.*, rule 87 (B).

²⁹⁷⁹ STL Office of the President (February 2012) 24.

²⁹⁸⁰ *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, paras. 38-44.

²⁹⁸¹ STL RPE, rule 144 (B).

must be highly qualified lawyers who satisfy the same requirements as those asked for the defence counsel,²⁹⁸² and who may receive logistical and legal assistance from the VPU.²⁹⁸³

Sixth, victim participants may be allowed to file motions and briefs.²⁹⁸⁴

Seventh, victim participants shall be informed about any procedural developments in a case, which includes the pronouncement of the judgment.²⁹⁸⁵ Like in other procedural stages, ‘The Registrar shall provide victims participating in the proceedings or their legal representatives information about procedural developments in the case’.²⁹⁸⁶ Indeed, the right of notification is of pivotal importance in order to put in motion the other victim participants’ modalities of participation during trial.

Eighth, victim participants shall receive all documents filed by the parties (excluding any confidential and *ex parte* material) during trial,²⁹⁸⁷ and have access to the case file handed over by the Pre-Trial Judge to the Chamber, unless the Trial Chamber establishes ‘any appropriate restrictions in the interests of justice’.²⁹⁸⁸ These restrictions may be set to, for example, guarantee the protection of sensitive and confidential information affecting the security of a State or an international organization.²⁹⁸⁹ In *Ayyash et al.*, the victim participants’ legal representative has submitted that access to confidential documents during the trial, access to the case file and access rights to other disclosure materials should be given and under conditions similar to those imposed during the pre-trial stage.²⁹⁹⁰ The conditions during pre-trial were previously examined.²⁹⁹¹

Ninth, only victims who have been granted the official status of victim participants have the right to legal representation before the STL according to the Directive on Victims’ Legal Representation,²⁹⁹² document through which the Registrar:

²⁹⁸² Ibid., rule 51 (C) (i).

²⁹⁸³ Ibid., rule 51 (C) (iii).

²⁹⁸⁴ Ibid., rule 87 (B). See also *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, paras. 19-21.

²⁹⁸⁵ STL RPE, rule 168 (A).

²⁹⁸⁶ Ibid., rule 86 (F).

²⁹⁸⁷ Ibid., rule 87 (A). See also STL Chambers (2010b), para. 25.

²⁹⁸⁸ STL RPE, rule 87 (A). See also STL Chambers (2010b), para. 25.

²⁹⁸⁹ See STL RPE, rules 117-119; Hemptinne (2010) 174.

²⁹⁹⁰ *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, paras. 22-26.

²⁹⁹¹ See *supra* Chapter IV 3.4.2.2 and 3.5.

²⁹⁹² See Directive on Victims’ Legal Representation, article 6. This article is subject to article 18 (Designation of duty legal representatives. (A)The Registrar may designate a duty legal

[...] seeks to guarantee the rights afforded to victims under the Statute and the Rules by ensuring that their representation is efficient, effective, meets internationally recognized standards and is consistent with the provisions of the Statute, the Rules, the Joint Code of Conduct, the Code of Conduct for Victims' Legal Representatives, the Directive and any other relevant instruments.²⁹⁹³

This article implements what is established under rule 51 (G) which provides for that 'The Registrar, after consulting the Victims' Participation Unit, shall designate counsel to represent victims participating in the proceedings in accordance with the Directive on Victims' Legal Representation'. As previously mentioned,²⁹⁹⁴ the Directive on Victims' Legal Representation fleshes out, *inter alia*, aspects concerning the designation by the Registrar of the lead legal representative for victim participants,²⁹⁹⁵ who is responsible for all aspects of his/her clients' participation at the STL,²⁹⁹⁶ as well as remedies against such designation.²⁹⁹⁷ Victim participants in the proceedings are presumed to be treated as a single group, unless valid reasons according to rule 86 (D) (i) justifies not doing so. If this is the case, victim participants shall be divided into groups with common legal representation, considering, *inter alia* '(i) any conflicting interests that may hinder common representation; (ii) any shared or similar interests that may facilitate common representation [...]'.²⁹⁹⁸ This decision may not be appealed.²⁹⁹⁹

Tenth, as previously discussed,³⁰⁰⁰ victim participants can testify, i.e., under rule 150 (D) victim participants 'may be permitted to give evidence if a Chamber decides that the interests of justice so require' and, thus, they may hold a dual status victim participant-victim witness.³⁰⁰¹

Eleventh, concerning disclosure rights, the STL RPE phrase them in reference to the two parties, i.e., the Prosecutor and the defence,³⁰⁰² and

representative for the limited purpose of undertaking a specific appeal, review or response in the following circumstances [...]'.

²⁹⁹³ Directive on Victims' Legal Representation, article 5.

²⁹⁹⁴ See supra Chapter IV 3.4.2.2.

²⁹⁹⁵ Directive on Victims' Legal Representation, articles 16-17.

²⁹⁹⁶ Ibid., article 24.

²⁹⁹⁷ Ibid., articles 22-23.

²⁹⁹⁸ STL RPE, rule 86 (D).

²⁹⁹⁹ Ibid., Loc. cit.

³⁰⁰⁰ See supra Chapter III 2.4.2.2.

³⁰⁰¹ Ayyash et al. (STL-11-01/PT/PT), 18 May 2012, para. 60.

³⁰⁰² STL RPE, rules 110 and 112.

disclosure normally takes place before trial, as done in *Ayyash et al.*³⁰⁰³ It remains to be seen exactly what kind of disclosure proceedings/mechanism for victim participants the STL Trial Chamber may follow leading up to and during trial. Concerning disclosure obligations, unlike the ICC RPE, the STL RPE explicitly establish that when ‘the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed’.³⁰⁰⁴ Unlike the ICC RPE, the STL RPE explicitly stated that victim participants have like the Prosecutor the obligation to disclose exculpatory material to the defence; however, via 2013 amendment they now in certain circumstances shall disclose such material to the Prosecutor.³⁰⁰⁵ It should be noticed that although these disclosure obligations are regulated under Part 5 of the STL RPE (‘Confirmation of Charges and Pre-Trial Proceedings’), they have been presented in this sub-chapter due to their close connection to evidentiary issues during trial and the involvement of the Trial Chamber.

Twelfth, on behalf of the victim participants, their legal representative’s presence and participation during trial proceedings.³⁰⁰⁶ It remains to be seen whether the STL Trial Chamber will exceptionally allow it during *ex parte* hearings.

In addition to the previously examined modalities of participation/procedural rights, it should be noted that the victim participants’ legal representative in *Ayyash et al.* requested that the victim participants ‘be given access to the courtroom subject to the control of the Trial Chamber during trial proceedings’.³⁰⁰⁷

It should finally be remembered that the Appeals Chamber has completely banned anonymous victim participants during trial in *Ayyash et al.*,³⁰⁰⁸ which is criticized herein as previously examined.³⁰⁰⁹

³⁰⁰³ *Ayyash et al.* (STL-11-01/PT/PTI), 2 August 2013, para. 46.

³⁰⁰⁴ STL RPE, rule 112 *bis*.

³⁰⁰⁵ *Ibid.*, rule 113 (B). See also STL (2013) 28 (‘This amendment adds a requirement that if the victims participating in the proceedings (VPP) have reason to believe that information, which they must disclose under Rule 113 (i.e., exculpatory material), falls under Rule 116 (for example, because it might endanger future prosecutions/investigations by the Prosecutor, or might endanger a victim or witness) or Rule 117 (because it might affect the security of a State), they must disclose that material to the Prosecutor. This is because the Prosecutor usually has a much better understanding of the issues at stake’).

³⁰⁰⁶ STL RPE, rules 143, 146 and 147. See also *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, paras. 16-18.

³⁰⁰⁷ *Ayyash et al.* (STL-11-01/PT/TC), 1 November 2013, para. 59.

³⁰⁰⁸ *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, paras. 27, 28, 31 and 39.

4.4.2. Additional Related Legal Issues and Evaluation of Civil Party/Victim Participant Regime

4.4.2.1. The ECCC

As seen, civil party's status during trial proceedings at the ECCC may be characterized as being particularly strong as illustrated by the variety of modalities of participation/procedural rights at his/her disposal, which includes the ability to lead evidence. Such a robust status, as suggested by the Supreme Court Chamber in *Duch*, may have an important impact on the issue of equality of arms.³⁰¹⁰ In order to guarantee the accused's rights and to preserve the efficiency and integrity of the trial, the ECCC Internal Rules have been amended several times as proceedings in *Duch* progressed, which led to limiting the civil parties' modalities of participation. On the one hand, establishing time limits for questioning witnesses, denial of civil parties' request to give opening statements in *Duch* (and also in *Nuon Chea et al.*) trial proceedings,³⁰¹¹ and denial of request to respond to the Co-Prosecution's opening statement; and, on the other hand, for example, the designation of a single team of legal counsels representing civil parties' collective interests, are examples of the measures adopted by the ECCC to achieve the above-mentioned objectives. Accordingly, the Trial Chamber in *Duch* throughout the trial proceedings adopted a restrictive interpretation about civil parties' participation, which may be regarded as if it were unwilling to acknowledge the civil parties as actual parties.³⁰¹² However, as the Trial Chamber stated in *Duch*, restrictions to the scope of civil parties' rights may be necessary as 'features of more traditional Civil Party models, devised for less complex proceedings with fewer victims, required adaptation'.³⁰¹³

In spite of those procedural limitations to the exercise of the civil parties' modalities of participation/procedural rights, most civil parties who participated in *Duch* have shown satisfaction with the trial proceedings. Accordingly, in addition to the satisfaction experienced by the civil parties when testifying as

³⁰⁰⁹ See supra Chapter IV 4.4.2.2.

³⁰¹⁰ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 489.

³⁰¹¹ Kaing Guek Eav alias Duch (Case 001), Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, Trial Chamber, 27 March 2009; Nuon Chea et al. (Case 002), Scheduling order for opening statements and hearing on the substance in Case 002, Trial Chamber, 18 October 2011, p. 3.

³⁰¹² Michelle Staggs Kelsall et al., Lessons Learned from the Duch Trial. A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia (Asian International Justice Initiative's KRT Monitoring Group December 2009) 32; Stover, Balthazard and Koeing (2011) 523-524.

³⁰¹³ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 12.

previously mentioned, victims have qualified their participation as civil parties as transformative for them and, in some cases, for their families and found the trial to have been fair.³⁰¹⁴ Civil parties also highlighted that their motivation to bear witnesses in representation of their deceased relatives had been done during the trial and highlighted how the overall trial experience introduced them to other victims.³⁰¹⁵ Moreover, even though some civil parties felt that their mission was not fulfilled when they failed to get Duch to admit having ordered the killing of a relative, they were still satisfied.³⁰¹⁶

It should be pointed out that victims' final perceptions about the meaningfulness of their participation as civil parties may be different in *Nuon Chea et al. vis-à-vis Duch*. An important factor underlying this is the number of civil parties who participated in *Duch*, less than 100, as opposed to the much higher number of civil parties participating in *Nuon Chea et al.*, a total of 3864 civil parties. Accordingly, victims' participation as civil parties in trial proceedings in the latter case 'may be more formulaic and less individualized, and therefore less transformative'.³⁰¹⁷ Other factors make a meaningful participation of victims as civil parties in *Nuon Chea et al.* during trial more difficult. Thus, whereas in *Duch* there was only one defendant, viewed as the most responsible by the civil parties that lost their loved ones, and who early expressed remorse for his crimes that were confined to two specific locations (S-21 and S-24), in *Nuon Chea et al.* civil parties are facing aging senior former Khmer Rouge leaders, who refused to talk and with very little or lack of knowledge of the local circumstances where civil parties' loved ones died and associated to several locations in Cambodia where crimes were perpetrated.³⁰¹⁸

In any case, it must be noticed here that, *inter alia*, arguably considering the high number of civil parties in *Nuon Chea et al.* (Case 002), the Trial Chamber decided to 'separate the proceedings in Case 002 into a number of discrete cases that incorporate particular factual allegations and legal issues',³⁰¹⁹ in application of rule 89 *ter* adopted in 2011.³⁰²⁰ Although the initial severance of

³⁰¹⁴ Stover, Balthazard and Koeing (2011) 533 and 535.

³⁰¹⁵ *Ibid.*, 536.

³⁰¹⁶ *Ibid.*, Loc. cit.

³⁰¹⁷ *Ibid.*, 543.

³⁰¹⁸ *Ibid.*, Loc. cit.

³⁰¹⁹ *Nuon Chea et al.* (Case 002), E/124, 22 September 2011 para. 4.

³⁰²⁰ This rule was adopted by the ECCC Plenary on 23 February 2011 and reads as follows 'When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges

Nuon Chea et al. was annulled by the Supreme Court Chamber due to *inter alia* the Trial Chamber's failure to hear the parties,³⁰²¹ such initial severance and its scope were later confirmed by the Trial Chamber, after having heard the parties, following the Supreme Court Chamber's decision.³⁰²² The fact that the severance and the scope of the first trial, the so-called 'Case 002/01', within *Nuon Chea et al.*, were confirmed after hearing the civil parties is herein found as a necessary step to enhance the civil parties' right of audience, i.e., right to be heard, as previously stated.³⁰²³ By doing so, civil parties' status during trial proceedings has hence been enhanced.

It must be pointed out that the severance of the trial is limited to a determination of the subject-matter, i.e., the first trial within *Nuon Chea et al.* was focused on alleged crimes against humanity concerning the forced movement of the population from Phnom Penh in April 1975 and later from other regions (phases one and two), and alleged executions at Toul Po Chrey execution site; however, such severance does not involve the Trial Chamber's personal jurisdiction in relation to any accused in *Nuon Chea et al.*³⁰²⁴ In other words, each of the co-accused, currently two of the original four,³⁰²⁵ is and will continue to be tried together. It is here agreed with this decision adopted by the Trial Chamber and the arguments given by it, which were as follows.

First, limiting the scope of facts to be tried during the first trial/mini-trial in *Nuon Chea et al.* produces no impact on the nature of civil party's participation during trial as civil parties 'no longer participate individually [...] but instead comprise a consolidated group' represented by their co-lead lawyers,³⁰²⁶ and their reparations claims formulated on their behalf by their lead co-lawyers should take account of internal rule 23 *quinquies* (1) (a),³⁰²⁷ which is later discussed.³⁰²⁸

contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate'.

³⁰²¹ *Nuon Chea et al.* (Case 002), 8 February 2013, paras. 40-41, 44 and 58.

³⁰²² *Nuon Chea et al.* (Case 002), 26 April 2013, para. 4. See also *Nuon Chea et al.* (Case 002), Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, Supreme Court Chamber, 23 July 2013, para. 13.

³⁰²³ See *supra* Chapter IV 4.4.1.1.

³⁰²⁴ *Nuon Chea et al.* (Case 002), E/124, 22 September 2011, para. 4.

³⁰²⁵ Originally, there were four co-accused; however, former Khmer Rouge Minister Ieng Thirith was released from detention on 16 September 2012 due to dementia. In turn, the proceedings against Ieng Sary were terminated on 14 March 2013, following his death that day.

³⁰²⁶ *Nuon Chea et al.* (Case 002), E/124, 22 September 2011, para. 8.

³⁰²⁷ *Ibid.*, Loc. cit.

³⁰²⁸ See *infra* Chapter V 3.4.2.1.

Second, separating the proceedings arguably enables the Chamber ‘to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial’.³⁰²⁹ Moreover, the Trial Chamber considered *inter alia* the advanced age and physical frailty of many witnesses and civil parties to favour an expeditious conclusion of the trial proceedings in Case 002/01 within *Nuon Chea et al.* to keep the initial severance of the proceedings.³⁰³⁰ The Trial Chamber also declined to add the S-21 detention center incidents to the scope of Case 002/01 as it may jeopardize the Chamber’s ability to reach a timely verdict in Case 002/01 and would still only encapsulate a fraction of the victimization that took place during the Democratic Kampuchea era.³⁰³¹ Thus, the S-21 incidents will be considered in the second trial within *Nuon Chea et al.*

Third, as consequence of the severance of the trial proceedings, the number of witnesses, experts and civil parties to be called was limited to ‘those whose proposed testimony is required for the first trial’.³⁰³² Only exceptionally, a ‘party may make an oral application before the Chamber for leave to question a witness or Civil Party on all matters relevant to Case 002, including those that may instead form the subject of future trials’.³⁰³³ Nevertheless, ‘the Chamber expects that only rarely will such applications be entertained’.³⁰³⁴ Accordingly, the level of civil parties’ participation, via their co-lead lawyers, participating in the first trial (750 civil parties) in *Nuon Chea et al.* was higher than if it were only one trial comprising nearly 4000 civil parties in this case.

Moreover, to guarantee that the civil parties can timely participate, the Trial Chamber foresaw the need to provide information ‘regarding subsequent cases to be tried in the course of Case 002’.³⁰³⁵ This has been, *inter alia*, implemented via the VSS regional forums, organized to: i) update the civil parties in *Nuon Chea et al.*, on the current work and progress of the ECCC cases; ii) to facilitate discussion between civil parties and their lawyers on the severance

³⁰²⁹ Nuon Chea et al. (Case 002), E/124, 22 September 2011, para. 8.

³⁰³⁰ Nuon Chea et al. (Case 002), 26 April 2013, paras. 133 and 134.

³⁰³¹ *Ibid.*, paras. 137 and 147.

³⁰³² Nuon Chea et al. (Case 002), E/124, 22 September 2011, para. 8.

³⁰³³ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Notice of Trial Chamber's Disposition of Remaining Pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and Further Guidance to the Civil Party Lead Co-Lawyers, E/145, Trial Chamber, 29 November 2011, p. 3.

³⁰³⁴ *Ibid.*, Loc. cit.

³⁰³⁵ Nuon Chea et al. (Case 002), E/124, 22 September 2011, p. 4.

order of *Nuon Chea et al.*; and iii) enable civil parties to be informed of, and also to exercise their rights.³⁰³⁶

In the first trial within *Nuon Chea et al.*, i.e., Case 002/01, the civil parties, represented by their lead co-lawyers, in their closing brief expressed some concern about whether all the factual allegations in the closing order will ultimately be examined and adjudicated due to the ECCC's situation and the accused's advanced age.³⁰³⁷ However, they manifested an overall speaking positive experience:

[...] civil parties also want to emphasize that this trial [...] has brought them within its boundaries a partial answer to their expectations. Debates, discussions, testimonies, the participation of victims in their quality as a party to the proceedings were all positive contributions to the ascertainment of the truth. Things were said, explanations were suggested, they will be a form of truth, albeit partial and imperfect.³⁰³⁸

Civil parties' co-lead lawyers also considered that their evidence has vitally contributed to prove the factual elements of the JCE and the crimes alleged and that it 'lends important context to the manner in which the crimes were carried out and how these crimes have impacted individuals, families, and Cambodian society as a whole'.³⁰³⁹ Moreover, as Judge Lavergne commented in *Nuon Chea et al.*, civil parties' rights have special significance considering 'not only the seriousness of the charges [...] but also the civil parties' very long wait for justice, a wait which makes these trials historic'.³⁰⁴⁰

An important issue to be examined in further detail herein is the revocation of the civil parties' status at the ECCC. As previously mentioned,³⁰⁴¹ the Trial Chamber in *Duch* as partially confirmed by the Supreme Court Chamber, revoked the status of some civil parties who participated in the trial

³⁰³⁶ VSS, Press Statement (August 2012). Available at: <http://www.eccc.gov.kh/en/articles/vss-hold-3rd-regional-forum-2012-200-civil-parties-case-002-siem-reap> (last visit on 31 December 2012).

³⁰³⁷ *Nuon Chea et al.* (Case 002), 26 September 2013, para. 421.

³⁰³⁸ *Ibid.*, para. 423.

³⁰³⁹ *Ibid.*, para. 417.

³⁰⁴⁰ *Nuon Chea et al.* (Case 002), Decision on lead Co-lawyer's 'Urgent Request for the Trial Chamber to amend memorandum E62/3/10 (formerly E106)' (E62/3/10/1), Trial Chamber Memorandum to Counsel for the Parties Regarding the Classification of Expert's Reports, Trial Chamber, Dissenting Opinion of Judge Jean-Marc Lavergne Concerning the Trial Chamber Decision in Memorandum E62/3/10/4, 23 August 2011, para. 10.

³⁰⁴¹ See *supra* Chapter IV 2.4.1.1.

proceedings leading to disappointment and frustration among them. Thus, as for the eight direct victims, i.e., the survivors of the atrocities committed in detention centers S-21 and S-24, who were granted the status of civil parties, only four were considered by the Trial Chamber ‘to have substantiated this claim and hence, to have established that KAING Guek Eav is directly responsible for their harm suffered’.³⁰⁴² With regard to the other four direct civil parties, although the Trial Chamber acknowledged their psychological harm, they did not satisfy the required standard that they were victims of crimes committed by Duch at S-21 or S-24.³⁰⁴³

Concerning indirect victims, i.e., civil parties who claimed to be the immediate family members of a victim of S-21 or S-24, extended family members of a victim of S-21 or S-24, and a deceased civil party’s successor, the Trial Chamber ended up stripping off the civil party status of 19 individuals as either they could not ‘establish that at least one of their family members was the immediate victim’ of crimes for which Duch was convicted to the required standard or could not provide ‘proof of kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24’.³⁰⁴⁴ In contrast, those victims who were ‘confirmed’ by the Trial Chamber in their status of civil parties were found to:

[...] have proved the existence of immediate victims of S-21 or S-24 and either close kinship or particular bonds of affection or dependency in relation to these victims. They have further shown that the death of these victims caused demonstrable injury within the scope of Internal Rule 23(2) and that this harm was a direct consequence of the crimes for which KAING Guek EAV was convicted.³⁰⁴⁵

The removal of the civil party status of those individuals was thus determined based on re-assessment, under a higher evidentiary standard, of the evidence that they brought to prove their status as civil parties. The fact that alleged victims who participated during the entire proceedings as civil parties to have their status revoked in the ‘last minute’, i.e., via the Trial judgment may be criticized on three grounds. First, based on an argument of efficiency, the Trial Chamber should not have waited until the very end of the trial, i.e., when it issued its judgment to conduct its own assessment of the civil party

³⁰⁴² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 645.

³⁰⁴³ Ibid., para. 647.

³⁰⁴⁴ Ibid., paras. 648 and 649.

³⁰⁴⁵ Ibid., paras. 650.

applications/interim recognition letters. Actually, unlike the removal of the victim participant status of three individuals via the ICC Trial Chamber I's judgment in *Lubanga* where there were serious allegations that they stole identities, in *Duch* the reason was that the victims did not meet the evidentiary requirements to 'retain' their civil party status. This could have been easily settled down once and for all before going to the trial hearings, which has indeed been acknowledged by the Supreme Court Chamber in *Duch* when it stated that:

[...] in accordance with legal certainty and economy of the proceedings, civil party applications should have been examined, as a rule, at the earliest opportunity and before the commencement of the trial hearing, so that unsuccessful applicants would have the opportunity to appeal or supplement their unsupported applications.³⁰⁴⁶

Also, the Supreme Court Chamber, agreed with a minority opinion of Pre-Trial Chamber in *Nuon Chea et al.*, which found that the 'interim recognition letters' are court decisions admitting civil parties with all procedural rights and obligations.³⁰⁴⁷ As already discussed,³⁰⁴⁸ although the Supreme Court Chamber did not find that the Trial Chamber acted outside the ECCC Internal Rules, it found the legal framework to be 'patently obscure'.³⁰⁴⁹ This was exacerbated by multiple pronouncements at the juncture between investigation and trial as to civil party status 'lacked a basis in actual scrutiny of the merits of civil party applications'.³⁰⁵⁰ In reaching this conclusion, the Supreme Court Chamber considered that:

After issuing these decisions [interim recognition letters] relevant judges should be considered *functus officio*, unless the law foresees review of the decision. Subsequent decisions on the same matter by the same body should be dependent on a change of circumstances in the case, new evidence, or the elevation of the requisite level of proof attaching to the case moving to the next

³⁰⁴⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 490.

³⁰⁴⁷ Ieng Thirith et al. (Case 002), Decision on Appeals Against Co-Investigating Judges' Combined Orders D250/3/3 and 250/3/2 on Admissibility of Civil Party Applications, Opinion of Judges Prak Kimsan and Rowan Dowing in Respect of the Declared Inadmissibility of Admitted Civil Parties, Pre-Trial Chamber, 27 April 2010, para. 1 (cited by Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 491).

³⁰⁴⁸ See supra Chapter III 2.4.1.1.

³⁰⁴⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 493.

³⁰⁵⁰ *Ibid.*, Loc. cit.

phase of proceedings. The Supreme Court is mindful, however, that these conclusions do not explicitly result from the legal framework of the Internal Rules at the time, and therefore there is no basis to invalidate the orders subsequent to ‘interim recognition’.³⁰⁵¹

Accordingly, although the Supreme Court Chamber did not overrule the legal approach applied by the Trial Chamber in *Duch*, by allowing civil parties to introduce evidence to challenge the revocations of their civil party status, it reversed some of these revocations as examined later.³⁰⁵² What should be mentioned here is that in reading internal rule 100 (3) and article 355 of the 2007 Cambodian Code of Criminal Procedure,³⁰⁵³ the Supreme Court Chamber concluded that the Trial Chamber in *Duch* ‘had a lawful basis in Cambodian criminal procedure to determine in its Judgment the merits of victims’ applications for civil party status’.³⁰⁵⁴ Moreover, the Supreme Court Chamber pointed out that the Trial Chamber actually provided notice in advance and an opportunity to the civil parties when the Trial Chamber signaled the lack of finality of its *prima facie* assessment at the initial hearing via Judge Lavergne’s words:

I think it is perfectly clear to all the parties that we are not going to go to the merits of the applications, we are just trying to look at the apparent existence of harm. It is perfectly clear that during the substantive proceedings we shall examine each of the applications to be perfectly certain that the alleged harm did in fact occur.³⁰⁵⁵

³⁰⁵¹ Ibid., para. 491.

³⁰⁵² See *infra* Chapter IV 6.4.1.1.

³⁰⁵³ ECCC Internal Rules, rule 100 (1) (‘The Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused. Where appropriate, the Chamber may adjourn its decision on Civil Party claims to a new hearing’). The reference is to version 3 of the Internal Rules as applied by the Trial Chamber in *Duch*. In turn, article 355 of the 2007 Code of Criminal Procedure of Cambodia reads as follows ‘[i]n the criminal judgment, the court [of first instance] shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims of the civil party against the accused and civil defendants’.

³⁰⁵⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 495.

³⁰⁵⁵ Kaing Guek Eav alias Duch (Case 001), Transcripts, 17 February 2009, E1/3.1, p. 42, lines 5-10 (cited by Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 497).

However, as the Supreme Court Chamber also acknowledged, the opportunity to make the respective submissions took place just shortly (only three months) before the end of the trial.³⁰⁵⁶ Therefore, why the Trial Chamber had to procrastinate the determination of whether or not the civil party status would be revoked may still be criticized.

Second, that individuals were allowed to participate as civil parties, without really being such, during trial and, hence, *inter alia*, allowed to tender incriminatory evidence against the accused may be considered as seriously threatening the accused's right to fair trial. Thus, individuals who should not have been granted the civil party status exercised the respective modalities of participation in detriment of the accused.

Third, the removal of the civil party status certainly caused victims' frustration and disappointment besides the fact that those civil parties invested a large amount of time by participating throughout the trial and just to the very end of the trial proceedings to find themselves with empty hands as their civil party status was revoked.³⁰⁵⁷

Be that as it may, as said, the Supreme Chamber Court reversed in some cases the Trial Chamber's decision to revoke civil party status, redressing to some extent some of the problems previously described. The analysis conducted by the Supreme Court Chamber is examined later when discussing victims' participation during appeals.³⁰⁵⁸

The above-mentioned problems can increase in *Nuon Chea et al.* considering the much higher number of civil parties participating during the respective ongoing trial proceedings. Only time will tell, once the Trial Chamber issues its judgment(s), whether and to what extent the civil parties currently participating in the proceedings in *Nuon Chea et al.* will get their status revoked.

4.4.2.2. The STL

With regard to the STL, bearing in mind that at the time of writing this thesis no trial has yet started, it is herein conducted a preliminary evaluation of the legal framework of victims' participation and connected legal issues. According to article 17 of the STL Statute, victims' participation, i.e., presentation of victims'

³⁰⁵⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 499 (referring to Kaing Guek Eav alias Duch (Case 001), Direction on Proceedings relevant to Reparations and on the Filings of Final Written Submissions, Trial Chamber, 27 August 2009, paras. 1 and 5).

³⁰⁵⁷ See also Pham et al. (2011) 284 ('Among those who ultimately had their status denied, anger, helplessness, shame, and feelings of worthlessness prevailed').

³⁰⁵⁸ See *infra* Chapter IV 6.4.1.1.

views and concerns, shall be conducted in ‘a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’. To implement this general provision, as seen, the STL RPE drafters included specific provisions, which are particularly important during trial proceedings. First, the Trial Chamber possesses the discretion to authorize victim participants, the exercise of certain procedural rights such as calling witnesses, authorization to tender other evidence, examination and cross-examination of witnesses and filing of motions and briefs.³⁰⁵⁹ Second, victims are expected to participate in the proceedings only through legal representatives unless authorized otherwise.³⁰⁶⁰

Third, victim participants may be divided in the proceedings into groups having common legal representation, taking into account conflicting interests that may hinder common representation, shared or similar interests that may facilitate common representation, and accused’s rights as well as a fair and expeditious trial.³⁰⁶¹ Moreover, this ‘decision may not be appealed’.³⁰⁶²

Fourth, that the Pre-Trial Judge is the responsible to decide whether victim participants may intervene directly and concerning the grouping of victim participants with common legal representatives may save time and other resources to the Trial Chamber Judges. This has been the situation in *Ayyash et al.* concerning, for example, the grouping of victim participants with common legal representation.³⁰⁶³

Fifth, although the original version of rule 86 (C) explicitly contemplated the possibility that the Pre-Trial Judge could limit the number of victim participants called to voice their views and concerns has been deleted,³⁰⁶⁴ the Trial Chamber may arguably use its discretion to adopt a practice similar to this rule when giving the respective directions for trial hearings.

These measures reflecting the active role of the judges, as an inquisitorial feature at the STL procedural structure,³⁰⁶⁵ are herein considered as

³⁰⁵⁹ STL RPE, rule 87 (B).

³⁰⁶⁰ The original text of rule 86 (C) of the RPE reads as follows ‘Unless authorized by the Pre-Trial Judge or a Chamber, as appropriate, a victim participating in the proceedings shall do so through a legal representative’. The current text reads as follows ‘A victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial Judge authorises otherwise’.

³⁰⁶¹ STL RPE, rule 86 (D).

³⁰⁶² *Ibid.*, Loc. cit.

³⁰⁶³ *Ayyash et al.* (STL-11-01/PT/PTJ), 8 May 2012, paras. 108-128; *Ayyash et al.* (STL-11-01/PT/PTJ), 28 November 2012, paras. 10-12.

³⁰⁶⁴ STL RPE, rule 86 (C) ([...] [the Pre-Trial Judge] may limit the number of victims entitled to express their views and concerns in proceedings’). This specific provision was deleted during the Fourth Plenary of Judges (February 2012), which amended the STL RPE.

³⁰⁶⁵ See *supra* Chapter II 3.4.2.

advisable/necessary to allow victim participation during the trial proceedings but without affecting the accused's rights. On the other hand, victim participants' legal representatives have access to the Pre-Trial Judge's case-file and to the filings of the parties. This feature should lead to victim participants' legal representatives to possess a clear understanding of the case in question (especially of the Prosecutor's strategy), being capable of understanding the content of the written exchanges between the parties and their in-court debates, which should prevent delays in trial proceedings.³⁰⁶⁶ It is clear that *mutatis mutandi*, as discussed when examining modalities of participation during pre-trial, victim participants' legal representatives should not be provided access to *ex parte* and confidential material (evidence included) of the parties, which is actually stated explicitly under rule 87 (A), previously referred to. Also, as the Pre-Trial Judge in *Ayyash et al.* already noticed:

[...] by virtue of being entitled to have access to the *Ayyash et al.* case file pursuant to Rule 87(A) of the Rules, Legal Representatives are ordinarily be entitled to receive the Indictment supporting materials, subject to any restriction that the PreTrial Judge or *the Trial Chamber* may determine in the interests of justice, at such time as they are transmitted to the Trial Chamber pursuant to Rule 95(A)(ii) of the Rules [emphasis added].³⁰⁶⁷

In order to guarantee the speediness of the trial proceedings and preserve their integrity, it might be considered that victim participants are permitted to express their views and concerns only after the parties had completed their intervention. Not only would it speed up and simplify the trial proceedings but it would also allow the Trial Chamber Judges to have a better control over the intervention of victims.³⁰⁶⁸ Nevertheless, *de lege lata* such option does not seem to be coherent with the STL Statute and RPE.³⁰⁶⁹ Nor, *de lege ferenda*, postponing the victim participants' intervention to the very end of the trial will be of their best interest as they would not be able to exercise in a proper manner some important procedural rights laid down in the STL instruments such as questioning the witnesses called by the parties to trial. Moreover, unlike the ICC and the ECCC, the relatively low number of victim participants expected at the STL trials does not really justify to split the trial proceedings into two stages.

³⁰⁶⁶ Hemptinne (2010) 177.

³⁰⁶⁷ Ayyash et al. (STL-11-01/PT/PT), 18 May 2012, para. 72.

³⁰⁶⁸ Hemptinne (2010) 177.

³⁰⁶⁹ See STL Statute, article 17; STL RPE, rule 146. See also Hemptinne (2010) 177.

Finally, it must be noted that certain modalities of victims' participation/procedural rights such as calling witnesses and tendering other evidence are explicitly mentioned under the STL RPE unlike the ICC RPE. This has led to victim participants' legal representatives and the Prosecutor at the ICC to consider that victims' participation at the STL is broader than at the ICC.³⁰⁷⁰ Nevertheless, as they also implicitly acknowledge,³⁰⁷¹ such a preliminary conclusion is only as for the comparison between the ICC RPE and the STL RPE. As previously examined, the ICC's case law has expanded the victim's participation regime during trial. Therefore, when comparing the ICC's case law and the STL RPE, it is concluded herein that the STL RPE drafters have clearly paid close attention to the ICC's case law when drafting the provisions on the victims' modalities of participation/procedural rights, especially during trial, and explicitly included victims' modalities of participation/procedural rights not explicitly included in the ICC RPE but later developed in the ICC's case law.

4.5. Comparative Conclusions

During trial, whereas victims can participate as victim participants at the ICC and the STL, they participate as civil parties at the ECCC. Victims' modalities of participation/procedural rights at the ICC have been broadly sharpened by the ICC Chambers. On the other hand, the ECCC's practice and amendments to its Internal Rules have sometimes taken the opposite direction to the ICC's practice, i.e., setting limits or controls to some of the civil parties' modalities of participation/procedural rights. These two opposing trends have led to an outcome where arguably the modalities of participation and/or procedural rights of victims as victim participants at the ICC have moved closer or are similar to those of the civil parties at ECCC. Whether the STL would adopt a broad and generous approach when crafting the modalities of participation/procedural rights of victim participants during trial, is yet to be seen. Although the STL Judges when drafting and/or amending the STL RPE have seemingly been influenced by the ICC's practice/legal framework, they in some aspects have adopted a relatively conservative approach. Be that as it may, either as victim

³⁰⁷⁰ See Ngudjolo Chui (ICC-01/04-02/12-80-tENG), Observations on the Participation of Anonymous Victims in the Appellate Proceedings and on Maintaining Deceased Victims on the List of Victims Authorised to Participate, Legal Representatives of Victims, 3 June 2013, para. 26; Ngudjolo Chui (ICC-01/04-02/12-87), Prosecution's Submissions Pursuant to the Appeals Chamber's "Order on the Filing of Further Submissions on the Registrar's List of Participating Victims" dated 27 May 2013, Office of the Prosecutor, 10 June 2013, para. 13.

³⁰⁷¹ See Ngudjolo Chui (ICC-01/04-02/12-80-tENG), 3 June 2013, para. 26; Ngudjolo Chui (ICC-01/04-02/12-87), 10 June 2013, para. 13.

participants at the ICC or the STL, or especially as civil parties at the ECCC, victims' modalities of participation and/or procedural rights at those three judicial forums resemble, in a higher or lower scale, the modalities of participation and/or procedural rights that victims as civil parties are entitled to in the French inquisitorial system.

Having said so, an important difference between victims' participation as victim participants (ICC, STL) and as civil parties (ECCC) during trial (and also in other procedural stages) is that victim participants need to show how their personal interests are affected to be allowed to participate and, thus, exercise one or more of the procedural rights/modalities of participation to which they are entitled or allowed to put in motion, which is not required for civil parties. This is explained by the fact that, unlike civil parties, victim participants are not parties to the trial proceedings. Another difference is that, only as civil parties, victims have an explicit right to support the prosecution, according to the ECCC Internal Rules, which however does not turn them in additional or auxiliary Prosecutors. Nevertheless, the possibility for victim participants, under the ICC's practice and the STL RPE, to be allowed to lead and challenge evidence on the accused's guilt may be considered as an indirect manner to support the prosecution, which may affect the accused's right to a fair trial. Be that as it may, and as already highlighted, the contents of victim participants' modalities of participation/procedural rights are generally speaking similar to those of the civil parties.

At the other end of the spectrum, at the ICTY, the ICTR and the SCSL, it is found that victims lack any formal status either as victim participants or as civil parties during trial proceedings and, hence, cannot be heard during trial, which resembles the situation existent in the common law adversarial systems of England and the United States. The submission of *amicus curiae* briefs has constituted an indirect manner for victims to draw the attention of the ICTY, the ICTR and the SCSL to issues of special relevance for victims and to have their views and concerns indirectly considered by the Trial Chambers. The outcomes of these submissions have been diverse as the Trial Chambers exert their discretion to invite or admit them. SCSL judgments arguably paid more attention to *amicus curiae* briefs than the ICTY and the ICTR have done. Also, *inter alia*, mainly civil society organizations and not victims as such are in practice those which file *amicus curiae*. Nevertheless, even when *amicus curiae* briefs have been declared inadmissible, they have managed to raise awareness about some specific issues of special interest for the victims and which were

originally disregarded, leading to a further investigation and (amendment of) indictments.

However, victims' status at trial at the ICTY, the ICTR, and the SCSL remains precarious and limited to that of being witnesses. Even when compared to the American adversarial system, victims' status during trial at those tribunals seems to have been left behind. Thus, besides *amicus curiae* briefs, some American states allow victims as witnesses to have legal representatives, who may be even permitted to intervene in sexual crimes cases, letting alone that some states grant a victim's right to attend trial (also under the federal CVRA) and to sit at counsel table on the Prosecutor's side. The efforts to provide some participatory rights at the ICTY, the ICTR and the SCSL have been unsuccessful like those undertaken in England, where victims have neither a legal representation right nor the *amicus curiae* brief option to express their own views.

With regard to the ICC, victim participants' modalities of participation/procedural rights during trial, which are normally exercised via their respective legal representatives, can be summarized as follows. First, victims have the right to be notified of the case submissions and proceedings. Second, right to access public documents. Victims' legal representatives and, with the exception of *Katanga and Ngudjolo Chui*, also victims themselves have been allowed to access confidential filings if these concern their personal interests. However, victims or their legal representatives cannot access *ex parte* filings. Third, whereas victims' right to attend /participate in public and closed hearings has been acknowledged by all Trial Chambers, Trial Chambers II and III (*Katanga and Ngudjolo Chui* and *Bemba* respectively) have excluded attendance at/participation in *ex parte* hearings but this may be exceptionally allowed according to Trial Chamber I (*Lubanga*) and Trial Chamber V (Kenyan cases). Fourth, right to participate orally, opening and closing statements included. Fifth, right to file written motions, *ex parte* filings included.

Sixth, victim participants may be allowed to introduce evidence pertaining to the accused's guilt or innocence and challenge the admissibility or relevance of evidence as construed by the ICC Trial and Appeals Chambers as this modality of participation/procedural right is understood not to be limited to the parties and evidence brought by victim participants can assist the Trial Chamber in its determination of the truth although the right to present and challenge evidence on the accused's guilt or innocence lies primarily with the Prosecution and the defence. Moreover, victim participants' presentation of evidence is not a self-standing or unfettered right insofar as, in a similar manner

than other victims' modalities of participation/procedural rights during trial, victims have to demonstrate that their personal interests are affected and this should also be done with due respect for the accused's right to fair trial. Additionally, the evidence has to be relevant to the issue of the case and the Chamber has to allow/request the evidence submission for truth determination. Seventh, victim participants may question witnesses and also the accused, when their personal interests are engaged by the evidence under consideration. Trial Chambers' practice has introduced some controls such as submitting questions in advance to avoid irrelevant, repetitive and/or leading questions. Concerning questions about the accused's guilt, Trial Chambers have followed different approaches. Thus, whereas Trial Chambers I and III (*Lubanga* and *Bemba* respectively) have normally permitted questions about the accused's guilt in connection with the assistance to the ICC's determination of the truth but somehow overlapping with the Prosecutor's mandate, Trial Chamber II (*Katanga and Ngudjolo Chui*) has allowed it only on exceptional basis. In any case, when questioning, it may not be formulated any new allegations against the accused.

Eighth, victim participants may be allowed to testify as witnesses under oath, which enables the defence to cross-examine them. When a dual status victim participant-victim witness testifies specific controls apply such as consistency with the accused's right to a fair and impartial trial, not transforming them in additional or auxiliary prosecutors, contribution to determination of the truth and not allowing anonymous testimony. Ninth, victims do not have in principle general disclosure rights or obligations. However, they may be provided with any material in the Prosecutor's possession if relevant to victims' personal interests and after passing through a specific mechanism or case-by-case analysis for that end. Also, disclosure obligations may apply to victims who are permitted to present/lead evidence. Tenth, victim participants' legal representatives may call their clients to testify and propose other persons to the Chamber to testify, e.g., expert witnesses. As an additional observation, it should be indicated that anonymous victims can participate but depending on the scope/nature of the proposed modality of participation, they can be requested to identify themselves. Nevertheless, in practice, anonymous/non-anonymous victim participants are represented by the same common legal representatives and, therefore, the impact of such distinction is reduced.

A matter directly connected with victims' participation during trial consisted in victim participants' application to add new charges (legal re-characterization of the facts) against the accused in *Lubanga*, which was finally

denied by the Appeals Chamber as facts and circumstances exceeding the crimes charged cannot be used. Another issue concerns legal representation. Unlike the ECCC and the STL legal instruments, the ICC Statute and RPE do not require victim participants to be represented. However, as evidenced in the ICC's practice, reality has shown that such representation indeed becomes necessary. Due to the large number of victims, efficiency purposes and victims' own benefit, they have been grouped under common legal representatives based on factors such as geographical origin or crimes. Victims' distinct interests are considered when selecting common legal representatives, a situation similar to the ECCC and the STL, and necessary for victims' status. Nevertheless, in appointing a common legal representative for a group of victims, sometimes the ICC has not sought due consultation from victims, weakening their status. For a meaningful participation and to avoid potential secondary victimization, representatives should remain in contact with and receive instructions from their clients. In any case, at the ICC, the ECCC and (expectedly) the STL, in application of their respective instruments, victims have been grouped together or grouped themselves, in one or more groups, under common legal representation, chosen by the respective court or victims. At the ICC trials, when victim participants have been grouped under common legal representation criteria such as geographical origin and harm have been considered. When common legal representatives are appointed, the ICC, the ECCC and the STL need to take into account the interests of victim participants or civil parties according to their instruments. Regardless of the potential benefits from the Trial Chamber V's approach to appoint the OPCV as interface between the victims' common legal representatives and the Chamber, it may be questioned as, based on too a 'creative' interpretation of the ICC instruments, establishes an extra appointed intermediary/filter between victims and the Chamber in some important modalities of participation and considering that the common legal representative (not the OPCV) is the one who is in direct contact with the victims.

As for the ECCC, most of civil parties' modalities of participation or procedural rights are already detailed in the ECCC Internal Rules and, thus, unlike the ICC Trial Chambers, the ECCC Trial Chamber in *Duch* did not have to spend too much effort and time in crafting them. This is especially relevant concerning the most 'controversial' modalities of participation in the case of victim participants (ICC, STL), which were already stated under the ECCC Internal Rules and/or considered necessary for civil parties' status as formal parties to the proceedings, supporting the prosecution and seeking reparations.

Civil parties' modalities of participation/procedural rights may be summarized as follows.

First, right to be represented by lawyers and indeed civil parties' participation has to be done via their legal counsels. In France, there is no such requirement. However, at the ECCC, common legal representation is indeed necessary considering the large number of civil parties, especially in *Nuon Chea et al.* and, in exercising such representation, attention must always be paid to the victims' views and interests like under the ICC RPE and the STL RPE. Nevertheless, unlike the ICC RPE, the ECCC Internal Rules somehow deal with the representation of interests as those of a consolidated group rather than of individual civil parties, which may lead to victims' depersonalization. Under the amended Internal Rules (being applied to *Nuon Chea et al.*), the consolidated group of civil parties are represented by the civil parties' lead co-lawyers who are in contact with and seek the views from civil parties' lawyers. Although this legal representation mechanism is explicitly required in the Internal Rules (unlike the ICC Trial Chamber V's above-mentioned proposal) and regardless of its (efficiency) benefits, it may in principle be questioned as introduces another intermediary/filter between the civil parties and the Chamber, especially considering that the lead co-lawyers have to be selected by the ECCC. Unlike victim participants (ICC, STL), civil parties are explicitly granted the right to be questioned in presence of their lawyers.

Second, civil parties can be heard, i.e., exercise the right of audience. Third, civil parties can give unsworn testimony. Unlike the ICC and the STL, they do not need to take an oath, which is similar to the French system. However, civil parties can be cross-examined. In addition to testimony, civil parties can provide statements of suffering and, if these introduce new factual allegations (especially inculpatory), adversarial challenge and potential further examination of the civil party follow. Fourth, civil parties have the right to support the prosecution and, thus, tender evidence for the determination of the accused's guilt in a similar manner than in the French system. Nonetheless, civil parties do not hold a general right of equal participation with the Co-Prosecutors. Moreover, the right to support the prosecution does not transform the civil party in an additional or auxiliary Prosecutor as the accused must only face a Prosecuting authority. Thus, civil parties should not advance their own case theory. Be that as it may, civil parties' right to support the prosecution in determining accused's guilt is determined by their interest to obtain reparations and the general procedural goal to establish the truth.

Fifth, closely connected with the previous right, civil parties may question the accused and witnesses provided that their questions are connected to the matters and, hence, be relevant and not repetitive. Time limits were also set in *Duch*. Similar than in France, civil parties themselves can via the Chamber's President question the accused. Sixth, civil parties hold the right to propose witnesses to be called by the Trial Chamber and ask this to summon new witnesses during trial. Seventh, civil parties have the right to respond to preliminary objections. Eighth, civil parties have the right to make written submissions. Ninth, civil parties have the right to access the case file via the civil party's lawyer. Tenth, civil parties hold the right to make closing statements. Eleventh, civil parties can tender written evidence. These modalities of participation/procedural rights are generally speaking similar to those existent in the French inquisitorial system.

At the STL, victim participants' modalities of participation/procedural rights during trial laid down in its RPE are in general quite similar to those existent under the ICC's legal framework and/or the ICC's practice. Indeed, the STL RPE explicitly include victims' modalities of participation/procedural rights during trial such as calling witnesses and tendering other evidence not explicitly included in the ICC RPE but developed in the ICC's case law. At the STL, modalities of participation/procedural rights, which are exercised via victim participants' legal counsels, may be summarized as follows. First, victims may be allowed to make opening and closing statements. Second, right to tender evidence upon the Chamber's authorization. Third, victim participants can request the Trial Chamber to call witnesses. STL Trial Chamber Judges stand better chances than their ICC counterparts to control whether witnesses called by the victim participants are necessary to determine the truth and, thus, avoid parallel prosecutions since those Judges receive a case-file from the Pre-Trial Judge, containing relevant information. Fourth, victim participants may be allowed to examine and cross-examine witnesses. Fifth, victim participants' lawyers can directly pose questions to witnesses but, unlike the ICC, questioning of the accused is conducted via the Trial Chamber, which better guarantees the accused's right to remain silent. Sixth, victim participants have the right to file motions and briefs. Seventh, right to notification. Eighth, right to receive all documents filed by the parties, *ex parte* material is excluded like at the ICC. Victims can also access the case file handed over by the Pre-Trial Judge to the Trial Chamber. Ninth, right to legal representation. The STL can divide victim participants into groups with common legal representation. Tenth, victims can testify (dual status victim-participant-victim witness). Eleventh, although

disclosure rights under the STL RPE refer to parties and normally takes place before trial, when it comes to disclosure obligations, unlike the ICC RPE, the STL RPE explicitly foresee that these obligations are also applicable to victim participants. Twelfth, presence and participation during trial proceedings. It should be finally remembered that anonymous victim participants have totally been banned from trial by the STL Appeals Chamber in *Ayyash et al.*, which is criticized herein as previously examined.³⁰⁷²

With regard to the impact of victims' participation on the first ICC cases trials, a general evaluation can be done considering three important factors: efficiency, accused's rights and impact on the victims themselves. This is also *mutatis mutandi* applicable to the ECCC and the STL. Concerning efficiency, the broad participatory regime granted to victims participants is inversely proportional not only to trial speediness but also to the inclusion of other victims who may have joined the proceedings if the participatory regime of victim participants had not been largely expanded. Second, concerning the accused's rights, victim participants' broad participatory regime at the ICC has led to a tense and delicate situation with regard to the accused's right to a fair and impartial trial, especially in participation modalities/rights such as tendering and challenging evidence on accused's guilt, access to some confidential documents, calling witnesses, and questioning witnesses about the accused's guilt as victims may be perceived as additional or auxiliary prosecutors. Third, concerning the situation of victims in themselves, as matter of principle not necessarily the broader their participation is in trial, the more benefits they have since 'humble' or 'more passive-oriented' modalities of participation such as notification already serve an important function.

However, with hindsight benefit, the generous and broad participatory regime crafted by the ICC Trial and Appeal Chambers should be considered in balance as an acceptable cornerstone in strengthening the victims' status in international criminal proceedings, in particular during trial. To justify the victims' extended participatory regime, the ICC's role to determine the truth, which is also a victim's right, is, *inter alia*, a pivotal ground considering the ICC's main objective to fight impunity. This approach is also coherent with a restorative-oriented justice approach. Moreover, in general, some initial excesses have been dealt with by the Chambers by setting conditions and specific proceedings especially to guarantee the integrity and efficiency of the trial as well as the accused's rights. Nevertheless, in order to safeguard the efficiency of the proceedings as much as possible as well as other competing interests, not to

³⁰⁷² See supra Chapter IV 4.4.2.2, 4.5 and 5.

transform victim participants in parallel Prosecutors and even for the own sake of victims, approaches which may be considered more balanced (such as that employed in *Katanga and Ngudjolo Chui*) should be in principle preferred.

These challenges, which due to chronological reasons, first arose in the trial stage of the first ICC cases, are similar to those experienced at the ECCC in *Duch* and in the ongoing trials in *Nuon Chea et al.* Accordingly, in addressing them, via amendments to its rules and/or via its practice, the ECCC has sometimes restricted the civil parties' rights/modalities of participation, by *inter alia* setting limits to questioning witnesses, denial of both opening statements and of responding Co-Prosecutor's opening statements as well as designation of a single team of lawyers. These restrictions correspond to the legal complexity of the proceedings and the high number of civil parties as compared to the situation in national systems. Moreover, the Trial Chamber in *Duch* revoked the status of some of the civil parties due to a lack of evidence proving it, and in application of a higher evidentiary standard as confirmed by the Supreme Court Chamber. It should be remembered that the ICC also revoked the status of some of the victim participants due to their unreliable testimonies and/or alleged stolen identities (*Lubanga*) or serious credibility doubts (*Katanga and Ngudjolo Chui*).

As identified by the ECCC Supreme Court Chamber, although by revoking civil party status the Trial Chamber in *Duch* did not breach the ECCC instruments, the moment when it did so, i.e., at the very end of the trial should be criticized. Victims' frustration, anger, and disappointment by having their status revoked at the last minute as well as considerations on efficiency and accused's right to a fair and impartial trial since individuals who got their status revoked were allowed to, *inter alia*, tender (incriminating) evidence during trial make it imperative to settle this issue even before the trial hearings start. In spite of this, most civil parties in *Duch* were satisfied with their participation and even qualified it as a transformative experience not only for themselves but also for their families. It remains to be seen how civil parties participating in *Nuon Chea et al.* will assess their experience once the trial stage ends. As a consequence of a much larger number of civil parties in *Nuon Chea et al.*, civil parties' participation may end up being less personalized and more formulaic. Nevertheless, considering the large number of civil parties (around 4000) in *Nuon Chea et al.*, this case has been divided into trials/mini-trials, which is found convenient since: i) the nature of civil party's participation is not affected; ii) increased efficiency and in respect of the accused's rights; and iii) potential increase in civil party's substantial participation. This is complemented with

information to civil parties about the progress of their cases. Additionally, civil parties' experience in the first trial within *Nuon Chea et al.* has been overall speaking positive. The fact that the severance of the proceedings in *Nuon Chea et al.* was kept after having heard *inter alia* the civil parties enhances their status during trial.

As for the STL, Judges have drafted and amended the STL RPE in such a way that it is expected that victims' participation during the first trial yet to begin in *Ayyash et al.* will move smoothly without affecting the integrity and efficiency of the proceedings and guaranteeing the accused's rights. The (much) lower number of victim participants at the STL in comparison with those at the ICC and the ECCC cannot be disregarded as an important factor contributing to a potentially positive outcome. Be that as it may, the STL RPE explicitly state that the Trial Chamber has the discretion to authorize victim participants to exercise certain rights/modalities of participation, which have proven to be particularly contentious at the ICC (and to some extent at the ECCC), such as calling witnesses, tender evidence, and examination and cross-examination of witnesses. Additionally, the STL RPE lay down as a rule that victims' participation can only be done via their legal representatives. This is similar to the ECCC but different from the ICC RPE under which legal representation is worded as a right rather than something mandatory. However, the STL RPE put in written the ICC and the ECCC Trial Chambers' practice, i.e., the rule is precisely that victims participate via lawyers. Also, similar to the ICC and the ECCC instruments and practice, the STL RPE provide for grouping victims under common representatives and paying attention to victims' interests.

5. Victims' Participation in Sentencing Proceedings

It should first be mentioned that while at the ECCC trial and sentence proceedings are merged, at the ICC the Chamber can decide to split them, which happened in *Lubanga*, and at the STL trial and sentence proceedings are divided. For methodological purposes, the status of victims either as victim participants (ICC, STL) or as civil parties (ECCC) concerning sentencing is presented herein in an independent manner. Concerning the ICTY, the ICTR and the SCSL, the specific figure of victim impact statement (VIS) relevant to sentencing is examined. Due to the fact that VIS or similar concepts are present at the international level and also in the national jurisdictions presented (in particular the Anglo-American ones) is convenient at this point to provide a general operative notion thereof. According to the UN Handbook on Justice for Victims:

It [...] provides the victim with an opportunity to inform the court of how the offence has affected him or her physically, mentally or otherwise [...] provides the victim with an opportunity not only to relate what impact the offence has had on the victim but also what, in the victim's view, should be done about the matter.³⁰⁷³

5.1. National Systems

5.1.1. English Adversarial System

The Victim Personal Statement (VPS) scheme was introduced nationally in October 2001.³⁰⁷⁴ The purpose of the VPS is only to provide sentencers better understanding of the harm inflicted on the victims as a consequence of the crime.³⁰⁷⁵ Hence, victims are not allowed to provide any indication concerning the nature of the sentence that should be imposed, as emphasized by the Lord Chief Justice in a Practice Direction 'opinions of the victim or the victim's close relatives as to what the sentence should be are therefore not relevant, unlike the consequences of the offence on them'.³⁰⁷⁶ This limitation has been said to cause erratic take-up rates among victims, victims' lower satisfaction and, thus, VPS as being considered as having only a purely expressive function.³⁰⁷⁷ Although VPS can have a cathartic effect as it constitutes an avenue whereby victims can communicate their feelings about the impact of the crime,³⁰⁷⁸ victims are not permitted to read the statements themselves in open court. In other words, they can only submit them in paper but they cannot appear in person to read their statements before the sentencer and, thus, lack a right of allocution.³⁰⁷⁹

A pilot victim's advocate scheme, including family impact statements, incorporated a more comprehensive victims' participation scheme during sentencing as victims acquired a 'right of allocution' and were led through their statements by the advocate; however, similar to the VPS, such mechanism only

³⁰⁷³ United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims (1999) 39.

³⁰⁷⁴ Doak (2008) 150. The VPS national scheme followed up the 1996 Victim's Charter and pilot Victim Personal Statement (VPS) schemes in late 1990s. See Home Office, The Victim's Charter: A Statement of Service Standards for Victims of Crime (1996).

³⁰⁷⁵ Doak (2008) 150.

³⁰⁷⁶ Practice Direction (Victim Personal Statements) [2002] 1 Cr App R (S) 482. Cited by Doak (2008) 151. See also *R v Hobstaff* [1993] 14 Cr App R (S) 606 and *R v Perks* The Times 11/5/00.

³⁰⁷⁷ See Doak (2008) 152 (referring to Jenny Graham et al. Testaments of Harm: A Qualitative Evaluation of the Victim Personal Statements Scheme (National Centre for Social Research (Great Britain) 2004)).

³⁰⁷⁸ *Ibid.*, 151.

³⁰⁷⁹ *Ibid.*, Loc. cit.

sought to provide the sentencer a more accurate picture of the impact of the crime and, potentially, some cathartic benefit for the victims and, hence, specific penal demands to the court were not allowed.³⁰⁸⁰ In any case, family members of homicide victims can read a family impact statement aloud to the court before sentencing via the nationwide introduction of the Crown Prosecution Service's Victim Focus Scheme introduced in October 2007.³⁰⁸¹

At the regional level, the Recommendation (1985) 11, the EU Framework Decision on Victims and the EU Directive on Victims have not required a formal role for victims in the sentencing process. Victims' rights in the sentencing stage was considered in *McCourt v. United Kingdom*, where the European Commission of Human Rights (ECmHR) found that it would be inappropriate to recognize any role for the victim's family in setting the tariff period for the crime as they would not possess the required impartiality.³⁰⁸² The ECtHR in *T and V v. United Kingdom* adopted the exceptional decision to allow the killed victim's parents to intervene in the case filed by two juvenile delinquents and authorized the parents' legal representatives to address the ECtHR in oral argument although it fell short of stating this requirement as for the domestic proceedings.³⁰⁸³ This approach is similar to the Practice Statement by Lord Woolf C.J. where he 'would invite written representations from the detainees' legal advisers and also from the Director of Public Prosecutions who may include representations on behalf of victims' families'.³⁰⁸⁴ Even though this maintains the English approach of not permitting a direct submission of victim statements and demanding them to be sent through the prosecution, it clearly acknowledges the relevance of submissions by victims' families.³⁰⁸⁵

However, at the domestic level case relating to *T and V v. United Kingdom*, the Lord Chief Justice 'invited, and received, representations from [Mr. Bulger] and his family as to the impact of his son's death on them but had not invited them to give their views on what they thought was an appropriate [sentencing] tariff'.³⁰⁸⁶ These considerations are consistent with the Court of

³⁰⁸⁰ *Ibid.*, Loc. cit.

³⁰⁸¹ Ian Edwards, 'The Evidential Quality of Victim Personal Statements and Family Impact Statements' (2009) 13 *International Journal of Evidence and Proof* 293, 293.

³⁰⁸² ECtHR, *McCourt v. United Kingdom*, Appl. No. 20433/92, Admissibility Decision, 2 December 1992, para. 1.

³⁰⁸³ ECtHR, *T and V. v. United Kingdom*, Appl. No. 24794/94, Judgment, 16 December 1999, para. 4.

³⁰⁸⁴ Practice Statement (Life Sentences for Murder) [2000] 2 Cr App R 457.

³⁰⁸⁵ Emmerson, Ashworth and MacDonald (2012) 830.

³⁰⁸⁶ *Per* Rose L.J. in *R. v Secretary of State for the Home Department Ex parte Bulger*, Times, 7 March 2001.

Appeal's approach, which has considered that the opinion of victims or surviving family members 'about the appropriate level of sentence do not provide any sound basis for reassessing a sentence'.³⁰⁸⁷ Otherwise, cases presenting identical or quite similar characteristics would lead to different sentences depending on whether victims are merciful or obsessed with revenge.

Therefore, the VPS allows victims to provide representations on the effects of the crime on the victim and his/her life and wellbeing but it does not admit opinions or demands on a specific sentence as currently reflected in the Practice Direction (Criminal Proceedings: Consolidation).³⁰⁸⁸ Representations on the length or type of sentence may conflict with impartiality of the trial (ECHR, article 6) as suggested in *McCourt v. United Kingdom*, or may mislead victims and their families as for the significance of their statements.³⁰⁸⁹ In any case, victims' interests are only one factor to be taken into account when passing a sentence although private interests should not be considered strange to or conflicting with public proceedings.³⁰⁹⁰

5.1.2. American Adversarial System

Virtually all states and the federal government permit victims to present information bearing on the appropriate sentence via VIS, which can be presented in writing to a probation officer elaborating a pre-sentence report for a judge or in open court to the sentencing judge and also to the accused.³⁰⁹¹ Under the CVRA, victims have the right to 'be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding'.³⁰⁹² The Ninth Federal Circuit Court of Appeals in *Kenna v. United States*, after considering that the CVRA made victims full participants for sentencing purposes, found that victims' participation is not limited to written statements but they can be heard 'if they choose to speak'.³⁰⁹³ Thus, especially under the CVRA where the victim's act of speaking constitutes an individual choice and holds greater latitude to express opinions independent or even

³⁰⁸⁷ Nunn [1996] 2 Cr App R (S) 136 at p. 140. See also, e.g., Perks [2001] 1 Cr App R (S) 19.

³⁰⁸⁸ Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 W.L.R. 2870.

³⁰⁸⁹ Emmerson, Ashworth and MacDonald (2012) 832.

³⁰⁹⁰ Doak (2008) 155.

³⁰⁹¹ Beloof, Cassell and Twist (2010) 567. As for state legislation see, e.g., Illinois Constitution, article 1, § 8.1; Nebraska Constitution, article 1, § 28.

³⁰⁹² 18 U.S.C § 3771 (a)(4).

³⁰⁹³ *Kenna v. United States* D. Ct. For C. Dist. Ca. 435 F.3d 1011, 1015-1016 (9th Cir. 2006).

contrary to those of the government.³⁰⁹⁴ Nevertheless, victims' status as independent participants during sentencing under the CVRA does not transform them into parties to the proceedings.³⁰⁹⁵ Thus, in *In re Kenna (Kenna II)*, the court rejected that the victim's arguments whereby the right to be reasonably heard under the CVRA includes the right to litigate, as a party, the calculation of the accused's sentence.³⁰⁹⁶

VIS on victims' personal characteristics and also the nature and the extent of harm out of the crime are generally admissible.³⁰⁹⁷ As for victims' opinion on what is a proper sentence, its admissibility depends on whether the recommendation is for capital cases or not. Concerning capital cases, although the Supreme Court in *Payne v. Tennessee* overruled aspects of its previous broad prohibition on the presentation of VIS in *Booth v. Maryland*,³⁰⁹⁸ it did not consider VIS as admissible regarding the appropriate sentence to be imposed,³⁰⁹⁹ as, for instance, also mentioned by Justice Souter's concurring opinion 'This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about [...] the appropriate sentence'.³¹⁰⁰ Thus, even though *Payne* overruled *Booth's* *per se* prohibition on victims' statement regarding the victim and the impact of the crime on the victim's family, it did not find victims' sentencing opinions relevant and even considered them as potentially prejudicial due to impartiality concerns.³¹⁰¹

However, concerning non-capital cases, the few courts deciding on the admissibility of VIS on sentence recommendation have decided that a victim can express an opinion regarding the accused's sentence if this is provided for in law.³¹⁰² Indeed, in non-capital cases, VIS is constitutionally allowed either by state constitutional amendment or state statute in virtually all states.³¹⁰³ VIS is

³⁰⁹⁴ Mary Giannini, 'Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act' (2008) 26 Yale Law and Policy Review 431, 445.

³⁰⁹⁵ *Ibid.*, 446.

³⁰⁹⁶ *In re Kenna*, 453 F.3d 1136, 1136, 1137 (9th Cir. 2006) (per curiam) (*Kenna II*).

³⁰⁹⁷ *Payne v. Tennessee*, 501 U.S. 808 (1991) at 827; *United States v. Sampson* 332 F. Supp. 2d 325, 338 (D. Mass. 2004); *Lynn v. Reinstein*, Judge of the Superior Court of the State of Arizona 68 P.3d 412 (Az. 2002).

³⁰⁹⁸ *Booth v. Maryland* 482 U.S. 496 (1987).

³⁰⁹⁹ *Payne v. Tennessee*, 501 U.S. 808, 830 n. 2 (1991).

³¹⁰⁰ *Ibid.*, 835 n. 1 (Souter, J., concurring). See also *Ibid.*, 833 (O' Connor, J. concurring).

³¹⁰¹ *Ibid.*, 827, 830 n. 2.

³¹⁰² *State v. Mattesan*, 851 P.2d 336 (Idaho 1993); *Randall v. State*, 846 P.2d 278 (Nev. 1993).

³¹⁰³ *Beloof, Cassell and Twist* (2010) 597.

generally limited to victims of the charged crime.³¹⁰⁴ Although a victim's right to introduce a VIS cannot be delegated to a relative or friend, the court normally has discretion to hear and consider other witnesses as appropriate.³¹⁰⁵ Some judges have passed sentences on defendants that focus on the victims, frequently at victims' request.³¹⁰⁶

On another note, the Federal Sentencing Guidelines provide for sentencing enhancements (aggravating factors) in various situations paying attention to the kind of victim or the effects on the victims. Accordingly, the guidelines provide additional punishment, estimated by increasing the level of a crime under some circumstances, among which the following are related to victims: vulnerable victim, restraint of victim, physical injury, extreme psychological injury, and extreme conduct.³¹⁰⁷

5.1.3. French Inquisitorial System

The request of imposing a penalty is solely reserved to the prosecution, i.e., the state authority and, hence, civil parties' opinions or wishes concerning the nature and the amount of the penalty are judicially inoperative.³¹⁰⁸ Even though the victim lacks an active and direct role in choosing the sanction, (s)he can exercise an indirect influence and play a passive but at the same time real role as referred to under article 132-24 of the French Criminal Code which states that:

The nature, amount and regime of penalties pronounced against the accused are set in such a manner to conciliate the effective protection of the society, sanction of the accused *and the victims' interests* with the need to facilitate the insertion or re-insertion of the convicted and to prevent the commission of new crimes [emphasis added].³¹⁰⁹

³¹⁰⁴ Commonwealth v. Smithton, 631 A.2d 1053 (Pa. Super. Ct. 1993).

³¹⁰⁵ People v. Zikorus, 197 Cal.Rptr. 509 (Cal. App. 1983).

³¹⁰⁶ Beloof, Cassell and Twist (2010) 597.

³¹⁰⁷ See respectively: § 3A1.1, § 3A.1.3, § 3A1.3, § 5K2.3, and § 5K2.8.

It should be added that both the CVRA and the majority of States allow victims' input in parole hearing. See, as for the CVRA, 18 U.S.C § 3771 (a) (4). This is handled in quite similar manner as in court hearings. See Beloof, Cassell and Twist (2010) 606. Some states admit victims' input in pardon proceedings. See Ibid., 607. Lastly, but equally important, a type of victim-defendant confrontation is the requirement of attendance at a victim impact panel as condition of sentencing. See Ibid., 629.

³¹⁰⁸ See Pignoux (2008) 313. See also Serge Guinchart and Jacques Buisson, Procédure Pénale (Litec 2005) § 912.

³¹⁰⁹ 'La nature, le quantum et le régime des peines prononcées sont fixés de manière à concilier la protection effective de la société, la sanction du condamné et les intérêts de la victime avec la

Accordingly, judges and, where applicable, jury members are requested to integrate the victim, i.e., the person who has suffered because of a crime, in their reflection about a suitable penalty. However, there is neither an obligation to justify the application of the penalty nor an obligation to explain to the victims how their interests have been integrated to the decision. This has led to an opaque scenario, which is compounded by difficulties found by the victim to access information on the reality of the penalty regarding his/her interest. Thus, the victim would be only a parameter to be considered by the judge.³¹¹⁰

Nevertheless, according to article 81-1 of the CPP, the civil party can according to law request the investigating judge to proceed to ‘[...] any act which permits him/her to appreciate the nature and importance of the harm suffered by the victim or gather information about the victim’s personality’.³¹¹¹ This provision was clarified by a circular which made it explicit that its purpose is to collect elements to enable the competent jurisdiction to better evaluate the seriousness of the crime with regard to harm inflicted to the victim as well as to make it easier for the victim to justify his/her compensation claim.³¹¹² The acts established under article 81-1 can be conducted by a rogatory commission or by an expert in charge of assessing his/her harm.³¹¹³ Accordingly, the victim can via his/her harm, influence the choice of the penalty and, therefore, the French practice gets closer to VIS; however, this is not as explicit as in the case of common law jurisdictions.³¹¹⁴ In any case, the civil party may testify on the character and the morals of the accused.³¹¹⁵

According to the French Criminal Code the same crime is sanctioned in a different manner based on the consequences over victims’ physical integrity, and victims’ need for compensation can also guide the judge to choose the penalty in order to preserve the capacity of the convicted to provide

nécessité de favoriser l’insertion ou la réinsertion du condamné et de prévenir la commission de nouvelles infractions’.

³¹¹⁰ Stéphane Bernhard, ‘Le Rôle de la Victime dans le Prononcé et L’Exécution des Peines’ in Strickler (2009) 157, 160.

³¹¹¹ ‘[...] à tout acte lui permettant d’apprécier la nature et l’importance des préjudices subis par la victime ou de recueillir des renseignements sur la personnalité de celle-ci’. The above-quoted can also be exercised by the investigating judge on his/her own initiative or requested by the Prosecutor.

³¹¹² Circulaire 14 May 2001 JUS-D-01-30065 C/CRIM-01-07/F1 - 14.05.01, Présentation des Dispositions de la Loi du 15 Juin 2000 Renforçant la Protection de la Présomption D’Innocence et les Droits des Victimes Relatives aux Victims, 1.3.14.

³¹¹³ Ibid., Loc. cit.

³¹¹⁴ Pignoux (2008) 316.

³¹¹⁵ CPP, article 444.

compensation.³¹¹⁶ Moreover, paying attention to victims' interests, when pronouncing sentences, can lead the judge to interdict the convicted from coming into contact with the victim.³¹¹⁷

5.2. The ICTY, the ICTR and the SCSL

5.2.1. General Considerations

Since victims lack the official status of victim participants, they do not have the right to submit VIS to the Trial Chamber themselves. Nor, are the Chambers required to admit VIS. Nevertheless, the ICTY and the ICTR have admitted VISs filed by the Prosecutor,³¹¹⁸ and regardless of the fact that submission of those statements to the Chamber was not originally provided for in the Statutes or the RPE of those tribunals. Currently, the legal ground thereof is contained in the ICTY RPE and the ICTR RPE rule 92 *bis* and which reads as follows:

(A) Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question: [...]

d) concerns the impact of crimes upon victims.

It is pertinent to mention that rule 155 (A) (d) of the STL RPE contains a similar provision. On the other hand, under rule 92 *bis* of the SCSL RPE, there is no explicit reference to the impact of crimes upon victims as a factor when examining whether to admit witnesses' written statements unlike the ICTY RPE

³¹¹⁶ Ibid., Loc. cit.

³¹¹⁷ Criminal Code, articles 131-6, 14; 132-45, 13.

It should be noticed that, unlike the sentencing stage as such where victim's participation is limited, victims (either victims *sensu lato* or civil parties) during the post-sentence stage, i.e., in the application of the penalty, hold a particularly active role as, *inter alia*, they have the rights to present written observations and the civil party's lawyer can participate in the contradictory debate by presenting his/her respective observations before the tribunal of application of penalties. See CPP, articles 712-6 and 712-7 respectively. Finally, it should be added that victims' interests can be taken into account in the individualization of the imprisonment penalty, in particular a temporal or definitive cessation thereof. See CPP, article 720.

³¹¹⁸ See, e.g., Akayesu (ICTR-96-4-T), Sentencing Judgment, Trial Chamber, 2 October 1998; Tadić (IT-94-1-Tbis-R117), Sentencing Judgment, Trial Chamber, 11 November 1999, para. 4; Todorović (IT-95-9/1), Sentencing Judgment, Trial Chamber, 31 July 2001, para. 53.

and the ICTR RPE. Moreover, unlike the ICTY and the ICTR, the SCSL was reluctant to admit VIS.³¹¹⁹

5.2.2. Legal Issues

A VIS is first and foremost given for sentencing purposes since it may impact the sentence to be imposed. These statements portray the degree of suffering and harm endured by victims, which is part of the seriousness of the crimes and, hence, an aggravating factor as identified in *Krstić* by the ICTY:

[...] the Trial Chamber must assess the seriousness of the crimes in the light of their individual circumstances and consequences. This presupposes taking into account quantitatively the number of victims and qualitatively the suffering inflicted on the victims.

[...]

Appropriate consideration of those circumstances gives “a voice” to the suffering of the victims.³¹²⁰

The appropriate circumstances referred to in the previous excerpt included complete defenselessness of victims, physical and psychological suffering inflicted on them as well as terrifying and heinous methods employed to perpetrate the crimes.³¹²¹ Individual victims’ specific characteristics may also hold relevance, in particular when it comes to a victim who is particularly vulnerable, or a victim who is a child or a woman, which have been considered as an aggravating factor.³¹²² Other aggravating factors considered have been discriminatory motive, e.g., ethnic and religious discrimination,³¹²³ particular or extreme cruelty,³¹²⁴ and scale of the crime, including the number of victims.³¹²⁵

³¹¹⁹ See, e.g., Brima et al. (SCSL-04-16-T), Trial Chamber, Sentencing Judgment, 19 July 2007, paras. 6-9.

³¹²⁰ *Krstić* (IT-98-33-T), Judgment, Trial Chamber, 2 August 2001, paras. 701 and 703.

³¹²¹ *Ibid.*, para. 703.

³¹²² See, e.g., concerning the status of victims as women and children: Furundžija (IT-95-17/1), Judgment, Trial Chamber, 10 December 1998, para. 283; Kunarac et al. (IT-96-23-T and IT-96-23/1-T), Judgment, Trial Chamber, 22 February 2001, paras. 864, 874 and 879; Kunarac et al. (IT-96-23-A and IT-96-23/1-A), Appeals Judgment, Appeals Chamber, 12 June 2002, paras. 352, 354 and 355; Taylor (SCSL-03-01-T), Sentencing Judgment, Trial Chamber, 30 May 2012, para. 25. As for the vulnerability of victims see, e.g., *Deronjić* (IT-02-61), Judgment on Sentencing Appeal, Appeals Chamber, 20 July 2005, paras. 124, 126-128; Taylor (SCSL-03-01-T), 30 May 2012, paras. 25 and 75.

³¹²³ See, e.g., *Blaškić* (IT-95-14), Judgment, Trial Chamber, 3 March 2000, para. 785; Taylor (SCSL-03-01-T), 30 May 2012, para. 25.

³¹²⁴ See, e.g., *Todorović* (IT-95-9/1-S), Judgment, Trial Chamber, 31 July 2001, para. 65.

The effect of a VIS has explicitly been acknowledged and/or quoted in judgments. To illustrate this point, judgments on *Mucić et al.* and *Bralo* at the ICTY are analyzed here. In the first case, concerning sexual violence, the Trial Chamber stated that:

[...] Ms. Antic testified as to the effect these crimes had on her, including feelings of misery, constant crying and the feeling that she had gone crazy. In a victim impact statement submitted by the Prosecution for the purposes of sentencing, she stated, “[t]he wounds that I carry from the rapes in Čelebići will never go away”.³¹²⁶

It should be mentioned that VISs of sexual violence survivors seem to be exceptional.³¹²⁷ Moreover, even though the impact of sexual violence on the victims is sometimes emphasized by the Prosecutor when conducting examination, the Office of the Prosecutor has not apparently included such inquiry as part of its prosecutorial strategy to seek justice for rape victims.³¹²⁸

In *Bralo*, the Trial Chamber considered not only the way in which crimes were perpetrated but also ‘the submissions of the Prosecution on the impact of these crimes on his victims’.³¹²⁹ Indeed, in this case, the defence explicitly reckoned:

[...] the suffering of Bralo’s victims, both at the time of commission of his crimes, and in the months and years afterwards. The Defence has further agreed with the Prosecution that the victim impact statements provided to the Trial Chamber are both powerful and affecting.³¹³⁰

The Chamber took note of and examined the several statements, submitted by the Prosecutor, from survivors and whose relatives were killed, and actually the Chamber appreciated ‘the willingness of these victims to describe their ordeal and the consequences of the attack upon their lives since’.³¹³¹ Therefore, the effect of VISs in establishing the sentence was explicitly acknowledged by the Chamber under the following wording:

³¹²⁵ See, e.g., Kambanda ((ICTR-97-23-S), Judgment and Sentence, Trial Chamber, 4 September 1998, para. 42; Blagojević (IT-02-60-T), Judgment, Trial Chamber, 17 January 2005, para. 485.

³¹²⁶ Delalić et al. (IT-96-21-T), Judgment, Trial Chamber, 16 November 1998, para. 1263.

³¹²⁷ Brouwer (2005) 286.

³¹²⁸ Ibid., Loc. cit.

³¹²⁹ Bralo (IT-95-17-T), Sentencing Judgment, Trial Chamber, 7 December 2005, para. 36.

³¹³⁰ Ibid., Loc. cit.

³¹³¹ Ibid., para. 37.

These statements paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma. The Trial Chamber is therefore mindful of the suffering of these victims, and of all of the other Muslim residents of Ahmići and Nadioci who were persecuted or otherwise abused by Bralo in the course of the attacks on their villages. It observes that the consequences of the persecution, murders, rape, and other crimes committed by Bralo are profound and long-lasting and takes this into consideration in its determination of sentence.³¹³²

The ICTY Prosecutor has additionally called victim-witnesses to give testimony concerning the impact of the crimes on their lives as well as the accused's character during the time when the offences in question took place.³¹³³ Indeed, the ICTY and the ICTR Prosecutors have frequently introduced VISs as an avenue to voice the suffering and harm endured and expressed by the victims in their own language. Therefore, although victims lack an official victim participant status, they can at least influence the Chambers when these are considering what sentence should be imposed. Be that as it may, once a crime is established, the negative effect on the victim is implicitly understood by the Chamber, as was indicated by the ICTR in *Akayesu* and *Musema*.³¹³⁴ In the latter case, the Trial Chamber noticing that an important number of witnesses 'in this case have seen or have experienced terrible atrocities' and bearing in mind that recounting such painful experiences normally produces pain to the witness and affects his/her ability to recount those events before a court, it 'considered the testimony of those witnesses in this light'.³¹³⁵ Nevertheless, the above-referred implicit understanding is not equal to saying that the impact of the crime is always explicitly pointed out in the judgments or sentences of these tribunals, which is the situation when the effects of the crimes on the victims are not adequately addressed.³¹³⁶

Be that as it may, it has been held that the consequences of the crime upon the victims who are directly injured are 'always' a relevant consideration in sentence.³¹³⁷ When such consequences on the victim are a constitutive part of the crime definition, 'they may not be considered as an aggravating circumstance in

³¹³² Ibid., para. 40.

³¹³³ See, e.g., Nikolić (IT-94-2-S), Sentencing Judgment, Trial Chamber, 18 December 2003, paras. 41-43. See also McGonigle Leyh (2011) 145.

³¹³⁴ *Akayesu* (ICTR-96-4-T), 2 September 1998, paras. 142-144; *Musema* (ICTR-96-13-T), Trial Chamber, Judgment and Sentence, 27 January 2000, paras. 100-101.

³¹³⁵ *Musema* (ICTR-96-13-T), Trial Chamber, Judgment and Sentence, 27 January 2000, para. 100.

³¹³⁶ See also, with special emphasis on sexual crimes, Brouwer (2005) 291.

³¹³⁷ See, e.g., Krnojelac (IT-97-25-T), Judgment, Trial Chamber, 15 March 2002, para. 512.

imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences’.³¹³⁸

It is important to notice that although the Statutes and the RPEs of these tribunals do not mention explicitly the effects of the crimes on victims, the ICTY RPE, the ICTR RPE and the SCSL RPE include an open-ended clause, which refers to ‘any aggravating circumstance’.³¹³⁹ In addition, these tribunals when imposing sentences as part of the ‘gravity of the offence’ factor contained in their Statutes,³¹⁴⁰ have considered the degree of suffering or impact of the crime on the immediate victim, effect on his/her relatives and the vulnerability and number of victims.³¹⁴¹ Effects of the crime on the victims’ relatives may be taken into account when establishing the appropriate punishment and that ‘even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others’.³¹⁴² Moreover, the ICTY in *Mucić et al.* determined that ‘The gravity of the offences of the kind charged has always been determined by the effect on the victims or, at the most, on persons associated with the crime and nearest relations’.³¹⁴³ Evidence of the accused’s bad character, i.e., concerning similar conduct that did not lead to a conviction, has been considered as an aggravating factor.³¹⁴⁴ Lastly, but equally important, an admission of guilt and a guilty plea have sometimes been considered as mitigating factor.³¹⁴⁵ This seeks not only to save the court resources but also to avoid undue strain on witnesses and victims.³¹⁴⁶

³¹³⁸ Ibid., Loc. cit. See also, Blagojević (IT-02-60-T), Judgment, Trial Chamber, 17 January 2005, para. 845. On the effect of the crimes on the victims and their families as an aggravating factor see, e.g., Taylor (SCSL-03-01-T), 30 May 2012, paras. 25, 70 and 74.

³¹³⁹ ICTY RPE, rule 101 (B) (i); ICTR RPE, rule 101 (A) (i); and SCSL RPE, rule 101 (B) (i).

³¹⁴⁰ ICTY Statute, article 24 (2); ICTR Statute, article 23 (2); SCSL Statute, article 19 (2).

³¹⁴¹ See, e.g., Taylor (SCSL-03-01-T), 30 May 2012, para. 20; Blaškić (IT-95-14-A), Appeal Judgment, Appeals Chamber, 29 July 2004, para. 683.

³¹⁴² Krnojelac (IT-97-25-A), Appeal Judgment, Appeals Chamber, 17 September 2003, para. 260.

³¹⁴³ Delalić et al. (IT-96-21-T), 16 November 1998, para. 1226.

³¹⁴⁴ Ndindabahizi (ICTR-01-71-A), Appeal Judgment, Appeals Chamber, 16 January 2007, para. 141; Ndindabahizi (ICTR-01-71-I), Judgment, Trial Chamber, 15 July 2004, paras. 474, 508 (iii).

³¹⁴⁵ See, e.g., Erdemović (IT-96-22-S), Sentencing Judgment, Trial Chamber, 5 March 1998, paras. 16, 21; Kambanda ((ICTR-97-23-S), 4 September 1998, paras. 36, 48, 50 and 52; Blaškić (IT-95-14-T), 3 March 2000, para. 777.

³¹⁴⁶ William Schabas, ‘Penalties’ in Cassese, Gaeta and Jones (2002) 1497, 1506.

5.3. The ICC

5.3.1. Preliminary Considerations

According to article 76 (2) of the ICC Statute ‘the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence’. In *Lubanga*, the defence requested Trial Chamber I to hold an additional hearing in the event of a conviction.³¹⁴⁷ The Chamber decided that there would be a separate hearing if the accused is convicted,³¹⁴⁸ and for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial.³¹⁴⁹ Indeed, under article 76 (1) of the ICC Statute, the Chamber when considering the appropriate sentence ‘shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence’. As it is known, Lubanga was convicted by Trial Chamber I and separate sentencing proceedings took place, where victim participants intervened.

5.3.2. Victims’ Participation and Related Legal Issues

5.3.2.1. Victims’ Participation

In *Lubanga*, upon Trial Chamber I’s invitation,³¹⁵⁰ victim participants’ legal representatives filed written submissions on the procedure to be adopted for sentencing and the principles to be applied by the Chamber when considering the appropriate sentence to be imposed.³¹⁵¹ By referring to rule 145 of the ICC RPE, the legal representatives of victims emphasized the extent of damage to

³¹⁴⁷ See *Lubanga* (ICC-01/04-01/06-1250), Observations de la Défense sur l’interprétation et l’application de l’Article 76, 31 March 2008, para. 4.

³¹⁴⁸ See *Lubanga* (ICC-01/04-01/06), Transcripts, 25 November 2008, p. 39, lines 22-23.

³¹⁴⁹ See *Lubanga* (ICC-01/04-01/06), Transcripts, 25 November 2008, p. 39, line 11 to page 40, line 4; *Lubanga* (ICC-01/04-01/06-1140), 29 January 2008, para. 32; *Lubanga* (ICC-01/04-01/06-2360), Decision on Judicial Questioning, Trial Chamber, 18 March 2010, para. 38.

³¹⁵⁰ *Lubanga* (ICC-01/04-01/06-2844), Scheduling Order Concerning Timetable for Sentencing and Reparations, Trial Chamber I, 14 March 2012, para. 3.

³¹⁵¹ *Lubanga* (ICC-01/04-01/06-2864), Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10, 18 April 2012; *Lubanga* (ICC-01/04-01/06-2869), Observations du Groupe de Victimes V02 Concernant la Fixation de la Peine et des Réparations, 18 April 2012.

victims and their families as a factor to be considered by the Trial Chamber when determining the sentence.³¹⁵²

Victim participants' legal representatives filed submissions, a single filing for each of the two groups of victims,³¹⁵³ on the relevant evidence introduced during trial, as well as their views on the kind of penalty to be imposed in the sentence against Lubanga, including specific aggravating and mitigating factors.³¹⁵⁴ By referring to article 77 (applicable penalties) of the ICC Statute and rule 146 (imposition of fines), victims' legal representatives not only regarded imprisonment but also confiscation and imposition of fines as the applicable penalties in this case.³¹⁵⁵ By invoking rule 145 (2) (b) (ii) (iii) and (v), the legal representatives of victims emphasized the abuse of power or official capacity, the particular defenseless situation of the victims and the commission of the crimes with a discriminatory effect as aggravating sentencing circumstances.³¹⁵⁶ On the other hand, victims' legal representatives could not identify any mitigating circumstance, in particular, they noticed the lack of Lubanga's apologies towards the victims and the absence of his intention to redress the harm inflicted on victims.³¹⁵⁷ The V01 group of victims relied on the 25 April report from the TFV, which determined that approximately 2900 children under the age of 15 were enlisted, and submitted that this constituted considerable damage in the context of the case.³¹⁵⁸

Victim participants' legal representatives filed their submissions on the defence's request to introduce additional evidence, opposing it since they considered that admission of new evidence could substantially alter the subject matter of the sentencing hearing.³¹⁵⁹ They also considered that submission of

³¹⁵² Lubanga (ICC-01/04-01/06-2864), 18 April 2012, paras. 4-9; Lubanga (ICC-01/04-01/06-2869), 18 April 2012, paras. 6-8.

³¹⁵³ Lubanga (ICC-01/04-01/06-2893), Order Fixing the Date for the Sentencing Hearing, Trial Chamber I, 24 April 2012, para. 5.

³¹⁵⁴ Lubanga (ICC-01/04-01/06-2880), Observations sur la Peine pour le Groupe de Victimes V01, 14 May 2012; Lubanga (ICC-01/04-01/06-2882), Observations du Groupe de Victimes VO2 Sur des Éléments de Preuve Établissant des Circonstances Aggravantes ou des Circonstances Atténuantes des Faits Portés à la Charge de l'accusé Reconnu Coupable, 14 May 2012.

³¹⁵⁵ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 4-13.

³¹⁵⁶ Lubanga (ICC-01/04-01/06-2882), 14 May 2012, para. 4. See also, Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 15-16.

³¹⁵⁷ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 18-21; Lubanga (ICC-01/04-01/06-2882), 14 May 2012, paras 9-10.

³¹⁵⁸ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 8-9. See also Lubanga (ICC-01/04-01/06-2901), 10 July 2012, para. 46.

³¹⁵⁹ Lubanga (ICC-01/04-01/06-2893), Réponse Des Représentants Légeux du Groupe de Victimes V01 à la Requête de la Défense ICC-01/04-01/06-2892 du 4 Juin 2012, 7 June 2012, para. 4.

new evidence may affect the victims' interests and requested that they should be permitted to request leave to examine the relevant witnesses and, where applicable, to respond to any additional evidence introduced with the Chamber's leave, including via additional written submissions.³¹⁶⁰ Based on considerations of potential assistance to determine the aggravating and mitigating sentencing circumstances, Trial Chamber I allowed two defence witnesses' testimonies and a document on the time spent by Lubanga in custody for imprisonment sentence deduction effects.³¹⁶¹

In *Lubanga*, after two additional defence witnesses were heard, the Prosecutor and victim participants' legal representatives made their oral submissions, which were followed by a Lubanga's statement to the Chamber.³¹⁶² Victim participants' legal representatives are expected to endeavor not to repeat submissions made by the Prosecutor or, where applicable like in *Lubanga*, by the legal representatives of the other group of victim participants.³¹⁶³ During the sentencing hearing, the Trial Chamber emphasized that although the legal representatives of the victims can ask questions to the defence's witness, this shall be done guaranteeing that 'there is neither the reality nor the appearance of there being two Prosecutors in this Court'.³¹⁶⁴ Accordingly, questions posed by victim participants' legal representatives are allowed provided that they are relevant to the victims' concerns, they assist the Chamber to determine the truth, and their content and the manner of being framed do not trespass the above-mentioned restriction of not having two Prosecutors.³¹⁶⁵ One of the victims' lawyers tried to ask a defence's witness questions on his identity document;³¹⁶⁶ however, the Trial Chamber rejected doing so as this belongs to issues considered during the course of the trial leading to the judgment and not to the sentencing stage.³¹⁶⁷

The legal representative of the V01 group of victims challenged the language used by the defence which tried to present the crimes committed as not very serious.³¹⁶⁸ The legal representative also highlighted that the sentence has to

³¹⁶⁰ *Ibid.*, paras. 4-6.

³¹⁶¹ *Lubanga* (ICC-01/04-01/06-2895), Order on the defence request to present evidence during the sentencing hearing, Trial Chamber I, 11 June 2012, paras. 19-23.

³¹⁶² See *Lubanga* (ICC-01/04-01/06), Transcripts, 13 June 2012.

³¹⁶³ *Lubanga* (ICC-01/04-01/06-2893), 24 April 2012, para. 8.

³¹⁶⁴ *Lubanga* (ICC-01/04-01/06), Transcripts, 13 June 2012, p. 18, lines 24-25.

³¹⁶⁵ *Ibid.*, p. 18, line 25 and p. 19, lines 1-4.

³¹⁶⁶ *Ibid.*, p. 30, lines 16-21.

³¹⁶⁷ *Ibid.*, p. 30, lines 22-25.

³¹⁶⁸ *Ibid.*, p. 37, lines 1-25.

reflect the gravity of the crimes taking into account the condition of the perpetrator,³¹⁶⁹ and pointed out that Lubanga did not express regret for what happened to the victims.³¹⁷⁰ In turn, the legal representative of the V02 group of victims emphasized that while it was difficult to identify mitigating sentencing factors,³¹⁷¹ it was possible to find several aggravating sentencing factors such as Lubanga's personality and behavior, means employed to commit the crimes, harm done to the victims (both direct and indirect) and Lubanga's degree of participation.³¹⁷²

Under rule 143, the sentencing hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the victim participants' legal representatives, besides the Prosecutor and the defence.³¹⁷³

Although it has been suggested that a Chamber may authorize victims to make a sentencing recommendation (via an impact statement),³¹⁷⁴ neither the ICC Statute nor the ICC RPE provides for explicitly this option. In *Lubanga*, none of the submissions on sentencing filed by victims' legal representatives suggested a specific imprisonment term. Those submissions only dealt with considerations on what sentence should be the appropriate, i.e., imprisonment, confiscation and fine; however, concerning imprisonment they did not contain a recommendation on a specific imprisonment term and they limited themselves to discuss the aggravating and mitigating sentencing circumstances, especially as for the impact on the victims as previously examined. This is different from the Prosecution's scope of action as he requested the Chamber to impose a 30-year imprisonment sentence on Lubanga.³¹⁷⁵

5.3.2.2. Related Legal Issues

Victims' interests go beyond the determination of criminal responsibility and may include the establishment of the punishment. The ICC concluded in *Katanga and Ngudjolo Chui* that the identification, prosecution and punishment

³¹⁶⁹ Ibid., p. 39, lines 21-25.

³¹⁷⁰ Ibid., p. 40, lines 20-25.

³¹⁷¹ Ibid., p. 41, lines 9-12.

³¹⁷² Ibid., p. 41, line 12-p. 43, line 5.

³¹⁷³ It should be added that, under rule 144, wherever possible, sentence decisions should be rendered in presence of victim participants or their lawyers.

³¹⁷⁴ McGonigle Leyh (2011), p. 301.

³¹⁷⁵ Lubanga (ICC-01/04-01/06-2868), Prosecution's Submissions on the Procedures and Principles for Sentencing, 18 April 2012, para. 5. See also Lubanga (ICC-01/04-01/06-2901), 10 July 2012, para. 95.

of those responsible are located 'at the root of the well established right to justice for victims of serious violations of human rights, which international human rights bodies have differentiated from the victims' right to reparations'.³¹⁷⁶ It is here discussed whether the punishment of the perpetrators is really a key component of the victim-centered discourse.

Victims' participation at the sentencing stage is grounded in boosting levels of victims' satisfaction, victims' moral interest in seeing that punishment is effected, and reassurance to victims of having support and public recognition.³¹⁷⁷ Those who oppose victims' participation during sentencing point out that it jeopardizes the due process rights of the accused and the public interest.³¹⁷⁸ Even those advocating for victims' greater access to the criminal process show some reservations concerning victims' participation during sentencing.³¹⁷⁹ Indeed, international law generally neither recommends nor prescribes victims' direct participation at sentencing and, if this is the case, such participation is usually limited to reparations.³¹⁸⁰ This is reasonable since the state obligation to punish constitutes an obligation of means.³¹⁸¹ Even though a victim-centered approach claims that societies punish serious crimes out of deference to the victims,³¹⁸² it acknowledges that a State meets its obligation to punish even when the trial results in acquittal provided that this was not 'preordained to be ineffective'.³¹⁸³

It is sustained here that a balanced position according to which the victims' interests, including the punishment of the perpetrator, should be considered when determining the sentence but only as one factor, which is indeed the position in the ICC Statute and RPE.³¹⁸⁴ Determination of individual

³¹⁷⁶ Katanga and Ngudjolo Chui (ICC-01/04-01/07-474), 13 May 2008, paras. 38-39.

³¹⁷⁷ Doak (2008) 152; Antonia Cretney and Gwynn Davis, *Punishing Violence* (Routledge 1996) 178.

³¹⁷⁸ See Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578, 585; Jane Morgan, Frans Winkel and Katherine Williams, 'Protection of and Compensation for Victims of Crime' in Christopher Harding, Phil Fennell, Nico Jorg and Bert Swart (eds.), *Criminal Justice in Europe* (Oxford University Press 1996) 301, 315.

³¹⁷⁹ Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes (2004) 26 *Human Rights Quarterly* 605, 609.

³¹⁸⁰ *Ibid.*, *Loc. cit.* See also UN Basic Principles and Guidelines, Principle 22 (f) ('Judicial and administrative sanctions against persons liable for the violations' is included under satisfaction, a mode of reparations.). See for further details *infra* Chapter V.

³¹⁸¹ Mendez (1997) 264.

³¹⁸² Mendez (2001) 31.

³¹⁸³ Mendez (1997) 264.

³¹⁸⁴ ICC Statute, article 78 (1); ICC RPE, rule 145 (1) (c) ('the extent of the damage caused, in particular the harm caused to the victims and their families'). See also Schabas (2010) 902-906.

criminal responsibility should also be related to a more inclusive appraisal of community liability regarding sentencing purposes.³¹⁸⁵ This does not mean to engage the ICC in truth-seeking as if it were a TRC but that the ICC exploits ‘the restorative potential of the trial when establishing accountability for international crimes’,³¹⁸⁶ which may help to achieve healing and closure for victims and their respective communities by facilitating mediation in trial.³¹⁸⁷

The foregoing considerations should arguably guide ICC Judges’ discretion. The ICC Statute and RPE leave important room for flexibility to take into account the harm inflicted on victims when determining the sentence and, therefore, victims’ participation oriented to sentencing is appropriately allowed. Article 78 (1) of the ICC Statute mentions ‘gravity of the crime and the individual circumstances of the convicted person’ as illustrative factors when determining the sentence. Rule 145 (1) (c) of the ICC RPE adds a non-exhaustive list including ‘the extent of the damage caused, in particular the harm caused to the victims and their families’. Nevertheless, this rule only obliges the ICC to ‘give consideration’ to the harm caused to victims but does not introduce a victim’s right to file submissions to be necessarily considered in sentencing. Therefore, it would be advisable to amend the ICC RPE to ensure that viewpoints of victims be sought by the ICC.³¹⁸⁸

As previously referred to, besides imprisonment, the ICC may also impose fine and ‘forfeiture of proceeds, property and assets derived directly or indirectly from that crime’.³¹⁸⁹ This is discussed in detail later in the next chapter.³¹⁹⁰ It is also discussed in the next chapter,³¹⁹¹ the possibility for victim participants to make representations on reparations at the sentencing hearing and, in particular, in any additional hearing, if one is held by the Trial Chamber.³¹⁹²

To complete this sub-section, it is now examined some findings contained in the first sentence decision by Trial Chamber I in *Lubanga*. Trial Chamber I considered the gravity of the crimes in the circumstances of this case,

³¹⁸⁵ Ralph Henham, ‘Towards Restorative Sentencing in International Criminal Trials’ (2009) 9 *International Criminal Law Review* 809, 814.

³¹⁸⁶ *Ibid.*, Loc. cit.

³¹⁸⁷ *Ibid.*, 815.

³¹⁸⁸ Especially amendment to rule 93 of the ICC RPE (Views of victims or their legal representatives).

³¹⁸⁹ ICC Statute, article 77 (2) (a) and 77 (2) (b) respectively.

³¹⁹⁰ See *infra* Chapter V 2.3.2.

³¹⁹¹ See *infra* Chapter V 3.3.1.4.

³¹⁹² See ICC Statute, article 76 (3); ICC RPE, rule 143.

with regard, among others, to the extent of the damage caused and, in application of rule 145 (1) (c), in particular:

[...] the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.³¹⁹³

Although the Prosecution did not charge Lubanga with rape and other sexual violence crimes, the Trial Chamber examined them under rule 145 (1) (c) as a component of: i) the harm suffered by the victims; ii) the nature of the unlawful behavior; iii) the circumstances of manner in which the crime was committed; and, iv) under rule 145 (2) (b) (iv), this can also be considered as showing that the crime was perpetrated with particular cruelty.³¹⁹⁴ However, due to the fact that the Prosecutor neither introduced relevant evidence during the sentencing stage nor referred to any relevant evidence brought during the trial, sexual violence was not considered part of the assessment of Lubanga's culpability for sentencing purposes.³¹⁹⁵ Trial Chamber I also rejected the fact that some child soldiers were under the age of 15 as an aggravating circumstance,³¹⁹⁶ which was submitted by the legal representatives of the V01 group of victims.³¹⁹⁷ Although the legal representatives of the V02 group of victims argued that there was a discriminatory intent as the female soldiers were sexually abused,³¹⁹⁸ Trial Chamber I concluded that evidence was not provided to demonstrate that Lubanga deliberately discriminated against women in the commission of these crimes.³¹⁹⁹

Moreover, Trial Chamber I found no aggravating factor and, therefore, it considered that a whole life term would be inappropriate.³²⁰⁰ On the contrary, Lubanga's persistent cooperation with the ICC during the proceedings was

³¹⁹³ Cited in Lubanga (ICC-01/04-01/06-2901), 10 July 2012, para. 44.

³¹⁹⁴ Ibid., para. 67.

³¹⁹⁵ Ibid., para. 75.

³¹⁹⁶ Ibid., paras. 77-78.

³¹⁹⁷ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 15-16; Lubanga (ICC-01/04-01/06-2882), 14 May 2012, paras. 6-9.

³¹⁹⁸ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, para. 10.

³¹⁹⁹ Lubanga (ICC-01/04-01/06-2901), 10 July 2012, para. 81.

³²⁰⁰ Ibid., para. 96. Trial Chamber I cited rule 145 (3), which states that life imprisonment sentence is 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances'.

considered as mitigating.³²⁰¹ Taking into account all these factors, and pursuant article 78 (3), the total period of imprisonment on the basis of the joint sentence was set to be 14 years.³²⁰²

This sentence may be considered as lenient, which has indeed been the main criticism coming from some human rights NGOs, activists and victims.³²⁰³ Victims have complained about the relative low number of years by stating, *inter alia*, that ‘We are many whose lives were ruined because of him. This penalty is not proportional to his capacity to cause trouble’, and ‘He [Lubanga] has done a lot of things in Ituri that everyone knows about, and today you condemn him to 14 years [...] that is to mock us’.³²⁰⁴ Even other members of the NGOs community fear Lubanga’s return.³²⁰⁵ It is here argued that victims’ disappointment, anger and frustration for the relatively lenient sentence has some ground. In particular, the Majority of the Chamber should have considered the damage inflicted to the victims and their families, especially as a consequence of the harsh punishments and sexual violence suffered by the victims of those crimes in accordance with rule 145 (1) (c), which was criticized by Judge Odio Benito in her dissent to the decision on sentence.³²⁰⁶

Accordingly, the Chamber should have considered the ample evidence brought in trial connected with the conditions in which boys and girls were recruited and the harm suffered by them, particularly harsh treatment and sexual violence against very young children, as aggravating circumstances when determining the applicable sentence.³²⁰⁷ Therefore, factors such as ‘sexual violence’ and ‘punishment’, disregarded by the majority but admitted in the dissenting opinion,³²⁰⁸ should have been considered as aggravating factors to increase the sentence inasmuch as these factors led to serious and frequently irreparable harm to the victims and their families. In any case, the Prosecutor

³²⁰¹ Lubanga (ICC-01/04-01/06-2901), 10 July 2012, paras. 88-90 and 97.

³²⁰² *Ibid.*, para. 99. See also para. 107.

³²⁰³ See, e.g., Olivia Bueno, ‘14 Years: Too Much or Not Enough?’ Commentary Trial Reports, 16 July 2012 in the Lubanga Trial at the International Criminal Court. Available at: <http://www.lubangatrial.org/2012/07/16/14-years-too-much-or-not-enough/> (last visit on 20 October 2012).

³²⁰⁴ See *Ibid.*, Loc. cit. (quoting victims interviewed. Another victim was reported to have said that the ICC had shown ‘how limited it is, the ICC must correct this error. Thomas doesn’t deserve 14 years in prison, he deserves 20, 25, 30, and even 50 years in prison’).

³²⁰⁵ See *Ibid.*, Loc. cit.

³²⁰⁶ Lubanga (ICC-01/04-01/06-2901), Decision on Sentence pursuant Article 76 of the Statute, Trial Chamber I, Dissenting Opinion of Judge Odio Benito, 10 July 2012, para. 2.

³²⁰⁷ See also *Ibid.*, paras. 6 and 8.

³²⁰⁸ See *Ibid.*, para. 22.

filed its notice of appeal against the sentence decision and, thus, ‘For reasons that will be provided in its document in support of the appeal, request that the Appeals Chamber reverse and revise upward Thomas Lubanga’s 14-year sentence’.³²⁰⁹ The Prosecutor considered the sentence disproportionate to the crime, considering *inter alia* the harm caused to victims and their families,³²¹⁰ and requested the Appeals Chamber to vary the sentence upwards.³²¹¹ As it is known, both the judgment and sentence in *Lubanga* are currently under appeals.

5.4. The ECCC and the STL

5.4.1. General Considerations

5.4.1.1. The ECCC

With regard to the ECCC, as previously mentioned, the trial before the ECCC is not divided into trial and sentencing stages, and, therefore, all relevant testimony and material put before the Chamber, whether it refers to the question of guilt or any eventual innocence, is examined during trial.³²¹² The Trial Chamber in *Duch* concluded that civil parties’ lawyers cannot file submissions on sentencing as this corresponds exclusively to the Prosecutor’s mandate and, hence, civil parties were asked not to file submissions: i) on the sentence, ii) relevant to sentencing, and iii) on the assessment of factors underlying a decision on sentencing.³²¹³ The Trial Chamber noted that the ECCC Internal Rules provide no legal basis for the civil parties to file submissions on sentencing.³²¹⁴

In any case, for example, in *Nuon Chea et al.*, as previously referred to,³²¹⁵ civil parties during trial have been allowed to express their suffering during the Democratic Kampuchea era in general, at least when this has not infringed the accused’s right to a fair trial.³²¹⁶ These statements of suffering may be considered *mutatis mutandi* as serving a similar function than that of VIS although those are not specific sentencing submissions.

³²⁰⁹ Lubanga (ICC-01/04-01/06-2933), Prosecution’s Notice of Appeal against Trial Chamber I’s “Decision on Sentence pursuant to Article 76 of the Statute”, 3 October 2012, para. 4.

³²¹⁰ Lubanga (ICC-01/04-01/06-2950), Prosecutor’s Document in Support of Appeal Against the “Decision on Sentence Pursuant to Article 76 of the Statute” (ICC-01/04-01/06-2901), Office of the Prosecutor, 3 December 2012, paras. 27-35.

³²¹¹ *Ibid.*, para. 96 (i).

³²¹² Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 15.

³²¹³ See Kaing Guek Eav alias Duch (Case 001), Transcripts, 27 August 2009, pp. 41-42.

³²¹⁴ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 35.

³²¹⁵ *Supra* Chapter IV 4.4.1.1.

³²¹⁶ Nuon Chea et al. (Case 002), 2 May 2013, para. 15. See also Brouwer and Heikkilä (2013) 1329-1330.

Additionally, the civil parties' lead co-lawyers in the first trial within *Nuon Chea et al.*, i.e., Case 002/01, requested the Trial Chamber to sentence the accused 'to a period of imprisonment commensurate with the gravity of their crimes and the measure of suffering and injury these crimes have caused civil parties and victims'.³²¹⁷

5.4.1.2. The STL

With regard to the STL, it should be first mentioned that the STL proceedings are divided into two stages: trial, to establish the accused's guilt or innocence and, provided the accused is found guilty, the sentencing stage to establish the sentence.³²¹⁸ Rule 87 (C) of the STL RPE explicitly provides for that victim participants may participate in the proceedings either via oral or written submissions as follows:

At the sentencing stage, subject to the authorisation by the Trial Chamber, a victim participating in the proceedings may be heard by the Trial Chamber or file written submissions relating to the personal impact of the crimes on them.

5.4.2. Legal Issues

5.4.2.1. The ECCC

In deciding not to admit civil parties' submissions on sentencing, the Trial Chamber in *Duch* interpreted rule 23 (1) (a) which states that one of the civil parties' purpose is to 'Participate in proceedings [...] by supporting the prosecution' as having to be interpreted restrictively and, hence, it 'does not confer a general right of equal participation with the Co-Prosecutors'.³²¹⁹ Although the fact that trial and sentencing proceedings before the ECCC are not divided leading to some ambiguity on the purpose of the evidence especially where facts relate simultaneously to conviction and sentence, civil parties were not permitted to evaluate all facts adduced during the criminal process.³²²⁰ Thus, the Trial Chamber determined that civil parties' evaluation of such facts is restricted to assisting the Co-Prosecutors to establish the accused's guilt or innocence and to the reparations proceedings.³²²¹ However, 'Where facts relate exclusively to sentencing, Civil Parties may not evaluate such factors or make

³²¹⁷ Nuon Chea et al. (Case 002), 26 September 2013, conclusive part i).

³²¹⁸ See STL RPE, rule 171. See also STL President (2010), para. 46; STL President (2012), para. 46.

³²¹⁹ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 25.

³²²⁰ *Ibid.*, para. 36.

³²²¹ *Ibid.*, Loc. cit.

submissions in relation to them'.³²²² It was therefore considered that civil parties have no role in relation to sentencing as this 'is the sole preserve of the prosecution, in the public interest and in the interests of justice'.³²²³

In connection with this issue, the Trial Chamber determined that civil parties are not allowed in general to question the accused concerning his character,³²²⁴ as well as experts and witnesses who testify exclusively on the character of the accused.³²²⁵ In reaching this conclusion, the Trial Chamber defined 'character' as including 'the personality, temperament, integrity and reputation of a person'.³²²⁶ In principle, according to the Chamber, none of these features are relevant concerning the accused's guilt or innocence.³²²⁷ They are relevant when determining aggravating or mitigating circumstances in relation to any eventual sentence and are not relevant to establish the accused's guilt or innocence.³²²⁸

The ban on civil parties to file submissions on sentencing and questioning related to the accused's character is herein criticized. First, neither the ECCC Internal Rules nor the Cambodian Code of Criminal Procedure contains an express limitation for civil parties as for sentencing. Second, the ban in question hinders civil parties' ability to support the prosecution. Third, by prohibiting civil parties to question the character of the accused at the end of the trial, the Trial Chamber dilutes Cambodians' capability to claim the trial as their own, which may make it more difficult for the ECCC to achieve its goal to promote national reconciliation.³²²⁹

Fourth, excluding civil parties' participation from sentencing considerations originated frustration and disillusionment among victims.³²³⁰ Thus, victims as civil parties who were denied participation concerning

³²²² Ibid., Loc. cit.

³²²³ Ibid., para. 42.

³²²⁴ Ibid., para. 48.

³²²⁵ Ibid., Loc. cit.

³²²⁶ Ibid., para. 45.

³²²⁷ Ibid., Loc. cit.

³²²⁸ Ibid., para. 46. The Trial Chamber considered that the portion of the trial proceedings depicted in the Scheduling Order of 13 August 2009 as 'Questioning the witness and expert on issues relating to the character of the accused' relates only to issues of character of the accused.

³²²⁹ See also David Sokol, 'Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia' (2011) 10 Washington University Global Studies Law Review 167, 181-182.

³²³⁰ See Michael Saliba, 'Civil Parties Boycott Start of Character Witness Testimony while Experts Offer Psychological Assessment of Duch', Cambodia Tribunal Monitor, 31 August 2009; McGonigle Leyh (2011) 196.

sentencing got disappointed when the Trial Chamber condemned Duch to only 35 years in prison.³²³¹ To an important extent, the Supreme Court Chamber via its appeal judgment corrected this situation insofar as it held that the sentence of 35 years of imprisonment by the Trial Chamber did not appropriately reflect the gravity of crimes and the individual circumstances of Duch.³²³² The Supreme Court Chamber found that the Trial Chamber erred in imposing an arbitrary and manifestly inadequate sentence, which prompted the Supreme Court Chamber to impose a sentence of life imprisonment against Duch.³²³³ In imposing this harsher sentence, the Supreme Court Chamber paid close attention to the ‘particularly heinous character’ of the crimes committed by Duch based on the verified number of victims killed, who totaled at least 12272, and also the systematic torture and deplorable conditions of the detention suffered by them.³²³⁴ Accordingly, in the understanding of the Supreme Court Chamber:

The sufferings of victims and their families and relatives are not in the past, but are continuing and will continue throughout their lives. Although the punishment of KAING Guek Eav does not completely cure their suffering, the victims’ fair and reasonable expectations for justice deserve to be fulfilled. KAING Guek Eav’s crimes were an affront to all of humanity, and in particular to the Cambodian people, inflicting incurable pain.³²³⁵

It should be noticed that, unlike the other international and hybrid criminal courts’ instruments, the ECCC Internal Rules do not contain an explicit enumeration of aggravating and mitigating circumstances.

Fifth, as determined by a dissent to a Decision on civil parties’ submissions on sentencing and directions concerning the accused’s character in *Duch*, legal proceedings are not only about answering the question ‘what did he or she do?’ but they also concern answering the question ‘why did he or she do that’, which is a legitimate concern for all parties, civil parties included.³²³⁶

³²³¹ McGonigle Leyh (2011) 196; Pham et al. (2011) 280.

³²³² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 383.

³²³³ *Ibid.*, Loc. cit.

³²³⁴ *Ibid.*, para. 376.

³²³⁵ *Ibid.*, para. 381.

³²³⁶ Kaing Guek Eav alias Duch (Case 001), Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Trial Chamber, Dissenting Opinion of Judge Lavergne, 9 October 2009, para. 28.

Accordingly, civil parties' participation should have not been restricted to the mere determination of accused's guilt or innocence but it should have also included participation as for sentencing. Moreover, it is quite difficult to differentiate between what should be taken into account for accused's guilt or reparations and what should be considered to establish an appropriate punishment, which is particularly relevant when it comes to very serious crimes where, *inter alia*, the consequences for victims is a factor to be considered when imposing the punishment.³²³⁷ Furthermore, accused's guilt is not determined in the abstract but it is connected to knowledge of the crimes and matters that go to knowledge of the defendant's character.³²³⁸ Indeed, these matters which may be inculpatory or exculpatory generally are already included in the judicial investigation case file or dossier to which all parties (civil parties included) had the opportunity to contribute.³²³⁹

Sixth, as put forward by the civil parties in *Duch* and acknowledged by the dissenting opinion previously referred to, domestic procedures permit civil parties to question all witnesses including those who testified on the defendant's character.³²⁴⁰ Indeed, civil parties had already testified or questioned the accused and others concerning the accused's character.³²⁴¹ For example, a civil party told about a meeting with Duch that took place after the facts over which the ECCC has jurisdiction but relevant to the accused's character.³²⁴² This reveals contradiction in the prohibition later imposed by the Trial Chamber.

5.4.2.2. The STL

With regard to the STL, following a systematic reading of rule 87 (C) of its RPE, quoted previously,³²⁴³ it should be pointed out that the STL RPE clearly state that when the Trial Chamber finds the accused guilty, the Prosecutor and the defence are those who are entitled to submit 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence'.³²⁴⁴ Hence, only subject to authorization by the Trial Chamber, victim participants 'may exercise all the

³²³⁷ Ibid., para. 27.

³²³⁸ Ibid., Loc. cit.

³²³⁹ Ibid., Loc. cit.

³²⁴⁰ Ibid., para. 33. See also McGonigle Leyh (2011) 195.

³²⁴¹ McGonigle Leyh (2011) 195.

³²⁴² Kaing Guek Eav alias Duch (Case 001), Transcripts, 24 August 2009, p. 26. Referred to by McGonigle Leyh (2011) 19, footnote 160.

³²⁴³ See supra Chapter IV 5.4.1.2.

³²⁴⁴ STL RPE, rule 171 (A).

rights provided in Rule 87 (C)'.³²⁴⁵ Moreover, rule 87 (C) can be considered as having achieved an important balance.³²⁴⁶

Accordingly, even though victim participants can be heard by the Judges so that these examine the seriousness of the crimes perpetrated based on the suffering inflicted on the victims, these are not allowed to file submissions or observations on the sentence to be imposed. Such a power has been limited to the Prosecutor, i.e., in his/her role as a public order guardian and who is expected to provide a recommendation for a proportional and just sentence based on the seriousness of the crime(s) in question as well as applicable mitigating and aggravating factors. Thus, by not allowing victim participants' submissions or observations on a specific sentence to be imposed, it is expected to avoid any manifestation of revenge. Be that as it may, as highlighted by the former President of the STL, Antonio Cassese, under rule 87 (C), victims may play an important role in the sentencing stage in assisting the Judges to evaluate the personal impact of the crimes on them via written or even oral submissions.³²⁴⁷ Thus, as summarized in the STL Information Guide on Victims' Participation, victim participation during the sentencing stage is limited, i.e., 'a victim may only give details of the impact of the crime on him if authorized to do so by the Trial Chamber. He is therefore not entitled to comment on sentencing'.³²⁴⁸ Additionally, rule 171 (E) establishes that not only the sentence shall be pronounced in public but it also, wherever possible, in the presence of the accused and victim participants.

It is important to mention that the STL RPE or Statute does not contain, as part of aggravating factors, an explicit reference to the harm or damage caused to the victims and their families. However, rule 172 (B) (i) of the STL RPE refers to an open-ended clause 'any aggravating circumstance'. Accordingly, when the STL has to impose a sentence, harm or damage inflicted on the victims must arguably be considered as an aggravating factor in order to achieve a fair and proportional sentence. Moreover, under article 24 (2) of the STL Statute factors such as 'the gravity of the offence and the individual circumstances of the convicted person' are mentioned for illustrative effects, letting alone that 'gravity of the offence' has been interpreted in international case law as including the

³²⁴⁵ Ibid., rule 171 (B).

³²⁴⁶ Hemptinne (2010) 178.

³²⁴⁷ STL President (2010), para. 17. See also STL President (2012), para. 17.

³²⁴⁸ STL Chambers (2010b) para. 28.

degree of suffering or impact of the crime on the immediate victim, effect on his/her relatives and the vulnerability and number of victims.³²⁴⁹

5.5. Comparative Conclusions

Although international law does not require a formal role for victims during/connected to sentencing proceedings, common law domestic practice examined (especially in the United States) and most of the international and hybrid criminal courts provide avenues in a higher or lower extent to permit at least some level of victims' participation. Whereas at the ICC and the STL, victims participants can present oral and written submissions on sentence, at the ECCC civil parties have been precluded from doing so. At the ICTY and the ICTR, victims can via the Prosecutor submit written evidence concerning the impact of crimes on them. Even though victims lack a formal victim participant status at the ICTY and the ICTR, their VISs have sometimes been explicitly acknowledged by the respective Trial Chamber when determining sentence. VISs have accordingly influenced sentences rendered although sometimes, for example, in sexual crimes cases, this influence has been rather limited. However, a VIS is channeled through the Prosecution like in England (family impact statement excepted) and only consists in written submissions like in England (oral family impact statement excepted) but unlike the United States.

At the ICC, victim participants' lawyers can *inter alia*: i) file written submissions on the procedures, principles applicable to sentencing as well as views on the kind of penalty to be imposed in the sentence, the impact of the crimes on the victims, aggravating/mitigating factors, and relevant evidence introduced during trial; ii) file submissions on defence's request to introduce additional evidence (witnesses included); iii) make oral submissions during the sentencing hearing; iv) ask questions to the defence's witnesses provided that these are relevant to victims' interest and contribute to the truth and without constituting or giving the appearance of being a second Prosecutor; and v) can ask the sentencing hearing to be postponed.

In *Lubanga*, the victim participants' lawyers did not propose a specific imprisonment term. This is similar to the practice existent in England (and in the United States concerning capital cases), which is justified by impartiality concerns and the Prosecutor's scope of action. In the United States, although in non-capital cases sentence recommendation is admissible, victims do not have the right to litigate sentence calculation. In *Lubanga*, even though ICC Trial

³²⁴⁹ See case law referred to in previous sub-sections of this sub-chapter, especially under sub-section 5.2.2.

Chamber I examined sexual violence crimes (not charged) to determine the sentence, it did not consider them as aggravating factors due to evidentiary and legal technicalities. This may explain why the sentence imposed on Lubanga was relatively lenient (14 years), which understandably caused disappointment among the victims. This sentence can be considered as disproportionately low considering the damage inflicted to the victims and their families, which was actually and extensively presented in trial connected to the conditions under which child soldiers were recruited and used in the hostilities.

At the ECCC, in *Duch*, the situation for victims looked much more difficult since civil parties were not allowed to file submissions on sentencing, relevant to sentencing and on evaluation of factors underlying a decision on sentencing. Even though these limitations are similar to those existent in the French system where civil parties are excluded from sentencing, at least in France victims can testify on the accused's character, which is prohibited by the ECCC for sentencing. This restrictive approach can be criticized under considerations such as: i) no explicit prohibition in the ECCC instruments; ii) hindering civil parties' ability to support the prosecution; iii) disempowerment of civil parties and obstacles to achieve reconciliation; iv) frustration among victims; v) the importance of participation to build knowledge of not only what crimes were committed but also why the accused did so; and vi) the fact that indeed civil parties had already testified and questioned about the accused's character during the trial in *Duch*. In any case, civil parties can present statements of suffering during trial.

At the STL, victim participants subject to Trial Chamber's authorization can participate in the sentencing proceedings via oral and written submissions on the personal impact of the crime on them but they cannot submit recommendations on sentence, i.e., their participation is limited.

A feature common to all the examined international and hybrid criminal courts (and also present in the considered national systems) is that in their instruments and/or case law,³²⁵⁰ factors relating to the victims have been considered to examine the gravity of the crimes and as aggravating factors. These have included the harm caused to and impact of crimes inflicted on victims and their families; the vulnerability and particular condition of victims; the manner to commit the crime, including cruelty and discrimination against victims; and the number of victims. All these factors are arguably an important guarantee to reach a sentence which is both fair and proportional to seriousness of the crimes

³²⁵⁰ As mentioned, the ECCC Internal Rules do not contain an explicit list of aggravating sentencing factors but these have been considered in its case law.

and the harm caused to victims. Thus, for example, the ECCC Supreme Court Chamber imposed a life sentence on *Duch*, overruling the 35 year imprisonment sentence imposed by the Trial Chamber, since the former paid closer attention to aggravating factors that have victims as central reference. Such factors are also similar *mutatis mutandi* to those employed by the examined domestic jurisdictions when determining a sentence. As a matter of *lege ferenda*, the ICC RPE and the other international and hybrid criminal courts' instruments may be modified so that it is made explicit that those courts shall always consider the harm inflicted on the victims. This would arguably constitute a guarantee for victims' submissions on this regard to be duly considered.

6. Victims' Participation in Appeals Proceedings

In this subchapter, it is examined the victims' participation regime during appeals proceedings. The appeals proceedings correspond not only to those related to a final judgment and sentence but also refer to interlocutory appeals, i.e., those appeals concerning issues before a case is finally decided.³²⁵¹ The analysis is focused on the situation of victims at the ICC, the ECCC and the STL.

6.1. National Systems

6.1.1. English Adversarial System

Since victims do not have an official status in criminal proceedings, they lack participatory rights during appeals proceedings. However, under the Code of Practice for Victims of Crime, there are specific obligations to inform. Thus, if a person convicted at the Magistrate's Court appeals against his/her conviction or sentence to the Crown Court, the joint police/CPS Witness Care Units must inform all victims of the appeal after the joint Police/CPS Witness Care Units are notified that an appeal notice has been lodged.³²⁵² The Witness Care Units must notify a prosecution witness regardless of the likelihood of the witness being called to provide evidence again and to inform them of the outcome of the

³²⁵¹ See McGonigle Leyh (2011) 303 (referring to Black's Law Dictionary (7th edn, West Publishing Company 1999)). An issue for interlocutory appeal can be identified by the fact that there is a topic requiring a decision for its resolution and is not merely disagreement over an issue. An issue for appeal must significantly affect, in a material manner, the fair and expeditious conduct of proceedings or the outcome of the trial. See, e.g., Situation in the DRC (ICC-01/04-168), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006, paras. 9-10.

³²⁵² The Code of Practice for Victims of Crime, para. 6.13.

appeal.³²⁵³ In turn, the Prosecutors have to keep victims informed of the progress of any appeal and, together with the Witness Care Units, to explain the effect of the court's judgment.³²⁵⁴ Moreover, witnesses and also any interested parties 'are entitled to approach the Attorney General' directly, establishing the reasons why they consider that the sentence should be reviewed.³²⁵⁵ Furthermore, the ECtHR concluded in *Kelly and Others v. The United Kingdom* that the lack of reasons in the Prosecutor's decision not to prosecute denied the families of the killed victims access to information and prevented them from challenging such decision.³²⁵⁶

6.1.2. American Adversarial System

The CVRA provides that when a victim is denied any of his/her enumerated rights (under the CVRA), (s)he 'may petition the court of appeals for a writ of mandamus [...] [which] the court [...] shall take up and decide [...] forthwith [...]'.³²⁵⁷ Moreover, the United States Congress endeavored to give victims a powerful new remedy that would fully protect victims through the incorporation of the 'shall take up and decide' language,³²⁵⁸ i.e., exonerating victims from the ordinary mandamus standards,³²⁵⁹ as also identified by some case law.³²⁶⁰ However, it should be stressed that the CVRA only permits victims to obtain appellate review of violations of their rights under the Act.³²⁶¹ Accordingly,

³²⁵³ The Witness Charter, Standards of Care for Witnesses in the Criminal Justice System (March 2008), standard 31.

³²⁵⁴ Implementing and complying with the Witness Charter - Operational Guidance for CPS Staff and Managers, standard 31. Available at: http://www.cps.gov.uk/legal/v_to_z/witness_charter_cps_guidance/#Toc194480777 (last visit on 20 October 2012).

³²⁵⁵ The Witness Charter, Standards of Care for Witnesses in the Criminal Justice System (March 2008), standard 31.

³²⁵⁶ ECtHR, *Kelly and Others v. United Kingdom*, 4 August 2001, para. 117.

³²⁵⁷ 18 U.S.C. § 3771 (d) (3). The 10th Federal Circuit Court in *United States v. McVeigh* considered the lack of standing of victims who were pursuing an appeal against a District Judge. This Judge had prohibited those victims that would testify at the sentencing phase from attending the trial. See *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997). This lack of standing was remedied by a statute specifically providing standing, e.g., the CVRA in the federal system. See Beloof, Cassell and Twist (2010) 691.

³²⁵⁸ See, for further details, Kyl, Twist and Higgins (2005) 618-622.

³²⁵⁹ Paul Cassell and Steven Joffe, 'The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act' (2010) 105 *Northwestern University Law Review Colloquy* 164, 169.

³²⁶⁰ *In re W.R. Huff Management Co.*, 409 F.3d, 555, 562 (2d Cir. 2005); *Kenna v. United States*, Dist. C. for C. Dist. CA. 435 F.3d. 1011, 1017 (9th Cir. 2006).

³²⁶¹ 18 U.S.C. § 3771 (d) (3).

unlike a Prosecutor, a victim who is just dissatisfied with the length of an imprisonment sentence against the convicted cannot seek mandamus review.³²⁶² Nevertheless, the victim is entitled to appeal a Judge's restitution decision since an erroneous restitution decision deprives a victim of 'the right to full and timely restitution as provided in law'.³²⁶³ Concerning restitution, the Sixth Federal Circuit Court of Appeals in *United States v. Perry* rejected previous case law and instead permitted a crime victim to appeal a District Court releasing a lien in favor of victim securing a restitution.³²⁶⁴

In *Kenna v. U.S.*, the Ninth Federal District Court of Appeals, considered that the District Court committed an error of law by refusing the petitioner (victim) to allocute at the sentencing, and it thus issued the writ, ordering the District Court to resentence the convicted after allowing the victims to speak during the sentencing hearing.³²⁶⁵ In *Doe v. United States*, taking into account the legislative history of rule 412 of the Federal Rules of Evidence, it was concluded that if rape victims are not permitted to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to that rule, the purpose thereof would be frustrated.³²⁶⁶ Additionally, in *United States v. Hunter*, it was found no precedent for allowing a non-party, i.e., a victim, post-judgment appeal that would reopen an accused's sentence and affect his/her rights, unlike cases not disturbing a final judgment, i.e., interlocutory appeal,³²⁶⁷ which was the situation in *Doe v. United States*.

Concerning state case law, in, for instance, *Landon v. State*, it was recognized that the victim has a mandatory and self-enabling right to appeal.³²⁶⁸ State appellate courts have vacated results, i.e., based on the use of remedy of voiding, and ordered judges to comply with and enforce victims' rights.³²⁶⁹ At a reconsideration hearing, the victim can exercise his/her right to address the court and this will affirm or void the previous order or ruling.³²⁷⁰ However, in some states, victims lack standing to ensure rights which cannot be exercised in criminal cases insofar as there is no voiding or reconsideration remedy

³²⁶² Cassell and Joffe (2010) 171.

³²⁶³ 18 U.S.C. § 3771 (a) (6). See also Cassell and Joffe (2010) 171, footnote 50.

³²⁶⁴ *United States v. Perry*, 360 F.3d 519, 524-527 (6th Cir. 2004).

³²⁶⁵ *Kenna v. United States*, Dist. C. for C. Dist. CA. 435 F.3d. 1011, 1018 (9th Cir. 2006).

³²⁶⁶ *Doe v. United States*, 666 F.2d 43 1981 (4th Cir. 1981).

³²⁶⁷ *United States v. Hunter* 548 F. 3d 1308, 1316 (10th Cir. 2008).

³²⁶⁸ *Landon v. State*, 1999 WL 46543 (No. A-6479 Alaska App. 1999).

³²⁶⁹ See, e.g., *Ford v. State* 829 So. 2d 946, 948 (Fla. Dist. Ct. App. 2002); *Melissa J. V. Superior Court*, 237 Cal. Rptr. 5, 6 (Cal. Ct. App. 1987).

³²⁷⁰ Douglas Beloff, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' (2005) *Brigham Young University Law Review* 255, 302.

available.³²⁷¹ Finally, it should be mentioned that only two states provide for appellate review of a trial court's violation of victims' rights.³²⁷² Therefore, other state courts have denied victim appeals against a final judgment as they are not parties and, therefore, lack standing to appeal.³²⁷³

6.1.3. French Inquisitorial System

The victim as civil party can appeal most of the decisions concerning his/her civil interests, in each stage of the proceeding, i.e., prosecution, instruction and judgment.³²⁷⁴ Concerning appeals against investigating judges' orders, the civil party has more limited rights of appeal before the *chambre de l'instruction* than the accused but (s)he may still appeal against certain orders.³²⁷⁵ The civil party may appeal any investigating judge's order which conflicts his/her civil interests; however, the civil party cannot appeal against orders regarding custody or conditions of bail.³²⁷⁶

The civil party has the right to appeal:³²⁷⁷ i) the investigating judge's decision on competence;³²⁷⁸ ii) admissibility of civil party constitution;³²⁷⁹ iii) medical or psychological examination upon a preliminary decision by the presiding judge of the *chambre de l'instruction*, and direct access to the court is provided;³²⁸⁰ iv) use of expert testimony, with direct access to the court provided;³²⁸¹ v) additional expert testimony, 'second opinion' and number of experts appointed upon a preliminary decision by the presiding judge of the *chambre de l'instruction*, and direct access to the court is provided;³²⁸² vi) hearing, questioning, hearing of a witness or confrontation upon preliminary decision by the presiding judge of the *chambre de l'instruction*, and direct access to the court is provided;³²⁸³ vii) transport to the scene of the crime upon a

³²⁷¹ See, for further details, *ibid.*, 312, 319.

³²⁷² As of 2005, Utah and Maryland. See *Ibid.*, 322 (citing Maryland Code, Courts and Judicial Proceedings § 11-103 b 'A victim of violent crime [...] may file an application for leave to appeal [...] from an interlocutory or final order [...]').

³²⁷³ See, e.g., *People v. Gansz*, 888 P.2d 256, 257 (Colorado 1995).

³²⁷⁴ *Cario* (2010) 10.

³²⁷⁵ CPP, articles 186 and 186-1.

³²⁷⁶ *Ibid.*, article 186, para. 2.

³²⁷⁷ See, in general, *Dervieux* (2002) 273.

³²⁷⁸ CPP, article 186, para. 3.

³²⁷⁹ *Ibid.*, articles 87 and 186.

³²⁸⁰ *Ibid.*, articles 81 and 186-1.

³²⁸¹ *Ibid.*, articles 156 and 186-1.

³²⁸² *Ibid.*, articles 167 and 186-1.

³²⁸³ *Ibid.*, articles 82-1 and 186-1.

preliminary decision by the presiding judge of the *chambre de l'instruction*, and direct access to the court is provided;³²⁸⁴ viii) production of exhibit upon a preliminary decision by the presiding judge of the *chambre de l'instruction*, and direct access to the court is provided;³²⁸⁵ and ix) ruling on procedure for instruction (when there is a withdrawal of case) with direct access to the court provided.³²⁸⁶

Concerning any decision by the *tribunal correctionnel*, and convictions and acquittals given by the *cour d'assises*, they may be subject of an appeal on the merits;³²⁸⁷ however, a civil party can only appeal decisions that affect his/her civil interests,³²⁸⁸ i.e., the civil party can appeal only in relation to his/her civil claim,³²⁸⁹ as seen in further detail later.³²⁹⁰ Concerning appeals to the Supreme Court (*Cour de Cassation*), only the civil claim can be affected if the civil party appeals,³²⁹¹ which is similar to ordinary appeals.³²⁹² This is different from the accused's appeal which can affect not only the verdict and sentence but also the claim by the civil party.³²⁹³ In case of sentence appeal proceedings, the civil party can address his/her observations to the Criminal Chamber of the *Cour de Cassation* before this designates a new *Cour d'assises*.³²⁹⁴ In any case, since the *Cour de Cassation* is not a judge on merits, it may only overrule a decision provided that there has been an error of law.³²⁹⁵

Reconsideration of conviction can only be requested by the convicted person or his/her heirs if the convicted has died or by the Minister of Justice in specific cases.³²⁹⁶

³²⁸⁴ Ibid., articles 82-1 and 186-1.

³²⁸⁵ Ibid., articles 82-1 and 186-1.

³²⁸⁶ Ibid., articles 175-1 and 186.

³²⁸⁷ Dervieux (2002) 274.

³²⁸⁸ As for felonies, see CPP, article 380-2 (4). See also article 380-4 to 380-8. As for misdemeanors, see CPP, articles 497 and 498. See also Brienen and Hoegen (2000) 321.

³²⁸⁹ Dervieux (2002) 275.

³²⁹⁰ See *infra* Chapter V 3.1.3.

³²⁹¹ CPP, articles 567, 568 and 573.

³²⁹² Dervieux (2002) 275.

³²⁹³ Ibid., *Loc. cit.*

³²⁹⁴ See Cario (2010) 10.

³²⁹⁵ Ibid., *Loc. cit.*

³²⁹⁶ CPP, articles 622 and 623. As an additional point, it should be mentioned that the civil party's lawyer can intervene in the adversarial debate that takes place at the Application of Penalties Chamber, Appeals Chamber, concerning an appeal against a judgment rendered by the Tribunal of Application of Penalties. See CPP, article 712-13.

6.2. The ICTY, the ICTR and the SCSL

Victims cannot bring appeals against the final decision since, according to those tribunals' Statutes, this is only limited to parties to the criminal proceedings 'The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor [...]'.³²⁹⁷ Concerning review proceedings of the judgment, victims are not entitled to them either.³²⁹⁸ As for interlocutory decisions, victims lack *locus standi* to bring interlocutory appeals, which is reserved to the parties to the proceedings.³²⁹⁹ Indeed, in an appellate decision, a detained witness from the proceedings in *Tadić* sought leave to appeal an ICTY Trial Chamber's decision but his request was denied as the Appeals Chamber held that he lacked standing to invoke rule 72 (B) as this only allows 'either party' to bring appeal and rule 2 of the ICTY RPE defines 'party' as 'the Prosecutor or the accused'.³³⁰⁰ The Appeals Chamber read these provisions in a strict manner and concluded that a detained witness was not a 'party' and, hence, lacks standing to appeal.³³⁰¹ It reached this conclusion as 'any another ruling would open up the Tribunal's appeals procedure to non-parties-witnesses, counsel, *amicus curiae*, even members of the public when might nurse a grievance against a Decision of the Trial Chamber'.³³⁰²

Due to the lack of status as victim participants or civil parties, victims cannot participate during appeals proceedings. The only manner of 'participation' at those tribunals is as witnesses. The analysis of the status of victims as witnesses is referred to that conducted in the previous chapter.

6.3. The ICC

6.3.1. Appeals Against Judgment (Verdict), Sentence and Reparations Orders

A decision of acquittal or conviction, or a sentence, can only be appealed by the Prosecutor or by the convicted person or the Prosecutor on behalf of the convicted.³³⁰³ In other words, the right of appeal against a judgment and sentence is only reserved to parties. Hence, since victims are not parties but participants, they cannot appeal those decisions. Indeed, in *Lubanga*, while the defence filed its notices of appeals against both the condemnatory judgment and the

³²⁹⁷ ICTY Statute, article 25 (1); ICTR Statute, article 24 (1); SCSL Statute, article 20 (1).

³²⁹⁸ ICTY Statute, article 26; ICTR Statute, article 25; SCSL Statute, article 21.

³²⁹⁹ ICTY RPE, rule 72 (B), ICTR RPE, rule 72 (B), SCSL, rule 73 (A).

³³⁰⁰ *Tadić* (IT-94-1), In the Case of Dragan Opacic Decision on Application for Leave to Appeal, Appeals Chamber, 3 June 1997.

³³⁰¹ *Ibid.*, Loc. cit.

³³⁰² *Ibid.*, Loc. cit.

³³⁰³ ICC Statute, article 81 ; ICC RPE, rules 150 et seq.

sentence,³³⁰⁴ the Prosecutor did so against the sentence.³³⁰⁵ In any case, victims can participate as victim participants in the respective appeals proceedings triggered by one or the two parties. Thus, the Appeals Chamber in the ongoing appeals proceedings against Trial Chamber I's conviction and sentencing decisions (proceedings triggered by the Prosecution and the defence) in *Lubanga* found that:

The victims who participated in the trial proceedings in the case of Prosecutor v. Thomas Lubanga Dyilo and whose right to participate in the proceedings as victims was not withdrawn, may, through their legal representatives, participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal.³³⁰⁶

The Appeals Chamber in the same decision added that:

4. [...] 120 victims who participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn may participate in the appeal proceedings against the Conviction Decision, as their personal interests are affected by the appeal in the same way as during trial. For the same reason, the 120 victims who participated in the sentencing proceedings may participate in the appeal proceedings against the Sentencing Decision.

5. [...] victims may participate in the present appeals in the following manner: the Legal Representatives of Victims V01 and V02 may present the victims' views and concerns with respect to their personal interests in the issues on appeal by filing consolidated observations on the three Documents in Support of the Appeals. [...] Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary information [...].³³⁰⁷

³³⁰⁴ See respectively, *Lubanga* (ICC-01/04-01/06-2934), Acte d'appel de la Défense de M. Thomas Lubanga à l'encontre du «Jugement rendu en Application de l'article 74 du Statut» rendu par la Chambre de Première Instance I le 14 Mars 2012, 3 October 2012; *Lubanga* (ICC-01/04-01/06-2935), Acte d'appel de la Défense de M. Thomas Lubanga à l'encontre de la «Décision relative à la peine, rendue en application de l'article 76 du Statut » rendue par la Chambre de première instance I le 10 juillet 2012, 3 October 2012.

³³⁰⁵ *Lubanga* (ICC-01/04-01/06-2933), 3 October 2012.

³³⁰⁶ *Lubanga* (ICC-01/04-01/06-2951), Decision on the Participation of Victims in the Appeals Against Trial Chamber I's Conviction and Sentencing Decisions, Appeals Chamber, 13 December 2012, p. 3 (1).

³³⁰⁷ *Ibid.*, paras. 4 and 5.

In *Ngudjolo Chui*, the Appeals Chamber followed the same approach and determined that victim participants who participated in the trial proceedings and whose victim participant status has not been revoked may participate through their legal representatives for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal, which was lodged by the Prosecutor against Trial Chamber II's judgment that acquitted the accused.³³⁰⁸ In *Ngudjolo Chui*, the Appeals Chamber determined that, until further specification is given later, victims' modalities of participation include victims filing observations on the document in support of the appeal and the response to the document in support of the appeal.³³⁰⁹

In turn, the Appeals Chamber in *Lubanga* assessed the admissibility of 29 applications for participation that had not been assessed by either Pre-Trial Chamber I or Trial Chamber I, and 3 applications that had been rejected by the Trial Chamber because they were incomplete at that time.³³¹⁰ The Appeals Chamber granted the victim participant status to most of those victim applicants.³³¹¹ Moreover, for example, victim participants' legal representatives in *Lubanga* have filed their observations concerning the appeals against the judgment and sentence brought by the defence and Prosecutor.³³¹²

With regard to reparations orders, victims via their legal representatives can appeal reparations orders as provided by article 82 (4) of the ICC Statute:

A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 [Reparations to victims] may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.³³¹³

³³⁰⁸ *Ngudjolo Chui* (ICC-01/04-02/12-30), Decision on the Participation of Victims in the Appeal Against Trial Chamber II's "Judgment Rendu en Application de l'Article 74 du Statut", Appeals Chamber, 6 March 2013, p. 3. The Appeals Chamber also determined that: '[...] the legal representatives shall have access to all confidential documents in the appeal proceedings, with the exclusion of all those documents classified as ex parte'. *Ibid.*, para. 7.

³³⁰⁹ *Ibid.*, para. 5; *Ngudjolo Chui* (ICC-01/04-02/12-140), 23 September 2013, para. 18.

³³¹⁰ *Lubanga* (ICC-01/04-01/06-3045), Decision on 32 Applications to Participate in the Proceedings, Appeals Chamber, 27 August 2013, paras. 13-166.

³³¹¹ *Ibid.*, *Loc. cit.* See also *Lubanga* (ICC-01/04-01/06-3052), Decision on a/2922/11's Application to Participate in the Appeals Proceedings, Appeals Chamber, 3 October 2013.

³³¹² See *Lubanga* (ICC-01/04-01/06-2976), Observations Consolidées de l'équipe VO2 de Représentants Légaux de Victimes, sur les Appels Interjetés par la Défense et le Procureur contre le Jugement et la Sentence Rendus en Vertu des Articles 74 et 76 du Statut de Rome, V02 Team of Legal Representatives of Victims, 7 February 2013.

³³¹³ See also ICC RPE, rules 149-158.

Accordingly, the Appeals Chamber ‘may confirm, reverse or amend a reparation order made under article 75’.³³¹⁴ The existence of this specific provision arguably confirms that victims have no general standing to appeal decisions by the ICC, excepted for the reparations order.³³¹⁵ Although appeals concerning reparations orders are analyzed in further detail in the next chapter,³³¹⁶ some general considerations are fleshed out herein.

Concerning the Decision establishing the principles and procedures to be applied to reparations in *Lubanga*, adopted by Trial Chamber I,³³¹⁷ V01 victim group’s legal representative and also V02 victim group’s legal representative together with the OPCV appealed it,³³¹⁸ since they considered it to be a reparations order under article 82 (4).³³¹⁹ However, the Trial Chamber considered that its decision was not a reparations order but only an interlocutory decision that could not be appealed by victims’ legal representatives:

The Chamber repeats and emphasises that the Decision of 7 August 2012 does not constitute an “order for reparations” in the sense of Article 82(4), given reparations were not ordered in the Decision. Rather, the Decision establishes principles and procedures relating to reparations, pursuant to Article 75 (1). On this basis, Article 82(1)(d) is the correct legal basis for the defence request.³³²⁰

Nevertheless, the Appeals Chamber in *Lubanga*, upon requesting and receiving observations from the victims’ legal representatives to *in limine, inter*

³³¹⁴ Ibid., rule 153 (1).

³³¹⁵ Schabas (2010) 949; Robert Roth and Marc Henzelin, ‘The Appeal Procedure of the ICC’ in Cassese, Gaeta and Jones (2002) 1535, 1542.

³³¹⁶ See *infra* Chapter V 3.3.1.4.

³³¹⁷ *Lubanga* (ICC-01/04-01/06-2904), Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, 7 August 2012.

³³¹⁸ See, respectively, *Lubanga* (ICC-01/04-01/06-2914), Appeal against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, V01 Team of Legal Representatives of Victims, 3 September 2012; *Lubanga* (ICC-01/04-01/06-2909), Appeal against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, Office of Public Counsel for Victims and V02 Team of Legal Representatives of Victims, 24 August 2012.

³³¹⁹ *Lubanga* (ICC-01/04-01/06-2914), 3 September 2012, para. 5; *Lubanga* (ICC-01/04-01/06-2907), Réponse conjointe à la « Requête de la Défense Sollicitant l’autorisation d’interjeter Appel de la «Decision Establishing the Principles and Procedures to be Applied to Reparation» Rendue le 7 Août 2012”, Office of Public Counsel for Victims and V02 Team of Legal Representatives of Victims, 17 August 2012, paras. 12-15.

³³²⁰ *Lubanga* (ICC-01/04-01/06-2911), Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, 29 August 2012, para. 20.

alia, determine the nature of the decision in question, concluded that the Trial Chamber I's reparations decision is actually a reparations order:

[...] the Impugned Decision, as is apparent from its title consists of two parts. First, it establishes principles relating to reparations as referred to in article 75 (1) of the Statute. Second, it sets out, in a comparatively short part, the "procedure" to be applied in relation to reparations. It is this latter part of the Impugned Decision that persuades the Appeals Chamber, for the reasons that follow, that the Impugned Decision should be deemed to be an order for reparations and recourse may therefore be had to article 82 (4) of the Statute.³³²¹

As examined later, reparations claimants appealed the reparations decision in question in *Lubanga*.³³²² In any case, when a reparations decision is not considered a reparations order, victim participants can participate voicing their views and concerns in the respective interlocutory decision appeals proceedings triggered by one of the parties but not to appeal as such the respective interlocutory decision since victims' legal representatives can only appeal a reparations order.³³²³

Finally, rule 159 (3) of the ICC RPE lays down that notification of a decision on an application for revision, which is an exceptional remedy and applicable only to conviction or sentence,³³²⁴ 'shall be sent to the applicant and, as far as possible, to all the parties who participated in the proceedings related to the initial decision'.³³²⁵ Although victims would in principle not need to be notified and/or able to participate in a revision hearing, it could be argued that the ICC may notify victims and seek their views and concerns,³³²⁶ which can be sustained under rule 86 and the *travaux préparatoires* of the ICC.³³²⁷

³³²¹ Lubanga (ICC-01/04-01/06-2953), Decision on the Admissibility of the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations" and Directions on the Further Conduct of Proceedings, Appeals Chamber, 14 December 2012, para. 51.

³³²² See *infra* Chapter V 3.3.1.3 and Chapter V 3.3.1.4.

³³²³ See also *infra* Chapter V 3.3.1.4.

³³²⁴ See ICC, article 84 (1) (establishing the grounds for revision, namely, new evidence discovered, decisive evidence resulted to be forged or falsified, or serious misconduct or breach of function from Judges who participated in the conviction or confirmation of charges).

³³²⁵ See also ICC RPE, rule 161 (Determination on revision).

³³²⁶ McGonigle Leyh (2011) 306-307.

³³²⁷ ICC RPE, rule 86 ('A Chamber in making any direction or order [...] shall take into account the needs of all victims and witnesses'). As for *travaux préparatoires*, the French delegation proposed that all participants from the trial should be able to participate although this was later modified leading to the current text. See Proposal submitted by France,

6.3.2. Appeals Against Other Decisions (Interlocutory Appeals)

It must be first mentioned that only parties, i.e., the Prosecutor and the defence, can appeal interlocutory decisions.³³²⁸ Even though victim participants cannot appeal interlocutory decisions as such, they can still voice their views and concerns during interlocutory appeals proceedings. Victims who wish to participate in an interlocutory appeal need to file their application as soon as possible and, in any situation, before the date of filing of the responses to the document in support of the appeal.³³²⁹ To participate, a victim must demonstrate that his/her personal interests are affected by the issues on appeal and the Appeals Chamber has to establish that such participation is appropriate.³³³⁰ Moreover, the Appeals Chamber is not automatically bound by previous determinations of the other Chambers concerning the appropriateness of participation.³³³¹

Accordingly, the Appeals Chamber evaluates each application under article 68 (3) of the ICC Statute and, therefore, considers whether the victim participants meet the following requirements: i) whether the individuals seeking participation are victims in the respective case; ii) whether they have personal interests affected by the issues on appeal; iii) whether their participation is appropriate; and iv) that the manner of participation is not prejudicial to or inconsistent with the accused's rights.³³³² This same determination is applicable in interlocutory appeals that arise in the investigation stage of a situation.³³³³ Those applicants who have not been granted the victim participant status will be

PCNICC/1999/WRGPE/DP.13 (19 July 1999). See also Gilbert Bitti and Silvia Fernández de Gurmendi, 'Revision of Conviction or Sentence' in Lee (2001) 596, 600-602.

³³²⁸ ICC Statute, article 82. It should be mentioned that the decision by the Pre-Trial Chamber authorizing the Prosecutor to take specific investigate steps without having secured the State's cooperation can also be appealed by the State concerned. See ICC Statute, article 82 (2).

³³²⁹ Lubanga (ICC-01/04-01/06-1335), Decision in Limine, on Victim Participation in the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision Entitled 'Decision on Victims' Participation', Appeals Chamber, 16 May 2008, para 12.

³³³⁰ *Ibid.*, para. 35.

³³³¹ *Ibid.*, Loc. cit.

³³³² *Ibid.*, para 36. See also Lubanga (ICC-01/04-01/06-824), 13 February 2007, para. 43; Katanga (ICC-01/04-01/07-3346), Decision on the Application of Victims to Participate in the Appeal Against Trial Chamber II's Decision on the Implementation of Regulation 55 of the Regulations of the Court, Appeals Chamber, 17 January 2013, para. 6.

³³³³ Situation in the DRC (ICC-01/04-503), Decision on Victim Participation in the Appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007, Appeals Chamber, 30 June 2008, para. 89.

denied the right to participate in appeals proceedings, i.e., the Appeals Chamber does not conduct rule 85 assessments.³³³⁴

Under article 82 (1) (b) of the ICC Statute, either party, i.e., Prosecutor and defence, can appeal a decision that grants or denies the release of an individual investigated or prosecuted. Victims who wish to participate in this type of appeal must file an application seeking leave to participate, i.e., victims do not hold an automatic right to participate but they need to show how their personal interests are affected, and also why it is appropriate for the Appeals Chamber to allow victims' views and concerns to be presented.³³³⁵ For further analysis of victims' participation in this sort of appeals, see also discussion previously conducted.³³³⁶

Under article 82 (1) (d) of the ICC Statute:

Either *party* may appeal any of the following decisions [...]

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings [emphasis added].

As seen, there is only reference to parties, not participants. The same goes true with rule 155 (Appeals that require leave of the Court), which in referring to article 82 (1) (d) only mentions parties. However, under regulation 65 (Appeals under rule 155) of the Regulations of the Court, victim participants are granted the right to file responses for leave to appeal and substantive appeals as well as a limited right to be heard when the competent Chamber ordered an immediate hearing on an application seeking leave to appeal.³³³⁷ The ICC Statute and RPE permit arguing for a broad victim participatory regime; however, it may be sustained that the drafters intentionally wished to restrict the access to interlocutory appeals,³³³⁸ as they may cause delay and, hence, negatively impact

³³³⁴ Ibid., para. 93. See also Lubanga (ICC-01/04-01/06-1335), 16 May 2008, para. 40 ('The Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims').

³³³⁵ Lubanga (ICC-01/04-01/06-925), 13 June 2007, para 23. See also Lubanga (ICC-01/04-01/06-824), 13 February 2007, paras. 1 and 38. See also McGonigle Leyh (2011) 305.

³³³⁶ See supra Chapter IV 3.3.3.2.

³³³⁷ Regulations of the Court, regulation 65 (3). See also regulation 65 (1).

³³³⁸ Helen Brady, 'Appeal' in Lee (2001b) 575, 595.

on the accused's rights.³³³⁹ Indeed, the ICC instruments, as seen, are not totally clear whether victim participants have the automatic right to participate in interlocutory appeals. Even though victims cannot appeal and present arguments against the accused to the Chamber according to the ICC instruments,³³⁴⁰ whether they can share their views and concerns with the Appeals Chamber in cases when a request for leave to appeal is given to one party was considered less clear.³³⁴¹

Be that as it may, the Appeals Chamber found that its decision whereby victims need to file an application seeking leave to participate in appeals under article 82 (1) (b), is also applicable to article 82 (1) (d) appeals.³³⁴² Actually, for the purpose of appeals under rule 155, the Appeals Chamber does not interpret the reference to 'participant' within regulation 65 (5) to mean that victims can automatically participate in appeals proceedings under article 82 (1) (d).³³⁴³ Nevertheless, the ICC has also noted that a party's request for leave to appeal under article 82 (1) (d) of the Statute constitutes the only remedy of a general nature by which victim participants can voice their concerns regarding a Chamber's decision.³³⁴⁴

Victims who wish to participate in an article 82 (1) (d) appeal must file an application seeking leave to participate in such appeal. Besides demonstrating that: i) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and that ii) the impugned decision requires an immediate resolution by the Appeals Chamber so as to materially advance proceedings; according to the Appeals Chamber, the application ought to include a statement explaining how the victim's personal interests are affected and why it is appropriate for the Appeals Chamber to allow the presentation of their views and concerns during this stage of the proceedings and why the presentation of those views and concerns would not be prejudicial to or inconsistent with the rights of the defence.³³⁴⁵

³³³⁹ McGonigle Leyh (2011) 304.

³³⁴⁰ See Jorda and Hemptinne (2002) 1406.

³³⁴¹ *Ibid.*, Loc. cit.

³³⁴² Lubanga (ICC-01/04-01/06-1335), 16 May 2008, para. 13.

³³⁴³ Situation in the DRC (ICC-01/04-503), 30 June 2008, para. 34.

³³⁴⁴ Kony et al. (ICC-02/04-01/05-219), Decision on the 'Prosecution's Request for Leave to Appeal the Decision Denying the "Application to Lift Redactions from Applications for Victims' Participation to be Provided to the OTP"', Pre-Trial Chamber II (Single Judge), 9 March 2007, p. 3.

³³⁴⁵ Situation in the DRC (ICC-01/04-481), 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, Appeals Chamber, 29 February 2008, pp. 2-3. See also Situation in

In his separate opinions in Appeals Chamber's decisions, Judge Song has sustained that if victims participated in pre-trial or trial proceedings leading to an appeal, their participation on the appeals proceedings is pertinent.³³⁴⁶ Judge Van den Wyngaert has followed a similar approach and has additionally argued that victim participants hold the right to file submissions under regulation 65 (5) as they participated in proceedings which originated the appeal.³³⁴⁷ Therefore, according to both Judges, victims would not need to apply to participate in the interlocutory appeal.³³⁴⁸

Be that as it may, the Appeals Chamber has stressed the need to ensure fair and expeditious proceedings by limiting the observations submitted by victim participants in interlocutory appeals and, thus, requiring that those submissions be specifically relevant to the issues that arise in the appeal and affect their personal interests.³³⁴⁹ Moreover, the Appeals Chamber has asked the victim participants' legal representatives to file consolidated briefs paying

Darfur (ICC-02/05-129), Decision of the Appeals Chamber on the OPCV's Request for Clarification 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, Appeals Chamber, 29 February 2008, p. 3.

³³⁴⁶ See, e.g., Katanga and Ngudjolo Chui (ICC-01/04-01/07-2124), Decision on the Participation of Victims in the Appeal of Mr. Katanga against the 'Decision on the Modalities of Victim Participation at Trial', Appeals Chamber, Separate Opinion of Judge Song, 24 May 2010, p. 8; Lubanga (ICC-01/04-01/06-1335), Decision in Limine, on Victim Participation in the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision Entitled 'Decision on Victims' Participation', Dissenting Opinion by Judge Song, 16 May 2008, paras. 3-7; Lubanga (ICC-01/04-01/06-824), Dissenting Opinion by Judge Song, 13 February 2007, paras. 2-8.

³³⁴⁷ Lubanga (ICC-01/04-01/06-2205), Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts may be Subject to Change in Accordance with Regulation 55 (2) of the Regulations of the Court', Appeals Chamber, Separate Opinion of Judge Song and Judge Van Der Wyngaert, 8 December 2009, p. 43.

³³⁴⁸ Additionally, although it was suggested that victim participants should be allowed to appeal a decision on protective measures (under a flexible interpretation of article 82 (1) (d)), the same author acknowledged very important pragmatic problems due to the high volume of victims at the ICC. Brady (2001b) 596.

³³⁴⁹ See, e.g., Lubanga (ICC-01/04-01/06-1452), Decision on the Participation of Victims in the Appeal, Appeals Chamber, 6 August 2008, para. 12; Situation in Darfur, Sudan (ICC-02/05-138), Decision on Victim Participation in the Appeal of the Office of Public Counsel for the Defense against Pre-Trial Chamber I's Decision of 3 December 2007 and in the Appeals of the Prosecutor and the Office of Public Counsel for the Defense against Pre-Trial Chamber I's Decision of 6 December 2007, Appeals Chamber, 18 June 2008, paras. 60 and 62.

attention to the similarity, number and complexities of issues in an interlocutory appeal.³³⁵⁰

On another note, the version in English of the ICC RPE refers to notifying a ‘party’ or ‘parties’ in the proceedings giving rise to the appeal.³³⁵¹ However, based on considerations of fairness, the versions in French and Spanish which refer to ‘all those who participated in the proceedings’, and consistency with rule 92 (Notification to victims and their legal representatives), victim participants should be notified.³³⁵² Finally, it is relevant to notice that the ICC Statute and RPE do not provide victims with a possibility to challenge the Trial Chamber’s decision to withdraw their victim participant status.³³⁵³ Also, those who are applying to participate as victim participants cannot appeal a decision rejecting such application.³³⁵⁴ Nevertheless, those applicants may submit a new application under rule 89 (2) as previously seen.³³⁵⁵ In turn, victim participants may ask for the review of certain administrative decisions, e.g., should victims be dissatisfied with the registrar’s choice of common legal representative, they may request the Chamber to review the decision.³³⁵⁶ Nonetheless, when a Judge or a Chamber appoints a common legal representative, such review option is not applicable.³³⁵⁷

³³⁵⁰ Situation in Democratic Republic of Congo (ICC-01/04-503), 30 June 2008, paras. 101-102.

³³⁵¹ ICC RPE, rules 151, 155 and 156.

³³⁵² See also Brady (2001b) 595.

³³⁵³ In Lubanga, the OPCV requested Trial Chamber I to reconsider its decision to withdraw the status of four victim participants, but the Chamber rejected it *in limine*. Lubanga (ICC-01/04-01/06-2846), Order Refusing a Request for Reconsideration, Trial Chamber, 27 March 2012.

³³⁵⁴ Situation in the DRC (ICC-01/04-418), Decision on the Requests of the OPCV, Pre-Trial Chamber I (Single Judge), 10 December 2007, para. 16.

³³⁵⁵ See *supra* Chapter IV 2.3.2.1.

³³⁵⁶ ICC Regulations of the Court, regulation 79 (3).

³³⁵⁷ Ruto et al. (ICC-01/09-01/11-330), 9 September 2011, paras. 13-15. See also Brouwer and Heikkilä (2013) 1331. In addition, it should be mentioned that ‘According to the Appeals Chamber’s jurisprudence on the participation of victims in appeals under articles 19(6) and 82(1)(a) of the Statute, victims who made observations according to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence in the proceedings before the Pre-Trial or Trial Chamber may submit observations before the Appeals Chamber’. Gbagbo (ICC-02/11-01/11-236 OA2), Direction on the Submissions of the Observations, Appeals Chamber, 31 August 2012, para. 3.

6.4. The ECCC and the STL

6.4.1. Appeals Against Judgment, Sentence and Reparation Orders

6.4.1.1. The ECCC

With regard to the ECCC, the Supreme Court Chamber has jurisdiction over appeals against the three kinds of decisions enumerated in the heading of this sub-section as well as over other decisions provided that they were issued by the Trial Chamber.³³⁵⁸ In the next sub-section, special attention is drawn to appeals against interlocutory decisions by Co-Investigating Judges, which fall under the Pre-Trial Chamber's jurisdiction. Under internal rule 104 (1), the Supreme Court Chamber can admit appeals against a Trial Chamber's judgment or a decision based on the following grounds:

- a) an error on a question of law invalidating the judgment or decision; or
- b) an error of fact which has occasioned a miscarriage of justice.

[...]

For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.

According to the current text of internal rule 105 (1):

An appeal against the Trial Chamber judgment may be filed by [...] c) The Civil Parties may appeal the decision on reparations. Where the Co-Prosecutors have appealed, the Civil Parties may appeal the verdict. They [civil parties] may not appeal the sentence.

In application of internal rule 105 (1), the Co-Prosecutors in *Duch* filed an appeal against the sentence, referring to it as 'plainly unjust' and 'manifestly inadequate'.³³⁵⁹ Civil parties, unable to appeal the sentence, and in application of a previous version of this rule,³³⁶⁰ had two appealable issues, namely the revocation of their civil party status and the reparations order. Although it was not completely clear what proceedings should be applicable to appeals on civil party status determination,³³⁶¹ the Supreme Court Chamber decided to consider them as appeals against the judgment.³³⁶² Civil party groups 1, 2 and 3 filed

³³⁵⁸ See ECCC Internal Rules, section F 'Appeals from the Trial Chamber', rules 104 et seq.

³³⁵⁹ Kaing Guek Eav alias Duch (Case 001), Co-Prosecutor's Appeal against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav alias 'Duch', 13 October 2010, paras. 5 and 8.

³³⁶⁰ ECCC Internal Rules, rule 105 (1) (c) (Rev. 3); ECCC Internal Rules, rule 105 (1) (c) (Rev. 6).

³³⁶¹ McGonigle Leyh (2011) 203.

³³⁶² Kaing Guek Eav alias Duch (Case 001), Decision on Characterization of Group 1 – Civil Party Co-Lawyers' Immediate Appeal of Civil Party Status Determination in the Trial Judgment,

appeals and one of the lawyers of civil party group 4 joined the group 2's filing.³³⁶³ Whereas group 1 solely filed an appeal against the rejection of the civil party status of their clients,³³⁶⁴ groups 2 and 3 appealed not only the revocation of the civil party status of their clients but also the reparations order.³³⁶⁵ Examination of the Supreme Court Chamber's relevant findings follows, in particular, those concerning revocation of the civil party status.

As mentioned previously,³³⁶⁶ the Supreme Court Chamber considered that any prejudice inflicted on the civil parties appealing the revocation of their status 'has been cured by the opportunity they have had on appeal to submit additional evidence to satisfy the Supreme Court Chamber that they qualify as civil parties under the Internal Rules'.³³⁶⁷ The Supreme Court Chamber evaluated civil party applications under the standard of appellate review, on factual matters, for example, its task consisted in determining whether the Trial Chamber's application of the 'more likely than not to be true' standard of proof for applications of civil parties used when ordering the reparations in the judgment was unreasonable.³³⁶⁸ The Supreme Court Chamber considered whether the appellants' statements 'contain the necessary degree of particularity and authenticity to make it credible in the circumstances of the case'.³³⁶⁹ The Supreme Court Chamber lent high credibility to civil parties' statements, due to their lack of individual financial interest, provided that they were consistent and complete; however, it referred to the Trial Chamber's credibility evaluation when the civil party had been directly heard.³³⁷⁰ Additionally, the Supreme Court Chamber examined the civil party appellants' statements connected with official and private (unofficial) documents included in the case file and also those

Supreme Court Chamber, 30 September 2010, p. 4. See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 511.

³³⁶³ See McGonigle Leyh (2011) 208.

³³⁶⁴ Kaing Guek Eav alias Duch (Case 001), Group 1-Civil Parties' Co-Lawyers' Immediate Appeal of Civil Party Status Determinations from the Final Judgment, Civil Party Group 1, 14 September 2010.

³³⁶⁵ Kaing Guek Eav alias Duch (Case 001), Appeal against Rejection of Civil Party Applicants in the Judgment, Civil Party Group 2, F13, 2 November 2010; Kaing Guek Eav alias Duch (Case 001), Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, Civil Party Group 3, 5 October 2010 (Filed in English on 10 November 2010).

³³⁶⁶ See *supra* Chapter IV 2.4.1.1.

³³⁶⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 534.

³³⁶⁸ *Ibid.*, para. 536.

³³⁶⁹ *Ibid.*, *Loc. cit.*

³³⁷⁰ *Ibid.*, *Loc. cit.*

submitted by the parties during the appeal hearing.³³⁷¹ In individually applying these criteria to the situation of each civil party who got and appealed the revocation of their status, the Supreme Court Chamber reversed the Trial Chamber's decision to revoke civil party status in the case of 10 out of 23 civil party appellants.³³⁷²

Concerning appeals against the reparations order contained in the judgment in *Duch*, consideration on substantive issues are examined in detail in the next chapter.³³⁷³ However, it should be mentioned herein that in their submissions, civil party group 2 articulated extensive submissions on reparations, requesting in its notice of appeal and on its appeal on reparations that the Supreme Court Chamber overturns the Trial Chamber's rejection of its nine reparations requests and, hence, grant those claims fully.³³⁷⁴ Civil party group 3 also requested to be granted the appellant's original claims for reparations before the Trial Chamber and refused in the Trial judgment.³³⁷⁵ Broadly speaking, those civil party groups claimed that: i) the ECCC is empowered to grant reparations measures requiring assistance of Cambodia to be implemented; ii) Duch's indigence should not prevent the ECCC from issuing reparations orders; and iii) the Trial Chamber committed an error of law by grouping the reparations requests and disposing of them without explicitly explaining which request is addressed under each group.³³⁷⁶ As said, analysis of legal issues under these grounds is conducted in detail in the next chapter.

It is important to mention that the Supreme Court Chamber found its powers to be exercised within the limits of the issues appealed.³³⁷⁷ Therefore, civil parties alleging an error of law have to identify the alleged error, present arguments supporting such allegation and explain how the error invalidates the

³³⁷¹ Ibid., Loc. cit.

³³⁷² See Ibid., paras. 537-629.

³³⁷³ See infra Chapter V 3.4.2.2 and 4.4.2.1.

³³⁷⁴ Kaing Guek Eav alias Duch (Case 001), Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, Civil Party Group 2, E188/14, 6 September 2010, para. 9; Kaing Guek Eav alias Duch (Case 001), Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties – Group 2, Civil Party Group 2, F13, 2 November 2010, paras. 8 and 130.

³³⁷⁵ Kaing Guek Eav alias Duch (Case 001), Notice of Appeal by the Co-Lawyers for Civil Party Group 3, E188/4, 20 August 2010, paras. 26-27; Kaing Guek Eav alias Duch (Case 001), Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, F9, 5 October 2010, paras. 107-108.

³³⁷⁶ See Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 634-637.

³³⁷⁷ Ibid., para. 15.

trial judgment in application of internal rule 105 (3).³³⁷⁸ Nevertheless, the Supreme Court Chamber also added that:

[...] the burden of proof on appeal is not absolute with regard to errors of law. Even if the party's arguments [civil party's arguments] are insufficient to support the contention of an error of law, the Supreme Court Chamber may find other reasons and come to the same conclusion, holding that there is an error of law.³³⁷⁹

Be that as it may, a party, civil party included, which wishes to appeal a judgment must file a notice of appeal establishing the grounds.³³⁸⁰ Subsequently, the appellant has to file an appeal brief setting out the arguments and authorities in support of each of the appeal grounds, specifically referring to the page and paragraph numbers of the Trial Chamber's decision.³³⁸¹

Concerning appeals against Trial Chamber's appealable decisions, both judgment and (where applicable) other decisions, i.e., interlocutory decisions, it is pertinent to make some additional precisions. First, the Trial Chamber's Greffier needs to immediately notify all other parties and their lawyers in case of the filing of an appeal or an immediate appeal.³³⁸² Second, the civil parties 'shall be represented by the Civil Party Lead Co-Lawyers'.³³⁸³ Third, civil parties' lawyers may examine the case file at any time before the appeals hearing and they 'may submit any pleadings for the appeal to the Greffier of the Chamber as provided in the Practice Direction on filing of documents'.³³⁸⁴ Fourth, parties, civil parties included, cannot raise matters of fact or law during an appeal hearing 'not previously set out in their submissions on appeal'.³³⁸⁵ Fifth, civil parties on appeal cannot introduce new claims which were not submitted to the Trial Chamber.³³⁸⁶ Sixth, civil parties 'may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a

³³⁷⁸ Ibid., Loc. cit.

³³⁷⁹ Ibid., Loc. cit.

³³⁸⁰ ECCC Internal Rule, rule 105 (3) (this provision also states that "The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice").

³³⁸¹ Ibid., rule 105 (4).

³³⁸² Ibid., rule 106 (1).

³³⁸³ Ibid., rule 106 (3).

³³⁸⁴ Ibid., rule 108 (6).

³³⁸⁵ Ibid., rule 109 (6).

³³⁸⁶ Ibid., rule 110 (5).

decisive factor in reaching a decision at trial'.³³⁸⁷ In the appeals proceedings in *Duch*, some civil parties' requests for additional evidence were accepted.³³⁸⁸

Civil parties participated via submissions directly related to the conviction during appeals proceedings in *Duch*. Thus, for example, Civil Parties Group 3 filed submissions responding to alleged errors on personal jurisdiction, which was ground 1 of the defence appeal.³³⁸⁹ Finally, the extraordinary remedy of revision of a condemnatory final judgment, is only reserved to the accused or the Co-Prosecutors on his/her behalf.³³⁹⁰ Therefore, there is no reference to civil parties and, at least explicitly, no reference to some civil parties' participation.

6.4.1.2. The STL

With regard to the STL, according to article 17 of its Statute 'Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber [...]'. Rule 87 (D) develops this provision by laying down that 'At the appeal stage, subject to the authorisation of the Appeals Chamber, after hearing the Parties, a victim participating in proceedings may participate in a manner deemed appropriate by the Appeals Chamber'. Accordingly, both the STL Statute and RPE recognize the possibility for victims to have some participation in the appeals stage. This includes participation during proceedings relating to appeal of the judgment (verdict) and sentence (the STL lacks the power to order a reparations order) as well as during interlocutory appeals.

What has to be left clear in this subsection is that victim participants cannot appeal the Trial Chamber's judgment (verdict) or the sentence as rule 177 (B) only mentions 'a party', i.e., the Prosecutor and the defence, as holders of this specific right.³³⁹¹ This limitation was explicitly stressed by the former President of the STL, Antonio Cassese.³³⁹² Be that as it may, according to the STL RPE, the appeal judgment must not only be pronounced in public but also 'on a date of

³³⁸⁷ *Ibid.*, rule 108.

³³⁸⁸ Kaing Guek Eav alias Duch (Case 001), Decision to File Additional Evidence Admitted by Oral Decision of the Chamber during the Appeal Hearing, Supreme Court Chamber, 1 April 2011.

³³⁸⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 25.

³³⁹⁰ After the accused's death, his/her relatives or a person authorized in writing can exercise this remedy. See ECCC Internal Rules, rule 112.

³³⁹¹ STL RPE, rule 177 (B) ('Following a Judgement of conviction pursuant to Rule 168, a Party seeking to appeal either the Judgement or the sentence shall be permitted to file a notice of appeal following the pronouncement of the sentence pursuant to Rule 171').

³³⁹² STL President (2010), para. 17. See also STL President (2012), para. 17.

which notice shall have been given to the Parties and to the victims participating in the proceedings, and at which they shall be entitled to be present'.³³⁹³ Finally, as for a request for review of a final judgment, there is only mention to parties, not victim participants.³³⁹⁴ Nor is there explicitly contemplated victims' participation.

6.4.2. Appeals Against Other Decisions (Interlocutory Appeals)

6.4.2.1. The ECCC

Under internal rule 74 (4) civil parties may appeal against some orders issued by the Co-Investigating Judges before the Pre-Trial Chamber, which are the following:

- a) refusing requests for investigative action allowed under these Rules;
- b) declaring a Civil Party application inadmissible;
- c) refusing requests for the restitution of seized property;
- d) refusing requests for expert reports allowed under these IRs;
- e) refusing requests for further expert investigation allowed under these IRs;
- f) a Dismissal Order where the Co-Prosecutors have appealed;
- g) refusing an application to seize the Chamber for annulment of investigative action; or
- h) relating to protective measures.

Civil parties (unlike the Co-Prosecutors and the accused) are not allowed to appeal against Co-Investigating Judges' orders or decisions confirming the ECCC's jurisdiction.³³⁹⁵ As for appeals proceedings before the Pre-Trial Chamber, it may 'after considering the views of the parties, decide to determine an appeal or application on the basis of written submissions of the parties only'.³³⁹⁶ Civil parties have not been granted permission to speak in person.³³⁹⁷

Concerning inadmissibility of civil party applications since originally the Trial Chamber was also competent to determine their admissibility, the respective appeals could also take place at the Supreme Court Chamber as

³³⁹³ STL RPE, rule 188 (D).

³³⁹⁴ *Ibid.*, rule 190.

³³⁹⁵ ECCC Internal Rules, rule 74.

³³⁹⁶ *Ibid.*, rule 77 (3).

³³⁹⁷ See Brianne McGonigle Leyh, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 *Leiden Journal of International Law* 127, 143; Brouwer and Heikkilä (2013) 1332.

occurred in *Duch*.³³⁹⁸ Currently, the respective appeals take place before the Pre-Trial Chamber.³³⁹⁹ For example, in *Nuon Chea et al.*, civil parties' co-lawyers filed appeals for those civil party applicants who had been found inadmissible and these appeals were filed within the time limits established by the Internal Rules or under the specific directions of the Pre-Trial Chamber.³⁴⁰⁰ Civil parties' co-lawyers requested the Pre-Trial Chamber to overturn the impugned orders with respect to the applicants and admit them as civil parties.³⁴⁰¹ The co-lawyers alleged errors in law: i) on lack of specific reason for rejecting civil party applications; ii) application of the wrong criteria in the determination on the causal link; and iii) restrictive application of the term 'injury'.³⁴⁰² The co-lawyers also claimed lack of due diligence by the Co-Investigating Judges.³⁴⁰³ The Pre-Trial Chamber 'Considering the totality and significance of the errors [...]' decided to 'judge the rejected Civil Party applications before it afresh, taking into account [...] any supplementary material filed by the Appellants'.³⁴⁰⁴ An important number of victims, whose civil party applications were rejected by the Co-Investigating Judges, got civil party status granted by the Pre-Trial Chamber overruling the previous decision accordingly.³⁴⁰⁵ Under internal rule 77 *bis*, appeals 'regarding the admissibility of Civil Party applications [...] shall be considered expeditiously on the basis of written submissions alone'. On another note, as discussed in detail, although civil parties cannot participate in the adversarial hearings on provisional detention, the Pre-Trial Chamber found that civil parties' lawyers could participate in appeals against provisional detention.³⁴⁰⁶

For immediate appeal before the Supreme Court Chamber against a Trial Chamber's decision, besides error of law and error of fact, a ground may be based on a discernible error in the exercise of the Trial Chamber's discretion resulting in prejudice to the appellant,³⁴⁰⁷ and the Supreme Court Chamber 'may

³³⁹⁸ See Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 511.

³³⁹⁹ *Ibid.*, Loc. cit.

³⁴⁰⁰ *Nuon Chea et al.* (Case 002), 24 June 2011, para. 20.

³⁴⁰¹ *Ibid.*, Loc. cit.

³⁴⁰² *Ibid.* paras. 37-50.

³⁴⁰³ *Ibid.*, paras 51-54.

³⁴⁰⁴ *Ibid.*, para. 55. As for rejected appeals against inadmissibility of a civil party application, see, e.g., Case 003, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant, Pre-Trial Chamber, 28 February 2012.

³⁴⁰⁵ *Nuon Chea et al.* (Case 002), 24 June 2011, pp. 51-55.

³⁴⁰⁶ See *supra* Chapter IV 3.4.2.1.

³⁴⁰⁷ ECCC Internal Rules, rule 104 (1).

itself examine evidence and call new evidence to determine the issue.³⁴⁰⁸ The following Trial Chamber's decisions are subject to immediate appeal:

- a) decisions which have the effect of terminating the proceedings;
- b) decisions on detention and bail under Rule 82;
- c) decisions on protective measures under Rule 29(4)(c); and
- d) decisions on interference with the administration of justice under Rule 35(6).³⁴⁰⁹

As the Supreme Court Chamber clarified in *Duch* 'immediate appeals' under the provision quoted applies to decisions made by the Trial Chamber during trial proceedings as opposed to the concept of 'against the judgment' which applies to decisions contained in the Trial Chamber's judgment.³⁴¹⁰ Indeed, internal rule 104 establishes that 'Other decisions may be appealed only at the same time as an appeal against the judgment on the merits'. A party, civil party included, wishing to appeal a Trial Chamber's decision, where immediate appeal is available 'shall file an immediate appeal setting out the grounds of appeal and arguments in support thereof'.³⁴¹¹ Moreover, although the Supreme Court Chamber's hearing shall be conducted in public, it 'may decide to determine immediate appeals on the basis of written submissions only [i.e., civil parties' written submissions]'.³⁴¹²

6.4.2.2. The STL

The STL Appeals Chamber in *Ayyash et al.* determined that there is a narrow right to an interlocutory appeal of the victim participants 'in strictly confined circumstances and only after obtaining certification',³⁴¹³ and this right is not automatic.³⁴¹⁴ It is herein agreed on this Appeals Chamber's finding, which is based on the following arguments. First, there is certain ambiguity in the STL RPE, in particular, rule 126 (Motions Requiring Certification) as whereas rule

³⁴⁰⁸ Ibid., rule 104, last paragraph.

³⁴⁰⁹ Ibid., rule 104 (4).

³⁴¹⁰ Kaing Guek Eav alias Duch (Case 001), Supreme Court Chamber, 30 September 2010, para. 3.

³⁴¹¹ ECCC Internal Rules, rule 105 (2) (this provision also lays down that 'In respect of each ground of appeal it shall: a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or b) specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice').

³⁴¹² Ibid., rule 109 (1).

³⁴¹³ *Ayyash et al.* (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 9.

³⁴¹⁴ Ibid., Loc. cit.

126 (A) refers to ‘all motions’, which may presumably include motions filed not only by the parties but also by the victim participants’ legal representatives if authorized to do so, rules 126 (B) and (E) refer to ‘a Party’ that may appeal.³⁴¹⁵ Although rule 126 is based on the nearly identical rule 73 of the ICTY RPE, the key difference is that at the STL victims can participate in the proceedings unlike the situation at the ICTY.³⁴¹⁶ Second, the RPE do not contain any general provision that would exclude a victim participant’s right to lodge interlocutory appeals:

On the contrary, Rule 86 (C) grants an appeal as of right to any unsuccessful applicant for the status of VPP [victim participant] against the decision of the Pre-Trial Judge denying them that status. Moreover, Rule 86 (D) specifically prohibits appeals against decisions relating to the grouping of victims in the proceedings. *Argumentum e contrario*, if the drafters of the Rules had believed that VPPs did not have a general right to file interlocutory appeals, the express prohibition of Rule 86 (D) in relation to one specific matter would not have been necessary. In sum, the Rules do not contain any general prohibition of interlocutory appeals by VPPs but do permit appeals by persons seeking to participate as VPPs.³⁴¹⁷

Third, based both on a reading and application of article 17 of the STL Statute (Rights of victims) as this is applicable to all stages of the proceedings and that victim participants’ legal representative are allowed to file motions or briefs on an issue that affects the victim participants’ personal interests, it should be allowed to appeal a decision on victim participants provided that the certification threshold under rule 126 is met.³⁴¹⁸

The STL Appeals Chamber has determined a narrow right to appeal interlocutory decisions for victim participants, limited to very specific situations that fundamentally affect their personal interests:

[...] for the purposes of whether VPPs [victim participants] have standing to seek appellate review of interlocutory first instance decisions, we hold that such personal interests must necessarily be limited to situations where the VPPs’ own interests as participants in the proceedings are fundamentally concerned. We can discern three such specific situations:

³⁴¹⁵ Ibid., para. 12.

³⁴¹⁶ See Ibid., Loc. cit.

³⁴¹⁷ Ibid., para. 13.

³⁴¹⁸ Ibid., para. 14.

- Decisions on applications for status as a VPP (a right to appeal is already provided for under Rule 86 (C)).
- Decisions on the modalities of victims' participation in the proceedings (such as decisions concerning access of the LRV [legal representative of victim participants] to documents and decisions on whether victims may call evidence and make submissions).
- Decisions on protective measures for VPPs and the variation of such measures.³⁴¹⁹

Some extra observations follow. First, victim participants also have the right to appeal certain disclosure decisions.³⁴²⁰ Second, Pre-Trial Judge's decision on 'whether to divide victims participating in the proceedings into groups having common legal representation' cannot be appealed according to rule 86 (D) of the STL RPE. Third, an unsuccessful applicant of victim participant status may appeal the decision denying his/her application and, under a 2013 amendment to the STL RPE, this appeal is no longer subject to the requirement of being an issue significantly affecting the fair and expeditious conduct of the proceedings or the trial outcome.³⁴²¹ As determined by the Plenary of Judges amending the STL RPE 'Rule 86(C) is amended to simply give an unsuccessful applicant for victim participation status the possibility to appeal this decision as of right'.³⁴²² Fourth, the STL Appeals Chamber considered not to be bound by the ICC's case law under which, as previously seen, victim participants have not been permitted to trigger interlocutory appeals.³⁴²³

Concerning interlocutory decisions other than the previously ones detailed, victim participants cannot appeal them. Therefore, in general, concerning appeals against Pre-Trial Judge's decisions, the STL RPE only refer to parties, i.e., the Prosecution and defence, but not to victim participants. For example, regarding decisions on preliminary motions subject to interlocutory appeal,³⁴²⁴ rule 90 (D) provides for that 'If certification is given, a Party shall appeal to the Appeals Chamber within ten days of the filing of the decision to

³⁴¹⁹ Ibid., para. 15.

³⁴²⁰ STL RPE, rules 116 (D), (E).

³⁴²¹ Ibid., rule 86 (c) (i). See also Ibid., rule 126 (C).

³⁴²² STL (2013) 20.

³⁴²³ Ayyash et al. (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 17.

³⁴²⁴ STL RPE, rule 90 (B) ('Decisions on preliminary motions are without interlocutory appeal save: (i) in the case of motions challenging jurisdiction; (ii) in other cases where certification has been granted upon the basis that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings').

certify'. Likewise, according to rule 176 *bis* (B) (Preliminary Questions), before the Appeals Chamber renders its interlocutory decision on any question raised by the Pre-Trial Judge under rule 68 (G),³⁴²⁵ the Appeals Chamber 'shall hear the Prosecutor and the Head of Defence Office in public session'. In any case, victim participants can participate during interlocutory appeals proceedings. However, neither the STL Statute nor the RPE refers to an automatic right for victim participants to participate on appeals proceedings.

Be that as it may, the STL's initial practice shows that victim participants' legal representatives have been allowed to submit their observations, both written and oral, in interlocutory appeal proceedings. To illustrate how victims' participations works, it is herein examined their participation in the interlocutory appeal proceedings triggered by the defence against the Trial Chamber's decision on the defence's challenges to the jurisdiction and legality of the STL in *Ayyash et al.* Considering the participation of the victims' lead legal representative in the proceedings on and pursuant to article 17 of the STL Statute and rule 87 of the STL RPE, the Appeals Chamber determined that '[...] we may be assisted by his observations on behalf of the participating victims in this appeal'.³⁴²⁶ Following up this invitation, the victims' lead legal representative submitted two observations, one of which consisted in that 'is in the victims' interest that the legality of this Tribunal be thoroughly addressed and established'.³⁴²⁷ During the appeal hearing on this matter, upon the Chamber's invitation, the lead legal representative of victims was given five minutes,³⁴²⁸ in which he highlighted victims' interest in 'having access to a forum which can preserve their rights and which is properly and legally established [...] the essence and the kernel of our observations is that this Tribunal is properly

³⁴²⁵ 'The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment'.

³⁴²⁶ *Ayyash et al.* (STL-11-01), Scheduling Order on Interlocutory Appeals, Appeals Chamber, 27 August 2012, para. 3.

³⁴²⁷ *Ayyash et al.* (STL-11-01), Observations of the Legal Representative of Victims on the Interlocutory Appeal Briefs and Responses to the Trial Chamber's Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, Legal Representative of Victims, 19 September 2012, para. 2 (1).

³⁴²⁸ *Ayyash et al.* (STL-11-01), Transcripts, 1 October 2012, p. 148, lines 9-11.

and legally established'.³⁴²⁹ It should be noticed that the Appeals Chamber dismissed the defence's appeals.³⁴³⁰

Since rule 87 (D) of the STL RPE does not determine exactly the modalities of participation during appeals (both appeals of verdict/sentence and of interlocutory decisions), it has been suggested that victim participants may be authorized to exercise all functions entrusted to them during trial proceedings or, if the Appeals Chamber decides so, they should have more limited functions.³⁴³¹ As examined, it seems to be that the Appeals Chamber's initial practice concerning interlocutory appeals has primarily adopted the second option. It remains to be seen what approach the Appeals Chamber will follow once the first appeal proceedings against verdict/sentence take place in the future. In any case, the kind of victims' participation during appeals, including interlocutory appeals, depends on the nature of the appeals proceedings, i.e., they may be conducted via written exchanges of briefs or orally when additional evidence is submitted and witnesses heard.³⁴³²

6.5. Comparative Conclusions

Victim participants (ICC and STL) can neither appeal the trial judgment (verdict) nor the sentence delivered by the Trial Chamber. At the ECCC, although civil parties can appeal against the trial judgment (verdict) when the Co-Prosecutors have appealed it, civil parties cannot appeal the sentence. These limitations are also present in the domestic systems examined and at the ICTY, the ICTR and the SCSL. However, victim participants (via their legal representatives) at the ICC and civil parties at the ECCC can appeal final orders on reparations issued by the respective Trial Chambers, which is similar to the French system. Such possibility to appeal a final reparations order corresponds to victims' specific and clear interests common to victim participants and civil parties to obtain reparations. Victims' legal representatives in *Lubanga* appealed the ICC decision on reparations as this was considered to be a reparations order. At the ICC, if a reparations decision is not considered a reparations order, victims can not appeal it but can still participate as victim participants in the respective interlocutory appeals proceedings triggered by one of the parties.³⁴³³

³⁴²⁹ Ibid., p. 148, lines 15-18.

³⁴³⁰ Ayyash et al. (STL-11-01/PT/AC/AR90.1), Decision on the Defence Appeals against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', Appeals Chamber, 24 October 2012, p. 25.

³⁴³¹ Hemptinne (2010) 175.

³⁴³² See STL RPE, rule 186. See also Hemptinne (2010) 175.

³⁴³³ See also *infra* Chapter V 3.3.1.4.

At the ICC, victim participants can also participate via, e.g., filing of observations, during the appeals against a conviction/sentence concerning their personal interests in the issues on appeal, e.g., in *Lubanga* and *Ngudjolo Chui*.

At the ECCC, in *Duch* civil parties' lawyers appealed the revocation of their clients' civil status as well as reparation orders both contained in the Trial Chamber judgment. They submitted additional evidence and statements and, as for the first claim, the Appeals Chamber reversed the revocation of civil party status in approximately 40% of the cases. As for appeals against Trial Chamber's decisions, civil parties in hearings cannot raise new matters of fact or law or new claims not contained in their written submissions but they may request to introduce additional evidence. In *Duch*, civil parties filed submissions directly related to conviction during the appeals. As for the STL, both its Statute and RPE lay down that victim participants may participate in appeals proceedings but subject to Appeals Chamber's authorization and in a manner considered appropriate by it. At all the examined international and hybrid criminal courts, revision/review of a judgment or sentence is not available to victim participants or civil parties, similar to the French system; however, as argued when it comes to the ICC, they may be notified thereof.

With regard to participation in appeals against other decisions (interlocutory decisions), although two ICC Appeals Chamber Judges have argued that victims who participated in pre-trial or trial proceedings leading to an appeal should have automatic participation in the respective appeal proceedings, the ICC Appeal Chamber's case law has sustained that there is no automatic right to participate in them. Accordingly, victim participants who wish to participate in interlocutory appeals have to apply for participation and they have to demonstrate that they are case victims, that their personal interests are affected by issues on appeal, the appropriateness of their participation at this stage of the proceedings, and that their manner of participation is not prejudicial to or inconsistent with the accused's rights, alongside the adoption of safeguards and some restrictive approach. At the ICC, appeal of revocation of victim participant status is not foreseen. As for the ECCC, similar to the French system, civil parties have the right to appeal some interlocutory decisions which are mentioned in its Internal Rules and rendered either by the Co-Investigating Judge (before the Pre-Trial Chamber), e.g., inadmissibility of civil party applications, or by the Trial Chamber (before the Supreme Court Chamber). Accordingly, civil parties can participate via written submissions (mainly) and oral submissions. As for the STL, unlike the ICC's case law, the Appeals Chamber has recognized a narrow right of the victim participants to appeal

certain interlocutory decisions that fundamentally affect their personal interests, namely, decisions on applications for status as a victim participant (already established under the STL RPE), decisions on modalities of participation of victim participants, and decisions on protective measures for victim participants and variations on protective measures. Also, under the STL RPE, certain disclosure decisions can be appealed by victim participants. However, the decision to divide victims in groups under common representation cannot be appealed at the STL. As for other interlocutory decisions, victim participants cannot appeal them at the STL. In any case, they can participate in interlocutory appeals although there is no victim participants' automatic participation in them. In any case, the STL Appeals Chamber's emerging practice has allowed written and oral submissions/observations from victim participants' lawyers.

The civil party's explicit right to appeal some interlocutory decisions at the ECCC, i.e., not only participation during interlocutory appeals but also the right to appeal as such, in contrast to the victim participants' situation at the ICC and the STL, where they can participate in interlocutory appeals but lack the right to appeal *per se* (ICC) or their right to appeal is limited to specific decisions fundamentally affecting victim participants' personal interests and not as an automatic right (STL), is arguably the most important difference in status between civil parties and victims participants during these appeals. In other words, victims at the ICC and the STL (with the exception of the specific decisions above-mentioned) can only participate once appeals requests had been filed by a party, i.e., the Prosecution and the defence. This situation arguably corresponds to the distinction in status between victim as civil party (a 'party' to the proceedings) and victim as victim participant (a 'participant' in the proceedings).

Having said so, the modalities of victim participation at the appeals stage in the ICC, the ECCC and the STL resemble those of the French civil party and also *mutatis mutandi* the American system. In the latter, victims' status at the appeals stage has been particularly strengthened especially in comparison with the English system to the point that, under the American system, victims hold the right to appeal certain interlocutory decisions that affect their rights, chiefly under the CVRA. A feature common to the ICC, the ECCC and the STL is that participation of victim participants or civil parties in appeals have to be conducted via their legal representatives.

7. Chapter Conclusions

1. The formal status of victims as victim participants or as civil parties only exists at the ICC, the STL (victim participants) and the ECCC (civil parties). Victim participants at the ICC and the STL intervene to present their own views and concerns. The civil party action at the ECCC, like in the French system, has the dual purpose of participating in the proceedings by supporting the prosecution and seeking reparations, i.e., participate as civil parties in criminal proceedings and pursue a related civil action for reparations. Indeed, victims' status as civil parties at the ECCC is a clear example of the French system's influence (via Cambodian law). At the ICC and the STL, unlike the ECCC, victims cannot be civil parties, i.e., full parties, and whereas victim participants' modalities of participation and participation timing are subject to the ICC or the STL competent chamber's authorization, at the ECCC victims who have been admitted as civil parties do not need to receive a chamber's prior authorization to participate. This is related to the difference in status between victims as participants and as civil parties. However, victim participants' modalities of participation/procedural rights put in practice victim participants at the ICC and the STL in a status generally speaking similar to that of the civil parties at the ECCC and the French system. Under the ICC Statute, victims who do not hold the official victim participant status, i.e., without having been granted the formal victim participant status upon application, can participate via observations/submissions as for Prosecutor's *proprio motu* investigation and proceedings concerning the question of the ICC's jurisdiction and admissibility of a case. At the ICTY, the ICTR and the SCSL, victims do not hold the status of victim participants or civil parties as their status is limited to be witnesses; however, there are some very limited instances where victims may have some level of indirect 'participation'. This situation is similar to the Anglo-American systems, i.e., although victims are not civil parties (unlike the ECCC or the French system) or participants (unlike the ICC and the STL) but first and foremost witnesses, they can participate in some limited and specific manners and procedural stages, primarily during sentencing and some appeals. Indeed, their participation (in the United States, in particular) may be considered as stronger than the very limited avenues of 'participation' at the ICTY, the ICTR and the SCSL.

2. The ICC, the ECCC and the STL have applied a flexible *prima facie* standard when examining the admissibility of applications to become and participate as victim participants or civil parties. This standard is necessary to handle the numerous applications received by these courts. Nevertheless, as they

can later be reviewed by the respective Trial Chambers, the withdrawal/revocation of the victim participant/civil party status has led/may lead to understandable disappointment and frustration among victims. To avoid this undesired effect, some more careful admissibility assessment of the applications and also not to procrastinate the 'confirmation' of the status of victim participants or civil parties until the trial judgment are advisable, alongside mechanisms to speed up the admissibility process such as collective applications, simplified application process, or admissibility deadlines set in earlier procedural stages but within the respective court's legal framework, e.g., not replacing the judicially assessed application process with mere 'registration'.

3. As for the requirements to become and participate as victim participants or civil parties, generally speaking, they are to an important extent similar across the ICC, the ECCC and the STL. First, natural persons have to prove their identity although those courts have been flexible on identification documents. Second, crimes have to be those under the respective court's jurisdiction. Third, there must be physical, material or mental personal harm. The direct victim's harm may raise harm on others, i.e., indirect victims. In turn, indirect victims not only include relatives (there is a presumption on close relatives) but also extended family members based on the cultural context and even beyond that, e.g., victims who were harmed by assisting the direct victims, preventing potential direct victims from being victimized or who witnessed violent crimes (ICC) or common law spouses, *de facto* adopters and friends (ECCC) if harm is proved. Under the case law of the ICC, the ECCC and the STL, deceased victims' relatives have suffered personal harm and, thus, allowed to participate. Fourth, there must be a causal link between the crime and harm, which does not necessarily have to be direct at the ICC. In any case, the ICC, the ECCC and the STL have recognized direct and indirect victims. Concerning indirect victims, it is necessary to prove that their harm suffered comes as a result of the harm caused to the direct victim. The fact that victims of victims (e.g., victims of crimes committed by child soldiers) have been excluded in *Lubanga* at the ICC makes it necessary for the Prosecutors to carefully decide what crimes to prosecute not to exclude victims. When it comes to case stage at the ICC, the ECCC and the STL, the causal link must be between the harm and the (confirmed) crime charged, i.e., not any crime under the court's jurisdiction. Fifth, whereas at the ICC and the STL, victims have to demonstrate that their personal interests are affected to be allowed to participate, at the ECCC civil parties do not need to do so, i.e., difference between participants and parties. Whereas the ICC Pre-Trial Chambers have considered personal interests on

procedural stage basis, the ICC Trial Chambers, Appeals Chamber, and Pre-Trial Chambers (during investigation) have mainly done so on specific procedural issue basis. The latter approach may in principle be criticized as it is quite time-consuming (except when applied in investigations) although it matches better the personal interest and fair trial requirements. At the ICC, although personal interests include not only reparations, protection and truth but also arguably to see the accused punished, this cannot intersect with the Prosecutorial function.

4. Victims, in general, can report crimes as complainants before the ICC and the ECCC, which is similar to the national systems examined. However, unlike national systems, victims cannot initiate prosecutions at the international and hybrid criminal courts. In any case, national 'private prosecutions' are quite limited and symbolic. At the ICC, victims, without being officially victim participants, can participate in some specific proceedings, i.e., via representations in Prosecutor's *proprio motu* investigations and observations in challenges to jurisdiction/admissibility. At the ICTY and the ICTR, as a form of 'participation' during investigation, victims have approached the Prosecutor via NGO letters. As for victim participation *sensu stricto*, i.e., based on article 68 (3) of the ICC Statute, the ICC has reached a balanced halfway solution by allowing victims to participate during investigation but only corresponding to judicial proceedings and, hence, it has been conciliated the need for fairness and efficiency and appropriate victim participation at this early stage. The complete exclusion of victim participants from investigation at the STL is herein criticized, especially considering the comparatively lower volume of victims. At the ECCC (similar to the STL as for victim participants), victims cannot participate as civil parties during preliminary investigations conducted by the Co-Prosecutors. During preliminary investigations, victims can only be complainants at the ECCC. At the ECCC, victims can participate as civil parties during judicial investigations conducted by the Co-Investigating Judges. These ECCC features are similar to the French system.

5. Modalities of participation/procedural rights during the pre-trial stage of a case at the ICC and the STL are *mutatis mutandi* similar. However, while the discussed rights are mainly applicable up to and during the confirmation of charges hearing (ICC), the examined rights only apply after the confirmation of the indictment at the STL as victim participants can only participate after it. First, at the ICC, access to the case-record (*ex parte* materials excluded), confidential information access is allowed for non-anonymous victim participants, and there is no disclosure rights. At the STL, common lawyers of victim participants (anonymous or not) can access: the case-file except for

confidential (or under seal) and *ex parte* documents; ‘disclosed’ materials by one party to the other under restrictions; and confidential information under certain conditions. Second, attendance at hearings, excepted those *ex parte* (ICC) or excluded by the Pre-Trial Judge (STL). Third, participation in hearings not excluded by the instruments (ICC) or by the Pre-Trial Judge (STL). Fourth, filing written motions not excluded by the respective instruments. At the ICC, two additional modalities are specifically applicable concerning/during the confirmation of charges hearing, i.e., submissions on admissibility and probative value of the evidence to be relied by the parties and its examination, and examination of any witness called by the parties. At the STL, access to portions of transcripts/minutes of *in camera* or *ex parte* hearings as for the time the representative was present was considered in pre-trial. In addition to these modalities/procedural rights, two considerations should be mentioned. First, under the ICC’s practice, although anonymous victim participants’ rights have been sometimes restricted, common legal representatives concurrently represent anonymous/non-anonymous victim participants, reducing this distinction impact. Similar observation is applicable *mutatis mutandi* to trial proceedings. Second, under the ICC’s case law, although victim participants can challenge evidence brought by the parties, they cannot introduce evidence additional to that filed by the parties and victims lack investigative powers. These limitations are related to their status as participants and, thus, different from the victims’ status as civil parties at the ECCC.

6. As for ECCC civil parties, there are some similarities with the ICC and the STL victim participants but since victims are parties at the ECCC, the scope of their procedural rights during pre-trial proceedings is broader. Civil parties’ procedural rights at the ECCC during pre-trial, i.e., during the ECCC judicial investigation, which are similar to those existent in the French system are, *inter alia*, as follows. First, as a party, access to the dossier. Second, civil parties can confront and question the accused (via civil party’s lawyer). Third, unlike victim participants (ICC, STL), civil parties’ right to request the Co-Investigating Judges to conduct investigations on civil parties’ behalf but linked to Co-Prosecutors’ investigations. Fourth, right to request and propose witnesses. Fifth, civil parties may attend and participate in pre-trial proceedings via written and oral interventions. However, they cannot necessarily participate in all hearings, e.g., provisional detention hearings. Sixth, right to support the prosecution. In addition to these modalities/procedural rights, two considerations should be indicated. First, whereas under the case law of the ECCC and the ICC victims can participate in pre-trial detention appeals, at the STL this remains to be seen.

Second, in the practice of the ICC, the ECCC and the STL, victims have been normally grouped together and represented by common legal representatives. Such practice, based on the respective legal instruments, has proven to be necessary for the sake of efficiency and fairness due to the large number of victim participants and civil parties, especially and increasingly at the ICC and the ECCC.

7. During trial proceedings, whereas the ICC's case law has broadly and generously sharpened victims' modalities of participation/procedural rights, at the ECCC civil parties' procedural rights have been limited. The outcome is that the victim participants' procedural rights/modalities of participation at the ICC have moved closer/are similar to those of the civil parties at the ECCC. The STL's practice on victims' participation remains to be seen. While the STL RPE generally speaking follow the ICC's practice/legal framework, explicitly including some modalities of participation/procedural rights not explicitly included in the ICC RPE but developed in the ICC's case law, a relatively conservative approach is in place in some aspects. In any case, victim participants (ICC, STL) have to show their affected personal interests to participate in trial (similar to the other stages) unlike civil parties at the ECCC. Moreover, civil parties, unlike victim participants, hold the explicit right, under the ECCC Internal Rules, to support the prosecution but without turning them in additional or auxiliary Prosecutors. However, under the ICC's case law (and the STL RPE), the possibility for victim participants to be allowed to lead and challenge evidence on the accused's guilt may be considered as an indirect manner to support the prosecution, which may compromise the accused's right to a fair trial. At the ICTY, the ICTR and the SCSL, the only chance to indirectly 'participate' is via *amicus curiae* briefs, which has raised some awareness about issues that matter to victims despite limitations.

8. Concerning modalities of participation/procedural rights of victim participants at the ICC and the STL during trial, they are in principle and generally speaking similar. Since no trial has started yet at the STL (at the moment of writing this thesis), the following enumeration is based on the ICC's case law and/or the ICC and the STL instruments. First, right to notification. Second, access to documents but *ex parte* filings (ICC), and confidential and *ex parte* material (STL) are excluded. Third, attendance at and participation in public and closed hearings and, as for *ex parte* hearings, some ICC Trial Chambers have allowed it. Fourth, oral participation (opening and closing statements included). Fifth, filing of written motions and the ICC's practice has allowed *ex parte* filings. Sixth, the ICC's case law has permitted leading evidence

and challenge of evidence brought by the parties, and the STL RPE permit to tender evidence. As for the ICC's case law, it has been particularly controversial that the Chambers have allowed victim participants to submit and challenge evidence on the accused's guilt. Such modality has been and can be justified on the contribution to truth determination. In any case, parties are the primary actors on this matter and presentation of evidence is not a victim's self-standing right (unlike in the case of civil parties), i.e., as determined in the ICC's case law, it is subject to conditions such as personal interests affected, evidence relevant to the case, evidence allowed/requested by the Chamber for truth determination, and submission without affecting accused's right to a fair trial. Seventh, questioning the witnesses and the accused, and questioning of the latter at the STL, unlike the ICC, can only be conducted via the Chamber. Some ICC Chambers have normally allowed questions on the accused's guilt, but ICC Trial Chamber II has permitted them only exceptionally. Under the ICC's case law, when questioning, it cannot be formulated any new allegations against the accused. Eighth, victims can testify under oath (dual victim participant-victim witness status). Nevertheless, the ICC's practice has correctly established controls to avoid victims to become additional or auxiliary prosecutors and safeguards for the accused's right to a fair trial, including prohibition of anonymous testimony. Ninth, despite of the silence of the ICC instruments on victims' disclosure rights, the ICC's practice has allowed them to be provided with material in Prosecution's possession. Unlike the ICC RPE, the STL RPE explicitly foresee disclosure obligations for victim participants. Tenth, victim participants' right to propose/call witnesses to testify under the ICC's practice and the STL RPE. In addition to these modalities of participation, at the ICC, victim participants were able to apply for new charges in *Lubanga* although with an unsuccessful outcome. Also, whereas at the ICC anonymous victim participants are allowed with limited procedural rights during trial, they have been banned altogether by the STL Appeals Chamber, which is criticized herein, as discussed in the previous chapter.³⁴³⁴

9. Civil parties' procedural rights at the ECCC during trial are in general similar to those of victim participants (ICC, STL), but since they are parties, the scope of those rights is broader. These rights, which are similar to those existent in the French system, follow. First, right to legal representation and, unlike the ICC and the STL, the explicit right to be questioned in presence of their lawyer. Unlike the ICC RPE, the ECCC Internal Rules frame the representation as being of consolidated groups (via co-lead lawyers appointed by the ECCC) rather than

³⁴³⁴ For further discussion on this point, see *supra* Chapter IV 4.5 and 5.

of individuals, which depersonalizes victims. Second, right to be heard, i.e., right of audience. Third, civil parties can provide testimony and, unlike the ICC and the STL, without an oath, i.e., unsworn testimony, but they may still be cross-examined. Also, they can provide statements of suffering. Fourth, civil parties' right to support the prosecution and, thus, provide evidence on the accused's guilt (also seeking reparations and truth determination) but without holding a general right like that held by the Co-Prosecutors or without being transformed in an additional or auxiliary Prosecutor since the accused can only face one Prosecution authority. Civil parties should not advance their own case theory. Fifth, relevant and non-repetitive questioning of the accused and witnesses. Sixth, right to propose witnesses to be called by the Chamber. Seventh, right to respond preliminary objections. Eighth, right to file written submissions. Ninth, right to access the case file (via a lawyer). Tenth, right to make closing statements. Eleventh, right to tender written evidence.

10. As for participation in proceedings related to sentencing, there is the paradoxical situation where the status of victim participants at the ICC and the STL is stronger than that of civil parties at the ECCC. Thus, whereas the former may file oral and written submissions, the latter have been precluded by the ECCC's case law from filing submissions on sentencing, relevant to sentencing, and evaluation of factors on sentencing as well as they are prohibited from testifying on the accused's character. These restrictions can be criticized as, *inter alia*, there is no explicit prohibition on the ECCC instruments, hinder civil parties' support to the Prosecution, and due to the frustration generated among victims, especially considering that they had indeed already testified/questioned about the accused's character (in *Duch*). Indeed, these restrictions are stronger than those existent in the French System. Moreover, even in the Anglo-American systems, victims can directly participate during sentencing via VIS/VPS. In any case, civil parties at the ECCC can present statements of suffering during trial. At the ICC, in *Lubanga*, victims' lawyers, *inter alia*, filed written and oral submissions on procedures and principles applicable to sentencing, including the kind of penalty to be imposed in the sentence, the impact of the crimes on the victims, and aggravating factors, as well as on relevant evidence submitted on trial. They also asked questions to the defence's witnesses, with the caveat that they cannot become a second Prosecutor. However, they did not propose a specific imprisonment term, which is consistent with the Prosecutor's scope of action and impartiality. Under the STL RPE, victims can only give details on the crime impact on them but not to comment on a specific sentence. At the ICTY, the ICTR and the SCSL, victims

may indirectly participate via VIS filed by the Prosecution. Common to all the examined international and hybrid criminal courts (and also present in the reviewed national systems) is the consideration of victims, in particular, for example, harm inflicted, vulnerability, number thereof, to determine the gravity of the crime and as aggravating factors in the sentence. This consideration should be made mandatory.

11. Victim participants (ICC, STL) cannot appeal the Trial Chamber judgment (verdict) and sentence although they may participate in the related appeals proceedings triggered by the parties. At the ECCC, civil parties may only appeal the trial judgment (verdict) when the Co-Prosecutors have appealed it; however, they cannot appeal a sentence. These limitations are similar to those existent in the considered national systems. Be that as it may, at the ICC and the ECCC, victim participants (via their legal representatives) and civil parties can appeal a reparations order according to explicit provisions under the respective courts' instruments, similar to the French system. In *Duch*, civil parties appealed the reparations order, and revocation of their status both contained in the Trial Judgment. As for revocations of their status, the Supreme Court Chamber, based on additional evidence and statements submitted by the civil parties in appeals, overruled them in approximately 40% of the cases. Revision/review remedy is not available to victim participants/civil parties, like in the national systems examined. Concerning interlocutory appeals, the most important difference between victim participants and civil parties is that whereas victim participants cannot appeal a decision as such (ICC) or their right to appeal is limited to specific decisions fundamentally affecting victim participants' personal interests, namely, decisions on applications for victim participants status, modalities of participation, protective measures and certain disclosure issues, and not as an automatic right (STL), civil parties as parties at the ECCC hold this right against some interlocutory decisions, similar to the French system and *mutatis mutandi* to some extent to the American system. In any case, victim participants can participate in interlocutory appeals proceedings, triggered by one or the two parties, via written and oral submissions. However, this right is not automatic, i.e., according to the ICC's case law, victim participants need to demonstrate, *inter alia*, that their personal interests are affected during the appeals proceedings and that their participation is not prejudicial to or inconsistent with the accused's rights. Decisions on revocation of victim participant status (ICC) or grouping victims under common representatives (STL) cannot be appealed.

12. The impact of the participation of victim participants and civil parties on trial, and other procedural stages at the ICC, the ECCC and the STL,

can be evaluated considering three factors: efficiency, accused's rights and victims themselves. First, the broader the victims' participation regime is, the less efficient and slower the proceedings become. Also, victims who could have participated are excluded for the sake of fewer victim participants or civil parties with (too) broad procedural rights. Second, a broader participation regime generally remains in a tense relation with the accused's right to a fair and impartial trial/proceedings, especially in the most controversial modalities, e.g., victim participants' evidence on and witness questioning on the accused's guilt at the ICC. Third, a more robust participation regime does not necessarily mean a higher level of victims' satisfaction. Nevertheless, the victims' participation regime as crafted by the ICC can be justified based on victims' contribution to the truth and, more generally, to the first objective of the ICC, and of the other courts, which consists in the fight against impunity, as well as under a restorative-oriented justice approach. This is, however, only feasible if victims' procedural rights as participants and, *mutatis mutandi* as civil parties, are subject to controls by the respective courts, which include to follow more balanced approaches, as those adopted by some of the ICC Chambers, to guarantee the other interests at stake and for the benefit of the victims themselves.

13. The ECCC and the STL, bearing in mind the emerging challenges at the ICC and especially in the case of the ECCC facing its own problems with civil parties' participation have adopted more cautious approaches to victims' status. This has sometimes led to uncomfortable situations, e.g., stripping off civil parties of their status only at the end of the trial when a decision could have been taken earlier or by prohibiting civil parties' participation on sentencing altogether, both at the ECCC. In the STL, the much lower number of victims compared to the ICC or the ECCC is an important factor to better handle the flux of participation and, accordingly, their complete exclusion from investigation was not justified. On the other hand, at the ECCC, the severance of *Nuon Chea et al.* in (mini)trials is a sound option to increase civil party's participation and with regard to efficiency and the accused's rights. That such severance was kept after having heard *inter alia* the civil parties enhances their status during trial. The fact that it has become practice of the ECCC and the ICC and, even mandatory under the ECCC Internal Rules (from the issuance of the closing order onwards), and the STL RPE, that victim participants and civil parties are represented by lawyers is indeed an answer to the exorbitant number of victim participants or civil parties intervening in the cases before these judicial forums and also to some problems when civil parties participated directly (e.g., incidents at provisional release appeals at the ECCC). Moreover, the imperative

need to handle such high numbers of victim participants/civil parties, especially at the ICC and the ECCC, has led to the scenario where in all cases before the ICC, the ECCC and the STL, under their respective instruments, victims constitute themselves or are grouped in one or more groups under common legal representatives who are chosen by the respective court or by the victims. Even though grouping victims is necessary, it is pivotal not to weaken the status of individual victims. Accordingly, when the ICC, the ECCC and the STL are in process of selecting/appointing a common legal representative for grouped victims, victims' interests need to be considered and, in general, the legal representatives must stay in regular contact with and receive instructions from their clients. Otherwise, victims' status as participants or civil parties, may become symbolic, depersonalized and even lead to secondary victimization. Also, some additional legal representation filters/intermediaries such as the appointment of the ICC OPCV to 'represent' an ICC appointed common legal representative or the requirement for ECCC appointed lead co-lawyers (from trial onwards) may be criticized as they may result in victims' symbolic participation.

14. It is necessary to reach a balanced participation regime of victims as participants or civil parties at the ICC, the ECCC and the STL, in particularly challenging contexts where the number of victim participants/civil parties is much higher than that in domestic cases. Such balanced participation regime has to take into account victims as such and integrate them within the big picture existent at those courts where other competing and legitimate interests need to be all reconciled. Therefore, provisions and/or practices that go to extremes of either being too generous/broad in scope or excluding victims altogether must be avoided as much as possible. Only in this manner, can the participatory dimension of the victims' status as participants or civil parties be truly enhanced without jeopardizing other interests, all of which should in the end benefit victims themselves. This is also coherent with international human rights law sources, in particular case law, under which although certain participatory rights in criminal proceedings have been acknowledged for victims, these have been considered taking into account other legitimate interests.³⁴³⁵

³⁴³⁵ See for further discussion on this point supra Chapter II 2.1.7 and 4, as well as sections on national systems in this chapter.

Chapter V. Victims' Status as Reparations Claimants

1. Introduction

The present chapter examines the third dimension of the status of victims, i.e., victim status as reparations claimants, at international and hybrid criminal courts as presented in this thesis. In the context of state responsibility, the obligation to provide reparations, compensation included, as a consequence of a violation of an international obligation is a well-established international law principle,³⁴³⁶ and an international customary law rule.³⁴³⁷ Examples of how this obligation has been in practice implemented include human rights monitoring bodies, in particular the IACtHR and the ECtHR, which have provided reparations, based on their constitutive instruments,³⁴³⁸ in among others, cases of serious human rights violations. In addition, the Convention against Torture lays down an obligation to repair violations of the prohibition against torture.³⁴³⁹ Indeed, (international) human rights law is the primary area where individuals can exercise their right to claim and receive reparations. Although under international humanitarian law States have been reluctant to recognize explicitly and generally a right for victims of international humanitarian law violations,³⁴⁴⁰ the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

³⁴³⁶ See, e.g., Permanent Court of International Justice, *Factory at Chorzow (Germany v. Poland)*, Ser A, No 17, 13 September 1928, p. 29; International Law Commission, *Responsibility of States for Internationally Wrongful Acts* 2001.

³⁴³⁷ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Rules*, rule 150 ('A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused').

³⁴³⁸ ACHR, article 63 (1); ECHR, article 41. For further analysis on these provisions, see, e.g., Jo M., Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn., Cambridge University Press 2013) 188-250; Juan Pablo Pérez León Acevedo, 'Las Reparaciones en el Derecho Internacional de los Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional' (2008) 23 *American University International Law Review* 7.

³⁴³⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, article 14 ('1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law').

³⁴⁴⁰ Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts' (2010) 8 *Journal of International Criminal Justice* 79, 83.

and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines), have recognized that victims' right to remedies includes 'adequate, effective and prompt reparation for harm suffered',³⁴⁴¹ and 'Reparation should be proportional to the gravity of the violations and the harm suffered'.³⁴⁴² These principles, as noticed by Bassiouni,³⁴⁴³ are based on international and national practice. Therefore, victims' right to reparations is well-established under international law.

International instruments and practice have generally applied the reparations right in the state-individual relation.³⁴⁴⁴ However, the emergence of international criminal law and, in particular, as implemented by international and hybrid criminal courts, makes it possible for an individual to claim reparations from another individual at international criminal justice forums. This is related to the principle whereby individuals found guilty are obligated to provide reparations (including compensation) for the harm inflicted on victims.³⁴⁴⁵ As found in the study on customary international humanitarian law by the International Committee of the Red Cross, recent national and international practice favors obtaining reparations from individuals claimed by victims, both before (international) criminal courts and national civil courts.³⁴⁴⁶

Even though the existence of reparations proceedings and modalities at international and hybrid criminal courts have specific, even *sui generis*, characteristics, human rights courts' jurisprudence on reparations as well as the UN Basic Principles and Guidelines have been closely taken into account by the emerging case law of the ICC and the ECCC. The ICC and the ECCC are the only judicial forums among the international and hybrid criminal courts considered in this thesis where victims can claim reparations and benefit from them.³⁴⁴⁷ It is necessary to remember that reparations orders can only be made

³⁴⁴¹ UN Basic Principles and Guidelines, principle 11 (b).

³⁴⁴² *Ibid.*, principle 15.

³⁴⁴³ Bassiouni (2006) 265-275.

³⁴⁴⁴ E.g., the UN Basic Principles and Guidelines mainly refers to State obligations. For a discussion on state implementation of reparations for violations of human rights and international humanitarian law, see Elizabeth Salmón Gárate, *El Derecho Internacional Humanitario y su Relación con el Derecho Interno de los Estados* (Palestra 2007a) 263-271.

³⁴⁴⁵ Zegveld (2010) 85.

³⁴⁴⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (ICRC/Cambridge University Press 2005) 554-555.

³⁴⁴⁷ Some references to victims as reparations claimants at the hybrid criminal courts in the Balkan region, which have not been considered in this thesis, are mentioned later for illustrative purposes. Under the extinct UNTAET Special Panels for Serious Crimes in East Timor, a hybrid criminal court not considered in this thesis, section 49.1 of its Regulation 2000/30 established the option for

against convicted persons at the ICC and the ECCC,³⁴⁴⁸ i.e., not against States. In turn, the implementation of reparations orders against the convicted may be conducted by the Trust Fund for Victims (TFV) (ICC) or potentially implemented with external funds involving state/non-state cooperation and the Victims Support Section (VSS) (ECCC) as detailed later.³⁴⁴⁹ The importance of the ICC and the ECCC reparations regimes for the success of the respective courts has been stressed both by the courts themselves,³⁴⁵⁰ and by victims acting as reparations claimants before them.³⁴⁵¹ Since the ICC and the ECCC are the only courts among the international and hybrid criminal courts considered in this thesis at which victims' status as reparations claimants can be exercised, the analysis in this chapter is mainly focused on those two courts.

Having said so, the situation at the other international and hybrid criminal courts considered in this thesis, i.e., the ICTY, the ICTR, the SCSL and the STL, is also examined. The three national systems considered in the previous chapters are also taken into account in this chapter for complementary/referential and comparative purposes.

With regard to the chapter structure, it consists of five subchapters (including this introduction and chapter conclusions). The second subchapter, 'General Framework', includes two independent sections, for the ICC and the ECCC. Each of them starts with preliminary considerations about the case-based reparations regimes existent at the ICC and the ECCC. This is followed by a much more detailed analysis of categories of reparations claimants and beneficiaries, which includes *inter alia* considerations on direct and indirect victims, the causal link between crimes and harm to be redressed, civil parties as reparations claimants (ECCC), relation between victim participant status and victims as reparations claimants (ICC). Finally, it is included an analysis of the resources for implementing reparations, i.e., financial penalties and others, especially those from the ICC TFV.

victims to bring civil action before civil courts. Under, section 49.2, it was provided for that these panels could order a compensation order for victims; however, in practice apparently no order was rendered. See Brouwer and Heikkilä (2013) 1362; Bassiouni (2006) 242, footnote 202.

³⁴⁴⁸ ICC Statute, article 75 (2); ECCC Internal Rules, rule 23 *quinquies* (1).

³⁴⁴⁹ See *infra* Chapter IV 2.3.3, 2.4.3, 4.3.2, and 4.4.2.

³⁴⁵⁰ See e.g., Lubanga (ICC-01/04-01/06-8-US-Corr), Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 136. ('[...] the success of the Court is, to some extent, linked to the success of its reparation system').

³⁴⁵¹ See, e.g., Nuon Chea et al. (Case 002), Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011, Civil Party Lead Co-Lawyers, E125/2, 12 March 2012, para. 99.

The third subchapter, 'Victims and Reparations Proceedings', mainly discusses the proceedings whereby victims can claim and later obtain reparations at the ICC and the ECCC, in their respective independent subchapter sections. Thus, these proceedings are examined following the sequential succession of procedural stages that victims need to pass through to claim and obtain reparations. Accordingly, it is discussed initial proceedings to bring/file reparations claims, participation/intervention during trial and appeals proceedings, putting particular emphasis on proceedings specifically relating to reparations requests and hearings. Victims' situation at the TFV is also examined.

The fourth subchapter, 'Modalities of Reparations and other Legal Issues', when it comes to the independent subchapter sections on the ICC and the ECCC, consist of two subsections. Under the first one, 'Individual/Collective Reparations and Reparations Standard/Burden of Proof' (ICC) and 'Collective and Moral Reparations and Reparations Standard/Burden of Proof' (ECCC), the notions of individual and collective reparations as designed at the ICC and the ECCC are extensively discussed. This is followed by some analysis of reparations standard and burden of proof. The second subsection, 'Modalities of Reparations', examines which modalities of reparations, i.e., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,³⁴⁵² may be available at the ICC and the ECCC, alongside the challenges to implement them.

Subchapters two, three and four start with references to the three national systems considered and the other international and hybrid criminal courts examined in this thesis. Comparative conclusions are included within each subchapter. Finally, comprehensive chapter conclusions are provided in the last subchapter.

2. General Framework

In this subchapter, after some general points on the three considered national systems, and the situation at the ICTY, the ICTR, the SCSL and the STL, the analysis is focused on the ICC and the ECCC as the only judicial forums, among the examined international and hybrid criminal courts, where victims can claim and benefit from reparations. Accordingly, in the respective independent subchapter sections on the ICC and the ECCC, a general presentation of the ICC and the ECCC case-based reparations regimes is given. Then, the discussion concerns the categories of reparations claimants and beneficiaries. Finally, it is

³⁴⁵² See UN Basic Principles and Guidelines, principles 19-23.

examined the resources to support reparations. Comparative conclusions complete this subchapter.

2.1. National Systems

2.1.1. English Adversarial System

Concerning compensation from the offender, victims can obtain it either via compensation orders, which are criminal sanctions or penalties,³⁴⁵³ (criminal proceedings) or civil actions.³⁴⁵⁴ Regardless of whether a perpetrator is convicted in criminal courts, a victim is entitled to begin civil proceedings against him/her to recover losses.³⁴⁵⁵ However, although compensation orders are made on the principle that victims should be compensated by any harm, the compensation order beneficiary is technically speaking not a reparations claimant.³⁴⁵⁶ Victims cannot file a civil claim in criminal proceedings.³⁴⁵⁷ In England and Wales, courts can order the defendant to pay compensation as part of a sentence for ‘any personal injury, loss or damage resulting from the offender’ since 1973.³⁴⁵⁸ Although it was originally introduced as an ancillary penalty, courts are empowered to award compensation orders as penalties in their own right since 1982.³⁴⁵⁹ The rule is that compensation orders are awarded in conjunction with other penalties; however, a compensation order can be made instead of or in addition to any other penal sanction.³⁴⁶⁰

Compensation orders, are currently regulated under section 130 (4) of the Powers of Criminal Courts (Sentencing) Act 2000 which provides for that compensation ‘shall be of such amount as the court considers appropriate, having regard to any evidence and to any representation that are made by or on behalf of the accused or the prosecutor’. Compensation is given priority over fines, i.e., when an offender lacks sufficient means to pay both, the court should

³⁴⁵³ Brien and Hoegen (2000) 258. See also that compensation orders are regulated under Part VI (‘Financial Penalties and Orders’) of the Powers of Criminal Courts (Sentencing) Act 2000.

³⁴⁵⁴ Doak (2008) 231.

³⁴⁵⁵ Chris Lewis and Tom Ellis, *Victim Protection in the United Kingdom: Policies, Practice and the Law* (2006) 7. Available at: <http://www.port.ac.uk/departments/academic/icjs/staff/documentation/filetodownload.63887.en.pdf> (last visit on 30 November 2012).

³⁴⁵⁶ Brien and Hoegen (2000) 258.

³⁴⁵⁷ *Ibid.*, 1073.

³⁴⁵⁸ This was originally included in Criminal Justice Act (1972). The power is currently included in the Powers of Criminal Courts (Sentencing) Act 2000, section 130.

³⁴⁵⁹ Criminal Justice Act (1982), section 67.

³⁴⁶⁰ Doak (2008) 232.

impose a compensation order instead of a fine.³⁴⁶¹ Moreover, the court is obligated to contemplate issuing a compensation order and when does not do it, it has to state reasons.³⁴⁶² Courts can also order, against the convicted, deprivation of offender's property, etc. used to commit the crime and restitution,³⁴⁶³ as well as confiscation.³⁴⁶⁴

Compensation orders are limited by important factors.³⁴⁶⁵ First, they have to reflect the perpetrator's capability of paying, unlike civil damages. Second, the victim lacks standing to influence the decision and needs to rely on the prosecutor to ask that an order be made and, indeed, there is some evidence of prosecution's failure to pass on appropriate information as demanded by the courts to facilitate the process. Third, compensation orders have a maximum amount limit (£5,000),³⁴⁶⁶ the amount awarded is normally small and compensation orders are made inconsistently. On the other hand, unlike state compensation schemes, compensation orders are not limited to violent crimes, i.e., an order may be made in cases involving death, injury, loss or damage.³⁴⁶⁷ Moreover, pursuing compensation via criminal courts has been found to enhance the victims' opportunities to obtain some tangible compensation as opposed to a retributive justice model which leaves them with empty hands,³⁴⁶⁸ and indeed has been considered as a relatively successful experience.³⁴⁶⁹

Since compensation order is a penalty, it can only be ordered provided that the accused is convicted.³⁴⁷⁰ In any case, the victim can sue the offender for damages in a civil court even when the criminal court has acquitted him/her,³⁴⁷¹ although a criminal conviction normally increases the likelihood of success in civil action.³⁴⁷² However, civil actions are very rare due to, *inter alia*, the fact that

³⁴⁶¹ Powers of Criminal Courts (Sentencing) Act 2000, section 130 (2). Concerning imposition of fines imposed on the accused see Powers of Criminal Courts (Sentencing) Act 2000, section 127-129.

³⁴⁶² Powers of Criminal Courts (Sentencing) Act 2000, section 130 (12).

³⁴⁶³ See respectively Powers of Criminal Courts (Sentencing) Act 2000, sections 143-145 and sections 148-149.

³⁴⁶⁴ See Proceeds of Crime Act 2002, section 6.

³⁴⁶⁵ See Doak (2008) 233.

³⁴⁶⁶ Powers of Criminal Courts (Sentencing) Act 2000, section 131 (1).

³⁴⁶⁷ Doak (2008) 233.

³⁴⁶⁸ *Ibid.*, 235.

³⁴⁶⁹ Brien and Hoegen (2000) 1099.

³⁴⁷⁰ *Ibid.*, 258.

³⁴⁷¹ Doak (2008) 231.

³⁴⁷² *Ibid.*, 232.

the burden lies on the victim and civil actions are seldom financially worthy.³⁴⁷³ This situation may explain why Recommendation (1985)11 and the UN Victims' Declaration seem to prefer the scenario where victims can obtain compensation via criminal proceedings.³⁴⁷⁴ The same went true under the EU Framework Decision on Victims,³⁴⁷⁵ and is also the case now under the EU Directive on Victims, which states in its article 16 (Right to decision on compensation from the offender in the course of criminal proceedings) that:

1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.
2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

Additionally, similar to the EU Framework Decision on Victims,³⁴⁷⁶ the EU Directive on Victims provides for the victims' right to return of property seized in criminal proceedings.³⁴⁷⁷ As compensation from the offender may become very difficult as (s)he is not identified or even when identified there are many obstacles for doing so,³⁴⁷⁸ an alternative for victims is compensation from the State, the so-called Criminal Injuries Compensation Scheme administered by the Criminal Injury Compensation Authority (CICA).³⁴⁷⁹ Indeed, the European

³⁴⁷³ Ibid., 231.

³⁴⁷⁴ See respectively Recommendation (1985)11, guidelines 10 and 11; UN Victims' Declaration, principle 9.

³⁴⁷⁵ EU Framework Decision on Victims, article 9. Right to compensation in the course of criminal proceedings ('1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner. 2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims'.).

³⁴⁷⁶ Ibid., article 9 (3) ('Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay'.).

³⁴⁷⁷ EU Directive on Victims, article 15. Right to the return of property ('Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law'.).

³⁴⁷⁸ Doak (2008) 227.

³⁴⁷⁹ Martin Partington, Introduction to the English Legal System (Oxford University Press 2012) 140.

Union Council Directive Relating to Compensation to Crime Victims (EU Council Directive on Compensation) states the existence of national schemes of compensation:

All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.³⁴⁸⁰

However, the CICA scheme (like the Directive) is restricted to victims injured as result of violent criminal acts, which has been criticized as seemingly introducing a distinction ‘between deserving and undeserving victims’.³⁴⁸¹ The compensation provided by the State limited to serious crimes is also a feature shared with the European Convention on Compensation for Violent Crime Victims, which additionally establishes that compensation has to be awarded via state schemes even when the perpetrator cannot be prosecuted or punished.³⁴⁸² In any case, compensation for victims of the London Bombings in July 2005 and the immediate relatives of those who were killed was available from the CICA.³⁴⁸³ It should be noticed that, as consequence of amendments in the Domestic Violence, Crime and Victims Act (2004), courts when making a compensation order may require sums obtained from the offender to be used by the Compensation Injuries Fund when there has been given an award from the Fund.³⁴⁸⁴

Like in other domestic systems, the existence of, *inter alia*, state immunities can preclude victims from receiving damages on civil claims proceedings, as determined by the ECtHR in *Al Adsani v. United Kingdom*, a case concerning allegations of torture.³⁴⁸⁵ It must be also said that the law of torts is not examined as it exceeds the scope of this thesis. However, some very general and brief references to tort/civil litigation are included in the sections

³⁴⁸⁰ Council Directive 2004/80/EC Relating to Compensation to Crime Victims, 29 April 2004, article 12 (2).

Concerning the access to compensation, in cross-border situations, article 2 of the Directive lays down that ‘Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed’.

³⁴⁸¹ Doak (2008) 228. See also Partington (2012) 140.

³⁴⁸² See European Convention on Compensation for Violent Crime Victims, articles 2-3 and 5-6.

³⁴⁸³ Lewis and Ellis (2006) 15.

³⁴⁸⁴ Partington (2012) 141.

³⁴⁸⁵ ECtHR, *Al-Adsani v. United Kingdom*, Appl. No. 35763/97, 21 November 2001, para. 66.

corresponding to the English and American systems. In any case, it can be mentioned here that:

The paradigm of tort consists of an *act* or *omission* by the defendant which *causes damage* to the claimant. The damage must be caused by the fault of the defendant and must be a *kind of harm* recognised as attracting legal liability.

This model can be represented: act (or omission) + causation + protected interest + damage = liability.³⁴⁸⁶

Under the law of torts, a irrecoverable consequential loss for the claimant is one that is 'too remote' or 'not proximately caused' by the defendant's wrong, i.e., a 'remoteness' test or 'proximate cause' is the test used.³⁴⁸⁷ Finally, it should be noted that, under the Human Rights Act (1998), a person claiming that a public authority has acted or proposes to act in a way incompatible with the ECHR may bring free-standing proceedings under the Act at a competent tribunal or court or may rely on the ECHR in any other legal proceedings being brought, provided that (s)he would be a 'victim' of the unlawful act for purposes of article 34 of the ECHR.³⁴⁸⁸ In any case, damages 'may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings'.³⁴⁸⁹ Accordingly, damages may not be awarded by a criminal court.³⁴⁹⁰

2.1.2. American Adversarial System

To begin with, victims are not technically speaking reparations claimants in criminal proceedings although they can benefit of restitution orders. Thus, offenders are normally ordered by the competent court to pay restitution to his/her victims.³⁴⁹¹ The Federal CVRA states that a crime victim has 'The right to full and timely restitution as provided in law'.³⁴⁹² The restitution award is generally governed by the Mandatory Victims Restitution Act (MVRA) of

³⁴⁸⁶ John Cooke, *The Law of Tort* (8th edn. Pearson 2007) 4. This basic pattern has of course some variations such as torts which do not require fault known as torts of strict liability. See *Ibid.* *Loc. cit.*

³⁴⁸⁷ Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 152.

³⁴⁸⁸ See Human Rights Act (1998), sections 7 (1) (a), 7 (1) (b), 7 (3) and 7 (7). As for case law of the UK Supreme Court, see, e.g., *G (AP) (Appellant) v Scottish Ministers and another (Respondents)* (Scotland) [2013] UKSC 79.

³⁴⁸⁹ Human Rights Act (1998), section 8 (2).

³⁴⁹⁰ Emmerson, Ashworth and MacDonald (2012) 203.

³⁴⁹¹ Human Rights Watch (2008) 30.

³⁴⁹² 18 USC § 3 771 (a) (6).

1996,³⁴⁹³ and the earlier Victim and Witness Protection Act (VWPA) (1982).³⁴⁹⁴ Under the MVRA, a court is required to enter a restitution order for each defendant without regard to the defendant's economic circumstances in every case that involves a conviction for certain listed crimes.³⁴⁹⁵ While under previously discretionary statutes, restitution was discretionary with the court, the CVRA makes restitution a victim's right and, hence, discretion on this issue does not exist anymore.³⁴⁹⁶ However, as established in *In re W.R. Huff Asset Management Co., LLC*, the CVRA does not provide any (restitution) right against an individual who has not been convicted.³⁴⁹⁷ Nevertheless, it was also found that neither the government nor the sentencing court is prevented by the CVRA from effecting reasonable settlement or restitution measures directed against non-convicted defendants.³⁴⁹⁸

The term 'crime victim' under the CVRA has been interpreted in case law as 'a person must be directly harmed as a result of the offense and the harm must be proximate to the crime' and it has also been established that 'proximate cause' emphasizes 'the continuity of the sequence that "produces an event and refers to a cause of which the law will take notice"'.³⁴⁹⁹ Thus, 'the harm must "proximately" result from the crime'.³⁵⁰⁰ Besides CVRA's victim definition, previously examined in further detail,³⁵⁰¹ it is relevant to notice the definition of 'victim' for restitution effects under the MVRA, which reads as follows:

[...] a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section.

³⁴⁹³ 18 USC § 3 663A (a) (2).

³⁴⁹⁴ 18 U.S.C. §§ 3579, 3580.

³⁴⁹⁵ See for further details Kyl, Twist and Higgins (2005) 610.

³⁴⁹⁶ *Ibid.*, 611.

³⁴⁹⁷ *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 558–64 (2d Cir. 2005).

³⁴⁹⁸ *Ibid.*, *Loc. cit.*

³⁴⁹⁹ *United States v. Hunter*, 2008 WL 53125 (D. Utah 2008).

³⁵⁰⁰ *In re Antrobus*, 519 F.3d 1123, 1225 (10th Cir. 2008) (Judge Tymkovich concurring).

³⁵⁰¹ See *supra* Chapter IV 2.1.2.

This provision was, for instance, interpreted in *United States v. Bedonie*, which stressed the proximate cause standard ('proximately harmed') and that those persons who 'may assume the victim's rights' when the victim is deceased do not become the victim as they are considered mere representatives of the victim under the statute.³⁵⁰² In *United States v. Johnson*, the Second Circuit Court of Appeals concluded that a District Court, under the MVRA, was required to order restitution even when the victim did not accept the restitution as the purpose underlying the MVRA did not only consist in the compensation of victims but also the punishment of offenders. In this particular case, as the victim refused the money, the court directed that the perpetrator pay restitution to the Federal Crime Victims Fund.³⁵⁰³ Similar to most states, federal legislation prohibits monetary damages for violations.³⁵⁰⁴

In almost all states, the court that imposes a criminal sentence can order a convicted to make restitution to the victim and, in some states, victims even hold a constitutional right to restitution.³⁵⁰⁵ However, many offenders lack funds to afford the restitution ordered by the court. On the other hand, all but two states permit victims to enforce restitution orders via a civil judgment. In turn, state systems of crime victim compensation seek to supplement or act instead of restitution that cannot or will not be provided directly by offenders.³⁵⁰⁶ This is organized in most states via state compensation funds.³⁵⁰⁷ Many states have passed laws prohibiting defendants from profiting from their crimes.³⁵⁰⁸ However, the United States Supreme Court found the New York statute transferring any profits to crime victims unconstitutional.³⁵⁰⁹ As restitution obligations are part of a criminal judgment, it has been suggested the penal

³⁵⁰² *United States v. Bedonie* 317 F. Supp. 2d 1285 (D. Utah 2004).

³⁵⁰³ *United States v. Johnson*, 378 F.3d 230 (2d Cir. 2004).

³⁵⁰⁴ *Beloof, Cassell and Twist* (2010) 730.

³⁵⁰⁵ *Ibid.*, 607. As for constitutions, under which there is a right to restitution see, for example, Illinois Constitution, article I, § 8.1 ('Crime victims, as defined by law shall have the following rights as provided by law: (10) The right to restitution'); South Carolina Constitution, article I, § 24; Michigan Constitution, article I, § 24 (1).

³⁵⁰⁶ Human Rights Watch (2008) 30, 31.

³⁵⁰⁷ *Ibid.*, 31.

³⁵⁰⁸ *Beloof, Cassell and Twist* (2010) 618.

³⁵⁰⁹ *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105 (1991). Since then, courts have struggled to establish the constitutionality of state laws so as to comply with the United States Supreme Court's decision. *Beloof, Cassell and Twist* (2010) 618.

nature of restitution.³⁵¹⁰ A restitution order can be converted into a civil judgment in most states and under federal statutes.³⁵¹¹

As for civil jurisdiction, a class action, which consists in a civil lawsuit of a large group of victims with similar legal claims, may be brought collectively in federal or state courts.³⁵¹² Thus, a large unnamed group of plaintiffs is represented by a smaller, named group of plaintiffs, or even one single plaintiff and the link between the named plaintiffs and those unnamed consists in a shared legal grievance.³⁵¹³ The Alien Tort Claims Act (ATCA),³⁵¹⁴ provides a legal basis for United States Federal Courts to hear civil claims against persons allegedly responsible for serious human rights abuses.³⁵¹⁵ Starting with the Second Circuit Court of Appeal's decision on *Filartiga v. Pena-Irala*, it has been held that conduct which violates the 'law of nations' under the ATCA includes human rights abuses prohibited by customary international law.³⁵¹⁶ The United States Supreme Court in *Sosa v. Alvarez-Machain*, cited with approval *Filartiga* and other cases which have permitted claims for violations of 'specific, universal and obligatory' international norms.³⁵¹⁷ This litigation has also been exercised by class action suit, due to the large number of victims, for example, in *Kadić v. Karadžić*, where it was found that the ACTA *ratione materiae* scope may cover international crimes such as genocide, war crimes and crimes against humanity.³⁵¹⁸

Lastly, but equally important, the United States Government has granted compensation for specific groups of victims, e.g., the 'September 11th Victim Compensation Fund of 2001' or the Office of Redress Administration (1988) for Japanese-Americans interned during the Second World War.³⁵¹⁹ Based on

³⁵¹⁰ *Thompson v. Hewitt*, 311 B.R. 415 (E.D. Penn. 2004).

³⁵¹¹ *Beloof, Cassell and Twist* (2010) 617.

³⁵¹² As for federal law, see Federal Rules of Civil Procedure, rule 23.

³⁵¹³ *Zegveld* (2010) 97.

³⁵¹⁴ 28 USC § 1350. The other acts are: Torture Victim Protection Act (T 28 USC § 1350 note), the Anti-Terrorism Act (18 USC § 2333); and the Foreign Sovereign Immunities Act (28 USC § 1330 et seq.).

³⁵¹⁵ REDRESS, *Enforcing Reparations: Enforcement of Awards for Victims of Torture and Other International Crimes* (May 2006) 60.

³⁵¹⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980)

³⁵¹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004).

³⁵¹⁸ *Kadić v. Karadžić*, 70 F. 3d 232, 242-243 (2nd Cir.. 1995). See also Ilaria Bottiglierio, *Redress for Victims of Crimes Under International Law* (Martinus Nijhoff Publishers 2004) 57-62.

³⁵¹⁹ See, for further details, respectively Samuel Issacharoff and Anna Morawiec Mansfield, 'Compensation for the Victims of September 11' in Greiff (2006) 284-320; Erik Yamamoto and Liann Ebesugawa, 'Report on Redress: The Japanese American Internment' in Greiff (2006) 257-283.

agreements adopted by the United States with Germany and Austria, Germany and Austria set up funds to award compensation to victims of the Second World War crimes.³⁵²⁰

2.1.3. French Inquisitorial System

To obtain reparations from the offender, victims can present their requests before the civil judge or the criminal judge according to article 4 of the CPP 'The civil action for reparation of damage caused by the infraction foreseen in article 2 can be exercised before a civil jurisdiction separated from the public action'.³⁵²¹ The rule is that the selection of a civil court is irrevocable, i.e., according to article 5 of the CPP, the victim who has brought his/her action before the competent civil court may not bring it before the criminal court. However, under articles 4 and 5 of the CPP, when the public prosecutor has referred the case to a criminal court (the criminal action then puts the civil action on hold), the victim may join his/her action to the public action provided that the competent court has not yet judged the case.³⁵²² Thus, the civil case must be adjourned until the criminal court reaches a decision,³⁵²³ and the civil judge cannot reach a decision contrary to the criminal court's decision.³⁵²⁴

One of the two objectives for civil party constitution is to obtain reparation for the damage inflicted, i.e., the civil action before a criminal court.³⁵²⁵ As discussed,³⁵²⁶ the object of civil action before criminal jurisdiction is to obtain reparation for damages. Although the civil party constitution and the civil action as such should not be confused, there is doctrinal consensus concerning the dual repressive and reparative finality of civil party's constitution and participation.³⁵²⁷ As examined,³⁵²⁸ a claim for reparations is not required for

³⁵²⁰ See Henckaerts and Doswald Beck (2005) 543.

³⁵²¹ CPP, article 4 ('L'action civile en réparation du dommage causé par l'infraction prévue par l'article 2 peut être exercée devant une juridiction civile, séparément de l'action publique'). See also Yann-Matthias Dazin, 'La Situation Française, à L'Épreuve Des Droits Allemand et Suisse' in Strickler (2009) 177, 189.

³⁵²² CPP, articles 4 and 5. See also Dervieux (2002) 227.

³⁵²³ CPP, article 4.

³⁵²⁴ In application of respectively the principles *le criminel tient le civil en état*, and the precedence of criminal proceedings over civil litigation. See Brienen and Hoegen (2000) 319. However, although the principle *le criminel tient le civil en état* remains in place, it has been restricted by amendments to article 4-1. See Yves Strickler, 'Post-Face' in Strickler (2009) 263, 266.

³⁵²⁵ Dervieux (2002) 227.

³⁵²⁶ See supra Chapter IV 2.1.3.

³⁵²⁷ See supra Chapter IV 2.1.3.

³⁵²⁸ See supra Chapter IV 2.1.3.

civil party constitution. Be that as it may, the admissibility of the civil action does not automatically imply that damages will be awarded to the victim.³⁵²⁹

In general, a natural person brings a civil action before a criminal court in order to obtain compensation for personal, direct harm caused to him/her.³⁵³⁰ Article 2 of the CPP explicitly states that the civil action aims at repairing ‘the damage suffered because of a felony, a misdemeanor or a petty offence [and it] is open to all those who have personally suffered damage directly caused by the offence’.³⁵³¹ Accordingly, there is a required direct causal link between the crime and the damage inflicted. This provision is complemented by article 85 of the CPP whereby any individual who claims to have suffered harm out of a felony or a misdemeanor may request to become civil party by filling a complaint with the competent investigating judge. As a general rule, compensation of the victim by a criminal court presupposes the conviction of the accused.³⁵³² Also, the Criminal Chamber of the *Cour de Cassation* has stated that a criminal court lacks competence over a civil action, i.e., reparations for damages, already decided on merits concerning the public (criminal) action.³⁵³³

According to the Criminal Chamber of the *Cour de Cassation*, not only direct victims can become civil parties and, hence, to claim reparations but also their next of kin as they suffer a direct and personal harm out of a crime and even they can become civil parties and, therefore, become reparations claimants regardless of whether the direct victim is alive.³⁵³⁴ Next of kin’s personal harm has hence been understood as their own harm, different from the harm inflicted to the direct victim, i.e., the next of kin suffers a direct and personal harm out of the harm inflicted on the direct victim.³⁵³⁵ Losses and injuries may be of a material, moral or both nature, and the victim’s right may be transferred to his/her heirs, assignees, creditors and also third parties.³⁵³⁶ However, the *Cour de Cassation* has been more restrictive as the admissibility of heirs’ civil action at criminal courts, and thus their chances to obtain reparations in criminal

³⁵²⁹ Dervieux (2002) 237.

³⁵³⁰ *Ibid.*, 226.

³⁵³¹ ‘L’action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction’.

³⁵³² Dervieux (2002) 227.

³⁵³³ *Crim.*, 9 September 2008, Arrêt n°4701(07-87.207).

³⁵³⁴ *Crim.*, 9 February 1989, arrêt Latil-Janet, *D.*, 1989, somm. comm., p. 389, note J. Pradel; *Crim.*, 23 May 1991, *Bull. crim.* n° 220; *D.*, 1992, somm. comm., p. 95, note J. Pradel; *Crim.*, 11 July 1994, *Bull. crim.* n° 269; *J.C.P.*, 1995, II, 22441, note F. Eudier. Cited by Pignoux (2008) 250-251.

³⁵³⁵ Pignoux (2008) 250-251.

³⁵³⁶ Brienen and Hoegen (2000) 319.

proceedings, has been subject to the requirements of having the action started by the direct (immediate) victim or the Public Ministry.³⁵³⁷

Concerning *crimes* (felonies), *cour d'assises*, which has jurisdiction over them,³⁵³⁸ rules on any civil party's claims for damages against the accused.³⁵³⁹ Even in acquittal or when there is exemption of penalty, the court may endorse the civil party's claim for compensation for the damage caused by the accused's fault provided that it is clear that the accused has committed a civil wrong and, therefore, the damage comes from the matters of which (s)he was accused based on the CPP,³⁵⁴⁰ and on jurisprudence of the Criminal Chamber of the *Cour de Cassation*.³⁵⁴¹ Restitution of articles may be ordered by the court on its own motion.³⁵⁴² Individuals convicted of the same felony are jointly responsible for restitution and compensation for damages, and the court may determine that if one of the co-accused is surrounded by insolvent co-principals or accomplices, (s)he is jointly liable to pay the fines imposed.³⁵⁴³ In cases of individuals found guilty of genocide or crimes against humanity, the Criminal Code provides for forfeiture of some or of all of their assets.³⁵⁴⁴

There is a penalty named 'sanction-reparation',³⁵⁴⁵ which consists in 'the obligation for the convicted, within the deadline and according to the modalities established by the jurisdiction, the compensation of prejudice of the victim'.³⁵⁴⁶ This can be pronounced instead or in addition to the imprisonment penalty or fine, and, based on the provision text, the sanction-reparation may be susceptible to benefit victims who have not been constituted civil parties.³⁵⁴⁷ The acquittal by the *tribunal correctionnel* or the *tribunal de police* (misdemeanors and

³⁵³⁷ Crim., 27 April 2004, *J.C.P.*, 2004, II, 10175, note L. Boré, J. De Salve de Bruneton; *R.S.C.*, 2004, pp. 804-905, obs. D-N. Commaret. See also Ass. Plén. 9 may 2008, 2 arrêts (rulings), *J.C.P.*, 2008, II, 10124, note J-Y. Maréchal. Cited by Pignoux (2008) 252.

³⁵³⁸ Dervieux (2002) 231.

³⁵³⁹ CPP, article 371.

³⁵⁴⁰ *Ibid.*, article 372.

³⁵⁴¹ Crim., 14 January 1981, *Bull. crim.* n° 24. Cited by Dervieux (2002) 227.

³⁵⁴² CPP, article 373. The court can also order the perpetrator to pay the civil party the sums it establishes to compensate the costs spent by the civil party and not paid by the State. See *Ibid.*, article 375.

³⁵⁴³ *Ibid.*, article 375-2.

³⁵⁴⁴ Criminal Code, article 231-1, 221-9, 3° and 131-21.

³⁵⁴⁵ Pignoux (2008) 158.

³⁵⁴⁶ Criminal Code, article 131-8-1 ('La sanction-réparation consiste dans l'obligation pour le condamné de procéder, dans le délai et selon les modalités fixés par la juridiction, à l'indemnisation du préjudice de la victime').

³⁵⁴⁷ Pignoux (2008) 158.

contraventions respectively³⁵⁴⁸) of an individual accused of an offence that does not require evidence of intention does not constitute obstacle to the court awarding damages.³⁵⁴⁹ France's Law of Armed Conflict Manual restates article 1382 of the Civil Code on civil liability and provides that 'this implies that someone who has not been held criminally liable must nevertheless provide reparation for the damage caused'.³⁵⁵⁰

Lastly, but equally important, in addition to the civil action exercised either before a civil or criminal jurisdiction, public structures, i.e., state compensation schemes, such as the *Commission d'indemnisation des victimes d'infractions* (CIVI),³⁵⁵¹ presided by a judge,³⁵⁵² and the *fonds de garantie* multiply reparations avenues for victims.³⁵⁵³ Thus, victims of terrorist acts, individuals whose lives have been threatened or physically damaged, those sexually attacked and certain victims of theft, fraud or breach of trust can obtain full compensation for the damage resulting from these offences from the State.³⁵⁵⁴ Damages are allocated by a committee with the characteristics of a civil court and they are paid out of a guarantee fund subrogated in the victim's right to get reimbursement of the compensation paid from the convicted person.³⁵⁵⁵ If the CIVI compensates the victim, it is subrogated into the victim's right to claim damages from the offender.³⁵⁵⁶ In practice, state compensation schemes have been said to be much more effective than individual victims' actions.³⁵⁵⁷ According to the Civil Chamber of the *Cour de Cassation*, the avenue of

³⁵⁴⁸ Dervieux (2002) 230-231.

³⁵⁴⁹ CPP, article 470-1, para. 1. Additionally, article 4-1 of the CPP states that where negligence in the criminal sense (*faute pénale intentionnelle*) is not proved, it does not preclude a civil court from granting damages under article 1383 of the Civil Code. See Dervieux (2002) 227.

³⁵⁵⁰ Law of Armed Conflict Manual (2001) 422. Article 1382 of the Civil Code states that 'Any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it' ('Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer'). In addition, Article 1383 provides that 'One shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence' ('Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence').

³⁵⁵¹ Compensation Commission for Crime Victims.

³⁵⁵² The so-called 'Juge Délégué aux Victimes (JUVEDI). See Cario (2010) 13-14.

³⁵⁵³ Dazin (2009) 190.

³⁵⁵⁴ CPP, 706-3 et seq. See also Dervieux (2002) 227.

³⁵⁵⁵ CPP, 706-3 et seq. See also Dervieux (2002) 227.

³⁵⁵⁶ CPP, 706-11.

³⁵⁵⁷ Brienen and Hoegen (2000) 315.

compensation examined in this paragraph is autonomous and subject to its own rules.³⁵⁵⁸

2.2. The ICTY, the ICTR, the SCSL and the STL

2.2.1. Absence of Reparations Claimant Status

The ICTY, the ICTR, the SCSL and the STL do not have the mandate to issue reparations orders against the convicted person in favor of victims of the crimes upon which the offenders are found guilty. Therefore, at the ICTY, the ICTR, the SCSL, and the STL, victims lack the status of reparations claimants although they may benefit as witnesses of some limited rehabilitative measures as detailed later.³⁵⁵⁹

Even at the STL where, as seen, victims can apply for and be granted the victim participant status, victims do not possess the reparations claimant status. This feature was emphasized by the former President of the STL, Antonio Cassese, when, by comparing the situation of victim participants before the STL with that of civil parties, illustratively concluded that ‘the main *raison d'être* of “*parties civiles*”, namely their participation in criminal proceedings for the purpose of seeking compensation is removed’.³⁵⁶⁰ The victim participant status thus shaped was determined by the Secretary-General’s Report on the establishment of the STL where it was stated that ‘the participation of victims as “*parties civiles*” [is] absent’, i.e., victim participants at the STL cannot claim reparations before the STL.³⁵⁶¹ Accordingly, the STL trial proceedings aim at determining the accused’s responsibility but not the determination of compensation, one modality of reparations, in favor of victim participants.³⁵⁶² The fact that at the STL proceedings lack of victims’ status as reparations claimants co-exists with the victims’ status as victim participants (previously examined) evidences the possibility that these two dimensions of victims’ status, i.e., as reparations claimants and as participants, are autonomous although they are normally closely interconnected, which is the case of the ICC and especially at the ECCC as for civil parties. This also shows the several options when engineering the dimensions that victims’ status may consist of at international

³⁵⁵⁸ Cour de Cassation, Second Civil Chamber, 25 May 1987. Cited by Association des Paralysées de France- Conseil Technique National, Les Victimes d’Infractions Pénales, Circulaire No. 130 (19 November 2008) 13.

³⁵⁵⁹ See *infra* Chapter V 4.2.1.

³⁵⁶⁰ STL President (2010), para 15. See also STL President (2012), para. 15.

³⁵⁶¹ Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893, 15 November 2006, para. 32.

³⁵⁶² STL President (2010), para. 16; STL President (2012), para. 16.

and hybrid criminal courts, as expressed by the Secretary-General on the establishment of the STL ‘The statute also protects the rights of victims whose personal interests are affected and, while not recognizing them as “*parties civiles*”, it permits their views and concerns to be presented and considered at all stages of the proceedings’.³⁵⁶³

Although victims lack the status as reparations claimants before these tribunals, another feature common to them is that their legal instruments only envisage a system where victims may claim compensation at the national level based on a condemnatory judgment from these tribunals, i.e., delegation to national courts.³⁵⁶⁴ The relevant proceedings are discussed in detail later.³⁵⁶⁵ What should be criticized here is that those provisions assume the existence of financial resources available for compensation at the domestic level, existence of national legislation and that there is a competent domestic body to grant compensation.³⁵⁶⁶ Problems on applying these proceedings are evidenced by the fact that, as far as it is known, no national domestic compensation claim has been grounded on a judgment from these tribunals. Indeed, the title of rule 106 of the ICTY ‘Compensation to Victims’ (and the respective equivalent provisions in the other courts) is misleading.³⁵⁶⁷ Thus, even though it may imply that the ICTY (and the other courts) can give compensation to victims, in reality they neither hold the authority to decide on the amount to be awarded nor to direct States to grant compensation.³⁵⁶⁸ In any case, as detailed later,³⁵⁶⁹ under article 25 (1) of the STL Statute ‘The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal’. For identifying purposes that may later lead to compensation claims in a national court, as remarked by Cassese, victim participation at the STL ‘may prove of enormous value’.³⁵⁷⁰ Due to the fact that the STL has not started its first trial at the time of writing this thesis, this option remains to be seen.

³⁵⁶³ Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893, 15 November 2006, para. 31.

³⁵⁶⁴ See ICTY RPE, rule 106; ICTR RPE, rule 106; SCSL RPE, rule 105; and STL Statute, article 25.

³⁵⁶⁵ See *infra* Chapter V 3.2.1.

³⁵⁶⁶ Heikkilä (2004) 175-176.

³⁵⁶⁷ Susanne Malmström, ‘Restitution of Property and Compensation to Victims’ in Richard May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer Law International 2001) 373, 380.

³⁵⁶⁸ *Ibid.*, *Loc. cit.*

³⁵⁶⁹ See *infra* Chapter V 3.2.1.

³⁵⁷⁰ STL President (2010), para. 16. See also STL President (2012), para. 16.

It should be noticed that victims who have not been identified by the STL may also use the condemnatory judgment to seek compensation at the national level.³⁵⁷¹ This is explicitly stated in rule 86 (G), which reads as follows:

Any person identified in a final judgment as a victim, or otherwise considering himself or herself victim, who has suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal may request from the Registrar a certified copy of the judgment for the purpose of exercising his or her rights under national or other relevant law, as provided by Article 25 of the Statute.

Moreover, the STL Appeals Chamber has explicitly stated that the victim participant status ‘is not a condition-precedent of a victim’s ability to seek compensation in a national court under Article 25 and Rule 86 (G)’.³⁵⁷² The Appeals Chamber has also concluded that the extent to which a domestic court can rely on determination on victim participant status in a STL’s final judgment is properly a matter for that court.³⁵⁷³ Therefore, as determined by the STL Appeals Chamber:

Under Article 25 of the Statute and Rule 86 (G) of the Rules, persons who have suffered harm as the result of the commission of crimes by an accused convicted by the Tribunal may bring an action in a national criminal court in order to obtain compensation, if they are identified as victims in the final judgment, or otherwise consider themselves to be victims. Article 25 (1) gives the Tribunal the specific power to identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.³⁵⁷⁴

As discussed later,³⁵⁷⁵ and referred to at the beginning of this subsection, some limited rehabilitative measures have been provided at these tribunals. In particular, a ‘Support Programme for Witnesses and Potential Witnesses’ (2000-2002) set up by the ICTR’s Gender Issues and Assistance to Victims Unit, involved some (limited) rehabilitative measures, such as physical rehabilitation or psychological counseling, at the ICTR (operated by NGOs and financed by the ICTR’s Voluntary Trust Fund) but only for witnesses or potential

³⁵⁷¹ STL Chambers (2010b) para. 20.

³⁵⁷² Ayyash et al. (STL-11-01/PT/AC/AR126.3), 10 April 2013, para. 34.

³⁵⁷³ *Ibid.*, Loc. cit.

³⁵⁷⁴ *Ibid.*, para. 33.

³⁵⁷⁵ See *infra* Chapter V 4.2.1.

witnesses.³⁵⁷⁶ This program, once cancelled, was followed by the setting up of a medical unit for witnesses, primarily in the context of medical HIV/AIDS treatment in sexual crimes cases.³⁵⁷⁷ In other words, some rehabilitation was provided to victims but based on their status as witnesses rather than on a reparations claimant status, which is inexistent at these tribunals. Besides so, victims at these tribunals may receive some witness allowances,³⁵⁷⁸ but they are once again given on their status as witnesses and not as properly speaking reparations claimant. Moreover, such allowances are negligible considering the costs of the crimes caused to the victims.³⁵⁷⁹

At the ICTY, the ICTR and the SCSL according to articles 24 (3), 23 (3) and 19 (3) of their Statutes respectively, in addition to imprisonment, the respective Trial Chamber as a penalty ‘may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners’. The wording used in the case of the SCSL is slightly different, being the most important difference that restitution can also be made to Sierra Leone ‘the Trial Chamber may order the forfeiture of the property proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone’. This penalty is further developed under the RPE of these tribunals, which is examined later.³⁵⁸⁰ What needs to be stated here is that victims have no standing to request restitution before the Chamber as this request corresponds to the Prosecutor or can be taken by the Chamber on its own motion.³⁵⁸¹ Accordingly, victims lack the status of reparations claimant in these proceedings. The most accessible and direct manner whereby victims may receive restitution of property is seemingly via a Trial Chamber’s order on the identification of the rightful owner,³⁵⁸² on the balance of probabilities.³⁵⁸³ Indeed, potential beneficiaries are not limited to those victims who testified. However, similar to the delegation to national proceedings concerning compensation, as far as it is known, there has not been a Chamber’s order to restitute property or proceeds to the rightful owner.³⁵⁸⁴

³⁵⁷⁶ Brouwer (2005) 401

³⁵⁷⁷ *Ibid.*, 403.

³⁵⁷⁸ See, e.g., ICTY, Directive on Allowances for Witnesses and Expert Witnesses, Doc. IT/200, 5 December 2001, articles 7-14.

³⁵⁷⁹ Heikkilä (2004) 179.

³⁵⁸⁰ See *infra* Chapter V 3.2.1 and 4.2.1.

³⁵⁸¹ ICTY RPE, rule 98 *ter* (B); ICTR RPE, rule 88 (B); and SCSL RPE, rule 88 (B).

³⁵⁸² Brouwer (2005) 396.

³⁵⁸³ ICTY RPE, rule 105 (D); ICTR RPE, rule 105 (D).

³⁵⁸⁴ See OSCE-ODIHR/ICTY/UNICRI, International Criminal Law and Practice Training Materials: Sentencing (2011b) 12; Khan and Dixon (2009) 1379; Guénael Mettraux, International

Therefore, this mechanism has also remained dead letter. In any case, restitution (as a penalty) is subject to the accused's conviction and, hence, can only be given after a judgment of conviction as determined by the ICTR when it rejected *amicus curiae* on restitution of property and/or compensation filed by the Belgian and Rwanda Governments,³⁵⁸⁵ and by the NGO African Concern.³⁵⁸⁶ The ICTR considered that the *amicus curiae* were filed too early in the process and/or victims cannot appear as plaintiffs.³⁵⁸⁷ For example, when the ICTR rejected the Belgian Government's request that Belgian victims appear before the ICTR not as witnesses but as plaintiffs.³⁵⁸⁸ Lastly, but equally important, under the STL RPE, only imprisonment may be imposed on the convicted.³⁵⁸⁹

Finally, the instruments of these courts establish that only victims who have suffered injury or harm as a result of a crime based upon which the accused has been convicted, or someone claiming on behalf of a victim, may claim compensation from the convicted in a domestic court or other body. Therefore, victims of crimes not addressed by the courts are excluded from the provisions of the courts.³⁵⁹⁰ However, the reference to the causal link is general, i.e., no direct causal link is explicitly required as the wording of the respective provisions are that 'the accused guilty of a crime which has caused injury to a victim' (ICTY, ICTR and SCSL RPE),³⁵⁹¹ and 'victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal' (STL Statute).³⁵⁹²

Crimes and the ad hoc Tribunals (Oxford University Press 2005) 358 ('The practical difficulties involved in such a process [...] appear to have deterred all Trial Chambers from any attempt to apply that provision [return/restitution of property] [...] despite the fact that several Chambers have had ample opportunity to do so').

³⁵⁸⁵ See respectively Bagosora (ICTR-96-7-T), 6 June 1998 (dealing with restitution and compensation); Bagosora et al. (ICTR-98-41-T), 13 October 2004, para. 6 (dealing with restitution). See also Brouwer (2005) 397.

³⁵⁸⁶ Musema (ICTR-96-13-T), Decision on an Application by African Concern to Leave to Appear as Amicus Curiae, Trial Chamber, 17 March 1999 (restitution); Bagosora et al. (ICTR-98-41-T), Decision on Amicus Curiae Request by African Concern, Trial Chamber, 23 March 2004 (restitution).

³⁵⁸⁷ Brouwer (2005) 397. See also supra Chapter IV 4.2.2.

³⁵⁸⁸ Bagosora (ICTR-96-7-T), 6 June 1998 (restitution and compensation).

³⁵⁸⁹ STL RPE, rule 172.

³⁵⁹⁰ Brouwer (2005) 398.

³⁵⁹¹ ICTY RPE, rule 106 (A); ICTR RPE, rule 106 (A); SCSL RPE, rule 105 (A).

³⁵⁹² STL Statute, article 25 (1).

2.2.2. Attempts to Change the Status Quo

Bearing in mind both the legal and factual limitations in these courts, a logic question was to think over about the need to reform the system in place at these judicial institutions so that victims may become compensation claimants before them. These initiatives were particularly debated at the ICTY and the ICTR. Nonetheless, they were unsuccessful as examined herein.

Former Chief Prosecutor of the ICTY and the ICTR, Carla del Ponte, several times tried to enhance the indirect system of compensation, and also victims' participation at the ICTY and the ICTR.³⁵⁹³ At the ICTY, after being requested by del Ponte,³⁵⁹⁴ the tribunal commissioned the Rules Committee to further study this issue and the ICTY Judges agreed with the conclusions on the Committee's Report, which established that victims of crimes within the ICTY's jurisdiction 'have a legal right to seek compensation for their injuries'.³⁵⁹⁵ Nevertheless, the problem once again was to determine at which forum and how to implement this right. The Committee's Report proposed that the ICTY's President recommend to both the Secretary General and Security Council a claims commission as a suitable mechanism to compensate victims of the crimes in the former Yugoslavia.³⁵⁹⁶ However, the Rules Committee was reluctant to any amendment to the ICTY's Statute and RPE to introduce a compensation mechanism within the tribunal as the Committee considered it as a very difficult approach based on the following grounds: i) increase in the Chamber's workload and further exacerbation of the length of the proceedings, affecting the accused's right to a fair and expeditious trial; ii) difficult implementation; iii) going contrary to the ICTY's main objective, i.e., prosecuting those individuals responsible for the crimes in the Former Yugoslavia; iv) funding problems for the compensation scheme, in particular considering that many of the accused have few resources.³⁵⁹⁷

The ICTY Judges finally upheld the Committee's recommendations and communicated them to the UN Secretary-General who in turn submitted the

³⁵⁹³ See, *inter alia*, ICTY, Eighth Annual Report of the ICTY, UN Doc. A/56/352-S/2001/865, 17 September 2001, para. 49.

³⁵⁹⁴ ICTY, Press Release, The 22nd Plenary Session of the International Criminal Tribunal for the Former Yugoslavia, JL/P.I.S./518-e, The Hague, 17 July 2000.

³⁵⁹⁵ ICTY Rules Committee, Victims' Compensation and Participation (2000), Section IV. See also ICTY, Eighth Annual Report of the ICTY, UN Doc. A/56/352-S/2001/865, 17 September 2001, para. 49.

³⁵⁹⁶ ICTY Rules Committee, Victims' Compensation and Participation (2000), Section IV.

³⁵⁹⁷ *Ibid.*, Loc. cit. See also Brouwer (2005) 407.

recommendations to the Security Council.³⁵⁹⁸ Hence, the ICTY's mandate was not extended to include the payment of compensation to victims of crimes perpetrated by those convicted by it. Even though the ICTY Judges acknowledged the existence of a right to compensation for victims under international law,³⁵⁹⁹ they considered that the implementation of a compensation system in the ICTY would have had a major negative impact on the workload of the different organs of the tribunal and on the lengths of trials besides financial difficulties and potential inequity among victims.³⁶⁰⁰ Therefore, they recommended the setting of mechanisms outside the ICTY such as an international claims commission.³⁶⁰¹

In turn, at the ICTR, the Judges initially welcomed Prosecutor del Ponte's suggestion on compensation for victims; however, they introduced the caveat that amendments to the Statute would be necessary and thus changes to the RPE would not be sufficient.³⁶⁰² Also, the ICTR established that it was not responsible for providing compensation for victims.³⁶⁰³ Thus, like at the ICTY, the ICTR Judges put forward the setting up of other mechanisms such as: i) a UN specialized agency to manage a compensation scheme or trust fund; ii) a similar scheme administered by an agency or governmental entity; or iii) an arrangement operating in tandem with options (i) and (ii) which would allow the ICTR to exercise a limited power to order payments from a trust fund to victims appearing before it as witnesses.³⁶⁰⁴ Moreover, the ICTR Judges concluded that a compensation system managed by the tribunal would 'severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal'.³⁶⁰⁵ Nevertheless, the ICTR Judges suggested that, alongside those other mechanisms, the tribunal should be given a limited power to decide on the payment of compensation to victims who were

³⁵⁹⁸ ICTY, Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, Annex, 3 November 2000.

³⁵⁹⁹ *Ibid.*, para. 22.

³⁶⁰⁰ *Ibid.*, paras. 33-41.

³⁶⁰¹ *Ibid.*, paras. 42-48.

³⁶⁰² See ICTY Rules Committee, Victims' Compensation and Participation (2000), Sections I and III. See also Brouwer (2005) 406.

³⁶⁰³ ICTR, Seventh Annual Report of the ICTR, UN Doc. A/57/163-S/2002/733, 2 July 2002, paras. 90-91.

³⁶⁰⁴ ICTR, Letter dated 14 December 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, UN Doc. S/2000/1198, Annex, 15 December 2000, para. 4.

³⁶⁰⁵ *Ibid.*, para. 15.

witnesses at the tribunal from a trust fund but (once again) on the condition to amend the ICTR Statute accordingly.³⁶⁰⁶

Del Ponte addressing the UN Security Council, pointed out the deficiencies in the participation and compensation for victims and, in particular, the fact that the system in place at the ICTY and the ICTR fell short of providing justice to the populations of the former Yugoslavia and Rwanda.³⁶⁰⁷ Moreover, she suggested the option to employ frozen assets in the accused's personal accounts to benefit victims.³⁶⁰⁸ Notwithstanding these attempts to incorporate a compensation mechanism, the ICTY and the ICTR Judges were not persuaded by these initiatives and, hence, there is no direct compensation mechanism at the ICTY or the ICTR.

Later, although a former President of the ICTR, Judge Pillay, in a speech to the UN General Assembly strongly urged the UN Member States to compensate victims, she did not suggest implementing a mechanism at the ICTR to do so.³⁶⁰⁹ This restrictive view would also later be endorsed by another former President of the ICTR, Judge Møse, who said that the ICTR is not tasked or responsible for processing and assessing compensation claims.³⁶¹⁰ In turn, Judge Claude Jorda, a former President of the ICTY, had considered that a truth commission/compensation fund could give reparations to victims since reparations 'is not a priority for the International Tribunal [ICTY]'.³⁶¹¹

Those restrictive views adopted by the ICTY and the ICTR Judges can be criticized. Although the fears of delayed trials if a compensation mechanism would have been introduced may be considered as realistic,³⁶¹² national jurisdictions have demonstrated that it is possible to transcend the differentiation between retributive punishment and reparations ordered by the

³⁶⁰⁶ *Ibid.*, Loc. cit.

³⁶⁰⁷ ICTY, Press Release, Address to the Security Council by Carla del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, to the UN Security Council, JL/P.I.S./542-e, The Hague, 24 November 2000.

³⁶⁰⁸ *Ibid.*, Loc. cit.

³⁶⁰⁹ ICTR, Office of the President, Statement by the President of the ICTR to the United Nations General Assembly by Judge Navanethem Pillay, President, 28 October 2002; ICTR, Office of the President, Statement by the President of the ICTR to the United Nations Security Council by Judge Navanethem Pillay, 29 October 2002.

³⁶¹⁰ ICTR, Address by Judge Erik Møse, President of the International Criminal Tribunal for Rwanda to the United Nations General Assembly, 9 October 2003.

³⁶¹¹ ICTY, The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina, Doc. Press Release JL/P.I.S./591-e, 17 May 2001.

³⁶¹² See Zegveld (2010) 94-96.

court.³⁶¹³ Moreover, as appropriately remarked by Van Boven, receiving reparations during criminal proceedings reports important advantages such as: i) the public defendant is not only aware of the commission of his/her crime but also of the harm inflicted by him/her on victims; ii) reparations modalities and punitive measures are connected; and iii) it helps speed up the process of receiving civil damages.³⁶¹⁴

With regard to the SCSL, reparations were not seemingly discussed during the process of establishing the SCSL nor was it apparently considered that the SCSL could play a role on this regard.³⁶¹⁵

2.3. The ICC

2.3.1. Preliminary Considerations

The ICC Statute contains the first reparations regime in the history of international and hybrid criminal courts. This regime has its legal ground on article 75 (Reparations to victims), alongside other dispositions such as article 79 (establishing a TFV), as complemented by the respective ICC RPE Rules. Thus, the first three paragraphs of article 75 read as follows:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

³⁶¹³ Brouwer (2005) 407 (Citing Marc Groenhuijsen, 'Victims' Rights and Restorative Justice: Piecemeal Reform of the Criminal Justice or a Change of Paradigm? in Hendrik Kaptein and Marijke Malsch (eds.), *Crime Victims and Justice: Essays on Principles and Practice* (Ashgate 2004) 63, 73); Brienen and Hoegen (2000) 1057-1101.

³⁶¹⁴ Theo Van Boven, 'The Perspective of the Victim' in Yael Danieli, Elsa Stamatopoulou, Clarence Dias (eds.) *The Universal Declaration of Human Rights* (Baywood 1999) 13, 21. Cited by Brouwer (2005) 407.

³⁶¹⁵ See William Schabas, 'Reparations Practices in Sierra Leone and the Truth and Reconciliation Commission' in Koen de Feyter et al. (eds.), *Out of the Ashes. Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 289, 295.

3. Before making an order under this article, the Court may invite and shall take account of presentations from or on behalf of the convicted person, victims, other interested persons or interested States.

Article 75 was developed relatively late in the negotiating process,³⁶¹⁶ and after some initial opposition,³⁶¹⁷ there was a gradual realization of the need for recognizing in the ICC Statute that the victims not only have an interest in the prosecution of the offenders but also an interest in restorative justice via restitution, compensation or other forms of reparation.³⁶¹⁸ Accordingly, there was a very strong support at the Rome Conference for allowing the ICC to award reparations,³⁶¹⁹ explained as an effort at rectifying the situation at the ICTY and the ICTR.³⁶²⁰ Under article 75 (1) ‘The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation [...]’.³⁶²¹ In *Lubanga*, Trial Chamber I has for first time established these principles,³⁶²² and also the approach to be taken to their implementation in its ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ (hereinafter ‘reparations decision’). Although this decision is limited to the circumstances of the case, i.e., not intended to affect the victims’ rights to reparations in other cases,³⁶²³ it constitutes a landmark decision in sharpening the status of victims as reparations claimants at the ICC and, hence, is considered extensively in this chapter. It should also be noticed, as previously mentioned,³⁶²⁴ and discussed later,³⁶²⁵ that the Appeals Chamber has considered

³⁶¹⁶ See Peter Lewis and Håkan Friman, ‘Reparations to Victims’ in Lee (2001) 474, 475.

³⁶¹⁷ See Christopher Muttukumaru, ‘Reparation to Victim’ in Roy S. Lee (ed.). *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International 1999) 262, 263-264.

³⁶¹⁸ See *Ibid.*, 264.

³⁶¹⁹ UN Doc. A/CONF.183/SR.2, paras. 37 (European Union, Lithuania, Latvia, Estonia, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, Iceland, Norway), 58 (Sweden); UN Doc. A/CONF.183/SR.6, paras. 10 (Belgium), 69 (Luxemburg), 113 (Rwanda); UN Doc. A/CONF.183/SR.7, para. 56 (Malawi).

³⁶²⁰ UN Doc. A/CONF. 183/SR.2, para. 74 (France).

³⁶²¹ See also ICC Assembly of States Parties, Resolution ICC-ASP/12/Res.5, Victims and Affected Communities, Reparations and Trust Fund for Victims, 27 November 2013, para. 6; ICC, Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, Including Reparations and Intermediaries-Annex: Draft Resolution on Victims and Affected Communities, Reparations and Trust Fund for Victims, ICC-ASP/12/38, 15 October 2013, para. 6.

³⁶²² *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 176.

³⁶²³ *Ibid.*, para. 181.

³⁶²⁴ See *supra* Chapter IV 6.3.1.

³⁶²⁵ See *infra* Chapter V 3.3.1.3.

that the nature of the reparations decision is that of a reparations order, mainly due to the inclusion of procedural steps on reparations implementation, via the TFV, which can be only undertaken once a reparations order has been issued.³⁶²⁶

Trial Chamber I in its reparations decision stressed that the reparations system set up under the ICC Statute and RPE goes beyond the notion of punitive justice as it recognizes ‘the need to provide effective remedies for victims’.³⁶²⁷ Indeed, the ICC reparations scheme is a key feature and, as established by the ICC itself, the ICC’s very own success is, to some extent, connected with its reparations system.³⁶²⁸ According to the ICC Statute,³⁶²⁹ reparations orders may only be made against the convicted person.³⁶³⁰ Therefore, ICC reparations orders cannot be issued against States. Not only do reparations oblige those responsible to repair the harm caused to the victims but they also provide justice to the victims by mitigating the consequences of crimes, relieving the suffering caused by crimes, and assist in promoting reconciliation.³⁶³¹ As applicable law, Trial Chamber I, in accordance with article 21 of the ICC Statute (Applicable Law) considered not only the ICC instruments but also the right to reparations under international human rights law instruments and, in particular, the jurisprudence of regional human rights bodies. It is necessary to mention, as Trial Chamber I did,³⁶³² that according to article 75 (6) ‘Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law’, which has been interpreted as a message to other courts, at which ICC reparations mechanisms might be raised in opposition to other claims.³⁶³³ In other words, it should in principle be possible for victims to claim reparations, for example, both before the ICC (based on criminal responsibility) and a regional human rights court (based on international state responsibility). This is also coherent with article 25 (4) of the ICC Statute ‘No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’.

Even though the ICC reparations orders are issued against the convicted person, reparations at the ICC are not intended to be punitive in character as

³⁶²⁶ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, paras. 51, 53, 55 and 64.

³⁶²⁷ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 177.

³⁶²⁸ *Ibid.*, para. 178; Lubanga (ICC-01/04-01/06-1-US-Exp-Corr), 24 February 2006, para. 150.

³⁶²⁹ ICC Statute, article 75 (2).

³⁶³⁰ See also Dwertmann (2010) 68-71; Zegveld (2010) 86 footnote 28.

³⁶³¹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 179.

³⁶³² *Ibid.*, para. 257.

³⁶³³ Schabas (2010) 883. See also David Donat-Cattin, ‘Article 75 - Reparations to Victims’ in Triffterer (2008b) 1399, 1410-1411.

article 75 is found in Part 6 of the ICC Statute ('The Trial') rather than in Part 7 ('Penalties'). Indeed, article 77 ('Applicable Penalties') does not refer to reparations, as also seen in the *travaux préparatoires*.³⁶³⁴ As examined later,³⁶³⁵ although the ICC under its Statute and RPE may order that money and property collected through fines under article 77 (2) be transferred to the TFV and, finally, provide compensation to the victims, the punitive role of the penalty and the restorative role of reparations remain distinct and complementary.³⁶³⁶ Therefore, at the ICC, reparations do not pursue to punish the perpetrator but to redress the harm inflicted on the victims.³⁶³⁷

It should be finally added, concerning enforcement of reparations orders, that State Parties to the ICC Statute 'shall give effect to a decision under this article as if the provisions of article 109 [Enforcement of fines and forfeiture measures] were applicable to this article'.³⁶³⁸

2.3.2. Reparations Claimants

2.3.2.1. Categories of Reparations Claimants and Beneficiaries: Preliminary Observation

A necessary preliminary observation consists in the use of the expressions 'claimants' and 'beneficiaries'. At the ICC, victims as reparations claimants will logically be reparations beneficiaries if their reparations claims are successful. Victims as reparations claimants can request that the reparations benefit also goes to *inter alia* their families as seen later.³⁶³⁹ As discussed in the next subsection, victims' status as reparations claimants (and subsequently reparations beneficiaries) exists regardless of whether victims hold the official victim participant status. Concerning victims who could not initially claim reparations, the ICC may exceptionally initiate reparations proceedings,³⁶⁴⁰ and, thus, victims may be granted reparations without having initially made a request

³⁶³⁴ See Proposal by France and the United Kingdom, Committee of the Whole, Rome Conference, 26 June 1998, A/CONF.183/C.1/WGPM/L.28; Report of the Working Group on Penalties, Committee of the Whole, Rome Conference, 4 July 1998, A/CONF.183/C.1/WGP/L.14.

³⁶³⁵ See *infra* Chapter V 2.3.3.1.

³⁶³⁶ Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012a) 78. See also Conor McCarthy, 'Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible Forms of Justice?' (2012b) 10 *Journal of International Criminal Justice* 351, 361-362.

³⁶³⁷ McCarthy (2009) 257.

³⁶³⁸ ICC Statute, article 75 (5).

³⁶³⁹ See *infra* Chapter 3.3.1.1.

³⁶⁴⁰ ICC RPE, rule 95 (1).

at the ICC, which thus proceeds on ‘behalf’ of the victims, as seen later.³⁶⁴¹ In any case, even when the ICC exceptionally intervenes, reparations beneficiaries have first to be identified by it and/or by the TFV and, thus, victims will then have the opportunity to claim reparations, following proceedings, as detailed later.³⁶⁴²

Herein, it should be posed the question concerning the situation of those victims, i.e., potential beneficiaries, who could not be identified and could not claim reparations and/or for whom no reparations claimant requested reparations. These victims will not benefit from individual reparations, in particular compensation. Thus, for example, the IACtHR has not ordered compensation when it was not possible to individualize victims.³⁶⁴³ When it comes to collective reparations, it is argued that victims of the crime(s) based upon which the accused was convicted and who could not claim reparations, for whom no reparations claimant requested reparations, and/or who could not be identified may at least indirectly benefit from some forms of collective symbolic reparations such as the delivery of the condemnatory judgment, public apologies or construction of a memorial, and from some collective rehabilitative measures such as provision of some services for whole victimized communities.

The previous considerations about a potentially broader scope of collective reparations beneficiaries stem from, *inter alia*, three reasons. First, Trial Chamber I has drawn some distinction between the victims, which include direct and indirect victims and legal entities, and the beneficiaries of the collective reparations programmes, as identified by the TFV.³⁶⁴⁴ Therefore, it was stated that:

[...] reparations will not be limited to those who participated in the trial and those who have applied for reparations, but they may benefit other individuals residing in the communities where the collective reparation programmes will be developed. However, these latter beneficiaries will not be granted victim [participant] status.³⁶⁴⁵

³⁶⁴¹ See *infra* Chapter V 3.3.1.1.

³⁶⁴² See *infra* Chapter V 3.3.

³⁶⁴³ IACtHR, *Case of the Plan de Sánchez Massacre v. Guatemala, Reparations*, Judgment of 19 November 2004, Series C No. 116, para. 62.

³⁶⁴⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, paras. 283 and 288; Lubanga (ICC-01/04-01/06-2911), *Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations*, Trial Chamber I, 29 August 2012, para. 29.

³⁶⁴⁵ Lubanga (ICC-01/04-01/06-2911), 29 August 2012, para. 29.

The TFV has also followed this approach as, referring to community-oriented collective reparations, it has considered that collective reparations ‘[...] also must and will have to include broader communities in order to remedy the damage that affected the communities and society as a whole’.³⁶⁴⁶

Second, the reparations application form allows the reparations claimants to choose where the benefit should go, which includes the victim’s community, as detailed later.³⁶⁴⁷ It should be noticed that, in *Lubanga*, the V02 group of victims represented by their lawyers submitted in their observations, as part of the reparations decision, that collective reparations should include victims’ community.³⁶⁴⁸ The V01 group of victims, represented by their lawyers, in turn suggested the construction of a memorial for children who died in combat.³⁶⁴⁹

Third, Trial Chamber I in its reparations decision considered symbolic collective reparations modalities and, as rehabilitation, inclusion of child soldiers’ communities in steps taken to rehabilitate and integrate child soldiers as those programs are implemented in the respective communities.³⁶⁵⁰ Individual and collective reparations as well as modalities of reparations are also discussed later.³⁶⁵¹

What must be left clear here is that when the expression ‘reparations claimants and beneficiaries’ is used, it refers first and foremost to those victims who after claiming reparations may benefit and/or request to benefit others such as their families and/or communities from reparations. The above-mentioned does not deny, as previously detailed, that in some forms of collective reparations, the scope of reparations beneficiaries may be broader than the universe of reparations claimants. In any case, the case-based reparations regime at the ICC, as detailed in the next subsection, is linked to the harm caused on victims for crimes based upon which the accused was convicted.

³⁶⁴⁶ The TFV also added that ‘For these types of collective reparations, which necessarily include broader and larger communities/groups, the beneficiaries do not need to establish the requirements of Rule 85. [...] The convicted person can be held liable only for those reparations, which are for victims in the meaning of Rule 85. Others might and should benefit in order to address the collective harm but the convicted person cannot be held liable for these reparations awards’. *Ibid.*, paras. 147 and 149.

³⁶⁴⁷ See *infra* Chapter V 3.3.

³⁶⁴⁸ *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012, paras. 19 and 20.

³⁶⁴⁹ *Lubanga* (ICC-01/04-01/06-2864), 18 April 2012, para. 19.

³⁶⁵⁰ See *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, paras. 236-240.

³⁶⁵¹ See *infra* Chapter V 4.3.1.1 and 4.3.2.

2.3.2.2. Categories of Reparations Claimants and Beneficiaries

In application of rule 85 of the ICC RPE, which defines victims and previously examined,³⁶⁵² Trial Chamber I in its reparation decision found that:

Beneficiaries of reparations

Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims [...]; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.³⁶⁵³

This paragraph captures the broad scope of potential claimants and beneficiaries of reparations. Some observations follow. First, as seen, the definition of victims, under rule 85, used by the ICC when examining the admissibility application to become and participate as victim participants, has also been used in order to determine the scope of claimants and beneficiaries of reparations. It is herein considered that such application is in principle correct as rule 85 explicitly stipulates that definition ‘For the Purposes of the Statute and the Rules of Procedure and Evidence’, and both the definition of victims under rule 85 and rules on reparations are located under the same section of the ICC RPE, i.e., Section III (Victims and Witnesses). Therefore, the definition of victims, previously examined, has a general scope and is applicable to the different dimensions of the victims’ status, in particular, victims as participants and victims as reparations claimants. Additionally, when interpreting the ICC Statute, should one consider, *inter alia*, the UN Basic Principles and Guidelines, an international instrument containing numerous provisions on reparations, as the ICC Chambers have done.³⁶⁵⁴ In particular, the UN Basic Principles and Guidelines contain a definition of victims that *mutatis mutandi* is similar to that under the ICC Statute and which reads as follows:

[...] victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate

³⁶⁵² See supra Chapter IV 2.3.

³⁶⁵³ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 194.

³⁶⁵⁴ Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 90-92; Lubanga (ICC-01/04-01/06-1432), 11 July 2008, paras. 33-35.

family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization³⁶⁵⁵

Second, concerning what constitutes harm for reparations purposes, although article 75 refers to ‘damage, loss or injury’, it does not provide further details on the type of harm that may be claimed for reparations. The UN Basic Principles and Guidelines definition of victims just quoted, alongside relevant case law of the IACtHR and the ECtHR, permit to identify, *inter alia*, physical/mental injury,³⁶⁵⁶ emotional suffering,³⁶⁵⁷ and economic loss.³⁶⁵⁸ As previously examined,³⁶⁵⁹ these categories have been considered by the ICC Chambers concerning victims’ status as victim participants. Moreover, Trial Chamber I, by relying on the above-mentioned sources, has identified similar categories of harm in its reparations decision when determining compensable damages, as detailed later.³⁶⁶⁰ Furthermore, similar categories of harm are listed in the current combined participation and reparation standard application form,³⁶⁶¹ and were considered by the OPCV in its observations on the road to the reparations decision.³⁶⁶² As also previously examined,³⁶⁶³ harm can be direct and indirect, i.e., harm ‘attach to both direct and indirect victims’ as determined by the Appeals Chamber in *Lubanga*.³⁶⁶⁴ Some extra considerations about direct and indirect victims for reparations purposes follow.

³⁶⁵⁵ UN Basic Principles and Guidelines, Principle 8.

³⁶⁵⁶ UN Basic Principles and Guidelines, principle 8. As for case law, see, e.g., IACtHR, *Case of Velásquez-Rodríguez v. Honduras*, Merits, Judgment of 29 July 1988, paras. 156, 175 and 187; ECtHR, *Y.F. v. Turkey*, Appl. No. 24209/94, Judgment, 22 July 2003, para. 33;

³⁶⁵⁷ UN Basic Principles and Guidelines, principle 8. As for case law, see, e.g., IACtHR, *Case of Aloebotoe et al. v. Suriname*, Judgment of 10 September 1993, para. 20; ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment, 18 December 1996, para. 113.

³⁶⁵⁸ UN Basic Principles and Guidelines, principle 8. As for case law, see, e.g., IACtHR, *Case of El Amparo v. Venezuela*, Judgment of 14 September 1996, paras. 28-63; ECtHR, *Ayder and Others v. Turkey*, Appl. No. 23656/94, Judgment, 8 January 2004, paras. 10, 141 et seq.;

³⁶⁵⁹ See supra Chapter IV 2.3.2.2.

³⁶⁶⁰ See infra Chapter V. 4.3.2.1.

³⁶⁶¹ Application Form for Individuals. Request for Participation in Proceedings and Reparations at the ICC For Individual Victims. Available at: <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf> (last visit on 30 November 2012). See Part C, question 30 (*‘Describe physical or mental injury, emotional suffering, harm to reputation, economic loss and / or damage to property or any other kind of harm’*).

³⁶⁶² *Lubanga* (ICC-01/04-01/06-2863), Observations on Issues Concerning Reparations, OPCV, 18 April 2012, paras. 36-37; 47-60, 62-71.

³⁶⁶³ See supra Chapter IV 2.3.2.2.

³⁶⁶⁴ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 32.

Third, concerning the inclusion of ‘indirect victim’, i.e., victims who suffered harm as a result of the harm suffered by direct victims,³⁶⁶⁵ to be included in the reparations scheme, Trial Chamber I in its reparations decision also followed the ICC’s case law on admissibility of victim participant applications. Thus, the ICC has to determine whether there was a close personal relationship between the direct and the indirect victim, e.g., child soldiers-parents.³⁶⁶⁶ Moreover, in its reparations decision, Trial Chamber I appropriately reckoned that since the concept of ‘family’ has many cultural variations, the ICC should pay attention to applicable social and family structures,³⁶⁶⁷ which is similar to the IACtHR’s jurisprudence on reparations.³⁶⁶⁸ As noticed by Schabas, the ICC law ‘will not be applied identically everywhere in the world, but rather may display a degree of cultural relativism’.³⁶⁶⁹ Furthermore, Trial Chamber I by referring to the IACtHR’s case law concluded that the ICC should consider the widely accepted presumption whereby an individual is succeeded by his/her spouse and children.³⁶⁷⁰ Relying on its previous case law and the UN Basic Principles and Guidelines, Trial Chamber I in its reparations decision established that indirect victims may also include individuals who ‘suffered harm when helping or intervening on behalf of direct victims’.³⁶⁷¹ Reparations, pursuant to rule 85 (b), can also be granted to legal entities such as non-governmental, charitable and non-profit organizations, public schools and institutions that benefit members of the community.³⁶⁷²

Concerning ‘direct’ and ‘indirect’ victims in the specific context of reparations, three additional provisions should be examined. Article 79 (1) refers to establishment of the TFV ‘for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims’. In turn, article 75 (2) lays down that the ‘ICC may make an order directly against a convicted person specifying appropriate reparations *to, or in respect of victims* [emphasis added]’. Based on the preparatory works, it is possible to conclude that the

³⁶⁶⁵ See for further discussion *supra* Chapter IV 2.3.2.2.

³⁶⁶⁶ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 195 (referring to Lubanga (ICC-01/04-01/06-1432), 8 April 2009, para. 32).

³⁶⁶⁷ *Ibid.*, Loc. cit.

³⁶⁶⁸ See, e.g., IACtHR, Case of Aloebotoe et al. v. Suriname, 10 September 1993, paras. 58-59, 62.

³⁶⁶⁹ Schabas (2010) 912.

³⁶⁷⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 195 (referring to IACtHR, Case of Aloebotoe et al. v. Suriname, 10 September 1993, para. 62; IACtHR, Case of Godínez-Cruz v. Honduras. Reparations and Costs. Judgment of 21 July 1989. Series C No. 8, para. 13).

³⁶⁷¹ *Ibid.*, Loc. cit., para. 196 (Referring to Lubanga (ICC-01/04-01/06-1813), 8 April 2009, para. 13; and UN Basic Principles and Guidelines, principle 8).

³⁶⁷² *Ibid.*, para. 197.

wording ‘in respect’ was used to extend the scope of application to include indirect victims such as direct victims’ families and successors.³⁶⁷³ Articles 79 (1) and 75 (2) have been complemented by Regulation 46 of the TFCV Regulations which establishes that:

Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person.

Thus, read systematically, those three provisions lead to a balanced outcome where, on the one hand, reparations claimants and beneficiaries include not only direct victims, but also indirect victims such as family members and successors, and, on the other hand, to receive reparations the harm has to be causally linked to the crimes for which the accused was convicted.³⁶⁷⁴ This interpretation is also consistent with the categories of direct and indirect victims, as reparations beneficiaries, identified in the reparations decision by Trial Chamber I in *Lubanga* and previously examined.³⁶⁷⁵ The required causal link between harm and crime for reparations purposes is explained as follows.

Fourth, concerning causation for claiming and being granted reparations, i.e., the causal link between the crimes for which the accused is convicted and the harm inflicted on the victims, rule 85 (a) does not provide a ‘direct’ legal causation standard as it only lays down that ‘victims’ are those who have suffered harm ‘as a result’ of the commission of a crime within the ICC’s jurisdiction.³⁶⁷⁶ Indeed, the Appeals Chamber has noticed that this ‘does not necessarily imply the existence of direct harm’.³⁶⁷⁷ In *Lubanga*, the convicted was solely charged with and was found criminally responsible only for the war crimes

³⁶⁷³ UN. Doc. A/CONF. 183/C.1/WGPM/L.2/Add.7, p. 5 (1998). See also Donat-Cattin (2008b) 1403; Dwertmann (2010) 112.

³⁶⁷⁴ For further discussion, see Dwertmann (2010) 111-114.

³⁶⁷⁵ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, paras. 194 and 195. In *Muthaura et al.*, Judge Ekaterina Trendafilova considered family members and successors as reparations beneficiaries but not as victims themselves under rule 85. See *Muthaura et al.* (ICC-01/09-02/11-267), 26 August 2011, paras. 53-55. Judge Trendafilova’s interpretation, adopted tangentially in her decision on victims’ participation during pre-trial, is at odds both with the reparations decision later adopted in *Lubanga*, and other ICC case law on victims’ participation, based on which, Trial Chamber I in its reparations decision identified family members and successors as indirect victims under rule 85 for reparations purposes.

³⁶⁷⁶ McCarthy (2012a) 150.

³⁶⁷⁷ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 35.

of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. Nevertheless, Trial Chamber I in its judgment in *Lubanga* stated that it would later consider whether factual allegations of sexual violence (sexual slavery included) in the context of child soldiers' active participation in hostilities should be taken into account for sentencing and reparations purposes although sexual violence as such was not charged by the Prosecutor and, therefore, sexual violence evidence was not considered for determination of the accused's criminal liability.³⁶⁷⁸ In its sentence decision, Trial Chamber I mentioned that whether the link between Lubanga and sexual violence, in the context of the charges, is relevant as a factor to the issue of reparations would be assessed in a separate decision.³⁶⁷⁹

In its reparations decision, Trial Chamber I has considered in a closer look the situation of victims of sexual violence.³⁶⁸⁰ Unlike the IACtHR or the UN Compensation Commission, which have respectively applied the 'immediate effects' and 'directness' standards,³⁶⁸¹ Trial Chamber I in its reparations decision considered that reparations should not be limited to 'direct harm' or 'the immediate effects' of the crimes, and instead applied a proximate cause standard.³⁶⁸² This test is, as previously seen, used in common law jurisdictions.³⁶⁸³ The 'proximate cause' standard consists in the existence of a 'but/for' relationship between the crime and the harm, i.e., the crimes for which the accused, e.g., Lubanga, was convicted were the proximate cause of the harm for

³⁶⁷⁸ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 630, 631 and 896. The Trial Chamber also stated that 'Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of 15] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue'. Ibid., para. 630.

³⁶⁷⁹ Lubanga (ICC-01/04-01/06-2901), 10 July 2012, paras. 75-76.

³⁶⁸⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, paras. 207-209.

³⁶⁸¹ As for the IACtHR see IACtHR, Case of Aloebotoe et al. v. Suriname, 10 September 1993, para. 48. See also Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2003) 237. As for the UN Compensation Commission, see Norbert Wuhler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission' in Richard Lillich (ed.), *The United Nations Compensation Commission* (Transnational Publisher 1995) 207, 230-231.

³⁶⁸² Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 249.

³⁶⁸³ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005) 51.

which reparations are sought.³⁶⁸⁴ Trial Chamber I in a subsequent decision added that:

[...] the [reparations decision] permits awards to victims of sexual and gender-based violence, provided that the facts have been established to the relevant standards and the crimes of enlisting and conscripting children under the age of 15 or using them to participate actively in the hostilities are the proximate cause of the sexual violence.³⁶⁸⁵

However, the language employed by Trial Chamber I is not completely clear when it refers to ‘permits awards to victims of sexual violence and gender based violence’, which read together with the Chamber’s generic references to victims of sexual violence,³⁶⁸⁶ may lead to some confusion, i.e., the misassumption of the adoption of an ‘extended’ notion of indirect victim for reparations purposes, e.g., including victims of crimes committed by child soldiers,³⁶⁸⁷ or victims of sexual crimes as such committed by Lubanga’s forces. Nevertheless, putting aside some lack of clarity with the used language, the Trial Chamber has, as exemplified in the quoted paragraph, only referred to the crimes for which the accused was convicted to delimit the ICC case-based reparations regime.

Connected with the above-mentioned, Trial Chamber I, upon defense’s application, for the sake of a fair and expeditious conduct of the proceedings to identify the correct criteria on the link between the harm suffered and the crime committed, and ‘the scope of the harm that can be considered in this connection’, has found this to be an appealable issue and, therefore, the Appeals Chamber will have the last word on it.³⁶⁸⁸ The Appeals Chamber is expected to determine whether the ‘proximate cause’ standard is the right test to be employed and, then, apply the chosen standard to the facts of this case. Be that as

³⁶⁸⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 250.

³⁶⁸⁵ Lubanga (ICC-01/04-01/06-2911), 29 August 2012, para. 32.

³⁶⁸⁶ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, paras. 207-209.

³⁶⁸⁷ See Valentina Spiga (2010) 193. It has been suggested that potentially victims who suffered harm as a result of the child soldiers’ actions, e.g., women and girls raped as a consequence of the forced initiation rites of new recruits, may be reparations claimants and beneficiaries. See Carla Ferstman and Mariana Goetz, ‘Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings’ in Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers 2009) 313, 331.

³⁶⁸⁸ Lubanga (ICC-01/04-01/06-2911), 29 August 2012, para. 33.

it may, regardless of the standard employed, it is difficult to ‘determine whether a particular loss falls within the classification’,³⁶⁸⁹ and its exact dimension will only be clarified in the ICC’s jurisprudence.

Some important considerations on causation are herein presented. To begin with, reparations claimants and beneficiaries under the ICC case-based reparations regime are limited to victims, both direct and indirect (as previously defined), of crimes for which the accused was found guilty, as laid down by the ICC Statute, article 75 (2) ‘The Court may make an order directly against a convicted person specifying appropriate reparations [...]’,³⁶⁹⁰ and Regulation 46 of the TFV Regulations, previously quoted. Therefore, under the ICC case-based reparations regime, the ‘damage, loss and injury’ which form the basis of a claim for reparations have to be caused by the crimes(s) for which the offender was convicted.³⁶⁹¹ The Appeals Chamber, in paraphrasing the reparations decision by the Trial Chamber in *Lubanga*, has established that the ‘decision [reparations decision] is intrinsically linked to his conviction [Lubanga’s conviction], with the Trial Chamber finding that reparations should be awarded for the crimes for which Mr Lubanga was convicted in the case brought against him’.³⁶⁹² Indeed, the Appeals Chamber has considered victims, for reparations purposes, those ‘who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations’.³⁶⁹³

The application of the ‘proximate cause’ standard adopted by the ICC Trial Chamber might broaden the harm to be considered for reparations purposes and, potentially, the scope of reparations claimants and beneficiaries. When material damages are claimed, these must not be too remote from the wrongful conduct.³⁶⁹⁴ However, whereas civil law jurisdictions tend to deal with this issue in terms of ‘equivalent or adequate causal connections’, common law

³⁶⁸⁹ Wuhler (1995) 232.

³⁶⁹⁰ See also American University Washington College of Law, War Crimes Research Office, *The Case-Based Reparations Scheme at the International Criminal Court* (2010) 40.

³⁶⁹¹ See, e.g., *Ibid.*, 37; Dwertmann (2010) 92; Linda Keller, ‘Seeking Justice at the International Criminal Court: Victims’ Reparations’ (2007) 29 *Thomas Jefferson Law Review* 189, 203. See also ICC Assembly of States Parties, Resolution ICC-ASP/12/Res.5, 27 November 2013, para. 9.

³⁶⁹² *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 66.

³⁶⁹³ *Ibid.*, para. 69. Accordingly, a Prosecutor’s suggestion, in a 2010 policy paper, whereby reparations claims may include harm stemming from crimes other than those based on which the accused was charged and ultimately convicted is not consistent with the ICC case-based reparations regime. See ICC OTP, *Policy Paper on Victims’ Participation under Article 68 (3) of the ICC Statute*, April 2010, p. 9.

³⁶⁹⁴ Shelton (2005) 51 (commenting on reparations in the law of state responsibility).

jurisdictions pay attention to the ‘proximate or natural consequences of acts’.³⁶⁹⁵ Thus, in application of the ‘proximate cause’, material damages claimed must not be too remote from the wrongful conduct in order to identify compensable claims.³⁶⁹⁶ Accordingly, proximate cause is ‘generally considered to be a relative term meaning ‘near’ or ‘not remote’ and also to include concepts of foreseeability and temporal proximity’.³⁶⁹⁷ In simple words, under this standard, victims may only need to prove their presence in a particular location in a particular time to justify their claim that their harm was caused by the offender’s acts identified by the relevant judgment.³⁶⁹⁸

In both domestic and international norms, proof of both ‘factual’ and ‘legal causation is required.’³⁶⁹⁹ When it comes to factual causation, the ‘proximate cause’ or ‘but for’ standard might be considered as not completely appropriate in the context of crimes under international law (unlike other areas of international law).³⁷⁰⁰ However, rather than selecting a single ‘test’ for factual causation, the ICC should ‘account a range of factors which assist in assessing the extent of an individual’s contribution to the harm caused by the crime of which he or she has been convicted’.³⁷⁰¹

As for ‘legal causation’, a standard along the lines of ‘proximate cause’ may in principle be accepted,³⁷⁰² since, unlike rule 85 (b) which states that only organizations suffering ‘direct’ harm may be considered victims, rule 85 (a) (natural persons) does not specify such standard. Thus, the Appeals Chamber noticed that subparagraphs (a) and (b) of rule 85 imply different causal relationships between the crime and the harm sustained by the victim.³⁷⁰³ However, the ‘proximate cause’ standard should be applied in a restrictive manner as much as possible since by definition the ICC case-based reparations

³⁶⁹⁵ Ibid., Loc. cit..

³⁶⁹⁶ Ibid., Loc. cit.

³⁶⁹⁷ Arthur Rovine and Grant Hanessian, ‘Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission in Lillich (1995) 235, 243.

³⁶⁹⁸ American University Washington College of Law, War Crimes Research Office (2010) 40.

³⁶⁹⁹ Rovine and Hanessian (1995) 241. See also American University Washington College of Law, War Crimes Research Office (2010) 40, footnote 129.

³⁷⁰⁰ McCarthy (2012a) 155.

³⁷⁰¹ Ibid., Loc. cit.

³⁷⁰² See also American University Washington College of Law, War Crimes Research Office (2010) 39-40.

³⁷⁰³ Lubanga (ICC-01/04-01/06-1432), 11 July 2008, para. 30 (stating that ‘The type of “harm” referred to relates to organizations or institutions rather than natural persons. It is therefore different from the type of harm set out in rule 85 (a) of the Rules, which is harm to natural persons’).

regime, in particular the harm to be repaired, has to be linked to crimes upon which the accused was found criminally responsible. In other words, for example, victims of sexual violence committed by Lubanga's armed forces, especially in incidents that were remote from or not near to the specific incidents and crimes for which Lubanga was convicted, should not be considered as reparations claimants and beneficiaries as they are outside the crimes attributed via conviction to Lubanga. As previously examined,³⁷⁰⁴ this is also consistent with the exclusion of the civilian victims of crimes committed by child soldiers from the category of indirect victims by Trial Chamber I in *Lubanga*, applying Appeals Chamber's case law,³⁷⁰⁵ since the nexus to the crimes charged was deemed to be too remote:

52. [...] Indirect victims, therefore, are restricted to those whose harm is linked to the harm of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise. Although a factual overlap may exist between the use of the child actively to participate in hostilities and an attack by the child on another, the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the harm inflicted on the child when the offence was committed.

53. This is not to undermine the possibility that individuals in these circumstances may well be victims of other crimes within the jurisdiction of the Court.³⁷⁰⁶

Whether the 'proximate cause' standard will remain in the ICC's practice, it is yet to be seen. If it does, besides the previous considerations, it is important to bear in mind that due to the high number of potential reparations claimants in the ICC cases, the ICC should adopt a (relatively) strict threshold criterion/interpretation.³⁷⁰⁷ Thus, the causation standard should be kept practicable and simple, within the broader need for considering as reparations claimants those victims who were sufficiently affected by the crime(s) in question.³⁷⁰⁸ This is connected with the fact that the harm claimed is to an

³⁷⁰⁴ See supra Chapter IV 2.3.2.2.

³⁷⁰⁵ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 62.

³⁷⁰⁶ *Lubanga* (ICC-01/04-01/06-1813), 8 April 2009, paras 52 and 53.

³⁷⁰⁷ Marc Henzelin, Veijo Heiskanen and Guénael Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes' (2006) 17 *Criminal Law Forum* 317, 325.

³⁷⁰⁸ Dwertmann (2010) 95-96.

important extent linked to evidentiary issues. Accordingly, claims based on harm too remote or speculative should be excluded.³⁷⁰⁹

As the Trial Chamber itself in its reparations decision mentioned the ‘damage, loss and injury’ which constitutes the basis of a reparations claim ‘must have resulted from the crimes’ upon which the accused was convicted,³⁷¹⁰ which was noticed by the Appeals Chamber.³⁷¹¹ In application of the ‘proximate cause’ standard, although reparations should not be limited to ‘direct harm or immediate effects’,³⁷¹² it is necessary to adopt the above-mentioned precautions not to denaturalize the case-based reparations regime and also to avoid a highly exponential increase in reparations claimants and beneficiaries who can make the system of reparations at the ICC to become inefficient. Thus, the legal representatives of the V01 group of victims in *Lubanga* pointed out that only a minority of their clients considered that other victims of the Lubanga’s Union of Congolese Patriots, such as victims of the crimes committed by child soldiers, should receive reparations due to concerns to reduction in available resources.³⁷¹³ After all, victims who are not eligible to receive reparations under the ICC case-based reparations regime can still be supported by the TFV, via reparation-like modalities, when the TFV exercises its assistance mandate as seen later.³⁷¹⁴ Indeed, in the OPCV’s submission,³⁷¹⁵ and in the TFV’s submissions leading to Trial Chamber I’s reparations decision, it was only referred to victims of crimes for which Lubanga was found guilty as beneficiaries of reparations.³⁷¹⁶

It is necessary to leave it clear that the previous analysis and considerations do not mean to neglect sexual violence endured by direct and indirect victims in *Lubanga*. Indeed, as examined in the next subsection, and based on the reparations decision, it is expected that specific reparations measures are tailored and implemented to address the harm that direct victims (child soldiers) and indirect victims may have suffered due to sexual violence.

³⁷⁰⁹ American University Washington College of Law, War Crimes Research Office (2010) 38.

³⁷¹⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 247.

³⁷¹¹ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 66 (‘The Impugned Decision is intrinsically linked to his conviction, with the Trial Chamber finding that reparations should be awarded for the crimes for which Mr Lubanga was convicted in the case brought against him’).

³⁷¹² Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 249.

³⁷¹³ Lubanga (ICC-01/04-01/06-2864), 18 April 2012, para. 26. Legal representatives of the V02 group of victims suggested that child soldiers, their parents and communities should be able to apply for reparations. See Lubanga (ICC-01/04-01/06-2869), 18 April 2012, paras. 31 and 34.

³⁷¹⁴ See *infra* Chapter V 3.3.2.3.

³⁷¹⁵ Lubanga (ICC-01/04-01/06-2904), 18 April 2012, paras. 33-35.

³⁷¹⁶ Lubanga (ICC-01/04-01/06-2904), Observations on Reparations in Response to the Scheduling Order of 14 March 2012, TFV. 25 April 2012, para. 22.

This is arguably the case of an important number of child soldiers (particularly girls), who need to receive specific reparations measures to redress the particular dimension of their harm caused by sexual violence. This point is connected to what a witness expert in Lubanga's trial, the former UN Special Representative for Children and Armed Conflict, Mrs. Coomaraswamy, said by appropriately pointing out that the use for sexual exploitation of boys and girls by armed forces or groups constitutes an 'essential support function'.³⁷¹⁷ Thus, for reparations effects, it is also herein agreed with Judge Odio-Benito's Separate and Dissenting Opinion to the Trial Judgment, where she concluded that:

Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group [...] It must be clarified, however, that [...] crimes of sexual violence are distinct and separate crimes that could have been evaluated separately by this Chamber if the Prosecutor would have been presented charges against these criminal conducts.³⁷¹⁸

Accordingly, for reparations purposes, sexual violence or enslavement may produce harm directly caused by the war crime of enlisting, conscripting, and the use of children under the age of 15 in support of the combatants.³⁷¹⁹ This consideration is also related to the finding by Trial Chamber I in its judgment in *Lubanga* where although the Chamber excluded sexual violence as a general category within the concept of using children to participate actively in hostilities, it mentioned that its 'determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis'.³⁷²⁰ The TFV has also established that '[...] victims who suffered harm from sexualized violence occurring during their enlistment, conscription, or use to participate actively in

³⁷¹⁷ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 630, footnote 1811 (referring to Lubanga (ICC-01/04-01/06-1229-AnxA), Written Submissions of the United Nations Special Representative of the Representative of the Secretary-General on Children and Armed Conflict, 18 March 2008, paras 23 and 24-26).

³⁷¹⁸ Lubanga (ICC-01/04-01/06-2842), Judge Odio-Benito's Separate and Dissenting Opinion, 14 March 2012, para. 20.

³⁷¹⁹ See also *Ibid.*, para. 21.

³⁷²⁰ Lubanga (ICC-01/04-01/06-2842), Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 628.

hostilities as children under the age of 15 are entitled to reparations addressing this specific harm'.³⁷²¹

Fifth, the ICC Statute does not require the participation of victims in pre-trial or trial proceedings in order to be able to claim reparations.³⁷²² This is clearly illustrated in *Lubanga* where only 129 individual victims out of a clearly much bigger universe of potential reparations claimants and beneficiaries participated. As determined by Trial Chamber I in *Lubanga*, victims who may obtain reparations 'will not necessarily participate in the proceedings, either in person or through their legal representatives'.³⁷²³ Although details on the reparations request proceedings are examined later,³⁷²⁴ what should be mentioned here is that under Section III (Victims and Witnesses) of the RPE, there are two separate sub-sections (3 and 4) dealing with respectively participation of victims in the proceedings, i.e., victim participant status; and reparations to the victims, i.e., victims as reparations claimants. The autonomous dimensions of victims' status at the ICC, i.e., victims as participants to voice their own views and concerns in the proceedings at the ICC, and victims as reparations claimants lead to the important consequence whereby victims can claim reparations without having necessarily participated as victim participants in the ICC pre-trial or trial proceedings. In other words, to claim and benefit from reparations, victims must have suffered some personal harm linked to the crimes upon which the accused was convicted, but they do not need to have participated as victim participants in the pre-trial or trial proceedings. This feature of the ICC case-based reparations regime has been noticed by the Appeals Chamber in *Lubanga*,³⁷²⁵ as examined later,³⁷²⁶ as well as by the Trial Chamber and the TFV.³⁷²⁷

Moreover, as discussed later,³⁷²⁸ the exact scope of beneficiaries of reparations, i.e., total identification of eligible individual beneficiaries, in

³⁷²¹ *Lubanga* (ICC-01/04-01/06-3009), 8 April 2013, para. 158. See also Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 12 *The International Journal of Human Rights* 368, 375.

³⁷²² Muthaura et al. (ICC-01/09-02/11-267), 26 August 2011, para. 52. See also McGonigle Leyh (2011) 239; Brouwer and Heikkilä (2013) 1359.

³⁷²³ *Lubanga* (ICC-01/04-01/06-2858), Decision on the OPCV's Request to Participate in the Reparations Proceedings, Trial Chamber I, 5 April 2012, para. 10.

³⁷²⁴ See *infra* Chapter V 3.3.

³⁷²⁵ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 69.

³⁷²⁶ See *infra* Chapter V 3.3.1.4.

³⁷²⁷ See respectively *Lubanga* (ICC-01/04-01/06-2911), 29 August 2012, para. 29; *Lubanga* (ICC-01/04-01/06-3009), 8 April 2013, para. 148.

³⁷²⁸ See *infra* Chapter V 3.3.2.1.

Lubanga is yet to be determined via the implementation of TFV's reparations plan under the ICC Trial Chamber's monitoring and oversight. Not restricting the universe of potential claimants and beneficiaries of reparations to only those who are/were victim participants also correspond to minimum considerations of non-discrimination as 'it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations'.³⁷²⁹ Considering all factors such as on-going armed violence, remoteness and intimidation that may have been prevented victims from participation during trial, this is also a realistic approach. Accordingly, victims, as defined in rule 85, have to be given equal access to any information relating to their right to reparations and the ICC's assistance,³⁷³⁰ which is also coherent with the UN Basic Principles and Guidelines.³⁷³¹ The autonomous dimension of victims as reparations claimants is also reflected in specific proceedings to do so, under the ICC RPE and which do not require victims' previous participation in the proceedings as victim participants, as examined in detail later.³⁷³² Concerning dual status victim participants-victim witnesses who lost their victim participant status due to problems with their testimonies in *Lubanga*, they may still claim and benefit from reparations if the respective causal link is proved, as noticed by the Appeals Chamber,³⁷³³ and discussed later.³⁷³⁴

Sixth, as analyzed in the previous chapter, victims who participate in the pre-trial and trial proceedings present several interests to do so, including an interest in receiving reparations as identified by Pre-Trial Chambers,³⁷³⁵ Trial Chambers,³⁷³⁶ and the Appeals Chamber.³⁷³⁷ Moreover, victims do not only want to participate in the proceedings but also want to be identified as victims and

³⁷²⁹ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 187.

³⁷³⁰ *Ibid.*, para. 188.

³⁷³¹ UN Basic Principles and Guidelines, principles 11, 12 and 24.

³⁷³² See *infra* Chapter V 3.3.1.

³⁷³³ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 70. See also *Lubanga* (ICC-01/04-01/06-2842), Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 35.

³⁷³⁴ See *infra* Chapter V 3.3.1.4.

³⁷³⁵ See, e.g., Situation in the DRC (ICC-01/04-101-tEN-Corr), 17 January 2006, para. 63; Abu Garda (ICC-02/05-02/09-121), 25 September 2009, para. 3.

³⁷³⁶ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 97-98; Ruto and Sang (ICC-01/09-01/11-460), 3 October 2012, para. 2; Muthaura and Kenyatta (ICC-01/09-02/11-498), 3 October 2012, para. 2.

³⁷³⁷ *Lubanga* (ICC-01/04-01/06-925), 13 June 2007, para. 28; *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008.

claim and receive reparations (compensation included) for the harm inflicted.³⁷³⁸ Accordingly, there is consensus that victims' personal interests to receive reparations claimed by those who were granted the victim participant status and as such participated in the proceedings are judicially recognizable and justiciable personal interests.³⁷³⁹ Therefore, the universe of victims as reparations claimants and beneficiaries includes victim participants who precisely had, as an important personal interest for participation, to obtain reparations. In any case, like other victims, victims who hold the official victim participant status need to specifically apply for reparations, following proceedings detailed later,³⁷⁴⁰ to be reparations claimants at the ICC.

Seventh, victims hold the right to be awarded reparations at the ICC, based on the conviction of the accused, i.e., determination of his/her criminal responsibility. Accordingly, victims may receive reparations based on their claims for adequate and proportional reparations for the damage inflicted. Moreover, even scholars who have been critical of a broad status of victims as participants have pointed out that concerning reparations 'might victims be considered as proper parties to judicial proceedings against the convicted person and could possess all relevant procedural rights'.³⁷⁴¹ During the pre-trial/trial proceedings before conviction, victim participants who participate in those proceedings, to *inter alia* later receive reparations, remain participants since during those stages, as determined by the Appeals Chamber in *Lubanga*, there are only two formal parties, 'namely the Prosecutor and the Defence'.³⁷⁴² However, as seen later,³⁷⁴³ during the reparations phase proceedings, i.e., after conviction, victims as reparations claimants may be considered as parties, as suggested by Trial Chamber I in its reparations decision,³⁷⁴⁴ and also by the Appeals Chamber.³⁷⁴⁵

Eighth, as appropriately highlighted by a former ICC Judge, Claude Jorda,³⁷⁴⁶ victim's right to reparation is potential as the ICC has the sole discretion to decide whether a victim can receive reparation, award him/her

³⁷³⁸ Van den Wyngaert (2011) 475, 486.

³⁷³⁹ As for discussion on the concept of judicially recognizable personal interests see, e.g., Vasiliev (2009) 664-668.

³⁷⁴⁰ See *infra* Chapter V 3.3.1.

³⁷⁴¹ Zappalà (2010) 154.

³⁷⁴² *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 93.

³⁷⁴³ See *infra* Chapter V 3.3.1.3.

³⁷⁴⁴ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 267.

³⁷⁴⁵ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 67.

³⁷⁴⁶ Jorda and Hemptinne (2002) 1407.

reparation on individual or collective basis, bearing in mind the scope and extent of any damage, loss and injury. The ICC can act not only based on victim's application but also, exceptionally, on its own initiative as laid down under article 75 (1) of the ICC Statute:

[...] in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which is acting.

As detailed later,³⁷⁴⁷ this *motu proprio* power permits the competent ICC Chamber to make up for victims' initial absence of request for reparations due to, *inter alia*, cultural or geographical remoteness, his/her lack of information, and/or pressures over him/her,³⁷⁴⁸ and victims may end up becoming reparations claimants and beneficiaries.

2.3.2.3. Related Legal Issues

Some of the other principles considered by Trial Chamber I in its reparations decision, related and applicable to victims as claimants and beneficiaries of reparations are briefly presented here. Following up its previous case law on victim participation,³⁷⁴⁹ Trial Chamber I concluded that victims may use official or unofficial documents, any other means of demonstrating their identities accepted by the Chamber, or even, absent documentation, a statement signed by two credible witnesses establishing the applicant's identity and describing the relationship between the victim and any individual action on his/her behalf.³⁷⁵⁰

In matters concerning reparations, the ICC has to take into account the needs of all victims, particularly children, the elderly, disabled individuals and the victims of sexual or gender violence, according to article 68 of the ICC Statute and rule 86 of the ICC RPE,³⁷⁵¹ Victims of the respective crimes, as defined in rule 85 of the ICC Rules, have to enjoy equal access to information on their right to reparations as well as assistance from the ICC, as an important component of their right to a fair and equal treatment via the proceedings,³⁷⁵²

³⁷⁴⁷ See *infra* Chapter V 3.3.1.1.

³⁷⁴⁸ Jorda and Hemptinne (2002) 1407.

³⁷⁴⁹ See, e.g., Lubanga (ICC-01/04-01/06-1119), 18 January 2008, paras. 88-89.

³⁷⁵⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 198.

³⁷⁵¹ *Ibid.*, para. 189.

³⁷⁵² *Ibid.*, para. 188.

which is also coherent with the UN Basic Principles and Guidelines.³⁷⁵³ Moreover, the ICC has to treat the victims with humanity, respecting their dignity and human rights and implement appropriate measures to ensure their safety,³⁷⁵⁴ physical and psychological well being and privacy, in accordance with rules 87 and 88 of the ICC RPE.³⁷⁵⁵

Pursuant article 21 (3) of the ICC Statute, reparations have to be granted to victims without any discriminatory ground.³⁷⁵⁶ This is coherent with international human rights law at which, as Salmón Gárate observes, victims' status is not subject to discriminatory restrictions.³⁷⁵⁷ Indeed, the IACtHR's case law on serious human rights violations has ordered reparations in favor of individuals accused of or convicted of terrorism.³⁷⁵⁸ Be that as it may, Trial Chamber I in its reparations decision acknowledged that priority may need to be given to some victims who are particularly vulnerable and/or who may require urgent assistance such as:

[...] victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.³⁷⁵⁹

Moreover, as previously said,³⁷⁶⁰ although decisions by other national or international bodies do not affect victims' right to receive reparations under

³⁷⁵³ UN Basic Principles and Guidelines, principles 11, 12 and 24.

³⁷⁵⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 190. See also UN Basic Principles and Guidelines, principle 10.

³⁷⁵⁵ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 190.

³⁷⁵⁶ *Ibid.*, para. 191. See also UN Basic Principles and Guidelines, principle 25.

³⁷⁵⁷ Salmón Gárate (2007b) 30, 31 and 35.

³⁷⁵⁸ See, e.g., IACtHR, Case of the Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment of 25 November 2006, Series C No. 160; IACtHR, Case of Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment of 22 February 2002, Series C No. 91; IACtHR, Case of Neira-Alegría et al. v. Peru, Reparations and Costs, Judgment of 19 September 1996, Series C No. 29.

³⁷⁵⁹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 200. See also Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (Nairobi Declaration) 2007, para. 7; Convention on the Elimination of All Discrimination against Women (1979), article 4.

³⁷⁶⁰ See *supra* Chapter V 2.3.1.

article 75, the ICC may consider any award or benefits granted to victims so as to ensure that reparations are not applied discriminatorily or unfairly.³⁷⁶¹

The ICC has emphasized the accessibility and consultation with victims of the crimes who, together with their families and communities, should be capable of effectively and substantively participating and being assisted in the reparations process.³⁷⁶² Accordingly, the consultation with victims should include aspects such as the beneficiaries' identity, their priorities and the obstacles faced by them in their efforts to secure reparations.³⁷⁶³ A gender-inclusive approach has to be undertaken.³⁷⁶⁴ Moreover, concerning victims of sexual violence, the ICC should prepare and implement reparations awards suitable for sexual and gender-based violence victims.³⁷⁶⁵ Thus, the ICC's approach should enable girls and women in the affected communities to participate in a meaningful manner in the design and implementation of reparations orders and, therefore, fully participate in the reparations programs.³⁷⁶⁶

Concerning child victims, in accordance with article 68 (1) of the ICC Statute and rule 86 of the ICC RPE, the ICC has to consider the age-related harm and, therefore, any differential impact on boys and girls.³⁷⁶⁷ Moreover, as for children beneficiaries of reparations, the principle of the 'best interests of the child' embedded in the Convention on the Rights of the Child,³⁷⁶⁸ should *inter alia* guide the decisions by the ICC.³⁷⁶⁹ Furthermore, reparations proceedings, orders and programs that benefit child soldiers should guarantee the development of the victims' personalities, help them obtain rehabilitation and reintegrate them into society.³⁷⁷⁰ Child victims' views are to be taken into account when adopting decisions on individual or collective basis, considering the circumstances, age and level of maturity.³⁷⁷¹ Information provided to child

³⁷⁶¹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 201.

³⁷⁶² *Ibid.*, para. 203.

³⁷⁶³ *Ibid.*, para. 206.

³⁷⁶⁴ *Ibid.*, para. 202. See also Nairobi Declaration, principle 2.

³⁷⁶⁵ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 207.

³⁷⁶⁶ *Ibid.*, paras. 208-209. See also Nairobi Declaration, principle 1-D.

³⁷⁶⁷ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 210. See also Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles) February 2007, principle 4.0. Concerning the related issue of the children as a vulnerable group, see Salmón Gárate (2010a) 17-24.

³⁷⁶⁸ Convention on the Rights of the Child, article 3.

³⁷⁶⁹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 210.

³⁷⁷⁰ *Ibid.*, paras. 213 and 216. See also Paris Principles 7.0, 7.46-7.49.

³⁷⁷¹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 215.

victims should be delivered in a comprehensible manner for them and those representing them.³⁷⁷²

2.3.3. Resources for Implementing Reparations

2.3.3.1. Penalties

According to article 75 (2), the ICC may make a case-based reparations order ‘directly against a convicted person’. Thus, it is necessary to examine the complementarity between some of the penalties, those of an economic nature, imposed on the convicted and their use as resources to finance a reparations order in favor of victims. As previously said,³⁷⁷³ besides imprisonment, article 77 (2) lays down that the ICC may impose on the convicted person:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Also, article 79 (2) of the ICC Statute provides for that ‘The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund’.

With regard to fines, under rule 146 (1), the ICC, when determining whether or not to impose a fine as well as when fixing the amount, should evaluate ‘whether imprisonment is a sufficient penalty’, giving ‘due consideration to the financial capacity of the convicted person, including any orders for forfeiture’ and orders for reparations. The ICC also has to take into account ‘whether and to what degree the crime was motivated by personal financial gain’. Fines must be set at an ‘appropriate level’.³⁷⁷⁴ In addition to the factors previously established, the ICC has to pay attention to ‘the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator’.³⁷⁷⁵

With regard to forfeiture, at any hearing considering a forfeiture order, the competent Chamber shall hear evidence on the identification and location of

³⁷⁷² Ibid., para. 214.

³⁷⁷³ See supra Chapter V 2.3.1.

³⁷⁷⁴ ICC RPE, rule 146 (2).

³⁷⁷⁵ Ibid., rule 146 (2) (also adding that ‘[...] Under no circumstances may the total amount exceed 75 per cent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants’).

specific proceeds, property or assets derived directly or indirectly from the crime.³⁷⁷⁶ The Chamber must notify any *bona fide* third party who appears to have an interest in relevant proceeds, property, or assets and that party is entitled to intervene and submit evidence.³⁷⁷⁷ The ICC has to be satisfied that the specific proceeds, property, or assets were derived directly or indirectly from the crime.³⁷⁷⁸

In *Lubanga*, the V01 group of victims submitted that a fine should be imposed under article 79 (2) of the ICC Statute to benefit the TFV and added that rule 146 enables the ICC to consider the financial circumstances of the convicted person.³⁷⁷⁹ Additionally, the V01 group of victims sought for a Trial Chamber's order whereby any confiscated assets are paid to the TFV according to article 79 (2).³⁷⁸⁰ Nevertheless, in applying article 77 (2) and rule 146 (1), Trial Chamber I considered 'it inappropriate to impose a fine in addition to the prison term, given the financial situation of Mr Lubanga. Despite extensive enquiries by the Court, no relevant funds have been identified'.³⁷⁸¹

As previously mentioned, it is important to remind that under the ICC the reparative regime and punitive measures are, although complementary, distinct. When fine or forfeiture is ordered as a penalty, its purpose is to divest the perpetrator of material benefits obtained via the crime. On the other hand, if fine or forfeiture is used as a part of a reparations order, its subsequent role is to compensate the victim for the harm inflicted.³⁷⁸² Accordingly, even though the ICC may in application of article 79 (2) order that money and property collected via fines under article 77 (2) have to be transferred to the TFV and thus used to compensate the victims, this does not modify 'the distinctly punitive rationale underpinning the imposition of the fine or forfeiture in the first instance'.³⁷⁸³ The non-punitive character of reparations for serious international human rights violations that may be constitutive of international crimes, has also been identified by the IACtHR's case law, which has established that international law does not provide damages meant to deter or serve as an example,³⁷⁸⁴ but seeks to

³⁷⁷⁶ Ibid., rule 147 (1).

³⁷⁷⁷ Ibid., rule 147 (2), (3).

³⁷⁷⁸ Ibid., rule 147 (4).

³⁷⁷⁹ Lubanga (ICC-01/04-01/06-2880), 14 May 2012, paras. 8-10.

³⁷⁸⁰ Ibid., para. 11.

³⁷⁸¹ Lubanga (ICC-01/04-01/06-2901), 10 July 2012, para. 106.

³⁷⁸² McCarthy (2012a) 78.

³⁷⁸³ Ibid., Loc. cit.

³⁷⁸⁴ IACtHR, Case of Velásquez-Rodríguez v. Honduras, Reparations and Costs, Judgment of 21 July 1989, Series C No. 7, para. 38; IACtHR, Case of Godínez-Cruz v. Honduras. Reparations and Costs. Judgment of 21 July 1989. Series C No. 8, para. 36.

provide reparations for the damages caused.³⁷⁸⁵ Be that as it may, the relation between reparations and financial penalties at the ICC may be considered as two sides of the same coin, i.e., whereas reparations seek to redress the harm caused to the victims, fines and forfeitures concern the side of the offender and may be used to enforce reparations awards given directly or through the TFV.³⁷⁸⁶ Thus, financial penalties may have a dual effect and/or role.³⁷⁸⁷ Moreover, the outcomes of reparations, in particular compensation and restitution, can take shapes identical to financial penalties,³⁷⁸⁸ although still different in nature.

The imposition of fines or forfeiture may provide some benefits. First, the burden of punishment on the convicted is lessened and a forward-looking, constructive sentence is in place.³⁷⁸⁹ Second, these penalties present psychological advantages over retributive penalties as those relieve the offender's feeling of guilt and alienation.³⁷⁹⁰ Thus, there is a restorative effect 'not only to the victim but also to the offender, increasing their sense of self-esteem and aiding reintegration'.³⁷⁹¹ This is consistent with the restorative justice paradigm which also closely takes into account the offender's situation.³⁷⁹² Nevertheless, there are certain limitations to implement economic penalties. First, they can be used only if and when the offender is identified and convicted.³⁷⁹³ Second, most offenders, e.g., Lubanga, lack the means to pay economic penalties and these must reflect the offender's capacity to pay.³⁷⁹⁴ Third, even if the convicted is able and willing to pay, it only serves to cover specific material losses to victims, regarded as 'worthy'.³⁷⁹⁵ Fourth, an imposed payment will be insufficient or may even be counterproductive to originate a real attitude change in the offender.³⁷⁹⁶

It is submitted herein that the ICC Statute/RPE to some extent keep a balance with regard to the above-mentioned competing arguments. First, imposition of fines complements but does not replace imprisonment. The

³⁷⁸⁵ IACtHR, Case of Fairén-Garbi and Solís-Corrales v. Honduras, Merits, Judgment of 15 March 1989, Series C No. 6, para. 136.

³⁷⁸⁶ Dwertmann (2010) 260

³⁷⁸⁷ Claus Krieb and Göran Sluiter, 'Fines and Forfeiture Orders' in Cassese, Gaeta and Jones (2002) 1823, 1832.

³⁷⁸⁸ *Ibid.*, Loc. cit.

³⁷⁸⁹ Zedner (2009) 189.

³⁷⁹⁰ *Ibid.*, Loc. cit.

³⁷⁹¹ *Ibid.*, Loc. cit.

³⁷⁹² *Ibid.*, Loc. cit; Zehr (1990) 185 ('Wounds of the offender important').

³⁷⁹³ Doak (2008) 231 (commenting on compensation orders as a penalty).

³⁷⁹⁴ *Ibid.*, 231, 233 (commenting on compensation orders as a penalty).

³⁷⁹⁵ *Ibid.*, 235 (commenting on compensation orders as a penalty).

³⁷⁹⁶ Zedner (2009) 190.

seriousness of the crimes makes fines unsuitable as the only punishment.³⁷⁹⁷ Nevertheless, a convicted person's efforts to compensate victims are a mitigating circumstance in sentencing.³⁷⁹⁸ Second, the ICC RPE provide guidance to impose fines so that these are neither arbitrary nor disproportional.³⁷⁹⁹ Third, should collection of fines and/or forfeiture be unsuccessful, victims' status as reparations (including compensation) claimants at the ICC can still be implemented due to the existence of the TFV and certain non-monetary reparations such as apologies by the offender. Indeed, although Trial Chamber I in its reparations decision highlighted that the convicted person has been declared indigent and no assets or property have been identified to be used for reparations purposes, the Chamber considered that Lubanga was only able to contribute to non-monetary reparations (symbolic reparations) such as public or private apology to the victims, as a satisfaction, provided that these are given with his agreement.³⁸⁰⁰ This modality of reparations, alongside others, is examined in further detail later.³⁸⁰¹ Arguably, *inter alia*, in connection with non-monetary reparations, what should be mentioned now is that the Trial Chamber concluded that the fact that assets belonging to Lubanga have not been identified does not leave him unaffected by the reparations process as the overall aim of the ICC reparations system goes 'beyond the notion of punitive justice in order to provide effective remedies to the victims'.³⁸⁰²

Lastly, but equally important, under article 93 (1) (k) of the ICC Statute and as part of their obligation to cooperate with the ICC, States Parties to the ICC Statute shall provide assistance to the ICC in 'the identification, tracing, freezing or seizure of proceeds, property, assets and instrumentalities of crimes

³⁷⁹⁷ 'Discussion Turns to Range and Definition of Penalties in Draft Statute in Preparatory Committee on International Criminal Court', Press Release L/285, 22 August 1996 (Sweden, Japan, Switzerland).

³⁷⁹⁸ ICC RPE, rule 145 (2) (a) (ii).

³⁷⁹⁹ *Ibid.*, rule 146 ('1. In determining whether to order a fine [and in fixing the amount], the Court shall determine whether imprisonment is a sufficient penalty. The Court shall give due consideration to the financial capacity of the convicted person, including any orders for forfeiture [...] and [...] any orders for reparation [...] The Court shall take into account [among others] whether and to what degree the crime was motivated by personal financial gain. 2. A fine imposed [...] shall be set at an appropriate level [taking into account *inter alia*] the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator [...] The total amount [cannot] exceed 75 per cent of the value of the convicted person's [...] after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants').

³⁸⁰⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 269.

³⁸⁰¹ See *infra* Chapter V 4.3.2.2.

³⁸⁰² Lubanga (ICC-01/04-01/06-2911), 29 August 2012, para. 23.

for the purpose of eventual forfeiture'. In securing effective reparations, the identification and freezing of any asset of the convicted person is pivotal.³⁸⁰³ Therefore, State Parties ought to timely and effectively assist the ICC as early as possible in the proceedings as identified by the Assembly of ICC State Parties.³⁸⁰⁴ The ICC has ordered 'protective measures' to secure funds for reparations for 'the ultimate benefit of the victims', under article 57 (3) (e) of the ICC Statute,³⁸⁰⁵ and thus prevent that those funds are placed outside the ICC's reach, which is technologically feasible as determined in *Lubanga* by Pre-Trial Chamber I.³⁸⁰⁶ In *Bemba*, an important quantity of property and assets, including bank accounts, real estate and aircrafts were either seized or frozen.³⁸⁰⁷ Additionally, it should be noticed that, under rule 221 of the ICC RPE, the ICC Presidency has, as appropriate, to consult with, among others, victims in order to decide on disposition or allocation of property or assets belonging to the sentenced person and it shall in all cases prioritize enforcement of measures on reparations.

2.3.3.2. General Remarks on the TFV and Reparations Through it

To begin with, some general remarks on the TFV are provided herein. The TFV is a unique feature at the ICC and set up for the benefit of victims of crimes under the ICC's jurisdiction as laid down in article 79 (1) of the ICC Statute 'A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'. The concept of a Trust Fund, which received strong support in the Preparatory Committee on the Establishment of the ICC,³⁸⁰⁸ constitutes in Schabas's words 'one manifestation of the enhanced role for

³⁸⁰³ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 277.

³⁸⁰⁴ ICC Assembly of States Parties, Resolution ICC-ASP/12/Res.5, 27 November 2013, para. 10; ICC Assembly of State Parties, Resolution ICC-ASP/10/Res.3, Reparations, 20 December 2011, para. 3.

³⁸⁰⁵ ICC Statute, article 57 (3) (e) ('Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims').

See also ICC RPE, rule 99. Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4.

³⁸⁰⁶ *Lubanga* (ICC-01/04-01/06-8-US-Corr), 24 February 2006, para. 137.

³⁸⁰⁷ *Bemba* (ICC-01/05-01/08-8), Décision et Demande en Vue d'obtenir l'identification, la Localisation, le Gel et la Saisie des Biens et Avoirs Adressées a la République Portugaise, Pre-Trial Chamber III, 27 May 2008.

³⁸⁰⁸ See Mark Jennings, 'Article 79. Trust Fund' in Triffterer (2008) 1439, 1439.

victims in the general philosophy of the Court'.³⁸⁰⁹ The TFV was established by decision of the Assembly of States Parties to the ICC Statute at its first session in September 2002,³⁸¹⁰ its Board of Directors was elected in September 2003, during the second session of the Assembly of States Parties.³⁸¹¹ The Assembly also adopted regulations setting up the Trust Fund Secretary and those measures were in place by 2006 and, in early 2007, the TFV began its operations.³⁸¹²

The phrase 'benefit of victims' contained in article 79 (1) has been interpreted by the Assembly of States Parties as consisting of two components, reparations and material support.³⁸¹³ Accordingly, and generally speaking, the TFV's mandate is twofold and reflects its relationship with the ICC. A first mandate is to ensure the existence of sufficient available funds in case the ICC orders reparations in accordance with article 75 (2) of the ICC Statute,³⁸¹⁴ which provides for that 'Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79'. This has been the case in *Lubanga*, as detailed by the Appeals Chamber.³⁸¹⁵ This first mandate is referred to by the TFV as 'reparations mandate' and linked to a specific ICC case.³⁸¹⁶ Thus, under this mandate, the TFV implements reparations awards to victims ordered by the Court against the convicted in accordance with ICC's specified criteria.³⁸¹⁷ The TFV's second function, i.e., the general assistance function,³⁸¹⁸ has also been called non-judicial or humanitarian.³⁸¹⁹ The difference

³⁸⁰⁹ Schabas (2010) 909.

³⁸¹⁰ Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the families of such Victims, Resolution ICC-ASP/1/Res.6, 9 September 2002, Adopted Pursuant to Rule 89, Rules of Procedure of the Assembly of State Parties, ICC-ASP/1/3, pp. 160-179.

³⁸¹¹ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10, paras. 40-43.

³⁸¹² See Schabas (2010) 911.

³⁸¹³ See Regulations of the TFV, regulation 50 (a) (i).

³⁸¹⁴ Situation in the DRC (ICC-01/04-492), Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, p. 7 (Apr. 11, 2008).

³⁸¹⁵ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 55.

³⁸¹⁶ Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2011 to 30 June 2012, ICC-ASP/10/14, 7 August 2012, paras. 3-8.

³⁸¹⁷ See also Zegveld (2010) 88-89.

³⁸¹⁸ Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2011 to 30 June 2012, ICC-ASP/10/14, 7 August 2012, paras. 9 et seq.

³⁸¹⁹ Zegveld (2010) 88.

is that whereas in the first function, the TFV can by using resources deposited with it implement ICC-ordered reparations awards against a convicted person, when directed by the ICC to do so; the second function allows the TFV using voluntary contributions to provide general assistance, i.e., technically speaking not reparations, to all victims of the situations before the ICC.³⁸²⁰ Details concerning these two mandates of the TFV and how victims' status is exercised are discussed later on.³⁸²¹

Article 79 (2) of the ICC Statute establishes that 'The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund'. In addition, as established by the Assembly of State Parties, besides the sources of income listed in article 79 (2), the TFV can also be funded with voluntary contributions from governments, organizations, individuals, corporations, and other entities, according to the 'relevant criteria adopted by the Assembly of States Parties', via 'Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence', and 'Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund'.³⁸²²

With regard to the concept of 'reparations through the Trust Fund', as laid down in article 75 (2) of the ICC Statute, Trial Chamber I in its reparations decision applied the Vienna Convention on the Law of the Treaties, concerning interpretation of treaties,³⁸²³ and thus the Chamber gave 'the word "through" its ordinary meaning, namely "by means of"'.³⁸²⁴ Accordingly, Trial Chamber I understood that when article 75 (2) of the ICC Statute establishes that a reparations award may be made 'through' the TFV, the ICC can draw on the TFV's logistical and financial resources in implementing the award.³⁸²⁵ Additionally, the Chamber considered that when the convicted person lacks assets, as seen in *Lubanga*, the reparations award is not limited to the funds and

³⁸²⁰ See, e.g., TFV, The Two Roles of the TFV. Reparations and General Assistance, available at: <http://www.trustfundforvictims.org/two-roles-tfv> (last visit on 30 November 2012).

³⁸²¹ See infra Chapter V 3.3.2.

³⁸²² Resolution ICC-ASP/1/Res.6, 9 September 2002, para. 2.

³⁸²³ Vienna Convention on the Law of Treaties, article 31 (1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose').

³⁸²⁴ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 270 (citing the Oxford English Dictionary).

³⁸²⁵ *Ibid.*, Loc. cit.

assets seized and deposited with the TFV, but such award ‘can, at least potentially, be supported by the Trust Fund’s own resources’.³⁸²⁶

As found by Trial Chamber I,³⁸²⁷ this interpretation can be in principle considered consistent with rule 98 (5) of the RPE and regulation 56 of the TFV Regulations. Rule 98 (5) establishes that the Trust Fund ‘may use “other resources” for the benefit of victims [emphasis added by the Chamber]’.³⁸²⁸ In turn, regulation 56 of the TFV Regulations sets an obligation on the TFV’s Board of Directors to complement the resources collected from the convicted with ‘the other resources of the Trust Fund’, and the Board, without prejudice of its activities ‘[...] shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 [of the ICC RPE]’. Accordingly, it is possible to argue that, under regulation 56, the ‘need to provide adequate resources’ includes the need to fund reparation awards.³⁸²⁹ When the ICC orders reparations against an indigent convicted, e.g., Lubanga, the ICC ‘may draw upon “other resources” that the TFV has made reasonable efforts to set aside’. This conclusion can also be reached by considering the equally authentic French version.³⁸³⁰

The ICC Trial Chamber I’s interpretation is also consistent with a previous decision by Pre-Trial Chamber I, which established that:

[...] pursuant to articles 75(2), 79(2) of the Statute and rule 98 of the Rules, the Court may order that an award for reparations be made through the Trust Fund; that the Court order concerning awards for reparations may be executed with (i) funds collected through fines and forfeiture as provided for in article 79(2) of the Statute, or (ii) other resources as provided for in rule 98(5) of the Rules which is subject to the provisions of article 79 of the Statute; and *that therefore, the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to article 75 of the Statute* [emphasis added].³⁸³¹

³⁸²⁶ Ibid., para. 271.

³⁸²⁷ Ibid., Loc. cit.

³⁸²⁸ Ibid., Loc. cit.

³⁸²⁹ Ibid., Loc. cit.

³⁸³⁰ Regulations of the TFV, regulation 56 (French version) (‘Le Conseil de direction détermine s’il faut compléter le produit de l’exécution des ordonnances de réparation par d’«autres ressources du Fonds» et en informe la Cour’).

³⁸³¹ Situation in the DRC (ICC-01/04-492), 11 April 2008, page 7. For a critical view of this decision, see Tom Dannenbaum, ‘The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims’ (2010) 28 Wisconsin Law Journal

Thus, Pre-Trial Chamber I concluded that even though the TFV is in principle and formally free to use its ‘other sources’, such freedom is limited by the TFV’s obligation to guarantee an adequate reserve to provide/pay reparations under article 75 of the ICC Statute. Such interpretation seems to be consistent with the interpretation by Cherif Bassiouni who sustains that article 75 (2) grants the ICC the authority to order reparations out of the TFV.³⁸³² Therefore, based on the interpretations given by Pre-Trial Chamber I and Trial Chamber I, it is possible to conclude that, under regulation 65, the TFV has to complement the funding of a reparations award, but within the limitations of resources available to the TFV and without affecting its assistance mandate, as also determined by Trial Chamber I.³⁸³³ The Board of Directors of the TFV approved in March 2013 the increase of the Fund’s reparation reserve from € 1.2 million to € 1.8 million.³⁸³⁴

ICC RPE on the TFV’s involvement on implementing individual and collective reparations awards and related findings in the reparations decision in *Lubanga*, are analyzed later.³⁸³⁵ What should be mentioned herein is that rule 98 (1) states that ‘Individual awards for reparations shall be made directly against a convicted person’. However, according to rule 98 (2), if the ICC orders that the award for reparations against a convicted person be deposited with the TFV at a time when making the order is ‘impossible or impracticable to make individual awards directly to each victim’, such award ‘shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible’. Rule 98 (3) deals in turn with a collective reparations award against the convicted through the TFV. Thus, although reparations awards are ordered by the Chamber against the accused, their implementation can be conducted through the TFV, e.g., in *Lubanga*, as detailed later.³⁸³⁶

234, 297 (concluding that Pre-Trial Chamber I was wrong to limit the TFV’s independence by asserting the TFV’s responsibility to maintain a balance enough to supplement insufficiently resourced reparations awards ordered by the ICC under article 75).

³⁸³² Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence*, Vol. 1 (Brill 2005) 177.

³⁸³³ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 273.

³⁸³⁴ Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2012 to 30 June 2013, ICC-ASP/12/14, 31 July 2013, p. 1.

³⁸³⁵ See *infra* Chapter V 3.3.2.1, 4.3.1.1 and 4.3.2.

³⁸³⁶ See *infra* Chapter V 3.3.2.1, 4.3.1.1 and 4.3.2.

2.4. The ECCC

2.4.1. Preliminary Considerations

Even though the right to claim reparations was not included in the ECCC Law, it is incorporated in the ECCC Internal Rules. Moreover, most Cambodians agree on the necessity of some form of reparations for Khmer Rouge victims.³⁸³⁷ Although the civil party's right to claim reparations is also recognized under Cambodian Law,³⁸³⁸ there are differences between the ECCC reparations regime and that existent under national law. The scope of civil action at the national level is significantly wider.³⁸³⁹ Following the ECCC Supreme Court Chamber's appeal judgment in *Duch*,³⁸⁴⁰ those differences can be summarized as follows.

First, whereas civil parties at the ECCC may direct their reparations claims only against the accused,³⁸⁴¹ the civil parties in Cambodian domestic proceedings may claim compensation for injury against a broader group of liable persons (not limited to perpetrators).³⁸⁴² Second, whereas the ECCC Internal Rules confine reparations to moral and collective awards,³⁸⁴³ i.e., individual awards and compensation are excluded,³⁸⁴⁴ the Cambodian domestic system allows a wider set of classic civil law remedies including damages proportional to the injury suffered, return of lost property and restoration of damaged or destroyed property to its original state.³⁸⁴⁵ However, some of the measures identified under the ECCC Internal Rules are not yet available under the 2007 Cambodian Code of Criminal Procedure,³⁸⁴⁶ as examined later.³⁸⁴⁷ Third, unlike

³⁸³⁷ In a 2008 survey conducted in a universe of 1000 Cambodian nationals, whereas 88% considered that reparations should be given to victims, 68% opined that they should be granted to the community as a whole. In turn, 53% considered that reparations should be provided in a modality that affects Cambodians' daily lives such as social services (20%), infrastructure development (15%), economic development programs (12%), housing and land (5%), and provision of livestock, food and agricultural tools. See Phuong Pham et al., *So We will Never Forget: A Population-based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California January 2009) 43-44.

³⁸³⁸ See 2007 Code of Criminal Procedure, articles 2 and 14.

³⁸³⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 643.

³⁸⁴⁰ *Ibid.*, Loc. cit.

³⁸⁴¹ ECCC Internal Rules, rule 23 *quinquies* (3). See also ECCC Internal Rules, rule 23 (11) (Rev. 3).

³⁸⁴² 2007 Code of Criminal Procedure, article 21.

³⁸⁴³ ECCC Internal Rules, rules 23 (1), 23 *bis* (1) and 23 *quinquies* (1).

³⁸⁴⁴ *Ibid.*, rule 23 *quinquies* (1).

³⁸⁴⁵ 2007 Code of Criminal Procedure, article 14.

³⁸⁴⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 643. For further details see *infra* Chapter V 4.4.2.

the Cambodian national system,³⁸⁴⁸ civil actions at the ECCC are not limited by statute of limitations.³⁸⁴⁹ Fourth, unlike the ECCC,³⁸⁵⁰ it is possible to bring the civil action before civil courts at the Cambodian domestic system.³⁸⁵¹

Based on the previous considerations, although the ECCC Internal Rules reparations regime comes from analogous forms of redress included in the 2007 Cambodian Code of Criminal Procedure, rules on civil parties at the ECCC have to be differentiated and ‘cannot readily be drawn by way of analogy to those in domestic law’,³⁸⁵² including in Cambodia.³⁸⁵³ Such observation is of particular relevance concerning civil compensation regime from which the Internal Rules significantly depart as highlighted by the Supreme Court Chamber.³⁸⁵⁴ These departures from national law were considered necessary by the Trial Chamber due to not only the large number of civil parties anticipated at the ECCC but also because of the difficulties of quantifying the total extent of losses suffered by an indeterminate class of victims.³⁸⁵⁵ In addition, due to the need for prosecuting crimes, which was unviable in Cambodia for many years, reparations provided by the ECCC are intended to be symbolic rather than compensatory.³⁸⁵⁶ Furthermore, the eligibility has to be decided on an equal basis and not under civil compensation formulae.³⁸⁵⁷ Lastly, but equally important, it should be noticed that the ECCC is the first forum for victims of the Khmer Rouge to apply for reparations as a national reparations program has not been implemented.³⁸⁵⁸

³⁸⁴⁷ See *infra* Chapter V 4.4.2.

³⁸⁴⁸ 2007 Code of Criminal Procedure, article 26.

³⁸⁴⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 643.

³⁸⁵⁰ *Ibid.*, Loc. cit.

³⁸⁵¹ 2007 Code of Criminal Procedure, article 22.

³⁸⁵² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 644.

³⁸⁵³ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 661.

³⁸⁵⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 644.

³⁸⁵⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 661, footnote 1144. See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 644.

³⁸⁵⁶ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 661, footnote 1144. See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 644.

³⁸⁵⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 644.

³⁸⁵⁸ See Hao Duy Phan, ‘Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia’ (2009) 4 *East Asia Law Review* 277-298.

2.4.2. Reparations Claimants

2.4.2.1. Civil Parties as Reparations Claimants

The Trial Chamber in *Duch* has found that civil parties' interests 'are principally the pursuit of reparations' provided that there is criminal conviction.³⁸⁵⁹ As previously mentioned,³⁸⁶⁰ under the ECCC Internal Rules, victims are entitled to reparations, which are their primary interest, alongside support of the Prosecutor, in order to join and participate as civil parties in the criminal proceedings before the ECCC. As noted by the Supreme Court Chamber and the Trial Chamber in *Duch*, civil participation before the ECCC includes 'both the right for victims to participate in the criminal trial of an accused, and to pursue a related civil action for collective and moral reparations'.³⁸⁶¹ Moreover, at the ECCC, only victims who have been granted the status of civil parties may claim reparations. As already seen,³⁸⁶² one of the purposes of the civil party action before the ECCC is to 'Seek collective and moral reparations, as provided in Rule 23 *quinquies*'.³⁸⁶³

Having said so, similar to the situation at the ICC, some modalities of collective reparations may potentially and at least indirectly be enjoyed by victims who could not apply to become civil parties and, thus, were not reparations claimants at the ECCC. The Supreme Court Chamber in its appeal judgment in *Duch*, when discussing the term 'collective' reparations, concluded that:

In the ECCC context it excludes individual awards, whether or not of a financial nature. It also seems to favour those measures that benefit as many victims as possible. The present case is concerned with mass crimes, which, by their very nature, directly and indirectly affected, albeit to varying degrees, a large number of victims. *Granting measures which are capable of being enjoyed by a restricted group of victims only, however much they might be deserved, would entail excluding other individuals such as those: who were not aware of the proceedings or of the opportunity to participate as civil parties; were not in a financial, physical, psychological or logistic position to join the proceedings; did not possess sufficient evidence to meet the required threshold of admissibility of their application; or did not wish to be engaged for other reasons [...] the present case*

³⁸⁵⁹ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 33.

³⁸⁶⁰ See supra Chapter IV 2.4.2.1.

³⁸⁶¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 639; Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 660.

³⁸⁶² See supra Chapter IV 2.4.2.1.

³⁸⁶³ ECCC Internal Rules, rule 23 (1) (a).

*numbers fewer than one hundred civil parties, while the crimes involved more than 12,000 victims. Moreover, an unspecified number of victims could not, and will likely never fully, be identified. In the present circumstances, the Supreme Court Chamber is of the view that the most inclusive measures of reparation should be privileged [emphasis added].*³⁸⁶⁴

Similar approach has been put forward by the civil parties' lead co-lawyers in *Nuon Chea et al.* when discussing the implementation of collective reparations projects and, thus, 'In addition to civil parties, it could also benefit victims in a broader sense as awarding collective and moral reparations to civil parties implies that they can benefit many victims'.³⁸⁶⁵ Indeed, some of the modalities of collective and moral reparations asked by the civil parties in Case 002/01 within *Nuon Chea et al.* can benefit a larger group than just civil parties, e.g., those modalities related to the categories of remembrance and memorialization and documentation and education,³⁸⁶⁶ and also, as rehabilitation, testimonial therapy of civil parties read aloud in public ceremonies with the participation of community members, survivors and relatives.³⁸⁶⁷ These and other modalities are discussed in detail later.³⁸⁶⁸ In *Duch*, the proposal for a memorial, the S-21 Detention Centre Victims' Memorial, was presented by Civil party group 3 on behalf of the Association of Victims of Democratic Kampuchea, 'Ksem Ksan'.³⁸⁶⁹ This association, which includes most victims in this case but consisted of 486 victims (at the time of Supreme Court Chamber's appeal judgment in *Duch*) as opposed to the 94 civil parties in *Duch*, was included in the list of associations recognized by the Victims Support Section (VSS) of the ECCC.³⁸⁷⁰ However, as previously seen,³⁸⁷¹ these victims

³⁸⁶⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 659.

³⁸⁶⁵ *Nuon Chea et al.* (Case 002), E125/2, 12 March 2012, para. 84.

³⁸⁶⁶ See, *inter alia*, *Nuon Chea et al.* (Case 002), Civil Party Lead Co-Lawyers' Response to the Trial Chamber's Memorandum E218/7/2 Concerning Reparations Projects for Civil Parties in Case 002/01, With Confidential Annexes, Civil Parties' Lead Co-Lawyers, 23 August 2013, paras. 3-7 and 9-12.

³⁸⁶⁷ *Nuon Chea et al.* (Case 002), Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations (Internal Rule 80BIS(4)) With Strictly Confidential Annexes, Civil Parties' Lead Co-Lawyers, 12 February 2013, para. 16.

³⁸⁶⁸ See *infra* Chapter V 4.4.2.2.

³⁸⁶⁹ See Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 690.

³⁸⁷⁰ See *Ibid.*, para. 690, footnote 1399.

³⁸⁷¹ See *supra* Chapter IV 3.4.2.1.

associations are not themselves civil parties and are different from class actions.³⁸⁷²

Discussion on collective and moral reparations and modalities of reparations is conducted later.³⁸⁷³ Be that as it may, reparations claimants who trigger the reparations proceedings and who may later benefit from reparations have to meet the respective causal link between harm inflicted and crimes upon which the accused is convicted, as discussed later. What should be mentioned now is that internal rule 23 *quinquies* conditions the granting of reparations to only cases where the ‘Accused is convicted’, as occurred in *Duch*. Thus, as identified by the Supreme Court Chamber in its appeal judgment in *Duch*, victims’ participation in criminal proceedings as civil parties before the ECCC is ‘inextricably linked with the civil action’,³⁸⁷⁴ i.e., seeking collective and moral reparations. With regard to the civil party’s civil action, the status of a civil party is only attached to ‘the fact of deriving a civil claim from the criminal act charged’.³⁸⁷⁵ Nor is there any formal limitation on the claimant inasmuch as the focus is on assessing the proof in support of the claim.³⁸⁷⁶ According, to internal rule 23 (1) *quinquies*, ‘If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties [...]’.

Thus, in *Duch*, the Trial Chamber in its judgment, once determined the accused’s criminal responsibility for specific crimes and convicted him accordingly, then moved on to ‘consider whether he can also be found responsible for the particular harm alleged by two categories of Civil Parties’.³⁸⁷⁷ In *Nuon Chea et al.*, the Pre-Trial Chamber stressed that a ‘Civil Party has a right, as a member of a collective “class” to request moral reparations’ and such a right flows from joining the proceedings, which is not an issue to be balanced against the accused’s position.³⁸⁷⁸ The proceedings applicable to civil parties as reparations claimants as well as the specific modalities of reparations are discussed in detail later.³⁸⁷⁹

What should be left clear herein is that, unlike the TFV existing at the ICC, there is no similar trust fund existent at the ECCC, which would have

³⁸⁷² Zegveld (2010) 97.

³⁸⁷³ See *infra* Chapter V 4.4.1.1 and 4.4.2.

³⁸⁷⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 411.

³⁸⁷⁵ *Ibid.*, Loc. cit.

³⁸⁷⁶ *Ibid.*, Loc. cit.

³⁸⁷⁷ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 644.

³⁸⁷⁸ Nuon Chea et al. (Case 002), 24 June 2011, para. 99.

³⁸⁷⁹ See *infra* Chapter V 3.4 and 4.4.2.

provided a solid option to implement reparations claims before the ECCC. Victims who are granted the civil party status have to attach claims to the criminal proceedings before the ECCC, i.e., exercise their civil action in the criminal proceedings. Although in theory not necessarily all civil parties might seek reparations,³⁸⁸⁰ victims who wish to claim reparations before the ECCC have to as a *sine qua non* condition to join as civil parties first. Relating to this point, the Trial Chamber in *Duch* compared the system in place at the ECCC with that set up at the ICC:

Under the scheme established by the ICC's Rome Statute, however, there is no necessary connection between victim participation in criminal proceedings and their participation in relation to reparations: a civil action is not a prerequisite for victim participation in criminal proceedings before the ICC.³⁸⁸¹

It should be additionally reminded that according to internal rule 23 *bis* (5):

At any time during the pre-trial stage, a Civil Party may expressly waive the right to request reparation, and abandon a Civil Party action. The waiver of the right or abandonment of the action shall not stop or suspend the criminal prosecution.

This may be regarded as an example of the possibility to consider victims' status as reparations claimants as intrinsically conditioned to the constitution as civil party but not identical to it.

Internal rule 23 (2) explicitly lays down that 'The right to take civil action may be exercised without any distinction based on criteria such a current residence or nationality'. This rule is particularly important as implements in a specific setting the principle of non-discrimination. By making it explicit that the reparations regime under the ECCC is led by the principle of non-discrimination, the ECCC Internal Rules drafters have at least on paper reached a standard which is coherent with the UN Basic Principles and Guidelines.³⁸⁸²

³⁸⁸⁰ McGonigle Leyh (2011) 175.

³⁸⁸¹ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 38.

³⁸⁸² UN Principles and Guidelines, principle 12 ('[victims] shall have equal access to an effective judicial remedy [...]), principle 25 ('[these principles should be applied] without any discrimination of any kind or on any ground, without exception').

As also examined,³⁸⁸³ to be admissible as a civil party and, therefore, be able to claim reparations before the ECCC, the civil parties according to internal rule 23 *bis* (1) need to:

- a) be clearly identified; and
- b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

As seen, harm or injury relevant for reparations may be of a ‘physical, material or psychological’ nature, as previously defined.³⁸⁸⁴ Furthermore, this rule requires that the injury has to be ‘a *direct* consequence of at least one of the crimes alleged against the Charged Person’ and, thus, concerning causation, the perpetrator’s liability is limited to ‘direct losses’.³⁸⁸⁵ In interpreting this provision, the Supreme Court Chamber in its appeal judgment in *Duch*: i) concluded that it is necessary a causal link between the prohibited conduct giving rise to reparations and the form of reparations sought,³⁸⁸⁶ and ii) interpreted this causal link at the ECCC as follows:

[...] the causality that needs to be demonstrated for the purpose of admissibility of civil party applications concerns the presence of an injury suffered as a direct consequence of the crime. The presence of the injury is conducive to the right to seek reparation. Accordingly, once the Trial Chamber satisfied itself with the presence of injury and the civil party status of the applicant, eligibility for reparation is established.³⁸⁸⁷

In any case, as determined by the Trial Chamber, responsibility is not limited to persons against whom crimes were perpetrated ‘but may also be the direct cause of injury to a larger group of victims’.³⁸⁸⁸ The implications for civil parties as reparations claimants, under rule 23 *bis* (b) are examined in detail in

³⁸⁸³ See supra Chapter IV 2.4.2.1.

³⁸⁸⁴ See supra Chapter IV 2.4.2.1.

³⁸⁸⁵ American University Washington College of Law, War Crimes Research Office (2010) 38-39.

³⁸⁸⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 699 (citing jurisprudence on reparations from the IACtHR and the ECtHR. The Supreme Court Chamber added that although the causal link is not entirely precise, it is relatively easy to interpret).

³⁸⁸⁷ Ibid., Loc. cit.

³⁸⁸⁸ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 642.

the next subsection. It should be mentioned that since legal entities (in addition to natural persons) can become civil parties, they can also claim reparations at the ECCC.³⁸⁸⁹

2.4.2.2. Categories of Civil Parties as Reparations Claimants

The definition/requirements for civil party constitution and, therefore, the possibility to claim reparations before the ECCC is not a formal reference to a specific class of individuals but instead a substantive criterion of an actual injury that results as a direct consequence of the crime, as correctly identified by the Supreme Court Chamber in its appeal judgment in *Duch*.³⁸⁹⁰ In reaching this conclusion, the Supreme Court Chamber recalled that (previous) internal rule 23 (2) (Rev. 3) (current internal rule 23 *bis* (1) (b) (Rev. 8)) reflects article 13 of the 2007 Cambodian Code of Criminal Procedure, which in turn closely resembles article 2 of the French CPP.³⁸⁹¹

The injury resulting from the crime charged is the defining and at the same time limiting criterion for the admissibility of the civil party application before the ECCC,³⁸⁹² and hence for claiming and receiving reparations if the accused is convicted. In any case, to be granted reparations, the harm inflicted on victims must be directly linked to the crime(s) for which the accused was convicted, as noticed by the Trial Chamber in *Duch* ‘to pursue a related civil action for collective and moral reparations against an Accused for harm that is directly attributable to the crimes for which the Accused is convicted’.³⁸⁹³

Based on the existence of an injury thus considered, the following question consists in determining whether this includes persons other than direct victims. In other words, the question is whether not only a direct victim but also an indirect victim can be admitted as civil party,³⁸⁹⁴ and thus to claim reparations before the ECCC. As previously examined in detail and concluded,³⁸⁹⁵ ECCC’s case law has found that not only direct but also indirect victims can be civil

³⁸⁸⁹ ECCC, Practice Direction 02/2007/Rev.1, article 3 (2) (a).

³⁸⁹⁰ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 411.

³⁸⁹¹ *Ibid.*, para. 409 (citing article 13 of the 2007 Cambodian Code of Criminal Procedure which states that ‘In order for [a] Civil Party action to be admissible, the injury must be: a) Physical, material or psychological; and b) The direct consequence of the offence, personal and have actually come into being’).

³⁸⁹² *Ibid.*, para. 415.

³⁸⁹³ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 660

³⁸⁹⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

³⁸⁹⁵ See *supra* Chapter IV 2.4.2.1, 2.5 and 7.

parties. Accordingly, not only direct victims but also indirect victims, constituted as civil parties, can claim reparations at the ECCC and receive them if the accused is convicted. Thus, as determined by the Supreme Court Chamber as for admissibility of civil party applications during the reparations stage, it can be concluded that the requirement of injury as a direct consequence of the offence (as stated in internal rule 23 *bis* (1) (b)) does not limit the admissibility of civil parties, and therefore their status as reparations claimants, to direct victims and, thus, indirect victims can be included.³⁸⁹⁶

The Supreme Court Chamber has found that indirect victims are those who ‘actually suffered psychological injury, for example, as a result of the injury, whether temporary or permanent, of their loved ones’.³⁸⁹⁷ This conclusion is consistent with the IACtHR’s case law on reparations.³⁸⁹⁸ The Supreme Court Chamber found that psychological injury is the result of uncertainty or fear about the direct victim’s fate, knowledge of their suffering or the loss of sense of safety and moral integrity.³⁸⁹⁹ In reaching this conclusion, the Chamber relied on jurisprudence of the IACtHR and the ECtHR dealing with the provision of reparations for damages in serious human rights violations cases.³⁹⁰⁰ Moreover, in grave or prolonged cases, psychological injury may lead to physical injury by causing several ailments.³⁹⁰¹ Vulnerable groups such as infants, children, the old and sick may have suffered psychological and physical injury as their caregivers were taken away from them.³⁹⁰² The Supreme Court Chamber found that material injury may have been caused on individuals for whom the direct victims was providing when victimization stroke, or would have, in all probability,

³⁸⁹⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 418.

³⁸⁹⁷ *Ibid.*, para. 417.

³⁸⁹⁸ See, e.g., IACtHR, Case of Garrido and Baigorria v. Argentina, Reparations and Costs, Judgment of 27 August 1998, Series C No. 39, para. 50; IACtHR, Case of Bulacio v. Argentina, Merits, Reparations and Costs, Judgment of September 18, 2003. Series C No. 100, para. 98; IACtHR, Case of Loayza-Tamayo v. Peru. Reparations and Costs, Judgment of 27 November 1998, Series C No. 42, paras. 138, 140 and 142-143.

³⁸⁹⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

³⁹⁰⁰ As for IACtHR’s case law, see IACtHR, Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala, Reparations and Costs. Judgment of 25 May 2001, Series C No. 76, para. 66; IACtHR, Case of the Caracazo v. Venezuela, Reparations and Costs, Judgment of 29 August 2002, Series C No. 95, para. 97 (b). As for the ECtHR, see ECtHR, Cakici v. Turkey, App. No. 23657/94, Judgment, 8 July 1999, para. 98.

³⁹⁰¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

³⁹⁰² *Ibid.*, Loc. cit.

provided for in the future, which is the case of the relationship between parents and children.³⁹⁰³ This is consistent with the IACtHR's jurisprudence,³⁹⁰⁴ and the UN Basic Principles and Guidelines.³⁹⁰⁵

The Supreme Court Chamber also added that material injury may be occasioned by or be a material damage to the family's patrimony.³⁹⁰⁶ In reaching this conclusion, the Chamber relied once more on the IACtHR's jurisprudence on reparations.³⁹⁰⁷ Furthermore, material injury may eventually have its source in a contractual or statute-based claim against the direct victim that the crime in question prevented from being satisfied.³⁹⁰⁸

Accordingly, victims who pursue a civil action as civil parties are reparations claimants and, therefore, may benefit from reparations at the ECCC. In turn, civil parties as reparations claimants include not only direct victims but can also include indirect victims who 'personally suffered injury as a direct result of the crime committed against the direct victim'.³⁹⁰⁹ Moreover, as previously examined, indirect victims are not limited to a specific class of individuals, e.g., families, but may also include common law spouses, distant relatives, friends, *de facto* adopters and adoptees and adoptees, or other beneficiaries if that injury on them is demonstrated.³⁹¹⁰ This broad scope of reparations claimants and beneficiaries is similar to the IACtHR's jurisprudence on reparations.³⁹¹¹

Under this logic, the Supreme Court Chamber found that persons who do not present injury are not considered indirect victims even if they were immediate family members.³⁹¹² Concerning this particular finding, it should be first borne in mind that, for example, jurisprudence on reparations from the IACtHR and the ECtHR, when it comes to immediate family members, has applied a rebuttable presumption according to which they have suffered injury

³⁹⁰³ Ibid., Loc. cit.

³⁹⁰⁴ See, e.g., IACtHR, Case of Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment of 10 September 1993, paras. 48, 67 and 71.

³⁹⁰⁵ UN Principles and Guidelines, principle 8.

³⁹⁰⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

³⁹⁰⁷ Ibid., para. 417, footnote 880 (referring to IACtHR, Case of the Caracazo v. Venezuela. Judgment of 29 August 2002, paras. 80-88).

³⁹⁰⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 417.

³⁹⁰⁹ Ibid., para. 418.

³⁹¹⁰ Ibid., para. 418.

³⁹¹¹ See Burgorgue-Larsen and Úbeda (2011) 110-117, 225-228.

³⁹¹² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 418.

and accordingly shall be granted reparations.³⁹¹³ Hence, in principle, this Supreme Court Chamber's particular finding, with regard to immediate family members, can be questioned as may affect the chances of some individuals to become civil parties and, therefore, their right to claim reparations before the ECCC. Indeed, this may be considered as a factor that underlies the fact that in *Duch* only around 40% of the victims who got their civil party status revoked by the Trial Chamber were restituted with it by the Supreme Court Chamber in appeals, as previously seen.³⁹¹⁴

However, as the Supreme Court Chamber established, it should be borne in mind the difference in scope and standards between the regional human rights courts' jurisprudence on reparations, in particular that developed by the IACtHR and the ECtHR, and heavily relied on by the ECCC's jurisprudence, and the admission of victims as civil parties and consequently their claims for reparations before the ECCC.³⁹¹⁵ In particular, causality relevant to the proceedings under regional human rights instruments is different from that before the ECCC and, hence, whereas the first is rights-focused, the latter is injury-focused.³⁹¹⁶ As a result, the margin of discretion in deciding the admissibility of victims and claims for reparations before regional human rights courts is normally larger than in criminal proceedings due to, *inter alia*, necessary fair trial considerations in the latter.³⁹¹⁷ Thus, the standard of and burden of proof as well as the scope of reparations beneficiaries are more relaxed before the regional human rights courts as compared to the criminal proceedings at the ECCC since 'legal precepts of regional human rights mechanisms do not necessarily provide guidance for civil actions in criminal cases'.³⁹¹⁸

Bearing in mind these standards, the Supreme Court Chamber examined in further detail the legal presumptions applied by the IACtHR's jurisprudence

³⁹¹³ With regard to the IACtHR's jurisprudence, see, e.g., IACtHR, Case of Garrido and Baigorria v. Argentina, Reparations and Costs, Judgment of 27 August 1998, paras 63-64; IACtHR, Case of Juan Humberto Sánchez v. Honduras, Preliminary Objection, Merits, Reparations and Costs, Judgment of 7 June 2003, Series C No. 99, paras. 58-59; IACtHR, Case of the Caracazo v. Venezuela, Judgment of 29 August 2002, para. 91. With regard to the ECtHR's jurisprudence, which has used a notion of victim generally speaking more restrictive, see, e.g., ECtHR, Yasa v. Turkey, App. No. 22495/93, Judgment, 2 September 1998, paras. 61-66; ECtHR, Velikova v. Bulgaria, App. No. 41488/98, Judgment, 18 May 1999, p. 12.

³⁹¹⁴ See *supra* Chapter IV 4.4.2.1.

³⁹¹⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 431-432.

³⁹¹⁶ *Ibid.*, para. 433.

³⁹¹⁷ *Ibid.*, para. 434.

³⁹¹⁸ *Ibid.*, para. 435.

on reparations.³⁹¹⁹ As correctly stated by the Chamber,³⁹²⁰ the IACtHR's has applied a presumption *iuris tantum* (a legal rebuttable presumption) about the existence of mental and moral harm with regard to mothers, fathers, daughters and sons, husbands and wives, and permanent companions in cases of serious human rights violations such as forced disappearance of persons,³⁹²¹ extrajudicial executions,³⁹²² and massacres.³⁹²³ In this context, the State in question has to disprove victims' claim.³⁹²⁴ Thus, when there is state's opposition, the IACtHR proceeded to examine the legal representatives' evidence and it has asked that at least testimonial evidence be provided.³⁹²⁵ Based on this closer examination of the IACtHR's jurisprudence on reparations, and also considering the difference in nature between the regional human rights courts and a criminal court such as the ECCC, it is possible to agree with the Supreme Court Chamber when this concludes that:

[...] the jurisprudence under the ACHR serves to demonstrate that while there is a standard practice of applying presumptions regarding the scope of the notion of victim, the concrete inferences are not treated as law but as factual statements drawn in consideration of the circumstances of the case. These presumptions may be of assistance for the ECCC inasmuch as they attest to the universality of certain probabilities in given circumstances. The ECCC, however, exercises its own discretion in formulating presumptions in the factual context of the cases before it.³⁹²⁶

Be that as it may, indirect victims' rights, including the possibility to claim reparations once constituted as civil parties, are independent from those of

³⁹¹⁹ Ibid., paras. 439-443.

³⁹²⁰ Ibid., para. 440.

³⁹²¹ IACtHR, Case of Blake v. Guatemala, Judgment of 24 January 1998, para. 114; IACtHR, Case of Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment of 22 September 2006, Series C No. 153, paras. 96-97; IACtHR, Case of Heliodoro-Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs. Judgment of 12 August 2008, Series C No. 186, paras. 174-175.

³⁹²² IACtHR, Case of La Cantuta v. Peru, Judgment of 29 November 2006, para. 218.

³⁹²³ IACtHR, Case of the Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2006, Series C No. 148, paras. 96-97; IACtHR, Case of the Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C No. 134, para. 146.

³⁹²⁴ See Pasqualucci (2003) 236-237.

³⁹²⁵ IACtHR, Case of Kawas-Fernández v. Honduras, Merits, Reparations and Costs, Judgment of 3 April 2009. Series C No. 196, paras. 130-139.

³⁹²⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 444.

the direct victims, i.e., indirect victims can be granted civil party status and claim compensations even ‘where the direct victim is alive and does not pursue the civil party action him or herself’.³⁹²⁷ Moreover, as for the two avenues whereby victims can join as civil parties and claim reparations under the 2007 Cambodian Code of Criminal Procedure: i) as indirect victim, i.e., having suffered personal injury as a result of the injury to his or her family members (*iure proprio*) or ii) as a successor (*iure hereditaris*),³⁹²⁸ the Supreme Court Chamber clarified that a early decision by the Trial Chamber ‘to limit the scope of eligible successors to circumstances where the direct victim had personally filed a civil party application before his or her death has no basis in applicable law’.³⁹²⁹

Finally, as previously discussed in detail,³⁹³⁰ the ECCC’s case law has considered the Cambodian cultural context to consider the nature of familial relationships, in particular extended family members,³⁹³¹ to grant civil parties status and, therefore, opening up a possibility for indirect victims as civil parties to claim for reparations. In this aspect, there is a similarity with the IACtHR’s case law on reparations.³⁹³²

2.4.3. Resources for Implementing Reparations

2.4.3.1. From the Convicted

As pointed out by the Supreme Court Chamber in its appeal judgment in *Duch*, unlike the reparations system existent under Cambodian law where civil parties may claim compensation for injury against a broader group of liable persons, including, but not limited to, perpetrators, the civil action can only be directed against the accused before the ECCC.³⁹³³ However, unlike the version of the ECCC Internal Rules considered by the Chamber in *Duch*,³⁹³⁴ which laid down

³⁹²⁷ Ibid., para. 418.

³⁹²⁸ Ibid., para. 419 (referring to articles 13 and 16 of the 2007 Cambodian Code of Criminal Procedure and citing article 16 which states that ‘in case of death of the victim, a civil action may be started or continued by his successors’.).

³⁹²⁹ Ibid., para. 421.

³⁹³⁰ See supra Chapter IV 2.4.2.1.

³⁹³¹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 643.

³⁹³² IACtHR, Case of Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment of 10 September 1993, paras. 54-66 (especially para. 62).

³⁹³³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 643 (citing internal rule 23.11 (Rev.3) which stated that ‘Subject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against and be borne by convicted persons’.).

³⁹³⁴ See Ibid., para. 11, footnote 22 (‘Unless otherwise indicated, as here, all references in this Appeal Judgment to the ECCC Internal Rules (“Internal Rule(s)”) are to Revision 3’.).

that the reparations award ‘shall [...] be borne by the convicted person’,³⁹³⁵ the current version also contemplates the alternative option of external funding to implement a specific reparations project,³⁹³⁶ as discussed in the next subsection. In any case, what should be left clear here is that civil actions in ECCC proceedings can only be brought against the accused and, therefore, the civil parties lack standing to file a claim against another civil defendant.³⁹³⁷ This feature has not been changed by the revisions of the Internal Rules.³⁹³⁸

The Trial Chamber in its judgment in *Duch* highlighted, as key features of civil party participation, ‘awards are directed against and borne exclusively by the Accused following a determination of responsibility for the harm established by Civil Parties as resulting from the criminal offending’.³⁹³⁹

However, as established in the ECCC Law ‘All penalties shall be limited to imprisonment’.³⁹⁴⁰ Nevertheless, the same ECCC Law provides for that:

[...] In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.³⁹⁴¹

Although under the ECCC Internal Rules the Chambers ‘may award only collective and moral reparations to Civil Parties’ and ‘These benefits shall not take the form of monetary payments to Civil Parties’,³⁹⁴² property confiscated from the accused can eventually be used to finance and implement some of the non-monetary reparations claimed by the civil parties. Internal Rules 23 *quinquies* (3) establishes that ‘In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either: a) order that the costs of the award shall be borne by the convicted person’. In interpreting this provision, alongside the Chamber’s power to ‘award only collective and moral

³⁹³⁵ ECCC Internal Rules, rule 23 (11) (Rev.3) (the full text read ‘These [reparations] shall be awarded against and be borne by convicted persons’). See also ECCC Internal Rules, rule 23 *quinquies* (1).

³⁹³⁶ ECCC Internal Rules, rule 23 *quinquies* 3 (b).

³⁹³⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 656.

³⁹³⁸ *Ibid.*, para. 656, footnote 1312.

³⁹³⁹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 661.

³⁹⁴⁰ ECCC Law, article 38.

³⁹⁴¹ *Ibid.*, article 39.

³⁹⁴² ECCC Internal Rules, rule 23 (1).

reparations to Civil Parties,³⁹⁴³ Pre-Trial Chamber in *Nuon Chea et al.* noticed that civil party's only right that may directly affect the accused's right in case of conviction is to 'seek in a "single submission" "in relation to each award, the single specific mode of implementation" of the award which *may* include an "order that the costs of the award shall be borne by the convicted person'.³⁹⁴⁴ The Chamber introduced the necessary precision that this particular issue is not related to the cost of the award but to civil party's right to claim moral reparations and, hence, does not affect the accused's position.³⁹⁴⁵

In *Duch*, the Trial Chamber identified no personal property, money or real property acquired unlawfully or by criminal conduct by the accused and, therefore, no asset which could form the subject of confiscation under article 39 (new) of the ECCC Law.³⁹⁴⁶ Based on this quite precarious situation, at the time the Trial Chamber delivered its judgment concluded that when the accused seems to be indigent, which is Duch's case, there was not a mechanism allowing the ECCC to substitute or supplement awards made against them with funds provided by national authorities or other third parties. Thus, the overwhelming losses suffered by the civil parties in *Duch* were compounded by the unlikelihood of recovery from the convicted, who was found to be indigent.³⁹⁴⁷

Whether Duch's indigence affects the ECCC's power to award reparations to be borne by him was an issue discussed by the Supreme Court Chamber in *Duch*, as part of the appeals filed by the civil parties' lawyers.³⁹⁴⁸ The Supreme Court Chamber began its analysis by referring to Cambodian Law. By doing this exercise, the Chamber found that the situation of indigence of an obligor, i.e., the accused, 'does not exclude the possibility that his/her obligations are nevertheless ultimately performed through the intervention of third parties'.³⁹⁴⁹ Having said so, the Chamber moved on to consider the *sui generis*

³⁹⁴³ Ibid., Loc. cit.

³⁹⁴⁴ Nuon Chea et al. (Case 002), 24 June 2011, para. 99.

³⁹⁴⁵ Ibid., Loc. cit.

³⁹⁴⁶ See Kaing Guek Eav alias Duch (Case 001), Inquiry into Income and Assets of the Accused, Trial Chamber, 15 October 2009; Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 634.

³⁹⁴⁷ Kaing Guek Eav alias Duch (Case 001), 26 July 2010, para. 666.

³⁹⁴⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 666-668.

³⁹⁴⁹ Ibid., para. 666 (referring to the fact that civil action under the 2007 Cambodian Code of Criminal Procedure presupposes that even when concerning an indigent civil defendant, (s)he may receive income in the future or third parties may pay instead of him/her; and citing, among others, article 434 (1) of the Civil Code of Cambodia, which explicitly foresees that 'an obligation may be performed by a third party as well as by the obligor'.).

and dual private/public character of the ECCC reparations regime and, therefore, the Chamber reckoned that a reparations award that, in all probability, can never be enforced (*de facto fictious*), ‘would belie the objective of effective reparation and would be confusing and frustrating for the victims’.³⁹⁵⁰ The Chamber correctly stated that whereas in a civil action seeking a title of execution against an indigent accused is based on a choice and private interest of the plaintiff, in proceedings that include elements of reparations, ‘the effectiveness requirement mandates that there be a tangible availability of funds’.³⁹⁵¹ Thus, reparations claims programs envisage reparations to be funded by the State, companies or specific funds (e.g., the TFV in the ICC).³⁹⁵²

The Supreme Court Chamber in *Duch* came to terms with the lack of externally subsidized funding mechanism whereby a reparations award issued against an indigent convicted could be given effect and, hence, agreed with the Trial Chamber’s implicit finding according to which the reparations award should be limited to what can realistically be implemented taking into account the convicted’s actual financial situation.³⁹⁵³ The modalities of reparations claimed by the civil parties and how the Trial Chamber and Supreme Court Chamber addressed them taking into consideration, *inter alia*, this important limiting financial factor are analyzed later on.³⁹⁵⁴ What should be mentioned here is that since the possibilities (in purely abstract terms) whereby Duch can enrich himself or a third party would come forward to give means sufficient to fund the reparations on Duch’s behalf rather than on his/her/its own name are so remote, those chances can practically be excluded and cannot be a basis for ordering reparations.³⁹⁵⁵ On the contrary, the Supreme Court Chamber adopted an approach that, although limited by the notorious constraints under the ECCC’s previous reparations implementation regime, is realistic as is ‘tailored to what is in practical terms attainable is appropriate in the ECCC reparations framework’.³⁹⁵⁶

³⁹⁵⁰ Ibid., para. 667.

³⁹⁵¹ Ibid., Loc. cit.

³⁹⁵² Ibid., Loc. cit.

³⁹⁵³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 668 (referring to Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, paras. 664, 666).

³⁹⁵⁴ See *infra* Chapter V 4.4.2.

³⁹⁵⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 668.

³⁹⁵⁶ Ibid., Loc. cit.

2.4.3.2. External Funding

Previous versions of the ECCC Internal Rules (applied in *Duch*) only laid down that the collective and moral reparations to civil parties ‘shall be awarded against, and be borne by convicted persons’.³⁹⁵⁷ Although reparations orders are issued against the convicted and, therefore, depend on the conviction,³⁹⁵⁸ not only the convicted can bear the reparations award according to the amended Internal Rules, as established in the current version of internal rule 23 *quinquies*:

3. In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either:

- a) order that the costs of the award shall be borne by the convicted person; or
- b) recognize that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

In *Nuon Chea et al.*, where this provision is being applied, the Trial Chamber considered that the implementation regime of reparations was amended due to the uncertainties of recovery of victims’ reparations through the ‘traditional civil party claim’.³⁹⁵⁹ Thus, rule 23 *quinquies* (3) (b) introduces ‘a new and independent avenue for reparations’ and initiatives under this provision do not result in enforceable claims against the accused.³⁹⁶⁰ Accordingly, the underlying idea:

[...] was to ensure that tangible, externally funded awards acknowledging the suffering of Civil Parties could be realized soon after a verdict becomes final. This presupposes the development of awards (technically through program management) in parallel with the ongoing trial. Given that the Victims Support Section already deals with non-judicial measures, allocation of project development in relation to Rule 23*quinquies* (3)(b) to this section was the obvious choice.³⁹⁶¹

³⁹⁵⁷ ECCC Internal Rules, rule 23 (11) (Rev. 3); ECCC Internal Rules, rule 23 *quinquies* (1) (Rev. 5).

³⁹⁵⁸ ECCC Internal Rules, rule 23 *quinquies* (1).

³⁹⁵⁹ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Initial Specification of the Substance of Reparations Awards Sought by the Civil Party Lead-Co-Lawyers Pursuant to Internal Rule 23*quinquies* (3), E125, Trial Chamber, 23 September 2011, p. 2.

³⁹⁶⁰ Ibid., Loc. cit.

³⁹⁶¹ Ibid., Loc. cit.

Moreover, a program manager, tasked with the development of these awards, was installed in the VSS to design the awards identified by the civil parties' lead co-lawyers as well as to ensure their funding and readiness for implementation at the verdict stage.³⁹⁶² The process of consultation and the modalities of reparations and their implementation presented so far in reparations projects in *Nuon Chea et al.* are discussed later.³⁹⁶³ What should be highlighted here, concerning financing of the implementation of the collective and moral reparations in this case is the so-called 'Project to establish a trust fund and for collective and moral reparations', presented by the civil parties' lead co-lawyers as follows:

[...] We wish to point here that what we are proposing is the establishment of an independent non-governmental, quasi-administrative body, outside the ECCC framework. Its purpose would be to implement reparation awards ordered by the Court and to allocate funds to that effect.

[...] it must be demonstrated to the Chamber that funding for the projects has been secured. It is therefore justified to envisage the establishment of a trust fund or a funding organ. This would enable donors who are prepared to fund a reparation project to willingly entrust funds to an independent organisation for use in implementing a variety of projects.³⁹⁶⁴

The civil parties' lead co-lawyers mindful of a previous observation raised by the Trial Chamber, which consisted in that a trust fund cannot be established as an organ of the ECCC as this is outside the ECCC legal framework,³⁹⁶⁵ added that:

There are many types of trust funds. The first example is the fund established by the International Criminal Court. The Chamber could argue that the fund was established through the Rome Statute at the same time as the ICC as an organ thereof. Such is not the case here. However, there is no impediment to establishing such a fund here in another form, provided that it guarantees use of the funds collected.³⁹⁶⁶

This clarification by the lead co-lawyers indeed is similar to the Supreme Court Chamber's in *Duch* observation according to which a workable solution,

³⁹⁶² Ibid., Loc. cit.

³⁹⁶³ See infra Chapter V 3.4.2.1 and 4.4.2.

³⁹⁶⁴ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, paras. 41 and 81.

³⁹⁶⁵ Nuon Chea et al. (Case 002), E125, 23 September 2011, p. 3.

³⁹⁶⁶ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 82.

applicable under the amended regime in *Nuon Chea et al.*, may be the setting up of an externally-subsidized trust fund, whose administrative structure would be tasked with the implementation of measures asked.³⁹⁶⁷ In any case, as the Chamber correctly stressed, monetary payments are excluded although the proposed projects are to be financed either by the convicted person or by external donors.³⁹⁶⁸ However, due to the alleged indigence of the co-accused in *Nuon Chea et al.* (like in *Duch*), financing by those convicted is not a realistic option. It is important to notice that although civil parties could not benefit of the amended regime in *Duch*, most of them have also been admitted as civil parties in *Nuon Chea et al.*³⁹⁶⁹ Accordingly, as encouraged by the Supreme Court Chamber,³⁹⁷⁰ these civil parties can benefit from the new regime to implement their reparations claims in *Nuon Chea et al.* Indeed, in *Nuon Chea et al.*, the current fundraising strategy includes the establishment of the Victims Foundation of Cambodia ‘as a potential mechanism for channeling and administering funds for reparations projects’.³⁹⁷¹

Thus, the VSS may to some extent step in and, if there are external funds, to make the implementation of reparations awards a reality as provided in the current version of internal rule 23 *quinquies*. Internal rule 12 *bis* (2) complements this provision by stating that:

The Victims Support Section shall, in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, endeavour to identify, design and later implement projects envisaged by Rule 23*quinquies* (3)(b).

As established in its web-site, part of the VSS’s mission consists in coordinating the process of seeking reparations for victims via legal and non-judicial measures and programs addressing victims’ broader interests both during the ECCC proceedings and beyond.³⁹⁷² To implement its mandate, the VSS:

³⁹⁶⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 704, footnote 1430.

³⁹⁶⁸ *Ibid.*, para. 668, footnote 1343.

³⁹⁶⁹ *Ibid.*, para. 704, footnote 1430.

³⁹⁷⁰ *Ibid.*, Loc. cit.

³⁹⁷¹ *Nuon Chea et al.* (Case 002), Lead Co-Lawyers’ Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations (Internal Rule 80BIS(4)) With Strictly Confidential Annexes, Civil Parties’ Lead Co-Lawyers, 12 February 2013, para. 34.

³⁹⁷² VSS’s Mission Statement, available at: <http://www.eccc.gov.kh/en/victims-support/vss-structure> (last visit on 30 November 2012).

[...] seeks to design, propose, and seek alternate financial sources for development and implementation of non-judicial measures and programs addressing the broader interests of victims. These programs may when appropriate be developed and implemented in collaboration with government and non-governmental organization external to the ECCC.³⁹⁷³

Corresponding to the first case within *Nuon Chea et al.*, i.e., Case 002/01, the Trial Chamber requested from the lead co-lawyers, in consultation with the VSS, information regarding the status of the financing of the reparations projects to ensure that all measures sought pursuant to internal rule 23 *quinquies* (3) (b) might be realized with the support of donor assistance and external collaborators and within a meaningful time frame.³⁹⁷⁴ At the time of writing this thesis, the Trial Chamber requested the civil parties' co-lead lawyers to file clarifications concerning funding for an important number of reparations projects and the final written submissions.³⁹⁷⁵

Notwithstanding civil society groups expressed their approbation of the amendments introduced to the ECCC Internal Rules in 2010 whereby the VSS's mandate was expanded,³⁹⁷⁶ problems with funding have raised fears about insufficient financial resources due to the ECCC's budgetary problems.³⁹⁷⁷ This has led to NGOs doing work that should in principle be conducted by the ECCC, which in turn may originate the disadvantage of making the ECCC feel self-satisfied as for funding for victims.³⁹⁷⁸

³⁹⁷³ Ibid., Loc. cit.

³⁹⁷⁴ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Indication of Priority Projects for Implementation as Reparation (Internal Rule 80*bis*(4)), Trial Chamber, 3 December 2012; Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Trial Chamber's Response to the Lead Co-Lawyers' Initial Specification of the Civil Party Priority Projects as Reparations Pursuant to Rule 80 *bis*(4), Trial Chamber, 1 August 2013, para. 2.

³⁹⁷⁵ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Trial Chamber's Subsequent and Final Order on the Updated Specification of Civil Party Priority Projects Pursuant to Rule 81*bis*(4), Trial Chamber, 6 September 2013.

³⁹⁷⁶ See, e.g., Cambodian Human Rights Action Committee, 'New Directions for Victim Participation at the ECCC', Press Release, 26 February 2010, p. 1 ('In doing so, the Court recognizes the need to complement the criminal justice process with restorative elements of justice. The relevant provision is broad and allows therefore the Victim Support Section to design – by applying a consultative and inclusive approach – measures that are most appropriate for victims of the Khmer Rouge'). Available at:

http://www.chrac.org/eng/CHRAC%20Statement%20in%202010/02_26_2010_CHRAC%20Press%20Release%20on%20Outcome%20of%207th%20ECCC%20Plenary%20in%20Eng.pdf (last visit on 30 November 2012). See also McGonigle Leyh (2011) 217.

³⁹⁷⁷ McGonigle Leyh (2011) 217.

³⁹⁷⁸ Ibid., 221.

In the particular case of using external funding to implement a reparations award project to be provided for the victims, according to the quoted rule 23 *quinquies* (3) (b) is subject not only to a specific designation or identification of a specific project in cooperation with the VSS, but also to the quite challenging task to guarantee sufficient external funding. The importance of external funding to implement reparations and how it operates within the ECCC framework is illustrated as follows. In *Duch*, the Supreme Court Chamber considered that due to convicted's indigence, *inter alia*, the installations of memorials at Tuol Sleng and Choeng Ek and transformation of Prey Sar into a memorial site could not be granted.³⁹⁷⁹ Nevertheless, the Supreme Court Chamber noticed that an association, namely the Association of Victims of Democratic Kampuchea 'Ksem Ksan',³⁹⁸⁰ had started a fund-raising initiative, which may attract potential donors' interests. However, considering that the edification of a memorial within the S-21 compound is a complex process and requires the participation and coordination of different entities and administrative bodies, the Chamber only ended up inviting and encouraging 'the competent national and international entities to 'facilitate the performance of any and all measures required to give it effect'.³⁹⁸¹ Thus, due to the ECCC's legal framework, the Chamber fell short of ordering or asking further actions to ensure the allocation of funds for this particular modality of reparations claimed by the civil parties. Only time will tell if the merely exhortative but not binding language produces any real impact.

Lastly, but equally important, the Supreme Court Chamber in *Duch* stressed that the limited reparations available from the ECCC did not affect the victims' right to seek and receive reparations that fully address their harm in proceedings that may be available in the future.³⁹⁸² However, it also reckoned that unlike, for example, the situation in Rwanda where defendants were indigents, there is no ECCC legal instrument provision foreseeing that a reparations decision be transmitted to domestic courts or other competent bodies.³⁹⁸³ Moreover, awarded monetary reparations in favor of victims in Rwanda as damages in the proceedings against the convicted were ordered by domestic courts in application of national law.³⁹⁸⁴

³⁹⁷⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 692.

³⁹⁸⁰ *Ibid.*, para. 690.

³⁹⁸¹ *Ibid.*, para. 692.

³⁹⁸² *Ibid.*, para. 668.

³⁹⁸³ *Ibid.*, para. 668, footnote 1344.

³⁹⁸⁴ *Ibid.*, *Loc. cit.*

Although the matter of whether a civil action would be available at the Cambodian system,³⁹⁸⁵ the fact that the civil action can only be brought against the accused at the ECCC ‘precludes the use of legal framework of the 2007 Code of Criminal Procedure to sue the State before the ECCC’.³⁹⁸⁶ In addition, unlike the ICC proceedings,³⁹⁸⁷ the ECCC instruments do not contemplate a mechanism to invite State representations.

2.5. Comparative Conclusions

At the examined international and hybrid criminal courts, victims’ status as reparations claimants only exists at the ICC and the ECCC, i.e., victims can claim reparations in criminal proceedings at the ICC and the ECCC and, later, receive reparations for the harm inflicted caused by the accused’s crimes for which (s)he is convicted. Victims’ status as reparations claimants at the ICC and especially at the ECCC in general terms resemble to that existent in the French system. Reparations orders at the ICC and the ECCC may only be issued against the convicted but they can be implemented by the TFV (ICC) or, potentially, with external funds by the VSS in liaison with non-governmental organizations, e.g., an externally subsidized trust fund, and governmental organizations (ECCC).

At the ICTY, the ICTR, the SCSL and the STL, victims lack the status of reparations claimants although they may benefit from some limited rehabilitative measures, such as medical assistance, but based on their status as witnesses at those courts. Even at the STL where victims can participate as victim participants, the possibility for them to claim reparations does not exist. What exists in these courts is a sort of ‘delegation’ to domestic courts where victims can claim compensation, i.e., victims may use a condemnatory judgment from these tribunals to claim compensation at the national level, but, as far as it is known, no domestic compensation claims have been granted based on a condemnatory judgment of the ICTY, the ICTR or the SCSL. The STL may

³⁹⁸⁵ Ibid., para. 656 (referring to articles 291 and 355 of the 2007 Cambodian Code of Criminal Procedure that state that a civil defendant other than the accused becomes responsible in connection with the establishment of the accused’s criminal responsibility. As for the state obligation to grant reparations, it is independent of the determination of the accused’s criminal responsibility; however, there is no positive domestic regulation that would tie up state obligation to pay reparations upon the determination of a former state agent’s criminal responsibility. Accordingly, the Supreme Court Chamber found that the use of the 2007 Code of Criminal Procedure provisions on a civil defendant is likely to be a moot question.).

³⁹⁸⁶ Ibid., Loc. cit.

³⁹⁸⁷ See ICC Statute, article 75 (3); ICC RPE, rules 94 (2) and 95 (1).

'identify' victims who have suffered harm as a result of the commission of crimes by an accused convicted by the STL and who later may bring compensation claims at national courts and, thus, for identification purposes victims' participation as victim participants may be important. In any case, victims not identified by the STL can also use the condemnatory judgment to claim compensation at the national level. Victim participant status at the STL is not a pre-requisite to claim compensation at the national level. The ICTY, the ICTR and the SCSL can order, as a penalty against the accused, restitution of property and proceeds to the rightful owners, which can include victims. However, as far as it is known, this provision has not been applied. Indeed, *amicus curiae* on restitution of property and/or compensation at the ICTR have been rejected. Although there have been some attempts at the ICTY and the ICTR to grant victim the status of reparations claimants, in particular concerning compensation, these initiatives have been unsuccessful. Reasons for this negative outcome have included, *inter alia*, that these tribunals' judges considered these tribunals not to be suited for handling compensation claims, funding problems, and potential delays. Notwithstanding efficiency and financial concerns may be sound, it is herein criticized the exclusion of victims as reparations claimants from these courts, which have thus adopted a purely retributive approach on this regard.

The lack of standing as reparations claimants before the ICTY, the ICTR, the SCSL and the STL is a feature also present in the Anglo-American systems, where the fact that victims can receive compensation via penalties imposed against the accused does not transform them in technically speaking compensation claimants. However, in the Anglo-American systems and also in the French one, victims have the option to claim reparations before civil courts via, for instance, in United States class actions and/or the ACTA. Indeed, the class actions as implemented in the United States may be considered as a general/indirect referent for international and hybrid criminal courts since in both contexts large numbers of reparations claimants are involved. Be that as it may, national systems provide avenues additional to criminal proceedings such as civil courts and state funds where victims can claim reparations, mainly compensation. Accordingly, on this regard, the scope of alternatives available in national systems is broader than the existent at the examined international and hybrid criminal courts.

The ICC is the first court, among the international and hybrid criminal courts, at which victims can claim reparations. The ICC reparations regime recognizes the need to go beyond an exclusively punitive justice approach by

redressing the suffering inflicted on the victims and, thus, introduces a restorative justice approach element based on victims' interest to receive reparations. At the ECCC, one of the two purposes for which victims become civil parties is to seek reparations, which is similar to the French system. Therefore, the civil party participation at the ECCC includes the right to seek reparations. However, the reparations regime at the ECCC in comparison to that in place at the Cambodian System (and also as for the French system) is in some aspects more limited as, *inter alia*, civil parties at the ECCC can only direct their reparations claims against the accused; reparations at the ECCC are only limited to moral and collective awards; and, unlike the ECCC, in Cambodia victims can bring the civil action before civil courts.

Concerning the scope of reparations claimants and beneficiaries, the most important difference between the ICC and the ECCC is whether victims' participation as victim participants in the proceedings (ICC) or civil party constitution (ECCC) is a requirement to claim reparations. On the one hand, at the ICC, victims do not need to be victim participants, i.e., are not required to participate as victim participants during pre-trial or trial to seek and receive reparations. This approach should be welcome as it does not restrict reparations to the few victims who participated in the trial but also considers the (much) larger universe of victims of crimes committed by the accused and upon which (s)he is convicted and who for reasons, most of the times beyond their control, could not or did not want to become victim participants. Accordingly, it is not only non-discriminatory but also realistic. Victims who participated as victim participants in the ICC criminal proceedings have, *inter alia*, the personal interest to obtain reparations. Be that as it may, for victims (including victim participants) to be reparations claimants and receive reparations accordingly, they need to request reparations via proceedings detailed later.³⁹⁸⁸ In any case, the ICC exceptional court-initiated reparations proceedings may benefit victims, i.e., eligible reparations beneficiaries, who could not initially apply for reparations if they can be identified by the ICC and/or the TFV and, thus, have the chance to later claim reparations.

Principles applicable to victims as reparations claimants at the ICC include *inter alia*: i) consideration of all victims, in particular, children, elderly, disabled and sexual or gender violence victims, and related to it, reparations awards suitable for sexual violence and child victims; ii) reparations based on non-discriminatory grounds; and iii) accessibility, consultation with and participation from victims, families and communities.

³⁹⁸⁸ See *infra* Chapter V 3.3.1.

On the other hand, victims who want to claim and obtain reparations at the ECCC are first required to become civil parties, which may (considerably) reduce the universe of potential reparations claimants and beneficiaries. Although this situation is similar in the French system, i.e., constitution as civil parties to claim reparations at a criminal court, in France victims may alternatively exercise their civil action before civil courts, which is non-existent at the ECCC. In any case, at the ECCC, civil party is not determined by residence or nationality criteria. ECCC's case law has determined that the accused's responsibility for any harm for reparations purposes is established once the accused's criminal responsibility is determined, i.e., once (s)he is convicted. In other words, granting reparations to civil parties at the ECCC depends on the accused's conviction, which is also the rule in the French system but with the caveat that a French court may under certain conditions endorse the civil party's claim for damages in case of acquittal.

Therefore, whereas at the ICC victims' status as reparations claimants may be exercised independently from the victim participant status, i.e., victims do not need to become (or remain) victim participants to claim reparations, at the ECCC civil party constitution is required for victims to claim reparations.

However, victims' status as reparations claimants and beneficiaries at the ICC and the ECCC presents several similarities. First, when it comes to some modalities of collective reparations, victims who claim reparations at the ICC or the ECCC will not necessarily be the only reparations beneficiaries as victims who could not claim reparations, could not be identified and/or for whom no one claimed reparations benefits at the ICC or who could not become civil parties to exercise the respective civil action at the ECCC may potentially and at least indirectly benefit from some symbolic and/or non-monetary collective reparations such as collective (rehabilitative) measures for communities. Second, at the ICC and the ECCC case-based reparations regimes, the granting of reparations to victims depends on the accused's conviction as the harm inflicted on the victim to be redressed has to be causally linked to the crime(s) upon which the accused was convicted. Third, the categories of reparations claimants and beneficiaries, i.e., direct and indirect victims, at the ICC and the ECCC are to an important extent similar. In shaping these categories, the ICC and the ECCC have mainly relied on jurisprudence on reparations from the IACtHR and the ECtHR, and the UN Basic Principles and Guidelines. Fourth, at the ICC victims as reparations claimants may be considered as parties concerning their reparations claims during the reparations phase proceedings, i.e., after

conviction, although there is no official civil party status at the ICC unlike the ECCC.

At the ICC, in application of the definition of victims under the ICC RPE, used not only for victims' status as victim participants but also as reparations claimants, and ICC's case law (in particular the reparations decision in *Lubanga*), reparations for material, physical or psychological harm can be claimed by and granted to not only direct victims but also indirect victims, i.e., those who suffer harm as a result of the harm inflicted on direct victims. Indirect victims include family members of the direct victims, those who tried to prevent the commission of a crime and those harmed when helping or intervening on direct victims' behalf. In further analyzing the notion of indirect victims to determine the scope of reparations beneficiaries, the Trial Chamber in its reparations decision has highlighted the importance of the cultural context when examining family structures, and also the presumption that an individual is succeeded by his/her spouse and children.

Likewise, ECCC's case law has concluded that not only direct victims but also indirect victims can be civil parties and, therefore, claim reparations for physical, material or psychological injury before the ECCC. The indirect victim category is not limited to family members but also may include, for example, common law spouses, distant relatives, (*de facto*) adopters, adoptees and friends. To examine familial relationships, the ECCC considered the Cambodian context. Nevertheless, the ECCC Supreme Court Chamber concluded, as for immediate family members who do not present injury, that they are not considered indirect victims. Although this may in principle be criticized in the light of human rights courts' reparations jurisprudence, the ECCC's approach is sound as, *inter alia*, the margin of discretion and scope of reparations claimants and beneficiaries in the former (rights-focused) is broader than in the latter (injury-focused in criminal proceedings). Even in human rights courts' reparations jurisprudence, the presumption of immediate relatives as indirect victims is not absolute but rebuttable. In any case, indirect victims at the ECCC can be granted civil party status and claim reparations regardless of whether the direct victim is alive, which is similar to the French system. However, unlike the French and Cambodian systems, the ECCC is not limited to the direct victim having first applied for civil party constitution when it comes to eligible successors.

Concerning causation, i.e., the causal link between the crime for which the accused is convicted and the harm inflicted on victims for which they will be granted reparations, the ICC RPE do not provide a specific legal standard. The 'as a result' of the commission of a crime phrasing (rule 85 (a)) has been

interpreted by the ICC as not limited to direct harm. In the reparations decision in *Lubanga*, Trial Chamber I has applied the 'proximate cause' standard, which consists in the existence of a 'but/for' relationship between the crime and the harm inflicted and, thus, not limited to 'direct harm' or 'immediate effects' of the crimes. This standard is also applied in the Anglo-American systems. At the ICTY, the ICTR, the SCSL and the STL, compensation delegated to national systems does not require explicitly direct causation. However, *inter alia*, ICC Trial Chamber I's not very clear language by referring to 'victims of sexual and gender-based violence' as seemingly within the scope of reparations in *Lubanga*, where the accused had not even been charged with sexual violence crimes as such, has led to an on-going appeal. In any case, putting aside that clarity of language problem, both the Trial and Appeals Chambers in *Lubanga* have only referred to victims (both direct and indirect as previously defined) of crimes for which the accused was convicted for reparations purposes. Regardless of whether the legal causation standard is confirmed by the ICC Appeals Chamber, the proximate cause standard can in principle be accepted as the legal causation standard as there is no reference to a 'direct' causation in the ICC RPE although when it comes to factual causation it may be difficult to apply, like any another single standard.

In any case, it is concluded here that if the 'proximate cause' standard finally prevails, it should be applied in a restrictive manner, excluding as much as possible (too) remote or speculative harm from reparations, based on the following reasons. First, victims claiming reparations can only and by definition receive them in the ICC case-based reparations regime if those claimants are victims, both direct and indirect, of those crimes for which the accused was found guilty. Second, those victims who are not eligible to receive reparations under the ICC case-based reparations regime can still benefit from the TFV's general assistance mandate. Third, a quite flexible application of the 'proximate cause' standard may likely lead to an exponential increase in reparations claimants and beneficiaries by including harm and/or victims too remote from the crimes that led to the accused's conviction. Not only would it denaturalize the logics of the ICC case-based reparations regime, i.e., linked to crimes for which the accused was found criminally responsible, but also it in practical terms would most likely jeopardize the efficiency of the reparations regime set up in the ICC due to, *inter alia*, the limited resources available for reparations and potential delays in proceedings. The above-mentioned arguments are not incompatible with acknowledging that, for example, in *Lubanga*, the fact that those victims of crimes for which the accused was found guilty, i.e., enlisting,

conscripting or using children under the age of 15 to directly participate in the hostilities, suffered sexual violence or enslavement (especially girls) and, hence, have to receive reparations tailored to redress the particular dimension of their harm caused by sexual and gender-based violence and abuse, as identified by Trial Chamber I. Thus, in *Lubanga*, victims (direct and indirect) who were sexually abused as part of the ‘essential support function’ connected to the crimes for which Lubanga was convicted should also be redressed for that harm.

With regard to causation, the ECCC Supreme Court Chamber has considered the need for a causal link between the crime and the reparations sought and, in application of the ECCC Internal Rules, this causal link consists in an injury suffered as a ‘direct consequence’ of the crime, i.e., a direct causal link. The presence of injury thus established is conducive to the civil party’s right to seek reparation. Therefore, the harm to be redressed has to be directly attributable to the crimes for which the accused is convicted. In any case, reparations are not limited to persons against whom crimes were perpetrated (direct victims) but also include a larger group of victims (indirect victims) provided that criminal responsibility is the direct cause of the injury. The direct causal link at the ECCC is similar to the one existent in the French system.

Concerning resources for implementing reparations, a first point to be remembered is that the ICC and the ECCC can issue a reparations order directly against the convicted person. At the ICC, financial penalties (punitive measures), i.e., fines and forfeiture, can be used to fund reparations in favor of victims. However, it should be borne in mind that reparations regime and punitive measures are although complementary distinct in nature. The ICC reparations regime is not of a punitive nature since reparations at the ICC do not seek to punish the perpetrator but address the harm caused to the victims. Reparations under the ICC are not penalties. This feature is different from the Anglo-American systems where compensation orders (England) and restitution orders (United States) are penalties in nature although they may arguably have a dual effect (or even purpose), i.e., punitive and restorative, especially in the United States where ‘full and timely restitution’ (Federal CVRA) has been worded as a victim’s right. Indeed, reparations and penalties at the ICC may be considered as two sides of the same coin, i.e., interrelated, but different in nature. Even though funding reparations for victims out of the financial punitive measures imposed on the convicted present advantages for victims and even for the defendant, the most important limitative factor is the convicted’s lack of financial means, which is common at the international level as evidenced in *Lubanga*. Nevertheless, this

important gap is compensated at the ICC via its TFV, whose first mandate concerns case-based reparations.

Thus, the ICC can implement its case-based reparations orders against the convicted through the TFV and, hence, when the former needs funds (e.g., in case of convicted's indigence) can use those collected by the TFV but without affecting the TFV's second mandate, which is of general assistance. Accordingly, the TFV is a *sui generis* mechanism not only to complement funds when the ICC needs to provide case-based reparations but also to design and implement reparations plans, for example, in *Lubanga*, as seen later.³⁹⁸⁹ The TFV is *mutatis mutandi* similar to national practice examined where there are specific compensation funds as alternative avenues to provide reparations to victims. However, in the case of the TFV, its reparations mandate is intrinsically linked to the cases litigated before the ICC.

When it comes to the ECCC, although there are not monetary reparations, financial resources are necessary to implement collective and moral reparations (with some exceptions such as apologies). The reparations order is addressed against the convicted and, under the previous implementation regime, it could only be borne by him/her, i.e., to assume the costs thereof. Nonetheless, as shown in *Duch*, due to convicted's indigence, funds, for example, obtained via confiscation of the accused's property, which may eventually be used to finance and implement non-monetary reparations, are normally not found. Nevertheless, the amended implementation regime of reparations at the ECCC, applicable to *Nuon Chea et al.*, permits as an option that reparations initiatives identified by the civil parties' lead co-lawyers in cooperation with the VSS may be supported by external funding. Thus, it has been prepared a project to establish an externally subsidized trust fund to finance collective and moral reparations in this case. Most of the civil parties in *Duch* are also civil parties in *Nuon Chea et al.* and, thus, at least this time their collective and moral reparations claims can be externally financed. The projected trust fund will not be an ECCC's organ, i.e., not like the TFV. In any case, the always challenging process of securing funds will determine whether reparations projects succeed.

Finally, it should be mentioned that, *mutatis mutandi* similar to the French system, the ECCC Law contemplates confiscation of the accused's property,³⁹⁹⁰ but unlike the French system, not fines. Moreover, in France, the so-

³⁹⁸⁹ See *infra* Chapter V 3.3.2, 4.3.1.1 and 4.3.2.

³⁹⁹⁰ As seen before, confiscated property ordered by the ECCC in principle returns to the State. See *supra* Chapter V 2.4.3.1.

called ‘sanction-reparation’ penalty can be ordered and may benefit victims who did not become civil parties.

3. Victims and Reparations Proceedings

In this subchapter, after some general points on the national systems considered and the ICTY, the ICTR, the SCSL and the STL, the analysis is focused on reparations proceedings and how victims participate/intervene in them to claim and receive reparations at the ICC and the ECCC. Thus, the analysis follows the sequence of procedural stages where victims can claim reparations from bringing their reparations requests, including trial and appeals, and putting emphasis on reparations phase proceedings such as reparations hearings, reparations orders and appeals against them. As for the ICC, victims’ situation at the TFV (reparations implementation phase) is also considered. The subchapter is completed with comparative conclusions.

3.1. National Systems

3.1.1. English Adversarial System

As previously determined, victims are not technically speaking reparations claimants in criminal proceedings although they may benefit from compensation orders established as penalty against the accused by a criminal court. In other words, the court may make a compensation order of its own accord and the victim neither has to submit an application nor can file a civil claim.³⁹⁹¹ In any case, the likelihood to receive compensation via criminal courts contrasts with a purely retributive justice approach that offers nothing on this regard.³⁹⁹² Indeed, compensation orders have been considered relatively successful since they are better enforced and made more often than mechanisms to compensate victims in civil law jurisdictions (adhesion model).³⁹⁹³ However, in an absolute sense, the frequency and amount of awards via compensation orders remain very modest.³⁹⁹⁴ Indeed, an important number of victims were led to believe that they were likely to receive compensation via criminal courts although they received nothing in spite of a legal requirement.³⁹⁹⁵ In any case, victims seem to be more concerned about whether the defendant made a personal contribution rather than the actual amount of compensation.³⁹⁹⁶

³⁹⁹¹ Brien and Hoegen (2000) 258 and 1073.

³⁹⁹² Doak (2008) 235.

³⁹⁹³ Brien and Hoegen (2000) 1099.

³⁹⁹⁴ *Ibid.*, Loc. cit.

³⁹⁹⁵ Doak (2008) 235.

³⁹⁹⁶ *Ibid.*, 236.

It is herein briefly examined victims' status as reparations claimants via civil actions as an alternative manner to obtain reparations from the offender. Although the majority of crimes against the person or property also constitute civil wrongs and, hence, victims have always been able to pursue offenders for damages via the civil justice system, civil actions are rare.³⁹⁹⁷ Reasons explaining this include: i) the burden of proof on victims as they, unlike in criminal proceedings, have to conduct investigations, gather evidence and prove the case before the civil court in a lengthy and time consuming process; and ii) civil actions are seldom financially worthy as civil actions are expensive and most perpetrators have very limited financial resources to afford large compensation payments.³⁹⁹⁸ Be that as it may, conviction in criminal proceedings can increase the likelihood to receive reparations in the civil jurisdiction; however, when criminal proceedings have taken place, victims will still need to testify again before the civil jurisdiction,³⁹⁹⁹ which may lead to secondary victimization. In any case, the victim can take the perpetrator to a civil or a county court and obtain judgment against him/her regardless of whether the case is proceeded in criminal courts.⁴⁰⁰⁰ Nonetheless, unlike criminal proceedings, the enforcement of the judgment is up to the victim and not the court, which increases the constraints for victims.⁴⁰⁰¹ Civil judgment debts are pursued via the county and high courts and there are various means to enforce debts, including an Attachment of Earnings Order.⁴⁰⁰²

Finally, eligible victims have the possibility to apply for reparations from the State via the CICA, which is *inter alia* obligated to provide explanations of its decisions, give information on the procedure and notify its decision to review its decision to the applicants.⁴⁰⁰³ Moreover, victims may appeal the award, first to a higher level within the CICA and, then, to the Criminal Injuries Compensation Appeals Panel, where claimants *inter alia* have to receive information on procedure for appeals and on appeals decisions.⁴⁰⁰⁴ Victims should make their complaints in writing to the CICA and, where applicable, to the Appeals Panel.⁴⁰⁰⁵ However, there have been important criticisms against the state

³⁹⁹⁷ Ibid., 227.

³⁹⁹⁸ Ibid., 231-232.

³⁹⁹⁹ Ibid., 227.

⁴⁰⁰⁰ Lewis and Ellis (2006) 9.

⁴⁰⁰¹ Ibid., Loc. cit.

⁴⁰⁰² Ibid., 9-10.

⁴⁰⁰³ See Code of Practice for Victims of Crime, section 13.

⁴⁰⁰⁴ See Ibid., section 14.

⁴⁰⁰⁵ Ibid., p. 20.

reparations regime such as: i) the requirement for applicants to have been living in England, Scotland or Wales when the injury was sustained; ii) the apparent distinction between ‘deserving’, i.e., victims free from blame, from ‘undeserving’ victims; iii) victims are denied compensation when they have criminal records; and iv) ambiguity on what is a violent offence, which is important as the scheme primarily targets some offences against the person, the so-called ‘core’ assault offences.⁴⁰⁰⁶ On the other hand, there is no requirement that the perpetrator is prosecuted or even identified as the applicant only has to show that (s)he has been inflicted a personal injury meriting a tariff excess scale in excess of £ 1000 or that (s)he is a dependant or relative of the deceased victim.⁴⁰⁰⁷ Lastly, but equally important, it should be noted that the EU Council Directive on Compensation foresees, in cross-border situations, that the deciding authority may hear the applicant.⁴⁰⁰⁸

3.1.2. American Adversarial System

As previously said, victims are not technically speaking reparations claimants in criminal proceedings. However, there are some ‘indirect’ avenues whereby they may participate in the proceedings related to and leading to the imposition of restitution by a court, as a penalty, on the convicted and/or benefit from restitution thus established. Relatively recent cases under the CVRA are particularly useful to illustrate this point. Thus, in *In re W. R. Huff Asset Management Co., LLC*, a group of victims petitioned for a writ of mandamus to vacate the settlement agreement in a forfeiture action.⁴⁰⁰⁹ The Second Circuit Court of Appeals in this case determined by denying the mandamus (in appeals) that nothing under the CVRA requires the government to seek victims’ approval before negotiating or entering into a settlement agreement since the CVRA only requires the competent court to hear the victims on a proposed settlement agreement.⁴⁰¹⁰

In *In re Jane Doe*, a victim claimed that, under the CVRA, she should receive restitution for harms suffered. By denying the petition, the Fourth Circuit Court of Appeals concluded that the petitioner had to demonstrate a legal entitlement to restitution and that the CVRA itself does not provide that entitlement, but it states that a victim has a right to full and timely restitution ‘as

⁴⁰⁰⁶ Doak (2008) 228-230.

⁴⁰⁰⁷ Ibid., 228.

⁴⁰⁰⁸ Council Directive on Compensation, article 9.

⁴⁰⁰⁹ *In re W. R. Huff Asset Management Co., LLC*, 409 F.3D 555, 558-64 (2d Cir. 2005).

⁴⁰¹⁰ Ibid., Loc. cit.

provided in law'.⁴⁰¹¹ Since the law applicable was the VWPA and the victim's injuries did not flow 'directly and proximately' from the crime, there was no abuse to deny her motion seeking restitution under the CVRA.⁴⁰¹² In *U.S. v. BP Products of North America, Inc.*, victims filed a motion requesting rejection of a plea agreement as they claimed violation by the government of the CVRA obligations as the government did not answer letters questioning restitution calculation sent by a victims' lawyer.⁴⁰¹³ However, the court concluded that the victims were given notice of their CVRA rights and the hearing on the proposed plea agreement and sentence would be deferred in order to allow victims to fully exercise their rights, attend, be heard, and, thus, the represented victims took advantage of the rights afforded.⁴⁰¹⁴ Finally, in *U.S. v. Sacane*, a group of victims required more detailed financial disclosures from the defendant in advance of a restitution hearing as they claimed the need for receiving information to enforce their right to 'full and timely restitution' under the CVRA.⁴⁰¹⁵ However, the court denied the motion by concluding that other courts have determined that victims lack a right to information contained in a presentence report.⁴⁰¹⁶

Considering the importance acquired for compensation on cases involving serious human rights violations under the ATCA, it is herein briefly examined this civil litigation mechanism. Under the ATCA, federal District Courts can exercise jurisdiction to give a tort remedy to aliens who have been victims of violations of the law of the nations, including serious human rights violations such as torture. Conditions are that: i) the claimant must be an alien; ii) the suit must be a civil action for a tort only; and iii) the tort must be committed in violation of the laws of nations or a treaty of the United States.⁴⁰¹⁷

However, there are important difficulties.⁴⁰¹⁸ First, plaintiffs are required to first exhaust remedies available at the country where the offences were perpetrated.⁴⁰¹⁹ Second, the court needs to have personal jurisdiction over the defendant, i.e., the defendant has to bring himself within the court's jurisdiction. Third, limitations from the Foreign Sovereign Immunities Act, which prohibits United States courts' jurisdiction over a foreign state official without previous

⁴⁰¹¹ In re Jane Doe, No. 07-1705 (4th Cir. Aug. 9, 2007) (per curiam) (unpublished).

⁴⁰¹² Ibid., Loc. cit.

⁴⁰¹³ *United States v. BP Products of North America, Inc.*, No. H-07-434 (S.D. Tex. Feb. 21, 2008).

⁴⁰¹⁴ Ibid., Loc. cit.

⁴⁰¹⁵ *United States v. Sacane*, Crim. No. 3:05cr325(AHN) (D. Conn. Mar 28, 2007).

⁴⁰¹⁶ Ibid., Loc. cit.

⁴⁰¹⁷ See 28 USC § 1350.

⁴⁰¹⁸ See Bottiglierio (2004) 53-65.

⁴⁰¹⁹ See also Torture Victim Protection Act, T 28 USC § 1350 (2) (b).

consent of the respective State.⁴⁰²⁰ Nevertheless, in *Kadić v. Karadžić*, it was considered that the former Bosnian Serb President did not have immunity from service of process,⁴⁰²¹ which also led to another case against a Rwandan who was a political leader at the time of the Rwandan genocide.⁴⁰²² Fourth, the financial judgment is recoverable only when the defendant's assets are subject to the court's jurisdiction. Indeed, although United States courts have awarded very high compensation and punitive damages against defendants, these have been 'nominal victories' as victims have not been successful to enforce them.⁴⁰²³ Having said so, considering the high number of victims, the ATCA has provided a good avenue for numerous victims via class actions to at least obtain 'symbolic' victories.

Moreover, the United States Supreme Court in *Sosa v. Alvarez-Machain* (2004) confirmed the 1980 federal court's decision in *Filartiga v. Peña-Irala* to allow foreign victims of serious human rights abuses to sue for damages in United States courts under the ATCA,⁴⁰²⁴ reaffirming thus a sort of civil universal jurisdiction.⁴⁰²⁵ The United States Torture Victim Protection Act provides for civil actions for damages against individuals that committed torture and extrajudicial killing in favor of the torture victim or the primary victim's legal representative as well as any individual who may be a claimant for wrongful death respectively.⁴⁰²⁶ Concerning the class action proceedings, the group has to be approved or certified by the judge before the respective action can proceed, the unnamed plaintiffs are not obligated to be part of the class as they may opt out once informed of the lawsuit and, although non-members of the class are logically not benefited with the award, they can individually litigate their own claims.⁴⁰²⁷

It is important to mention that in class action cases such as *Re Holocaust Victims' Assets* and *Re Agent Orange*, the respective courts appointed a Special Master to conduct factual and statistical research analysis to determine

⁴⁰²⁰ Foreign Sovereign Immunities Act, 28 USC § 1330 et seq., 1602-11.

⁴⁰²¹ *Kadić v. Karadžić*, 70 F. 3d 232, 246-248 (2nd Cir. 1995).

⁴⁰²² *Mushikiwabo v. Barayagwiza*, No. 94, Civ. 3627 (JSM), 1996 WL 164496 (S.D.N.Y. 9 April 1996).

⁴⁰²³ See Bottiglierio (2004) 63-65.

⁴⁰²⁴ *Sosa v. Alvarez Machain*, 124 S.Ct. 2739 (2004)

⁴⁰²⁵ See Naomi Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 Journal of International Criminal Justice 387, 395.

⁴⁰²⁶ Torture Victim Protection Act, T 28 USC § 1350 (2) (a) (1) and (2).

⁴⁰²⁷ See for further details Federal Rules of Civil Procedure, rule 23. See also Zegveld (2010) 97.

implementation issues.⁴⁰²⁸ Part of the task performed by the Special Master involved extensive consultations with victims and their representatives,⁴⁰²⁹ and, even, in, for instance, *Re Holocaust Victims' Assets* the District Court conducted its own process of consultation and a further hearing was led by it to consider whether the proposed plan was equitable and fair according to the comments or objections from victims and their heirs or representatives.⁴⁰³⁰ Lastly, but equally important, the September 11th Victim Compensation Fund has been considered with reservations as a reparations program since the fund is limited to provision of compensation in contrast to standard reparations programs closely related to social reintegration of victims.⁴⁰³¹ As for the Office of Redress Administration for Japanese-Americans interned during the Second World War, it was established that the acceptance of reparations payments barred the beneficiaries from claiming other reparations against the government.⁴⁰³²

3.1.3. French Inquisitorial System

The proceedings concerning victims' participation as reparations claimants in criminal proceedings in France correspond to those of the civil parties, already examined. Accordingly, it is here made a general re-account of the main stages of intervention offered to civil parties with some additional points relevant to their claims for reparations in criminal proceedings. The first necessary procedural step for victims of felonies and misdemeanors to claim reparations before criminal jurisdictions is their constitution as civil parties.⁴⁰³³ The civil party petition may be filed during any moment of the judicial investigation with the competent investigating judge.⁴⁰³⁴ In case of a challenge, by the district prosecutor or by a party,⁴⁰³⁵ or when the civil party petition is found inadmissible by the investigating judge in a reasoned order and after having sent the case file to the public prosecutor,⁴⁰³⁶ the civil party may appeal it.⁴⁰³⁷ The investigating judge makes an order recoding the filing of the complaint.⁴⁰³⁸

⁴⁰²⁸ See *Re Holocaust Victims' Assets*, Final Order and Judgment, 9 August 2000, 96 Civ. 4849 (ERK) (MDG); *Re Agent Orange*, 611 F. Supp. 1396.

⁴⁰²⁹ See Memorandum and Order of Korman, C.J., 22 November 2000, United States District Court EDNY Case No. CV 96-4849 (ERK)(MDG) (Consolidated with CV 96-5161 and CV 97-461).

⁴⁰³⁰ McCarthy (2012a) 247-248.

⁴⁰³¹ See Issacharoff and Morawiec Mansfield (2006) 310.

⁴⁰³² See Yamamoto and Ebesugawa (2006) 275.

⁴⁰³³ See CPP, articles 2 and 85. As for *délits* (misdemeanors) at the tribunal correctionnel, see also *Ibid.*, article 418.

⁴⁰³⁴ *Ibid.*, article 87.

⁴⁰³⁵ *Ibid.*, *Loc. cit.*

⁴⁰³⁶ *Ibid.*, articles 86 and 87.

With regard to *crimes* (felonies), which fall under the jurisdiction of the *cour d'assises*, civil parties are heard and, once the court has decided on the public prosecution, it decides on the claims for damages brought by the civil party against the accused. It is possible for the court to appoint one of its members to hear the (civil) parties, examine evidence and produce a report at a hearing where the (civil) parties may also present their observations.⁴⁰³⁹ Even when the accused is acquitted or exempted from penalty, the civil party can still apply for compensation damage caused by the accused's fault provided this derives from matters for which (s)he was accused.⁴⁰⁴⁰ Convicted co-accused are jointly liable for damage compensation.⁴⁰⁴¹ As for *délits* (misdemeanors) at the *tribunal correctionnel*, civil party constitution can take place at the hearing itself, (s)he can support his/her petition for damages corresponding to the harm suffered, and the petition can be filed either before the hearing or in the course of it.⁴⁰⁴² With the public prosecutor's agreement, the restitution or reparations claim may be also drawn up by the victims, during the police investigation, with a judicial police officer.⁴⁰⁴³ The court rules on the admissibility of the civil party petition,⁴⁰⁴⁴ the civil party may always be represented by a lawyer,⁴⁰⁴⁵ and the civil party who having lawfully summoned does not appear or is not represented at the hearing, is considered as having waived his/her petition.⁴⁰⁴⁶ Civil party's withdrawal does not preclude a civil action at a competent court.⁴⁰⁴⁷

As for appeals before the *cour d'assises* (felonies), the civil party can appeal on merits provided that this regards his/her civil interests,⁴⁰⁴⁸ and the execution of the decision reached in the criminal proceedings is suspended during the appeals.⁴⁰⁴⁹ When the *cour d'assises* is not seized of appeal against the prosecution's outcome, any appeal lodged by one party against the decision in the civil action is brought before the appeal division of the *tribunal*

⁴⁰³⁷ Ibid., article 87.

⁴⁰³⁸ Ibid., article 88.

⁴⁰³⁹ Ibid., article 371.

⁴⁰⁴⁰ Ibid., article 372.

⁴⁰⁴¹ Ibid., article 375-2.

⁴⁰⁴² Ibid., articles 418 and 419.

⁴⁰⁴³ Ibid., article 420-1.

⁴⁰⁴⁴ Ibid., article 423.

⁴⁰⁴⁵ Ibid., article 424. In this case, the judgment made is adversarial in relation to the civil party.

⁴⁰⁴⁶ Ibid., article 425.

⁴⁰⁴⁷ Ibid., article 426.

⁴⁰⁴⁸ Ibid., article 380-2.

⁴⁰⁴⁹ Ibid., article 380-4.

correctionnel.⁴⁰⁵⁰ Although the civil party is not allowed to introduce any new claims via appeal, (s)he may ask for increased damages in relation to any harm suffered since the first judgment.⁴⁰⁵¹ Even though when no appeal has been filed against the ruling on the civil action, the civil party may exercise the rights granted to the civil party before the court seized of the appeal.⁴⁰⁵² The accused's position cannot be worsened by the court trying a civil action when only the civil party brought the appeal.⁴⁰⁵³ During the appeal, the execution of the judgment on civil action is suspended.⁴⁰⁵⁴ The enforcement of the provisional payment of the damages, obtained via a civil action, may be suspended.⁴⁰⁵⁵ Concerning appeals against misdemeanors, the civil party holds the right to appeal on merits, only in respect of his/her civil claims.⁴⁰⁵⁶ Even though the civil party cannot put forward any additional claim during appeals, (s)he may apply for an increase in the award of damages relating to harm occurring after the first instance decision.⁴⁰⁵⁷ The court can order suspension of any interim payment of the compensation granted on civil action.⁴⁰⁵⁸

Concerning proceedings applicable to the CIVI, victims who have suffered harm caused by an offence may obtain full compensation for the damage coming from offences against the person if some requirements are met.⁴⁰⁵⁹ Compensation is given by a commission (the CIVI), which is of a civil court nature, set up with a first instance court's jurisdiction.⁴⁰⁶⁰ Although the indemnity application must be filed within three years from the date of the offence, this is extended when criminal proceedings have been initiated up to one year after the final decision is taken.⁴⁰⁶¹ When a criminal prosecution is started, the commission's decision may be made before the Prosecution's outcome. The CIVI may stay the implementation of its admissibility ruling until

⁴⁰⁵⁰ Ibid., article 380-5.

⁴⁰⁵¹ Ibid., article 380-6.

⁴⁰⁵² Ibid., Loc. cit.

⁴⁰⁵³ Ibid., Loc. cit.

⁴⁰⁵⁴ Ibid., article 380-7.

⁴⁰⁵⁵ Ibid., article 380-8.

⁴⁰⁵⁶ Ibid., article 497 (3).

⁴⁰⁵⁷ Ibid., article 515.

⁴⁰⁵⁸ Ibid., article 515-1.

⁴⁰⁵⁹ These are: i) need for an offence and that offence is not excluded from the CIVI's material scope of application; ii) the action caused death, permanent incapacity or total incapacity to work for more than one month; and iii) (in principle) French nationality, although open to other nationals under certain conditions. See CPP, article 706-3.

⁴⁰⁶⁰ Ibid., article 706-4.

⁴⁰⁶¹ Ibid., article 706-5.

the final criminal court's decision if the victim requests so.⁴⁰⁶² The hearing and decision take place in chambers.⁴⁰⁶³ If the criminal court rules on a civil claim granting a higher compensation than the indemnity by the CIVI, the victim may apply for further compensation within one year after the civil claim decision becomes final.⁴⁰⁶⁴

On the other hand, the *Fonds de Garantie des Victimes des Actes de Terrorisme et d'autres Infractions* (FGTI),⁴⁰⁶⁵ is subrogated to the victim's right to obtain compensation for the damage caused by the offence from the responsible and it can do via, for example, filing a civil party petition at the criminal court, which may even begin during appeals.⁴⁰⁶⁶ If the victims or his/her beneficiaries file a civil party petition at a criminal court or when starting an action against the responsible for the damage, they shall state (whatever the stage of the proceedings) whether they have applied to the CIVI and, if applicable, whether the CIVI has given them an indemnity.⁴⁰⁶⁷ If not, the nullity of the judgment concerning their civil action may be petitioned.⁴⁰⁶⁸ It is important to mention that, regarding terrorist offences, the FGTI (unlike other offences before the CIVI where this intervenes as a payer), intervenes directly as the only direct interlocutor and the only possible remedy for the victims of terrorism who are outside the CIVI's scope of application; however, the victim can accept, discuss or refuse the compensation offer.⁴⁰⁶⁹

3.2. The ICTY, the ICTR, the SCSL and the STL

3.2.1. Proceedings Foreseen in the Courts' Instruments

At the ICTY, the ICTR, the SCSL and the STL, victims cannot claim reparations and there is a 'delegation' to domestic courts where victims may apply for compensation. This scheme was foreseen as early as in the Security Council Resolution adopting the ICTY Statute, which states that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.⁴⁰⁷⁰ This was

⁴⁰⁶² Ibid., article 706-7.

⁴⁰⁶³ Ibid., Loc. cit.

⁴⁰⁶⁴ Ibid., article 706-8.

⁴⁰⁶⁵ Guaranty Funds for Victims of Terrorism and other Crimes.

⁴⁰⁶⁶ CPP, article 706-11.

⁴⁰⁶⁷ Ibid., article 706-12.

⁴⁰⁶⁸ Ibid., Loc. cit.

⁴⁰⁶⁹ See Association des Paralysées de France- Conseil Technique National (2008) 27-28.

⁴⁰⁷⁰ UN Doc. S/RES/827 (1993), para. 7.

implemented via common rule 106 (Compensation to Victims) of the ICTY RPE and the ICTR RPE and rule 105 (Compensation to Victims) of the SCSL RPE, which present identical texts:

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under paragraph (B) the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Former President of the ICTY, Antonio Cassese, describing the background to the adoption of the rule said that ‘This is a sort of hint to the victim: please go to the national court and try to get some sort of vindication of your rights’.⁴⁰⁷¹ At the STL, the language employed is similar. However, there are two important differences. First, the respective provision is contained in the STL Statute, not in its RPE.⁴⁰⁷² Second, unlike the RPE of the other courts, article 25 (1) of the STL Statute explicitly provides for that the STL ‘may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal’. Concerning the rest of article 25, as said, it is basically the same than the equivalent provisions of the other courts’ RPE.

As seen, the provisions quoted foresee that victims who suffered injury for a crime under the jurisdiction of the respective court and based upon which the accused was found guilty have to exercise their status as reparations claimants at other judicial forums, i.e., either a national or other competent body.⁴⁰⁷³ This sort of ‘delegation’ may be criticized as there is an assumption of

⁴⁰⁷¹ Cited in Albrecht Randelzhofer and Christian Tomuschat (eds.), *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhoff Publishers 1999) 48 (Cassese also indicated that ‘We decided to adopt provisions in Rule 106 of our Rules of procedure whereby the Tribunal has the right to transmit the judgement to the relevant national authorities deciding that somebody, say, has been raped or has been the victim of physical atrocities, and then we also go on to say that under the national legislation the victim, or person claiming through the victim, may bring action in a national court’).

⁴⁰⁷² STL Statute, article 25 (Compensation to Victims).

⁴⁰⁷³ See Heikkilä (2004) 175; Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1 (Transnational Publishers 1998) 596-597.

not only the existence of financial resources available but also of national bodies to grant reparations, in particular compensation.

Such assumption is unfounded and the very functionality of these provisions can be called into question as confirmed by the fact that as far as it is known no domestic compensation claim award has been given based on a judgment of the ICTY, the ICTR and the SCSL. Rule 106 of the ICTY RPE and its equivalent provisions do not preclude collective claims and also are equally applicable for persons claiming through the victim although without establishing if the person has to be related or may represent, for example, an organization. However, since the claim has to be brought before a national court, the issue of who is entitled to claim compensation depends on the respective national laws.⁴⁰⁷⁴ Thus, the applicable national law may only permit standing for the direct victim but not for family members of other indirect victims. Moreover, the RPE do not oblige the respective State to grant compensation and the compensation scope depends on the respective domestic jurisdiction.⁴⁰⁷⁵ Nevertheless, the respective provisions are not limited in their application to the respective States, e.g., the application of rule 105 of the ICTR RPE is not limited to Rwandan domestic courts. Thus, in theory, compensation claims may be brought in any national jurisdiction. Although the respective provisions establish that the judgment of the respective court ‘shall be final and binding’, it is doubtful the real impact of the judgment as, in certain national jurisdictions, a judgment is not enforceable unless the judgment has been previously transformed into a domestic decision and, hence, the court’s judgment in question has limited value.⁴⁰⁷⁶ Finally, although the respective rules require that the crime causes injury to the victims, they do not specify what kind of injury is required.

The fact that, as far as it is known, no compensation has been granted in a domestic court based on a judgment from the ICTY and the ICTR led to discussions within the ICTY and the ICTR about whether to implement a system of compensation at these tribunals as previously examined.

It remains to be seen whether the STL situation will be different. The explicit provision of singling out victims, under article 25 (1) of the STL Statute, may make the difference when it comes to the STL since, as previously quoted, it provides that ‘The Special Tribunal may identify victims who have suffered harm

⁴⁰⁷⁴ See Malmström (2003) 382.

⁴⁰⁷⁵ See *Ibid.*, Loc. cit.

⁴⁰⁷⁶ *Ibid.*, Loc. cit.

as a result of the commission of crimes by an accused convicted by the Tribunal'. The rest of article 25 reads as follows:

2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Therefore, using the STL's identification, victims can later file an action for compensation at a national court and, as appropriately pointed out by Cassese, 'for the purpose of such "identification", the participation of victims in the criminal proceedings before the Tribunal may prove of enormous value'.⁴⁰⁷⁷ Moreover, in order to contribute to this process, the STL will give a person identified as a victim in a final judgment rendered by the Tribunal with regard to a convicted person, with a certified copy of the judgment.⁴⁰⁷⁸ It is expected that this measure will allow or at least expedite the actions for him/her to exercise his/her rights to compensation under national or other applicable law.⁴⁰⁷⁹ However, even though article 25 (4) stipulates that for the purposes of reparations claims, the STL's judgment shall be final and binding concerning the accused's criminal responsibility, there is no guarantee that judicial authorities of domestic jurisdictions other than the Lebanese courts would necessarily consider themselves to be legally obligated by the STL provisions.⁴⁰⁸⁰ Nevertheless, the STL provisions should open up Lebanese Courts to victims to file compensation claims. In any case, victims who have not been identified by the STL can also use a condemnatory judgment to claim compensation in domestic courts or other institutions.⁴⁰⁸¹ This has been implemented in rule 86 (G):

⁴⁰⁷⁷ STL President (2010), para. 16. See also STL President (2012), para. 16.

⁴⁰⁷⁸ STL President (2010), para. 16; STL President (2012), para. 16.

⁴⁰⁷⁹ STL President (2010), para. 16; STL President (2012), para. 16.

⁴⁰⁸⁰ See Aptel (2007) 1120.

⁴⁰⁸¹ STL Chambers (2010b), para. 20.

Any person identified in a final judgment as a victim, or otherwise considering himself or herself victim, who has suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal may request from the Registrar a certified copy of the judgment for the purpose of exercising his or her rights under national or other relevant law, as provided by Article 25 of the Statute.

It is noticed that compensation is the only modality of the reparations envisaged by the provisions of the ICTY, the ICTR, the SCSL and the STL to be provided at the domestic level. This should also be criticized as compensation is only one modality of the broader concept of reparations as examined in detail later.⁴⁰⁸²

As for the restitution of property and proceeds, which cannot be claimed by victims but may be ordered by the Chamber as a penalty, the respective RPE of the ICTY, the ICTR and the SCSL set requirements for restitution: i) accused's conviction and unlawful taking of property; ii) the property taken is associated with 'the crime'; and iii) the Prosecutor requested so or the Chamber delivered this order on its own motion.⁴⁰⁸³ If these requirements are met, a special hearing is convened to establish the matter of restitution of unlawfully taken property or the proceeds thereof.⁴⁰⁸⁴ For Chamber's determination, it is necessary a sufficient level of investigation during pre-trial or trial, especially from the Prosecution.⁴⁰⁸⁵ If the Trial Chamber cannot determine ownership, the competent domestic authorities are required to do so, based on which the Chamber will order the restitution of property or proceeds.⁴⁰⁸⁶ However, these proceedings may be difficult due to lack of ability or willingness from national authorities. In any case, the Registrar is responsible to transmit to the competent national authorities the orders for the restitution of property or proceeds and these bear

⁴⁰⁸² See *infra* Chapter V 4.3.2.

⁴⁰⁸³ See ICTY RPE, rule 98 *ter* (B) and ICTR RPE, rule 88 (B) ('If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105'). See also SCSL RPE, rule 104.

⁴⁰⁸⁴ See ICTY RPE, rule 105 (A); ICTR RPE, rule 105 (A) ('After a judgement of conviction containing a specific finding as provided in Rule 98 *ter* (B) [or ICTR RPE, rule 88 (B)], the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate'). See also SCSL RPE, rule 104 (A).

⁴⁰⁸⁵ Brouwier (2005) 396; Bottigliero (2004) 200.

⁴⁰⁸⁶ ICTY RPE, rule 105 (E); ICTR RPE, rule 105 (E).

responsibility for the enforcement of the restitution orders thus received.⁴⁰⁸⁷ Nevertheless, as indicated,⁴⁰⁸⁸ as far as it is known, these tribunals have not issued a restitution order and, hence, these proceedings remain theoretical. It must be mentioned that the STL does not have the power to order restitution at all.

With regard to some rehabilitative measures, as previously mentioned from 2000 to 2002, the ICTR initiated an assistance program in Rwanda for witnesses and potential witnesses, aimed to provide legal assistance, physical rehabilitation, reintegration and psychological assistance.⁴⁰⁸⁹ This program was carried out by Rwandan women's NGOs. Avega, one of the NGOs which received money from the ICTR, stressed that money did not go to women who had testified at the ICTR but was spent on a general target group providing medical and psychological assistance to victims.⁴⁰⁹⁰ Hagukura, one of the associations that received ICTR money, used it to organize training sessions on the victims' rights and on the ICTR procedures.⁴⁰⁹¹ Other organization, Asoferwa built a peace village in Taba (Gitamara), which was clearly linked to the ICTR's activities and more specifically to the notion that the ICTR wanted to provide some concrete assistance to women who had testified in Arusha.⁴⁰⁹² Indeed, the first accused convicted by the ICTR was Jean-Paul Akayesu, a former mayor of Taba, and many women from Taba testified against him for incidents of rape which were qualified as genocide.⁴⁰⁹³ However, at the UN level, the program was thought to be problematic, especially considering the narrow mandate of the ICTR, i.e., prosecution and punishment of perpetrators of international crimes committed in Rwanda in 1994, and which does not include social assistance programs, and, thus, the program was partially closed in 2002.⁴⁰⁹⁴ As detailed later,⁴⁰⁹⁵ a medical unit at the ICTR has been undertaking some rehabilitative measures but limited to witnesses.⁴⁰⁹⁶ Therefore, these measures are given to victims as witnesses and not as reparations claimants.

⁴⁰⁸⁷ ICTY RPE, rule 105 (G); ICTR RPE, rule 105 (G).

⁴⁰⁸⁸ See *supra* Chapter V 2.2.1.

⁴⁰⁸⁹ See Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case-Study on Rwanda* (2004 Intersentia) 465; Brouwer (2005) 401.

⁴⁰⁹⁰ See AVEGA, *Rapport Annuel d'Activités* (January-December 2000) 28, 67. Cited by Rombouts (2004) 466.

⁴⁰⁹¹ See Rombouts (2004) 466.

⁴⁰⁹² *Ibid.*, *Loc. cit.*

⁴⁰⁹³ Akayesu (ICTR-96-4-T), 2 September 1998, paras. 507-508.

⁴⁰⁹⁴ See Brouwer (2005) 402.

⁴⁰⁹⁵ See *infra* Chapter V 4.2.1.

⁴⁰⁹⁶ Brouwer (2005) 403.

As for allowances available to victims and given to them in their witness status at these courts, basically the respective proceedings to get them consist in (at least potentially) being called, normally by the Prosecutor, as witness.

3.2.2. External Mechanisms Related to the Crimes under the Courts' Jurisdictions

Relating to crimes under the jurisdiction of the ICTR, the ICTY, and the SCSL, some mechanisms outside these courts have been set up. Here, it is explored briefly some of those. In April 2005, the 'Hotel Rwanda' film team, in partnership with the UN Foundation set up the 'International Fund for Rwanda' to assist the survivors of the genocide perpetrated in Rwanda.⁴⁰⁹⁷ The fund was established to implement five projects: i) gender HIV/AIDS sensitive income generating project; ii) reintegration and sustainable livelihood initiatives for returnees and genocide survivors in Rwanda; iii) recruitment of new doctors and nurses; iv) the establishment of a film school at Kigali; and v) support to genocide orphans living in child headed households project.⁴⁰⁹⁸

At domestic Rwandan jurisdiction, the 1996 Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide, Crimes against Humanity Committed since 1 October 1990, provided that damages awarded to survivors who had not been identified should be deposited in a victims compensation fund, 'whose creation and operation shall be determined by a separate law'.⁴⁰⁹⁹ Genocide survivors participated in around 2/3 of all criminal cases at specialized chambers in ordinary courts as civil parties or civil claimants, and approximately 50 % of the survivors who filed compensation complaints against perpetrators were awarded compensation for material or moral damage.⁴¹⁰⁰ In 2001, Organic Law 40/2000, which introduced the special *Gacaca* jurisdictions, tasked with all genocide related cases with the exception of those individual most responsible for genocide,⁴¹⁰¹ declared civil actions against

⁴⁰⁹⁷ See UN Press Release, United Nations Welcomes Establishment of International Fund for Rwanda, AFR/1133 IHA/1031, 4 April 2005.

⁴⁰⁹⁸ The International Fund for Rwanda, available at: http://www.unrwanda.org/undp/hotel_rwa.htm (last visit on 30 November 2012).

⁴⁰⁹⁹ Organic Law No. 08/96, 30 August 1996, article 32.

⁴¹⁰⁰ See REDRESS and African Rights, Access to Reparation for Survivors of the 1994 Genocide in Rwanda, Background Note (17 August 2011) 4.

⁴¹⁰¹ *Ibid.*, 5.

the State inadmissible.⁴¹⁰² Be that as it may, none of the compensation awards rendered by national courts against individual perpetrators or the State has been enforced.⁴¹⁰³ Although Rwanda has established the *Fonds National pour l'Assistance aux Rescapés du Genocide* (FARG),⁴¹⁰⁴ it has not adopted a compensation law or set up a compensation fund.⁴¹⁰⁵ The legislation which governed the (now extinct) Gacaca jurisdiction kept silence on the survivor's right to claim damages, and relevant provisions of the Organic Law 40/2000 and subsequent legislation were repealed, and, since 2009, only FARG can bring a civil action against persons convicted as being the most responsible for genocide.⁴¹⁰⁶ Successful litigation via civil universal jurisdiction leading to compensation has however been implemented.⁴¹⁰⁷

With regard to the hybrid criminal courts established in the region of the former Yugoslavia, which are not studied in this thesis, some very general observations follow. Concerning the United Nations Interim Administration Mission in Kosovo (UNMIK) War Crimes Panels in Kosovo (later overtaken by the European Union Rule of Law Mission in Kosovo (EULEX)), established by UNMIK in the aftermath of the Serb-led attack against Kosovar-Albanians, in 1998-1999, victims can *inter alia* participate not only as witnesses but also as civil parties (referred to as 'injured parties') and, thus, 'The injured party has the right to file a property claim in criminal proceedings in accordance',⁴¹⁰⁸ and the 'The motion to realize a property claim in criminal proceedings may be filed by the person authorized to pursue that claim in civil litigation'.⁴¹⁰⁹ However, the number of victims participating in the proceedings has been relatively low.⁴¹¹⁰ On the other hand, at the War Crimes Chamber in the State Court of Bosnia and

⁴¹⁰² Organic Law No. 40/2000 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed between October 1, 1990 and December 31, 1994, article 91.

⁴¹⁰³ See REDRESS and African Rights (2011) 5.

⁴¹⁰⁴ National Funds for the Assistance of the Genocide Survivors.

⁴¹⁰⁵ REDRESS and African Rights (2011) 2.

⁴¹⁰⁶ See Organic Law No 69/2008 Relating to the Establishment of the Fund for the Support and Assistance to the Survivors of the Tutsi genocide and other Crimes against Humanity Committed between 1st October 1990 and 31st December 1994, and Determining its Organization, Powers and Functioning, 30 December 2008.

⁴¹⁰⁷ See REDRESS and African Rights (2011) 8.

⁴¹⁰⁸ Provisional Criminal Procedure Code of Kosovo, UNMIK/REG/2003/26, 6 July 2003, article 80 (1).

⁴¹⁰⁹ Provisional Criminal Procedure Code of Kosovo, article 108 (1).

⁴¹¹⁰ See McGonigle Leyh (2011) 158-159.

Herzegovina,⁴¹¹¹ that tries cases concerning lower to mid-level perpetrators referred to it by the ICTY,⁴¹¹² victims can not only be witnesses but also file civil property claims during the proceedings.⁴¹¹³ Thus, during a trial on the Srebrenica massacre, 800 injured parties submitted claims for damages and the Chamber referred them to pursue the property claims by taking civil action.⁴¹¹⁴ However, the War Crimes Chamber failed to grant compensation as it referred the injured parties (due to efficiency considerations) to pursue their property law claims by taking civil action and its referral was confirmed on appeals.⁴¹¹⁵ This failure has been one of the victims' principal complaints.⁴¹¹⁶ Indeed, due to efficiency considerations, the Chamber has in many cases instructed the injured parties to initiate their civil actions outside the criminal proceedings.⁴¹¹⁷ When the accused has been acquitted of the charges, the Chamber referred the injured parties to take civil actions with their claims under property law.⁴¹¹⁸

Concerning reparations mechanisms for, among others, victims of crimes related to the ICTY's mandate, under chapter 2 of Annex 6 of the Dayton Accords, a Human Rights Chamber was set up, modeled on the ECtHR, with the power to determine responsibility for human rights violations, especially those of a severe, systematic or discriminatory nature, committed by any of the parties to the Dayton Accords, i.e., the State and the Federation of Bosnia and Herzegovina and the *Republika Sprska*, and upon this determination provide reparations to victims.⁴¹¹⁹ In turn, under article XI of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, it was established the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina:

⁴¹¹¹ Established via an agreement between Bosnia and Herzegovina and the High Representative for Bosnia and Herzegovina. See for further details Cassese (2008) 331.

⁴¹¹² Pursuant rule 11 *bis* of the ICTY RPE.

⁴¹¹³ Criminal Procedure Code of Bosnia and Herzegovina, articles 193-204.

⁴¹¹⁴ Milorad Trbić (X-KRŽ-07/386), Court of Bosnia and Herzegovina, First Instance, 16 October 2009, para. 873.

⁴¹¹⁵ See OSCE-ODIHR/ICTY/UNICRI (2011a) 80.

⁴¹¹⁶ See for further details Olga Martin-Ortega, 'Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina' (2012) 12 *International Criminal Law Review* 589, 613.

⁴¹¹⁷ See OSCE-ODIHR/ICTY/UNICRI (2011a) 79.

⁴¹¹⁸ See *Ibid.*, Loc. cit.

⁴¹¹⁹ See Carla Ferstman and Sheri Rosenberg, 'Reparations in Dayton's Bosnia and Herzegovina' in Ferstman, Goetz and Stephens (2009) 483, 486-488.

The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

Finally, some sections of the UNMIK Regulation No. 2000/60, concerning the Housing and Property Claims Commission, also provided restitution, in particular the restitution of property or compensation for any person, including refugees or displaced persons.⁴¹²⁰ In particular, it was established that:

Any person with a property right on 24 March 1999, who has lost possession of that property and has not voluntarily disposed of the property right, is entitled to an order from the Commission for repossession of the property. The Commission shall not receive claims for compensation for damage to or destruction of property.⁴¹²¹

With regard to Sierra Leone, as previously mentioned, reparations were not apparently discussed during the process of setting up the SCSL nor was it seemingly considered that the SCSL could play a role on that issue.⁴¹²² Thus, the above-mentioned constituted a strong reason for the Sierra Leonean TRC to handle the issue of reparations and, in turn, highlights the complementarity of the SCSL and the TRC, i.e., two transitional justice institutions with different mandates.⁴¹²³ Accordingly, the Sierra Leonean TRC recommended setting up a reparations program ‘for those victims who were particularly vulnerable because of the human rights violations they had suffered and the harm that they continued to live with’.⁴¹²⁴ Following the TRC’s recommendations, the Sierra Leonean Government via the National Commission for Social Action (NaCSA) established its reparations program in 2009, which ‘will largely focus on the

⁴¹²⁰ See UNMIK Regulation No. 2000/60, section 2.2 (‘Any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right (hereafter “restitution in kind”) or compensation’.), and section 2.5 (‘Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation’.).

⁴¹²¹ *Ibid.*, section 2.6.

⁴¹²² See Schabas (2005) 295.

⁴¹²³ See *Ibid.*, *Loc. cit.*

⁴¹²⁴ Truth and Reconciliation Commission of Sierra Leone, Final Report, Vol. II, 2004, p. 229, para. 6.

rehabilitation of victims through the delivery of social service packages and symbolic measures which acknowledge the past, the harm done to victims, and empower them to rebuild their lives'.⁴¹²⁵ More than 30000 victims have registered at the NaCSA for reparations purposes,⁴¹²⁶ in five categories, namely, amputees, sexual assault, severely wounded, orphans and war widows.⁴¹²⁷

Concerning funding for the reparations program in Sierra Leone, the Victims' Trust Fund was only launched in 2009 although it had already been foreseen in the Lomé Peace Agreement (1999): 'The Government, with the support of the International Community, shall design and implement a programme for the rehabilitation of war victims. For this purpose, a special fund shall be set up'.⁴¹²⁸ This fund was also referred to in the TRC Act (2000),⁴¹²⁹ and recommended in the TRC's Final Report.⁴¹³⁰

3.3. The ICC and its TFV

3.3.1. Seeking Reparations at the ICC

3.3.1.1. Reparations Requests

Although the application process for reparations is individualized, i.e., each victim must file a reparations request form, a large number of victims 'may have suffered harm collectively'.⁴¹³¹ Rule 94 (1) (Procedure upon request) lists the specific requirements and, in particular items, for victims who want to claim reparations and reads as follows:

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:
 - (a) The identity and address of the claimant;

⁴¹²⁵ NaCSA (2009). Cited by Nina Sørheim, Sierra Leone Reparations Program. The Limits of Good Intentions. MA Thesis in the Practice and Theory of Human Rights (University of Oslo, Faculty of Law 2010) 22-23. Available at:

https://www.duo.uio.no/bitstream/handle/10852/22868/NKSThesis_2010.pdf?sequence=1 (last visit on 30 November 2012).

⁴¹²⁶ See ICTJ/Centre for Accountability and Rule of Law, 'Sierra Leone has demonstrated its ability to provide Reparations: Challenges Ahead', Press Release (4 December 2009) 1. Available at: <http://www.carl-sl.org/home/press-releases/376-ictj-and-carl-sl> (last visit on 30 November 2012).

⁴¹²⁷ See Joseph Sesay, 'The Reparations Programme: What Hopes for the Victims' (3 October 2011). Available at: <http://www.carl-sl.org/home/reports/512-the-reparations-programme-what-hopes-for-the-victims> (last visit on 30 November 2012).

⁴¹²⁸ Lomé Peace Agreement, article XXIX. Special Fund for War Victims.

⁴¹²⁹ TRC Act 2000, article 7 (6).

⁴¹³⁰ Truth and Reconciliation Commission of Sierra Leone, Final Report, Vol. II, 2004, p. 267, para. 220.

⁴¹³¹ See Ferstman and Goetz (2009) 335.

- (b) A description of the injury, loss or harm;
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;
- (e) Claims for compensation;
- (f) Claims for rehabilitation and other forms of remedy;
- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

Sub-rule 1 stipulates that the request has to be made ‘in writing’, which departs from the original draft that also considered requests being made ‘in electronic form’.⁴¹³² Nevertheless, alternative forms of communications to the ICC such as audio, video or other electronic forms are covered under general provisions in rule 102 and allowed under certain conditions, which are indeed necessary when, for example, the victim is disabled or illiterate. Items contained under sub-rules 1 (c) and 1 (g) proved to be controversial when drafted.⁴¹³³ The original draft version of sub-rule 1 (c) required the reparations claimant to identify the person(s) responsible for the injury, loss or harm since, absent this identification, the ICC might have found it difficult to link a claim with an accused being prosecuted at the ICC.⁴¹³⁴

However, it was realized that many victims would be incapable of identifying the perpetrator of the attack or a specific defendant at the ICC,⁴¹³⁵ because of the large scale of crimes or of victims’ unfamiliarity with legal concepts of responsibility, e.g., command responsibility.⁴¹³⁶ Therefore, sub-rule 1 (c) includes the provision that the reparations claimant should identify the person(s) responsible ‘to the extent possible’. In turn, concerning sub-rule 1 (g), while for many delegates the requirement to provide any supporting documentation helping to validate the claim sounded absolutely reasonable, for others that requirement would prevent those without documentation, e.g., refugees, from making reparations claims.⁴¹³⁷ Foreseeing this problem, it was added that documentation would be provided but only ‘to the extent possible’,

⁴¹³² Lewis and Friman (2001) 480. See also PCNICC/2000/WGRPE(6)DP. 3 (13 March 2000).

⁴¹³³ Lewis and Friman (2001) 479.

⁴¹³⁴ *Ibid.*, Loc. cit.

⁴¹³⁵ *Ibid.*, Loc. cit.

⁴¹³⁶ Dwertmann (2010) 204.

⁴¹³⁷ Lewis and Friman (2001) 480.

clause cited by Trial Chamber I in its reparations decision.⁴¹³⁸ In other words, the reparations request is still valid even when no documentation is provided, which avoids an automatic disqualification of victims lacking documents for their claims.⁴¹³⁹ In any case, similar to the ICC's case law on identification documentation for victim participant applicants, Trial Chamber I in its reparations decision has established that as for reparations proceedings, victims may use:

[...] official or unofficial identification documents, or any other means of demonstrating their identities that are recognized by the Chamber. In the absence of acceptable documentation, the Court may accept a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf.⁴¹⁴⁰

It is important to notice that victims who apply for admission to participate as victim participants in the pre-trial or trial proceedings have the option to additionally request reparations. In other words, they have to claim reparations if they wish to receive them in addition to their application to participate as victim participants. This is clear in the current combined participation and reparation standard application form,⁴¹⁴¹ which replaced and merged in one form the previous standard separate forms for participation and reparations requests. The combined form (like its predecessor) reflects the items requested under rule 94, and whose use is encouraged under the ICC instruments.⁴¹⁴² Part E (Reparations) of the combined form is particularly relevant for the analysis conducted here and consists of three questions. The first two read as follows: '33. Would the victim like to apply for reparations? *i.e.*, *does the victim want something to be done for what he / she suffered?*', and '34. If yes, what would the victim want?'

⁴¹³⁸ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 252.

⁴¹³⁹ Lewis and Friman (2001) 480; Dwertmann (2010) 204-205.

⁴¹⁴⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 198.

⁴¹⁴¹ See also ICC RPE, rule 96 (Requests for reparations in accordance with rule 94) ('1. For the application of rule 94, the Registrar shall develop a standard form for victims to present their requests for reparations and shall make it available to victims, groups of victims, or intergovernmental and non-governmental organizations which may assist in its dissemination, as widely as possible. This standard form shall be approved in accordance with regulation 23, subregulation. 2, and shall, to the extent possible, be used by victims').

⁴¹⁴² See ICC Regulations of the Court, regulations 86 and 88; Regulations of the ICC Registry, regulation 105. See also Dwertmann (2010) 202-205.

The third question (question 35) allows the reparations claimant to propose where the benefit should go giving these cumulative options ‘victims, victim’s family, victim’s community and other’. This should be understood as part of the discretion from the victims as reparations claimants’ right to propose to the ICC whether to retain the reparation benefit for him/herself or diversify it to include other beneficiaries. This is connected with the categories of reparations claimants and beneficiaries previously referred to,⁴¹⁴³ i.e., while in general reparations claimants will logically be reparations beneficiaries, when it comes to, especially, some forms of collective reparations the reparations beneficiaries universe may be broader than those who properly speaking claimed reparations. In any case, the scope of reparations claimants is limited by the notions of direct and indirect victims, as developed by the ICC’s jurisprudence, and by the fact that only victims, both direct and indirect (including family members and successors), of crimes upon which the accused was convicted should/can claim reparations as examined previously.⁴¹⁴⁴ Be that as it may, as evidenced in the ICC’s practice, not all victims who applied for victim participant status to participate in the proceedings additionally applied for reparations.⁴¹⁴⁵ It should also be mentioned that Part D ‘Participation in the Proceedings’ of the combined form consists of two questions: ‘31. Does the victim want to present his/her views and concerns in ICC proceedings?’ and ‘32. If yes, why does the victim want to participate in the proceedings?’.

In conclusion, victims who apply for participation have the option to claim reparations by filling in Part E of the combined form and, hence, become reparations claimants too. It should be additionally mentioned that although rule 94 (1) only refers to ‘victims’, the standard application form allows another person to file it on victims’ behalf when the victim is a child, disabled or deceased, or the victim has consented to it.⁴¹⁴⁶

Concerning notification, rule 94 (2) states that:

⁴¹⁴³ See supra Chapter V 2.3.2.1 and 2.3.2.2.

⁴¹⁴⁴ See supra Chapter V 2.3.2.2.

⁴¹⁴⁵ See, e.g., Lubanga (ICC-01/04-01/06-2838), Order on the Applications by Victims to Participate and for Reparations, Trial Chamber I, 27 January 2012, paras. 2 and 4 (stating, *inter alia*, that out of 27 new applications for participation in the trial proceedings, 25 also requested reparations); Lubanga (ICC-01/04-01/06-1308), Decision Inviting the Parties’ Observations on Applications for Participation of a/0001/06 et al., Trial Chamber I, 6 May 2008, paras. 5 and 6 (mentioning that out of the 105 applicants, 6 applicants also submitted applications for reparations).

⁴¹⁴⁶ Application Form for Individuals. Request for Participation in Proceedings and Reparations at the ICC For Individual Victims, Part A, questions 13-21.

At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

Although this is a simple provision about notification, notification of the claim has been described as a very important guide as to how the entire reparation scheme of reparations operates.⁴¹⁴⁷ Concerning the moment when the ICC can receive reparations claims, when drafting the ICC RPE, while some States argued that the ICC should only encourage claims where there was a known defendant against whom reparations could potentially be claimed, others sustained that the ICC should encourage victims to put forward their claims at the earliest opportunity.⁴¹⁴⁸ Then, the ICC would have to establish whether if the reparations claim could subsequently be linked to an identified person(s) prosecuted before the ICC.⁴¹⁴⁹ The second proposal prevailed and the rule was drafted to encourage early claims.⁴¹⁵⁰ Having said so, as suggested by some ICC's practice,⁴¹⁵¹ victims' requests for reparations should be better filed once charges are confirmed since the harm to be repaired is linked to (confirmed charged) crimes for which the accused may later be convicted and also in order to avoid further victimization if victims request reparations too early for crimes about which the respective charges would later be not even confirmed. With regard to the moment when the accused should be notified of the reparations claims, it was established that the appropriate point is at the beginning of the trial as at this stage the accused would know that the charges had been confirmed and that there were claims for reparations associated with that charge.⁴¹⁵²

The ICC, based on article 75 (1) of the ICC Statute, can determine the scope and extent of reparations on its own motion; however, it is also stipulated that the ICC should only act *proprio motu* in exceptional circumstances.⁴¹⁵³ When the Court raises the issue of reparations, rule 95 (Procedure on the motion of the Court) of the ICC RPE is applicable:

⁴¹⁴⁷ Lewis and Friman (2001) 480.

⁴¹⁴⁸ Ibid., Loc. cit.

⁴¹⁴⁹ Ibid., Loc. cit.

⁴¹⁵⁰ Ibid., Loc. cit.

⁴¹⁵¹ See REDRESS, Justice for Victims: The ICC's Reparations Mandate (20 May 2011) 17.

⁴¹⁵² Lewis and Friman (2001) 480.

⁴¹⁵³ ICC Statute, article 75 (1) ('[...] in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting').

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

2. If, as a result of notification under sub-rule 1:

(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;

(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

Thus, the ICC has the power to exceptionally initiate reparations proceedings and victims may be granted reparations without having initially made a request at the ICC if victims can be identified and, therefore, given the opportunity to later claim reparations.⁴¹⁵⁴ When reparations are ordered through the TFV and the ICC has not identified beneficiaries in its reparations order, the TFV Regulations establish that the TFV will use statistical and demographical data analysis to locate and determinate the individual beneficiaries.⁴¹⁵⁵

Conflicting views during the drafting of rule 95 (1) were conciliated under rule 95 (2). These views involved concerns about: i) victims who would not wish reparations as these would may be seen as benefiting from ‘blood money’; ii) the ICC should not be intervening in what was regarded as an essentially civil procedure, i.e., if the victims did not opt for exercising their right to claim reparations against the accused, the ICC should not step in; and iii) not affecting victims who decide to submit a late application for reparations in case the ICC decides to act *motu proprio*,⁴¹⁵⁶ i.e., not affecting victims’ late decision to become reparations claimants. Accordingly, in application of sub-rule (2) (a), a victim who becomes aware that the ICC is acting on its own motion and subsequently submits a reparations claim, is not to be treated differently from a victim making a claim in the usual manner.⁴¹⁵⁷

In turn, sub-rule (2) (b) establishes that the ICC will not issue a reparations order to make an individual reparations order if the victim wishes so and, hence, delegates who were concerned about the ICC’s intervention in what

⁴¹⁵⁴ See Dwertmann (2010) 209.

⁴¹⁵⁵ TFV Regulations, regulations 60 and 61. Concerning the application of statistic and demographic data to determine eligible victims, see also, Lubanga (ICC-01/04-01/06-2803), Trust Fund for Victims’ First Report on Reparations, 1 September 2011, paras. 264-265.

⁴¹⁵⁶ Lewis and Friman (2001) 481.

⁴¹⁵⁷ *Ibid.*, Loc. cit.

was regarded as an ‘essentially’ civil matter were convinced that this sub-rule dealt with their concerns.⁴¹⁵⁸ Nevertheless, an individual victim, member of a group of victims, cannot prevent the ICC from ordering collective awards.⁴¹⁵⁹ In any case, court-initiated reparations proceedings serve the important purpose of allowing the ICC Judges to make up for the absence of victims and, hence, protect the rights of victims who due to cultural, geographical remoteness and/or on-going conflict situations are unable to in principle file a reparations claims.⁴¹⁶⁰ Indeed, it might be sustained the existence of an obligation for the ICC to exceptionally begin reparations proceedings on behalf of the victims when they could not originally apply for reparations.⁴¹⁶¹

With regard to the notification of the reparations proceedings, rule 96 (Publication of reparation proceedings) is applicable.⁴¹⁶² During the drafting, there was a general recognition that special notification considerations are applicable to reparations and, hence, the general rule on notifications needed to be supplemented.⁴¹⁶³ Behind it, there was a justified concern to guarantee that victims are encouraged to bring application for reparations, which is only feasible if victims are aware of the proceedings.⁴¹⁶⁴ In addition to notification which aims to inform a specific person or people known to hold an interest in the reparations proceedings,⁴¹⁶⁵ rule 96 also lays down publication proceedings which seek to raise awareness among those who potentially be interested in reparations proceedings.⁴¹⁶⁶ Due to the particularly difficult conditions existent during or after the commission of serious crimes and the related problems of communication, seeking inter-governmental organizations’ assistance was considered necessary to communicate with potential reparations claimants,⁴¹⁶⁷

⁴¹⁵⁸ Ibid., Loc. cit.

⁴¹⁵⁹ Dwertmann (2010) 209.

⁴¹⁶⁰ Ibid., 208.

⁴¹⁶¹ Ibid., 210.

⁴¹⁶² ‘1. Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned [...]’.

⁴¹⁶³ Workshop 4 in the Report of the Paris Seminar, PCNICC/1999/WGRPE/INF/2 (6 July 1999) Rule C.

⁴¹⁶⁴ Lewis and Friman (2001) 482.

⁴¹⁶⁵ Dwertmann (2010) 215.

⁴¹⁶⁶ ICC RPE, rule 96 (‘1. [...]The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States’).

⁴¹⁶⁷ Lewis and Friman (2001) 482.

concerning both notification and publication proceedings.⁴¹⁶⁸ Indeed, the Regulations of the Court establish the option to rely on NGOs for dissemination of reparations application forms and, hence, ease victims' access to the reparations proceedings.⁴¹⁶⁹ In any case, the obligation to notify the accused is even more extensive when the ICC decides to begin reparations proceedings *proprio motu*.⁴¹⁷⁰ Although rule 95 does not detail which victims should be notified, it may be said, under a joint reading of rules 95 (2) and 94, that those are victims on whose behalf the ICC intends to begin reparations proceedings and if their identity is known to the ICC.⁴¹⁷¹

Concerning deadlines to file the reparations request, although there is no specific provision in the ICC instruments, to benefit from direct reparations orders, applications seemingly have to be filed before the reparations hearing.⁴¹⁷² In *Lubanga*, the OPCV suggested that, based on new reparations applications, the Trial Chamber would set up a deadline.⁴¹⁷³ Nevertheless, when reparations are awarded 'indirectly', i.e., through the TFV, the TFV may impose the respective time limits for reparations applications.⁴¹⁷⁴

3.3.1.2. Seeking Reparations before/during Trial

This sub-section deals with the legal issues concerning seeking reparations before/during trial up to the condemnatory/absolutory judgment. Victims or their legal representatives may raise the issue of reparations as early as during the investigation stage.⁴¹⁷⁵ Although some scholars and practitioners have based on practical reasons suggested a strict split of the trial and reparations proceedings, they also acknowledge that this approach is removed from the ICC RPE's spirit.⁴¹⁷⁶ Indeed, Regulation 56 (Evidence under article 75) of the Regulations of the Court establishes that 'The Trial Chamber may hear the witnesses and

⁴¹⁶⁸ ICC RPE, rule 96 ('2. In taking the measures described in sub-rule 1, the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court'.).

⁴¹⁶⁹ Regulations of the Court, regulation 86 (1).

⁴¹⁷⁰ Rule 95 (1) establishes that the person against whom the ICC is considering to issue a reparations order 'shall' be notified by the Registry. See also Dwertmann (2010) 213.

⁴¹⁷¹ Dwertmann (2010) 213.

⁴¹⁷² *Ibid.*, 111.

⁴¹⁷³ *Lubanga* (ICC-01/04-01/06-2863), 18 April 2012, para. 15.

⁴¹⁷⁴ Dwertmann (2010) 211.

⁴¹⁷⁵ See, e.g., Situation in DRC ((ICC-01/04-101-tEN-Corr), 17 January 2006, para. 63. See also Dwertmann (2010) 195-196.

⁴¹⁷⁶ See, e.g., Jorda and Hemptinne (2002) 1414.

examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial'. Case law in *Lubanga* and *Bemba* has fleshed out this principle as for: i) hearing evidence related to reparations in general; ii) specific questioning of witnesses in relation to reparations; and iii) testimony on reparations given by victim participants.⁴¹⁷⁷

Trial Chamber I in *Lubanga* presented its approach in the following terms:

119. The Trial Chamber accepts the submission of the legal representatives of victims that the extent of participation by victims during trial will to a significant degree depend on the Chamber's decision as to whether or not evidence concerning reparations will, at least in part, be considered during the trial or as a separate procedure after the trial.

120. [...] Regulation 56 [...] does not [...] undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.

121. [...] the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69 (3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.

122. The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given

⁴¹⁷⁷ See also REDRESS (2011) 43.

during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.⁴¹⁷⁸

As seen, Trial Chamber I arguably reached a fine balance. On the one hand, its approach allows considering, at least in part, evidence relevant for reparations during trial proceedings and, thus, not only avoiding victims the problems of providing evidence twice on the same issue but also guaranteeing expeditious and effective proceedings. On the other hand, since trial proceedings first and foremost aim at establishing the accused's criminal responsibility, the limits set by Trial Chamber I as for evidence on reparations are precisely determined by the respect for the accused's right to a fair and impartial trial as well as by considerations of efficiency and, thus, it rejected the Prosecutor's wholly 'blended approach'. Trial Chamber III in *Bemba* has followed Trial Chamber I's approach.⁴¹⁷⁹

As for questioning of witnesses on reparations, Trial Chamber I in *Lubanga*, based on rule 140 (2) (b), found that parties could question witnesses on 'other relevant matters' including among others 'reparation issues (properties, assets and harm suffered)'.⁴¹⁸⁰ In *Lubanga*'s trial, Judge Odio-Benito was particularly active questioning witnesses on harm, which included harm as a result of sexual violence suffered by girl child soldiers.⁴¹⁸¹ Although the defense opposed this systematic practice, Trial Chamber I found that the case general evidence is not limited to the facts and circumstances under the charges and, under article 69 (3), it can request submission of all evidence deemed by it as necessary to determine the truth.⁴¹⁸² Victims who testify personally during trial may contribute with highly important evidence in, among other issues, reparations and, therefore, both victims and their legal representatives need to be aware of this possibility.

If a legal representative of victims wants to pose a question to a witness on issues related to a potential order on reparations under article 75, as determined in *Katanga and Ngudjolo Chui*: i) (s)he has to make a written

⁴¹⁷⁸ *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 120-122.

⁴¹⁷⁹ *Bemba* (ICC-01/05-01/08-807-Corr), 12 July 2010, para. 28.

⁴¹⁸⁰ *Lubanga* (ICC-01/04-01/06-1140), 29 January 2008, para. 32.

⁴¹⁸¹ See also REDRESS (2011) 44.

⁴¹⁸² *Lubanga* (ICC-01/04-01/06-2360), 18 March 2010, paras. 36 and 39.

application, which shall be notified to the parties and must include the questions to be posed (in accordance to rule 91 (3) (a)), an explanation of the precise purpose and scope of the questions to be posed, and any relevant documents to be used for the questioning; and ii) this application has to be filed early enough for the defence to submit observations, which is seven days before the witness's appearance.⁴¹⁸³ If the request is granted by the Chamber, it will do so under regulation 56 of the Regulations of the Court, which permits questioning on reparations during trial, as mentioned, and the Chamber will determine whether and to what extent rule 91 (4), which contains more flexible dispositions on questioning applicable during the reparations hearing,⁴¹⁸⁴ may also apply to trial.⁴¹⁸⁵

Lastly, but equally important, as previously noticed,⁴¹⁸⁶ during the opening statements, victims' legal representatives have pointed out different victims' rights and/or interests,⁴¹⁸⁷ including reparations or protection,⁴¹⁸⁸ and harm inflicted on victims.⁴¹⁸⁹

3.3.1.3. Victims and Reparations Phase Proceedings: Reparations Hearings, Reparations Orders and Other Legal Issues

This sub-section and the following two sub-sections deal with the legal issues on seeking reparations during reparations phase proceedings, i.e., after conviction. The Appeals Chamber in *Lubanga* noticed that, under the statutory framework for reparations, reparations phase proceedings may be divided into two parts.⁴¹⁹⁰ First, the proceedings leading to the issuance of a reparations order, regulated in particular by articles 75 and 76 (3) of the ICC Statute and by rules 94, 95, 97 and 143 of the RPE and, during this first part of the reparations phase proceedings, the Trial Chamber may *inter alia* establish principles relating to reparations to,

⁴¹⁸³ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, paras. 84-85. See also *Lubanga* (ICC-01/04-01/06-1119), 18 January 2008, paras. 108-111; Bemba (ICC-01/05-01/08-807-Corr), 12 July 2010, paras. 30-40.

⁴¹⁸⁴ For further discussion on rule 91 (4), see *infra* Chapter V 3.3.1.3.

⁴¹⁸⁵ Katanga and Ngudjolo Chui (ICC-01/04-01/07-1665), 20 November 2009, para. 86.

⁴¹⁸⁶ See *supra* Chapter V 4.3.1.2.

⁴¹⁸⁷ McGonigle Leyh (2011) 293-294.

⁴¹⁸⁸ *Lubanga* (ICC-01/04-01/06), Transcripts, 26 January 2009, pp. 59, 67; Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 24 November 2009, p. 46; Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 39, line 17.

⁴¹⁸⁹ *Lubanga* (ICC-01/04-01/06), Transcripts, 26 January 2009, pp. 45, 47, 49, and 52-54; Katanga and Ngudjolo Chui (ICC-01/04-01/07), Transcripts, 24 November 2009, p. 40; Ruto and Sang (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 41, lines 13-22.

⁴¹⁹⁰ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 53.

or in respect of, victims.⁴¹⁹¹ Thus, the ‘first part of the reparations proceedings concludes with the issuance of an order for reparations under article 75 (2) of the Statute or a decision not to award reparations’.⁴¹⁹² The second part of the reparations phase proceedings, i.e., implementation phase, consists in the implementation of the reparations order, which the TFV may be tasked with carrying out.⁴¹⁹³ This reparations implementation phase is examined later.⁴¹⁹⁴

Reparations phase proceedings as determined by the Trial Chamber in its reparations decision are part of ‘the overall trial process’,⁴¹⁹⁵ and indeed article 75 of the ICC Statute that deals with reparations is located under part 6 (Trial) of the Statute. During reparations phase proceedings, i.e., post-conviction reparations hearings leading to a reparations order, and appeals against a reparations order, victims can be considered parties as indicated by Trial Chamber in its reparations decision:

As already indicated, the reparations phase is an integral part of the trial proceedings, but unlike the Article 74 [conviction/acquittal judgment] or the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings.⁴¹⁹⁶

These considerations justify why victims, when claiming reparations during the reparations phase proceedings, can be considered as ‘proper parties’,⁴¹⁹⁷ although there is no official status of civil party at the ICC, and, in general, there are only two formal parties at the ICC (the Prosecutor and the defence) as established by the Appeals Chamber.⁴¹⁹⁸

As determined in *Lubanga*, and already mentioned, reparations phase proceedings are an integral part of the overall trial process.⁴¹⁹⁹ Even though

⁴¹⁹¹ Ibid., para. 54.

⁴¹⁹² Ibid., Loc. cit.

⁴¹⁹³ Ibid., para. 53.

⁴¹⁹⁴ See infra Chapter 3.3.2.1.

⁴¹⁹⁵ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 260.

⁴¹⁹⁶ Ibid., para. 267.

⁴¹⁹⁷ Zappala (2010) 154. See also Brady (2001b) 595; Mariana Pena and Gaele Carayon, ‘Is the ICC Making the Most of Victim Participation’ (2013) 7 International Journal of Transitional Justice 518, 525, footnote 43.

⁴¹⁹⁸ *Lubanga* (ICC-01/04-01/06-1432), 11 July 2008, para. 93

⁴¹⁹⁹ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 260. See also *Lubanga* (ICC-01/04-01/06-2911), 29 August 2012, para. 36.

article 75 of the ICC Statute states that the ICC may order reparations, it does not specify the body in charge of monitoring and supervising this part of the proceedings. Trial Chamber I, in application of articles 64 (2) and (3) (a),⁴²⁰⁰ established that those tasks fall within the Judiciary's responsibilities and functions.⁴²⁰¹ However, the Chamber considered it unnecessary for it to remain seized throughout the reparations proceedings and, accordingly, 'reparations in this case [*Lubanga*] will be dealt with principally by the TFV, monitored and overseen by a differently composed Chamber'.⁴²⁰² As examined later, the Chamber thus constituted will be in a position to resolve any contested issues arising out of the TFV's work and decisions.⁴²⁰³

Concerning reparations orders, article 75 (3) stipulates that 'Before making an order under this article, the Court may invite and shall take into account of representations from or on behalf of the [...] victims [...]'. The use of the verb 'may' would in principle seem 'to reduce the victims' right of intervention into a mere faculty' concerning reparations proceedings after conviction.⁴²⁰⁴ Similar wording is found in two other official language versions, i.e., French and Spanish.⁴²⁰⁵ The wording is obscure and it would have been better to have the victims' right to be heard and present observations explicitly recognized.⁴²⁰⁶ Be that as it may, once victims' representations take place, the ICC must take them into consideration.⁴²⁰⁷ Under the RPE, the ICC 'shall require the Registrar to notify victims and is thus obligated to involve them'.⁴²⁰⁸

Article 76 (3) states that if a separate sentencing hearing takes place, which was the case in *Lubanga*, reparations could be examined at the same hearing or alternatively at a separate hearing 'Where paragraph 2 applies [separate sentencing hearing], any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing'. In general, it is expected that a reparations hearing takes

⁴²⁰⁰ Provisions dealing with the Trial Chamber's functions and powers.

⁴²⁰¹ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 260.

⁴²⁰² *Ibid.*, para. 261.

⁴²⁰³ *Ibid.*, para. 262.

⁴²⁰⁴ Donat-Cattin (2008b) 1407.

⁴²⁰⁵ See, respectively, 'Avant de rendre une ordonnance en vertu du présent article, la Cour peut solliciter, et prend en considération, les observations [...] des victimes [...]', and 'La Corte, antes de tomar una decisión con arreglo a este artículo, podrá solicitar y tendrá en cuenta las observaciones formuladas por el condenado, las víctimas'.

⁴²⁰⁶ Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003) 229.

⁴²⁰⁷ Donat-Cattin (2008b) 1408.

⁴²⁰⁸ ICC RPE, rules 94 (2) and 95 (3).

place before the competent Trial Chamber prior to the delivery of the reparations order by that Chamber. Indeed, rule 143 of the RPE refers to a reparations hearing in association with one on sentencing, which would suggest that it is required.⁴²⁰⁹ However, under the ICC Regulations of the Court, the Trial Chamber may hear witnesses and examine evidence concerning a reparations order at the same time than the trial,⁴²¹⁰ which implies that there is no need for a separate hearing.⁴²¹¹ In any case, the Regulations 'shall be read subject to the Statute and the Rules'.⁴²¹²

The Working Group at the Rome Conference added the reference to additional hearings contained in article 76 (3).⁴²¹³ This article is complemented by the above-mentioned rule 143 (Additional hearings and matters related to sentence or reparations), which reads as follows:

Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91 and, in respect of reparations hearings, those victims who have made a request under rule 94.

During the drafting of this rule, it was felt necessary to include within those who could apply for a postponement of a reparations hearing, victims who had requested reparations under rule 94.⁴²¹⁴ In order to avoid that the explicit reference to victims seeking reparations may lead to assume that victim participants would be excluded from asking postponement, the latter were included explicitly.⁴²¹⁵ In any case, legal representatives cannot as such initiate a

⁴²⁰⁹ Schabas (2010) 883.

⁴²¹⁰ ICC Regulations of the Court, regulation 56 ('Evidence under Article 75. The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial'.).

⁴²¹¹ Schabas (2010) 883.

⁴²¹² ICC Regulations of the Court, regulation 1 (2).

⁴²¹³ Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/ Add.2 (4 July), p. 5. See also Schabas, 'Article 76 – Sentencing' in Triffterer (2008b) 1413, 1416.

⁴²¹⁴ See Lewis (2001) 552.

⁴²¹⁵ *Ibid.*, Loc. cit.

reparations hearing as they only have the power to postpone such hearing as seen.⁴²¹⁶

‘Representations’ whereby victims can present their views to the ICC can be written and oral.⁴²¹⁷ While article 76 (2) and (3) require that they ‘shall be heard’ in the reparations hearing(s), the Regulations of the Court refer to representations as being written.⁴²¹⁸

It has been argued that the right to be heard prior to a reparations order (under article 75 (3)) might be qualified as a specification of the general right of participation (under article 68 (3)),⁴²¹⁹ and thus the application of article 68 (3) would be excluded and victims would participate in the reparations phase proceedings only via representations and upon invitation of the ICC.⁴²²⁰ Additionally, some ICC RPE differentiate between victim participants and victims as reparations claimants.⁴²²¹

However, it is sustained herein that victims as reparations claimants cannot only participate in reparations phase proceedings via ‘representations’ on notification following articles 75 (3) and rules 94 or 95, but they should also be allowed to participate as victim participants in reparations phase proceedings, i.e., to possess relevant procedural rights beyond mere submission of representations upon the ICC’s invitation, if they follow the respective application process, detailed in the previous chapter,⁴²²² based on the following reasons.⁴²²³

First, reparations phase proceedings ‘are an integral part of the overall trial process’, according to Trial Chamber I,⁴²²⁴ and ICC official documents,⁴²²⁵ letting alone the systematic location of article 75 under part 6 (Trial) of the ICC Statute, as previously said. Thus, since article 68 (3) (legal ground for victim participant status) is applicable to ‘all stages of the proceedings determined to be

⁴²¹⁶ See also Dwertmann (2010) 195.

⁴²¹⁷ *Ibid.*, 218.

⁴²¹⁸ According to regulation 38, representations under article 75 shall not exceed the 100 page limit, unless otherwise permitted by the ICC.

⁴²¹⁹ Donat-Cattin, David, ‘Article 75’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article (Nomos/Baden Baden 1999b)* 965, 974.

⁴²²⁰ Dwertmann (2010) 219.

⁴²²¹ See, e.g., ICC RPE, rule 143.

⁴²²² See *supra* Chapter IV 2.3.

⁴²²³ See also Dwertmann (2010) 220-221.

⁴²²⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 260.

⁴²²⁵ ICC (2006) 11.

appropriate by the Court', which includes pre-trial, trial and appeals, article 68 (3) is also applicable during reparations phase proceedings.⁴²²⁶

Second, excluding the application of article 68 (3) from reparations phase proceedings would mean a considerable reduction of the victims' participatory rights in reparations phase proceedings, which would go against the goals behind victims' rights to participate and claim reparations.⁴²²⁷

Third, under subsection 3 (Participation of victims in the proceedings) of section III (Victims and witnesses) of the ICC RPE, rule 91 (4) mentions victims' participation in a hearing that is 'limited to reparations under article 75'.

Fourth, the purpose of article 75 (3) is arguably to give the ICC authority to persons who have not applied to participate on their own motion, i.e., as victim participants, but about whom the ICC is interested in hearing their views on reparations.⁴²²⁸ Actually, under article 75 (3) (read together with article 76), besides victims, other interested persons, including *bona fide* third parties, namely, owners of property which was previously owned by victims, and the convicted can be heard by the ICC on reparations.⁴²²⁹

Fifth, although it has been suggested that, in post-conviction stages, the need to protect the convicted's interests ought to prevail over victim's search for justice,⁴²³⁰ it does not seem to be the case that the offender's interests are more worthy of protection after establishment of his/her responsibility.⁴²³¹ On the contrary, it is precisely during the reparations phase proceedings (post-conviction) where victims may be particularly interested in an active participation and, thus, truly benefit of a clear manifestation of restorative justice. Thus, Trial Chamber I in its reparations decision established that 'The Court is mainly concerned at this juncture [reparations phase proceedings] with the victims'.⁴²³² Additionally, if when participating in proceedings (in general) at the ICC, victim participants have been considered as 'potential parties',⁴²³³ this qualification could be even more appropriate during reparations phase proceedings.

⁴²²⁶ See also Dwertmann (2010) 220.

⁴²²⁷ *Ibid.*, Loc. cit.

⁴²²⁸ *Ibid.*, Loc. cit.

⁴²²⁹ See also Donat-Cattin (2008b) 1408.

⁴²³⁰ Donat-Cattin (1999b) 974; Donat-Cattin (2008b) 1407.

⁴²³¹ Dwertmann (2010) 220.

⁴²³² Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 267.

⁴²³³ Donat-Cattin (1999b) 974; Donat-Cattin (2008b) 1407.

Indeed, Trial Chamber I in its reparations decision suggested the application of the victim participant status during reparations phase proceedings:

The Registry shall decide, in accordance with its powers under Article 43 (1) of the Statute, the most appropriate manner in which the current *victims participating in the proceedings*, along with the broader groups of victims who may ultimately benefit from a reparations plan, *are to be represented in order to express their views and concerns* [emphasis added].⁴²³⁴

Concerning the ‘personal interest’ criterion to participate, this is met when victims request reparations under rule 94.⁴²³⁵ With regard to victims who did not apply for reparations, considering that victims status as victim participants is only based on article 68 (3) and, in turn, article 75 (3) and the applicable rules only foresee reparations for those who have applied for them, it should be assessed whether victim’s personal interest to participate might come from his/her intention to prevent a reparations order against the convicted.⁴²³⁶

The considerations under the previous paragraphs are also related to the idea according to which victims, when claiming reparations, can be considered as ‘proper parties’ and, therefore, they ‘could possess all relevant procedural rights’.⁴²³⁷

At this point, it must be noticed that the Appeals Chamber in *Lubanga* has considered that victims are parties to, and not victim participants in, the appeal proceedings against a reparations order.⁴²³⁸ This finding, as examined in the next sub-section, corresponds to an explicit right for reparations claimants to appeal a reparations order under article 82 (4) of the ICC Statute, i.e., the right to appeal a reparations order as parties.

In practice, victims who have applied for reparations under rule 94, are expected to directly or via their legal representatives present their observations in the reparations hearing and these must be considered by the ICC.⁴²³⁹ Additionally, according to rule 144 (1) ‘victims or the legal representatives of victims participating in the proceedings’ hold the right to be present, wherever possible, when the Trial Chamber delivers ‘Decisions [...] concerning [...]

⁴²³⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 268.

⁴²³⁵ Dwertmann (2010) 221.

⁴²³⁶ Ibid., Loc. cit.

⁴²³⁷ Zappala (2010) 154. See also Brady (2001b) 595.

⁴²³⁸ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 67.

⁴²³⁹ Dwertmann (2010) 221.

reparations [...]’ and, under rule 144 (2) (a), copies of such decision shall be provided to ‘all those who participated in the proceedings, in a working language of the Court’. During the reparations hearing, rule 91 (4) of the ICC RPE provides a more generous scope of action for the legal representatives of victims than during other proceedings:

For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 [i.e., to limit legal representative’s intervention to written submission] shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

Accordingly, for example, there are in principle no limitations on the questioning of witnesses, experts and the convicted person; victims are also free to submit relevant supporting information;⁴²⁴⁰ and, unlike other stages, during reparations hearings the ICC cannot limit the legal representatives to only submit written submissions.⁴²⁴¹ This is related to the fact that, in the reparations hearing, the key matter is by definition to establish the injury, harm or loss inflicted on the victims caused on the crimes upon which the accused was convicted. The analysis of the necessary standard of proof is conducted later.⁴²⁴² It is expected the participation and/or submission of (written) representations/observations from a larger number of victims than those who participated as victim participants in the trial, which may transform the ICC in a sort of a mini claims commission.⁴²⁴³ Indeed, an important number of victim participants in *Lubanga* had not originally filed reparations applications, which may in principle be understood as that they were not particularly interested in having a monetary interest. In any case, victims may personally participate (articles 75 (3), 76 (3)), or considering the large number of them, most likely via

⁴²⁴⁰ See ICC RPE, rule 94 (1) (g); McGonigle Leyh (2011) 302.

⁴²⁴¹ Dwertmann (2010) 222.

⁴²⁴² See *infra* Chapter V 4.3.1.2.

⁴²⁴³ McGonigle Leyh (2011) 302. Indeed, the Prosecutor has favored a wider approach to allow victims’ participation and victims’ representations or on their behalf and other interested individuals ‘who suffered harm as a result of crimes other than those included in the charges selected for prosecution’. Office of the Prosecutor, Policy Paper on Victims’ Participation under Article 68 (3) of the ICC Statute, April 2010, p. 9.

their legal representatives as provided for in the ICC Statute,⁴²⁴⁴ and thus ensure efficiency.

Under rule 97 (2), the ICC may appoint experts for the reparations assessment on request of victims or their legal representatives and the ICC 'shall' invite victims or their legal representatives to make 'observations' on the experts' reports on reparations, as appropriate:

At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts [emphasis added].

Accordingly, victims' status and role during reparations phase proceedings at the ICC is 'potentially much stronger than the wording of Art. 75 (3) suggests'.⁴²⁴⁵

After Lubanga's conviction, on the road to its reparations decision, Trial Chamber I in *Lubanga* invited parties and victim participants to file submissions on the principles to be applied by the Chamber with regard to reparations; and the procedure to be followed by it including, *inter alia*:

[...] i) whether reparations should be awarded on a collective or an individual basis (see Rule 97 (1) of the Rules); ii) depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards; iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute; iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and v) whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.⁴²⁴⁶

⁴²⁴⁴ ICC Statute, article 75 (3) ('representations from or on behalf of [...] victims'). See also rule 91 providing for the possibility to present victims' views via their legal representatives in reparations proceedings.

⁴²⁴⁵ Dwertmann (2010) 222.

⁴²⁴⁶ Lubanga (ICC-01/04-01/06-2844), 14 March 2012, para. 8.

Moreover, it was also stated that if other individuals, including those notified of the reparations proceedings under rule 96 of the RPE, seek to file submissions, they were given the opportunity to apply in writing for leave to participate.⁴²⁴⁷ Thus, the Chamber granted leave to, for example, UNICEF, Women's Initiatives for Gender Justice, and other NGOs to make written representations.⁴²⁴⁸ Following the Trial Chamber's invitation, the legal representatives of the V01 group of victims,⁴²⁴⁹ and those of the V02 group of victims,⁴²⁵⁰ filed written submissions accordingly. The TFV and the Registrar also filed their submissions.⁴²⁵¹

Upon Trial Chamber I's instruction, the OPCV was appointed by the Registrar as the legal representative for any unrepresented reparations applicants. Trial Chamber I, considering that the expertise of the OPCV is useful, in particular to safeguard the rights of those potential beneficiaries for collective reparations,⁴²⁵² noticed that the OPCV may:

- [...] a. act as the legal representatives of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a legal representative to act on their behalf; and
- b. represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations pursuant to Rules 97 and 98 of the Rules.⁴²⁵³

The OPCV was thus provided with the applications for reparations so far received and given the mandate to receive any future applications from unrepresented victims as well as allowed to file submissions on behalf of those victims who had not 'submitted applications but who may fall within the scope of an order for collective reparations'.⁴²⁵⁴ Moreover, the Trial Chamber instructed the OPCV to 'file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed by the

⁴²⁴⁷ Ibid., para. 9.

⁴²⁴⁸ Lubanga (ICC-01/04-01/06-2870), 20 April 2012, para. 22 (the other NGOs were the *Fondation Congolaise pour la Promotion des Droits humains et la Paix* and *Avocats sans Frontières* (along with the NGOs it represents)).

⁴²⁴⁹ Lubanga (ICC-01/04-01/06-2864), 18 April 2012, paras. 10-50.

⁴²⁵⁰ Lubanga (ICC-01/04-01/06-2869), 18 April 2012, paras. 11-44.

⁴²⁵¹ See respectively Lubanga ((ICC-01/04-01/06-2870), 20 April 2012; Lubanga (ICC-01/04-01/06-2865), 18 April 2012.

⁴²⁵² Lubanga (ICC-01/04-01/06-2858), 5 April 2012, para. 11.

⁴²⁵³ Ibid., para. 12.

⁴²⁵⁴ Ibid., para. 13.

Chamber on behalf of those victims who have not submitted applications but who may fall within the scope of an order for collective reparations [...]'.⁴²⁵⁵ Accordingly, the OPCV filed submissions.⁴²⁵⁶ Submissions by legal representatives of the V01 and V02 groups of victims as well as those by the OPCV discussed, *inter alia*, individual and collective reparations as well as modalities of reparations including compensation, rehabilitation and restitution, which is examined later.⁴²⁵⁷

Based on the contents of and discussion in the reparations decision in *Lubanga*, it can be concluded that although Trial Chamber I paid close attention to the submissions by the legal representatives of the groups of victims and the OPCV, it differed in some issues, which have been questioned by the victims' legal representatives and the OPCV, as part of the appeals proceedings against the reparations decision, examined in the following subsection.

In *Lubanga*, as previously seen,⁴²⁵⁸ the Trial Chamber considered that its first reparations decision did not constitute an 'order for reparations' in the sense of article 82 (4) as reparations were not ordered in the reparations decision and, instead, it 'establishes principles and procedures relating to reparations, pursuant to Article 75 (1)'.⁴²⁵⁹ However, the Appeals Chamber considered it necessary to examine *in limine*, before addressing any other issue in the appeals, whether the appeals, not only those filed by the victims' legal representatives but also by the defence, were admissible and who should make submissions or submit observations on the appeals.⁴²⁶⁰ In particular, the Appeals Chamber requested submissions from the victims' legal representatives about whether they appear before the Appeals Chamber only on behalf of those individuals who have claimed reparations.⁴²⁶¹ From the Prosecutor, defence, victims' legal representatives and the TFV, Appeals Chamber requested observations (and the respective supporting documents):

[...] addressing the admissibility of the appeals and the question of the making of observations on the appeals, including on the following issues:

⁴²⁵⁵ Ibid., Loc. cit.

⁴²⁵⁶ Lubanga (ICC-01/04-01/06-2863), 18 April 2012.

⁴²⁵⁷ See *infra* Chapter V 4.3.1.1 and 4.3.2.

⁴²⁵⁸ See *supra* Chapter IV 6.3.2.

⁴²⁵⁹ Lubanga (ICC-01/04-01/06-2911), 29 August 2012, para. 20.

⁴²⁶⁰ Lubanga (ICC-01/04-01/06-2923), Directions on the Conduct of the Appeals Proceedings, Appeals Chamber, 17 September 2012, p. 3.

⁴²⁶¹ Ibid., p. 4.

- a) the nature of the "Decision establishing the principles and procedures to be applied to reparations" [...]
- b) whether Mr Thomas Lubanga Dyilo, who was not ordered to make any specific reparations, and claimants for reparations, including those whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber's "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 [...] as well as those victims who may be affected by an order for collective reparations, have the right to appeal it under article 82 (4) of the Statute.⁴²⁶²

In answering the Appeals Chamber's request for observations on the directions on the conduct of appeals proceedings, which established that this request was 'without prejudice to the resolution of who has standing in these appeals',⁴²⁶³ the legal representatives of the two groups of victims sustained that the reparations decision constitutes a reparations order due to their content and formulation and, thus, claimed to have the right to appeal it.⁴²⁶⁴ The OPCV,⁴²⁶⁵ and the TFV argued along the same lines, in particular, the later sustained that since the decisions shall be determined considering their content and the context where they were issued, the reparations decision constitutes a reparations order,⁴²⁶⁶ and in particular, as for individual applications transmitted by the Trial Chamber to the TFV to be included in any of its reparations program.⁴²⁶⁷

As previously noticed,⁴²⁶⁸ the Appeals Chamber ended up considering that the Trial Chamber I's reparations decision in *Lubanga* constitutes a reparations order. Thus, the Appeals Chamber reversed the Trial Chamber's finding on the nature of the reparations decision insofar as for the former the reparations decision in question is a reparations order. This finding was grounded mainly on two reasons. First, the Appeals Chamber noted that the reparations decision contained a part on 'procedure', whereby '[...] the Trial Chamber addressed aspects that relate, under the statutory scheme for

⁴²⁶² Ibid., Loc. cit.

⁴²⁶³ Ibid., Loc. cit.

⁴²⁶⁴ Lubanga (ICC-01/04-01/06-2931), Observations de l'équipe V02 de représentants légaux de victims, conformément aux directives ICC-01/04-01/06-2923, V02 team of legal representatives, 1 October 2012, paras. 17-24; Lubanga (ICC-01/04-01/06-2926), Observations sur les Appels à l'encontre de la 'Decision Establishing the Principles and Procedures to be Applied to Reparations', V01 team of legal representatives of victims, 28 September 2012, paras. 10-21.

⁴²⁶⁵ Lubanga (ICC-01/04-01/06-2928), 1 October 2012, paras. 19-28.

⁴²⁶⁶ Lubanga (ICC-01/04-01/06-2927), Observations in Response to the Direction on the Conduct of Appeal Proceedings, TFV, 1 October 2012, paras. 12-27.

⁴²⁶⁷ Ibid., para. 21.

⁴²⁶⁸ See supra Chapter IV 6.3.1.

reparations, to the steps to be taken both before and after the issuance of an order for reparations'.⁴²⁶⁹ As for the first part of the reparations proceedings, the Appeals Chamber paid attention to the delegation of the Trial Chamber's functions under rule 97 of the ICC RPE to the TFV, in particular the hearing of experts pursuant rule 97 (2).⁴²⁷⁰ As for the second part of the reparations proceedings, i.e., those adopted after the issuance of a reparations order, the Appeals Chamber noted that the reparations decision indeed includes steps on the implementation phase as the reparations decision:

[...] requires the Trust Fund to determine the appropriate forms of reparations and to execute a five-step implementation plan, including by presenting proposals for collective reparations to a differently composed Trial Chamber for approval. The Trial Chamber further ruled that the assessment of harm and the identification of victims and beneficiaries were to be carried out by the Trust Fund, which was to update a newly constituted Chamber in relation to the implementation of the five-step plan on a regular basis.⁴²⁷¹

Therefore, the Appeals Chamber concluded that the Trial Chamber mandated the TFV 'to take steps in relation to the implementation phase' and that, under the reparations statutory scheme, 'the TFV can only undertake activities in relation to implementation following the issuance of an order for reparations'.⁴²⁷²

Second, the Appeals Chamber recalled the Trial Chamber's reference to the role of a newly composed Trial Chamber as that of monitoring and oversight of the TFV,⁴²⁷³ which corresponds to the Trial Chamber's role under the Regulations of the TFV during the reparations implementation phase.⁴²⁷⁴ Thus, the Appeals Chamber concluded that:

[...] the practical effect of this is that the Impugned Decision represents the final judicial decision in respect of reparations, apart from such monitoring and oversight required of the Trial Chamber under the Regulations of the Trust Fund after an order for reparations has been issued, such as the "approval" of

⁴²⁶⁹ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 57.

⁴²⁷⁰ Ibid., para. 59 (referring to Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 265.).

⁴²⁷¹ Ibid., para. 60.

⁴²⁷² Ibid., Loc. cit.

⁴²⁷³ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, paras. 261 and 262.

⁴²⁷⁴ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 62.

the draft implementation plan under regulations 57 or 69 of the Regulations of the Trust Fund.⁴²⁷⁵

Based on the previous considerations, it may herein be agreed with the Appeals Chamber when this concludes that ‘without prejudice to any final decision on the merits, the Appeals Chamber concludes that the Impugned Decision is deemed to be an order for reparations, which may be appealed pursuant to article 82 (4) of the Statute’.⁴²⁷⁶

It may be noticed that, in *Lubanga*, a reparations hearing has not yet taken place. This may be related to the fact that originally the submissions leading to the reparations decision were asked and arguably filed in the understanding that the Trial Chamber would not yet deliver a reparations order at that stage, which was changed by the Appeals Chamber’s qualification of the reparations decision as a reparations order. In any case, since a newly constituted Trial Chamber will monitor and oversight the TFV’s reparations implementation plan, it is expected that reparations claimants will exercise other procedural rights in the reparations phase proceedings ahead. It should also be remembered, as mentioned previously,⁴²⁷⁷ that in *Lubanga*, both the conviction and the sentence have been appealed.

3.3.1.4. Victims and Reparations Phase Proceedings: Appeals Against Reparations Orders

As previously mentioned,⁴²⁷⁸ with regard to appeals of a reparations order, according to article 82 (4) of the ICC Statute ‘A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence’. This specific provision arguably confirms that victims have no general standing to appeal ICC’s decisions, excepted for the reparations order.⁴²⁷⁹ Concerning the question of which categories of victims have the right to appeal a reparations order, via their legal representative, under article 82 (4), which was asked by the Appeals Chamber in *Lubanga*,⁴²⁸⁰ it may in principle be argued that the term a ‘legal representative of the victims’ refers to both lawyers of victim participants (who

⁴²⁷⁵ Ibid., para. 63.

⁴²⁷⁶ Ibid., para. 64.

⁴²⁷⁷ See supra Chapter IV 6.3.1.

⁴²⁷⁸ See supra Chapter IV 6.3.1.

⁴²⁷⁹ Schabas (2010) 949; Roth and Henzelin (2002) 1542.

⁴²⁸⁰ *Lubanga* (ICC-01/04-01/06-2923), 17 September 2012, p. 4.

claimed reparations) and also legal representatives of reparations claimants who do not have the official status of victim participants based on three reasons. First, to claim reparations at the ICC, it is not necessary to hold the victim participant status. Second, some references existent in the ICC Statute and the RPE in which when the word ‘victims’ is used alone may imply victims in general, i.e., regardless of their victim participant status.⁴²⁸¹ Third, the procedural stage when the appeal against a reparations order takes place, i.e., reparations phase. Therefore, it is herein agreed with the OPCV on that the legal representatives of reparations claimants without the victim participant status can appeal a reparations order.⁴²⁸² Even the Prosecutor, who showed reluctance about reparations claimants that do not have a formal victim participant status or those who have yet to claim reparations, concerning participation as victim participants in interlocutory appeals proceedings, has acknowledged that victims who are reparations claimants have the right to appeal a reparations order.⁴²⁸³

In this regard, it may be argued that since under article 75 victims hold a right to seek reparations, ‘As a claimant for reparations, such victims are clearly “parties” and have an explicit right under article 82, paragraph 4 to appeal an order for reparations’.⁴²⁸⁴ Indeed, when dealing with the procedure to bring an appeal, rule 150 of the RPE uses the word ‘parties’ to refer to those who may file an appeals against a conviction/acquittal judgment, sentence and reparations order,⁴²⁸⁵ although the civil party status does not exist in the ICC as previously said. In any case, the right to appeal a reparations order cannot be exercised directly and must be done via victims’ legal representatives. As seen, the legal representatives of the two groups of victims and the OPCV represent simultaneously several categories of victims, who have different status in *Lubanga*. Therefore, reparations claimants who lack the status of victim participants may directly benefit from any appeals against a reparations order

⁴²⁸¹ See, among others, ICC Statute, article 15 (3) (‘Victims may make representations [...]’), article 19 (‘[...] victims, may also submit observations to the Court’). As for the ICC RPE, see, among others, rule 92 (2) (‘In order to allow victims to apply for participation [...]’); rule 93 (‘[...] a Chamber may seek the views of other victims, as appropriate’).

⁴²⁸² *Lubanga* (ICC-01/04-01/06-2928), 1 October 2012, paras. 20-21.

⁴²⁸³ *Lubanga* (ICC-01/04-01/06-2930), 1 October 2012, para. 31.

⁴²⁸⁴ *Brady* (2001b) 595.

⁴²⁸⁵ ICC RPE, rule 150 (‘1. Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the *party* filing the appeal is notified of the decision, the sentence or the reparation order. 2. The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the *party* seeking to file the appeal [emphasis added]’).

due to the manner how victims have been grouped and represented in the ICC cases. The existence of common legal representation is also beneficial for the effectiveness of appeal proceedings considering the likely high number of reparations claimants.

The previous considerations evidence once again that although the status of victims as reparations claimants and as victim participants are related and may even be cumulative, i.e., victims may hold a sort of ‘dual’ reparations claimant-victim participant status, these two dimensions of the victims’ status are autonomous from each other. Be that as it may, since legal representatives of victims (especially the OPCV) for reparations purposes may represent victim participants (both those who have claimed reparations and those who have yet to claim them) and also victims who are only reparations claimants, their actions and also the final outcome of reparations orders will benefit equally all victims who claimed reparations or will claim reparations.

In *Lubanga*, after considering the reparations decision as a reparations order, the Appeals Chamber proceeded to determine the categories of victims who are holders of the right to appeal it. Since the reparations decision has been qualified as a reparations order, the legal representatives of victims and the OPCV are ‘entitled to bring an appeal’.⁴²⁸⁶ The Appeals Chamber explicitly considered that victims are parties to the appeals proceedings against a reparations order, under article 82 (4), and not victim participants:

They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected. Furthermore, the Appeals Chamber notes that the right to appeal lies with the victims, not with the legal representatives of victims. In this regard, article 82 (4) of the Statute provides that victims may only appeal with the assistance of a legal representative as is the case in these appeals.⁴²⁸⁷

As previously noticed, this finding corresponds to the existence of an explicit right for reparations claimants to appeal a reparations order under article 82 (4) of the ICC Statute, i.e., their right to appeal a reparations order as parties.

Concerning the categories of victims who can via their legal representatives appeal a reparations order, it should be noted that the Appeals Chamber in *Lubanga* when requesting observations for the direction on the

⁴²⁸⁶ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 67.

⁴²⁸⁷ *Ibid.*, Loc. cit.

conduct of appeals and, in addressing the two groups of victims' legal representatives and the OPCV, had focused on those who claimed reparations by explicitly asking 'who they represent in the present proceedings and, in particular, whether they appear before the Appeals Chamber only on behalf of those individuals who have claimed reparations'.⁴²⁸⁸ When submitting their observations in response to the Appeals Chamber's request, the V02 group of victims' legal representatives explicitly indicated that, concerning the appeals in question, they represented not only those victim participants who requested reparations but also victim participants who have not done yet so and, even those who lost their status as victim participants but who still are reparations claimants.⁴²⁸⁹ Moreover, the OPCV established that it was representing victims who lost their status as victim participants but who are seeking reparations, reparations claimants, and victims who have not yet claimed reparations but who could be involved by a collective reparations award.⁴²⁹⁰ The OPCV's answer was coherent with a previous instruction given by the Trial Chamber to represent those who have not submitted reparations applications yet but who can benefit from reparations,⁴²⁹¹ as already mentioned. Even the Prosecutor established that those who lost their victim status can still claim reparations in the future if a proper determination is made.⁴²⁹²

With regard to the categories of victims holding the right to appeal the reparations decision, understood as a reparations order, the Appeals Chamber in *Lubanga* has arrived to the following conclusions. First, victims under article 82 (4) include not only those victims who participated in proceedings related to the accused person's guilt or innocence or the sentence but also those victims who 'claimed to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations'.⁴²⁹³ The Appeals Chamber arrived to this conclusion by correctly recalling that a request for reparations (under rule 94 of the RPE) does not depend on holding the victim participant status or filing a victim participant application (under rule 89).⁴²⁹⁴

⁴²⁸⁸ Lubanga (ICC-01/04-01/06-2923), 17 September 2012, p. 4.

⁴²⁸⁹ Lubanga (ICC-01/04-01/06-2931), 1 October 2012, para. 16. Concerning those victims who lost their victim participant status, the legal representatives referred to the three victim participants called as witnesses by the victim participants' legal representatives during the trial in *Lubanga*.

⁴²⁹⁰ Lubanga (ICC-01/04-01/06-2928), 1 October 2012, para. 9.

⁴²⁹¹ Lubanga (ICC-01/04-01/06-2858), 5 April 2012, para. 13.

⁴²⁹² Lubanga (ICC-01/04-01/06-2930), 1 October 2012, para. 37.

⁴²⁹³ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 69.

⁴²⁹⁴ *Ibid.*, Loc. cit.

Second, the Appeals Chamber determined that those individuals whose request to participate as victim participants in relation to the accused's guilt or innocence was rejected or whose right to participate was withdrawn by the Trial Chamber in its judgment in *Lubanga* have the right to claim reparations and appeal the reparations decision.⁴²⁹⁵ The Appeals Chamber came to this conclusion by establishing that 'reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings'.⁴²⁹⁶

Third, the Appeals Chamber considered that victim participants who participated during the proceedings related to Lubanga's guilt or innocence but who did not request reparations are likely affected by the impugned reparations decision as those victims were given by the Trial Chamber a role in the reparations proceedings, which the victims accepted by filing submissions.⁴²⁹⁷ Thus, the Appeals Chamber found that:

[...] it is possible that they are affected by the Impugned Decision, in particular because the Impugned decision was the result of reparations proceedings in which they participated and made submissions. In this regard, the Appeals Chamber has also taken note of the submissions of the Legal Representatives of Victims 02 explaining that not all individuals that they represent have applied for reparations, at least in part because the legal representatives have been unable to contact them in relation to submitting a request for reparations.⁴²⁹⁸

Fourth, the Appeals Chamber determined that the OPCV is entitled to bring an appeal concerning individuals 'in respect of whom it was appointed as a legal representative'.⁴²⁹⁹ However, the Appeals Chamber considered that unidentified individuals who have not submitted applications but who may benefit from a collective reparations award and represented by the OPCV 'cannot have a right to appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist'.⁴³⁰⁰ Therefore, the Appeals Chamber found inadmissible the appeal brought by the OPCV concerning legal action on behalf of those unidentified

⁴²⁹⁵ Ibid., para. 70.

⁴²⁹⁶ Ibid., Loc. cit.

⁴²⁹⁷ Ibid., para. 71.

⁴²⁹⁸ Ibid., Loc. cit.

⁴²⁹⁹ Ibid., para. 72.

⁴³⁰⁰ Ibid., para. 72.

individuals; however, ‘This is without prejudice to the OPCV potentially being invited to make submissions on behalf of such individuals at a later stage in the proceedings’,⁴³⁰¹ i.e., ‘on specific issues arising in these appeals proceedings’.⁴³⁰²

It is herein agreed with the Appeals Chamber’s findings based on the analysis conducted in the beginning of this subsection, in particular the fact that those findings reflect the autonomous dimensions of victims’ status at the ICC, i.e., victims as victim participants and victims as reparations claimants. Therefore, although these two dimensions of the victims’ status may be interrelated, they can be exercised autonomously.

Concerning the grounds of appeals in *Lubanga*, it should be mentioned that the groups of victims’ legal representatives have requested the Appeals Chamber to set aside the Trial Chamber’s decision since, they claimed, this decision, *inter alia*, dismissed the individual reparations applications without considering their merits.⁴³⁰³ The appellants also asked the Appeals Chamber to direct ‘Trial Chamber I to rule anew on the matter of reparations under article 75 of the Rome Statute in light of the findings of the Appeals Chamber’.⁴³⁰⁴ The V01 group of victims’ legal representatives sustained that the Trial Chamber erred in law by: i) dismissing the individual applications for reparations without entertaining them; ii) absolving the convicted person from any obligation as regards reparations; and iii) deciding that the defence and the Prosecutor remain parties to the reparations phase proceedings.⁴³⁰⁵

In turn, the V02 group of victims’ legal representatives and the OPCV, the latter representing any unrepresented reparations applicant and those who have not submitted applications,⁴³⁰⁶ have sustained in their joint appeal against the reparations decision that the Trial Chamber erred in law by: i) dismissing the individual applications for reparations without considering them on their merits;

⁴³⁰¹ Ibid., Loc. cit.

⁴³⁰² Ibid., para. 76.

⁴³⁰³ *Lubanga* (ICC-01/04-01/06-2914), 3 September 2012, pp. 9-10 (the impugned decision was also appealed because it ‘[...] (ii) declines to order the convicted person to pay reparations; and (iii) – alternatively submitted – retains the Defence and the Prosecutor as parties in a process implemented by the Trust Fund for Victims’); *Lubanga* (ICC-01/04-01/06-2909), 24 August 2012, p. 11. (the impugned decision was also appealed because of ‘[...] (ii) the referral of the instant case to a newly constituted chamber; and (ii) the delegation by the Chamber of its own reparations responsibilities to the Trust Fund for Victims and the Registry’.).

⁴³⁰⁴ *Lubanga* (ICC-01/04-01/06-2914), 3 September 2012, p. 10; *Lubanga* (ICC-01/04-01/06-2909), 24 August 2012, p. 11.

⁴³⁰⁵ *Lubanga* (ICC-01/04-01/06-2914), 3 September 2012, paras. 11-27.

⁴³⁰⁶ *Lubanga* (ICC-01/04-01/06-2858), 5 April 2012, para. 12. See, for further details, *supra* Chapter V 3.3.1.3.

ii) referring the case to a newly constituted chamber at the reparations stage; and
iii) deciding to delegate its own reparations responsibilities to two non-judicial entities, i.e., the TFV and the Registry.⁴³⁰⁷ Moreover, the OPCV and the V02 group of victims' legal representatives filed responses to the defence's request for leave to appeal the reparations decision.⁴³⁰⁸

It should be mentioned that so far the Appeals Chamber has established that although whether the referral of individual reparations applications from Trial Chamber I to the TFV was correct will be determined on the merits of appeals, those individuals are entitled to appeal the reparations decision.⁴³⁰⁹ The grounds of appeals will be in due time examined by the Appeals Chamber on the merits of appeals. In any case, in *Lubanga*, legal representatives of the V02 group of victims (jointly with the OPCV) and the legal representatives of the V01 group of victims were authorized to submit their documents in support of their appeals within 60 days of notification (in application of regulation 59 of the Regulations of the Court),⁴³¹⁰ and they filed their documents accordingly.⁴³¹¹ They were also authorized to submit their responses to the supporting document to be filed by Lubanga in support of his appeal against the reparations decision,⁴³¹² and they filed their documents accordingly.⁴³¹³ Victim participants' legal representatives have also filed their responses to the defence's arguments contained in its appeal against the reparations decision.⁴³¹⁴

⁴³⁰⁷ Lubanga (ICC-01/04-01/06-2909), 24 August 2012, paras. 17-26.

⁴³⁰⁸ Lubanga (ICC-01/04-01/06-2907), 17 August 2012.

⁴³⁰⁹ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 70.

⁴³¹⁰ *Ibid.*, p. 4 and para. 74.

⁴³¹¹ Lubanga (ICC-01/04-01/06-2970), Document in Support of the Appeal Against Trial Chamber I's 7 August 2012 Decision Establishing the Principles and Procedures to be Applied to Reparation, Office of Public Counsel for Victims and V02 Team of Legal Representatives of Victims, 5 February 2013; Lubanga (ICC-01/04-01/06-2973), Document à l'appui de l'appel contre la « Decision Establishing the Principles and Procedures to be Applied to Reparations » du 7 août 2012, V01 Team of Legal Representatives of Victims, 5 February 2013.

⁴³¹² Lubanga (ICC-01/04-01/06-2953), 14 December 2012, p. 4.

⁴³¹³ Lubanga (ICC-01/04-01/06-3007), 7 April 2013; Lubanga (ICC-01/04-01/06-3010), Joint Response to the "Mémoire de la Défense de M. Thomas Lubanga Relatif à l'appel à l'encontre de la 'Decision Establishing the Principles and Procedures to be Applied to Reparations', Rendue par la Chambre de Première Instance le 7 août 2012", Office of Public Counsel for Victims and V02 Team of Legal Representatives of Victims, 8 April 2013.

⁴³¹⁴ Lubanga (ICC-01/04-01/06-3010), Joint Response to the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Decision establishing the principles and procedures to be applied to reparations', rendue par la Chambre de première instance le 7 août 2012", Office of Public Counsel for Victims and V02 Team of Legal Representatives of Victims, 8 April 2013; Lubanga (ICC-01/04-01/06-3007), Réponse au Mémoire de la Défense relatif à l'appel

It can also be mentioned that both the TFV and the V01 group of victims' legal representatives,⁴³¹⁵ agreed with the defence's request for suspensive effects of the reparations decision.⁴³¹⁶ Since Lubanga's conviction has been appealed, as previously noticed,⁴³¹⁷ and, in consideration that the case-based reparations regime depends on the (final) determination of Lubanga's responsibility in appeals, the suspensive effect is the most logical approach. This indeed has been the approach adopted by the Appeals Chamber 'Notwithstanding the potential for delay, the Appeals Chamber finds that in the present circumstances, there is a clear need to suspend the enforcement of the Impugned Decision'.⁴³¹⁸ Additionally, since the Appeals Chamber considered the reparations decision as a reparations order (appeal-related proceedings under article 82 (4) of the ICC Statute) and not an interlocutory decision, it declared inadmissible the appeal brought (under article 82 (1) (d)) by Lubanga.⁴³¹⁹ Thus, the Appeals Chamber found that Lubanga is entitled to appeal the reparations decision under article 82 (4),⁴³²⁰ and found the respective appeal brought by him admissible.⁴³²¹

In application of the ICC RPE: i) the appeal against a reparations order has to be filed not later than 30 days from the date when victims claiming reparations, or their legal representatives, have been notified of the reparations order although the Appeals Chamber may extend this time limit for good cause claimed by the party which is seeking to file the appeal;⁴³²² and ii) the Appeals Chamber may confirm, reverse or amend a reparations order.⁴³²³ In general, the appeals against a reparations order might concern, *inter alia*, the scope of

contre la « Decision Establishing the Principles and Procedures to be applied to Reparations » du 7 août 2012, V01 Team of Legal Representatives of Victims, 7 April 2013.

⁴³¹⁵ See respectively Lubanga (ICC-01/04-01/06-2926), Observations sur les Appels à l'encontre de la 'Decision Establishing the Principles and Procedures to be Applied to Reparations', 28 September 2012, para. 38; Lubanga (ICC-01/04-01/06-2927), 1 October 2012, paras. 44-48.

⁴³¹⁶ Lubanga (ICC-01/04-01/06-2917), Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation Rendered on 7 August 2012, 6 September 2012, paras. 12-15.

⁴³¹⁷ See supra Chapter IV 6.3.1.

⁴³¹⁸ Lubanga (ICC-01/04-01/06-2953), 14 December 2012, para. 84.

⁴³¹⁹ Ibid., p. 3.

⁴³²⁰ Ibid., para. 66 ('[...] at this stage and for the purposes of the admissibility of his appeal, it appears possible that Mr. Lubanga is adversely affected by the Impugned Decision').

⁴³²¹ Ibid., p. 3.

⁴³²² ICC RPE, rule 150 (1).

⁴³²³ Ibid., rule 153 (1).

reparations beneficiaries, e.g., some individual(s) excluded, and reparations modalities.⁴³²⁴

A point not explicitly clarified in the ICC instruments is whether victims' legal representatives can appeal when a reparations order is not awarded. It may in principle be presumed that victims' legal representatives can appeal against a decision refusing to render a reparations order.⁴³²⁵ This interpretation would be consistent with the object and purpose of the ICC's instruments to grant victims the right to appeal a reparations order, which may be even considered as more urgent when no reparations order has been issued.⁴³²⁶ Nevertheless, silence on this matter may be interpreted as victims being able to only challenge the content of reparations orders but not to appeal the Trial Chamber's refusal to issue this kind of order,⁴³²⁷ based on the following reasons.⁴³²⁸ First, the ICC Statute and RPE clearly establish which persons and institutions can appeal against which decisions and this is apparently done on an exhaustive manner. Second, the drafting history of rule 153 (Judgment on appeals against reparation orders) backs up the interpretation whereby there is a need for a reparations order since a proposal for a broader phrasing enabling the Appeals Chamber to order a new reparations hearing was refused.⁴³²⁹ In any case, it is expected that the ICC's practice clarifies this issue in its future jurisprudence.⁴³³⁰

In case that a reparations decision is not considered a reparations order, it may be said, based on, *inter alia*, the analysis of the victim participants' status during interlocutory decision appeal proceedings (in general) previously conducted,⁴³³¹ that in order to formally participate as victim participants in reparations decision appeals proceedings, i.e., interlocutory appeals proceedings, reparations claimants would first need to become victim participants. As argued by the OTP in *Lubanga*, in the context of the reparations decision (when this was

⁴³²⁴ Dwertmann (2010) 263.

⁴³²⁵ See Christopher Staker, 'Article 82' in Triffterer (1999) 1029, 1032; Staker (2008) 1480; Jason Manning, 'On Power, Participation and Authority: The International Criminal Court's Initial Appellate Jurisprudence' (2007) 38 *Georgetown Journal of International Law* 803, 813.

⁴³²⁶ Dwertmann (2010) 262.

⁴³²⁷ Adrian Hoel, 'The Sentencing Provisions of the International Criminal Court: Common Law, Civil Law, or Both' (2007) 33 *Monash University Law Review* 264, 286.

⁴³²⁸ See Dwertmann (2010) 262-263.

⁴³²⁹ See Brady (2001b) 587-588.

⁴³³⁰ In *Lubanga*, the Appeals Chamber stated that 'Whether the decision not to award reparations is appealable under article 82 (4) of the Statute does/not have to be, and is not, addressed in the present decision'. *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, para. 54, footnote 165.

⁴³³¹ See *supra* Chapter IV 6.3.2.

not yet considered a reparations order), not only the interest in participating in the appeal has to be real (not merely hypothetical) but also a ‘recognized procedural status in the case’ would be needed.⁴³³² This arguably corresponds to those already constituted as victim participants, i.e., those who already applied for and who were granted with the victim participant status.⁴³³³ Also, based on practical reasons, a lack of control would lead to a situation where any person possessing just a general interest, without victim participant status and, hence, lacking identified personal interest could participate in the appeal proceedings, which may flood the ICC.⁴³³⁴ Moreover, the Appeals Chamber does not first-hand grant victim participant status in interlocutory appeals proceedings.⁴³³⁵ In turn, when the nature of the reparations decision was still pending of determination by the Appeals Chamber in *Lubanga*, i.e., to determine whether it was a reparations order, the legal representatives of the V01 group of victims sustained that in case of not considering the reparations decision as a reparations order, victims (at least those who hold the victim participant status) should be entitled to participate in the respective interlocutory appeals proceedings triggered by the defence.⁴³³⁶

However, even if reparations claimants do not hold the victim participant status, reparations claimants may in practice still be represented by legal representatives or the OPCV, who represent simultaneously victims with different (procedural) status, as noticed in this subsection and in the previous one. This corresponds to the fact that their interests to later benefit from reparations are at stake, which can be reflected in submissions/observations by legal representatives/OPCV, e.g., in *Lubanga*, that may end up simultaneously representing several categories of victims.

⁴³³² *Lubanga* (ICC-01/04-01/06-2930), Prosecution’s Submissions further to the Appeals Chamber’s ”Directions on the Conduct of the Appeal Proceedings”, Office of the Prosecutor, 1 October 2012, para. 34.

⁴³³³ See also *Ibid.*, paras. 34 and 36.

⁴³³⁴ *Ibid.*, para. 34.

⁴³³⁵ See *Lubanga* (ICC-01/04-01/06-1335), 16 May 2008, para. 40 (“The Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims”).

⁴³³⁶ *Lubanga* (ICC-01/04-01/06-2926), 28 September 2012, para. 32.

3.3.2. Reparations Claimants and the TFV

3.3.2.1. Reparations Claimants in the TFV's Reparations Order Implementation Plan and Chamber's Monitoring/Oversight

Following the Appeals Chamber's finding in *Lubanga*, the second part of the reparations phase proceedings:

55. [...] consists of the implementation phase, which is regulated primarily by article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence. If the Trial Chamber has ordered that reparations be made through the Trust Fund pursuant to rules 98 (3) and 98 (4) of the Rules of Procedure and Evidence, or that the award for reparations be deposited with the Trust Fund pursuant to rule 98 (2) of the Rules of Procedure and Evidence, the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply. In this respect, the Appeals Chamber notes that, under the Regulations of the Trust Fund, an order for reparations has to be issued in order to seize the Trust Fund and allow it to undertake implementation activities in relation to reparations. This is stipulated in regulation 50 (b) of the Regulations of the Trust Fund [...].

56. The Appeals Chamber also notes that the Regulations of the Trust Fund [regulations 54, 55, 57, 58 and 69] contemplate oversight and a certain degree of intervention by the Trial Chamber during the implementation phase of reparations.⁴³³⁷

In *Lubanga*, Trial Chamber I endorsed the five-step reparations implementation plan suggested by the TFV that has to be executed in conjunction with the Registry, the OPCV and the experts.⁴³³⁸ In this subsection, the emphasis of the analysis is put on the avenues whereby victims seeking reparations can intervene. Indeed, Trial Chamber I in its reparations decision has highlighted accessibility and consultation as important and necessary principles sustaining the ICC case-based reparations regime and including issues on 'the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations'.⁴³³⁹ In particular, concerning victims of sexual violence, the Chamber has found it necessary to ensure that they are able to fully participate in the reparations program,⁴³⁴⁰ and, as for child victims, that their views are taken into account considering their circumstances,

⁴³³⁷ *Lubanga* (ICC-01/04-01/06-2953), 14 December 2012, paras. 55-56.

⁴³³⁸ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

⁴³³⁹ *Ibid.*, para. 206.

⁴³⁴⁰ *Ibid.*, para. 208.

age and level of maturity.⁴³⁴¹ These two are good examples of how to address the specific needs of reparations claimants who belong to vulnerable groups.

The TFV's five-step plan is examined as follows. First, it should be established which localities are to be considered in the reparations implementation proceedings and a focus should be given on the places referred to in the judgment and in particular where the crimes were committed; however, the reparations program is not restricted to those mentioned in the judgment.⁴³⁴² Second, there should be a process of consultation with victims and communities within the localities.⁴³⁴³ The importance of victims' participation in the design and implementation of reparations programs is intrinsically related to ensure that reparations are timely, meaningful and achieve the desired impact.⁴³⁴⁴ As the TFV pointed out, victims' heterogeneity, need for inclusiveness, their serious organizational and resources limitations, and security risks faced by them have to be taken into account.⁴³⁴⁵ As part of the participative process, an informative and outreach campaign could be launched, including consultation with victims on how they would define their reparations,⁴³⁴⁶ and, in particular, child soldiers who suffered violence, including that of a sexual or gender-based violence are expected to be given an informed choice to participate in the process.⁴³⁴⁷ Third, an assessment of harm ought to be carried out as part of this consultation phase by a team of experts, and including focus groups with former child soldiers, children, women and other vulnerable groups.⁴³⁴⁸

Fourth, public debates should be held in each locality to explain the reparations principles and procedures, and also to address the victims' expectations.⁴³⁴⁹ Following a community-based debate, explanation and discussion of the reparations principles with the victims and communities should be conducted, ensuring the full participation of former child soldiers and

⁴³⁴¹ Ibid., para. 215.

⁴³⁴² Lubanga (ICC-01/04-01/06-2872), Observations on Reparations in Response to the Scheduling Order of 14 March 2012, TFV, 25 April 2012, paras. 181-197. See also Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

⁴³⁴³ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 198-201; Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

⁴³⁴⁴ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, para. 198.

⁴³⁴⁵ Ibid., para. 199.

⁴³⁴⁶ Ibid., Loc. cit.

⁴³⁴⁷ Ibid., para. 200.

⁴³⁴⁸ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 202-206. See also Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

⁴³⁴⁹ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 207-214; Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

other vulnerable groups such as child mothers, children and women.⁴³⁵⁰ Fifth, the collection of proposals for collective reparations to be developed in each locality, which subsequently have to be presented to the Chamber for its approval, constitutes the final step.⁴³⁵¹ The TFV appropriately noticed that since a number of communities are multi-ethnic, the community consultation should be open to all members independently from their ethnic origin.⁴³⁵² Proposals would indicate: i) type of reparations (individual or collective) desired by the victims; ii) type of measures required to implement the desired reparations; iii) an estimation of the costs and available resources; iv) applicable best standards practice and technical standards; and v) the links to the case and reasons why the proposed measures would be meaningful and address the harm suffered.⁴³⁵³ Should victims request individual reparations, their names would be indicated confidentially.⁴³⁵⁴

Trial Chamber I agreed with the TFV on the assessment of harm to be carried out by the latter during a consultative phase in different localities and the Chamber also expressed that, in the circumstances in *Lubanga*, the identification of victims and beneficiaries (regulations 60 to 65 of the TFV Regulations) ought to be made by the TFV.⁴³⁵⁵

Based on the five-step implementation of the reparations plan, the Chamber established that the individual application reparation forms received by the Registry should be transmitted to the TFV and, hence, the Trial Chamber ‘Decides not to examine the individual application forms for reparations and instructs the Registry to transmit to the TFV all the individual application forms received thus far’.⁴³⁵⁶ The Trial Chamber also added that in case the TFV considers it pertinent, victims who have applied for reparations could be included in any reparations program to be implemented by the TFV.⁴³⁵⁷ In its conclusions, the Chamber accordingly ‘decline[d] to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions’.⁴³⁵⁸

⁴³⁵⁰ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 207-208.

⁴³⁵¹ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 215-217; Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 282.

⁴³⁵² Lubanga (ICC-01/04-01/06-2872), 25 April 2012, para. 216.

⁴³⁵³ *Ibid.*, para. 217.

⁴³⁵⁴ *Ibid.*, *Loc. cit.*

⁴³⁵⁵ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 283.

⁴³⁵⁶ *Ibid.*, para. 289 b.

⁴³⁵⁷ *Ibid.*, para. 284.

⁴³⁵⁸ *Ibid.*, para 289 d.

Legal representatives of victims have considered that the Trial Chamber by deciding not to entertain the individual applications for reparations before it, failed to comply with article 75 of the ICC Statute, depriving ‘the individual victims of the right to the due consideration and adjudication of their applications for reparations’,⁴³⁵⁹ and was also argued that the Chamber:

[...] deprived *de facto* the victims who had submitted the applications of the full exercise of their right to reparations under article 75 of the Rome Statute, that is, the right to have their applications for reparations duly examined and decided upon.⁴³⁶⁰

Although these claims will be examined by the Appeals Chamber on the merits of appeals, it is herein provided some considerations. It may be sustained herein that the Trial Chamber’s reparations decision has not deprived the victims from their status as reparations claimants and beneficiaries but what it has been done instead is to postpone the determination of potential reparations beneficiaries.

Moreover, in principle, the decision adopted by the Trial Chamber may be regarded as more balanced considering that the total scope of potential reparations claimants and beneficiaries in *Lubanga* has yet to be determined following the painstaking five-step plan proposed by the TFV and endorsed by the Trial Chamber in its reparations decision. Therefore, granting individual reparations to the few victims who have managed to submit their reparations applications would not have been in the best interest of the ICC reparations system.⁴³⁶¹ This is due to the fact that, prior to distributing the scarce resources available to redress victims’ harm in this case as well as in others which are similar, it is arguably necessary to know the total universe of reparations claimants and beneficiaries so that the resources for reparations do not end up just benefiting few victims. Had Trial Chamber I acted otherwise, it may have given rise to further tension with and among those victims who can come up later to claim reparations. However, what is criticized herein is the delay in Trial Chamber I’s delivery of reparations principles finally contained in its reparations

⁴³⁵⁹ *Lubanga* (ICC-01/04-01/06-2914), 3 September 2012, para. 15.

⁴³⁶⁰ *Lubanga* (ICC-01/04-01/06-2909), 24 August 2012, para. 20.

⁴³⁶¹ As of 28 March 2012, the Registry had received only 85 individual applications for reparations (53 applications by women and 22 by men). See *Lubanga* (ICC-01/04-01/06-2847), First Report on Applications for Reparations, Registry, 28 March 2012, para. 9. See also *Lubanga* (ICC-01/04-01/06-2906), Transmission to the Trust Fund for Victims of Applications for Reparations, Registry, 16 August 2012.

decision. Due to the general nature of, at least, most of the reparations principles, these may have already been discussed and drafted (much) earlier than when they were in fact finally rendered,⁴³⁶² and without jeopardizing the accused's right to a fair trial. Procrastinating the drafting of reparations principles neglected the existence of an important number of victims who had applied for reparations at the ICC VPRS.⁴³⁶³ It also limited opportunities to progressively keep victims informed of how reparations may affect them and what to expect from reparative measures.

Additionally, the V02 group of victims' legal representatives and the OPCV also sustained that the Chamber erred in law: i) by referring the case to a newly constituted chamber at the reparations stage; and ii) by delegating its own reparations responsibilities to two non-judicial entities, i.e., the Registry and the TFV.⁴³⁶⁴ Although these appeals claims will be examined by the Appeals Chamber on the merits of appeals, it is herein provided some considerations. Concerning the first claim, it should be noticed that *de lege lata* the ICC Statute and RPE seem to imply that the Trial Chamber, which heard the case, and evidence relating to reparations, will also hear evidence and deliver its decision on reparations.⁴³⁶⁵ *De lege ferenda*, it should have been advisable that the same three Judges who constituted Trial Chamber I in *Lubanga* and who are already familiar with the case would be the same to decide on reparations. Concerning victims' second claim, it is not fully accurate since reparations will principally be dealt with by the TFV, monitored and overseen by the newly constituted Chamber.⁴³⁶⁶ Regardless of what Trial Chamber will be the competent, 'During the implementation process [...] the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the TFV'.⁴³⁶⁷ In other words, there is no de-linking of a Trial Chamber from the reparations proceedings but an advisable and even necessary reliance on the Registry and, especially, the TFV's expertise on reparation issues:

⁴³⁶² See similar critique in: REDRESS (2011) 24.

⁴³⁶³ A total of 2031 victims' applications for reparations, in the situations at the ICC, as of March 2011. See Registry and Trust Fund for Victims, Fact Sheet, March 2011, 1.

⁴³⁶⁴ *Lubanga* (ICC-01/04-01/06-2909), 24 August 2012, paras. 21-26.

⁴³⁶⁵ Whereas article 75 and rules 94-98 (Reparation to victims) employ the word 'Court' as the entity in charge of conducting hearings and making decisions on reparation, article 76 and rule 143 (Additional hearings on matters related to sentence or reparation) and rule 144 (Delivery of decisions of the Trial Chamber) explicit refer to the Trial Chamber. See REDRESS (2011) 47, footnote 203.

⁴³⁶⁶ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 261.

⁴³⁶⁷ *Ibid.*, para. 262.

The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them. It is able to collect any relevant information from the victims, and the Chamber notes the TFV is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part.⁴³⁶⁸

Accordingly, it is left intact the Chamber's powers to monitor and oversight the TFV as part of the reparations proceedings. The advantage is that the Trial Chamber will benefit precisely from the reparations implementation plan proposed by the TFV. In any case, the Chamber's monitoring and ultimately decision-making role on reparations was expressed as follows:

The Chamber accordingly [...] remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64 (2) and (3) (a) of the Statute (including considering proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval) [...].⁴³⁶⁹

In addition, it was strongly recommended that experts on certain areas were retained by the Chamber,⁴³⁷⁰ pursuant rule 97 (2) already examined. In *Lubanga*, the Trial Chamber accepted the TFV's proposal that there should be a preliminary consultative stage involving the victims and the affected communities, conducted by a team of experts and supported by the Registry, the OPCV and any local partners.⁴³⁷¹ The TFV has been appointed to select and monitor experts, who should include experts in the field of child soldiers, violence against girls and boys and gender issues.⁴³⁷²

A closer look into the ICC legal instruments indicates that a delegation of decision-making as for reparations award to the TFV itself is a valid option.⁴³⁷³ Article 75 (2) generally refers to 'Where appropriate, the Court may order that the award for reparations be made through the Trust Fund'. Indeed, when an ICC Chamber delegates decision-making power to the TFV, the former retains ultimate control as indicated in regulation 55 of the TFV Regulations which establishes that the TFV's discretion 'is subject to the order of the Court'. Regulation 57 of the TFV Regulations, in turn, stipulates that the TFV shall

⁴³⁶⁸ Ibid., para. 266.

⁴³⁶⁹ Ibid., para. 289 c.

⁴³⁷⁰ Ibid., para. 263.

⁴³⁷¹ Ibid., para. 264.

⁴³⁷² Ibid., para. 265.

⁴³⁷³ See also McCarthy (2012a) 243.

submit to the relevant Chamber, ‘the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award’. Finally, under regulation 58, not only does the TFV have to provide updates to the Chamber on progress of the award implementation ‘in accordance with the Chamber’s order’ but also at the end of the implementation period, the TFV must ‘submit a final narrative and financial report to the relevant Chamber’.

Be that as it may, consultation with victims constitutes quite an important element in the reparations implementation proceedings so as not to undermine their victims’ status as reparations claimants, as actually established under regulation 70 of the TFV Regulations ‘The Board of Directors [of TFV] may consult victims [...] and where natural persons are concerned, their families, as well as their legal representatives’. Notification of on-going reparations proceedings, under rule 96 of the ICC RPE, is also pivotal to reach out potential reparations claimants and beneficiaries. In verifying the eligibility of claimants and beneficiaries and bearing in mind that under article 75 (2), the ICC can make reparation awards only ‘to, or in respect of, victims’, Regulation 62 of the TFV Regulations lays down that ‘The Secretariat [of the TFV] shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court’.

As detailed later,⁴³⁷⁴ the ICC can order individual or collective awards. What should be mentioned herein is that although both individual and collective reparations can be made through the TFV, when the ICC makes an individual reparation award, the TFV will not necessarily be involved as suggested under rule 98 (2):

The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

In case of individual reparations awards and as for beneficiaries in urgent situation, the TFV ‘may prioritize certain sub-groups of victims for verification and disbursement’.⁴³⁷⁵ Bearing in mind the likely high number of

⁴³⁷⁴ See *infra* Chapter V 4.3.1.1.

⁴³⁷⁵ TFV Regulations, regulation 65.

reparations claimants being involved in the adjudicative process before the TFV, it has been suggested that, for reasons of economy and efficiency, the large majority of claims should be tackled by writing by the TFV, and based on experiences of mass claim institutions, they should be inquisitorial.⁴³⁷⁶ However, the TFV has indicated that its proposed implementation plan can be subject to a hearing of interested parties held by the Chamber.⁴³⁷⁷ Accordingly, an approach that ensures both efficiency of the proceedings and victims' real participation as reparations claimants should be followed. If necessary, victims that are members of the community may be identified to express their views during the hearing and, thus, explain why reparations awards would help them redress the harm suffered as a result of the crimes perpetrated.⁴³⁷⁸ The TFV has also sustained that such hearing:

[...] would be an opportunity for the Chamber to call for experts in order to debate the propositions issued from the community-based consultation. The Trust Fund could provide the Chamber with a list of experts in different fields after consulting with the proposed individuals. The Trust Fund respectfully encourages the Chamber to conduct a hearing *in situ* if the security, logistical and financial issues are manageable by the Court. Such a hearing in the situation would increase the transparency of the reparations process, and value of the reparation measures ordered by the Chamber.⁴³⁷⁹

It is expected that the TFV will live up to victims' expectations and be beneficial for the ICC, considering that the ICC Judges do not necessarily hold expertise on the complex issues surrounding reparations, the fact that the ICC Judges possess different legal backgrounds, and that the ICC faces large-scale crimes contexts.

Finally, according to rule 98 (4), the ICC following consultations with interested States and the TFV may order that a reparations award be made through the TFV to an intergovernmental, international or national organization approved by the TFV, as discussed later.⁴³⁸⁰ According to the respective TFV Regulations,⁴³⁸¹ it is fundamental that reparations awards implemented by

⁴³⁷⁶ McCarthy (2012a) 263.

⁴³⁷⁷ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, para. 230.

⁴³⁷⁸ *Ibid.*, Loc. cit.

⁴³⁷⁹ *Ibid.*, para. 231.

⁴³⁸⁰ See *infra* Chapter V 4.3.1.1.

⁴³⁸¹ See TFV Regulations, regulations 73 (c) and 74.

intermediary organizations be monitored by the TFV to verify the appropriate implementation of the award.⁴³⁸²

3.3.2.2. The Need for the ICC and its TFV in Case-Based Reparations

Some (additional) considerations about the convenience of and even the need for the ICC's case-based reparations regime and also the TFV's involvement within it are discussed herein. First, where national systems that by definition have been unwilling or unable to provide access to criminal justice, which is common to countries where the ICC exercises jurisdiction based on the principle of complementarity, it is unlikely that such domestic systems will be willing or able to effectively implement the victims' right to reparations.⁴³⁸³ The ICC as an international criminal court lacks the mandate to order a State to provide reparations to victims of crimes under its jurisdiction. Precisely, the role of the ICC in the field of reparations and, in particular, the mandate of the TFV may at least partially compensate this gap. This is also grounded in the fact that reparations ordered to States by regional human rights courts are conditional on the determination of international state responsibility, which normally takes place after quite complex formal requirements in lengthy and expensive proceedings. As victims of cases before the ICC and the TFV mostly live in poverty or even extreme poverty, they need to be given alternatives such as the ICC/TFV to seek and obtain reparations in a relatively flexible manner.

Accordingly, the TFV assumes an integrative role, which may even be considered essential,⁴³⁸⁴ insofar as the ICC framework does not recognize any direct manifestation of state responsibility to grant reparations 'on behalf' of the convicted person in cases where (s)he acted in an official capacity as a state agent in committing the crime(s) but is unable to provide victims with reparations. In any case, the ICC and the TFV should complement domestic criminal justice systems and national reparations programs. In other words, when reparations are provided at the domestic level, the ICC and the TFV ought to consider those reparative measures before taking and/or implementing reparations plans and orders. Thus, for example, if a State only contemplates compensation as the exclusive form of reparations but neglects the other modalities of reparations such as rehabilitation or apologies, the ICC and the TFV should step in. It is therefore argued that the principle of complementarity, one of the ICC pillars,

⁴³⁸² See McCarthy (2012a) 282.

⁴³⁸³ Cattin (2008) 1401.

⁴³⁸⁴ See *Ibid.*, 1406.

should be understood as complementarity not only to fighting impunity but also to providing reparations for those who have been victimized.

Second, in spite of the limitations and challenges faced by the ICC/TFV when implementing reparations orders and the fact that reparations for the most serious crimes under the ICC's jurisdiction will hardly, if ever, fully redress the harm inflicted, the benefits of the ICC/TFV's involvement include the reaffirmation of the standing of victims as human rights holders. This has been put into practice in several ways, including the participation of victims before the ICC to seek reparations or their (expected) active participation when reparations programs are designed and implemented. This also has to do with the enhancement of the status of victims as reparations claimants as the TFV seeks to 'contribute to recognizing victims, and in this manner, to strengthen their status as right bearing citizens'.⁴³⁸⁵ Thus, TFV Regulations provide that the Board of Directors when conducting its projects 'may consult victims [as defined in Rule 85], their families, as well as their legal representatives'.⁴³⁸⁶ This consultation process strengthens the victims' status.

Third, the association of a trust fund with the ICC may also be grounded in the notion of external coherence, i.e., reparations programs bearing a close relationship with transitional mechanisms such as TRCs with mandates to determine at least some level of accountability or domestic criminal investigations and prosecutions. The association of the TFV with the ICC and, hence, its focus on ICC crimes may make that coherence more easily implemented.⁴³⁸⁷ It also reinforces the idea that a reparations program not accompanied by prosecutions may be perceived as asking victims to trade away their right to justice to receive support.⁴³⁸⁸

⁴³⁸⁵ Marieke Wierda and Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims* (ICTJ 2004) 7. Available at:

<http://www.ictj.org/static/TIApproaches/Prosecutions/RepICCTrustFund.eng.pdf> (last visit on 30 November 2012). See also Pablo de Greiff, *The Role of Reparations in Transitions to Democracy* (2004) 6-7. Available at:

http://www.carnegiecouncil.org/resources/articles_papers_reports/4980.html/res/id=sa_File1/4980_Greiff_Reparations_and_Democracy.pdf (last visit on 30 November 2012).

⁴³⁸⁶ TFV Regulations, Regulation 49.

⁴³⁸⁷ Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006b) 451, 467.

⁴³⁸⁸ Lisa Magarrell, *Reparations in Theory and Practice* (ICTJ 2007) 2. Available at: <http://www.ictj.org/static/Reparations/0710.Reparations.pdf> (last visit on 30 November 2012).

3.3.2.3. Victims and the TFV's General Assistance Mandate

Although not provided in the ICC Statute, the TFV's general assistance mandate, also called non-judicial or humanitarian,⁴³⁸⁹ is laid down under rule 98 (5) which establishes that 'other resources of the Trust Fund may be used for the benefit of victims subject to provisions of article 79 [i.e., for the benefit of victims of crimes within the jurisdiction of the ICC, and of their families]'.⁴³⁹⁰ Unlike the ICC's case-based reparations scheme, the TFV's general assistance mandate is not limited to provision of material support to 'victims who appear before the Court or to the victims who participate in the proceedings'⁴³⁹¹ or victims as reparations claimants and beneficiaries since all victims of crimes under the ICC's jurisdiction, which are investigated in the ICC's situations, can potentially be assisted. The TFV hence has independent power to assist victims outside the case-based reparations scheme. The underlying notion is that reparations through individualized, case-by-case court proceedings fragments the universe of victims and, hence, decreases the aggregate reparatory effect of the awards.⁴³⁹² The TFV implements the need for redress not only for individual harm but also human and social relations destroyed violently in a mass criminality context, which goes beyond individual redress and court proceedings.⁴³⁹³

The TFV's autonomy to design and implement general assistance projects outside the case-based reparations scheme would suggest the importance of having set up a specialized international agency not associated with the ICC. Although the class of victims is clearly larger than in a case-based reparations scheme, it may still be questioned whether a completely independent agency would not be better as the TFV's general assistance mandate is still limited to the crimes under the ICC's jurisdiction, investigated in the ICC's situations, and, therefore, selective. It is, however, argued here that the association of a trust fund with the ICC is necessary to counterbalance some of

⁴³⁸⁹ See Zegveld (2010) 88.

⁴³⁹⁰ ICC RPE, Rule 98 (5). See also TFV Regulations, regulation 47 ('[...]“other resources of the Trust Fund” set out in of rule 98, paragraph 5, of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeitures'); and regulation 48 (Other resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes').

⁴³⁹¹ Situation in Uganda (ICC-02/04), Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims, 25 January 2008, para. 35.

⁴³⁹² Wierda and Greiff (2004) 5.

⁴³⁹³ *Ibid.*, 6.

the problems that the ICC may be generating for the victims of its country situations. As the ICC can try only a small minority of perpetrators and, thus, only acknowledge a few victims, this inequity may potentially exacerbate existing animosities. The TFV by engaging in projects outside the few ICC cases but relating to the crimes and country situations that triggered those cases can reach a much larger number of victims who will not be heard and/or claim reparations at the ICC and, hence, mitigate the ICC 'side effect' or 'pathology' of artificially and to some extent inadvertently creating categories of victims who were affected by crimes of the same gravity and in the same factual scenarios.⁴³⁹⁴ Since reparations under article 75 of the ICC Statute are granted only if the harm inflicted is causally linked to crimes upon which an accused is convicted by the ICC, in *Lubanga*, the limited charges filed by the OTP came under strong criticism from NGOs expressing disappointment and concern about a 'negative impact on the right of victims to reparations',⁴³⁹⁵ and the fact that 'the lack of recognition of some of the most heinous and flagrant crimes denies victims their right to justice and reparation'.⁴³⁹⁶ The TFV's general assistance mandate can at least partially fill some of these notorious gaps.

Under its general assistance mandate, the TFV notified the ICC of its plans to conduct assessments of needs as part of specific projects to provide physical, psychological and material support to victims in two ICC country situations: Uganda and the DRC.⁴³⁹⁷ The TFV Board of Directors has estimated that those projects will benefit more than 380,000 victims,⁴³⁹⁸ and similar projects in the CAR were prepared,⁴³⁹⁹ and approved.⁴⁴⁰⁰ Those estimations should be

⁴³⁹⁴ Tom Dannenbaum, 'The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims' (2010) 28 *Wisconsin International Law Journal* 234, 296.

⁴³⁹⁵ Letter from Avocats Sans Frontiers et al. to Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court (31 July 2006).

⁴³⁹⁶ REDRESS, Press Statement, ICC trial will go ahead, but limited charges may alienate victims in Eastern Congo (29 January 2007). Available at: http://www.iccnw.org/documents/Redress_LubangaMediaAdvisory_29jan07_eng.pdf (last visit on 30 November 2012).

⁴³⁹⁷ In 2007, the TFV approved 18 projects for Uganda and 16 for the DRC. These were later endorsed by the Pre-Trial Chambers.

⁴³⁹⁸ TFV, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2007 to 30 June 2008, ICC-ASP/7/13, 3 September 2008, para. 22.

⁴³⁹⁹ TFV, Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012, ICC-ASP/11/14, 7 August 2012, p. 1.

taken carefully since, as Schabas observes, the notion of beneficiaries ‘is probably being used rather loosely’.⁴⁴⁰¹ Having said so, the nature and scale of projects handled by the TFV show the great potential that initiatives such as the TFV have to bring restorative justice to a much larger number of victims in contexts involving thousands or millions of victims. The TFV has set out the following categories of programs:

Physical rehabilitation, which includes reconstructive surgery, general surgery, bullet and bomb fragment removal, prosthetic and orthopedic devices, referrals to services such as fistula repair and HIV and AIDS screening, treatment, care and support;

Psychosocial rehabilitation, which includes both individual and group-based trauma counseling, dance and drama groups to promote social cohesion and healing, community sensitization workshops and radio broadcasts on victims’ rights, information sessions and large-scale community meetings; and

Material support in the form of safe shelter, vocational training, reintegration kits, microcredit support grants, and classes in accelerated literacy.⁴⁴⁰²

The TFV has also set out the following categories of programs:

Implementing special initiatives for children born out of rape and children who themselves have been victimized by sexual and gender-based crimes under the ICC’s jurisdiction, including access to basic services, education, and nutrition support, and intergenerational responses and stigma reduction programs;

Building the capacity of implementing partners and victims used as a strategy to reinforce the sustainability of the interventions; and

Engaging community dialogue and reconciliation to foster peace within and between the communities that create a suitable environment for prevention of crimes.⁴⁴⁰³

The target beneficiaries/victims have been categorized in groups including: i) children and youth; ii) victims of physical trauma; iii) other victims

⁴⁴⁰⁰ Situation in the Central African Republic (ICC-01/05-41), Decision on the “Notification by the Board of Directors in Accordance with Regulation 50 a) of the Regulations of the Trust Fund for Victims to Undertake Activities in the Central African Republic”, Pre-Trial Chamber II, 23 October 2012.

⁴⁴⁰¹ Schabas (2010) 915.

⁴⁴⁰² TFV, Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2009 to 30 June 2010, 28 July 2010, ICC-ASP/9/2, 28 July 2010, para. 4.

⁴⁴⁰³ TFV, ICC-ASP/11/14, 7 August 2012, para. 10.

of war; iv) community peace builders; v) former child soldiers;⁴⁴⁰⁴ and vi) victims of sexual and gender-based violence.⁴⁴⁰⁵ The majority of beneficiaries/victims receive a combination of integrated physical and psychological rehabilitation and/or material support.⁴⁴⁰⁶

As to the kind of support provided by the TFV in pursuit of its general assistance mandate outside case-based reparations, it has heavily emphasized that the provision of resources does not amount to ‘reparations’ as it belongs to a separate, broader mandate which covers the ‘provision of assistance of victims in general’.⁴⁴⁰⁷ Although support outside a case litigated before the ICC does not qualify as reparations under the ICC reparations scheme,⁴⁴⁰⁸ it may be argued here that such assistance redresses harm of victims of crimes relating to the ICC situations since any support by the TFV ‘must seek to redress the harm victims have suffered as a result of the crime to which they or their loved ones were subjected’.⁴⁴⁰⁹ The TFV programs implemented under its general assistance mandate are, at least partially, similar to some modalities of reparations. Indeed, Trial Chamber I in its reparations decision has acknowledged the importance of TFV’s general assistance ongoing programs involving:

[...] child soldiers rehabilitation, sustained by the TFV, which provide support to former child soldiers in improving their economic position through access to village savings and loans schemes. Furthermore, partnerships between the TFV and various organisations within the DRC have established a local system of “mutual solidarity”, which is another form of community savings plan. These initiatives, in the Chamber’s views, deserve the support of the ICC, the States Parties and any other interested actors.⁴⁴¹⁰

Also, in setting and implementing national reparations programs, comparative experience has shown that it is not necessarily victims as reparations beneficiaries who have litigated cases before the respective national (criminal) courts.⁴⁴¹¹ On the contrary, this seems to be the exception, like at the

⁴⁴⁰⁴ TFV, ICC-ASP/7/13, 3 September 2008, para. 9.

⁴⁴⁰⁵ TFV, ICC-ASP/11/14, 7 August 2012, para. 10.

⁴⁴⁰⁶ TFV, ICC-ASP/7/13, 3 September 2008, para. 10.

⁴⁴⁰⁷ TFV, ICC-ASP/7/13, 3 September 2008, paras. 15-17; TFV, ICC-ASP/11/14, 7 August 2012, para. 10.

⁴⁴⁰⁸ See McCarthy (2009) 269.

⁴⁴⁰⁹ *Ibid.*, Loc. cit.

⁴⁴¹⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 275.

⁴⁴¹¹ E.g., as for Peru, see Juan Pablo Pérez León Acevedo, ‘Reparations for and Prosecution of Serious Human Rights Violations Cases: Two Pending Points in Peru’s Transitional Justice

ICC, due to the necessary selectiveness when prosecuting international crimes. Thus, this TFV's function is related to the notion of an ICC 'situation country' and not limited to specific cases tried at the ICC. Additionally, the provision of general assistance by the TFV recognizes victims' standing before the ICC as victims of particularly heinous international crimes and not merely as humanitarian relief assistance beneficiaries.⁴⁴¹² Having said so, the TFV's general assistance mandate should not be expanded to wider forms of socio-economic assistance to victims in order to avoid duplication or even conflicts with humanitarian organizations working in the same areas and also bearing in mind the TFV's limited resources.

The existence of the TFV in general and, especially, its general assistance mandate corresponds to the fact that although the ICC and the TFV are closely connected by the scope of the situations addressed by them, the TFV is not of the same nature as the ICC. Trust Funds typically provide redress to an extensive number of beneficiaries, especially those who do not access courts.⁴⁴¹³ Accordingly, courts and trust funds constitute different approaches to redress harm of victims of international crimes. The large scale and systematic nature of the crimes under the ICC's jurisdiction reveals a need for redress not only at the individual level but equally importantly at the societal level.⁴⁴¹⁴ As a result, the actions and the scope of beneficiaries tend to increase in the general assistance programs conducted by the TFV. When drafting the ICC RPE, there was actually a discussion on whether the resources to be employed by the TFV should be limited to reparations only or should be available for a larger array of projects, including the assistance of victims of crimes not litigated directly at the ICC.⁴⁴¹⁵ In this regard, the Norwegian delegation argued for the preservation of 'maximum flexibility' in the design and regulations of the Fund as 'the Court and the Trust Fund may have to deal with very different situations and needs'.⁴⁴¹⁶

Regardless of agreement on the previous reasons explaining why there is a need for the TFV to be involved in general assistance mandate programs, one

Agenda' in Oxford Transitional Justice Research, Working Papers (Center for Socio-Legal Studies of Oxford University 2010). Available at:

<http://www.csls.ox.ac.uk/otjr.php?show=currentDebate11> (last visit on 25 October 2012).

⁴⁴¹² See McCarthy (2009) 270.

⁴⁴¹³ Wierda and Greiff, (2004) 1.

⁴⁴¹⁴ *Ibid.*, 5.

⁴⁴¹⁵ NGO Non-Paper on Behalf of Certain Members of the Victims Working Group and Financial Regulations and Rules Team: Statement on the Victims Trust Fund, 25 September 2001, 2.

⁴⁴¹⁶ Government of Norway, Trust Fund for Victims, Norwegian Statements, 5 March 2001, para. 1.

may understandably still be skeptical to the idea of the TFV as a better option than NGOs or humanitarian organizations. The latter organizations by definition and experience seem to be (much) better equipped to effectively address the needs of vast classes of victims. However, some arguments may be raised to consider the TFV in its general assistance mandate as a better option than NGOs or humanitarian organizations. First, the need to correct the imbalance and potential tension between the relatively few victims who benefit from the ICC case-based reparations regime and the (much) larger number of victims who remain and will remain outside the case-based reparations regime at the ICC. Second, the need for increasing coordination and coherence between transitional justice mechanisms such as criminal justice (ICC) and, an internationally backed-up body with a general assistance mandate to reach out those victims who are not reparations claimants/beneficiaries (TFV). Third, those victims assisted by the TFV are recognized as active actors in reparation-like measures that seek to redress their harm. Thus, when conducting its general assistance projects, the TFV may (and should) consult victims.⁴⁴¹⁷ Accordingly, in spite of falling outside the ICC case-based reparations regime, they may still participate in that manner.

3.4. The ECCC

3.4.1. Preliminary Considerations

As already examined, both the Trial Chamber,⁴⁴¹⁸ and the Supreme Court Chamber,⁴⁴¹⁹ in their respective judgments in *Duch*, determined that civil party's participation at the ECCC includes not only the victims' right to participate as civil parties in the criminal trial of the accused, but also to 'pursue a related civil action for collective and moral reparations' against the accused for the harm directly attributable to the crimes based upon which (s)he is convicted. Indeed, the status dimension of victims (civil parties) as reparations claimants may have a more predominant role for civil parties as voiced by the civil parties' lead co-lawyers in *Nuon Chea et al.*:

We are mindful, perhaps more than anyone else, of the importance of reparations to a judicial process, and the Civil Parties would not participate in the trial if it were not for the fact that reparations are their ultimate goal.

⁴⁴¹⁷ See TFV Regulations, regulation 49.

⁴⁴¹⁸ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 660.

⁴⁴¹⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 639.

Reparations necessarily go hand in hand with the sentence in any criminal trial which entails Civil Party participation.⁴⁴²⁰

Moreover, as the Trial Chamber explicitly acknowledged in *Duch*, whereas the Co-Prosecutors' responsibility is to prove the guilt of the accused, the civil parties' responsibility is to seek reparations and accordingly the Co-Prosecutors have no role in seeking reparations.⁴⁴²¹ To start the long path to claim and obtain collective and moral reparations at the ECCC, victims have to apply and be constituted civil parties. Requirements to become civil party were previously discussed.⁴⁴²² Thus, here, the emphasis is put on aspects particularly relevant to victims (civil parties) as reparations claimants. Under Part C (Application to be joined as a civil party) of the Victim Participation Form,⁴⁴²³ three questions are especially relevant to later receive reparations. Question 2 requires from the civil party applicant, to state the injury, loss or harm suffered by him/her, and to provide a brief description such as physical injury, mental pain and anguish, loss of or damage to property. In turn, under question 7, as for material or property loss, the civil party applicant is requested to provide any further details of physical records helping to identify the extent of loss suffered. Finally, question 8 directly deals with the modalities of reparations sought by the potential reparations claimants and consists of two sub-questions. First, it is given the applicant the option to explicit whether (s)he has any preference concerning the form of collective or moral reparation that (s)he would like to obtain. Second, if the answer to the first sub-question is in affirmative, the applicant is given the chance to provide details.

The other questions included under the civil party application section of the Victim Participation Form and, also relevant, for victims' status as reparations claimants are: i) whether the applicant was examined by a doctor after the event(s) took place; ii) whether the applicant received any medical or psychological treatment; iii) whether the applicant has any records concerning any medical or psychological treatment such as medical report from a doctor, hospital or health centre, X-rays, prescription/invoices for medicines; iv) whether his/her condition persists today and, if this is the case, to provide details; and, v) concerning material or property loss, to give any further details or physical records that help identify the extent of loss suffered.⁴⁴²⁴ Internal rule 23

⁴⁴²⁰ Kaing Guek Eav alias Duch (Case 001), Transcripts, 19 October 2011, p. 6, lines 20- 25.

⁴⁴²¹ Kaing Guek Eav alias Duch (Case 001), 9 October 2009, para. 42.

⁴⁴²² See supra Chapter IV 2.4.2.1.

⁴⁴²³ Practice Direction on Victim Participation (Rev.1), Appendix A/Rev.1.

⁴⁴²⁴ See respectively questions 3, 4, 5, 6 and 7.

bis (4) lays down that all civil parties' application must *inter alia* 'attach evidence of the injury suffered'.

3.4.2. Seeking Reparations

3.4.2.1. During Trial

In *Duch*, the Trial Chamber directed the civil party groups to file written submissions outlining the forms of collective and moral reparations sought against the accused in their final brief,⁴⁴²⁵ in addition to filing a motion on the 'form or forms of the award of collective and moral reparations [the civil parties] contend shall be awarded against the accused if convicted'.⁴⁴²⁶ Accordingly, the civil parties filed a joint submission highlighting the right of victims of mass violence and serious human rights violations as an important reparative justice measure 'Providing meaningful reparative justice in the aftermath of the Khmer Rouge atrocities involves identifying remedies that best respond to the rights, needs and priorities of targeted beneficiaries, namely the Civil Parties'.⁴⁴²⁷ Moreover, taking into account prominent factors such as the impossibility to fully redress the harm inflicted on victims, the substantial number of victims as civil parties involved, and differences in victims' experiences, the civil parties requested the provision of 'meaningful reparations in the Cambodian context should be of a collective and moral nature'.⁴⁴²⁸ Under this understanding, despite the disagreements among civil party legal teams,⁴⁴²⁹ the civil parties filed a joint claim for reparations, requesting, as a minimum, some specific modalities of collective and moral reparations,⁴⁴³⁰ which are examined in detail later.⁴⁴³¹

Generally speaking, the joint submission pointed out the rights of victims of serious human rights violations and, *inter alia*, requested: i) compilation and dissemination of apology statements by Duch made during the trial; ii) access to free medical care; iii) funding of educational programs informing Cambodians of the Khmer Rouge crimes; iv) erection of memorials;

⁴⁴²⁵ Kaing Guek Eav alias Duch (Case 001), Direction on Proceedings Relevant to Reparations and on the Filing of Written Submissions, Trial Chamber, 27 August 2009, para. 5.

⁴⁴²⁶ *Ibid.*, para. 1.

⁴⁴²⁷ Kaing Guek Eav alias Duch (Case 001), Civil Parties' Co-Lawyers' Joint Submission on Reparations, E/159/3, 14 September 2009, para. 43.

⁴⁴²⁸ *Ibid.*, para. 44.

⁴⁴²⁹ McGonigle Leyh (2011) 196.

⁴⁴³⁰ Kaing Guek Eav alias Duch (Case 001), E/159/3, 14 September 2009, paras. 16, 21, 24, 26-30, 45.

⁴⁴³¹ See *infra* Chapter V 4.4.2.

and v) inclusion of civil parties' names in the final judgment.⁴⁴³² Civil parties also requested in the event of conviction of the accused, which was finally the case, to declare the ECCC competent to ensure the implementation of reparations awards by the Cambodian government in the light of international obligations, or by the Victims Unit via a voluntary trust fund.⁴⁴³³ The reparations requests actually originated from victims and, thus, were not only mere proposals submitted by their lawyers.⁴⁴³⁴

Some civil parties were able to express their claims for reparations directly during hearings before the Trial Chamber, which included the factual background, their intention to seek reparations, and physical and emotional sufferings related to the crimes alleged against the accused.⁴⁴³⁵ While civil parties mostly left the question on reparations to their lawyers,⁴⁴³⁶ in other opportunities they expressed themselves during the hearings.⁴⁴³⁷ Also, civil parties' lawyers had the opportunity to question their clients to provide more details and information relevant to their reparations claims.⁴⁴³⁸ Even a civil party, who later was revoked in his status, said that he was not seeking reparation.⁴⁴³⁹ It should be mentioned that since the Trial Chamber in *Duch* was unwilling to entertain witnesses proposed by civil parties, it rejected an expert witness on reparations options.⁴⁴⁴⁰

The civil party groups' final submissions on reparations reiterated the requests put forward in their joint submissions, i.e., the collective and moral modalities of reparations preliminarily claimed, with groups 1, 2 and 3 providing additional particulars or supplementary claims.⁴⁴⁴¹ Civil party group 3 requested

⁴⁴³² Kaing Guek Eav alias Duch (Case 001), Civil Parties' Co-Lawyers' Joint Submission on Reparations, E/159/3, 14 September 2009, paras. 16, 21, 24, 26-30, 45. See also Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 652.

⁴⁴³³ Kaing Guek Eav alias Duch (Case 001), E/159/3, 14 September 2009, paras. 2, 41 and 47.

⁴⁴³⁴ McGonigle Leyh (2011) 196, footnote, 169.

⁴⁴³⁵ See, e.g., Kaing Guek Eav alias Duch (Case 001), Transcripts, 17 August 2009, p. 14 et seq., lines 2-5 et seq.; Kaing Guek Eav alias Duch (Case 001), Transcripts, 17 August 2009, p. 49, lines 12-17 et seq.

⁴⁴³⁶ See, e.g., Kaing Guek Eav alias Duch (Case 001), Transcripts, 18 August 2009, p. 93 et seq., lines 16-19; Kaing Guek Eav alias Duch (Case 001), Transcripts, 19 August 2009, p. 8, lines 1-2 et seq.; Kaing Guek Eav alias Duch (Case 001), Transcripts, 19 August 2009, p. 77, lines 20-25 et seq.

⁴⁴³⁷ See, e.g., Kaing Guek Eav alias Duch (Case 001), Transcripts, 19 August 2009, p. 80, lines 6-8 et seq.

⁴⁴³⁸ See, e.g., Kaing Guek Eav alias Duch (Case 001), Transcripts, 18 August 2009, pp. 75-84.

⁴⁴³⁹ See, e.g., Kaing Guek Eav alias Duch (Case 001), Transcripts, 17 August 2009, p. 114, lines 4-7 et seq.

⁴⁴⁴⁰ McGonigle Leyh (2011) 208.

⁴⁴⁴¹ Kaing Guek Eav alias Duch (Case 001), Civil Party Group 1 – Final Submission, E/159/7, 10 November 2009, paras. 120 and 121.

the Chamber to clearly delineate its framework for the enforcement and implementation of any reparations awards, and to mandate the Victims Unit to conduct wider consultation on how reparations should be approached in the Cambodian context.⁴⁴⁴² Civil party group 2 requested that the accused, regardless of his current income or property, adopts some actions or bears the cost of some specific reparations.⁴⁴⁴³ Civil party group 3 provided: i) further details on the modalities of collective and moral reparations requested,⁴⁴⁴⁴ later discussed;⁴⁴⁴⁵ ii) requested the Chamber, in case of the accused's indigence, to implement the modalities and measures of reparations requested, in compliance with international obligations, or order the constitution of a voluntary trust fund to be managed by Victims Unit;⁴⁴⁴⁶ and iii) requested the Chamber to establish processes to implement reparations and a mechanism for civil parties to seek redress in case of non-compliance with reparation awards.⁴⁴⁴⁷

The Internal Rules were amended in 2010 (not applied in *Duch*) and, as result, the civil parties' lead co-lawyers are requested to make a single claim for collective and moral reparations on behalf of the consolidated civil parties. The respective provision (internal rule 23 *quinquies* (2)), which has been applied in *Nuon Chea et al*, reads as follows:

Reparations shall be requested in a single submission, which may seek a limited number of awards. This submission shall provide:

- a) a description of the awards sought;
- b) reasoned argument as to how they address the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertain; and
- c) in relation to each award, the single, specific mode of implementation described in Rule 23 *quinquies* (3)(a)-(b) sought.⁴⁴⁴⁸

⁴⁴⁴² Ibid., paras. 119-124.

⁴⁴⁴³ Kaing Guek Eav alias Duch (Case 001), Co-Lawyers' for Civil Parties (Group 2) – Final Submission, E/159/6, 5 October 2009, paras. 14-21.

⁴⁴⁴⁴ Kaing Guek Eav alias Duch (Case 001), Co-Lawyers' for Civil Parties (Group 3) – Final Submission, E/159/6, 11 November 2009. See also Kaing Guek Eav alias Duch (Case 001), Co-Lawyers' for Civil Parties (Group 3) – Mémoire Additionnel Concernant la Reparation, E/159/3/1, 17 September 2009.

⁴⁴⁴⁵ See *infra* Chapter V 4.4.2.

⁴⁴⁴⁶ Kaing Guek Eav alias Duch (Case 001), Co-Lawyers' for Civil Parties (Group 3) – Final Submission, E/159/6, 11 November 2009.

⁴⁴⁴⁷ Ibid.

⁴⁴⁴⁸ ECCC Internal Rules, internal rule 23 *quinquies* 2 (Rev. 6). The current text (Rev. 8) remains the same.

In turn, as previously examined,⁴⁴⁴⁹ the Chambers can under the Internal Rules when deciding the modes of implementation of the reparations awards, either to order that the convicted bears the costs of the award (internal rule 23 *quinquies* 3 (a)) or according to internal rule 23 *quinquies* 3 (b) to:

[...] recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

In application of internal rule 80 *bis* (4), in the ongoing trial in *Nuon Chea et al.*:

The Trial Chamber may direct the Lead Co-Lawyers, within a deadline determined by the Chamber, to provide initial specification of the substance of the awards they intend to seek within the final claim for collective and moral reparation pursuant to Rule 23 *quinquies* (3) (b). At a later stage, the Chamber will determine the date by which the Lead Co-Lawyers shall file the final claim for collective and moral reparation.⁴⁴⁵⁰

Additionally, internal rule 80 *bis* (5) provides the opportunity for civil parties, in their final claims, to introduce changes to their initial requests but establishing details ‘The Final claim for collective and moral reparation may deviate from the initial specification where necessary, but shall in any case specify both the substance and mode of implementation of each award’.⁴⁴⁵¹

The initial specification of awards during an early stage introduced by internal rule 80 *bis* (4) is welcome since it aims at avoiding potentially costly, time consuming or misguided reparations projects.⁴⁴⁵² Thus, the VSS’s design of a project award as identified by the civil parties’ lead co-lawyers, under internal rule 23 *quinquies* (3) (b), and monitored by the Trial Chamber reduces the chances it may be rejected by the Chamber.⁴⁴⁵³ Accordingly, the Trial Chamber may raise concerns early when changes to reparations project developments are

⁴⁴⁴⁹ See supra Chapter IV 1.4.3.

⁴⁴⁵⁰ ECCC Internal Rules, internal rule 80 *bis* (4) (Rev. 6). The current text (Rev. 8) remains the same.

⁴⁴⁵¹ ECCC Internal Rules, internal rule 80 *bis* (5) (Rev. 6). The current text (Rev. 8) remains the same.

⁴⁴⁵² Nuon Chea et al. (Case 002), E125, 23 September 2011, p. 2.

⁴⁴⁵³ *Ibid.*, Loc. cit.

still possible.⁴⁴⁵⁴ Such early specifications are pivotal to guarantee that: i) the steps adopted by the civil parties' lead co-lawyers fall within the ECCC Internal Rules and lead to 'meaningful outcomes for victims'; ii) optimal use of resources by the VSS and external donors; and iii) Chamber's oversight and guidance of reparations sought. Even though rule 80 *bis* (5) states that the final claim for collective and moral reparations may come from the initial specification, civil parties' lead co-lawyers are obligated to specify both the substance and the modality of reparations of each award,⁴⁴⁵⁵ which may have led to some initial misunderstanding and resistance from the lead co-lawyers at the Initial Hearing in *Nuon Chea et al.*⁴⁴⁵⁶ However, as clarified by the Trial Chamber, those initial specifications aim at encouraging:

[...] sufficient specificity and advanced planning so as to ensure that meaningful reparation can result to the benefit of the consolidated group of Civil Parties within the ECCC's lifespan. It is therefore entirely to the benefit of the consolidated group of Civil Parties that as much specificity as possible is provided to the Chamber at an early stage regarding reparations measures sought on their behalf [...] the particulars of the awards sought may evolve over time and [...] the claims as ultimately presented might differ in terms of certain details.⁴⁴⁵⁷

Nevertheless, during the hearings in *Nuon Chea et al.*, civil parties' lead co-lawyers argued that rule 80 *bis* does not require the civil parties to provide a detailed account of the reparations awards under preparation nor their mode of implementation as they are only required to provide an initial specification of the reparations; however, they hoped that doing so constitutes 'the beginning of a continuing dialogue with the Chamber on issues relating to the development and the final outcome of these claims'.⁴⁴⁵⁸ Indeed, the Trial Chamber acknowledged that:

The purpose of these hearings was to enable the Chamber to provide initial oversight and guidance, where necessary, to ensure conformity of the awards sought with the ECCC legal framework, to ensure the effective deployment of

⁴⁴⁵⁴ Ibid., Loc. cit.

⁴⁴⁵⁵ Ibid., Loc. cit.

⁴⁴⁵⁶ Nuon Chea et al. (Case 002), Transcript, 29 June 2011, p. 100, line 110.

⁴⁴⁵⁷ Nuon Chea et al. (Case 002), E/125, 23 September 2011, pp. 2-3.

⁴⁴⁵⁸ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 9. See also Nuon Chea et al. (Case 002), Transcript, 19 October 2011, p. 11, line 24-p. 12, line 19.

donor and other resources, and to maximize the possibility of Civil Parties obtaining meaningful reparation.⁴⁴⁵⁹

Be that as it may, the observations presented by the civil parties' lead co-lawyers were claimed to be the product of collective work and consultations conducted among civil parties' lawyers and civil parties and, hence, taking into account the civil parties' rights and wishes.⁴⁴⁶⁰ Thus, the civil parties' lawyers, the VSS and partner organizations launched a consultation process in depth of the (back then) 2129 civil parties living in Cambodia and abroad.⁴⁴⁶¹

Upon receiving the results of those consultations, civil parties' lead co-lawyers as well as civil parties' lawyers acting in cooperation with the VSS and NGOs conducted an exhaustive analysis and a synthesis of all data to determine the areas in which the civil parties will express their wishes and, in application of the Internal Rules, to express the first indications concerning the nature of reparations sought.⁴⁴⁶² The lead co-lawyers also highlighted their effort to articulate common fields of interest and to come up with consistent and feasible reparations projects.⁴⁴⁶³ Moreover, it was pointed out that civil parties' wishes reflected very often modalities of reparations requested in *Duch*, which were rejected (under the previous regime of reparations implementation) by the Trial Chamber and (back then) were still in appeals proceedings.⁴⁴⁶⁴

In addition, 1750 new civil parties (originally rejected) were added to the process of consultation in *Nuon Chea et al.*⁴⁴⁶⁵ The need for incorporating each and every of the civil parties as potential reparations claimants, shown by civil parties' lawyers is herein considered pivotal to follow a truly inclusive approach to reparations claims and not leave out a (substantial) number of civil parties that were later incorporated. Otherwise, their status as reparations claimants would have been affected.

Concerning the severance of the facts leading to separation of trial proceedings in mini-trials in *Nuon Chea et al.*,⁴⁴⁶⁶ although the Trial Chamber had established that this has no impact on the formulation of the civil parties'

⁴⁴⁵⁹ Nuon Chea et al. (Case 002), E/145, 29 November 2011, pp. 2-3.

⁴⁴⁶⁰ Nuon Chea et al. (Case 002), Transcript, 19 October 2011, p. 8, lines 19-21-p. 9, lines 12-13.

⁴⁴⁶¹ *Ibid.*, p. 9, lines 15-18.

⁴⁴⁶² *Ibid.*, p. 9, lines 19-25.

⁴⁴⁶³ *Ibid.*, p. 9, line 25-p. 10, lines 1-2.

⁴⁴⁶⁴ *Ibid.*, p. 10, lines 4-13.

⁴⁴⁶⁵ *Ibid.*, p. 10, lines 14-21.

⁴⁴⁶⁶ See *supra* Chapter III 4.4.1.

reparations claims made on their behalf by the lead co-lawyers,⁴⁴⁶⁷ civil parties considered that such severance (without further initial specifications) could affect the consolidated group as the change in the scope of trial would mean that only 750 civil parties out of 3864 civil parties would be able to have *locus standi* to lodge reparation claims.⁴⁴⁶⁸ However, considerations of efficiency and timely justice, bearing in mind the high number of civil parties and the complexity of this case, similar to those already referred to as for civil parties' participation,⁴⁴⁶⁹ can be *mutatis mutandi* invoked herein to justify the decision adopted by the Trial Chamber. Therefore, a more substantial and meaningful victims' status as reparations claimants is expected as not all the nearly 4000 civil parties are participating at the same time in the trial proceedings seeking reparations. The Trial Chamber has not placed limitations 'on the ability of individual members of the consolidated group to benefit from any reparations ultimately endorsed or awarded by the Trial Chamber'.⁴⁴⁷⁰ Even though the formulation of reparations claims should consider internal rule 23 *quinquies* (1) (a), the Trial Chamber has provided guidance to the civil parties' lead co-lawyers to assist them to formulate requests that 'may result in meaningful measures in reparation and encompass the entire consolidated group of civil parties'.⁴⁴⁷¹ Additionally, the Trial Chamber reminded:

[...] the Lead Co-Lawyers that severance has no impact whatsoever in relation to the new and separate reparations avenue created by Internal Rule 23*quinquies*(3)(b), pursuant to which the initiatives proposed as possible measures do not result in enforceable claims against an Accused, and may be developed in parallel with the trial.⁴⁴⁷²

Accordingly, civil parties have not been deprived of their status as reparations claimants since all of them are able/will be able to claim and, depending on the conviction of the co-accused, receive reparations at the end of the present and/or subsequent trials/mini-trials within *Nuon Chea et al.* Thus, the Trial Chamber established that while it will only consider harm suffered that stems from charges under the first trial (Case 002/01) in *Nuon Chea et al.*, specific harm suffered related to the subject-matter of future trials in *Nuon Chea*

⁴⁴⁶⁷ Nuon Chea et al. (Case 002), 22 September 2011, para. 8.

⁴⁴⁶⁸ Nuon Chea et al. (Case 002), Transcripts, 19 October 2011, p. 17 line 19-p. 19, line 6.

⁴⁴⁶⁹ See supra Chapter III 4.4.1.

⁴⁴⁷⁰ Nuon Chea et al. (Case 002), 26 April 2013, para. 158.

⁴⁴⁷¹ Ibid., Loc. cit.

⁴⁴⁷² Ibid., Loc. cit.

et al., will be relevant to those trials.⁴⁴⁷³ Concerning the reparations foreseen under rule 23 *quinquies* (3) (b), i.e., not borne by the convicted:

[...] the Severance Order does not debar the elaboration of specific projects which give appropriate effect to the awards sought by the Lead Co-Lawyers. Initiatives sought in relation to this new form of reparation (in particular those aiming to secure sufficient external funding) may be conducted in parallel with the entire trial in Case 002. However the Chamber urges the Lead Co-Lawyers to focus efforts on awards that may be relevant to Case 002/01 and deliverable within or soon after the issuance of the verdict in that case.⁴⁴⁷⁴

The Trial Chamber also added that, when necessary, it will indicate:

- a) which of the reparations awards presently contemplated by the Lead Co-Lawyers appear to fall within the scope of Case 002/01;
- b) which of the awards identified appear to fall outside the scope of Case 002/01 (and thus will not be further considered during this trial) but which may instead be relevant to future trials [in *Nuon Chea et al.*]; and
- c) which of the specific projects identified by the Lead Co-Lawyers may fall entirely outside the scope of the ECCC legal framework.⁴⁴⁷⁵

Upon the severance of *Nuon Chea et al.* (Case 002), in the first case and trial within Case 002, i.e., Case 002/01, the Trial Chamber requested the civil parties' lead co-lawyers to identify the civil parties' prioritized list of reparations projects which are currently going under development.⁴⁴⁷⁶ Paying attention to 'the challenges in bringing reparations to fruition [...], the Chamber wishes to clarify that implementation of these measures may begin prior to the verdict in Case 002/01'.⁴⁴⁷⁷ The Chamber also asked the civil parties' lead co-lawyers, in consultation with the VSS, information on the status of the financing of their prioritized projects.⁴⁴⁷⁸ Civil parties' lead co-lawyers have submitted information on the prioritized list of reparations projects and the Trial Chamber has made

⁴⁴⁷³ See *Nuon Chea et al.* (Case 002), E/145, 29 November 2011. See also Brouwer and Heikkilä (2013) 1364.

⁴⁴⁷⁴ *Nuon Chea et al.* (Case 002), E/145, 29 November 2011, p. 2.

⁴⁴⁷⁵ *Ibid.*, p. 3.

⁴⁴⁷⁶ *Nuon Chea et al.* (Case 002), 3 December 2012, p. 1.

⁴⁴⁷⁷ *Ibid.*, *Loc. cit.*

⁴⁴⁷⁸ *Ibid.*, *Loc. cit.*

observations and asked for clarification concerning their funding and implementation,⁴⁴⁷⁹ which is examined in further detail later.⁴⁴⁸⁰

Moreover, as previously mentioned,⁴⁴⁸¹ the VSS has been and will be conducting ‘regional forums’ with civil parties in *Nuon Chea et al.* to, *inter alia*, facilitate discussion between them and their lawyers on the severance order of the case into mini-trials and to enable civil parties to be informed of, and to exercise their rights, especially those relating to reparations claims.⁴⁴⁸² Furthermore, civil parties will be informed on how their individual cases will be involved in the proceedings, depending on the different crimes addressed in each mini-trial.⁴⁴⁸³ Accordingly, this constitutes an important and necessary safeguard for civil parties not to miss the opportunity to participate in proceedings directly connected with their reparations claims and do it timely.

Lastly, but equally important, it should be mentioned that internal rule 100 (Judgment on the Civil Party Claims) establishes that the Trial Chamber ‘shall make a decision on the Civil Party claims in the judgment. The Chamber shall not hand down judgment on the Civil Party action that is in contradiction with the judgment on the criminal action in the same case’. Moreover, the same provision contemplates the possibility to adjourn its decision upon civil parties’ request ‘Where appropriate, the Chamber may adjourn its decision on the Civil Party claims to a new hearing’, as the Trial Chamber may consider to give priority to the determination of the criminal responsibility.⁴⁴⁸⁴

3.4.2.2. During Appeals

As previously referred to,⁴⁴⁸⁵ under internal rule 105 (1) (c), ‘The Civil Parties may appeal the decision on reparations’ and under rule 110 (5), civil parties on appeal cannot introduce new claims not previously submitted to the Trial Chamber. Considering that so far the only reparations order at the ECCC has been delivered in *Duch*, the analysis of civil parties’ participation as reparations claimants in appeals proceedings is limited to that case. Civil party group 2 filed

⁴⁴⁷⁹ Nuon Chea et al. (Case 002), Trial Chamber Memorandum Entitled: Trial Chamber’s Subsequent and Final Order on the Updated Specification of Civil Party Priority Projects Pursuant to Rule 81bis(4), Trial Chamber, 6 September 2013, paras. 2 and 9.

⁴⁴⁸⁰ See *infra* Chapter V 4.4.2.2.

⁴⁴⁸¹ See *supra* Chapter III 4.4.1.

⁴⁴⁸² See VSS, Press Statement (August 2012).

⁴⁴⁸³ *Ibid.*, *Loc. cit.*

⁴⁴⁸⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 685.

⁴⁴⁸⁵ See *supra* Chapter III 6.4.1.

extensive reparations submissions, requesting in its notice of appeal and its appeal on reparations to overturn Trial Chamber's rejection of its nine requests and grant them entirely.⁴⁴⁸⁶ Civil party group 3 also requested the Supreme Court Chamber to grant the appellants' original reparations claims that were rejected by the Trial Chamber.⁴⁴⁸⁷ Although civil party group 1 did not file an appeal against the Trial Chamber's findings on reparations as it considered that the admission of a civil party application is adequate reparation in and of itself, this group requested to also be benefited deriving from and in case of any Supreme Court Chamber's reparations awards requested by other civil parties groups on appeals.⁴⁴⁸⁸

Civil party group 2 considered that the State of Cambodia, regardless of the changes of Government over a period of time and based on the ICCPR and the Convention against Torture, has a legal obligation to satisfy the internationally recognized right to reparations.⁴⁴⁸⁹ This group also acknowledged that although the ECCC does not have the mandate to order reparations that would create an obligation on Cambodia, it also claimed that the ECCC is not prevented from ordering reparations that require Cambodia's assistance in the form of 'non-pecuniary and administrative support rather than a financial contribution', as this assistance underlies 'a general duty of States to take care of the needs of their population'.⁴⁴⁹⁰ In turn, civil party group 3 sustained that the ECCC can go beyond its mandate with regard to awarding reparations in light of the 'provisions of the ECCC law on property acquired unlawfully or by criminal conduct'.⁴⁴⁹¹ Civil party group 2 also submitted that Duch's indigence should not prevent the ECCC from issuing reparations orders.⁴⁴⁹² Even though reparations were to be 'awarded against, and be borne by convicted persons' under the

⁴⁴⁸⁶ Kaing Guek Eav alias Duch (Case 001), Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, Civil Party Group 2, E188/14, 6 September 2010, para. 9; Kaing Guek Eav alias Duch (Case 001), Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties – Group 2, Civil Party Group 2, 2 November 2010, paras. 8 and 130.

⁴⁴⁸⁷ Kaing Guek Eav alias Duch (Case 001), Notice of Appeal by the Co-Lawyers for Civil Party Group 3, E188/4, 6 September 2010, paras. 26-27; Kaing Guek Eav alias Duch (Case 001), Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, F9, 5 October 2010, paras. 107-108.

⁴⁴⁸⁸ Kaing Guek Eav alias Duch (Case 001), Transcripts, 30 March 2011, p. 8, lines 3-9.

⁴⁴⁸⁹ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, paras. 21-23.

⁴⁴⁹⁰ *Ibid.*, para. 25.

⁴⁴⁹¹ Kaing Guek Eav alias Duch (Case 001), F9, 5 October 2010, para. 98.

⁴⁴⁹² Kaing Guek Eav alias Duch (Case 001), Transcripts, 30 March 2011, p. 47, lines 14-15.

previous reparations implementation regime applied in *Duch*,⁴⁴⁹³ they argued that they should be issued irrespective of Duch's financial situation and not refused on uncertain financing grounds.⁴⁴⁹⁴ As for all unsuccessful reparations requests, civil party group 2 submitted that the Trial Chamber erred in law by abstracting and grouping the civil parties' requests without explicitly indicating what kind of request was examined under which paragraph, violating the right of a reasoned decision.⁴⁴⁹⁵

The Supreme Court Chamber's findings on Duch's indigence situation were already discussed.⁴⁴⁹⁶ With regard to whether the ECCC can issue reparations orders, the enforcement of which may require government administrative assistance, the Supreme Court Chamber stressed that it lacks jurisdiction over matters that are not statutorily conferred to it and, thus, reiterated its absence of mandate and jurisdiction over Cambodia or its Government to compel it to administer a reparations scheme.⁴⁴⁹⁷ It also determined that the Government cannot be engaged by the ECCC as civil defendant, nor can the ECCC exercise jurisdiction such as encroachment of statutory competence of the executive.⁴⁴⁹⁸ Accordingly, the Supreme Court Chamber concluded that:

[...] any reparation claim is predestined for rejection that *necessarily* requires the intervention of the RGC [Royal Government of Cambodia] to the extent that, in effect, such request predominantly seeks a measure failing within governmental prerogatives. This is the case, for instance, with respect to requests for State apology, organization of health care, institution of national commemoration days, and naming of public buildings after the victim.⁴⁴⁹⁹

However, the Supreme Court Chamber also concluded that domestic courts are bound to give effect to the ECCC reparations orders against convicted persons, similar to any other reparations order delivered by domestic courts.⁴⁵⁰⁰

⁴⁴⁹³ ECCC Internal Rules, rule 23 (11) (Rev. 3). See also ECCC Internal Rules, rule 23 *quinquies* (1) (Rev. 5).

⁴⁴⁹⁴ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, para. 26.

⁴⁴⁹⁵ *Ibid.*, paras. 30-35, 39.

⁴⁴⁹⁶ See *supra* Chapter IV 2.4.3.1.

⁴⁴⁹⁷ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 663.

⁴⁴⁹⁸ *Ibid.*, Loc. cit.

⁴⁴⁹⁹ *Ibid.*, para. 664.

⁴⁵⁰⁰ *Ibid.*, para. 665 (referring to internal rule 113 (1) and the 2007 Cambodian Code of Criminal Procedure, article 496).

As for whether the Trial Chamber erred by grouping the requests for reparations without explicitly indicating which reasons applied to the rejection of each reparations request, the Supreme Court Chamber determined that civil parties hold a right to a reasoned decision on their reparations claims and that Trial Chamber's course of action infringed the right to a reasoned decision in that it did not allow the civil party appellants to unambiguously identify the reasoning relevant to certain reparations requests.⁴⁵⁰¹ Thus, the Supreme Court Chamber not only recognized the violation of the appellants' right to a reasoned decision but it also, by way of redress, proceeded to give its own reasoning on the reparations claims reiterated on appeal.⁴⁵⁰² These reparations claims and modalities are examined in detail in the next subchapter. What should be noticed here is that civil parties, in particular civil party group 2, submitted numerous requests that generally speaking represent appropriate forms of reparation for the harm inflicted such as provision of medical and psychological treatment for direct and indirect victims, naming public buildings after victims and installation of informative plaques, holding commemorative ceremonies and erection of memorials, e.g., pagodas, pagoda fences and monuments.⁴⁵⁰³ During the appeals hearing before the Supreme Court Chamber, the lawyers of the civil parties groups had the opportunity to make oral statements concerning the collective and moral modalities of reparations requested by the civil parties and denied by the Trial Chamber,⁴⁵⁰⁴ as discussed in detail later.⁴⁵⁰⁵

Nevertheless, the Supreme Court Chamber concluded that, due to the constraints stemming from the ECCC reparations framework, they could not be granted.⁴⁵⁰⁶ Also, considering that several reparations requests were rejected due to Duch's indigence and as for those who were adequately specified, the Supreme Court Chamber 'encourages national authorities, the international community, and other potential donors to provide financial and other forms of support to develop and implement these appropriate forms of reparations'.⁴⁵⁰⁷ As seen, the Supreme Court Chamber in appeals only exhorted the above-mentioned actors,

⁴⁵⁰¹ Ibid., para. 671.

⁴⁵⁰² Ibid., Loc. cit.

⁴⁵⁰³ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, paras. 45-126. See also Kaing Guek Eav alias Duch (Case 001), F9, 5 October 2010, paras. 97-102.

⁴⁵⁰⁴ See Kaing Guek Eav alias Duch (Case 001), Transcripts, 30 March 2011, pp. 49, 54, 79-82, 84-85.

⁴⁵⁰⁵ See *infra* Chapter V 4.3.1.1 and 4.4.2.1.

⁴⁵⁰⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 717.

⁴⁵⁰⁷ Ibid., Loc. cit.

falling short of any binding order against them due to the ECCC's particular and restricted reparations implementation regime, especially the previous one.

3.4.3. Civil Parties as Reparations Claimants and the VSS

Concerning the new alternative to implement a reparations award for civil parties, under the amended version of rule 23 *quinquies* (3) (b) and applicable to *Nuon Chea et al.*, a first instance of civil parties' participation as reparations claimants is, via their lead co-lawyers, to identify reparations awards. Thus, as emphasized by the Trial Chamber in *Nuon Chea et al.*, it is important the close cooperation between the project manager installed in the VSS and the civil parties' lead co-lawyers in order to 'ensure that requests for such awards are not technically, numerically or financially unrealistic'.⁴⁵⁰⁸ Moreover, the Trial Chamber clarified that it was never intended to burden the civil parties' lead co-lawyers with project development or with securing funds.⁴⁵⁰⁹

In practice, as submitted by the civil parties' lead co-lawyers, both they and the civil parties' lawyers have understood that the burden to coordinate the reparations award projects does not lie only on them but also on the civil parties' lawyers and, what is more, the VSS is also tasked with the development of non-judicial measures that may be implemented immediately (under internal rule 12 *bis*) and, in particular, with identifying, designing and later implementing reparations projects under rule 23 *quinquies* (3) (b).⁴⁵¹⁰ In particular, internal rule 12 *bis* (2) clearly establishes that the VSS 'shall, in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, endeavour to identify, design and later implement projects envisaged by Rule 23*quinquies* (3)(b)'.⁴⁵¹¹

Accordingly, in *Nuon Chea et al.*, several months of facilitation among the lead co-lawyers and civil parties' lawyers took place and, in turn, the former held many meetings with the VSS project manager in order to establish the type and nature of the reparations projects.⁴⁵¹¹ Moreover, the civil parties' lead co-lawyers reminded that those measures 'will be implemented through projects supported by donors as well as other organizations',⁴⁵¹² and also in cooperation

⁴⁵⁰⁸ Nuon Chea et al. (Case 002), E125, 23 September 2011, p. 2.

⁴⁵⁰⁹ *Ibid.*, Loc. cit.

⁴⁵¹⁰ Nuon Chea et al. (Case 002), Transcripts, 19 October 2011, p. 25, lines 9-13; Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 38.

⁴⁵¹¹ Nuon Chea et al. (Case 002), Transcripts, 19 October 2011, p. 25, lines 13-17; Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 38.

⁴⁵¹² Nuon Chea et al. (Case 002), Transcripts, 19 October 2011, 25, lines 18-20; Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 39.

with the Cambodian Government.⁴⁵¹³ As previously seen,⁴⁵¹⁴ the project to set up an externally subsidized trust fund to implement collective and moral reparations awarded by the ECCC was advanced by the civil parties' lead co-lawyers as part of the projects submitted. Projects on modalities of collective and moral reparations proposed by the civil parties' co-lead lawyers are discussed in detail later.⁴⁵¹⁵ What should be mentioned here is that the civil parties' lead co-lawyers expressed that the VSS shares their deep commitment to making reparations a reality and their on-going collaboration with the VSS will even be reinforced in the future.⁴⁵¹⁶

Nevertheless, civil parties' lead co-lawyers recognized that the tasks assigned to them, to the civil parties' lawyers and the VSS are 'not only daunting but also unprecedented in the context of an international tribunal'.⁴⁵¹⁷ This observation is sound as these tasks are normally conducted by specialized bodies or entities, e.g., the TFV, that have an important number of staff members, funding, time as well as experience. In this scenario, the civil parties' lead co-lawyers considered it necessary in order to guarantee the on-time development of projects, other than those which are purely symbolic and that 'are clearly unsatisfactory for the Civil Parties', to propose that the VSS have staff with diversified skills.⁴⁵¹⁸

In Case 002/01, within *Nuon Chea et al.*, civil parties' lead co-lawyers, in consultation with the VSS, have provided information on the status of the financing of the prioritized list of reparations projects to ensure that all measures under internal rule 23 *quinquies* (3) (b) might be realized, with the support of external collaborators and donor assistance and within a meaningful time frame.⁴⁵¹⁹ Thus, as expressed by the civil parties' lead co-lawyers themselves, 'The Lead Co-Lawyers, Civil Party Lawyers, VSS and partner organizations and entities will cooperate to finalize the design of the prioritized projects and offer our support in fundraising efforts'.⁴⁵²⁰

⁴⁵¹³ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 39.

⁴⁵¹⁴ See *supra* Chapter IV 2.4.3.2.

⁴⁵¹⁵ See *infra* Chapter V 4.4.2.2.

⁴⁵¹⁶ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 39.

⁴⁵¹⁷ *Ibid.*, para. 40.

⁴⁵¹⁸ *Ibid.*, *Loc. cit.*

⁴⁵¹⁹ Nuon Chea et al. (Case 002), 3 December 2012, p. 1; Nuon Chea et al. (Case 002), 1 August 2013, para. 2.

⁴⁵²⁰ Nuon Chea et al. (Case 002), 12 February 2013, para. 36.

Finally, it should be mentioned that the VSS has developed a process of consultation, including non-civil parties, to discuss proposals and resources necessary for the implementation of non-judicial measures for them.⁴⁵²¹

3.5. Comparative Conclusions

The proceedings whereby victims can seek reparations at the ICC and the ECCC are generally speaking similar concerning bringing reparations claims although the ICC as a court may be regarded as more proactive. Victims who claim reparations at the ICC can be considered parties when it comes to their reparations claims during reparations phase proceedings, i.e., after conviction, as acknowledged by Trial Chamber I and the Appeals Chamber, although, unlike the ECCC or the French system, there is no civil party status at the ICC. During trial, appeals, and reparations phase proceedings (including reparations hearings, reparations order and appeals against it) the scope of participation and procedural rights of civil parties as reparations claimants at the ECCC is in some instances broader than that of reparations claimants at the ICC. However, any difference is compensated when reparations claimants also hold the status of victim participants at the ICC. Additionally, since legal representatives of victims (especially the OPCV) may represent both victim participants and victims who only claim reparations, legal representatives' actions and the final outcome of reparations are expected to benefit all victims who are seeking reparations at the ICC.

Victims' status as reparations claimants at the TFV and how its reparations implementation plan is integrated within the ICC case-based reparations regime constitutes an important difference with regard to the ECCC since this lacks a similar trust fund. Nevertheless, at the ECCC, under the amended reparations implementation regime, such implementation can potentially be conducted with external funds by the VSS in liaison with non-governmental organizations, e.g., an externally subsidized trust fund (different from the TFV) as proposed by the civil parties' lead co-lawyers in *Nuon Chea et al.*, and governmental organizations. In turn, civil parties who seek reparations at the ECCC have procedural rights similar to those available to civil parties in the French system both during trial and appeals proceedings, which are also to an important extent similar to the actions that can be followed by victims as reparations claimants, especially those who are also victim participants, at the ICC. On the other hand, although victims are not technically speaking reparations claimants in the Anglo-American criminal proceedings, they can still

⁴⁵²¹ See SáCouto (2012) 358.

benefit from compensation/restitution orders against the accused imposed by the respective court and, especially in the United States, there are some 'indirect' avenues for victims to be more pro-active on this regard. In any case, in the three examined national systems, victims can exercise civil actions before civil jurisdictions to obtain reparations normally and, in the United States, via class actions when it comes to large number of victims, which may be considered as a general/indirect reference for the international and hybrid criminal courts. Moreover, state special funds have been set up as an alternative. To some extent, the TFV resembles this last alternative.

At the ICTY, the ICTR, the SCSL and the STL, reparations proceedings, in particular concerning compensation, have been 'delegated' to national jurisdictions, i.e., victims may use a condemnatory judgment from these tribunals to claim compensation at the domestic level. This can be criticized since it is assumed the existence of applicable national law, competent bodies and enforcement mechanisms at the domestic level ready to be used by victims as reparations claimants, which is not necessarily the case letting alone other barriers and limitative factors. These circumstances may explain why, as far as it is known, no domestic compensation award has been granted based on a judgment of the ICTY, the ICTR and the SCSL. At the STL, whether its Statute provision on singling out victims and based on which they may later file compensation claims at the national level can change the above-mentioned negative outcome is yet to be seen. In any case, victim participant status for the purpose of identification at the STL can be considered quite important. Victims not identified by the STL can also use a condemnatory judgment to claim compensation in domestic courts or other institutions. At the ICTY, the ICTR and the SCSL, proceedings on restitution (as a penalty and not existent at the STL), which include a separate hearing, are difficult to implement due to, *inter alia*, the need for national authorities' involvement. In any case, restitution proceedings remain theoretical since, as far as it is known, these courts have not issued a restitution order. Concerning rehabilitation, some measures have been adopted especially at the ICTR but limited to witnesses, i.e., given to victims as witnesses. Concerning external mechanisms, where victims can claim reparations, related to crimes under these courts' jurisdictions, it can be mentioned, as for the former Yugoslavia, the establishment of hybrid criminal courts in Kosovo and Bosnia and Herzegovina as well as the setting up of the Human Rights Chamber and restitution commissions. As for Rwanda, national legislation and proceedings as well as specific projects under the 'International Fund for Rwanda' can be mentioned. With regard to Sierra Leone, a national

reparations program has been put into place. Therefore, these external mechanisms may be considered as complementary transitional justice mechanisms where victims can become reparations claimants.

At the ICC, victims who seek reparations within the ICC case-based reparations regime start this long path process by requesting and indicating, *inter alia*, the injury, loss and harm inflicted, claims for compensation, rehabilitation and other modalities of reparations as well as factual background and, to the extent possible, the identity of the person(s) believed to be responsible for the harm. There is large flexibility as for reparations claimants' documentation, including identifying documents. Victims who apply for victim participant status also have the option to additionally claim for reparations by filling in the respective application form and, thus, additionally become reparations claimants. Victims can bring their claims at the earliest opportunity; however, it is better to wait at least after the charges are confirmed since reparations are only granted for the harm caused by crimes upon which the accused is convicted and, thus, to avoid secondary victimization if some charge(s), based upon which victims were looking for reparations, is/are not confirmed. Although the ICC can on its own motion exceptionally proceed with reparations proceedings, if a victim as a result of notification becomes aware of such action, (s)he can always submit a reparations claim and his/her claim be treated in the regular way, i.e., be treated as a reparations claimant. Therefore, victims who could not initially apply for reparations can still benefit from the ICC's exceptional court-initiated reparations proceedings if beneficiaries can be identified by the ICC and/or the TFV and, thus, given the opportunity to claim reparations. Notification of reparations claims and proceedings to the accused and/or victims have to be conducted timely and, especially concerning publication of reparations proceedings, external assistance is foreseen and advisable considering the difficult contexts (including communication problems) faced by potential reparations claimants.

At the ECCC, the status of victims as reparations claimants is integrated in their status as civil parties as one of the two purposes of civil party constitution is to claim collective and moral reparations. Accordingly, information related to (later) reparations requests is provided when victims apply to become civil parties at which instance victims have to, *inter alia*, provide information on the injury, loss and harm suffered as well as on the psychological, physical pain and material loss.

At the ICC's cases, victims who hold the victim participant status, normally via their legal representatives, have had the opportunity to put forward

arguments and also bring evidence related to or concerning their reparations claims during trial. Accordingly, the Trial Chambers in *Lubanga* and *Bemba* (applying regulation 56 of the Regulations of the Court), adopted an approach whereby it is possible to hear reparations evidence, ask specific questions to witnesses (who may also be victims) in relation to reparations, and admit testimony on reparations by victims. It has thus been adopted a balanced approach as it is not only considered victims' interests but also the accused's right to a fair and impartial trial and efficiency. When victims' legal representatives wish to question a witness on reparations-related matters during trial, it is necessary to make a written application (including questions, their purpose and any relevant document) as well as file it early enough for the defence to submit observations. The Chamber will also determine whether and to what extent the more flexible questioning rules applicable in reparations hearings are also applicable in trial.

In turn, at the ECCC, in the trial in *Duch*, the groups of civil parties filed a joint written submission emphasizing the right of victims of mass violence and serious human rights violations to claim reparations and, in the particular context of the ECCC reparations regime, they requested several modalities of reparations of a collective and moral nature. In *Duch*, civil parties' final submissions on reparations reiterated their initial claims and also provided additional or supplementary claims. Besides requested collective and moral reparations, it was emphasized the need to conduct a wider consultation and the Chambers were requested to set up reparations implementation processes. Some civil parties were able to express their reparations claims during the trial hearings either via their lawyers (in most of the cases) or even by themselves and civil parties' lawyers had the opportunity to question their clients and, thus, enable them to provide further information about their reparations claims. In the amended ECCC Internal Rules, applicable to *Nuon Chea et al.* and other ongoing and future cases, civil parties' lead co-lawyers have to make a single claim for collective and moral reparations on behalf of the consolidated civil parties group. As for the Chamber's possibility to order the implementation of a reparations award sought by civil parties' lead co-lawyers, designed or identified with the VSS, these have to provide an initial specification of the awards that are sought. This should lead to meaningful outcomes for victims as the Trial Chamber may early identify whether the awards sought are feasible. In any case, civil parties are still allowed to introduce changes to the initial specifications but providing details on the substance and form of implementation of the proposed award.

In *Nuon Chea et al.*, the civil parties' lead co-lawyers sustained that their initial specifications resulted from collective work and consultation with civil parties' lawyers and civil parties, reflecting the civil parties' wishes on the nature and modalities of reparations that are sought. Additionally, civil parties, who were originally denied their status, were also consulted, which was a necessary inclusion measure. Although *Nuon Chea et al.* has been divided in (mini) trials which may postpone granting reparations for civil parties, it is a more efficient option and should lead to a more meaningful and substantial participation of civil parties as reparations claimants since not all the almost 4000 civil parties of this case are simultaneously doing so. Moreover, all civil parties will have the opportunity to have their reparations claims examined. Thus, the harm suffered by the civil parties and the respective requests for reparations awards will be progressively considered in the respective trials/mini-trials in *Nuon Chea et al.* In Case 002/01, within *Nuon Chea et al.*, upon Trial Chamber's request, the civil parties' lead co-lawyers have provided a prioritized list of reparations projects that are under development. The civil parties' lead co-lawyers and lawyers, the VSS and partner organizations and entities are jointly working to finalize the design of the prioritized reparations projects and raise the necessary funds so that those projects are endorsed by the Trial Chamber. Furthermore, the ECCC, in particular its VSS, has been and will continue informing the civil parties and their lawyers of the progress of their individual cases so that they can timely participate as for reparations claims. Finally, civil parties may request the Trial Chamber to adjourn its decision on reparations claims in a new hearing after the judgment.

Concerning ICC reparations phase proceedings, i.e., after conviction, in particular before making a reparations order, under article 75 (3) of the ICC Statute, the ICC may invite victims' representations (both oral and written) and, once these are provided, the ICC must take them into account. Article 76 (3) lays down the possibility for the Trial Chamber to have an additional hearing on reparations, where submissions made under article 75 (3) can be heard. Moreover, victim participants or victims who only requested reparations may ask the postponement of the reparations hearing although they cannot initiate reparations hearings. Victims as reparations claimants can in principle only intervene via 'representations' in reparations phase proceedings (including hearings) when invited by the Chamber. However, they should also be allowed to participate as victim participants during reparations phase proceedings, i.e., to be granted relevant procedural rights beyond mere submission of representations upon the ICC's invitation, if they hold this status. Reasons for

this are: i) since reparations phase proceedings form part of the overall trial process and article 68 (3) (legal ground for victim participant status) applies to, *inter alia*, trial, it is also applicable to reparations proceedings; ii) not to deprive victims of procedural/participatory rights and consistency with victims' (procedural) rights to both participate and claim reparations; iii) a reference, under rule 91 (4) of the RPE, to victims' participation in the reparations hearing; iv) invitations for representations actually seek to allow the ICC to hear victims who did not apply for victim participant status; and v) the special interest of victims to actively participate in reparations phase proceedings and, thus, obtain an important quota of restorative justice. The personal interest to participate as victim participants is given by requesting reparations. It must be pointed out that Trial Chamber I in its reparations decision referred to expression of victims' views and concerns as well as participation and, thus, implicitly and arguably suggested the application of the victim participant status for those who hold it in reparations phase proceedings. The above-mentioned considerations are related to the idea of considering victims (in general), when claiming reparations, i.e., victims as reparations claimants, as parties with relevant procedural rights during reparations phase proceedings, as also suggested by Trial Chamber I.

At hearings limited to reparations, legal representatives of victims are given a broader scope of action than in other proceedings as their intervention cannot be limited by the Chamber to written submissions and their questioning of witnesses, the convicted and experts is in principle not restricted. Victims' legal representatives have the right to be present when the Trial Chamber delivers its reparations order and to receive copies thereof. It is expected that the number of victims, mainly via their legal representatives or eventually in person, intervening during the reparations hearing be larger than those who participated during trial proceedings. Finally, victims or their legal representatives can request the appointment of experts to the ICC to assess reparations and shall be invited by the Chamber to make observation on the experts' reports, as appropriate.

Accordingly, victims' status during reparations phase proceedings seems to be broader than just a role limited to interventions via 'representations' upon the ICC's request.

In *Lubanga*, on the road to Trial Chamber I's reparations decision (not originally understood by the Trial Chamber as a reparations order), victims' legal representatives (after conviction and upon Trial Chamber's invitation) submitted their observations concerning the principles on reparations applicable by the Trial Chamber; and the procedure to be followed by it including whether

reparations should be awarded individually or collectively, the scope of reparations beneficiaries, the ways to assess harm, the criteria applicable to the reparations awards, whether to grant reparations awards via the TFV and whether victims were seeking to call expert evidence. Not only victim participants' lawyers but also importantly the OPCV representing unrepresented reparations claimants and even victims who have not yet applied for reparations but who may benefit from them, i.e., (unidentified) potential reparations claimants and beneficiaries, filed written submissions addressing, *inter alia*, those points. In turn and afterwards, the reparations decision in *Lubanga* has been considered by the Appeals Chamber as a reparations order. This was mainly based on the fact that the reparations decision included some procedural steps concerning reparations implementation via the TFV, which can only be undertaken when a reparations order has been adopted.

With regard to appeals against reparations orders at the ICC, victims (participants or not) who are claiming reparations can via their legal representatives appeal a reparations order. The Appeals Chamber in *Lubanga* found, based on article 82 (4) of the ICC Statute, that victims as parties can via their (common) legal representatives appeal a reparations order and that the categories of victims who hold the right to appeal a reparations order may include: i) victims who participated as victim participants in Lubanga's trial, including those who did not claim reparations but made submissions on reparations before the Trial Chamber; ii) identified reparations claimants, without the need of having participated as victim participants; and iii) individuals whose victim participant applications were rejected or whose victim participant status was withdrawn by the Trial Chamber. These categories are coherent with the lack of need to be victim participants in order to claim reparations. As conviction determines the case-based reparations and that has been appealed in *Lubanga*, the suspensive effects of the reparations decision is the soundest approach, which is also what happens in the French system. On the other hand, based on the wording of the ICC instruments and drafting history of the RPE, it may be concluded that the silence about whether victims (including victim participants) can appeal the Chamber's refusal to issue a reparations order should in principle be interpreted in negative. Concerning the reparations decision in *Lubanga*, legal representatives of victims filed appeals against some grounds of it including the Trial Chamber I's decision not to consider the individual reparations applications received by it as the Chamber instead referred them to the TFV. Victims' legal representatives can submit supporting documents and also respond to the accused's supporting documents on these

reparations order appeal proceedings. When a reparations decision is not considered a reparations order, to participate in the respective interlocutory appeals proceedings, reparations claimants would need to hold the victim participant status. However, in practice, even if this is not the case, since several categories of victims (e.g., reparations claimants, potential reparations claimants and victim participants) can be simultaneously represented and their observations can be voiced by common legal representatives, they may benefit from their common lawyers' actions and reparations proceedings outcome.

In turn, at the ECCC, civil parties groups in *Duch* exercised their right to appeal the Trial Chamber's judgment concerning its decision on reparations and which cannot include new claims not submitted to the Trial Chamber. Thus, civil parties (especially civil party group 2) filed extensive written submissions requesting the Supreme Court Chamber to overrule the Trial Chamber's rejection of their requests for reparations and civil parties' lawyers made oral submissions. Besides collective and moral reparations, the civil parties claimed Cambodia's duty to be involved in reparations. However, the Supreme Court Chamber found that ordering so would go beyond the ECCC's mandate and, thus, it only encouraged (financial) support from external actors for specified reparations requests. In any case, lawyers of the civil parties groups had the opportunity to make oral statements on, *inter alia*, collective and moral reparations.

In *Lubanga*, corresponding to the implementation phase of the reparations proceedings, the reparations order implementation plan from the TFV, which has already gathered some practical experience, will provide important avenues for victims to actively participate as reparations claimants and later benefit from reparations. Such avenues include consultation, public debates, focus groups with vulnerable victims and collection of proposals for collective reparations. Thus, victims' participation in the design and implementation of reparations programs should ensure that reparations are meaningful for them. Although victims' legal representatives have questioned that the Trial Chamber did not examine individual reparations applications and transmitted them to the TFV, this Chamber's action may be considered as necessary since it has yet to be determined the total universe of potential claimants and beneficiaries of reparations in *Lubanga*. Accordingly, waiting until the TFV's reparations plan is implemented and, thus, to appropriately distribute the available resources and to avoid tensions among and with victims was the best approach. It may have been better that the same Judges remain seized of the case for reparations purposes. In any case, some delegation of the reparations

proceedings to the TFV can be justified since a competent Chamber will monitor and control the TFV's activities on this regard and the Chamber will have the last word on the implementation of the reparations plan. What is even more important is that victims as reparations claimants can fully participate in the TFV's activities either via writing requests or hearings held by a Chamber, besides all the process of consultation and accessibility to be guaranteed to them.

The transcendence of the ICC and, in particular of its TFV, on reparations can be justified by the need for granting reparations to victims who would be unable to get their harm redressed in domestic systems or would do in regional/international systems with more difficulties. The ICC case-based reparations regime, implemented with the TFV's assistance and expertise, enhances the status of victims as reparations claimants as adds an important quota of restorative justice, via the provision of reparations to the victims, which complements the ICC's mainly retributive/deterrent justice mandate. In addition, the TFV via its general assistance mandate has been providing measures to redress harm inflicted to a much larger number of victims who will not benefit from the ICC case-based reparations as they fall outside of the specific charges litigated in the ICC cases but who still were harmed by crimes under the ICC's jurisdiction and from situations under the ICC's investigations. By reaching out victims who would otherwise be left with empty hands, the TFV's general assistance mandate addresses potential tensions created by providing reparations to only some victims and leaving out a much larger number of them. Moreover, the TFV's general assistance mandate is conducted in a manner that recognizes victims' standing and involves/benefits them in reparation-like measures.

At the ECCC, the implementation of reparations award sought by civil parties' lead co-lawyers, identified or in cooperation with the VSS, has promoted an intense dialogue between the VSS and civil parties' lead co-lawyers and lawyers to determine the modalities and implementation of collective and moral reparations in *Nuon Chea et al.* However the need for a specialized entity, similar to the TFV, to do this work has been highlighted by the lead co-lawyers as an important challenge.

4. Modalities of Reparations and other Legal Issues

Under this subchapter, it is first discussed the notions of individual and collective reparations as well as the reparations standard/ burden of proof at the ICC and the ECCC. Then, the focus is put on the modalities of reparations. When examining the situation at the ICC and the ECCC, attention is also given

to reparations implementation. According to the UN Basic Principles and Guidelines, the reparations modalities are i) restitution; ii) compensation; iii) rehabilitation; iv) satisfaction; and v) guarantees of non-repetition,⁴⁵²² which correspond to human rights bodies' case law, in particular the jurisprudence of the IACtHR. To what extent these modalities, originally crafted as for state responsibility, can be applied and implemented at international/hybrid criminal courts is also discussed. In addition, the situation at the ICTY, the ICTR, the SCSL and the STL is examined. Analysis of the three considered national systems is included for complementary/illustrative purposes.

4.1. National Systems

4.1.1. English Adversarial System

As previously discussed, although victims are not reparations claimants in criminal proceedings, criminal courts have the possibility to establish a financial penalty against the accused consisting in a compensation order. As previously seen,⁴⁵²³ even though financial penalties and reparations are in principle autonomous legal institutions, they are interrelated and for practical effects compensation orders may take shapes (almost) identical to compensation as a modality of reparations. Under the Powers of Criminal Courts (Sentencing) Act 2000 'The compensation to be paid under a compensation order made by a magistrates' court in respect of any offence of which the court has convicted the offender shall not exceed £5,000'.⁴⁵²⁴ However, compensation orders have been given inconsistently and the amount has frequently been small.⁴⁵²⁵ In any case, the English system of drawing up national guidelines on the levels of compensation to be ordered in relation to personal injuries has been qualified as deserving consideration by other jurisdictions.⁴⁵²⁶ Moreover, compensation orders are not limited to pecuniary loss, i.e., they can be ordered due to victim's distress or anxiety.⁴⁵²⁷

The competent criminal court must be satisfied that the amount of compensation is realistic to the injury, loss or damage and evidence on this regard has to be produced in court. If there is no compensation order, the victims can go to a civil court at which the 'balance of probabilities' standard is

⁴⁵²² UN Basic Principles and Guidelines, principles 19-23.

⁴⁵²³ See supra Chapter IV 2.1.1.

⁴⁵²⁴ Powers of Criminal Courts (Sentencing) Act 2000, section 131 (1).

⁴⁵²⁵ Doak (2008) 233.

⁴⁵²⁶ See Brienen and Hoegen (2000) 1073.

⁴⁵²⁷ See *Bond v Chief Constable of Kent* (1982) 4 Cr App R (S) 314. Cited by Doak (2008) 233.

applicable.⁴⁵²⁸ The EU Framework Decision on Victims referred to the right to compensation and (unless urgently required for criminal proceedings) immediate restitution of recoverable property to victims in the course of criminal proceedings.⁴⁵²⁹ The EU Directive on Victims considers the rights to reimbursement of expenses, to return of property seized in criminal proceedings and to adequate compensation from the offender in criminal proceedings.⁴⁵³⁰

As for the Criminal Injuries Compensation Scheme, victims of violent crimes can receive compensation for their injuries, ranging from £1000 to £500,000 depending on the injuries.⁴⁵³¹ As for victims of the London Bombings in July 2005, compensation provided has included amounts up to £500,000 for death. Compensation categories have included lost earnings, pain and suffering, temporary mental anxiety, serious/permanently disabling trauma, medical/care expenses and other expenses as well as funeral expenses reimbursement.⁴⁵³² Under article 4 of the European Convention on Compensation for Violent Crime Victims, compensation awarded via State schemes 'shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance'. It should be noticed that, by definition, the EU Council Directive on Compensation to Crime Victims refers to compensation only.

Concerning civil litigation, the law of torts considers as categories of damages for compensation, *inter alia*, loss of earnings, medical and other expenses and non-pecuniary loss.⁴⁵³³ Under the Human Rights Act, a court may order to pay damages or compensation in favour of victims of unlawful acts committed by public authorities.⁴⁵³⁴

In ECtHR cases against the United Kingdom, physical, mental and emotional harm (non-pecuniary damage), material damages as well as costs and expenses have been considered part of the compensation.⁴⁵³⁵ In *Z v. United Kingdom*, concerning a violation of the prohibition of torture, the ECtHR

⁴⁵²⁸ Lewis and Ellis (2006) 9.

⁴⁵²⁹ EU Framework Decision on Victims, article 9 (1) and (3).

⁴⁵³⁰ See respectively EU Directive on Victims, articles 14, 15 and 16.

⁴⁵³¹ Lewis and Ellis (2006) 8.

⁴⁵³² *Ibid.*, 15-16.

⁴⁵³³ See, for further discussion, Andrew Burrows, 'Damages' in Antony Dugdale and Michael Jones (eds.), *Clerk & Lindsell on Torts* (19th edn., Thomson 2006) 1799.

⁴⁵³⁴ Human Rights Act, Section 8 (1).

⁴⁵³⁵ See, e.g., ECtHR, *Keenan v. United Kingdom*, Appl. No. 27229/95, Judgment, 3 April 2001; ECtHR, *McCann v. United Kingdom*, Appl. No. 18984/91, 27 September 1995; ECtHR, *Price v. United Kingdom*, Appl. No. 33394/96, Judgment, 10 July 2001.

awarded victims compensation that was in excess of what they would have received in domestic proceedings and, on this regard, the ECtHR noticed that ‘the rates applied in domestic proceedings, though relevant, are not decisive’.⁴⁵³⁶ The state obligation to investigate and punish the perpetrators has also been stressed by the ECtHR.⁴⁵³⁷

4.1.2. American Adversarial System

As previously said, victims are not properly speaking reparations claimants in criminal courts; however, the respective courts can order the accused to provide restitution and compensation. The MVRA provides more details on these penalties, which are in nature different from reparations. Nevertheless, those penalties are examined herein as they, in their outcomes and for practical effects, resemble reparations modalities. As for restitution, the Federal MVRA, applicable to certain crimes, lays down that the court shall issue a restitution order as an additional penalty, in a crime resulting in damage to or loss or destruction of property of a victim, and shall thus require the defendant to ‘return the property to the owner of the property or someone designated by the owner’.⁴⁵³⁸ In case restitution is ‘impossible, impracticable, or inadequate’, the MVRA foresees the payment of:

- [...] an amount equal to—
- (i) the greater of—
 - (I) the value of the property on the date of the damage, loss, or destruction; or
 - (II) the value of the property on the date of sentencing, less
- (ii) the value (as of the date the property is returned) of any part of the property that is returned.⁴⁵³⁹

Moreover, when it comes to a crime resulting in bodily injury to a victim, it is foreseen the payment of an amount to cover:

- (A) [...] the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment [...];
- (B) [...] the cost of necessary physical and occupational therapy and rehabilitation; and

⁴⁵³⁶ ECtHR, *Z et al. v. United Kingdom*, Appl. No. 28945/95, Judgment, 10 May 2001, para. 131.

⁴⁵³⁷ See, e.g., ECtHR, *Finuance v. United Kingdom*, Appl. No. 29178/95, Judgment, 1 July 2003; ECtHR, *Al-Adsani v. United Kingdom*, Appl. No. 35763/97, Judgment, 21 November 2001.

⁴⁵³⁸ 18 USC § 3 663A (b) (1) (A).

⁴⁵³⁹ 18 USC § 3 663A (b) (1) (B).

(C) reimburse the victim for income lost by such victim as a result of such offense.⁴⁵⁴⁰

Furthermore, in case of the death of a victim, the convicted shall be ordered to pay an amount equivalent to the funeral costs and related services.⁴⁵⁴¹ In interpreting those provisions, it has been considered that the MVRA requests awards of all lost incomes resulting from the crime at the time of sentencing, i.e., not only those which took place in the past but also those which will occur in the future.⁴⁵⁴² Federal courts possess the discretion to assign restitution proportionally or jointly and severely.⁴⁵⁴³

Concerning civil actions and compensation funds, reparations have in practice taken mainly the form or modality of compensation. Thus, under the several cases litigated via class actions filed by victims under the ATCA and the Torture Victim Protection Act, the respective claimant class has been awarded very high compensatory amounts (compensatory and punitive damages), which in most of the cases consisted in millions of dollars.⁴⁵⁴⁴ However, as previously mentioned,⁴⁵⁴⁵ these quite substantial compensations may be considered as merely 'symbolic' victories as the claimants have not succeeded to implement their compensatory awards. Concerning the September 11 Victim Compensation Fund, its purpose was simply to give monetary compensation to victims and their survivors for their losses and, therefore, to reduce resultant economic hardship and provide an alternative to civil litigation.⁴⁵⁴⁶ Concerning the Office of Redress Administration (1988) for Japanese-Americans interned during the Second World War, in addition to an apology via a letter by President George Bush and payments, projects such as curriculum, landmarks and institutions, community development, arts and media, research, national fellowships and research resources were funded.⁴⁵⁴⁷ State compensation systems are intended to supplement or step in when restitution cannot be provided by the offenders.⁴⁵⁴⁸

Lastly, but equally important, in the Vietnam-related case *Agent Orange* and in *Holocaust Victims' Assets*, the doctrine of *cy pres* was applied. This

⁴⁵⁴⁰ 18 USC § 3 663A (b) (2).

⁴⁵⁴¹ 18 USC § 3 663A (b) (3).

⁴⁵⁴² United States v. Bedonie 317 F. Supp. 2d 1285 (D. Utah 2004).

⁴⁵⁴³ See United States v. Moten, 551 F.3d 763 (8th Cir. 2008). See also Belooof, Cassell and Twist (2010) 618.

⁴⁵⁴⁴ For further details, see Bottiglierio (2004) 63-64; REDRESS, (2006) 61-63.

⁴⁵⁴⁵ See supra Chapter IV 3.1.2.

⁴⁵⁴⁶ See Issacharaoff and Morawiec Mansfield (2006) 294-295.

⁴⁵⁴⁷ Yamamoto and Ebesugawa (2006) 274-275.

⁴⁵⁴⁸ Human Rights Watch (2008) 31.

doctrine allows court's discretion to establish 'the most equitable use of limited resources in situations where it is inappropriate or impractical to make awards to all eligible claimants' and this use may involve making collective awards in favor of a limited category of those who are eligible or those victims who present the most pressing need.⁴⁵⁴⁹ Thus, when a settlement fund cannot 'satisfy every class member', it is 'equitable to limit payments to those with the most severe injuries' to provide 'as much help as possible to individuals who, in general, are most in need of assistance'.⁴⁵⁵⁰ Accordingly, in *Holocaust Victims' Assets*, in relation to the looted assets class of claimants, the court allocated all looted assets funds, around US\$205 million of the overall US\$1.25 billion settlement, for humanitarian assistance programs to benefit the most needed victims.⁴⁵⁵¹

4.1.3. French Inquisitorial System

Losses and injuries may be of a material, moral or both nature.⁴⁵⁵² Although the CPP does not specify the modalities of reparations to be granted to the civil parties, compensation in practice has been the modality of reparations resulting from civil actions filed before criminal courts. The wording used in the CPP does not suggest that modalities of reparations should only be limited to compensation. Thus, CPP provisions, *inter alia*, refer to: i) the civil action aims 'at the reparation of the damage suffered because of a felony, misdemeanor or a petty offence; ii) person's claims to 'have suffered harm from a felony or misdemeanor'; and iii) the mandate of the *Cour d'Assises* to rule on 'any claims for damages' brought by the civil party against the accused.⁴⁵⁵³ Having said so, like in most of the other national systems, compensation and reparation have been mistakenly considered as synonyms, something particularly contested in international human rights law as compensation is only one category of reparations,⁴⁵⁵⁴ which has later been reflected at international and hybrid criminal courts, as discussed in this subchapter. Indeed concerning the so-called penalty of 'sanction-reparation', under the Criminal Code, it has been translated

⁴⁵⁴⁹ McCarthy (2012a) 254.

⁴⁵⁵⁰ Re Agent Orange Product Liability, 818 F.2d 145, 158 (2nd Cir. 1987). See also Re Holocaust Victims' Assets, 424 F.3d 132, 141 n.10 (2nd Cir. 1987); In Re Holocaust Victims' Assets, 302 F. Supp. 2d 89, 96-97 (EDYN 2004). Cited by Ibid., Loc. cit.

⁴⁵⁵¹ Thus, those claimants satisfying the respective criteria were presumed to have had property looted and, hence, did not have to bring evidence on this regard. See Ibid., 254-255.

⁴⁵⁵² Brien and Hoegen (2000) 319.

⁴⁵⁵³ CPP, articles 2, 85 and 371 respectively.

⁴⁵⁵⁴ See, e.g., Héctor Faúndez Ledesma, The Inter-American System for the Protection of Human Rights (3rd edn., Inter-American Institute of Human Rights 2008) 756-764.

in specific monetary sums,⁴⁵⁵⁵ i.e., resulting in an outcome quite similar/identical to compensation awards. Nevertheless, the penalties ordered by the criminal courts can manifest in financial sanctions against the convicted via confiscation,⁴⁵⁵⁶ which may end up in restitution of property and, thus, for practical effects, being equivalent to the respective modality of reparations. However, as previously discussed, reparations and penalties are by nature different legal categories although they are interrelated and may take similar/identical shapes.

Concerning state compensation schemes, i.e., reparations that can be obtained via the CIVI, the CPP only refers to compensation. Thus, concerning serious bodily attack, it is established that:

Any person who has suffered harm caused by an intentional or non intentional action which has the material characteristics of an offence may obtain full compensation for the damage deriving from offences against the person when the following cumulative conditions exist: [...] these actions: - either have brought about death, permanent incapacity or total incapacity for work for more than one month; - or are set out and punished by articles [...] of the Criminal Code

[...]

Compensation may be refused or its amount reduced if the victim is at fault.⁴⁵⁵⁷

With regard to material damage or non-serious bodily harm, it is laid down that:

These provisions are also applicable to any persons specified in article 706-3 who, as victims of offences against the person, as set out in that article, are not allowed to claim the full compensation for their damage on this basis, because the facts that brought it about have caused a total incapacity to work of less than one month's duration.⁴⁵⁵⁸

⁴⁵⁵⁵ Pignoux (2008) 158.

⁴⁵⁵⁶ See, e.g., CPP, article 131-21.

⁴⁵⁵⁷ Ibid., article 706-3 ('Toute personne ayant subi un préjudice résultant de faits volontaires ou non qui présentent le caractère matériel d'une infraction peut obtenir la réparation intégrale des dommages qui résultent des atteintes à la personne, lorsque sont réunies les conditions suivantes: [...] Ces faits: - soit ont entraîné la mort, une incapacité permanente ou une incapacité totale de travail personnel égale ou supérieure à un mois ; - soit sont prévus et réprimés par les articles [...] du code pénal [...] La réparation peut être refusée ou son montant réduit à raison de la faute de la victime').

⁴⁵⁵⁸ Ibid., article 706-14 ('Ces dispositions sont aussi applicables aux personnes mentionnées à l'article 706-3 qui, victimes d'une atteinte à la personne prévue par cet article, ne peuvent à ce titre

Whereas compensation for grave bodily harm is integral, non-serious bodily harm is restricted to an upper monetary limit.⁴⁵⁵⁹ For illustrative purposes, it is examined briefly what categories of damage have been considered when granting compensation by the CIVI. Broadly speaking, two categories of damages have been considered. First, damages about which attribution will be claimed, including expenses, loss of earnings and psychological problems during the temporary incapacity to work, professional damage, and economic damages of those entitled.⁴⁵⁶⁰ Second, personal damages, whose attribution is not possible unless there is evidence brought by the social body.⁴⁵⁶¹ Damages under the second category include permanent functional deficit, *pretium doloris* (i.e., pain and suffering and other immaterial damages), aesthetic damage, sexual harm, and moral harm of the victims' relatives.⁴⁵⁶² As for victims of terrorism (and other crimes), the FGTI considers compensation for physical damage of the injured persons as well as moral and economic damages of those who claim these damages as for the killed victims.⁴⁵⁶³ Victims of terrorism also have, *inter alia*, the right to free medical services.⁴⁵⁶⁴

Concerning ECtHR judgments against France, besides granting payment of compensation to the victims, it has been stressed the state obligation to investigate and punish the perpetrators.⁴⁵⁶⁵

4.2. The ICTY, the ICTR, the SCSL and the STL

4.2.1. Possibilities of Reparations Modalities Foreseen in the Courts' Instruments

The instruments of the ICTY, the ICTR, the SCSL and the STL foresee, at least indirectly, two modalities or forms of reparations for victims: i) compensation; and ii) rehabilitation or support.⁴⁵⁶⁶ Restitution of property and proceeds, which can be ordered as penalty, may be considered as being in outcome similar to the

prétendre à la réparation intégrale de leur préjudice, les faits générateurs de celui-ci ayant entraîné une incapacité totale de travail inférieure à un mois').

⁴⁵⁵⁹ Association des Paralysés de France- Conseil Technique National (2008) 25

⁴⁵⁶⁰ *Ibid.*, 14.

⁴⁵⁶¹ *Ibid.*, Loc. cit.

⁴⁵⁶² *Ibid.*, Loc. cit.

⁴⁵⁶³ *Ibid.*, 28.

⁴⁵⁶⁴ *Ibid.*, 29.

⁴⁵⁶⁵ ECtHR, *Selmouni v. France*, Appl. No. 25803/94, Judgment, 28 July 1999.

⁴⁵⁶⁶ See Brouwer (2005) 395-405; Anne Marie de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families' (2007) 30 *Leiden Journal of International Law* 207, 214-218.

respective modality of reparations and, thus, considered here. The STL legal framework does not consider restitution at all.

With regard to restitution of property and proceeds, articles 24 and 23 of the ICTY and the ICTR Statutes respectively establish that ‘In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners’. The wording of article 19 of the SCSL Statute is quite similar, existing only two differences. It is established ‘property proceeds and assets acquired unlawfully or by criminal conduct’ instead of ‘property and proceeds acquired by criminal conduct’, which arguably expands the sources from where to obtain restitution. However, this apparent broader scope is potentially reduced as the SCSL Trial Chamber, under the same article, may order restitution to ‘their rightful owner or to the State of Sierra Leone’. As previously examined,⁴⁵⁶⁷ these proceedings relating to these articles are detailed in the respective RPE and, as also seen, victims lack standing to claim restitution. At the ICTR, *amicus curiae*, addressing restitution of property and/or compensation,⁴⁵⁶⁸ were rejected as previously seen.⁴⁵⁶⁹ At the ICTY, the matter of restitution was introduced or evidence on property illegally taken from victims of a crime within the ICTY’s jurisdiction for which the accused was convicted was presented,⁴⁵⁷⁰ however, the Tribunal did not issue any restitution order. Thus, as far as it is known, no restitution has been ordered by any of the courts in question. Restitution orders could have been used in favor of, *inter alia*, victims of sexual violence, who are particularly vulnerable to face problems in regaining access to their land, homes and other property taken during armed conflicts.⁴⁵⁷¹

With regard to compensation, although the RPE of the ICTY, the ICTR and the SCSL and the STL Statute foresee compensation for victims, these same instruments have delegated the provision of compensation to domestic courts. The decision not to give the ICTY the mandate to provide reparations award was criticized by some ICTY Judges in the beginning of the tribunal’s operations, especially, because it was considered to be highly inappropriate to prioritize the restitution of property over compensation, alongside with the fact that

⁴⁵⁶⁷ See supra Chapter IV 3.2.1.

⁴⁵⁶⁸ See, e.g., Musema (ICTR-96-13-T), 17 March 1999 (restitution), paras. 10-14. For further references see Brouwer (2005) 397.

⁴⁵⁶⁹ See supra Chapter IV 4.2.2 and Chapter V 3.2.1.

⁴⁵⁷⁰ See, e.g., Aleksovski (IT-95-14), Judgment, Trial Chamber, 25 June 1999, para. 186. For further references see Malmström (2001) 377; Brouwer (2005) 396-397.

⁴⁵⁷¹ Brouwer (2005) 397.

compensation at national courts would be unlikely,⁴⁵⁷² or that compensation would depend on the national jurisdiction. However, as discussed,⁴⁵⁷³ initiatives to set up a compensation mechanism at the ICTY and the ICTR failed and, what is more, there has been no delegation to and, therefore, no provision of compensation by domestic courts based on judgments of those tribunals. Besides that, many convicted lack financial means to compensate victims or may have disposed of their money and assets. Such disposal could have been avoided but the proposal by the former Prosecutor of the ICTY/ICTR Carla Del Ponte to free assets that may have been used for, *inter alia*, providing compensation for the victims was not adopted,⁴⁵⁷⁴ arguably due to the ICTY/ICTR's limited mandate and (potential) national implementation problems. Survivor victims could have used funds thus obtained to, for example, afford their medical treatment when infected with HIV/AIDS as consequence of sexual crimes, which has been particularly serious in Rwanda.⁴⁵⁷⁵

With regard to rehabilitation, as previously mentioned,⁴⁵⁷⁶ the ICTR's program called 'Support Programme for Witnesses and Potential Witnesses' (2000), which was shortly after partially cancelled (2002), brought support to witnesses in form of rehabilitation including legal guidance, psychological counseling, physical rehabilitation and reintegration assistance.⁴⁵⁷⁷ The Support Program was based on the ICTR RPE rule 34.⁴⁵⁷⁸ Moreover, the Manual of Operational Guidance of the Victims and Witnesses Support Unit (VWSU) clarified rule 34 by laying down that counseling and supporting of victims and witnesses, especially 'in cases of rape and sexual assault is a major task, and the VWSU must rely on specialized services throughout the judicial proceedings as well as in the post-trial phase'.⁴⁵⁷⁹ Also, it was stated that the VWSU must organize the necessary support services including legal counseling to explain to

⁴⁵⁷² Ibid., 399. See also Malmström (2001) 382.

⁴⁵⁷³ See supra Chapter IV 2.2.2.

⁴⁵⁷⁴ As for Del Ponte's proposal, see Security Council Minutes (4150th Meeting) in UN Doc. S/PV.4150, 2 June 2000, p. 5. See also Malmström (2001) 378; Brouwer (2005) 400.

⁴⁵⁷⁵ Brouwer (2005) 400.

⁴⁵⁷⁶ See supra Chapter V 2.2.1.

⁴⁵⁷⁷ See ICTR Press Release, ICTR Launches Victims Support Initiative in Rwanda, ICTR/INFO-9-2-242.EN, 26 September 2000.

⁴⁵⁷⁸ ICTR RPE, rule 34 ("There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to: [...] Ensure that they [the victims and witnesses] receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault [...] (B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted [...]").

⁴⁵⁷⁹ ICTR VWSU, Manual of Operational Guidance 41. Cited by Brouwer (2005) 402.

witnesses how to give their testimony at the ICTR and trauma counseling and assistance were said to be provided to the relatives and dependants during pre-trial, trial and post-trial.⁴⁵⁸⁰ Furthermore:

[...] medical and psychological services are provided to victims and witnesses who suffered extensive trauma as a result of the genocide, and became psychologically affected, or who contracted diseases which they were not able to overcome before testifying.⁴⁵⁸¹

This also corresponded to the VWSU's mandate which includes provision of, *inter alia*, medical and psychological assistance, in particular counselling in cases of rape and sexual assaults.⁴⁵⁸² The problem with the Program was that it only provided rehabilitation to victims who were permitted to testify as witnesses at the ICTR. Additionally, the Program was not capable of responding the pressing demands related to HIV/AIDS treatment due to the limited funds.⁴⁵⁸³ Thus, between 1995 and 2003, victim-witnesses only received at their stay at the ICTR some medical and/or dental care, and occasionally a new pair of glasses.⁴⁵⁸⁴

Nevertheless, the situation of some victims, especially those survivors of sexual violence in Rwanda, later improved as in 2004 a medical unit, under the supervision of the ICTR's Gender Adviser Effange Mbella, was established in Rwanda to monitor patients.⁴⁵⁸⁵ The ICTR Registrar moved from sub-contracting a clinic offering medical care to witnesses to the setting up of an ICTR Clinic responsible for giving direct medical care to witnesses and victims.⁴⁵⁸⁶ Accordingly, the ICTR assumed a duty based on ICTR RPE rule 34, to provide rape victims who testify at the ICTR, potential witnesses included, with general medical services, counseling, social support (including food assistance, transport assistance in medical consultations, payment of connected medical bills, and follow-up care) and anti-retroviral treatment, throughout the

⁴⁵⁸⁰ ICTR VWSU, Manual of Operational Guidance 41. Referred to in Brouwer (2005) 402.

⁴⁵⁸¹ ICTR VWSU, Manual of Operational Guidance 41. Cited by Brouwer (2005) 402.

⁴⁵⁸² See ICTR, Witness Support and Protection at the ICTR. Available at: <http://www.unict.org/AboutICTR/ICTRStructure/WitnessesVictimsSupportSectionWVSS/tabid/106/Default.aspx> (last visit on 30 November 2012).

⁴⁵⁸³ See Brouwer (2005) 402.

⁴⁵⁸⁴ See *Ibid.*, Loc. cit. See also Brouwer and Heikkilä (2013) 1357.

⁴⁵⁸⁵ Brouwer (2007) 216.

⁴⁵⁸⁶ See ICTR, Witness Support and Protection at the ICTR. Available at: <http://www.unict.org/AboutICTR/ICTRStructure/WitnessesVictimsSupportSectionWVSS/tabid/106/Default.aspx> (last visit on 30 November 2012).

trial process and also in the pre-trial and post-trial stages.⁴⁵⁸⁷ Thus, the clinic has taken care of confirmed witnesses and potential witnesses with HIV/AIDS and an important number of them have received anti-retroviral drugs as medically recommended.⁴⁵⁸⁸ Nonetheless, the clinic is dependent on the resources of the ICTR's Voluntary Trust Fund, which serve multiple activities of the ICTR and not only to support program for witnesses.⁴⁵⁸⁹ Moreover, the financial resource problems faced by the Fund and the increase in confirmed cases of HIV infected witnesses as HIV testing has been going on,⁴⁵⁹⁰ have constituted continuous challenges for the Support Program for Witnesses and Potential Witnesses.

The situation concerning the ICTY Voluntary Trust Fund is not too different from the ICTR as only a part of the voluntary contributions are employed for victim support.⁴⁵⁹¹ Moreover, unlike the ICTR, the ICTY has not adopted any direct responsibility for giving any witness support before or after their testimony as the support has been limited only to some basic support during the witnesses' testimonies at the tribunal.⁴⁵⁹² The scheme in place at the STL seems to be similar to that existent at the ICTY, as the STL Victims and Witnesses Unit (VWU) has, *inter alia*, the function to 'assist victims and witnesses in obtaining medical, psychological and other appropriate support necessary for them to testify before the Tribunal'.⁴⁵⁹³ In turn, the SCSL, at least when it comes to the text of its RPE is closer to the ICTR.⁴⁵⁹⁴

Accordingly, compared to the ICTR support for sexual violence victims, including anti-retroviral drugs, the support offered to the victims appearing at

⁴⁵⁸⁷ See ICTR Draft Report on Improved Access to Anti-Retroviral Treatment and Psychological Counseling for ICTR Witnesses with HIV/AIDS, prepared by Elsie Effange-Mbella (2006) 2-3. Referred to by Brouwer (2007) 216.

⁴⁵⁸⁸ Brouwer (2007) 216; Brouwer and Heikkilä (2013) 1357.

⁴⁵⁸⁹ Brouwer (2007) 216-217. See also Brouwer and Heikkilä (2013) 1357.

⁴⁵⁹⁰ Brouwer (2007) 217.

⁴⁵⁹¹ See, e.g., ICTY, Fourteenth Annual Report of the ICTR, UN Doc. A/62/172-S/2007/469, 1 August 2007, para. 116 ('Voluntary contributions have been utilized for efforts in support of the Tribunal's prosecution and Registry activities, such as the arrest initiative, victims and witnesses support, the Outreach Programme, the continued development of the Tribunal's library, and advocacy training activities').

⁴⁵⁹² Brouwer (2007) 217.

⁴⁵⁹³ STL RPE, rule 50 (B) (iii).

⁴⁵⁹⁴ SCSL RPE, rule 34 ('[...] [The VWS shall] (A) [...] (iii) Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children. (B) The Section personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children. Where appropriate the Section shall cooperate with non-governmental and intergovernmental organizations').

the ICTY has been minimal. Nonetheless, the support provided by the ICTR is (almost) exclusively confined to sexual violence victims and, in addition, the universe of reparations beneficiaries is further reduced as only those who are testifying or can potentially testify at the ICTR receive some support.

As a symbolic reparations measure, under the early and cancelled ICTR Assistance Program, the NGO Asoferwa, with money provided by the tribunal, built a peace village in Taba, which may be considered as satisfaction under the UN Basic Principles and Guidelines.⁴⁵⁹⁵ The building of this village was clearly perceived as connected with the ICTR's activities and, more specifically, with the idea that the ICTR wanted to offer some tangible assistance to women who had testified.⁴⁵⁹⁶

Therefore, in general, reparations modalities at those tribunals are from extremely limited to non-existent, with the exception of some forms of rehabilitative measures at the ICTR, as previously discussed. However, even in this case, some rehabilitation is provided based on the victims' status as witnesses rather than as reparations claimants.

Lastly, but equally important, it should be mentioned that the standard of proof concerning the order of restitution of property or proceeds is 'balance of probabilities' as determined in the respective RPE of the ICTY and the ICTR 'Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate'.⁴⁵⁹⁷

4.2.2. Reparations Modalities Outside the Courts

Modalities of reparations have been provided for victims of crimes that materially fall under the jurisdiction of the ICTY, the ICTR, and the SCSL. Concerning the Human Rights Chamber, Annex 6 to the Dayton Accords provides that if the Chamber finds a human rights violation, it must address in its decision 'what steps shall be taken by the respondent Party to remedy the breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures'.⁴⁵⁹⁸ The Chamber ordered remedies including: i) compensation and the return of property; ii) orders for the investigation of allegations of ill-treatment and other

⁴⁵⁹⁵ UN Basic Principles and Guidelines, principle 22 (g) ('Commemorations and tributes to the victims').

⁴⁵⁹⁶ See Rombouts (2004) 466.

⁴⁵⁹⁷ ICTY RPE, rule 105 (D); ICTR RPE, rule 105 (D).

⁴⁵⁹⁸ Dayton Accords, Annex 6, article XI, para. 1 (b).

human rights violations with a view to bringing offenders to justice; iii) the prompt conclusion of proceedings which have lasted an unreasonable time; and iv) release from detention and reinstatement in employment.⁴⁵⁹⁹ In particular, concerning enforced disappearances, the Chamber ordered the *Republika Srpska* to conduct full investigation and, where applicable, to find the mortal remains of the victims.⁴⁶⁰⁰ Concerning the Srebrenica massacre, the Chamber ordered the *Republika Srpska*, *inter alia*, the release of all information under its control; the location of missing persons or their mortal remains; full investigation; lump sum, followed by four additional annual payments, as contribution to the Foundation of the Srebrenica-Potocari Memorial and Cemetery for the collective benefit of all the applicants and the families of the victims of the Srebrenica massacre.⁴⁶⁰¹ The Chamber also ordered the *Republika Srpska* the reconstruction of Banja Luka Mosques.⁴⁶⁰² As for Muslim burial sites, it was ordered the removal of the remains of the applicants' beloved ones and payment of a sum for moral damages and legal fees.⁴⁶⁰³ The Chamber refrained itself from ordering an apology on the basis that apologies are only meaningful if made voluntarily.⁴⁶⁰⁴

As for repossession of pre-war housing, the Chamber admitted cases not falling under the Commission for Real Property Claims of Refugees and Displaced Persons.⁴⁶⁰⁵ Precisely, this Commission, under the respective agreement annexed to the Dayton Accords confirmed pre-war rights of claimants entitling them to resume possession of the property or to transfer the interest to a third party.⁴⁶⁰⁶ Besides determining the lawful owner of the property and granting return thereof, if the claimant requested compensation in lieu of return, the Commission was expected to grant it;⁴⁶⁰⁷ however, the Commission in

⁴⁵⁹⁹ See Ferstman and Rosenberg (2009) 489-490.

⁴⁶⁰⁰ See *Ibid.*, 491-493 (referring to, among others, *Palić v. the Republika Srpska* (CH/97/46), Decision on Admissibility and Merits, 11 January 2001).

⁴⁶⁰¹ See *Ibid.*, 493-495 (referring to *Ferida Selimović et al. v. the Republika Srpska* (CH/01/8365 et al.), Decision on Admissibility and Merits, 7 March 2003).

⁴⁶⁰² See *Ibid.*, 495-497 (referring to *Islamic Community in Bosnia and Herzegovina* (CH/96/29), Decision on Admissibility and Merits, 11 June 1999).

⁴⁶⁰³ See *Ibid.*, 497 (referring to *Mahmutović v. RS* (CH/98/892), Decision on Admissibility and Merits, 8 October 1999).

⁴⁶⁰⁴ See Manfred Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina' in Feyter et al. (2005) 245, 285 (referring to *Hermas v. Federation* (CH/97/45), Decision on Admissibility and Merits, 18 February 1998).

⁴⁶⁰⁵ See Ferstman and Rosenberg (2009) 498.

⁴⁶⁰⁶ See *Ibid.*, 505.

⁴⁶⁰⁷ See 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords (Annex 7), articles XI, XII (2), (3) and (6).

practice never proceeded with this.⁴⁶⁰⁸ In turn, the UNMIK Housing and Property Claims Commission had only the power to order repossession of property but not compensation for damage or destruction of property.⁴⁶⁰⁹

With regard to the hybrid criminal courts established in the former Yugoslavia region, which are not examined in this thesis, both the instruments of the UNMIK/EULEX War Crimes Panels in Kosovo and the War Crimes Chamber in the State Court of Bosnia and Herzegovina refer to property claims as the reparations modality to be claimed during criminal proceedings.⁴⁶¹⁰

As for Rwanda, the government did not set up the compensation fund promised in 1996.⁴⁶¹¹ Although national criminal courts have awarded millions of dollars in compensation to victims, those judgments have not been enforced due to the indigence of the defendants.⁴⁶¹² Moreover, the government granted itself immunity from civil liability, sustaining that its responsibilities are met via payments to a survivor's rehabilitation fund and acknowledgment of the previous government's role in the genocide.⁴⁶¹³ Although the government has drafted several compensation bills since 1997, none of them had been enacted.⁴⁶¹⁴ Concerning rehabilitation, the government has paid 5 percent of tax revenues into a rehabilitation fund, the FARG, each year.⁴⁶¹⁵ The FARG has provided scholarships (mainly for high school education) and free medical care to the neediest survivors.⁴⁶¹⁶ As for symbolic reparations modalities, the Government of Rwanda has built or maintained 78 genocide memorials and around 400 mass tombs.⁴⁶¹⁷ Assisted by international donors and NGOs, Rwanda has established four high-profile genocide memorials, which have become pilgrimage destinations.⁴⁶¹⁸ Concerning the Gacaca courts, the issue of compensation was

⁴⁶⁰⁸ See Ferstman and Rosenberg (2009) 506.

⁴⁶⁰⁹ UNMIK Regulation No. 2000/60, section 2.6.

⁴⁶¹⁰ See respectively Provisional Criminal Procedure Code for Kosovo, articles 80, 107-118; Criminal Procedure Code of Bosnia and Herzegovina, articles 193-204.

⁴⁶¹¹ See Lars Waldorf, 'Goats and Graves: Reparations in Rwanda's Community Courts' in Ferstman, Goetz and Stephens (2009) 515, 519.

⁴⁶¹² See *Ibid.*, *Loc. cit.*

⁴⁶¹³ See Organic Law No. 40/2000. See also *Ibid.*, *Loc. cit.*

⁴⁶¹⁴ See Waldorf (2009) 520.

⁴⁶¹⁵ Law No. 02/98 Establishing a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda between 1 October 1990 and 31 December 1994, 22 January 1998, article 12 (1).

⁴⁶¹⁶ See Waldorf (2009) 522.

⁴⁶¹⁷ *Ibid.*, 523.

⁴⁶¹⁸ *Ibid.*, *Loc. cit.*

deferred and, finally, it was promised restitution instead of compensation.⁴⁶¹⁹ Since 2009 only FARG can bring civil action against those convicted as the most responsible for genocide.⁴⁶²⁰ Finally, in civil universal jurisdiction cases in Belgium and the Netherlands, victims have been granted compensation but these orders have yet to be implemented.⁴⁶²¹

As for Sierra Leone, as previously referred to,⁴⁶²² a reparations program was set in 2009. Reparations have mainly included three measures. First, interim payments (relief money), via grants to amputees, war wounded victims with 50% or more incapacity, and sexual violence victims.⁴⁶²³ Second, an emergency medical care program for a reduced number of victims who needed medical operations was established, and medical examinations and surgery for sexual violence victims have been provided.⁴⁶²⁴ Third, reimbursement of education expenses, i.e., school fees, books and uniforms for those children identified as victims, including children who are amputees and sexual violence victims.⁴⁶²⁵ Funds for the above-referred grants were provided by the United Nations Peace Building Fund.⁴⁶²⁶ Although there is a trust fund for victims, financial limitations to provide reparations to all the registered victims have been reported.⁴⁶²⁷

4.3. The ICC

4.3.1. Individual/Collective Reparations and Reparations Standard/Burden of Proof

4.3.1.1. Individual/Collective Reparations and their Implementation

Rule 97 ('Assessment of reparations') (1) and (3) of the RPE establishes that:

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
[...]
3. In all cases, the Court shall respect the rights of victims and the convicted person.

⁴⁶¹⁹ See *Ibid.*, 525-526.

⁴⁶²⁰ See REDRESS and African Rights (2011) 5.

⁴⁶²¹ See *Ibid.*, 8.

⁴⁶²² See *supra* Chapter IV 3.2.2.

⁴⁶²³ See Mohamad Suma and Christian Correa, Report and Proposals for the Implementation of Reparations in Sierra Leone (ICTJ December 2009) 7-10; Sesay (2011).

⁴⁶²⁴ Suma and Correa (2009) 10-11; Sesay (2011).

⁴⁶²⁵ Suma and Correa (2009) 11-13; Sesay (2011).

⁴⁶²⁶ See ICTJ/Centre for Accountability and Rule of Law (2009) 1.

⁴⁶²⁷ *Ibid.*, Loc. cit.

In referring to individual and collective reparations at the ICC, Trial Chamber I in *Lubanga* has established that:

Pursuant to Rule 97 (1) of the Rules, the Court may award reparations on an individual or collective basis. Furthermore, in accordance with Rule 98 (3) of the Rules, the Court may order that a collective award for reparations is made through the Trust Fund for Victims.⁴⁶²⁸

In turn, rule 97 (3) was included to guarantee that the ICC would not award reparations against the wishes of the victims.⁴⁶²⁹

The legal representatives of the V01 group of victims in *Lubanga* have considered individual reparations as appropriate, and the legal representatives of the V02 group of victims have pointed out that the power to provide individual reparations (unlike collective ones) is explicit under the ICC provisions.⁴⁶³⁰ In any case, both groups have also argued in favor of collective reparations although pointing out some problems of implementation.⁴⁶³¹ In turn, the OPCV has suggested a combination of individual and collective reparations and the TFV has argued against a broadly individualistic approach to reparations.⁴⁶³² Trial Chamber I in its reparations decision generally considered that under international human rights law victims and group of victims may apply for and be granted reparations.⁴⁶³³ In accordance with rules 97 (1) and 85 of the RPE and article 21 (3) of the ICC Statute, the Chamber concluded that reparations may be awarded to: i) individual victims; or ii) groups of victims, provided that in either case victims have suffered personal harm.⁴⁶³⁴ In any case, it was sustained that the ICC should guarantee that reparations are provided on a non-discriminatory and gender-inclusive basis.⁴⁶³⁵ Bearing in mind the uncertainty of the number of victims of the crimes and the limited number of individuals who claimed

⁴⁶²⁸ Lubanga (ICC-01/04-01/06-2858), 5 April 2012, para. 10.

⁴⁶²⁹ Lewis and Friman (2001) 484.

⁴⁶³⁰ See respectively Lubanga (ICC-01/04-01/06-2864), 18 April 2012, para. 15; Lubanga (ICC-01/04-01/06-2869), 18 April 2012, paras. 12-13.

⁴⁶³¹ See respectively Lubanga (ICC-01/04-01/06-2864), 18 April 2012, para. 16-17; Lubanga (ICC-01/04-01/06-2869), 18 April 2012, paras. 16, 18, 19 and 34 (a).

⁴⁶³² See respectively Lubanga (ICC-01/04-01/06-2863), 18 April 2012, paras. 14 and 17; Lubanga (ICC-01/04-01/06-2872), 25 April 2012, paras. 151 and 152.

⁴⁶³³ See Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 217 (referring to the UN Basic Principles and Guidelines, principles 8 and 13; ECHR, articles 25 (1) and 50; ACHR, articles 44 and 63).

⁴⁶³⁴ *Ibid.*, Loc. cit.

⁴⁶³⁵ *Ibid.*, para. 218.

reparations in *Lubanga*, the Chamber arrived to the sound conclusion whereby the ICC ‘should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified’.⁴⁶³⁶

Having said so, the Trial Chamber correctly acknowledged that ‘Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently’,⁴⁶³⁷ which is consistent with the IACtHR’s jurisprudence.⁴⁶³⁸ In any case, the Trial Chamber also added that the ICC should ensure that individual reparations should be provided in a manner that ‘avoids creating tensions and divisions within the relevant communities’.⁴⁶³⁹ In turn, when collective reparations awards are granted, ‘these should address the harm the victims suffered on an individual and collective basis’.⁴⁶⁴⁰ Furthermore, the Chamber considered that the ICC ought to provide medical services (psychiatric and psychological care included), in addition to assistance on rehabilitation, housing, education and training.⁴⁶⁴¹

Some considerations about individual and collective reparations follow. Concerning individual reparations, although article 75 (2) of the ICC Statute permits all ‘appropriate’ types and modalities of reparations, the ICC RPE seem to suggest that reparations should be granted, as a rule on an individualized basis.⁴⁶⁴² Rule 97 (1) establishes that ‘the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both’ and rule 98 stipulates that:

1. *Individual awards for reparations shall be made directly against a convicted person.*
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund *where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim.* The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. The Court *may order* that an award for reparations against a convicted person be made through the Trust Fund *where* the number of the victims and the

⁴⁶³⁶ Ibid., para. 219.

⁴⁶³⁷ Ibid., para. 220.

⁴⁶³⁸ IACtHR, Case of the Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C No. 124, paras. 194 and 201.

⁴⁶³⁹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 220.

⁴⁶⁴⁰ Ibid., para. 221.

⁴⁶⁴¹ Ibid., Loc. cit.

⁴⁶⁴² Dwertmann (2010) 120.

scope, forms and modalities of reparations makes a collective award more appropriate [emphasis added].

Although individual awards in principle seem to be of a monetary nature, individual victims can also claim restitution, rehabilitation and ‘other forms of remedy’. Indeed, victims in *Lubanga* have considered as part of individual awards not only compensation but also restitution.⁴⁶⁴³ Nevertheless, considering the collective character of the crimes under the ICC’s jurisdiction, ordering symbolic acts, e.g., an apology, in favor of only an individual does not seem very consistent.⁴⁶⁴⁴ Be that as it may, due to the fact that individual reparations awards often seek to address a specific harm, the harm must in principle be evaluated and the causal link to the crimes of the convicted shall be determined in each individual case.⁴⁶⁴⁵ The ICC may delegate this task to experts, the TFV or an approved organization.⁴⁶⁴⁶ If the ICC orders reparations directly to victims, these might be more individualized than when individual awards are made through the TFV.⁴⁶⁴⁷

According to rule 98 (2) of the RPE, the TFV can be involved in the distribution of individual awards when it is impossible or impracticable for the ICC to make reparations directly, which under the TFV Regulations may happen when: i) the ICC has identified each beneficiary but their names, location or other information are unknown;⁴⁶⁴⁸ ii) when the ICC has not identified each beneficiary or when the potentially high number of beneficiaries makes it burdensome to identify them individually;⁴⁶⁴⁹ and iii) when it is burdensome for the ICC to verify claims and disbursement of awards.⁴⁶⁵⁰ The award is then deposited with the TFV until it is possible to forward it to the victim or victims according to rule 98 (2). The TFV Regulations foresee the application of mass claims processing under standardized criteria,⁴⁶⁵¹ which may lead to individual but uniform awards.⁴⁶⁵² As already examined, Trial Chamber I in *Lubanga* via its

⁴⁶⁴³ *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012, paras. 16 and 20.

⁴⁶⁴⁴ See also Dwertmann (2010) 120.

⁴⁶⁴⁵ *Ibid.*, Loc. cit.

⁴⁶⁴⁶ See ICC RPE, rules 97 (2), 98 (2), (3), and (4).

⁴⁶⁴⁷ Dwertmann (2010) 120.

⁴⁶⁴⁸ TFV Regulations, regulation 59.

⁴⁶⁴⁹ *Ibid.*, regulation 60.

⁴⁶⁵⁰ *Ibid.*, regulations 62-65, 66.

⁴⁶⁵¹ *Ibid.*, regulation 60 et seq. See also ICC RPE, rule 98 (2).

⁴⁶⁵² Dwertmann (2010) 121.

reparations decisions instructed the Registry to transmit to the TFV the individual applications for reparations,⁴⁶⁵³ which is currently under appeals.

Concerning collective reparations, collective awards are given to a victimized group rather than to an individual victim.⁴⁶⁵⁴ Rule 98 (3) of the RPE suggests that collective awards are normally made through the TFV ‘The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate’. Moreover, according to regulation 69 of the TFV Regulations ‘[The TFV is] to set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation. Determinations made in this regard should be approved by the Court’. Collective awards can be either dedicated to only communal or collective purposes or they may also be distributed, upon an internal agreement, to the individual members who are a constitutive part of the group of victims following criteria defined internally and, possibly, in agreement with the ICC and/or the TFV.⁴⁶⁵⁵

Although the TFV can like in individual awards be limited to implement the collective award ordered by the ICC, the wording in rule 98 (3) would suggest that the TFV has more influence in determining the nature and beneficiaries of collective reparations.⁴⁶⁵⁶ Nevertheless, the ICC has the last word when determining the nature and beneficiaries of the collective awards.⁴⁶⁵⁷ Thus, according to regulation 69 of the TFV Regulations, the TFV’s draft reparations implementation plan ‘shall set out the precise nature of the collective award(s) where not already specified by the Court as well as the methods for its/their implementation’ but these determinations ‘should be approved by the Court’. Then, such plan can be endorsed via a reparations order by a Trial Chamber and, during the implementation of the reparations order by the TFV, the Chamber can monitor/supervise the TFV,⁴⁶⁵⁸ in application of the TFV Regulations.⁴⁶⁵⁹ This has been the path laid down in *Lubanga*, i.e., implementation of reparations

⁴⁶⁵³ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 289 b.

⁴⁶⁵⁴ Dwertmann (2010) 121.

⁴⁶⁵⁵ Ibid., Loc. cit.

⁴⁶⁵⁶ Ibid., 270.

⁴⁶⁵⁷ Ibid., Loc. cit.

⁴⁶⁵⁸ See Lubanga (ICC-01/04-01/06-2953), 14 December 2012, paras. 55-57.

⁴⁶⁵⁹ See TFV Regulations, regulations 50 (b), 54-55 and 58. See in particular regulation 50 (b) of the TFV Regulations (‘For the purposes of these regulations, the Trust Fund shall be considered to be seized when: [...] the Court makes an order for reparations against a convicted person and orders that the award be deposited with or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4 of the Rules of Procedure and Evidence’).

through the TFV, via voluntary contributions,⁴⁶⁶⁰ but monitored and controlled by a Chamber, i.e., by the ICC.⁴⁶⁶¹

Collective reparations distribution/implementation may be made to organizations. According to rule 98 (4) 'Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund'.⁴⁶⁶²

It is herein argued that collective reparations are in principle more appropriate than individual reparations at the ICC based on three main reasons. A first reason consists in the collective nature of the crimes under the ICC's jurisdiction, which is especially notorious in cases of genocide but also as for certain war crimes and crimes against humanity.⁴⁶⁶³ As noticed by the TFV in *Lubanga*, collective harm is the result of widespread violations of human rights.⁴⁶⁶⁴ Crimes under the ICC's jurisdiction and which originate cases litigated before it are mainly directed against a specific group and, hence, the victimization of the individual victim comes from the victimization of the whole group in question.⁴⁶⁶⁵ Granting collective reparations in mass-scale atrocities contexts seems to be logical inasmuch as those reparations focus 'on delivering a benefit to people who suffered from human rights violations as a group',⁴⁶⁶⁶ referred to as 'collective victims' by Bassiouni.⁴⁶⁶⁷ Collective awards can thus address identity-based dimensions of individual violations such as systematic sexual violence, attacks against an ethnic group and attacks against entire villages or towns. In scenarios of mass perpetration of international crimes, the interests of justice require more than redress for the particular harm suffered by particular individuals. As Greiff suggests, 'whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an aim that has a public, collective dimension'.⁴⁶⁶⁸ Since in the crimes under the

⁴⁶⁶⁰ According to the TFV Regulations, regulations 47, 48 and 50.

⁴⁶⁶¹ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, paras. 281, 286-287 and 289. See also *supra* Chapter V 3.3.2.1.

⁴⁶⁶² See also TFV Regulations, regulation 73.

⁴⁶⁶³ Dwertmann (2010) 122.

⁴⁶⁶⁴ *Lubanga* (ICC-01/04-01/06-2872), 25 April 2012, para. 155.

⁴⁶⁶⁵ See Cherif Bassiouni, 'The Protection of 'Collective Victims' in International Law' in Cherif Bassiouni (ed.), *International Protection of Victims* (Eres 1998) 181, 184. Cited by Dwertmann (2010) 122.

⁴⁶⁶⁶ Magarrell (2007) 5.

⁴⁶⁶⁷ Bassiouni (2006) 257.

⁴⁶⁶⁸ Pablo de Greiff, 'Introduction: Repairing the Past Compensation for Victims of Human Rights Violations' in Greiff (2006a) 1, 14.

ICC's jurisdiction violence is predominantly collective, it is argued here that the TFV measures and reparations plans have to place special emphasis on collective reparations.⁴⁶⁶⁹

A second reason consists in the difficulties to implement individual reparations. Thus, whereas the convicted's financial situation may not permit to, for example, compensate a substantial number of victims, collective awards may be pertinent and indeed, under certain circumstances, the only feasible alternative as individual reparations awards cannot be implemented or would exclude an important number of victims equally harmed from reparations.⁴⁶⁷⁰ Moreover, considering the ICC's limited financial and human resources, dealing with large numbers of individual reparations claims may seriously jeopardize its efficiency and/or be inappropriate.

The third reason invoked here is that when it comes to collective reparations, besides symbolic measures, certain community development grants and institutional reform may be preferable where a group has suffered harm⁴⁶⁷¹ and, thus, the amount of payment is nominal as empirical evidence shows that victims normally value long-term impact programs as 'forward-looking measures that improve the chances of future generations'.⁴⁶⁷²

With regard to the contents of collective awards, these can be made up of restitution, rehabilitation or other remedy awarded to a group of victims,⁴⁶⁷³ as identified *inter alia* by the OPCV in *Lubanga*.⁴⁶⁷⁴ A first possibility is granting a certain monetary sum, a lump sum, to a foundation or an organization representing the interests of the collective of victims,⁴⁶⁷⁵ i.e., via an intermediary organization.⁴⁶⁷⁶ Although the final reparations beneficiary is the individual victim, reparations are collective in nature as the entity representing the victims' interests holds the right to decide how to distribute the awards.⁴⁶⁷⁷ Moreover, collective reparations are connected to individual harm when individuals' rights/positions are transferred to an entity representing the group of victims.⁴⁶⁷⁸ Thus, at the ICC, the legal representative of victims may claim that a collective

⁴⁶⁶⁹ Ibid., Loc. cit.

⁴⁶⁷⁰ See Roth-Arriaza (2004) 185; Dwertmann (2010) 121.

⁴⁶⁷¹ See Magarrell (2007) 5-6.

⁴⁶⁷² Roth-Arriaza (2004) 162.

⁴⁶⁷³ Dwertmann (2010) 124.

⁴⁶⁷⁴ Lubanga (ICC-01/04-01/06-2863), 18 April 2012, paras. 83 et seq.

⁴⁶⁷⁵ Dwertmann (2010) 124.

⁴⁶⁷⁶ McCarthy (2012a) 276.

⁴⁶⁷⁷ Dwertmann (2010) 124.

⁴⁶⁷⁸ Ibid., Loc. cit.

reparations award is made through the TFV to an intermediary or organization that represents the collective of victims, which in turn can select how to distribute individual awards for members of the group but this could still be considered as collective compensation,⁴⁶⁷⁹ based on the previous reasoning. This first possibility for collective reparations can be implemented based on rule 98 (4) of the ICC RPE and some TFV regulations.⁴⁶⁸⁰

A second possibility for collective reparations is that they can also be conducted via a financial award given to community institutions or projects designed for the benefit of the 'group of victims as a whole'.⁴⁶⁸¹ The decision about which institutions or projects should be benefited may be taken by the TFV or by an intergovernmental, international or national organization approved by the TFV, according to rule 98 (4). Although not foreseen explicitly in the ICC's instruments, such approval may arguably be also given by the competent Chamber.⁴⁶⁸² Since the final 'beneficiary' is a collective or communal body with, for example, medical, rehabilitative, social, research, purposes and activities, which will in turn benefit to the reparations claimants overall/collectively, it is considered that the collective element is more dominant.⁴⁶⁸³ This second possibility for collective reparations has been applied in the IACtHR's case law as suggested by the OPCV in *Lubanga*.⁴⁶⁸⁴ Thus, the IACtHR in cases of serious human rights violations has ordered the respective defendant State, for example, to set up a trust fund for community development,⁴⁶⁸⁵ to implement a housing program,⁴⁶⁸⁶ or to re-open a medical dispensary in the village.⁴⁶⁸⁷

A third possibility for collective reparations may consist in symbolic awards, which seek to restore the 'moral well-being of a community and its members, such as their dignity, culture or tradition'.⁴⁶⁸⁸ Symbolic collective reparations such as public apology can redress simultaneously the harm endured by both the collective of victims and also each of the individual victims. In any

⁴⁶⁷⁹ *Ibid.*, Loc. cit.

⁴⁶⁸⁰ TFV Regulations, regulations 71 and 73. See also McCarthy (2012a) 276-285.

⁴⁶⁸¹ Dwertmann (2010) 125.

⁴⁶⁸² *Ibid.*, 126.

⁴⁶⁸³ *Ibid.*, Loc. cit.

⁴⁶⁸⁴ *Lubanga* (ICC-01/04-01/06-2863), 18 April 2012, paras. 89-91.

⁴⁶⁸⁵ IACtHR, *Case of the Moiwana Community v. Suriname*, Judgment of 15 June 2005, operative paragraph 5.

⁴⁶⁸⁶ IACtHR, *Case of the Ituango Massacres v. Colombia*, Judgment of 1 July 2006, operative paragraph 19.

⁴⁶⁸⁷ IACtHR, *Case of Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993, para. 96.

⁴⁶⁸⁸ Dwertmann (2010) 126.

case, the efficacy of symbolic reparations depends on both the convicted's authentic willingness to redress the harm inflicted by him/her via the symbolic act and on the group of victims to accept it. Symbolic reparations measures, as correctly pointed out by the OPCV in *Lubanga*, are not by themselves sufficient in cases of serious human rights violations;⁴⁶⁸⁹ however, as identified in the IACtHR's case law, they aim to repair victim's reputation or dignity and have public repercussions.⁴⁶⁹⁰

Lastly, but equally important, it should be indicated that the *cy press* doctrine, previously referred to,⁴⁶⁹¹ may be used at the ICC when this orders collective awards or fixed lump sums as may be impossible to make reparations awards to all victims.⁴⁶⁹² Also, as previously said, the contents of collective awards previously summarized are *mutatis mutandi* similar to those ordered in cases of massacres and other serious human rights violations against groups or communities of victims under the IACtHR's jurisprudence.⁴⁶⁹³

Accordingly, it is herein agreed with Trial Chamber I's decision in *Lubanga* to endorse the TFV's suggestion whereby it should be followed a 'community-based approach to collective reparations'.⁴⁶⁹⁴ The TFV indicated that reparations to be funded by the TFV with its own resources will tend to be collective in nature, using a community-based approach or they will be made to an organization under regulation 56 of the TFV Regulations,⁴⁶⁹⁵ and, based on this, the Chamber approved the TFV's proposal that a community-based approach, using the TFV's voluntary contributions, as the Chamber considered that it 'would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures'.⁴⁶⁹⁶

⁴⁶⁸⁹ *Lubanga* (ICC-01/04-01/06-2863), 18 April 2012, para. 110.

⁴⁶⁹⁰ IACtHR, *Case of the Plan de Sanchez Massacre v. Guatemala, Reparations*, Judgment of 19 November 2004, Series C No. 116, para. 93.

⁴⁶⁹¹ See *supra* Chapter V 4.1.2.

⁴⁶⁹² McCarthy (2012a) 255; REDRESS (2011) 67.

⁴⁶⁹³ For analysis of some of the IACtHR's case law listed in the previous footnotes concerning the three discussed possibilities for collective reparations, see Elizabeth Salmón Gárate, *Jurisprudencia de la Corte Interamericana de Derechos Humanos*, Vol. III: Los Derechos de los Pueblos Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos: Estándares en Torno a su Promoción y Protección (IDEHPUCP- Cooperación Alemana al Desarrollo-GTZ 2010b) 82-85.

⁴⁶⁹⁴ *Lubanga* (ICC-01/04-01/06-2872) paras. 103, 153-180. See also *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 274.

⁴⁶⁹⁵ See *Lubanga* (ICC-01/04-01/06-2872), 25 April 2012, paras. 16, 153-180 and 244.

⁴⁶⁹⁶ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 274.

Having said so, it is necessary not to exclude the provision of individual reparations awards altogether based on three reasons. First, as illustrated in *Lubanga*, some victims may show a general preference for individual reparations awards over collective awards.⁴⁶⁹⁷ This is due to several reasons such as, for example, in *Lubanga* not perception of child soldiers as a cohesive group, being perceived in conflict with their own communities, and possible ethnic tensions with communities not favored with collective reparations.⁴⁶⁹⁸ In any case, victims in *Lubanga* supported collective reparations for child soldiers as a means of reintegrating them,⁴⁶⁹⁹ and also to avoid a negative perception about them from other members of their communities.⁴⁷⁰⁰ Second, collective reparations are not easy to implement and may be resisted by individual victims as they do not respond to the individual dimension of the violations.⁴⁷⁰¹ Moreover, in determining collective reparations, the definition of communities may prove to be difficult and there may be some (politically manipulated) confusion with development policies.⁴⁷⁰² Third, international human rights standards are expressed in individual terms and individual reparations acknowledge the value of each individual and their place as rights-holders.⁴⁷⁰³

Accordingly, the approach undertaken in *Lubanga* by Trial Chamber I of considering collective reparations as in principle the most suitable option but without excluding the possibility to grant individual reparations since they can be awarded concurrently is found here as the most balanced and appropriate for the benefit of victims as reparations claimants. Thus, the provision of collective reparations should not neglect the importance of individual reparations. Therefore, combining collective reparations with and where appropriate and necessary individual awards seems to be the best way to give a meaningful content to modestly funded programs in contexts of mass criminal violence,⁴⁷⁰⁴ which is the situation of the ICC case-based reparations regime. Indeed, sometimes the difference between ‘individual’ and ‘collective’ reparations may be very subtle and may mainly be related to the beneficiaries’ role in reparations

⁴⁶⁹⁷ In *Lubanga*, 19 reparations claimants expressed their desire to benefit from individual reparations, 5 only requested collective reparations, 59 expressed desires for both and two did not express their preference. See *Lubanga* (ICC-01/04-01/06-2847), 28 March 2012, para. 10.

⁴⁶⁹⁸ *Lubanga* (ICC-01/04-01/06-2864), 18 April 2012, para. 16.

⁴⁶⁹⁹ *Ibid.*, para. 17.

⁴⁷⁰⁰ *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012, paras. 16, 18-19, and 34 (a).

⁴⁷⁰¹ Magarrell (2007) 6.

⁴⁷⁰² *Ibid.*, Loc. cit.

⁴⁷⁰³ *Ibid.*, 5.

⁴⁷⁰⁴ Magarrell (2007) 7.

plans.⁴⁷⁰⁵ Thus, for example, a scholarship fund for child soldiers is collective in the sense that benefits a collective group of beneficiaries, but it might also be considered having an individual dimension and, as pointed out by the TFV, ‘in practice, to the recipient of the scholarship this distinction will most likely not matter’.⁴⁷⁰⁶ In terminology used by the OPCV, whereas collective reparations in a ‘narrow sense’ address pre-existing groups tied by cultural or ethnic links, collective reparations in a ‘large sense’ refer to situations at which while individuals who, for example, have so far claimed reparations and who can individually benefit from reparations, the processes are described as collective reparations.⁴⁷⁰⁷

It is also important to bear in mind that a program of reparations should not be turned into a development program due to the different goals and nature of one and the other, i.e., development programs seek to resolve structural problems of poverty and inequality.⁴⁷⁰⁸

Be that as it may, as determined in Trial Chamber I’s reparations decision: i) victims should receive appropriate, adequate and prompt reparations,⁴⁷⁰⁹ which is coherent with the UN Basic Principles and Guidelines,⁴⁷¹⁰ and also with the IACtHR’s case law;⁴⁷¹¹ ii) reparations ought to be awarded on a non-discriminatory basis and be formulated and applied in a gender-inclusive manner;⁴⁷¹² iii) the awards should be proportionate to the harm, injury, loss and damage as established by the ICC;⁴⁷¹³ iv) reparations should aim to reconciling victims of the case crimes with their families and all the communities affected by the charges;⁴⁷¹⁴ v) reparations, when possible, ought to reflect local culture and customary practices provided that they are not ‘discriminatory, exclusive or deny victims equal access to their rights’;⁴⁷¹⁵ and vi) reparations need to support self-sustaining programs so that victims, their

⁴⁷⁰⁵ Lubanga (ICC-01/04-01/06-2803), 1 September 2011, para. 25.

⁴⁷⁰⁶ *Ibid.*, Loc. cit.

⁴⁷⁰⁷ See Lubanga (ICC-01/04-01/06-2863), 18 April 2012, paras. 31-32, 83-107.

⁴⁷⁰⁸ Greiff (2006b) 470.

⁴⁷⁰⁹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 242.

⁴⁷¹⁰ UN Basic Principles and Guidelines, principle 15.

⁴⁷¹¹ See, e.g., IACtHR, Case of Godínez-Cruz v. Honduras, Interpretation of the Judgment of Reparations and Costs, Judgment of 17 August 1990, Series C No. 10, para. 27.

⁴⁷¹² Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 243.

⁴⁷¹³ *Ibid.*, Loc. cit.

⁴⁷¹⁴ *Ibid.*, para. 244.

⁴⁷¹⁵ *Ibid.*, para. 245.

families and communities can benefit from such measures over an extended time period.⁴⁷¹⁶

4.3.1.2. Reparations Standard and Burden of Proof

With regard to the standard and burden of proof, Trial Chamber I in its reparations decision stated that whereas at trial the Prosecution shall determine the relevant facts to the criminal standard, i.e., beyond a reasonable doubt, a 'less exacting standard should apply' to the reparations proceedings due to the fundamentally different nature thereof.⁴⁷¹⁷ Such finding is consistent with the drafting history of the ICC instruments that shows that drafters agreed on that the standard of proof required for obtaining reparations is lower than that required for a conviction.⁴⁷¹⁸ The Trial Chamber considered that when determining the appropriate standard of proof, there are several factors to be taken into account such as the difficulty faced by victims to obtain evidence in support of their claim because of the destruction or unavailability thereof.⁴⁷¹⁹ Such limitation is recognized by several authors,⁴⁷²⁰ and, as remarked by Trial Chamber I, rule 91 (4) indeed establishes that victims' requests for reparations shall contain, to the extent possible, any relevant supporting documentation, including names and addresses of witnesses.⁴⁷²¹ Thus, although reparations claimants in principle have to prove their claims, it may be argued that the ICC (or certain organs of the ICC) are also responsible to be involved in collecting information on substantive claims.⁴⁷²² Indeed, the reparations application only requires victims to identify the person responsible for the crime that caused their harm 'to the extent possible'.⁴⁷²³ Therefore, it is considered both the complicated situation faced by victims when claiming reparations and the fact that they are not necessarily familiar with legal categories such as command responsibility.⁴⁷²⁴

⁴⁷¹⁶ Ibid., para. 246.

⁴⁷¹⁷ Ibid., para. 251.

⁴⁷¹⁸ See Lewis and Friman (2001) 484.

⁴⁷¹⁹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 252.

⁴⁷²⁰ See, e.g., Jorda and de Hemptinne (2002) 1411; Jacomijn van Haersolte-van Hof, 'Innovations to Speed Mass Claims: New Standards of Proof' in International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press 2006) 13, 14-22; Heike Niebergall, 'Overcoming Evidentiary Weakness in Reparation Claims Programmes' in Ferstman, Goetz, and Stephens (2009) 145, 156-158.

⁴⁷²¹ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 252.

⁴⁷²² Dwertmann (2010) 231.

⁴⁷²³ ICC RPE, rule 94 (1) (c).

⁴⁷²⁴ See Dwertmann (2010) 232.

Additionally, establishing the process of documenting harm and causation may be as such traumatizing for victims considering the types of crimes under the ICC's jurisdiction, which may force 'victims to choose between revisiting the experience and foregoing reparations, thus producing a further form of victimization'.⁴⁷²⁵ Moreover, although not explicitly provided under rule 153 of the ICC RPE, the Appeals Chamber might call evidence to determine issues arising in the reparations appeals when appropriate under rule 149.⁴⁷²⁶

Trial Chamber I in its reparations decision found that when article 74 stage of the trial, i.e., determination of the accused's criminal responsibility, is finished, 'the standard of "a balance of probabilities" is sufficient to establish the facts that are relevant to an order for reparations when it is directed against the convicted person'.⁴⁷²⁷ The standard of 'balance of probabilities' is also portrayed as a 'preponderance of proof' or 'the greater weight of the evidence'.⁴⁷²⁸ The standard mentioned by Trial Chamber I is consistent with reparations programs dealing with mass claims and which have followed flexible evidentiary standards based on a 'plausibility test' so as to accommodate the victims' situation as these usually face difficulties to provide the documentation required for.⁴⁷²⁹ The ICC's flexible approach to the standard and burden of proof on reparations may be compared to that adopted by the IACtHR, especially concerning reparations, as the latter has sustained that its proceedings are not subject to the same formalities existent in domestic courts and particular attention is paid to the circumstances of the specific case, respect for legal certainty, and the equality of the parties.⁴⁷³⁰ It should be noticed that the 'balance of probabilities' standard to grant a reparations order is higher than the *prima facie* standard used when assessing the admissibility of victim participant applications as implied by Pre-Trial Chamber II in the Uganda Situation.⁴⁷³¹

⁴⁷²⁵ Lisa Magarell (2007) 8. See also American University Washington College of Law, War Crimes Research Office (2010) 42-43.

⁴⁷²⁶ 'Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber'. See also Brady (2001b) 588.

⁴⁷²⁷ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 253.

⁴⁷²⁸ Bryan Garner (ed.), Black's Law Dictionary (8th edn., Thomson West 2004) 1220.

⁴⁷²⁹ See Lewis and Friman (2001) 484.

⁴⁷³⁰ See IACtHR, Case of Velázquez Rodríguez v. Honduras, Reparations and Costs, Judgment of 21 July 1989, para. 127. See also Shelton (2005) 249-251.

⁴⁷³¹ Situation in Uganda (ICC-02/04-101), 10 August 2007, para. 114 ('Whilst the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law, the Single Judge shares Pre-Trial Chamber I's view that a determination of the specific nature of such a link goes beyond the purposes of a determination

4.3.2. Modalities of Reparations

4.3.2.1. Restitution, Compensation and Rehabilitation

Even though article 75 (2) of the ICC Statute lists reparations in the modalities or forms of restitution, compensation and rehabilitation, this enumeration is only illustrative as the wording is ‘including restitution, compensation and rehabilitation’. This interpretation has also been reached by Trial Chamber I in *Lubanga* by remarking that ‘this list is not exhaustive’.⁴⁷³² In referring to other modalities of reparations, the Chamber established, as examples, those with a symbolic, preventative or transformative value to be appropriate, besides taking a gender-sensitive approach when establishing the way in which reparations are to be applied.⁴⁷³³ It should be mentioned that the modalities of reparations, i.e., restitution, compensation, rehabilitation and other modalities, identified and discussed by Trial Chamber I in its reparations decision went along the lines of those which were suggested by the legal representatives of the two groups of victims,⁴⁷³⁴ by the OPCV,⁴⁷³⁵ as well as by the TFV,⁴⁷³⁶ in their observations on reparations principles. Whereas restitution, compensation and rehabilitation are assessed in this sub-section, the other modalities of reparations are analyzed in the next subsection. In both cases, the analysis mainly considers the findings in the reparations decision.

With regard to restitution, Trial Chamber I, relying on the IACtHR’s jurisprudence,⁴⁷³⁷ found that restitution should as far as possible restore the victims to their circumstances before the commission of crime although this is often unachievable in, for example, cases of enlisting, conscription and using of child soldiers,⁴⁷³⁸ due to the fact that the previous situation of victims of international crimes cannot be fully restored. Be that as it may, as identified by

made under rule 89 of the Rules, whether in the context of a situation or of a case. In particular, whereas such an analysis may be required for the purposes of a reparation order, it does not seem required when the determination to permit an applicant to present “views and concerns” within the meaning of article 68, paragraph 3 of the Statute is at stake’). See also Ferstman and Goetz (2009) 332-333.

⁴⁷³² *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 222.

⁴⁷³³ *Ibid.*, Loc. cit.

⁴⁷³⁴ *Lubanga* (ICC-01/04-01/06-2864), 18 April 2012, paras. 15-23; *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012, paras. 13-20.

⁴⁷³⁵ *Lubanga* (ICC-01/04-01/06-2863), 18 April 2012 paras 45-121.

⁴⁷³⁶ *Lubanga* (ICC-01/04-01/06-2872), 25 April 2012, paras. 55-58.

⁴⁷³⁷ IACtHR, Case of González et al. (‘Cotton Field’) v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 205, para. 450.

⁴⁷³⁸ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 223.

the Trial Chamber, relying on the UN Basic Principles and Guidelines,⁴⁷³⁹ restitution is directed at the restoration of the life of an individual, which includes: i) the return to his/her family, home and previous employment; ii) provision of continuing education; and iii) returning lost or stolen property.⁴⁷⁴⁰ It was also found that restitution may be apposite for legal bodies, e.g., schools or other institutions.⁴⁷⁴¹ When it comes to implementation, since the ICC lacks the mandate to order States to provide reparations and, additionally, restitution of property, assets and other tangible goods may involve the respective State's sovereignty, such restitution may in principle be implemented only with the cooperation of States.⁴⁷⁴² About this, article 86 of the ICC Statute foresees the States Parties' general obligation to cooperate with the ICC in the investigation and prosecution of crimes within the ICC's jurisdiction.

With regard to compensation, Trial Chamber I, based on the UN Basic Principles and Guidelines,⁴⁷⁴³ determined that this modality ought to be considered when: i) the economic harm is sufficiently quantifiable; ii) an award of this sort would be appropriate and proportionate, taking into account the seriousness of the crime and also the case circumstances; and iii) the available funds guarantee the feasibility of this result.⁴⁷⁴⁴ When approaching compensation, the Chamber additionally found it necessary the adoption of a gender-inclusive approach as well as to avoid reinforcing structural inequalities and perpetuating previous discriminatory approaches.⁴⁷⁴⁵ As previously examined,⁴⁷⁴⁶ the Chamber determined that even though 'harm' is not defined in the ICC Statute and RPE, that concept denotes 'hurt, injury and damage'.⁴⁷⁴⁷ Although it is not necessary that harm has been direct, it must have been

⁴⁷³⁹ UN Basic Principles and Guidelines, principle 19 ('*Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property').

⁴⁷⁴⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 224.

⁴⁷⁴¹ *Ibid.*, para. 225.

⁴⁷⁴² Dwertmann (2010) 132-133.

⁴⁷⁴³ UN Basic Principles and Guidelines, principle 20 ('*Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law [...]').

⁴⁷⁴⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 226.

⁴⁷⁴⁵ *Ibid.*, para. 227.

⁴⁷⁴⁶ See *supra* Chapter IV 2.3.2.2.

⁴⁷⁴⁷ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 228.

personal to the victim.⁴⁷⁴⁸ Considering the UN Basic Principles and Guidelines and the IACtHR's jurisprudence,⁴⁷⁴⁹ Trial Chamber I found that compensation is of a broad application and, thus, comprehends all forms of damage, loss and injury, including material, physical and psychological harm.⁴⁷⁵⁰ Even though the Chamber found that some forms of damages cannot essentially be quantified in financial terms, it concluded, based on the UN Basic Principles and Guidelines and the UN Victims' Declaration,⁴⁷⁵¹ that compensation constitutes a modality of economic relief aimed at addressing in a proportionate and appropriate way the harm inflicted.⁴⁷⁵²

By referring to jurisprudence of the IACtHR and the ECtHR, and also in correspondence with the UN Basic Principles and Guidelines,⁴⁷⁵³ the Trial Chamber then proceeded to provide five examples of assessable damages. First, physical harm, e.g., causing a victim to lose the capacity to bear children.⁴⁷⁵⁴ Second, moral and non-material damage, which results in physical, mental and emotional suffering.⁴⁷⁵⁵ Third, material damage, which includes: i) lost earnings and the opportunity to work; ii) loss of, or damage to, property; iii) unpaid wages or salaries; iv) other forms of interference with a person's capability to work; and

⁴⁷⁴⁸ Ibid., Loc. cit.

⁴⁷⁴⁹ See respectively UN Basic Principles and Guidelines, principle 8; IACtHR, Case of 'Las Dos Erres' Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of 24 November 2009, Series C No. 210, para. 226.

⁴⁷⁵⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 229.

⁴⁷⁵¹ See respectively UN Basic Principles and Guidelines, principle 20; UN Victims' Declaration, principle 1.

⁴⁷⁵² Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 230.

⁴⁷⁵³ UN Basic Principles and Guidelines, principle 20 ('[...] (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services').

⁴⁷⁵⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 230 (a) (referring to IACtHR, Case of Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988, paras. 156, 175 and 187; and ECtHR, X and Y v. The Netherlands, Appl. No. 8978/80, Judgment, 26 March 1985, para. 22).

⁴⁷⁵⁵ Ibid., para. 230 (b) (referring to IACtHR, Case of Garrido and Baigorria v. Argentina, Judgment of 27 August 1998, para. 49; IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of 19 November 2004, paras. 80-89 and 117; and IACtHR, Case of the 'Juvenile Reeducation Institute' v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 September 2004, para. 295; and also referring to ECtHR, Selmouni v. France, Appl. No. 25803/94, Judgment of 28 July 1999, paras. 92, 98 and 105; and ECtHR, Aksoy v. Turkey, Appl. No. 21987/93, Judgment of 18 December 1996, para. 113).

v) the loss of savings.⁴⁷⁵⁶ Fourth, lost opportunities, which include: i) those related to employment, education and social benefits; ii) loss of status; and iii) interference with a person's legal rights.⁴⁷⁵⁷ Concerning the concept of 'damage to a life plan', developed by the IACtHR's jurisprudence,⁴⁷⁵⁸ the Chamber considered that it may be relevant for the ICC reparations.⁴⁷⁵⁹ In any case, the Chamber appropriately pointed out that the ICC shall guarantee that it does not perpetuate pre-existing or traditional discriminatory practices, for example, on gender grounds, when trying to address those issues.⁴⁷⁶⁰ Fifth, costs of legal or other relevant experts, medical services as well as psychological and social assistance, e.g., relevant help for girls and boys with HIV and AIDS.⁴⁷⁶¹

Lastly, but equally important, the Trial Chamber, considering the particular circumstances in *Lubanga*, determined that measures for awarding compensation should take into consideration the gender and age-specific impact that crimes of enlisting, conscripting and use of child soldiers have on direct victims, their families and their communities.⁴⁷⁶² Moreover, as correctly remarked by the Trial Chamber, the ICC ought to determine whether it is appropriate to grant 'compensation for any of the detrimental effect of child recruitment for the individuals directly affected, along with their families and communities'.⁴⁷⁶³ It should be mentioned that when the IACtHR's case law has been unable to specifically identify the totality of victims and, therefore, all reparations beneficiaries, the IACtHR considered it as a reason to reject

⁴⁷⁵⁶ *Ibid.*, para. 230 (c) (referring to IACtHR, Case of *El Amparo v. Venezuela*, Judgment of 14 September 1996, paras. 28-30; and ECtHR, *Ayder and Others v. Turkey*, Judgment, 8 January 2004, paras. 141-152).

⁴⁷⁵⁷ *Ibid.*, para. 230 (d) (referring to ECtHR, *Campbell and Cosans v. United Kingdom* (Just Satisfaction), Appls. No. 7511/76 and 7743/76, Judgment, 23 March 1983, para. 26; *TP and KM v. United Kingdom*, Appl. No. 28945/95, Judgment, 10 May 2001, para. 15; *Thlimmenos v. Greece*, Appl. No. 34369/97, Judgment, 6 April 2000, para. 70).

⁴⁷⁵⁸ IACtHR, Case of *Loayza-Tamayo v. Peru*, Judgment of 27 November 1998, para. 147 ("The so-called "life plan" deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals'). See also, e.g., Case of *Cantoral Benavides v. Peru*, Reparations and Costs, Judgment of 3 December 2001, Series C No. 88, para. 80.

⁴⁷⁵⁹ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 230 (d), footnote 418.

⁴⁷⁶⁰ *Ibid.*, para. 230 (d).

⁴⁷⁶¹ *Ibid.*, para 230 (e) (referring to IACtHR, Case of *Loayza-Tamayo v. Peru*, Judgment of 27 November 1998, para. 129 (d); IACtHR, Case of *Barrios Altos v. Peru*, Reparations and Costs, Judgment of 30 November 2001, Series C No. 87, para. 42).

⁴⁷⁶² *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 231.

⁴⁷⁶³ *Ibid.*, Loc. cit.

compensation for those not individualized at the time of the IACtHR's judgment and, thus, determined instead 'other forms of reparations' that would benefit 'all the members of the communities affected by the facts of the case'.⁴⁷⁶⁴

Whether compensation is pertinent/feasible at the ICC is discussed as follows. It has been said that compensation payments are not necessarily the most appropriate award even if the ICC can access the assets of a convicted person inasmuch as other modalities of reparations such as symbolic measures, some community development grants and institutional reform may be preferable where a group has suffered harm.⁴⁷⁶⁵ Additionally, reparations under the form of assistance or rehabilitation programs, as an individual or as a collective award, may be better than compensation especially when the amount of payment is nominal.⁴⁷⁶⁶ The TFV has indeed considered that restitution and (cash) compensation may be less suitable modalities of reparations as compared to others.⁴⁷⁶⁷ However, it is herein argued that a reparations program should usually and when feasible include measures integrating monetary, material and symbolic components rather than relying exclusively on a single form of reparation or completely excluding a form of reparation.⁴⁷⁶⁸ The UN Basic Principles and Guidelines refer to 'adequate, appropriate and prompt reparation',⁴⁷⁶⁹ which is held to include in some combination and as appropriate restitution, compensation, bodily and mental rehabilitation.⁴⁷⁷⁰

Indeed, in the context of a system for the protection of human rights, it has been remarked the transcendental importance held by reparations in general and also by compensation, in particular.⁴⁷⁷¹ In cases of serious human rights violations such as torture, extrajudicial killing and enforced disappearance, the IACtHR considering, *inter alia*, 'the grave circumstances of the case, the intensity of the suffering caused to the victim and his next of kin' concluded that it is 'pertinent for compensation to be paid, in fairness, for [*inter alia*] non-pecuniary damages'.⁴⁷⁷² Concerning the ICC case-based reparations regime, it may *mutatis mutandi* be affirmed the important role that compensation may

⁴⁷⁶⁴ IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of 19 November 2004, para. 107.

⁴⁷⁶⁵ Magarrell (2007) 5-6.

⁴⁷⁶⁶ Roth-Arriaza (2004) 162.

⁴⁷⁶⁷ Lubanga (ICC-01/04-01/06-2803), 1 September 2011, paras. 344.

⁴⁷⁶⁸ Magarrell (2007) 4.

⁴⁷⁶⁹ UN Basic Principles and Guidelines, principle 15.

⁴⁷⁷⁰ *Ibid.*, Loc. cit. See also Magarrell (2007) 1.

⁴⁷⁷¹ Faúndez (2008) 756.

⁴⁷⁷² IACtHR, Case of Bulacio v. Argentina, Merits, Reparations and Costs, Judgment of 18 September 2003. Series C No. 100, para. 96.

have in specific circumstances. An option is to consider that the ICC reserves its power to order compensation when: i) the accused has assets; ii) the link between him/her and the individual victim or group of victims is demonstrated; and iii) when the case is about a limited and definable group of victims.⁴⁷⁷³ Be that as it may, Trial Chamber I in its reparations decision has suggested that the ICC should consider whether the provision of compensation is appropriate.⁴⁷⁷⁴

Principles related to compensation ‘may only refer to the available national procedures under which individual victims may have effective access to an appropriate civil remedy’.⁴⁷⁷⁵ However, when this is not feasible due to, *inter alia*, collapse of the domestic system in question or unavailability of compensation mechanisms, the ICC may apply the principle of fairness (‘equality of all before the law’) and, hence, permit victims’ access to other sources of compensation, including the TFV.⁴⁷⁷⁶

With regard to rehabilitation, Trial Chamber I, relying on, for example, the IACtHR and the UN Basic Principles and Guidelines, found it to include: i) the provision of medical services and healthcare, in particular treatment of HIV and AIDS;⁴⁷⁷⁷ ii) psychological, psychiatric and social assistance to support victims enduring grief and trauma;⁴⁷⁷⁸ and iii) any relevant legal and social services.⁴⁷⁷⁹ Rehabilitation has to be implemented by the ICC in correspondence to the non-discrimination principle, which shall include a gender inclusive approach encompassing males and females of all ages.⁴⁷⁸⁰ As for child recruitment victims, rehabilitation should include measures directed at facilitating their reintegration to society, bearing in mind the differences in the impact of those crimes on boys and girls.⁴⁷⁸¹ These measures ought to include the provision of education and vocational training, sustainable work opportunities

⁴⁷⁷³ Pablo de Greiff and Marieke Wierda, ‘The Trust Fund for Victims of the ICC: Between Possibilities and Constraints’ in Feyter et al. (2005) 225, 239.

⁴⁷⁷⁴ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 231.

⁴⁷⁷⁵ Donat-Cattin (2008b) 1405.

⁴⁷⁷⁶ *Ibid.*, Loc. cit.

⁴⁷⁷⁷ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para.233 (referring to IACtHR, Case of the Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 15 September 2005, para. 312; IACtHR, Case of the Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 11 May 2007, Series C No. 163, para. 302; IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of 19 November 2004, para. 210).

⁴⁷⁷⁸ *Ibid.*, Loc. cit.

⁴⁷⁷⁹ *Ibid.*, Loc. cit. (referring to UN Basic Principles and Guidelines, principle 21).

⁴⁷⁸⁰ *Ibid.*, para. 232.

⁴⁷⁸¹ *Ibid.*, para. 234.

that promote a meaningful role in society.⁴⁷⁸² Rehabilitation measures should include manners of addressing the shame that victims may feel and, indeed, they ‘should be directed at avoiding further victimization of the boys and girls who suffered harm as a consequence of their recruitment’.⁴⁷⁸³ Rehabilitation (and reintegration of child soldiers) steps may also include communities of the victims, to the extent that the reparations programs are implemented where their communities are located.⁴⁷⁸⁴ Programs with transformative objectives, regardless of how limited they may be, can actually help prevent future victimization and symbolic measures such as commemorations and tributes may also contribute to rehabilitation.⁴⁷⁸⁵

Concerning implementation of rehabilitation measures such as medical, social and psychological rehabilitation, these require an important amount of money to be funded and, thus, it is not quite realistic to assume that an individual or individuals may finance them, letting alone the fact that it is in principle the State’s obligation to provide social security or health services.⁴⁷⁸⁶ However, the TFV has already gathered experienced with rehabilitation programs implemented under its general assistance mandate and which has been highlighted by the TFV as an important know-how when implementing similar initiatives concerning reparations orders.⁴⁷⁸⁷ Accordingly, an option is to either implement and finance similar programs, under the TFV’s management, for case-based reparations claimants and beneficiaries. A second alternative is to incorporate reparations beneficiaries to programs already run by the TFV for victims of situations in general but always making it explicit that the former category of victims are reparations beneficiaries and not general assistance beneficiaries. If the convicted is found to have funds, (s)he can be ordered to at least partially finance the rehabilitation of an individual or a rehabilitative program as part of a collective reparations award.⁴⁷⁸⁸

Lastly, but equally important, as previously said, the ICC cannot issue reparations orders against the States Parties to the ICC Statute. In any case, concerning enforcement of reparations orders, the ICC can oblige the States Parties to conduct certain measures as these have the obligation to cooperate

⁴⁷⁸² Ibid., Loc. cit.

⁴⁷⁸³ Ibid., para. 235.

⁴⁷⁸⁴ Ibid., para. 236 (referring to the Convention on the Rights of the Child, article 39; IACtHR, Case of Barrios Altos v. Peru, Judgment of 30 November 2001, para. 42).

⁴⁷⁸⁵ Ibid., Loc. cit.

⁴⁷⁸⁶ Dwertmann (2010) 148-149

⁴⁷⁸⁷ Lubanga (ICC-01/04-01/06-2803), 1 September 2011, paras. 319-326.

⁴⁷⁸⁸ Dwertmann (2010) 149.

with the ICC.⁴⁷⁸⁹ Indeed, article 75 (4) provides for that the ICC ‘may [...] determine whether, in order to give effect to an order [reparations order] which it may make under this article, it is necessary to seek measures under article 93 [Other forms of cooperation], paragraph 1’. Requests for forms of state cooperation can be used by the ICC on its own motion, upon application by the Prosecutor or victims who requested reparations or will do so.⁴⁷⁹⁰ Seizure of assets may be used to enforce a reparations order.⁴⁷⁹¹ According to rule 99 (1):

The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

As previously referred to,⁴⁷⁹² article 75 (5) of the ICC Statute states that the enforcement regime for fines and forfeiture order (regulated under article 109 of the Statute) shall apply to the ICC’s reparations orders and, therefore, States Parties are obliged to fully enforce ICC reparations orders ‘A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article’.⁴⁷⁹³ Moreover, in enforcing reparations orders, national authorities cannot modify them.⁴⁷⁹⁴ The provisions examined in the last paragraphs are related to the fact that the ICC’s efficacy is based on state cooperation towards it.⁴⁷⁹⁵

⁴⁷⁸⁹ See ICC Statute, Part 9 (International Cooperation and Judicial Assistance), in particular articles 93 and 109. See also articles 86 (General obligation to cooperate) and 88 (Availability of procedures under national law).

⁴⁷⁹⁰ See Schabas (2010) 883. See also Donat-Cattin (2008b) 1409.

⁴⁷⁹¹ ICC RPE, rule 99.

⁴⁷⁹² See *supra* Chapter V 2.3.1.

⁴⁷⁹³ Article 109 (Enforcement of fines and forfeiture measures) of the ICC Statute reads as follows: ‘States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law. 2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties. 3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court’.

⁴⁷⁹⁴ ICC RPE, rule 219. See also Kimberly Prost, ‘Enforcement’ in Lee (2001) 673, 695-696.

⁴⁷⁹⁵ See Salmón Gárate (2007a) 171.

4.3.2.2. Other Modalities

With regard to other modalities of reparations, conviction and sentence are examples thereof referred to by Trial Chamber I, based on the IACtHR's case law, as they likely have significance for the victims, their families and communities,⁴⁷⁹⁶ and, moreover, wide publication of the judgment may raise awareness of the crimes in question and, thus, deter those crimes.⁴⁷⁹⁷ Under the UN Basic Principles and Guidelines, these measures constitute satisfaction.⁴⁷⁹⁸ The ICC, in accordance with its broad competence and jurisdiction as well as assisted by the State Parties and the international community pursuant to Part 9 ('International cooperation and judicial assistance') of the ICC Statute,⁴⁷⁹⁹ can institute other modalities of reparations as remarked by Trial Chamber I in its reparations decision.⁴⁸⁰⁰

The Chamber considered that these modalities of reparations include: i) setting or assisting campaigns designed to improve the victims' position; ii) rendering certificates that acknowledge the particular harm experienced by individuals; iii) establishing outreach and promotional programs to inform victims on the trial outcome; iv) educational campaigns aiming at reduction of the stigmatization and marginalization of the victims of the crimes in question and, thus, to contribute to the society's awareness of crimes committed as well as the need to promote improved attitudes towards similar events and, for example, guarantee that children assume an active role within their respective communities;⁴⁸⁰¹ and v) measures to address the shame felt by victims and to prevent any future victimization, especially when there has been sexual violence, torture and inhumane and degrading treatment, and raising awareness of the effective reintegration of child soldiers.⁴⁸⁰² These measures may mostly qualify as

⁴⁷⁹⁶ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 237 (referring to IACtHR, Case of Velásquez-Rodríguez v. Honduras, Judgment of 21 July 1989, para. 36; IACtHR, Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 September 2004, Series C No. 114, para. 243; IACtHR, Case of Juan Humberto Sánchez v. Honduras, Judgment of 25 November 2003, para. 172).

⁴⁷⁹⁷ *Ibid.*, para. 238.

⁴⁷⁹⁸ UN Basic Principles and Guidelines, principle 22 (f) ('Judicial and administrative sanctions against persons responsible for the violations').

⁴⁷⁹⁹ See ICC Statute, articles 86 (General obligation to cooperate) et seq.

⁴⁸⁰⁰ Lubanga (ICC-01/04-01/06-2904), 7 August 2012, para. 239.

⁴⁸⁰¹ *Ibid.*, Loc. cit.

⁴⁸⁰² *Ibid.*, para. 240.

satisfaction and, to some extent, some of them as guarantees of non-repetition.⁴⁸⁰³

Under the category of other modalities of reparations, the Chamber also found that the convicted can contribute by providing a voluntary apology to an individual or groups of victims, either on a public or confidential basis.⁴⁸⁰⁴ It is important to notice that although apology as a satisfaction is also recognized under the UN Basic Principles and Guidelines and the IACtHR's case law, under these sources apologies must be public unlike the ICC's finding where apology can be confidential.⁴⁸⁰⁵ Even though apology should ideally be given in public in the ICC reparations regime, the difference may be explained by the subject who has to apologize to the victims, i.e., the State in the case of international human rights law *vis-à-vis* the convicted individual in the context of the ICC.

Concerning other measures of satisfaction, not explicitly examined in Trial Chamber I's reparations decision in *Lubanga*, it may be mentioned under the UN Basic Principles and Guidelines, *inter alia*: i) search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of the killed victims, and assistance to recover, identify and bury them in accordance to victims' wishes or cultural practices; and ii) commemorations and tributes to victims.⁴⁸⁰⁶ As submitted by the OPCV,⁴⁸⁰⁷ the IACtHR has considered, as 'symbolic' forms of reparations, the commemoration of the memory of the victims as a measure directed towards not only present but also future generations. Thus, the IACtHR has ordered reparations to publicly commemorate and/or honor individual victims and groups of victims which have consisted in: i) the naming of a street after the victims;⁴⁸⁰⁸ ii) the

⁴⁸⁰³ See UN Basic Principles and Guidelines, principles 22 (satisfaction) and 23 (guarantees of non-repetition).

⁴⁸⁰⁴ *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para. 240.

⁴⁸⁰⁵ UN Basic Principles and Guidelines, principle 22 (d). As for the IACtHR's case law, see, e.g., IACtHR, *Case of La Cantuta v. Peru*, Judgment of 29 November 2006, para. 234; IACtHR, *Case of Cantoral-Benavides v. Peru*, Reparations and Costs, Judgment of 3 December 2001, Series C No. 88, para. 81; IACtHR, *Case of Trujillo-Oroza v. Bolivia*, Merits, Judgment of 26 January 2000, Series C No. 64, para. 37; IACtHR, *Case of Durand and Ugarte v. Peru*, Reparations and Costs, Judgment of 3 December 2001, Series C No. 89, para. 39 (b); IACtHR, *Case of Barrios Altos v. Peru*, Judgment of 30 November 2001, para. 44 (e).

⁴⁸⁰⁶ See respectively UN Basic Principles and Guidelines, principle 22 (c) and (g).

⁴⁸⁰⁷ *Lubanga* (ICC-01/04-01/06-2863), 18 April 2012, paras. 115-118.

⁴⁸⁰⁸ IACtHR, *Case of Benavides-Cevallos v. Ecuador*, Merits, Reparations and Costs, Judgment of 19 June 1998, Series C No. 38, para. 48.

inauguration of an education center named after the victims;⁴⁸⁰⁹ and iii) the erection of public monuments frequently with commemorative plaques.⁴⁸¹⁰ The search of the whereabouts of disappeared and the bodies of those killed and their return has also been ordered by the IACtHR.⁴⁸¹¹ These measures have corresponded to cases of serious human rights violations such as massacres. Indeed, the ICC Victims Participation Booklet mentions ‘symbolic measures such as public apology or commemoration or memorial’ as examples of reparations.⁴⁸¹²

Having said so, it is necessary to notice that some forms of symbolic/non-pecuniary reparations identified by the IACtHR, the ECtHR and the UN Basic Principles and Guidelines would not necessarily be as such applicable in the ICC case-based reparations regime. This is because some modalities of reparations include international state obligations such as the obligation to investigate the case events, and to identify, prosecute and punish those responsible, which is considered as satisfaction under the UN Basic Principles and Guidelines,⁴⁸¹³ as well as ordering the State to amend, adopt or repeal domestic laws or judgments, which is considered as guarantees of non-repetition, i.e., those aimed at preventing crimes and associated with reforms,

⁴⁸⁰⁹ IACtHR, Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Reparations and Costs. Judgment of 26 May 2001, Series C No. 77, operative paragraph 7; IACtHR, Case of Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment of 27 February 2002, Series C No. 92, para. 6.

⁴⁸¹⁰ IACtHR, Case of Barrios Altos v. Peru, Reparations and Costs, Judgment of 30 November 2001, para. 50.5 (f); IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, para. 100; IACtHR, Case of the Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 15 September 2005, operative paragraphs 10-13; Case of ‘Las Dos Erres’ Massacre v. Guatemala, Judgment of 24 November 2009, para. 265.

⁴⁸¹¹ IACtHR, Case of Velásquez-Rodríguez v. Honduras, Judgment of 21 July 1989, paras. 34 and 35; IACtHR, Case of Castillo-Páez v. Peru, Judgment of 27 November 1998, para. 107.

⁴⁸¹² ICC (2006) 11.

⁴⁸¹³ UN Basic Principles and Guidelines, principle 22 (f). As for IACtHR’s case law see: IACtHR, Case of the ‘Street Children’ (Villagrán-Morales et al.) v. Guatemala, Judgment of 19 November 1999, para. 226; IACtHR, Case of Bámaca-Velásquez v. Guatemala, Merits, Judgment of 25 November 2000, Series C No. 70, para. 212; IACtHR, Case of Vargas-Areco v. Paraguay, Merits, Reparations and Costs. Judgment of 26 September 2006, Series C No. 155, paras. 153-156; IACtHR, Case of Osorio Rivera and Family v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of 26 November 2013, Series C No. 274, para. 244. As for ECtHR’s case law see: ECtHR, Selmouni v. France, 28 July 1999; ECtHR, Al-Adsani v. United Kingdom, 21 November 2001; and ECtHR, Finucane v. United Kingdom, Appl. No. 29178/95, Judgment, 1 July 2003 (Final 1 October 2003), paras. 86-90.

according to the UN Basic Principles and Guidelines.⁴⁸¹⁴ Indeed, only States may adopt measures such as introduction of a national memorial day, naming of streets or building of memorials.⁴⁸¹⁵ Nevertheless, although such orders could not be implemented against an individual due to their nature, they may be taken into account when it is possible to be implemented with the respective State's cooperation.⁴⁸¹⁶ Additionally, for example, when the convicted was a former State agent, a judgment against that State by domestic civil or regional human rights courts, which could also in turn be based on ICC's previous reparations orders.⁴⁸¹⁷

In general, to implement modalities of reparations, although the ICC lacks the power to order States to provide reparations to the victims, the wording and context of the ICC instruments neither exclude nor prohibit the possibility for the ICC to include recommendations to States Parties to the ICC Statute to implement certain reparations modalities.⁴⁸¹⁸ Be that as it may, as presented in the previous sub-section, the ICC States Parties have the obligation to cooperate with the ICC and, in particular, they are obliged to enforce ICC reparations orders. Concerning cooperation from the international community, the ICC may also appeal to organizations and other entities representing the international community to, for example, make voluntary payments to the TFV or support victims in other manners.⁴⁸¹⁹

Indeed, the TFV has suggested the adaptation of guarantees of non-repetition, in particular, reform of the security forces and judicial system, as well as satisfaction, to the ICC context.⁴⁸²⁰ As for guarantees of non-repetition, the TFV has suggested that the ICC may call upon the international community, the interested States, political leaders and affected communities to 'act responsibly in accordance with international standards and law, to promote reconciliation and to address any existing conditions that may give rise to renewed conflict'.⁴⁸²¹

⁴⁸¹⁴ UN Basic Principles and Guidelines, principle 23 (h). See also, e.g., IACtHR, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, para. 41; IACtHR, Case of Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C No. 154, paras. 145-157. As for other guarantees of non-repetition, see the rest of examples included in principle 23 of the UN Basic Principles and Guidelines.

⁴⁸¹⁵ Dwertmann (2010) 158.

⁴⁸¹⁶ *Ibid.*, Loc. cit; Donat-Cattin (1999b) 974.

⁴⁸¹⁷ Donat-Cattin (1999b) 975.

⁴⁸¹⁸ Dwertmann (2010) 55.

⁴⁸¹⁹ *Ibid.*, 61.

⁴⁸²⁰ Lubanga (ICC-01/04-01/06-2872), 25 April 2012, para. 58; Lubanga (ICC-01/04-01/06-2803), 1 September 2011, paras. 342-343.

⁴⁸²¹ Lubanga (ICC-01/04-01/06-2803), 1 September 2011, para. 343.

Guarantees of non-repetition adapted to the ICC context, for example, would aim at ensuring that no recruitment of child soldiers takes place.⁴⁸²²

4.4. The ECCC

4.4.1. Collective and Moral Reparations and Reparations Standard/Burden of Proof

4.4.1.1. Collective and Moral Reparations

The ECCC Internal Rules, both its current version and the previous ones, have limited reparations to collective and moral reparations. Thus, internal rule 23 (1) (b) establishes that one of the two purposes of the civil party action at the ECCC is to ‘Seek collective and moral reparations, as provided in Rule 23 *quinquies*’. In turn, rule 23 *quinquies* (1) lays down that ‘the Chambers may award only collective and moral reparations to Civil Parties’ and adds that ‘These benefits shall not take the form of monetary payments to Civil Parties’. Also, internal rule 23 *bis* (1) (b) provides for that ‘injury upon which a claim of collective and moral reparation [...]’. One important reason why at the ECCC reparations are only limited to collective and moral reparations, excluding financial reparations, i.e., compensation, altogether, is the few resources available,⁴⁸²³ which has been particularly notorious at the ECCC reparations system.

When interviewed outside court, reactions from civil parties about receiving collective and moral reparations in *Duch* have been diverse. Some believed that they should receive some individual material reparations, particularly in the form of medical or psychological care or a fund to permit them to hold a Buddhist ceremony to honor the memory of their loved ones who were killed at the S-21 detention centre.⁴⁸²⁴ Others thought they would be entitled to financial rather than non-financial reparations and considered the latter as insubstantial.⁴⁸²⁵ Yet other civil parties while acknowledging the symbolic importance of reparations, they have questioned whether compensation of any sort could truly contribute to individual and social redress after so many years of the commission of the crimes.⁴⁸²⁶

The Supreme Court Chamber in its appeal judgment in *Duch* agreed with the civil parties’ lawyers that the term ‘moral reparations’ may be unprecedented in international or domestic legal frameworks; however, it

⁴⁸²² Ibid., para. 340.

⁴⁸²³ Zegveld (2010) 99.

⁴⁸²⁴ Stover, Balthazard and Koeing (2011) 535.

⁴⁸²⁵ See Mohan (2009) 760-762.

⁴⁸²⁶ See Stover, Balthazard and Koeing (2011) 534-535.

concluded, by referring to the IACtHR's case law,⁴⁸²⁷ that the concept of moral damage is not so.⁴⁸²⁸ Moreover, the Supreme Court Chamber considered that a previous version of internal rule 23 (12) (Rev. 3) provided for some guidance by setting some examples of what would qualify as moral and collective reparations, namely, the publication of the judgment, financing a non-profit activity or service beneficial to victims, and 'other appropriate and comparable forms of reparations'.⁴⁸²⁹ Accordingly, the Chamber established that "'moral" denotes the aim of repairing moral damages rather than material ones'.⁴⁸³⁰ Moreover, the Chamber concluded that although the required 'collective' character of the measures confirms that individual financial awards are not available, 'neither the moral nor collective character requirements preclude *tout court* measures that require financing in order to be implemented'.⁴⁸³¹ Furthermore, the Chamber recognized the dual collective-individual benefits that may come from moral reparations awards 'As long as the award is available to victims as a collective, moral reparations also may entail benefit for the members of the collective'.⁴⁸³²

By referring to the IACtHR's jurisprudence,⁴⁸³³ the Supreme Court Chamber found that the 'term' collective is straightforward and, in the ECCC context:

[...] it excludes individual awards, whether or not of a financial nature. It also seems to favour those measures that benefit as many victims as possible. The present case is concerned with mass crimes, which, by their very nature, directly and indirectly affected, albeit to varying degrees, a large number of victims.⁴⁸³⁴

⁴⁸²⁷ IACtHR, Case of Castillo-Páez v. Peru, Reparations and Costs, Judgment of 27 November 1998, Series C No. 43, para. 53.

⁴⁸²⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 658. For the meaning of 'moral and collective reparations' see also Ruben Carranza, 'Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill its Reparations Mandate' (International Center for Transitional Justice 2009) 2-3. Available at: <http://www.ictj.org/sites/default/files/ICTJ-Cambodia-Reparations-2009-English.pdf> (last visit on 30 November 2012).

⁴⁸²⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 658. See also ECCC Internal Rules, rule 23 *quinquies* (2) (Rev. 5).

⁴⁸³⁰ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 658.

⁴⁸³¹ *Ibid.*, Loc. cit.

⁴⁸³² *Ibid.*, Loc. cit.

⁴⁸³³ IACtHR, Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala, Judgment of 26 May 2001, para. 84.

⁴⁸³⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 659.

Moreover, as previously examined,⁴⁸³⁵ the Supreme Court Chamber concluded that granting individual reparations to only those who participated as civil parties, i.e., those who were reparations claimants, will exclude from the scope of reparations beneficiaries those victims who were not able and/or willing to become civil parties and, thus, claim reparations, letting alone those victims who could not and will most like never be identified.⁴⁸³⁶ The Supreme Court Chamber accordingly was ‘of the view that the most inclusive measures of reparation should be privileged’.⁴⁸³⁷ Therefore, although only civil parties can claim reparations at the ECCC, they are not (necessarily) the only reparations beneficiaries as those victims who are not civil parties (reparations claimants) can still benefit at least indirectly from some collective and moral reparations provided by the ECCC, as already seen.⁴⁸³⁸ In any case, eligibility is conditioned to a causal link between the reparations measure in question and the injury produced by the crimes upon which the accused was found responsible,⁴⁸³⁹ as previously examined. In addition, the Chamber drew attention to the fact ‘the collective harm merits collective redress’, which it connected with ‘the reconciliatory function of reparations’.⁴⁸⁴⁰

The Supreme Court Chamber accepted that collective and moral reparations ‘may not reinstate the victims of human rights abuses either physically or economically’.⁴⁸⁴¹ However, the Chamber also pointed out that reparations general purposes at the ECCC are fulfilled to the extent that reparations provide an answer to the psychological, moral and symbolic elements of the crime or violation perpetrated.⁴⁸⁴² Verification of the facts, full and public truth disclosure via the victims’ access and participation and via identification of victims and individual recognition in the final judgment represent a public acknowledgement of their suffering.⁴⁸⁴³ This is consistent with the UN Basic Principles and Guidelines,⁴⁸⁴⁴ referred to by the Chamber. Actually,

⁴⁸³⁵ See supra Chapter V 2.4.2.1.

⁴⁸³⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 659.

⁴⁸³⁷ *Ibid.*, Loc. cit.

⁴⁸³⁸ See supra Chapter IV 2.4.2.1.

⁴⁸³⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 699.

⁴⁸⁴⁰ *Ibid.*, para. 660.

⁴⁸⁴¹ *Ibid.*, para. 661.

⁴⁸⁴² *Ibid.*, Loc. cit.

⁴⁸⁴³ *Ibid.*, Loc. cit.

⁴⁸⁴⁴ UN Basic Principles and Guidelines, principle 22 (referred to in Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 661).

a civil party lawyer expressed in his closing statement in the trial in *Duch* that the ECCC had already given victims with a ‘most valuable reparation’, namely, an acknowledgment of their right to be present and participate as well as of their solidarity.⁴⁸⁴⁵ Moreover, the Chamber concluded that its recognition of a proposed reparations award as an appropriate measure presents a potential of being ‘*per se* a form of satisfaction and redress, possibly capable of attracting attention, efforts, and resources toward its actual realisation’.⁴⁸⁴⁶

As for the severance of *Nuon Chea et al.*, in mini-trials and its impact on collective reparations and forms of reparations, some observations are provided here. Generally speaking, grouping and treating victims as a specific collective for reparations purposes based upon classifying factors such as crimes suffered, location/geographic identity, common ethnic/religious identity is in principle a sound option.⁴⁸⁴⁷ However, this approach needs to be carefully handled as granting certain forms of reparation to one group may raise expectations in the other groups or even dissatisfaction when in the most likely scenario different forms of reparations are applied to different groups of victims.⁴⁸⁴⁸ Another consideration in adopting this approach is to adopt appropriate measures to avoid the perception that the broader universe of victims of the Khmer Rouge regime has been fragmented; otherwise, it ‘may be perceived as diminishing the aggregate reparatory effect of the awards even if they are made collectively’.⁴⁸⁴⁹

4.4.1.2. Reparations Standard and Burden of Proof

With regard to the standard of proof for granting reparations, it should be first mentioned that the Internal Rules only requires the ‘beyond reasonable doubt’ standard when it comes to conviction ‘In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt’.⁴⁸⁵⁰ The Supreme Court Chamber in *Duch* noticed that factual elements of the civil party action not included by the criminal charges and, therefore, not proven by the Prosecutor beyond reasonable doubt, ‘must be proven by the civil

⁴⁸⁴⁵ Kaing Guek Eav alias Duch (Case 001), Transcripts, 23 November 2009, p. 80.

⁴⁸⁴⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 661.

⁴⁸⁴⁷ See Carranza (2009) 4-5.

⁴⁸⁴⁸ See *Ibid.*, 5.

⁴⁸⁴⁹ Caitlin Reiger, Comments on Draft Internal Rules for the Extraordinary Chambers in the Courts of Cambodia (ICTJ November 2006) 7. Available at: http://www.ictj.org/sites/default/files/ICTJ-Cambodia-Courts-Rules-2006-English_0.pdf (last visit on 30 November 2012).

⁴⁸⁵⁰ ECCC Internal Rules, rule 87 (1).

party pursuant to the standard of preponderance of evidence'.⁴⁸⁵¹ After an examination of the standards in the ICC, the STL, regional human rights bodies' reparations jurisprudence, and claims programs such as the International Commission on Holocaust Era Insurance Claims and the UN Compensation Commission,⁴⁸⁵² the Supreme Court Chamber in *Duch* came to the conclusion that the standard of proof applicable to reparations is 'balance of probabilities' or 'more probable than not to be true',⁴⁸⁵³ expressions which were found to be identical to the 'more likely than not to be true' standard introduced in internal rule 23 *bis* (1) (Rev. 5) of the ECCC Internal Rules and which also corresponds to the current version thereof.⁴⁸⁵⁴ The Supreme Court Chamber, based on the evidence accepted by the Trial Chamber during the reparations stage, inferred that the Trial Chamber applied the 'more likely than not to be true' standard of proof to civil party admissibility at the reparations stage.⁴⁸⁵⁵ Thus, the Supreme Court Chamber concluded that:

[...] the standard of proof applied by the Trial Chamber, namely, "more likely than not to be true" or "preponderance of evidence," was in accordance with the law. This standard is common to civil claims across the world. Moreover, there is no basis to claim a relaxation of this standard either in practice at the international level or in concerns for the proper balancing of interests.⁴⁸⁵⁶

As previously discussed,⁴⁸⁵⁷ the Supreme Court Chamber also determined that the standard of proof used in *Duch* during the reparations stage was higher than the *prima facie* standard used to preliminarily assess civil party applications.⁴⁸⁵⁸

With regard to the burden of proof, the ECCC Internal Rules stipulate that civil party applications shall:

⁴⁸⁵¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 510. See also *Ibid.*, para. 428.

⁴⁸⁵² *Ibid.*, paras. 513-521.

⁴⁸⁵³ *Ibid.*, para. 524.

⁴⁸⁵⁴ *Ibid.*, *Loc. cit.*

⁴⁸⁵⁵ *Ibid.*, para. 527.

⁴⁸⁵⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 531.

⁴⁸⁵⁷ See *supra* Chapter IV 2.4.1.1.

⁴⁸⁵⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 522-534.

[...] contain sufficient information to allow verification of their compliance with these IRs [Internal Rules]. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator'.⁴⁸⁵⁹

In addition, the Internal Rules also provide for that 'Unless provided otherwise in these IRs, all evidence is admissible'.⁴⁸⁶⁰ Although the ECCC due to its inquisitorial system orientation foresees quite an active role for the Judges in, *inter alia*, evidentiary matters,⁴⁸⁶¹ the Supreme Court Chamber in *Duch* established that 'the ECCC's mandate and the legal framework that retains the features of the civil action require that evidentiary proceedings on reparations remain claimant driven'.⁴⁸⁶² However, the Supreme Court Chamber also observed that the Trial Chamber, presumably mindful of the problems to provide official documents, showed flexibility and 'broadly accepted any documentary evidence capable of supporting the claim directly or indirectly'.⁴⁸⁶³

4.4.2. Modalities of Reparations and their Implementation

4.4.2.1. Modalities Examined in *Duch*

Three general observations applicable not only to *Duch* but also to the amended reparations implementation regime, i.e., applicable to *Nuon Chea et al.*, should be considered as for modalities of reparations and their implementation at the ECCC. First, as established by the ECCC in *Duch*, although the Internal Rules do not provide, unlike Cambodian domestic law, modalities such as compensation and restitution of property, some collective and moral reparations available at the ECCC are not available under Cambodian law.⁴⁸⁶⁴ Second, as seen in this and the next subsection, modalities of reparations that were requested (*Duch*) or are sought (*Nuon Chea et al.*) at the ECCC mainly fall under the categories of satisfaction and rehabilitation following the UN Basic Principles and Guidelines classification, previously referred to. Third, like the previous regime,⁴⁸⁶⁵ when the

⁴⁸⁵⁹ ECCC Internal Rules, rule 23 *bis* (4).

⁴⁸⁶⁰ *Ibid.*, rule 87 (1).

⁴⁸⁶¹ See, e.g., *Ibid.*, rules 87 (4) and 93 (1). For further discussion see *supra* Chapter II 3.4.2.

⁴⁸⁶² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 685.

⁴⁸⁶³ *Ibid.*, para. 527.

⁴⁸⁶⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 643 (referring to article 14 of the 2007 Code of Criminal Procedure).

⁴⁸⁶⁵ ECCC Internal Rules, internal rule 23 (11) (Rev. 3); ECCC Internal Rules, internal rule 23 *quinquies* (1) (Rev. 5).

reparations awards under the new regime are ordered by the Chamber to be borne by the accused,⁴⁸⁶⁶ the ECCC lacks the competence to enforce reparation awards and, accordingly, they can only be enforced, where necessary, within the ordinary Cambodian court system pursuant to and satisfying enforcement requirements under Cambodian domestic law (including with regard to specificity).⁴⁸⁶⁷ The difference is that, as seen,⁴⁸⁶⁸ unlike the amended reparations implementation regime, reparations awards could only be borne by the accused under the previous regime.

Previous versions of the Internal Rules considered in *Duch* included an illustrative list of modalities of collective and moral reparations to be awarded against and be borne by the accused 'a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense; b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or c) Other appropriate and comparable forms of reparation'.⁴⁸⁶⁹ The painstaking analysis by the Trial and the Supreme Court Chambers of the modalities of reparations sought by the civil parties in *Duch*,⁴⁸⁷⁰ are examined under this subsection. First, civil parties requested that their names and those of the immediate victims be included in the final judgment, including a specification concerning their connection with the crimes perpetrated at the S-21 detention centre.⁴⁸⁷¹ The Trial Chamber determined that although reparations at the ECCC are strictly speaking restricted to measures ordered against the accused, the Trial Chamber alone was able to honoring this request.⁴⁸⁷² It was also mentioned that similar official acknowledgments of suffering at other

⁴⁸⁶⁶ ECCC Internal Rules, internal rule 23 *quinquies* (3) (a).

⁴⁸⁶⁷ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 661.

⁴⁸⁶⁸ Nuon Chea et al. (Case 002), E125, 23 September 2011, p. 1.

⁴⁸⁶⁹ ECCC Internal Rules, rule 23 (12) (Rev. 3). See also ECCC Internal Rules, rule 23 *quinquies* (2) (Rev. 5).

⁴⁸⁷⁰ As for requests for reparations filed during trial proceedings, containing claims for modalities of reparations, see: Kaing Guek Eav alias Duch (Case 001), E/159/3, 14 September 2009, paras. 16, 21, 24, 26-30 and 45. See also civil parties' final submissions on reparations: Kaing Guek Eav alias Duch (Case 001), E/159/7, 10 November 2009, paras. 119-124; Kaing Guek Eav alias Duch (Case 001), E/159/6, 5 October 2009, paras. 14-21; Kaing Guek Eav alias Duch (Case 001), E/159/6, 11 November 2009; Kaing Guek Eav alias Duch (Case 001), E/159/3/1, 17 September 2009.

As for appeals on reparations, see: Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010; Kaing Guek Eav alias Duch (Case 001), Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, F9, 5 October 2010.

⁴⁸⁷¹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 667.

⁴⁸⁷² *Ibid.*, Loc. cit.

international bodies have been considered as reparations of high symbolic significance for victims.⁴⁸⁷³

Second, as for the civil parties' request of the compilation and publication of all statements of apology by Duch made during the trial, alongside the civil parties' comments on those statements, the Trial Chamber noted that although compilation and publication of apology made by Duch is not strictly speaking an order against him, it granted on the ground of 'the widespread recognition of similar measures as reparations'.⁴⁸⁷⁴ However, the Trial Chamber rejected the inclusion of the civil parties' comments as these were found to be different from the apology statements and their content had not been specified. Civil parties appealed this finding. The Supreme Court Chamber examined the IACtHR's jurisprudence in which public acceptance of state responsibility and apologies have not included victims' comments on public apologies,⁴⁸⁷⁵ and, therefore, concluded that 'Apology as a form of reparation does not foresee the participation of victims via their comments on the apologies. Rather what is commonly applied is that the form of apology is court-controlled so as to ensure its dignity'.⁴⁸⁷⁶ Moreover, the Supreme Court Chamber stressed that a convicted's apology which either contains criticism from some of the victims or incorporates content that would diminish the convicted, 'would readily devalue itself and not serve the purpose of just satisfaction'.⁴⁸⁷⁷

As for the claims from legal representatives of civil party groups 2 and 3 expressing doubts about the sincerity of Duch's apologies, the Supreme Court Chamber established that although it is desirable that all the addressees perceive an apology as a sincere expression of remorse, sincerity 'cannot be enforced and supplying the apology with comments does not render it more sincere'.⁴⁸⁷⁸ The Supreme Court Chamber added that although not all victims accept the sincerity of apologies, these are still valuable due to the publication and memorialization of the harm and the apology as such.⁴⁸⁷⁹ Furthermore, by referring to the IACtHR's case law, the Chamber added that apology 'transcends the time and

⁴⁸⁷³ Ibid., Loc. cit.

⁴⁸⁷⁴ Ibid., para. 668, footnote 1153.

⁴⁸⁷⁵ IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, para. 100; IACtHR, Case of the Ituango Massacres v. Colombia, Judgment of 1 July 2006, para. 406; IACtHR, Case of Zambrano-Vélez et al. v. Ecuador, Merits, Reparations and Costs, Judgment of 4 July 2007, Series C No. 166, para. 150.

⁴⁸⁷⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 676.

⁴⁸⁷⁷ Ibid., Loc. cit.

⁴⁸⁷⁸ Ibid., para. 677.

⁴⁸⁷⁹ Ibid., para. 677.

scene of the courtroom’ and, hence, may contribute to ‘just satisfaction in the long run and beyond the immediate scene’.⁴⁸⁸⁰

It is herein sustained that although the reference to the IACtHR’s case law made by the Supreme Court Chamber concerning apology is in principle correct, its confirmation of the Trial Chamber’s reject of the civil parties’ request may still be criticized based on two grounds. First, it should be borne in mind that apologies alone have been considered to redress, to some small extent, the consequences of serious human rights violations.⁴⁸⁸¹ In cases of gross human rights abuses, the IACtHR has considered apologies alongside other modalities of reparations such as compensation. This need for going a step further when sharpening modalities of reparations, i.e., apology in this particular case, is much stronger at the ECCC taking into account the quite limited ECCC reparations regime at which compensation is not an option. Accordingly, the almost literal reliance by the Supreme Court Chamber on the IACtHR’s case law, in this particular case, may be considered as de-contextualized and, hence, civil parties’ comments should have been included. This would have been more consistent with the final objective of reparations for victims, which is after all to redress the harm inflicted as much as possible. Second, the Supreme Court Chamber to some extent belittled the claims from civil party groups 2 and 3 about the lack of sincerity of Duch’s. In fact, these claims were objectively sound since the defence requested the acquittal of Duch. Moreover, as seen before,⁴⁸⁸² the Bosnian Human Rights Chamber has not ordered apologies when they were not made voluntarily. Although lack of sincerity and lack of voluntariness are two different concepts, it may be argued that in order to ‘compensate’ the perceived lack of sincerity by the victims in *Duch*, the inclusion of their comments would have been appropriate. In any case, the Supreme Court Chamber affirmed the Trial Chamber’s decision,⁴⁸⁸³ to ‘compile and post on the ECCC’s official website all statements of apology and acknowledgments of responsibility made by KAING Guek Eav during the course of the trial, including the appeal stage’.⁴⁸⁸⁴

⁴⁸⁸⁰ Ibid., Loc. cit. (referring to IACtHR, Case of Molina-Theissen v. Guatemala, Merits, Judgment of 4 May 2004, Series C No. 106, para. 46; IACtHR, Case of Ticona-Estrada et al. v. Bolivia, Merits, Reparations and Costs. Judgment of 27 November 2008, Series C No. 191, para. 26).

⁴⁸⁸¹ Pasqualucci (2003) 253.

⁴⁸⁸² See supra Chapter V 4.2.2.

⁴⁸⁸³ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 683.

⁴⁸⁸⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, p. 321. The compilation was attached to the Appeal Judgment as document F28.1, filed 16 February 2012 and corrected 20 March 2012. The compilation can be directly accessed under the document title ‘Compilation of Statements of Apology made by Kaing Guek Eav alias Duch during the Proceedings’ at:

Third, with regard to requests concerning publication of the judgment and outreach, the Trial Chamber noted that the judgment would be issued publicly and be made available at its web site and, hence, accessible to all media outlets which desire to refer to it.⁴⁸⁸⁵ However, the Trial Chamber rejected dissemination in the broadcast media of judgment portions on grounds of lack of specificity as the exact nature of the measures sought and their costs are uncertain and indeterminable and, hence, not amenable to a reparations award against Duch.⁴⁸⁸⁶ In any case, the Trial Chamber concluded that the public provision of information on the judgment will happen as part of the ECCC Public Affairs Section's outreach activities and, thus, likely to contribute meaningfully to reconciliation initiatives in Cambodia and public education.⁴⁸⁸⁷

The Supreme Court Chamber determined that although the Trial Chamber did not directly address civil parties' requests to disseminate audio, video and documentary material about trial, it considered that those claims were dealt with under the heading 'Requests concerning publication of the judgment and outreach'.⁴⁸⁸⁸ The Supreme Court Chamber recognized that a wide dissemination of the ECCC's findings and proceedings is an appropriate form of reparations and may contribute to the goals of national healing and reconciliation by fostering a public and genuine discussion on the past and, hence, minimizing denial, distortion of facts and partial truths.⁴⁸⁸⁹ However, the ECCC reminded that such measures would have to be implemented at the expense of the convicted, which is not feasible because of the convicted's indigence.⁴⁸⁹⁰ Be that as it may, the Supreme Court Chamber appropriately highlighted that many civil party appellants' proposals fell within the mandates of the Public Affairs Section and the VSS,⁴⁸⁹¹ which include outreach activities

http://www.eccc.gov.kh/sites/default/files/publications/Case001Apology_En_low_res.pdf (last visit on 30 November 2012).

⁴⁸⁸⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 669.

⁴⁸⁸⁶ *Ibid.*, Loc. cit.

⁴⁸⁸⁷ *Ibid.*, Loc. cit.

⁴⁸⁸⁸ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 706 (referring to the heading 4.4.3.3 (para. 469) of the Trial Chamber's judgment). It should be mentioned that the Supreme Court Chamber, concerning claims not explicitly discussed by the Trial Chamber, found the violation of the appellant's right to a reasoned decision and, by way of redress, provided its own reasoning as for claims reiterated in appeal. See *Ibid.*, para. 671. See also *supra* Chapter V 3.4.2.2.

⁴⁸⁸⁹ *Ibid.*, paras. 708-709.

⁴⁸⁹⁰ *Ibid.*, para. 709.

⁴⁸⁹¹ *Ibid.*, Loc. cit.

related to victims,⁴⁸⁹² and the dissemination of information on the ECCC.⁴⁸⁹³ The Supreme Court Chamber, without overruling the Trial Chamber's findings, directed the above-mentioned ECCC Sections to pay due attention to civil party appellants' claims when undertaking and implementing outreach activities:

The Supreme Court Chamber welcomes the efforts undertaken to date in ensuring the distribution of the Trial Judgment brochures, and audio-visual material to most communes and provincial officers, and, on demand, to media outlets, and further directs these ECCC Sections to undertake appropriate additional outreach activities, including dissemination of and information about this Appeal Judgment, attaching due consideration to the present claims for reparation of the Civil Party Appellants.⁴⁸⁹⁴

Fourth, as for requests which sought directly or indirectly individual monetary awards to civil parties or establishment of a fund, the Trial Chamber rejected them as being beyond the scope of the available reparations at the ECCC.⁴⁸⁹⁵ Therefore, requests including the provision of vocational training, micro-enterprise loans and business skills training were rejected.⁴⁸⁹⁶

Fifth, as for requests for measures by the Government of Cambodia, the Trial Chamber rejected them as they fall outside the ECCC's jurisdiction, i.e., they were measures that could not be satisfied via orders against the convicted.⁴⁸⁹⁷ Thus, since both the institution of a national commemoration day for victims and the issuance of official apology statements fall solely within national governmental prerogatives, the ECCC lacks competence to compel Cambodia to do so.⁴⁸⁹⁸ Concerning the request on an apology letter from the Government of Cambodia, the Supreme Court Chamber concurred with the Trial Chamber that this request revealed an intention that the reparation be performed by the State,⁴⁸⁹⁹ although civil party group 2 argued that the request

⁴⁸⁹² ECCC Internal Rules, rule 12 *bis* (1) (h). See also ECCC Internal Rules, rule 12 (2) (h) (Rev. 3).

⁴⁸⁹³ ECCC Internal Rules, rules 12 *bis* (1) (e) and 9 (4) (h). See also ECCC Internal Rules, rule 9 (4) (h) (Rev. 3).

⁴⁸⁹⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 709.

⁴⁸⁹⁵ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 670.

⁴⁸⁹⁶ *Ibid.*, Loc. cit.

⁴⁸⁹⁷ *Ibid.*, para. 671.

⁴⁸⁹⁸ *Ibid.*, Loc. cit.

⁴⁸⁹⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 678.

meant to order the convicted to write a letter.⁴⁹⁰⁰ The Supreme Court Chamber concluded that a governmental apology cannot be ordered within the ECCC's legal framework regardless of being an internationally practiced modality of reparations.⁴⁹⁰¹ The Supreme Court Chamber also added that this kind of order cannot be enforceable against the convicted based on the principle of law whereby it is not feasible to coerce an individual to perform in *specie* an obligation of *facere* of personal nature.⁴⁹⁰²

Although the request of naming 17 public buildings after the victims and associated ceremonies was not especially addressed by the Trial Chamber, the Supreme Court Chamber considered it as part of the requests for measures by Cambodia,⁴⁹⁰³ which were dismissed by the Trial Chamber.⁴⁹⁰⁴ The Supreme Court Chamber denied such request as the ECCC lacks power to issue binding orders against any third party or orders that would create obligations on a person or entity other than the convicted.⁴⁹⁰⁵ In any case, the Supreme Court Chamber found that 'designating a national commemoration day, holding of official ceremonies, and erection of informative and memorialising plaques are appropriate measures of reparation in the circumstances of the present case'.⁴⁹⁰⁶ Concerning the request for the convicted to write an open letter to the Government of Cambodia asking that part of the entrance fees for the Tuol Sleng museum and Choeung Ek be used to fund reparations, addressed implicitly by the Trial Chamber in the requests for measures by the Government of Cambodia,⁴⁹⁰⁷ it was rejected by the Supreme Court Chamber. The Supreme Court Chamber found that it lacks the power to issue binding orders against Cambodia.⁴⁹⁰⁸

Sixth, concerning requests for the construction of pagodas and other memorials, although the Trial Chamber sympathized with them, the Chamber rejected such requests due to their lack of sufficient specificity concerning the

⁴⁹⁰⁰ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, para. 57; Kaing Guek Eav alias Duch (Case 001), Transcripts, 30 March 2011, p. 50, lines 14-18.

⁴⁹⁰¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 679 (referring to IACtHR, Case of the Ituango Massacres v. Colombia, Judgment of 1 July 2006, paras. 96-97).

⁴⁹⁰² *Ibid.*, para. 680.

⁴⁹⁰³ *Ibid.*, para. 710.

⁴⁹⁰⁴ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 671.

⁴⁹⁰⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 712.

⁴⁹⁰⁶ *Ibid.*, para. 713.

⁴⁹⁰⁷ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 671.

⁴⁹⁰⁸ Kaing Guek Eav alias Duch (Case 001), 3 February 2012, para. 716.

exact number of memorials sought, their nature, their envisaged location, or their estimated cost.⁴⁹⁰⁹ The Trial Chamber found that no information was provided, e.g., concerning the identity of the owners of all proposed sites, whether these provided their consent to the edification of each proposed memorial, whether they consented to the construction of each proposed memorial, or whether additional administrative authorizations such as building permits would be necessary to give effect to each measure.⁴⁹¹⁰ Since the material examined by the Trial Chamber does not allow it to render an enforceable order against the convicted or a determinable amount in reparations, the Trial Chamber rejected the civil parties' request.⁴⁹¹¹ The Supreme Court Chamber concurred with the Trial Chamber in sympathizing with those requests, and held that they directly fell within the meaning of 'collective and moral reparations' under the Internal Rules.⁴⁹¹² The Supreme Court Chamber found that the 'moral requirement' is met by:

[...] the fact that memorials restore the dignity of victims, represent a public acknowledgement of the crimes committed and harm suffered by victims, and, as lasting and prominent symbols, assist in healing the wounds of victims as a collective by diffusing their effects far beyond the individuals who were admitted as Civil Parties.⁴⁹¹³

By referring to the IACtHR's jurisprudence,⁴⁹¹⁴ the Supreme Court Chamber also found that memorials contribute to national reconciliation since they strengthen public knowledge of past crimes, promote a culture of peace among the current and future generations as well as contribute to 'a global message of concord to all potential visitors'.⁴⁹¹⁵ Having said so, the Supreme Court Chamber found two obstacles for granting this request. On the one hand, the convicted's indigence, which makes impossible the enforcement of orders

⁴⁹⁰⁹ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 672.

⁴⁹¹⁰ *Ibid.*, Loc. cit.

⁴⁹¹¹ *Ibid.*, Loc. cit.

⁴⁹¹² Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 683.

⁴⁹¹³ *Ibid.*, Loc. cit.

⁴⁹¹⁴ See, e.g., IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, Series C No. 116, para. 104; IACtHR, Case of La Cantuta v. Peru, Judgment of 29 November 2006, para. 236.

⁴⁹¹⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 683.

against him and thus precludes an ‘effective remedy’.⁴⁹¹⁶ On the other hand, jurisdictional limitation impedes the imposition of obligations on Cambodia or other third parties, which precludes awards that by their nature would require such obligations.⁴⁹¹⁷ Concerning the lack of specificity, the Supreme Court Chamber determined that it does not constitute a fatal flaw in a reparations request as far as the request in question shows that the reparations award sought would be otherwise appropriate and enforceable against the convicted. Even though specifics of an award should be provided by the civil parties, they may be additionally requested from the parties or obtained by the ECCC via its own powers.⁴⁹¹⁸ Nevertheless, the Supreme Court Chamber added that the need for adjudicating the criminal case within a reasonable time does not permit the ECCC to just adopt the IACtHR’s paradigm in reparations,⁴⁹¹⁹ since the IACtHR assumes the ultimate task of designing a just and equitable remedy for the harmed party as well as creating the reparations it deems appropriate and is even not bound by the requests of victims, which was referred to by civil party group 2.⁴⁹²⁰

The Supreme Court Chamber found that the mandate and the framework of the ECCC, by retaining the characteristics of the civil action, require that the evidentiary proceedings on reparations are claimant-driven.⁴⁹²¹ Thus, a reparations request has to contain a reasonable level of detail, depending on the nature of the request, for the ECCC to issue an enforceable reparations award.⁴⁹²² The Chamber also considered that degree of specificity for reparations award requests and the prerogatives of government are issues at which the ECCC does not permit it to copy from regional human rights mechanisms such as the IACtHR, which uses a significantly lower standard of specificity as it passes some burden to or gives some discretion to the State when it comes to execution of the order.⁴⁹²³

Thus, the Supreme Court Chamber concluded that the ECCC can only endorse the installation of memorials ‘insofar as to confirm that the form of

⁴⁹¹⁶ Ibid., para. 684.

⁴⁹¹⁷ Ibid., Loc. cit.

⁴⁹¹⁸ Ibid., para. 685 (referring to the internal rule 87 (4)).

⁴⁹¹⁹ Ibid., Loc. cit.

⁴⁹²⁰ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, paras. 72 and 73.

⁴⁹²¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 685.

⁴⁹²² Ibid., para. 687.

⁴⁹²³ Ibid., para. 688.

reparation is appropriate'.⁴⁹²⁴ Nevertheless, the Chamber also added that specificity is secondary to the question of interference with third parties' rights and governmental prerogatives and, therefore, it is not needed to provide technical specifications to order the erection of a monument (unless it were to be on land owned by the convicted).⁴⁹²⁵ However, this request can only be given as an enforceable order provided that the issues of ownership and any administrative permits are resolved prior to bringing the request at the ECCC.⁴⁹²⁶ In the particular requests in *Duch*, memorials necessarily interfere with third party rights and the executive prerogatives and, thus, such interference and not a generic lack of specificity, was found by the Supreme Court Chamber to be the basis for rejecting those requests.⁴⁹²⁷ The Chamber found that, among requests for memorials, the S-21 Victims' Memorial presented by civil party group 3 on behalf of the Association of Victims of Democratic Kampuchea, 'Ksem Ksan', including most victims in *Duch* stood out because of the specificity provided and, therefore, was found to be an appropriate form of reparations under the ECCC Internal Rules.⁴⁹²⁸ Nonetheless, the Chamber, rephrasing civil party group 3,⁴⁹²⁹ also added that such official and solemn recognition by the ECCC of the adequacy of this reparations request is in itself a modality of reparations regardless of its future implementation.⁴⁹³⁰ Moreover, the Chamber denied the request due to the indigence of the convicted although it invited and encouraged competent national and international entities to facilitate the performance of all measures necessary to bring this request into effect.⁴⁹³¹

Seventh, concerning requests to preserve the S-21 detention centre archives, Vann Nath's paintings and the S-21 and S-24 sites, they were rejected by the Trial Chamber due to the lack of particulars concerning the legal ownership of the sites, archives or items, or whether their owners or possessors consent to proposals that they be accessed or altered or the relocation of revenues derived from them to civil parties.⁴⁹³²

⁴⁹²⁴ Ibid., Loc. cit.

⁴⁹²⁵ Ibid., Loc. cit.

⁴⁹²⁶ Ibid., Loc. cit.

⁴⁹²⁷ Ibid., Loc. cit.

⁴⁹²⁸ Ibid., para. 690.

⁴⁹²⁹ Kaing Guek Eav alias Duch (Case 001), Supplemental Submissions Concerning Reparations, F25, 30 March 2010, p. 3, last paragraph.

⁴⁹³⁰ Kaing Guek Eav alias Duch (Case 001), 3 February 2012, para. 691.

⁴⁹³¹ Ibid., para. 692.

⁴⁹³² Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 673.

Eighth, concerning requests for the provision of access to free medical care and educational measures, the Trial Chamber rejected them as by their nature are not symbolic but instead designed to benefit a large number of individual victims and, thus, those reparations requests are outside the scope of available reparations at the ECCC.⁴⁹³³ When appealing this decision civil party group 2 argued, *inter alia*, that the Trial Chamber misunderstood its claim as they only claimed treatment for 17 people and not for a larger number of individual victims.⁴⁹³⁴ The Supreme Court Chamber started by emphasizing the requirement of a causal link between the reparation measures sought by each civil party appellant and the injury caused by the crimes for which the accused was convicted.⁴⁹³⁵ Then, with regard to the modality of reparations, the Chamber found the provision of physical and/or psychological treatment of the injury as a suitable modality of reparations since the injury inflicted on the victims is the damage to their physical and/or psychological health.⁴⁹³⁶ The Chamber moved on to examine whether the reparations measure request qualifies as ‘collective and moral’.⁴⁹³⁷ Relying on IACtHR’s jurisprudence,⁴⁹³⁸ the Supreme Court Chamber concluded that the provision of medical and psychological care is an appropriate form of reparations and that it falls under the term ‘collective and moral’ reparations under the Internal Rules.⁴⁹³⁹ This modality of reparations is especially suitable when it is not possible for the court in question, for example, the IACtHR, to identify the totality of victims, i.e., the totality of all the reparations beneficiaries and thus to give it, alongside other modalities of reparations, instead of providing individual financial reparations.⁴⁹⁴⁰

The last step of analysis by the Supreme Court Chamber consisted in what it called ‘enforceability’ of the reparations measure sought.⁴⁹⁴¹ Unlike the IACtHR’s case law where it is required a sophisticated administrative structure

⁴⁹³³ Ibid., para. 674.

⁴⁹³⁴ Kaing Guek Eav alias Duch (Case 001), F13, 2 November 2010, para. 90.

⁴⁹³⁵ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 699.

⁴⁹³⁶ Ibid., Loc. cit.

⁴⁹³⁷ Ibid., para. 700.

⁴⁹³⁸ IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, para.107.

⁴⁹³⁹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 700-701.

⁴⁹⁴⁰ IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, paras. 62 and 92.

⁴⁹⁴¹ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, paras. 702-703.

to be implemented and executed by the State,⁴⁹⁴² the ECCC ‘is not vested with powers to render binding orders against the Cambodian State [...]’.⁴⁹⁴³ Nor has the ECCC an explicit State’s proposal to be able to assist a potentially large, undefined category of beneficiaries,⁴⁹⁴⁴ unlike the practice related to the IACtHR.⁴⁹⁴⁵ These previous considerations must be read ‘In the context of the ECCC [where] orders can only be borne by convicted persons’,⁴⁹⁴⁶ under the previous reparations implementation regime. The Supreme Court Chamber concluded that although the provision of medical care constitutes in general an appropriate modality of reparations, the reparations request is not mature enough to be singled out for the Chamber’s individual endorsement due to the lack of, *inter alia*, information on the estimated cost of the reparations, the number and identities of beneficiaries and duration and modality of the treatments needed.⁴⁹⁴⁷

Ninth, concerning paid visits for civil parties to memorial sites, not addressed directly by the Trial Chamber, the Supreme Court Chamber noted that implementing this request would entail financial investment and significant administrative and logistic arrangements.⁴⁹⁴⁸ Due to the complete lack of basic technical data, which did not allow the assessment of the reasonableness and costs of this request, the Chamber did not endorse this claim as an appropriate modality of reparations, not even as a non-binding recommendation.⁴⁹⁴⁹

Thus, although the Supreme Court Chamber acknowledged that the civil party appellants, in particular group 2, have proposed several, in principle, appropriate forms of reparations, they could not be granted due to the ECCC reparation framework and the indigence of the convicted:

⁴⁹⁴² IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, para. 108; IACtHR, Case of the ‘Juvenile Reeducation Institute’ v. Paraguay, Judgment of 2 September 2004, paras. 318-320; IACtHR, Case of Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment of 1 March 2005, Series C No. 120, para. 198.

⁴⁹⁴³ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 703.

⁴⁹⁴⁴ *Ibid.*, Loc. cit.

⁴⁹⁴⁵ IACtHR, Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment of 19 November 2004, para. 92

⁴⁹⁴⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 703.

⁴⁹⁴⁷ *Ibid.*, para. 704.

⁴⁹⁴⁸ *Ibid.*, para. 694.

⁴⁹⁴⁹ *Ibid.*, Loc. cit.

The Supreme Court Chamber recognises the suffering of the victims as well as their right to obtain effective forms of reparation under internationally established standards. It further notes that the Civil Party Appellants, and CPG2 in particular, have advanced numerous requests that represent, in general terms, appropriate forms of reparation for the harm suffered (for instance, the provision of medical and psychological treatment for direct and indirect victims, naming public buildings after victims and installation of informative plaques, holding commemorative ceremonies, and erection of memorials such as pagodas, pagoda fences and monuments).

Nevertheless, due to the constraints stemming from the ECCC reparation framework as outlined above, these specific requests cannot be granted. Considering that several requests have been rejected also on the basis of KAING Guek Eav's indigence, and while appreciating that some of them have been adequately specified, the Supreme Court Chamber encourages national authorities, the international community, and other potential donors to provide financial and other forms of support to develop and implement these appropriate forms of reparation.⁴⁹⁵⁰

Accordingly, the Supreme Court Chamber affirmed the Trial Chamber's rejection of claims for reparations and at the same time affirmed the reparations measures concerning the compilation and posting on the ECCC's web-site of the convicted's apologies made during the trial, including the appeal stage.⁴⁹⁵¹

4.4.2.2. Modalities under the Amended Reparations Implementation Regime in *Nuon Chea et al.*

As seen in the previous sub-section, a decisive factor to reject the collective and moral reparations proposed by civil parties in *Duch* was (almost) insurmountable obstacles for their implementation (due to the ECCC framework and the convicted's indigence) although those proposals in most of cases were in principle considered by the Trial and Supreme Court Chambers as appropriate reparations measures. However, as previously examined,⁴⁹⁵² the regime of implementation of reparations awards at the ECCC was amended in September 2010,⁴⁹⁵³ and is applicable to *Nuon Chea et al.* In particular, internal rule 23 *quinquies* (3) (b) lays down that:

⁴⁹⁵⁰ Ibid., para. 717.

⁴⁹⁵¹ Ibid., p. 321.

⁴⁹⁵² See supra Chapter V 2.4.3.2.

⁴⁹⁵³ This amendment came via Revision 6 of the ECCC Internal Rules adopted on 17 September 2010.

3. In deciding the modes of implementation Chamber may, in respect of each award, either:

- a) order that the costs of the award shall be borne by the convicted person; or
- b) recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding [emphasis added].

In turn, as previously examined, the VSS may in liaison with an external entity (having secured funding) implement reparations awards, as established under internal rule 12 *bis* 2 ‘The Victims Support Section shall, in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, endeavour to identify, design and later implement projects envisaged by Rule 23 *quinquies* (3)(b)’.

The Supreme Court Chamber in *Duch*, concerning the request for provision of medical treatment and psychological services for civil parties, remarked that a workable solution (for *Nuon Chea et al.* and other ongoing/future cases) may be the setting up of an externally-subsidized trust fund, whose administrative structure would be tasked with the implementation of measures asked.⁴⁹⁵⁴ Indeed, as appropriately highlighted by the Chamber,⁴⁹⁵⁵ the amendments to the Internal Rules, explicitly establish that the ECCC can recognize reparations projects designed and identified by the civil parties’ lead co-lawyers in cooperation with the VSS, under internal rule 23 *quinquies* (3) (b) above-quoted. Although the Supreme Court Chamber in *Duch* welcomed this new innovative regime, it noted that it was not applicable in *Duch* (Case 001).⁴⁹⁵⁶ Thus, it found that the Trial Chamber in *Duch* correctly dismissed the request to establish a trust fund.⁴⁹⁵⁷ Accordingly, the Supreme Court Chamber merely encouraged the civil parties in *Duch*, many of whom are also civil parties in *Nuon Chea et al.* (Case 002),⁴⁹⁵⁸ and to which case internal rule 23 *quinquies* (3)

⁴⁹⁵⁴ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 704, footnote 1430.

⁴⁹⁵⁵ *Ibid.*, Loc. cit.

⁴⁹⁵⁶ *Ibid.*, Loc. cit.

⁴⁹⁵⁷ Kaing Guek Eav alias Duch (Case 001), Judgment, Trial Chamber, 26 July 2010, para. 670.

⁴⁹⁵⁸ As of 3 February 2012, the date when the Supreme Court Chamber issued its judgment, 69 out of the 94 civil parties who participated in *Duch* were admitted as civil parties in *Nuon Chea et al.* See Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 704, footnote 1430.

(b) applies, to seek, for example, the provision of access to free medical care via the amended system.⁴⁹⁵⁹

The Trial Chamber in *Nuon Chea et al.*, concerning certain categories of reparations initially specified by the civil parties' lead co-lawyers, made the following precisions. First, no request for collective or individual financial compensation for civil parties or the establishment of trust fund for this end can be entertained by the Trial Chamber in *Nuon Chea et al.*⁴⁹⁶⁰ This approach is coherent as although there has been a change in the ECCC regime for implementation of reparations awards, compensation is explicitly excluded under internal rule 23 *quinquies* (1) from the reparations modalities available at the ECCC. It is also necessary here to remind that the ECCC still lacks power to order Cambodia to implement reparations.

Second, with regard to requests for measures requiring governmental approval such as the provision of citizenship to Vietnamese victims and instituting a day of remembrance, the Trial Chamber found that these may be only endorsed by it if it is clear that those measures have been approved or implemented by Cambodia.⁴⁹⁶¹ Third, the Trial Chamber noticed that a number of other reparations measures sought lacked sufficient specificity to allow it to give a meaningful comment at that stage.⁴⁹⁶² Those proposals included: i) the setting up of stupas and memorial sites; ii) preservation of killing sites; iii) creation of educational programs about the history of Cambodia and for children; iv) establishment of a framework of psychological support for victims and the creation of centers to provide such services; and v) the establishment of museums, archives or libraries in Phnom Penh.⁴⁹⁶³ The Trial Chamber stated that depending on what is specifically envisaged in each measure, some may also constitute measures that require specific governmental approval or authorization. Although some measures may be appropriately conceived, the Trial Chamber reminded the civil parties' lead co-lawyers of practical issues to be addressed so as to guarantee that even a limited cross-section of those measures may meaningfully be achieved within the applicable time-frame.⁴⁹⁶⁴

Fourth, with regard to requests for measures falling within the scope of the ECCC's legal framework such as dissemination of the Case 002 Judgment(s)

⁴⁹⁵⁹ *Ibid.*, Loc. cit.

⁴⁹⁶⁰ *Nuon Chea et al.* (Case 002), E/125, 23 September 2011, p. 3.

⁴⁹⁶¹ *Ibid.*, Loc. cit.

⁴⁹⁶² *Ibid.*, Loc. cit.

⁴⁹⁶³ *Nuon Chea et al.* (Case 002), Transcripts, 29 June 2011, pp. 107-109.

⁴⁹⁶⁴ *Nuon Chea et al.* (Case 002), E/125, 23 September 2011, p. 3.

and compilation of a list of civil parties,⁴⁹⁶⁵ the Trial Chamber found them to be akin to measures previously recognized, in *Duch*, ‘as appropriate and achievable measures within the specific ECCC context’.⁴⁹⁶⁶

The Trial Chamber gave civil parties’ lead co-lawyers the opportunity to supplement, update and, where necessary, remedy the initial specifications provided during the initial hearing and according to the above-mentioned guidelines/observations.⁴⁹⁶⁷ Accordingly, the lead co-lawyers addressed the Trial Chamber’s observations putting forward, *inter alia*, the following points.⁴⁹⁶⁸ First, it was stressed, at that time, that the judgment of the Supreme Court Chamber in *Duch* would provide guidance on devising and refining the reparations claimants being prepared by the civil parties’ lead co-lawyers and civil parties’ lawyers.⁴⁹⁶⁹ This judgment has previously been examined. Second, it was highlighted the coordination and meetings among civil parties’ lead co-lawyers, civil parties’ lawyers and the VSS to identify the reparations projects and assess their feasibility pursuant internal rule 23 *quinquies* (3) (b).⁴⁹⁷⁰

Third, as for the establishment of a trust fund, the lead co-lawyers clarified that what it is sought is to finance legally sound reparations projects.⁴⁹⁷¹ Accordingly, the constitution of an independent non-governmental, quasi administrative body, outside the ECCC was proposed to implement reparations awards ordered by the ECCC and to allocate funds for that effect.⁴⁹⁷² Fourth, as for measures requiring governmental approval, it was highlighted that while it is required official governmental approval, it is not needed governmental action.⁴⁹⁷³ Thus, for example, concerning a day of remembrance, it was clarified that the civil parties did not seek that the ECCC orders Cambodia to implement it as they referred to be working in collaboration with Cambodia before finalizing their claim and, only then, they would require the Chamber to endorse the outcome.⁴⁹⁷⁴ Fifth, as for specificity required for other measures, it was claimed the need for a definition of what was understood by ‘requisite specificity’ and

⁴⁹⁶⁵ Nuon Chea et al. (Case 002), Transcripts, 29 June 2011, p. 109.

⁴⁹⁶⁶ Nuon Chea et al. (Case 002), E/125, 23 September 2011, p. 3.

⁴⁹⁶⁷ *Ibid.*, Loc. cit.

⁴⁹⁶⁸ Nuon Chea et al. (Case 002), E125/2, 12 March 2012. See also Nuon Chea et al. (Case 002), Transcripts, 19 October 2011.

⁴⁹⁶⁹ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 21.

⁴⁹⁷⁰ *Ibid.*, paras. 38-39.

⁴⁹⁷¹ *Ibid.*, para. 41.

⁴⁹⁷² *Ibid.*, Loc. cit.

⁴⁹⁷³ *Ibid.*, para. 43.

⁴⁹⁷⁴ *Ibid.*, para. 44.

‘sufficient specificity’.⁴⁹⁷⁵ As, previously mentioned, the Supreme Court Chamber in *Duch* determined that problems with enforceability rather than lack of a generic (technical) specificity to be the basis to reject reparations requests such as the installation of memorials.⁴⁹⁷⁶ Sixth, with regard to measures within the ECCC’s legal framework, it was considered, under the UN Basic Principles and Guidelines,⁴⁹⁷⁷ that it should be awarded reparations awards much more proportional to the gravity of the violation and harm inflicted than the mere publication of court documents.⁴⁹⁷⁸

Finally, concerning update and further details of the initial specifications on reparations, the civil parties’ lead co-lawyers, in collaboration with the VSS, analyzed the requests from the 11 legal teams representing civil parties in *Nuon Chea et al.* and identified four main categories where projects may be implemented.⁴⁹⁷⁹ The first category is remembrance and memorialization, which aims at commemorating victims’ lives and deaths and providing literal and metaphoric spaces for grieving and reflection, consists of: i) facilitation of a memorial day; ii) stupas and monuments; iii) ceremonies; and iv) preservation of crimes sites.⁴⁹⁸⁰ The second category is rehabilitation, which consists in a range of awards aiming to restore the victims’ mental and physical health or at least mitigate their harm,⁴⁹⁸¹ i.e., projects to establish psychological and physical health services and to support a self-help group.⁴⁹⁸² The third category is documentation/education, which includes measures to preserve and understand the history of the Khmer Rouge and the individual victims’ experiences,⁴⁹⁸³ i.e., school curriculum, documentation center/museum/archives/libraries, victims register and publication of the civil parties’ names in the judgment.⁴⁹⁸⁴

The last category encompasses ‘other projects’, which were presented as part of international mainstream definitions of reparations.⁴⁹⁸⁵ Those projects include the setting of a trust fund although the lead co-lawyers correctly pointed

⁴⁹⁷⁵ Ibid., para. 50.

⁴⁹⁷⁶ Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 689.

⁴⁹⁷⁷ UN Basic Principles and Guidelines, principle 15.

⁴⁹⁷⁸ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 54.

⁴⁹⁷⁹ Ibid., para. 55.

⁴⁹⁸⁰ Ibid., para. 56. For details on the projects see also Ibid., paras. 57-65.

⁴⁹⁸¹ Ibid., para. 66.

⁴⁹⁸² For details on the projects see Ibid., paras. 67-69.

⁴⁹⁸³ Ibid., para. 70.

⁴⁹⁸⁴ For details on the projects see Ibid., paras. 71-77.

⁴⁹⁸⁵ Ibid., para. 78.

out that collective or individual monetary awards cannot be entertained.⁴⁹⁸⁶ On the contrary, as previously examined,⁴⁹⁸⁷ that trust fund project, in process of development, would be constituted in order to support genuine and sustainable reparations,⁴⁹⁸⁸ and in addition to civil parties, it was said it could benefit via collective and moral reparations victims in a broader sense.⁴⁹⁸⁹ The second project proposed was the creation of an entity to monitor the implementation of reparations after the verdict.⁴⁹⁹⁰ Concerning granting Cambodian citizenship to Vietnamese victims, it was clarified that actually it was only intended to facilitate applications for citizenship.⁴⁹⁹¹ The last project proposed was to identify requirements and preferences for professional training and, to implement it, the Cambodian Government would be invited.⁴⁹⁹²

The civil parties' lead co-lawyers acknowledged that their projects are ambitious and difficult to implement and that is their responsibility to prepare reparations projects to be feasibly implemented,⁴⁹⁹³ however, they stressed that reparations should be meaningful for civil parties and not only limited to the 'easy options' to be implemented.⁴⁹⁹⁴ This may be understood as the IACtHR has considered declaration of wrongfulness, for example, via the issuance of the judgment, as insufficient in cases concerning serious human rights violations.⁴⁹⁹⁵

At the time of writing this thesis, in Case 002/01, within *Nuon Chea et al.*, as previously noted,⁴⁹⁹⁶ upon Trial Chamber's request, the civil parties' lead co-lawyers have submitted a prioritized list of reparations projects. In order to endorse the reparations projects, the Trial Chamber has set the following requirements:

- 1) Proof of consent and cooperation of any involved third party has to be demonstrated;
- 2) Funding has to be fully secured, as the Chamber cannot endorse a reparation project that has secured partial funding only;

⁴⁹⁸⁶ Ibid., paras. 79-80.

⁴⁹⁸⁷ See supra Chapter V 2.4.3.2.

⁴⁹⁸⁸ Nuon Chea et al. (Case 002), E125/2, 12 March 2012, para. 83.

⁴⁹⁸⁹ Ibid., para. 84.

⁴⁹⁹⁰ Ibid., para. 85.

⁴⁹⁹¹ Ibid., paras. 88 and 90.

⁴⁹⁹² Ibid., paras. 94 and 95.

⁴⁹⁹³ Ibid., paras. 100-101.

⁴⁹⁹⁴ Ibid., para. 99.

⁴⁹⁹⁵ IACtHR, Case of Bulacio v. Argentina, Judgment of 18 September 2003, para. 96.

⁴⁹⁹⁶ See supra Chapter V 3.4.2.1.

3) Any necessary additional information shall be provided to the Chamber, such as detailed descriptions (including sketches and/or pictures) and budget plans of proposals.⁴⁹⁹⁷

A brief presentation of these projects, which have been grouped up by the civil parties' lead co-lawyers under three categories, and the Trial Chamber's observations on them follow.

First category (remembrance and memorialization), which consists in three projects: i) remembrance day, which fulfills the requirements as Cambodia has set May 20 every year for that;⁴⁹⁹⁸ ii) public memorials initiative, about which no funding has yet been secured;⁴⁹⁹⁹ and iii) a memorial in remembrance of victims entitled 'those who are no longer with us', about which only partial funding (from France) has been secured and the Phnom Penh municipality's commitment is still outstanding.⁵⁰⁰⁰

Second category (rehabilitation), which consists in two projects: i) testimonial therapy, which aims to provide civil parties in *Nuon Chea et al.* 'the means to address the psychological suffering caused by the crimes perpetrated against them by talking and recording the traumatic experiences with mental health workers' and such testimonials 'would later be read aloud in public ceremonies in accordance with religious or spiritual beliefs and cultural practices',⁵⁰⁰¹ has received partial funding (from Germany) but it has been requested to clarify whether that funding is sufficient to cover the 36 months to implement the project (planned in conjunction with the Transcultural Psychological Organization Cambodia) or if there were no further funding for how long the project could continue;⁵⁰⁰² and ii) self-help groups, which would provide the civil parties in *Nuon Chea et al.* 'with collective therapy through participation in eight group sessions, permitting them to talk about their

⁴⁹⁹⁷ Nuon Chea et al. (Case 002), 6 September 2013, para. 3.

⁴⁹⁹⁸ Nuon Chea et al. (Case 002), 23 August 2013, para. 5; Nuon Chea et al. (Case 002), 6 September 2013, para. 4.

⁴⁹⁹⁹ Nuon Chea et al. (Case 002), 23 August 2013, para. 6; Nuon Chea et al. (Case 002), 6 September 2013, para. 4.

⁵⁰⁰⁰ Nuon Chea et al. (Case 002), 23 August 2013, para. 7; Nuon Chea et al. (Case 002), 6 September 2013, para. 4.

⁵⁰⁰¹ Nuon Chea et al. (Case 002), 1 August 2013, para. 3.

⁵⁰⁰² Nuon Chea et al. (Case 002), 23 August 2013, para. 8; Nuon Chea et al. (Case 002), 1 August 2013, para. 3; Nuon Chea et al. (Case 002), 6 September 2013, para. 5.

suffering',⁵⁰⁰³ and about which the same situation/observations concerning the previous project are applicable.⁵⁰⁰⁴

Third category (documentation and education), which consists in three projects: i) mobile exhibition and education project, which seeks to establish an educational exhibition to inform and educate post-war generations of Cambodians about the crimes perpetrated during the Khmer Rouge period,⁵⁰⁰⁵ whose funding (from Germany) and the commitment from implementing non-governmental organizations has been secured;⁵⁰⁰⁶ ii) permanent exhibition (implemented by non-governmental organizations) that includes documents, photographs, relics, multi-media testimonies of civil parties and other survivors, historical dioramas, artistic displays and other interactive, educational and dialogue components to educate the public about the Khmer rouge regime and about which only partial funding has been secured and, thus, it is necessary to clarify whether, if were not given further funding, for how long the project (originally set for 24 months) could continue;⁵⁰⁰⁷ and iii) history book chapters, about which the Trial Chamber reminded the civil parties that it:

[...] is unable to endorse any book chapter on facts that are currently under judicial consideration and need to be finally adjudicated. Therefore even though the idea is generally laudable, the Trial Chamber cannot provide any official endorsement regarding this project.⁵⁰⁰⁸

Lastly, but equally important, as previously said, the ECCC reparations orders cannot be issued against Cambodia. Be that as it may, according to internal rule 113 (1), enforcement of reparations granted under rule 23 *quinquies* (3) (a), i.e., those borne by the accused:

[...] shall be done by appropriate [Cambodian] national authorities in accordance with Cambodian law on the initiative of any member of the collective group, unless the verdict specifies that a particular award shall be

⁵⁰⁰³ Nuon Chea et al. (Case 002), 1 August 2013, para. 3.

⁵⁰⁰⁴ Nuon Chea et al. (Case 002), 23 August 2013, para. 7; Nuon Chea et al. (Case 002), 6 September 2013, para. 5.

⁵⁰⁰⁵ Nuon Chea et al. (Case 002), 1 August 2013, para. 3.

⁵⁰⁰⁶ Nuon Chea et al. (Case 002), 23 August 2013, para. 9; Nuon Chea et al. (Case 002), 6 September 2013, para. 6.

⁵⁰⁰⁷ Nuon Chea et al. (Case 002), 1 August 2013, para. 1 ; Nuon Chea et al. (Case 002), 23 August 2013, para. 10 ; Nuon Chea et al. (Case 002), 6 September 2013, para. 7.

⁵⁰⁰⁸ Nuon Chea et al. (Case 002), 6 September 2013, para. 8.

granted in relation only to a specified group. In such case, any member of the specified group shall instead initiate enforcement of that award.⁵⁰⁰⁹

In turn, enforcement of reparations orders under rule 23 *quinquies* (3) (b), which were examined under this subsection, ‘does not fall within the scope of this Rule [rule 113 (1)]’.

4.5. Comparative Conclusions

A preliminary observation is that when the ICC and the ECCC have discussed aspects relevant to collective and/or individual reparations and modalities of reparations, they have paid attention to the UN Basic Principles and Guidelines and jurisprudence of regional human rights courts, especially that of the IACtHR. With regard to claiming and being granted individual and/or collective reparations, whereas at the ICC, upon the respective Chamber’s assessment, reparations may be granted on individual or collective basis, at the ECCC only collective and moral reparations can be granted according to its Internal Rules, which have accordingly been applied in *Duch* and in the ongoing *Nuon Chea et al.*

Whereas individual reparations at the ICC may normally be compensation, they can also take other forms such as restitution and rehabilitation. If individual reparations are directly ordered by the ICC, these might be more individualized than when made by the TFV. The TFV may be involved in distributing individual awards when it is impossible or impracticable for the ICC to make reparations directly. According to the ICC RPE, collective reparations at the ICC can be made through the TFV, which is in practice normally expected, for example, in *Lubanga*. The TFV’s draft implementation plan for collective reparations has to be approved by the ICC. Then, such plan is included in a reparations order, implemented by the TFV but monitored/supervised by an ICC Chamber, for instance, in *Lubanga*. The ICC may order the distribution of collective awards through an organization approved by the TFV. There may be three main possibilities to provide collective reparations. First, to give a sum to an entity representing the victims and it may then decide how to distribute the sum. The outcome may thus be individualized but the process is collective. Second, collective reparations can be given via a

⁵⁰⁰⁹ See also Kaing Guek Eav alias Duch (Case 001), Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 665 (‘[...] there is no doubt that [Cambodian] domestic courts are bound to give effect to the ECCC reparation orders against convicted persons, similar to any other reparation order issued by domestic courts’).

financial award issued by the ICC in favor of community institutions/projects (e.g., with rehabilitative purposes) authorized by either an organization (approved by the TFV) or authorized by the TFV or by a Chamber themselves. Third, collective awards can also be symbolic such as public apologies. The IACtHR's case law on reparations may be *mutatis mutandi* illustrative when implementing the above-mentioned three main possibilities. Also, the ICC may use the *cy press* doctrine, employed in, for example, the United States, when it orders collective awards or fixed lump sums as may be impossible to give reparations to all victims. Although the ICC Trial Chamber I in its reparations decision in *Lubanga* has concluded that individual and collective reparations are not mutually exclusive, it has endorsed the TFV's recommendation to focus on collective reparations, following a community-based approach, as these would be more beneficial than individual reparations.

Collective reparations are available at the ICC and the ECCC although in the latter they cannot include compensation and restitution of property as only 'collective and moral' reparations can be granted, i.e., to redress moral but not material damages and via collective awards. In any case, it is concluded here that collective reparations are in principle most suitable in the context of international and hybrid criminal courts based on four reasons. First, the collective nature of the crimes under the jurisdiction of the ICC and the ECCC and, hence, violence predominantly collective should in principle be redressed collectively as crimes under the ICC and the ECCC are mainly perpetrated against a group or collectivity rather than an individual in particular. Second, implementing individual reparations is difficult due to, *inter alia*, the limited resources available at those courts. Third, victims may value collective reparations in a more constructive way. Fourth, via some modalities of collective reparations, e.g., public apologies, memorials or some rehabilitative measures, the scope of reparations beneficiaries may at least indirectly include victims who did not have the opportunity to claim reparations or who were not even identified at the ICC or the ECCC.

Having said so, individual reparations may also play an important role to redress the harm of victims and, therefore, their complete exclusion from the ECCC reparations regime may be criticized. The reasons for this criticism, which also highlight their applicability in the ICC reparations regime, are basically three. First, victims' requests and expectations, e.g., in *Lubanga* some victims have manifested preference for individual reparations over collective ones, and in *Duch*, some civil parties showed some disappointment and frustration when they realized that they would not receive any (financial) individual reparation.

Second, there are certain difficulties to implement collective reparations, including not paying sufficient attention to the individual dimension of the crimes. Third, international human rights standards are expressed in individual terms and individual awards may better recognize the status of each victim as a reparations right holder.

Accordingly, in agreement with the ICC and relevant IACtHR's case law on reparations, the best approach in cases of international crimes/serious human rights violations is to focus on collective reparations but without excluding individual reparations. Therefore, the complete exclusion of individual reparations from the ECCC regime is herein considered as detrimental to the status of victims as reparations claimants. In any case, some collective reparations normally report also individual benefits, i.e., dual collective-individual benefits from collective (and moral) reparations, e.g., scholarships provided to a collective of victims. Be that as it may, reparations, *inter alia*, should be appropriate, adequate and prompt and be awarded without discrimination.

When it comes to standard of proof for granting reparations, the ICC's reparations decision and the ECCC's Internal Rules/case law agree on the 'balance of probabilities', 'preponderance of proof/evidence' or 'more likely than not to be true' standard, which is less demanding than the 'beyond reasonable doubt' standard required for conviction. Such standard also corresponds to national practice, civil claims commissions, human rights' case law and the ICTY/ICTR Statutes provisions on restitution. As for the burden of proof, although in principle victims are the ones who have to prove their reparations claims at the ICC and the ECCC, these courts and their instruments are flexible and the Judges using their own powers may call relevant evidence. This approach is sound as victims normally face problems to obtain pertinent evidence for their reparations claims.

Collective and individual reparations can take several modalities or forms. When it comes to modalities of reparations, the ICC is the international criminal judicial forum which in principle provides victims as reparations claimants with the broader array of possibilities, in accordance with the UN Basic Principles and Guidelines and human rights bodies' jurisprudence, especially that of the IACtHR. In contrast, the ECCC Internal Rules explicitly exclude compensation from the modalities of reparations available at the ECCC. Moreover, in *Duch* even though an important number of reparations requests asked by the civil parties were considered as appropriate, they were rejected due to implementation problems caused in turn by the ECCC's framework and the

convicted's indigence. This situation is expected to be dealt better under the amended regime applicable to *Nuon Chea et al.*, although its severance in mini-trials has to be handled carefully as for collective reparations modalities to avoid tensions among the several groups of reparations claimants. Implementation/enforcement problems may be also present in some modalities of reparations at the ICC; however, this presents (much) better chances to handle these challenges than the ECCC due to the existence of the TFV and its international scope involving assistance/cooperation of a large number of States Parties to the ICC Statute and the international community.

At the ICC, restitution, compensation, rehabilitation and other modalities (which mainly includes satisfaction) are foreseen in its Statute and have been accordingly discussed in Trial Chamber I's reparations decision and related submissions in *Lubanga*. First, restitution seeks to restore the victims to his/her situation before the crime took place; however, due to the nature of international crimes this is frequently unachievable. Unlike the ICTY, the ICTR and the SCSL and also examined national systems, which conceive restitution (as a penalty) limited to restitution of property/proceeds, restitution as a reparations modality is not restricted to it but the ICC would need to rely on state cooperation for that kind of specific restitution.

Second, as for compensation, it has been considered physical damage, moral/non material damage, material damage (including loss of earnings and property), lost opportunities, and, *inter alia*, legal and medical services as assessable damages. These categories are similar to those found by the regional human rights courts, in particular the IACtHR's case law, and the national practice examined. Generally speaking, compensation can be considered necessary to redress harm in international crimes/serious human rights violations cases. Whether compensation is a feasible reparations modality at the ICC may be decided on factors such as accused's assets and/or available funds, quantifiable harm and the existence of a limited or definable group of victims. For its implementation, the TFV's funds might be used. In any case, compensation in national systems is the most common modality of reparations and/or is often present as financial penalty.

Third, rehabilitation includes provision of medical, psychological as well as relevant legal and social services, reintegration of child soldiers, and may include the victims' communities in the sense that rehabilitation programs are implemented in those locations. Implementation difficulties may be sorted out via the TFV's know-how and by implementing programs for case-based reparations claimants or, as a second option, by placing them in TFV's on-going

assistance programs but identifying them as reparations beneficiaries. The convicted (if not indigent) should also contribute to the funding of rehabilitative reparations measures.

As for other modalities of reparations at the ICC, Trial Chamber I in its reparations decision in *Lubanga* has listed conviction and sentence as such and apologies from the convicted, which constitute satisfaction measures, alongside others, mainly satisfaction measures, such as (educational) campaigns to enhance victims' situation, certificates on victims' harm, and outreach and promotional programs to reduce stigmatization and marginalization of victims, in whose implementation Trial Chamber I has considered its broad jurisdiction and the cooperation/assistance from States Parties to the ICC Statute and the international community. Although not explicitly considered by Trial Chamber I, satisfaction measures such as naming of a street/school after the victims, public monuments and commemoration, search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of the killed victims, and assistance to recover, identify and bury the bodies normally require state action and cooperation. Moreover, obligations to identify/sanction those responsible not prosecuted by the ICC (satisfaction) and amend laws (guarantees of non-repetition) are *per se* state obligations. Additionally, when involving ex state agents, these measures may be implemented by a domestic (civil) court and/or a regional human rights body, which may in turn rely on the ICC's findings. Concerning guarantees of non-repetition, it might be possible to adapt them to the ICC case-based reparations regime as the ICC can always call upon the States Parties to the ICC Statute and the international community in general to act responsibly and promote reconciliation. Although reparations orders cannot be issued against States, with regard to their enforcement, States Parties to the ICC Statute are obligated to cooperate with the ICC and give effect to the ICC reparations orders.

When it comes to the ECCC, in *Duch* and *Nuon Chea et al.*, reparations measures, which were requested and are being sought respectively, fall mainly into the categories of satisfaction and rehabilitation. Compensation and restitution of property are outside the ECCC's scope. Those modalities and their implementation were analyzed here in the light of both the former and the current reparations implementation regimes at the ECCC. In any case, when awards are ordered to be borne by the convicted, they need to be enforced in ordinary Cambodian courts. About the former regime (applied in *Duch*), although most of the requests were considered as appropriate collective and moral reparations, only two were accepted due to implementation obstacles and,

to some extent, lack of specificity. Convicted's indigence, the ECCC's lack of power to order Cambodia to implement reparations, and the absence of a mechanism similar to the TFV explain that outcome. The reparations requests granted by the ECCC were that names of civil parties and their immediate family members were included in the trial judgment, and that public statements of apology by the convicted during the proceedings were compiled and attached to the appeal judgment, which are available at the ECCC's web site. These reparations requests were implemented by the ECCC itself. However, it was not accepted to include victims' comments to the apology compilation, which may be questioned considering the ECCC's quite limited reparations regime and the arguable need to 'compensate' the civil parties' perception of lack of sincerity from the accused.

Even though most of the rejected reparations modalities were considered appropriate, the Supreme Court Chamber could only encourage external actors (including Cambodia and the international community) to provide (financial) support to implement them. These reparations requests are summarized as follows. First, although broadcast media dissemination of judgment portions was considered appropriate, it was rejected as the (unspecified) costs could not be afforded by the convicted. In any case, posting the judgments in the ECCC's web site and related outreach and dissemination activities undertaken by ECCC sections were considered sufficient. Second, requests for individual monetary awards or a fund for, for example, micro-enterprise loans were rejected. Third, symbolic measures such as a national day, naming of buildings after the victims, official ceremonies, plaques and a government's letter of apology were considered appropriate; however, they were rejected due to the ECCC's lack of power to order Cambodia to implement those measures. Fourth, although requests for construction of pagodas and other memorials were considered proper reparations and also to contribute to national reconciliation, they got rejected because of the convicted's indigence, lack of ECCC's power to order Cambodia to do so and, to some extent, lack of specificity. Fifth, preservation of paintings, sites and archives were rejected due to lack of specifications. Sixth, although free medical care and educational measures were found appropriate, they were rejected due to the ECCC's lack of power to order Cambodia to do so. Seventh, paid visits for civil parties to memorial sites were rejected as no basic information was provided.

Under the ECCC's current reparations implementation regime, internal rule 23 *quinquies* (b), applicable to *Nuon Chea et al.*, provides with the possibility to implement reparations modalities like most of those rejected in *Duch*, starting

with the early identification of reparations projects by the civil parties' lead co-lawyers in coordination with the VSS. The in-advance feasibility assessment of these projects (to be potentially later granted) by the Trial Chamber has been taking place in *Nuon Chea et al.* What has not been changed is that reparations can only be 'collective and moral' and compensation is still excluded, besides the ECCC's lack of power to order Cambodia to implement reparations. However, there has been *inter alia* a project for an externally financed trust fund to finance reparations requests as the co-accused are indigents. Thus, the VSS in liaison with, for example, a trust fund, may implement reparations. Reparations projects have included edification of memorial sites and stupas, a framework of psychological support and respective centers, establishment of museums and preservation of crime sites. The Trial Chamber has requested further information on steps to implement them as at least some of them may require Cambodia's approval. The lead co-lawyers have provided further information, including some ongoing dialogue with the Cambodian Government. Dissemination of the (future) judgment(s) and compilation of a civil party list have not been found contentious. Even though modalities of reparations and their implementation are in process of being crafted, the lead co-lawyers have stressed the importance of meaningful reparations and added that some reparations projects may benefit not only civil parties but also victims (in a broader sense). In Case 002/01, within *Nuon Chea et al.*, the prioritized list of reparations projects of the civil parties' lead co-lawyers consists in remembrance and memorialization, rehabilitation, and documentation and education. At the moment of writing this thesis, these reparations projects are still under development and fall under the modalities of satisfaction, rehabilitation and, to some extent, guarantees of non-repetition. The Trial Chamber has already endorsed some reparations projects. Whether the Trial Chamber will finally endorse the outstanding prioritized reparations projects will depend on any involved third party's consent/cooperation, the existence of funding, and any necessary additional information. In any case, even though ECCC reparations orders cannot be rendered against Cambodia, only concerning reparations orders to be borne by the accused, Cambodia is obliged to give effect to them.

Although victims lack reparations claimant status at the ICTY, the ICTR, the SCSL and the STL, possibilities for some modalities of reparations foreseen at the ICTY, the ICTR and the SCSL instruments are restitution of property and proceeds (as a financial penalty), compensation (delegated to national systems) and rehabilitation/support (granted only to victims as witnesses or potential witnesses). At the STL, references are only to compensation (delegated to

national systems) and rehabilitation (for witnesses). In practice, only rehabilitation at the ICTR (mainly) via the provisions of medical care, especially anti-retroviral drugs against HIV/AIDS, has been implemented but limited solely to witnesses or potential witnesses and concerning sexual violence victims. However, unlike the ICTY, at the ICTR support for witnesses has not been limited to their testimony at the tribunal but has been expanded to pre-trial and post-trial. The availability of quite scarce resources from the respective voluntary trust funds has been a feature common to the ICTY and the ICTR, which explains the limited development of rehabilitation as a modality of reparations. In Rwanda, via an ICTR's early cancelled support program, a peace village was built by a NGO, which constitutes a symbolic modality of reparations, arguably satisfaction. Be that as it may, in Rwanda, the former Yugoslavia region, and Sierra Leone, victims of crimes under the jurisdiction of the ICTR, the ICTY, and the SCSL have respectively benefited from modalities of reparations including compensation (normally not enforced though), restitution, rehabilitation and symbolic measures granted by institutions set up in the former Yugoslavia region (especially the Human Rights Chamber and concerning property claims the hybrid criminal courts in Kosovo and Bosnia and Herzegovina constitute an option), national Rwandan institutions/courts and the Sierra Leonean reparations program. However, as far as it is known, the 'delegation' to national systems for the victims to obtain compensation, as envisioned in the ICTY, the ICTR and the SCSL instruments, has not been implemented and restitution order provisions at these courts remain theoretical.

Concerning the examined national systems, it is concluded that victims have been most commonly awarded compensation and/or restitution of property either as a financial penalty or as reparation via civil court litigation or by state schemes/funds. Nevertheless, concerning state funds, other modalities of reparations such as satisfaction (United States) and rehabilitation (France) have also been granted. As for the ECtHR judgments against the United Kingdom and France, compensation has normally been granted. The state obligation to investigate and sanction perpetrators, i.e., satisfaction, has also been stressed by the ECtHR.

5. Chapter Conclusions

1. At the level of the international and hybrid criminal courts that have been examined in this thesis, the status of victims as reparations claimants only exist at the ICC and the ECCC, which is similar to the situation existent in the French system. At the ICC and the ECCC, reparations orders may only be issued against

the convicted person although they may be implemented by the TFV (ICC), or potentially with external funding by the VSS in liaison with non-governmental organizations, e.g., an externally subsidized trust fund, and governmental organizations under the new reparations implementation regime (ECCC). The main difference when it comes to the scope of reparations claimants and beneficiaries at the ICC and the ECCC is that while in the former victims can claim and benefit from reparations without holding the status of victim participants, in the latter victims need to be civil parties to claim collective and moral reparations. Indeed, this is one of the two purposes of civil party constitution and, thus, civil party participation includes the right to seek collective and moral reparations at the ECCC. In other words, whereas at the ICC victims' status as reparations claimants is independent from their status as victim participants, at the ECCC the constitution of victims as civil parties is a *sine qua non* condition to be reparations claimants, which is a feature also present in the French criminal proceedings. Having said so, there are important similarities in the victims' status as reparations claimants at the ICC and the ECCC. First, some modalities of collective reparations may benefit not only the reparations claimants but, at least indirectly, those individuals who could not apply for reparations, could not be identified and/or for whom no one claimed reparations benefits at the ICC or who could not become civil parties at the ECCC. Second, victims' harm to be redressed at the ICC and the ECCC depends on the accused's conviction, i.e., a causal link requirement. Third, not only direct but also indirect victims can claim and receive reparations and, in addition, the victim's harm to be redressed is of the same kind at the ICC and the ECCC. Fourth, at the ICC, victims as reparations claimants can be considered parties concerning their reparations claims during the reparations phase proceedings, i.e., after conviction, although there is no official civil party status at the ICC unlike the ECCC.

2. According to the ICC's case law, in particular Trial Chamber I's reparations decision in *Lubanga*, indirect victims, i.e., those who suffer harm as a result of the harm inflicted on direct victims, can also be reparations claimants and beneficiaries and this includes family members and successors, those who tried to prevent the commission of the crime and those harmed when helping/intervening on direct victims' behalf. The ECCC's case law has also considered indirect victims as reparations claimants and beneficiaries. The ECCC has referred to the injury-focused approach in criminal proceedings instead of the rights-focused approach employed in human rights courts, which has an impact on the ECCC's margin of discretion and the scope of reparations

claimants and beneficiaries, including an ECCC's more restricted approach as for presumption of harm concerning direct victims' immediate relatives. In any case, civil parties can claim reparations regardless of whether the direct victim is alive. Both the ICC and the ECCC have considered material, physical and psychological harm for reparations as well as both courts have taken into account cultural contexts to give content to the categories of indirect victims. As for causation to receive reparations, i.e., the link between the crime for which the accused is convicted and the harm inflicted on victims, ICC Trial Chamber I in applying rule 85 (a), which is not limited to direct harm, has used the 'proximate cause' standard. Although this legal standard (existent in Anglo-American systems) is acceptable, it should be applied in a restrictive manner to remove too remote or speculative harm from reparations. Only victims, both direct and indirect as previously defined, i.e., including family members, who suffered harm linked to the crimes for which the accused was convicted should claim reparations. Thus, the ICC case-based reparations regime will not be de-naturalized and an exponential increase in reparations claimants and beneficiaries will be avoided. In *Lubanga*, victims who suffered sexual/gender violence caused by the crimes for which the accused was convicted should also be redressed in that dimension of their harm. At the ECCC, the Supreme Court Chamber, under the ECCC Internal Rules, has applied the direct causal link, i.e., an injury suffered as a 'direct consequence' of the crime, which is similar to the French system. However, this includes not only direct but also indirect victims as far as there is a direct causal link, which is similar to the French system.

3. With regard to resources for implementing reparations, even though the ICC and the ECCC can issue reparations orders directly against the convicted, in implementing them, i.e., *inter alia*, bearing the respective costs, the ICC can in addition to the accused's financial resources rely on the TFV, but without affecting this body's general assistance mandate. The existence of the TFV is fundamental considering that normally the accused/convicted at international and hybrid criminal courts are indigents and due to the active role that the TFV can assume to implement reparations orders, for example, in *Lubanga*. A similar institution is non-existent at the ECCC but in *Nuon Chea et al.*, in application of the amended reparations implementation regime (internal rule 23 *quinquies*), it has been projected an externally subsidized trust fund (not like the TFV though) which may benefit civil parties. At the ICC, reparations and financial penalties, i.e., fines and forfeitures imposed on the convicted, have different nature as reparations seek to redress the harm inflicted on the victims and financial penalties seek to punish the perpetrator. However, at the ICC,

reparations and financial penalties are interrelated and may be considered as two sides of the same coin. In the Anglo-American systems, compensation and restitution imposed as penalties against the accused may have a dual punitive-restorative effect or even purpose. This is also the case of the 'sanction-reparation' penalty in France, which may benefit victims who did not become civil parties.

4. Victims who claim reparations can be considered parties concerning their reparations claims during the reparations phase proceedings at the ICC as acknowledged by Trial Chamber I and the Appeals Chamber; however, unlike the ECCC or the French system, there is no official civil party status at the ICC. In general terms, civil parties' scope of participation and procedural rights as reparations claimants at the ECCC, which is similar to the French system, is in some procedural instances broader than that of reparations claimants at the ICC. Nevertheless, any difference is compensated when reparations claimants also hold the status of victim participants at the ICC. Be that as it may, at the ICC, since legal representatives may (simultaneously) represent victim participants and those who are only reparations claimants, their actions will benefit all those who are seeking reparations. Moreover, at the ICC, victims can claim reparations by filling in the respective form. Victims who are applying for victim participant status and, additionally, want to claim reparations, have to fill in the respective form section. In this latter case, victim participants will also hold the status of reparations claimants. Victims who could not initially claim reparations can benefit from the ICC's exceptional court-initiated reparations proceedings and, once identified/notified, they can claim reparations. Concerning the ECCC, when victims apply for civil party status, which has as one of its two objectives to claim collective and moral reparations, relevant information such as injury, loss or harm suffered, to be later used for reparations requests is provided.

5. At the ICC, victim participants can normally via their representatives bring arguments and evidence on reparations during trial, including questioning of witnesses, but adopting a balanced approach with due regard to the accused's right to a fair trial and efficiency. At the ICC reparations phase proceedings, reparations claimants can request the postponement of the reparations hearings although they cannot initiate them. In turn, at the ECCC, they can request the Trial Chamber to adjourn its reparations order on a new hearing after the conviction/acquittal judgment. At the ICC reparations phase proceedings, before making a reparations order, victims as reparations claimants may intervene via representations when invited by the Trial Chamber and, if made, they must be considered by the Chamber. At the ICC, victims should also be allowed to

participate in the reparations phase proceedings as victim participants, i.e., to be granted relevant procedural rights beyond mere submission of representations upon the ICC's invitation, if they additionally hold this status. This is justified by, *inter alia*, these reasons: i) reparations phase proceedings are part of the overall trial process and victim participation is hence applicable; ii) victims' rights to both participate and claim reparations, i.e., not to deprive victims of procedural/participatory rights; iii) a RPE reference to participation during the reparations hearing; and iv) victims' special interest to claim and receive reparations, which is an important restorative justice manifestation and should be supported by an appropriate set of procedural rights. Indeed, in the reparations decision in *Lubanga*, Trial Chamber I arguably implied the application of the victim participant status for those holding it during reparations phase proceedings. Victim participants' personal interest is linked to the reparations request. Considering victims as parties (as also acknowledged by Trial Chamber I) with all relevant procedural rights when victims claim reparations during the reparations phase proceedings underlies those arguments. In the ICC reparations hearing, victims' legal representatives have a broader scope of action than in other proceedings as their questioning cannot be limited to written submissions. The number of victims who intervene in the ICC reparations hearing is expected to be higher than those who participate during trial proceedings. Victims can also request the ICC the appointment of experts to assess reparations and must be invited by it to make observations on the experts' reports. In *Lubanga*, upon Trial Chamber I's invitation, victim participants' legal representatives and the OPCV (representing reparations claimants and those who may later claim/benefit from reparations), submitted observations on the road to the reparations decision in *Lubanga* (not originally understood by the Trial Chamber as a reparations order) about relevant issues of the ICC case-based reparations regime such as collective/individual reparations, reparations modalities, implementation via the TFV, the harm to be assessed and the beneficiaries scope. In turn, the Appeals Chamber has considered the reparations decision to be a reparations order.

6. At the ECCC, during the trial in *Duch*, civil parties filed a joint written submission, detailing, *inter alia*, their requests for collective and moral reparations. This was followed by final submissions on reparations, which were in turn complemented by civil parties' participation in hearings normally via their lawyers. Under the amended regime, applicable to *Nuon Chea et al.*, civil parties' lead co-lawyers have to make a single reparations claim for the consolidated civil parties group. As for reparations projects, the initial

specification thereof and further clarifications, as foreseen in the amended Internal Rules, have been already applied by the lead co-lawyers in cooperation with the VSS and following consultation with civil parties' lawyers in *Nuon Chea et al.* It is expected that via this process meaningful and feasible reparations can be awarded to the civil parties in this case, which includes an important number of civil parties who participated in *Duch* and who got almost all their reparations requests rejected (under the previous reparations implementation regime). The severance of *Nuon Chea et al.* in mini-trials is in general positive in order to increase a meaningful participation concerning reparations requests and as far as the civil parties are informed of the progress of their individual cases. Harm suffered by civil parties and their reparations requests will be progressively considered in the respective trials/mini-trials in *Nuon Chea et al.* At the moment of writing this thesis, in Case 002/01, within *Nuon Chea et al.*, following the Trial Chamber's request, the civil parties' lead co-lawyers provided a prioritized list of reparations projects that are under development. The civil parties' lead co-lawyers and lawyers, the VSS and partner organizations and entities are working together to make the prioritized list of projects implementable and raise the necessary funds so that those projects are endorsed by the Trial Chamber.

7. Concerning appeals against a reparations order, both at the ICC and the ECCC, victims (via their legal representatives) who are claiming reparations (ICC) and civil parties (ECCC) can appeal the respective reparations orders according to their respective instruments. This stems from the consideration of victims as parties in reparations phase proceedings at the ICC and as civil parties at the ECCC. In *Lubanga*, victims were granted the right to appeal the reparations decision, i.e., a reparations order, and exercised it via their legal representatives, which includes submission of supporting documents. The ICC Appeals Chamber has identified as victims holders of the right to appeal, as parties, a reparations order: i) victims who participated as victim participants in trial, including those who did not request reparations but made submissions on them during trial; ii) identified reparations claimants, without the need of having participated as victim participants; iii) and those individuals who were rejected in their victim participant applications or those who lost their victim participant status. These categories are coherent with the lack of need to be victim participants to claim reparations. The silence on the ICC instruments about whether victims' representatives have the right to appeal the Chamber's refusal to issue a reparations order may be interpreted in negative. At the ICC, when a reparations decision is not a reparations order, although victims cannot appeal it, victim participants can as such still participate in the respective interlocutory

appeals proceedings. In any case, at the ICC, victims who hold different status can benefit from common legal representation, their lawyers' actions and reparations outcomes. At the ECCC, civil parties cannot introduce additional reparations requests via appeals. At the ECCC, in *Duch*, the civil parties groups exercised their right to appeal against the Trial Chamber's judgment, which had refused most of their reparations requests. Additionally, civil parties, via their lawyers, made oral statements. However, the appeals outcome was mostly negative for civil parties due to the ECCC framework, especially under the previous regime applied in *Duch*.

8. Whereas at the ICC collective and individual reparations can be claimed and granted, the ECCC regime is restricted to collective and moral reparations, i.e., these cannot include individual reparations, compensation or restitution of property, which is criticized herein. Individual reparations do not necessarily have to be compensation at the ICC. Collective reparations at the ICC, which may be and are normally expected to be made through the TFV, for example, in *Lubanga*, can: i) be provided via distribution of a sum via an entity representing the victims; ii) be provided via a financial award to community institutions/projects authorized by an organization (approved by the TFV) or by the TFV itself; and iii) be of a symbolic nature. Collective reparations both at the ICC and the ECCC are in principle more suitable based on these reasons: i) the collective nature of the crimes under these courts' jurisdiction; ii) implementation difficulties with individual reparations; iii) collective reparations may be valued by victims more constructively; and iv) some collective reparations can benefit victims who could not claim reparations. Nevertheless, individual reparations can also play an important role due to: i) victims' expectations/preferences; ii) collective reparations may miss paying due attention to the individual dimension of the crime; and iii) individual awards may better individualize the victim's status as a reparations right holder. Therefore, in the context of international crimes and international/hybrid criminal courts, the best approach is to focus on collective reparations but without excluding individual awards since they are not mutually exclusive. Hence, the ECCC's legal framework by not considering individual reparations at all should be criticized. In any case, some collective reparations may also have an individual effect. Finally, the reparations standard of proof, i.e., 'balance of probabilities'/'more likely than not to be true', and the flexibility for victims when it comes to the burden of proof, i.e., evidentiary flexibility to prove their reparations claims, although reparations are still primarily claimant-driven constitute features common to the ICC and the ECCC.

9. Whereas at the ICC collective and individual reparations may assume a diverse variety of modalities, i.e., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, at the ECCC collective and moral reparations do not include compensation and restitution of property. In any case, both the ICC (in its reparations decision) and the ECCC's case law have relied on the UN Basic Principles and Guidelines and human rights bodies' jurisprudence, especially that of the IACtHR, to, *inter alia*, give content to these modalities and, more generally, to the notion of collective reparations. At the ICC, *inter alia*: i) restitution is not limited to restitution of property; ii) compensation includes physical, moral/non-material, material damages, lost opportunities, and costs; iii) rehabilitation, includes medical and psychological programs; iv) satisfaction includes conviction/sentence as such, apologies, memorials and campaigns; and v) guarantees of non-repetition have to be adapted to criminal proceedings. In some of these measures, state action is necessary for implementation and, thus, the ICC needs to rely on cooperation from the States Parties to the ICC Statute and the international community at large. Although ICC or ECCC reparations orders cannot be issued against States, as for their enforcement, ICC State Parties are obliged to give effect to reparations orders unlike the ECCC where only Cambodia is obliged and solely as for reparations orders to be borne by the accused. At the ECCC, in *Duch* only two reparations requests were granted, namely, inclusion of civil parties' names and their immediate family members in the trial judgment, and compilation of public apology statements and public access to them, available at the ECCC's web-site. These two reparations requests were implemented by the ECCC itself. Even though the rest of reparations requests, including broadcast media dissemination of judgment portions, memorials, official ceremonies and free medical care and educational measures were considered as appropriate collective and moral reparations, they were not granted due to the ECCC's legal framework, Duch's indigence, ECCC's lack of power to order Cambodia to implement them, and/or lack of specificity. Under the amended regime applicable in *Nuon Chea et al.*, similar reparations measure projects have been presented by the civil parties' lead co-lawyers and for their implementation: liaison between the VSS and non-governmental organizations, in particular an externally subsidized trust fund has been proposed, besides some on-going dialogue with the Cambodian Government. In Case 002/01, within *Nuon Chea et al.*, the prioritized reparations projects correspond to remembrance/memorialization, rehabilitation and documentation/education and whether the Trial Chamber finally endorses all of them will mainly depend

on any involved third party's consent/cooperation and funding. In any case, modalities of reparations at the ECCC normally are satisfaction, rehabilitation, and, to some extent, guarantees of non-repetition. Some of the modalities of reparations at the ICC and the ECCC, especially compensation (ICC) and the respective compensable damages, are similar to those existent at the examined national systems.

10. At the ICTY, the ICTR, the SCSL and the STL, victims lack the reparations claimant status. References to some proceedings and modalities of reparations under those courts' instruments are quite limited and do not change this conclusion based on the following reasons. First, compensation is 'delegated' to national systems, i.e., victims may use a condemnatory judgment from these tribunals to claim compensation at the domestic level, although there were unsuccessful attempts to set an internal compensation system at the ICTY and the ICTR. Moreover, as far as it is known, it has been not granted a national compensation award based on a judgment of the ICTY, the ICTR or the SCSL. At the STL, whether its Statute provision on identification of victims, who using this identification may later file compensation claims before national courts, will change the previous negative outcome remains to be seen. Victims not identified by the STL can also use a condemnatory judgment to claim compensation in domestic courts or other institutions. Victim participant status at the STL is not a pre-requisite to claim compensation at the national level. Second, some rehabilitative measures, such as anti-retroviral treatment at the ICTR, are restricted to victims who are witnesses or potential witnesses, i.e., given to victims not as reparations claimants. Third, although restitution of property and proceeds is foreseen at these courts' instruments (there is no restitution at the STL though), it may be ordered as a penalty but not based on reparations claims and, as far as it is known, it has not actually been ordered. Like at these courts, at the Anglo-American systems victims lack the status of reparations claimants in criminal proceedings. However, victims in the Anglo-American systems can benefit from compensation/restitution orders imposed on the accused as penalties, which unlike the ICTY and the other courts is commonly ordered. In any case, at some mechanisms outside these courts but related to crimes under their jurisdictions, e.g., Human Rights Chamber and the hybrid criminal courts in the former Yugoslavia region or national actions in Rwanda and Sierra Leone, victims have been reparations claimants and beneficiaries. This may be considered as an example of complementarity between international and hybrid criminal courts, and other transitional justice mechanisms in the area of reparations.

11. The importance of international and hybrid criminal courts for victims' status as reparations claimants in contexts of international crimes has to be highlighted. Thus, both the ICC and the ECCC constitute avenues where victims can be reparations claimants in contexts where, otherwise, victims would be left with empty hands due to the inexistence of or difficulties with national reparations programs and/or regional/international mechanisms. Moreover, an institution like the TFV, monitored and supervised by the ICC, may prove to be necessary to implement reparations at the level of international and hybrid criminal courts. Indeed, the process of inclusive consultation with victims and their communities to be undertaken when the TFV applies its reparations order implementation plan in *Lubanga*, following a community-based approach to collective reparations, will constitute an important avenue of participation for them, besides reparations claimants' written requests or their participation in Chamber-held hearings. Therefore, the Trial Chamber I's referral of individual reparations applications to the TFV in *Lubanga* is understandable as it is first necessary to know the total universe of reparations claimants and beneficiaries. Furthermore, the TFV's general assistance mandate includes the large number of victims, in the ICC's investigations, left outside by the ICC's case-based reparations regime and, thus, reduces potential tensions. At the ECCC, under the new reparations implementation regime, the VSS working in liaison with non-governmental organizations, for example, an externally subsidized trust fund, and governmental organizations seems to be a feasible and necessary way to guarantee the sustainable implementation of reparations requests projects as proposed in *Nuon Chea et al.* and also concerning other ongoing and future cases. Moreover, the process of consultation with civil parties' lawyers in *Nuon Chea et al.* exemplifies again that it is not only important what to receive as reparations but also how to receive reparations, i.e., via a victims' participatory process. Lastly, but equally important, when designing and implementing reparations regimes at the international and hybrid criminal courts, it should be borne in mind the more limited scope of these courts in comparison with national systems, at which victims can also claim reparations (mainly compensation) before civil courts or state funds.

Chapter VI. Thesis Conclusions

1. In contexts of massive commission of international crimes, international and hybrid criminal courts may constitute an important transitional justice mechanism, where victims can exercise one or more dimensions of their status. Although these courts in principle are driven by a retributive/deterrent or utilitarian justice approach and by adversarial system features in a greater or a lesser extent, the progressive and increasing introduction of restorative-oriented justice approach elements and inquisitorial system features have created better conditions to enhance the victims' status. Thus, whereas at the ICC, the ECCC and the STL victims' status dimensions are more numerous and/or broader in scope, at the ICTY, the ICTR and the SCSL, victims' status is fundamentally reduced to that of being witnesses. Victims' status as victim participants and/or civil parties and as reparations claimants clearly corresponds to the influence of the inquisitorial criminal system, e.g., France, and is guided by a restorative justice approach. Moreover, enhancement of the victims' status as witnesses has in some instances been guided by restorative justice approach considerations and/or inquisitorial criminal system influence. In any case, as seen in examined national practice (England and United States), some developments on victims' status have also come from the adversarial criminal system. Be that as it may, the idea that victims can play an important role in international and hybrid criminal courts in principle constitutes an increasing trend in these institutions.

2. Victims' status at the international and hybrid criminal courts that have been examined in this thesis may mainly consist of up to three dimensions, i.e., victims as witnesses, victims as victim participants/civil parties and victims as reparations claimants. Whereas the first dimension, i.e., victims as witnesses, exists in all the examined international and hybrid criminal courts, the other two dimensions of the victims' status are only present in some courts. Accordingly, what may be called the participatory dimension of the victims' status, i.e., victims as victim participants/civil parties, can only be exercised at the ICC and the STL concerning victim participants and at the ECCC with regard to civil parties. In turn, victims' status as reparations claimants only exists at the ICC and the ECCC (in the latter via civil party action). Although due to *inter alia* methodological reasons each of these dimensions has been primarily examined on its own merits, this thesis also paid close attention to the interaction between two or the three dimensions of the victims' status. Thus, the three dimensions of the victims' status as presented in this thesis can be cumulative depending on the

respective court's legal framework and/or practice as analyzed too. The underlying idea about this last point is that in principle victims as individuals constitute a unity and, thus, if it is provided under the respective court's legal framework/practice, the exercise of the three dimensions of victims' status as presented in this thesis should reflect such unity. Arguably, the three dimensions of victims' status can be held simultaneously and throughout the different stages of the proceedings only at the ICC. In other words, at the ICC, the same victim can hold and exercise his/her status as witness, victim participant, and reparations claimant on simultaneous basis. At the ECCC, although civil parties can provide unsworn testimony, they cannot be simultaneously witnesses. In any case, at the ECCC, the three dimensions of the victims' status are available, i.e., witnesses, civil parties and reparations claimants. Indeed, the same victim as a civil party can claim reparations, i.e., simultaneously hold a dual status under the scheme presented in this thesis, and since *inter alia* his/her unsworn testimony is considered evidence and it has not been given less weight than witness testimony at the ECCC, in this regard (s)he may in practice be considered as *mutatis mutandi* relatively similar to a 'witness'. At the STL, victims can hold the dual status victim participant-victim witness but since they cannot claim reparations at it, they cannot additionally be reparations claimants. At the ICTY, the ICTR and the SCSL, victim status is limited to the first dimension of victims' status considered in this thesis, i.e., victims as witnesses, although with some limited avenues of 'participation', namely, *amicus curiae* and victim impact statements. It should be additionally noted that at the examined international and hybrid criminal courts, when compared with the Prosecutor and the defence, victims' status is limited even when the latter hold the civil party status. However, the exception to this is arguably victims' status as reparations claimants due to the fact that, in this dimension of their status, victims can generally speaking be considered as fully fledged parties concerning reparations (phase) proceedings as for their reparations claims.

3. Victims' status as witnesses is present at all the examined international and hybrid criminal courts. Victims as witnesses are called to testify about facts known to them, normally by the Prosecutor or, where applicable, by victim participants/civil parties. Victims as witnesses do not express their own views and concerns (unlike victim participants) and their sworn testimonies are evidence (unlike victim participants' statements). Accordingly, the general legal regime for witnesses is also applicable to victims as witnesses. In any case, the principle of oral, live and in person testimony has been attenuated by measures which can be regarded as victim-friendly such as admission of testimony by

deposition and video-link, witness evidence in written form and hearsay evidence. Victims can hold the dual official status of victim participant-victim witness only at the ICC and the STL. At the ECCC, victims have to choose between being civil parties and witnesses, i.e., they cannot be simultaneously civil parties and witnesses. In any case, at the ECCC, considering that civil parties can still provide (unsworn) testimony, the fact that their testimonies are subject to adversarial argument and have not been given less weight than witness testimony, that the Judges/parties have referred to civil parties as witnesses, and that the Judges have treated civil party testimony as witness testimony, civil parties at the ECCC may in practice be considered as holding a sort of dual status. Revocation of dual status victim participant-victim witness at the ICC is not in principle justified when it is only based on unreliable testimony as the latter corresponds to victims' status as witnesses. To avoid serious issues concerning witness credibility similar to those present in the ICC's first completed trials, the ICC and its OTP have been adopting measures.

4. In order to, *inter alia*, avoid secondary victimization and for security reasons when the victims testify as witnesses (and also applicable to victim participants/civil parties), international and hybrid criminal courts have crafted protective measures, which have included measures specially tailored to protect vulnerable groups of victims and witnesses such as sexual violence and child victims. These measures, given *motu proprio* by Judges or Chambers or upon request of parties, victims or witnesses, are granted based on criteria such as witness's legitimate and objective fear that requires a protective measure (necessity), that the effect on the public proceedings is justified, and proportionality. Protective measures have included a wide array of actions such as sealed proceedings, expunging person's identification from records, pseudonyms, not disclosing a person's identity to third parties, image/voice distortion, *in camera* or closed proceedings, controlled cross-examination, witness being accompanied by someone else, and recorded audio/video testimony. These measures are in principle exceptional (especially during trial) and should be granted with due regard to the accused's rights and, during trial, measures concealing victims' identities are applicable as for the media/public rather than as for the accused. Protective measures constitute an exception to the principle of public hearings. There are also special evidentiary principles applicable to sexual crimes, i.e., non-corroboration as particularly emphasized on sexual crimes, irrelevance of consent in oppressive circumstances, and irrelevance of victim's prior/subsequent sexual conduct. Protection of sexual

violence and other vulnerable victims has also taken place *mutatis mutandi* under and been influenced by international human rights law.

5. Anonymity of victim witnesses has been applied exceptionally during pre-trial. As for trial, for those international and hybrid criminal courts whose instruments are ambiguous/keep silence on the issue (ICTY, ICTR, SCSL, ICC), the best option is not to grant anonymity based on a systematic reading of their instruments, due regard to the accused's right to a fair and impartial trial, witness protection programmes and the existence of other less restrictive protective measures. As for the STL and the ECCC, even though their instruments explicitly (STL) and implicitly (ECCC) allow anonymous witness's testimony exceptionally during trial, such testimony should be avoided due to similar previous considerations. In any case, at the ICC, the STL and the ECCC, victims as participants or civil parties exceptionally can participate (ICC, ECCC) or should be allowed (STL) to participate anonymously during trial, which corresponds to the difference in nature between victims' status as witnesses and as victim participants/civil parties. Hence, an absolute, complete and irrebuttable prohibition of anonymous victim participants during trial (STL's emerging approach) is criticized herein and a more balanced approach (ICC's) by allowing anonymous victims with limited participation modalities to protect the accused's rights is better. Be that as it may, the application of victim-friendly measures and protective/special measures available to witnesses should make the reliance on anonymous witnesses during trial unnecessary. Therefore, the predominant trend consisting in not allowing anonymous witnesses during trial in the practice of the studied international and hybrid criminal courts is reasonable.

6. Victims' status as victim participants/civil parties only exists at the ICC, the STL (victim participants) and at the ECCC (civil parties). Victim participants intervene to present their own views and concerns and civil parties participate in criminal proceedings by supporting the prosecution and to seek reparations. Victims once admitted as civil parties, unlike victim participants, are not subject to prior authorization to participate. This is related to the difference in status between victim participants and civil parties. However, the modalities of participation/procedural rights in both cases are generally speaking similar and, thus, the difference in status between civil parties and victim participants is reduced in practice. To be granted the victim participant or civil party status, a *prima facie* evaluation, which is necessary due to the volume of applications, is conducted requiring applicant's identification, crimes under the court's jurisdiction, physical/material/mental personal harm, and causal link between the crime and harm. To be allowed to participate, victim participants

additionally have to demonstrate that their personal interests are affected and also victim participation's consistency with the accused's rights. Not only direct victims but also indirect victims, i.e., those harmed by the direct victim's harm and who go beyond family members, can qualify as victim participants/civil parties. Measures to speed up the victims' application process have been adopted as they are necessary considering the high volume of applicants but those measures should remain within the respective court's legal framework. As seen in the practice of the ICC and the ECCC, victims' status as participants/civil parties can later be revoked as it is granted on *prima facie* basis, which may lead to victims' frustration and disappointment. At the ICC, in some very specific instances (during investigation/pre-trial), victims can via observations/submissions participate without holding the official/formal victim participant status granted upon application.

7. Whereas victim participants at the ICC can intervene during judicial proceedings within the investigation, victims can only participate as victim participants at the STL after the indictment confirmation. At the ECCC, victims cannot participate as civil parties during preliminary investigations where victims can only be complainants. At the ECCC, victims can participate as civil parties during judicial investigations. Victim participants' modalities of participation/procedural rights during the pre-trial stage of a case at the ICC and the STL are *mutatis mutandi* similar and include ICC case-record access (*ex parte* materials excluded), STL case-file access (confidential/under seal and *ex parte* materials excluded), access to 'disclosure' materials under conditions (STL), attendance at hearings (except *ex parte* (ICC) or excluded by the Pre-Trial Judge (STL)), and participation in hearings and filing of written motions not excluded by the instruments (ICC) or the Pre-Trial Judge (STL). As for the ICC, directly related to/during charges confirmation, victim participants can file submissions on parties' evidence admissibility/probative value and examine such evidence, and can examine parties' witnesses. In the ICC's practice, victim participants cannot file evidence additional to that filed by the parties. During pre-trial proceedings, civil parties have similar procedural rights than victim participants but they are broader due to civil parties' status as parties. Thus, civil parties, unlike victim participants, can request the conduct of investigations linked to the Co-Prosecutors' ones. Additionally, civil parties can *inter alia* access the dossier, confront and question the accused, request and propose witnesses, attend and participate via oral and written submissions in the proceedings (unless participation is not allowed, e.g., provisional detention hearing), and support the prosecution.

8. During trial, whereas the ICC's practice has broadened the victim's participatory regime, the ECCC's instruments/practice have sometimes limited the civil party's participation. This leads to an outcome where the status of victim participants (at the ICC) and civil parties present similar features, e.g., whereas civil parties can support the prosecution explicitly under the ECCC rules, the ICC's case law allowing victim participants to tender/challenge evidence on the accused's guilt or innocence may be considered as an indirect support to the Prosecutor. In any case, victim participants and civil parties are not additional, auxiliary or parallel prosecutors. The STL RPE generally speaking follow the ICC's practice/legal framework, explicitly including some modalities of participation/procedural rights not explicitly included in the ICC RPE but developed in the ICC's case law; however, the STL RPE are relatively conservative in some aspects. Be that as it may, civil parties' rights are still broader than those of their victim participants counter-parts. At the ICC and the STL, victim participants, *inter alia*, have notification right, can access documents, materials, and filings (*ex parte* excluded), can attend/participate in public and closed hearings (as for *ex parte* hearings, it has been allowed by some ICC Trial Chambers), can participate orally (opening and closing statements included) and in writing, can introduce/challenge evidence (calling witnesses included), can question witnesses/the accused, can testify under oath, can benefit from disclosure (ICC's practice) and may have certain disclosure obligations. At the ECCC, civil parties, *inter alia*, have legal representation right, have audience right, can provide unsworn testimony and statements of suffering, can support the prosecution but without being transformed in an additional Prosecutor, can propose witnesses to be called by the Chamber, can respond preliminary objections, can file written submissions, can examine the case file, can make closing statements, and can tender written evidence.

9. With regard to sentencing, there is the curious situation in which whereas victim participants at the ICC and the STL can intervene via, for example, oral and written submissions, the ECCC's practice has precluded civil parties from doing so although they can provide statements of suffering during trial. Thus, victim participants' status is arguably stronger than that of the civil parties. In any case, victim participants cannot comment on specific imprisonment terms but can make submissions on, *inter alia*, the impact of the crimes on them. As for appeals, whereas both victim participants and civil parties cannot appeal the Trial Chamber's verdict/sentence (civil parties can appeal against the trial judgment when the Co-Prosecutors have done so), they can participate in the related appeals proceedings and also appeal a reparations

order. However, whereas civil parties can also appeal certain interlocutory decisions (including decisions on protective measures and civil party application) and participate in the respective proceedings, victim participants cannot appeal interlocutory decisions (ICC) or their right to appeal is limited to specific interlocutory decisions fundamentally affecting victim participants' personal interests and not as an automatic right (STL). In any case, victim participants can participate once the respective appeals have been triggered by a party. Victim participants' right to participate in appeals proceedings is not automatic.

10. In examining the participatory dimension of the victims' status (victim participants/civil parties), certain considerations of efficient proceedings (also involving more victims within a more conservative participatory regime), respect for the accused's rights, guaranteeing his/her right to a fair and impartial trial/proceedings, as well as the fact that not necessarily more procedural rights are more beneficial for the victims would support criticism against the victims' broad participatory regime in the ICC's practice. The ECCC's amended instruments/practice and the STL's instruments/emerging practice have taken note of these factors. However, in balance, the ICC's practice on an enhanced victim participatory regime and also *mutatis mutandi* applicable at the ECCC and the STL can be justified considering elements such as victims' right to and contribution to the truth in the fight against impunity (the main mandate of these courts) and the need to incorporate elements of restorative-oriented justice in what are predominantly retributive justice bodies. In any case, it should be avoided extremes, i.e., instruments/practices that preclude victims from participation in an entire procedural stage altogether or those which by enhancing victims' status severely/really affect other interests such as accused's rights or efficiency of proceedings. Division of trials in mini-trials may be sound, for example, at the ECCC, to make civil parties' participation more meaningful, and undertaken after having heard them. Victim participants/civil parties' procedural rights have as a rule and in practice been exercised via common legal representatives at the ICC, the ECCC and the STL. Although this is necessary to handle the large volume of victims (especially at the ICC and the ECCC), victims' interests must be considered when the respective court selects/appoints their common legal representatives and, in general, victims' opinions should always be sought by their lawyers and considered when represented. Otherwise, the participatory dimension of the victims' status may become purely symbolic, which may be even worsened when there are extra appointed legal representation filters/intermediaries. In practice, the difference between

anonymous/non-anonymous victim participants is diluted as they are represented by the same common lawyers. Finally, as for the ICTY, the ICTR and the SCSL, since there is no victim participant/civil party status, victims can only 'participate' during certain procedural instances, mainly, via *amicus curiae* and victim impact statements.

11. Victims' status as reparations claimants only exist at the ICC and the ECCC, among all the examined international and hybrid criminal courts. While at the ICC victims can be reparations claimants without being victim participants, at the ECCC victims have to be civil parties to claim and obtain reparations. Indeed, seeking collective and moral reparations is one of the two purposes of the civil party's participation at the ECCC. Similarities at the ICC and the ECCC include, *inter alia*, that: reparations orders are issued against the convicted; some collective reparations may potentially benefit those victims who could not claim them; harm to be redressed is of the same kind; granting reparations depends on the accused's conviction; and direct and indirect victims (including family members and successors) can claim and receive reparations for the harm caused to them by accused's crimes upon which (s)he is found guilty although at the ICC (unlike the ECCC) the causal link is not limited to direct harm and, thus, a 'proximate cause' causality standard may be used but restrictively applied to avoid an excessive influx of reparations claimants affecting the ICC's efficiency and the de-naturalization of the case-based reparations regime. Concerning resources for implementing reparations, the ICC can rely on the TFV in addition to the convicted's resources, which is of pivotal importance as normally the accused/convicted at these courts are indigent. The TFV is also fundamental to prepare reparations plans and to implement reparations orders, in particular collective reparations awards. Although the ECCC lacks a body like the TFV, under its amended reparations implementation regime, potentially such implementation with external funding may be conducted by the VSS in liaison with non-governmental organizations, e.g., an externally subsidized trust fund, and governmental organizations.

12. During reparations phase proceedings, i.e., after conviction, victims as reparations claimants at the ICC can be considered parties (as acknowledged by Trial Chamber I and the Appeals Chamber) although there is no formal civil party status unlike at the ECCC. Victim participants at the ICC can become reparations claimants by claiming reparations. ECCC civil parties' procedural rights concerning reparations claims may be in general considered broader than those available to victims as reparations claimants at the ICC; however, such difference is compensated when the reparations claimants also hold the victim

participant status at the ICC. At trial, victim participants can intervene concerning evidence/arguments as for reparations. During the reparations phase proceedings (including reparations hearings) reparations claimants at the ICC can not only intervene via representations upon the Chamber's invitation but they should also be allowed to participate as victim participants, i.e., be equipped with relevant procedural rights, (if they additionally hold this status) due to, *inter alia*, victims' particular interests in this phase and the underlying rights to participate and claim reparations (restorative justice) during this phase which is part of the overall trial. This is based on regarding victims as parties with all relevant procedural rights when they claim reparations during the reparations phase proceedings at the ICC. Regardless of having participated as victim participants, victims as parties can appeal reparations orders (via their legal representatives) as took place in *Lubanga*, and exercise other specific procedural rights at the ICC like civil parties do at ECCC. When a reparations decision is not a reparations order, reparations claimants can be victim participants in the respective interlocutory appeals if they hold that status at the ICC. In any case, as victims with different status have common legal representatives at the ICC, these lawyers' actions in practice benefit victims claiming or who can claim reparations. At the ECCC, in *Duch*, civil parties filed a joint written submission on reparations complemented by final submissions and participation in hearings. They also appealed, alongside their civil party status revocation, the denial of their reparations requests; however, the appeals outcome was negative due to the ECCC's previous reparations implementation regime. In *Nuon Chea et al.*, under the ECCC's amended reparations implementation regime, civil parties' co-lead lawyers (in cooperation with the VSS) submitted initial reparations projects, following consultations with the civil parties' lawyers, so that these may be determined as feasible by and later granted by the competent Chamber. This dialogue/consultation with civil parties at the ECCC exemplifies that it is not only important what to receive but also how.

13. Both individual and collective reparations can be granted at the ICC unlike the ECCC where only collective and moral reparations can be provided, which is criticized herein. Collective reparations should be preferred at international and hybrid criminal courts due to, *inter alia*, the collective nature of the crimes, a broader scope of potential beneficiaries, and courts' limited resources. However, individual reparations should not be excluded and indeed they are not mutually exclusive with collective reparations. As for the standard of proof to grant reparations, the 'balance of probabilities/more likely than not to be true' standard is applicable at the ICC and the ECCC. Whereas reparations at

the ICC can take the modalities of restitution, compensation, rehabilitation, satisfaction, and (adapted) guarantees of non-repetition, compensation and restitution of property are excluded from the ECCC, which is criticized herein. In any case, reparations implementation requires, especially in some reparations modalities, state cooperation. The ICC stands in principle better chances to implement reparations than the ECCC due to the existence of the TFV, which under the ICC's monitoring/supervision is directly involved in implementing reparations orders, and at which reparations claimants can participate actively via, *inter alia*, consultation when the TFV applies its reparations order implementation plan, written requests and Chamber-held hearings. This is complemented with the ICC's scope, i.e., a numerous collective of States Parties (not only one State, i.e., Cambodia as for the ECCC) obliged to cooperate with the ICC and enforce reparations orders although ICC or ECCC reparations orders cannot be issued against States. At the ECCC, implementation problems in *Duch* got almost all the reparations requests rejected although they were found to fall under collective and moral reparations. Nevertheless, this situation is expected to improve in *Nuon Chea et al.*, in application of the amended regime leading to projects implemented by the VSS in liaison with non-governmental organizations, e.g., an externally subsidized trust fund, and governmental organizations. In Case 002/01, within *Nuon Chea et al.*, the prioritized reparations projects are constituted by remembrance/memorialization, rehabilitation and documentation/education, and whether the Trial Chamber will finally endorse all of them will mainly depend on any involved third party's consent/cooperation and funding. Finally, at the ICTY, the ICTR, the SCSL and the STL, victims are not reparations claimants, compensation is 'delegated' to national systems, limited rehabilitative measures are given to victims as witnesses and restitution of property may be imposed but as a penalty. Even though the victim participant status at the STL is not required to claim compensation at the national level, it may be useful for identification purposes. Some external mechanisms have allowed victims to be reparations claimants in the former Yugoslavia, Rwanda and Sierra Leone.

14. As demonstrated in this thesis, victims' status as witnesses, victim participants/civil parties and reparations claimants capture to a very large extent the complex paths that victims of the most serious international crimes have to face when searching for justice and redress in international and hybrid criminal courts. *Inter alia*, protective/special measures when victims are intervening as witnesses (also applicable to victim participants/civil parties), modalities of participation/procedural rights regarding victims as victim participants/civil

parties and reparations modalities concerning victims as reparations claimants are specific manifestations at international and hybrid criminal courts of victims' rights to protection, participation and reparations. However, although such general rights are recognized in diverse sources of international law as well as in examined national practice, their implementation at international and hybrid criminal courts is particularly challenging. Two important factors that are in the background to the victims' status at international and hybrid criminal courts are the large number of victims and limited resources of these courts. In particular, concerning the dimensions of victims' status as victim participants/civil parties and as reparations claimants, these factors can be limitative and, thus, for example, common legal representatives have by necessity and to a very large extent become victims' mouths at international and hybrid criminal courts.

15. In addition to bearing those factors in mind, it is clear that in order to increase the chances of a successful and fulfilling development of the victims' status as witnesses, victim participants/civil parties and reparations claimants, other existent interests which are equally legitimate at the international and hybrid criminal courts must be taken into account. In other words, victims' status is a legal concept which does not work in isolation but in direct interaction with other interests, concerns and needs at international and hybrid criminal courts. Therefore, the accused's rights, in particular the right to fair and impartial trial/proceedings guarantees, can be more or less affected or at least put in jeopardy by an enhancement of the dimensions of victims' status. Thus, for example, closed sessions and especially anonymity of witnesses concerning victims as witnesses or certain modalities of participation which put victim participants/civil parties closer to a situation of a sort of additional or auxiliary prosecutor reveal the almost intrinsic tense relationship between victims and the accused. Efficiency of proceedings may also be affected when being too generous with victims' status and especially considering their high numbers. Moreover, victims' expectations may be crushed when implementation problems, in particular concerning reparations, prevent promises from becoming a reality. Furthermore, although international and hybrid criminal courts are by definition where international criminal law is applied, international criminal law as directly or indirectly interpreted and/or applied by other transitional justice mechanisms such as TRCs, reparations programs, domestic criminal and civil courts normally grant/may grant a more central role, stronger status to victims.

16. Having said so, it is concluded that international and hybrid criminal courts in balance constitute feasible and important judicial platforms for victims' status as witnesses, victim participants/civil parties and reparations claimants to

be fulfilled and enhanced. Since the most serious international crimes committed against a large number of victims fall under the jurisdiction of these courts, the incorporation of the victims' status not only as witnesses but also in their other two dimensions results logical and even necessary. Under no circumstances does this affirmation deny that to make such victims' status incorporation workable and meaningful for victims at these courts, reasonable and painstaking assessment of how to pull together victims' interests, rights and expectations with the other interests, needs at stake at and also limitations of these courts should be conducted and checked on constant basis. International and hybrid criminal courts have arguably and continuously examined the options to make the three dimensions of the victims' status, as considered in this thesis, workable leading to sometimes positive and other times negative outcomes. By doing so, each court has observed not only its own mistakes/limitations but also practices from its peer courts.

17. The general trend regarding victims' status at international and hybrid criminal courts is that victims no longer are limited to a status of being mere witnesses (ICTY, ICTR and SCSL) but, with the establishment of the ICC as followed by the ECCC and the STL, at least one of the other two dimensions of the victims' status has been considered as exercisable before them. This is arguably a trend that should guide the constitution of future international and hybrid criminal courts and always adopting the necessary guarantees, safeguards and mechanisms to make victims' status workable. In this manner, it is possible to satisfy and meet victims' expectations and rights. Such trend thus corresponds to the thirst for justice that victims in many instances cannot quench at the national level, either in national criminal courts or other transitional justice mechanisms. Careful consideration of the three dimensions of victims' status as presented in this thesis and also of how these dimensions interact is fundamental to design proceedings and mechanisms, and adopt coherent practices (both normative and jurisprudential) at international and hybrid criminal courts so that victims' status is enhanced in such a manner that not only victims themselves are benefited but also without disturbing other legitimate interests and within these courts' limited legal and material frameworks. This at the end of the day will have a positive repercussion on victims themselves.

18. Should the three dimensions of victims' status be present, it gives the respective international and hybrid criminal court more options in order to in some instances 'compensate' some limitations set by it to one victims' status dimension with some additions to other victims' status dimension, e.g., prohibiting anonymous witness's testimony during trial but allowing

anonymous victim participants' statements or limiting some procedural rights during trial but expanding them during the reparations phase proceedings. Therefore, creative solutions may help to relocate some options for victims from one status to another when necessary for the sake of victims themselves and also considering other competing/parallel interests and courts' limitations. After all, these three dimensions constitute part and parcel of the victim understood as an integral unity, as a human being and a subject of international law. Victims' status dimensions as witnesses, victim participants/civil parties and reparations claimants used creatively and correctly can provide an important quota of restorative justice to victims at international and hybrid criminal courts.

19. Provided that mechanisms, guarantees and balanced approaches, carefully considering other legitimate interests and implementation/resources limitations, are adopted to make victims' status workable at international and hybrid criminal courts, an additional and powerful reason to equip the victims' status with the three dimensions examined in this study, now only present at the ICC and the ECCC, at each future international and hybrid criminal court is that those dimensions correspond to the victims' rights to protection, participation and reparations under international human rights law. Thus, it is easier to sustain a more coherent and close dialogue between international criminal (procedural) law and international human rights law, which alongside international humanitarian law, regard victims as rights holders. This does not deny that while in international human rights law victims assume a central role, in international criminal (procedural) law victims' role still remains (relatively) secondary due to *inter alia*: i) the main goal pursued by international human rights law *vis-à-vis* international criminal law, i.e., state responsibility determination and reparations for victims *vis-à-vis* individual criminal responsibility determination and repression/deterrence concerning international crimes; ii) regional human rights courts/monitoring human rights bodies and international and hybrid criminal courts have different mandates/competences; iii) while victims are parties at human rights courts and bodies, at international and hybrid criminal courts that is the case only concerning civil parties and, in general, victims as reparations claimants concerning reparations (phase) proceedings as for their reparations claims; and iv) philosophical differences, i.e., while the retributive/utilitarian or deterrent justice paradigm in international and hybrid criminal courts is still predominant, the restorative justice paradigm is arguably prevalent at regional human rights courts. Additionally, it must be taken into account that even though, for example, certain participatory rights in criminal proceedings have been recognized for victims under human rights

courts/bodies' case law to be applicable in national criminal proceedings, those institutions by definition are not criminal courts.

20. The presence of the three dimensions of the victims' status at international and hybrid criminal courts as examined in this thesis, in particular victims' status as victim participants/civil parties and as reparations claimants, brings to these judicial bodies important avenues to enhance the victims' status seen as a whole. Moreover, the existence of those three dimensions, and not only victims' status as witnesses, reflects inquisitorial system elements under which victims' status is stronger and which are in general more propitious frameworks for victims' status, e.g., France, as compared to victims' status in adversarial systems, e.g., England and the United States. Furthermore, provided that (as examined) mechanisms and balanced approaches are adopted and that other legitimate interests and implementation/resources limitations are carefully taken into account, the importance of the presence of the three dimensions of the victims' status at international and hybrid criminal courts also consists in that those judicial bodies constitute parallel and/or additional transitional justice mechanisms for victims and which have unique (international) justice features not present in human rights courts/bodies and other mechanisms. This does not deny that international and hybrid criminal courts fall short of being a panacea for problems of victims of the most serious international crimes and, indeed, these courts should ideally work on a coordinated basis with other transitional justice mechanisms.

Sammandrag på svenska av avhandlingen

Bestraffning av internationella brott vid internationella och hybrida straffrättsliga domstolar har traditionellt och huvudsakligen grundat sig på principen om retributiv (vedergällande) rättvisa och ackusatorisk process snarare än återuppbyggande rättvisa och en inkvisitorisk modell. Därav har brottsoffrens ställning vid dessa straffrättsliga domstolar begränsat sig till den som innehas av vittnen vid Tribunalen som behandlar brott som begåtts i det forna Jugoslavien (ICTY), Internationella krigsförbrytartribunalen för Rwanda (ICTR) och Specialdomstolen för Sierra Leone (SCSL). Internationella brottmålsdomstolen (ICC), å sin sida, har medfört en viktig förändring gällande brottsoffrens ställning i internationella straffrättsliga fora, vilket innebär att de från att ha betraktats endast i egenskap av vittnen nu även har en rätt att delta och lämna sina synpunkter (i egenskap av brottsofferdeltagare) samt kräva gottgörelse. Denna trend har fortsatt inom området för internationell straffrätt, vilket manifesterats vid hybridtribunaler som tillsatts efter ICC såsom Kambodjedomstolen (ECCC) vid vilken brottsoffer kan agera civilrättsliga parter och Specialdomstolen för Libanon (STL) där brottsoffer kan inneha en deltagande roll.

Den föreliggande studien behandlar två huvudsakliga frågeställningar, av vilka den första lyder: *Vilken ställning tillskrivs brottsoffren vid internationella domstolar och hybridtribunaler?* I detta hänseende argumenterar författaren, sammanfattningsvis, för att brottsoffrens ställning vid internationella straffrättsliga domstolar och hybridtribunaler huvudsakligen tar sig uttryck på tre sätt, d.v.s. som brottsoffer i egenskap av vittnen, som brottsoffer i egenskap av deltagande brottsoffer/civilrättsliga parter samt som brottsoffer som kräver gottgörelse. I egenskap av vittnen ger brottsoffer vittnesmål gällande omständigheter/fakta de bevittnat. Brottsoffer kan agera som vittnen vid samtliga internationella och hybrida straffrättsliga domstolar. Faktum är att denna ställning är den enda som tillskrivs brottsoffren vid ICTY, ICTR och SCSL. Brottsoffer i egenskap av deltagare/ civilrättsliga parter deltar i förfarandet för att göra sig hörda beträffande egna intressen och åsikter (brottsofferdeltagare) eller för att stöda åklagarsidan samt kräva gottgörelse (civilrättsliga parter). Brottsoffrens ställning såsom brottsofferdeltagare/civilrättsliga parter gör sig enbart gällande vid ICC och STL (brottsofferdeltagare) liksom vid ECCC (civilrättsliga parter). Vid ICTY, ICTR och SCSL gör sig möjligheten till ”deltagande” gällande endast i några begränsade fall. Brottsoffer som kräver gottgörelse kan kräva och erhålla

gottgörelse för skada som förorsakats av brott. Det är enbart ICC och ECCC som tillskriver brottsoffer denna ställning. Noteras bör att, beroende på domstol, kan dessa tre sätt på vilka brottsoffrens ställning tar sig uttryck vara kumulativa.

Den andra frågeställningen för denna studie lyder: *På vilket sätt fungerar brottsoffrens ställning som vittnen, brottsofferdeltagande/civilrättsliga parter och gottgörelsekrävande vid internationella och hybrida straffrättsliga domstolar?* I detta hänseende hävdar författaren, sammanfattningsvis, följande huvudpunkter. Vad beträffar brottsoffer i egenskap av vittnen är dessa underställda en strikt regimen i enlighet med vilken de inte kan uttrycka som sådana egna åsikter och intressen eftersom de tillkallats som beviskälla. Av säkerhetsskäl och för att förhindra ytterligare viktimisering erbjuds dessa brottsoffer dock särskilda skydds- och specialåtgärder (särskilt då det är frågan om sårbara vittnen), vilka i undantagsfall kan inkludera anonymitet (vanligtvis före huvudförhandlingen i domstol). Beträffande brottsoffer i egenskap av brottsofferdeltagare/civilrättsliga parter måste dessa för att erhålla formell ställning som brottsofferdeltagare (ICC, STL) eller som civilrättsliga parter (ECCC) först ansöka om och beviljas sådan. Sätillvida det senare är fallet, och i enlighet med respektive domstols instrument och rättspraxis, kan brottsoffer delta i egenskap av brottsofferdeltagare (ICC, STL) eller som parter (ECCC) utgående från ett antal olika former av deltagande/processuella rättigheter för att föra fram sina egna intressen. Deltagande i form av brottsofferdeltagande/civilrättsliga parter är möjlig i enlighet med respektive domstols instrument under förundersökningsskedet, huvudförhandlingen, straffmätningsskedet och/eller överklagan.

Vid Internationella brottmålsdomstolen kan vittnen delta i specifika procedurer under utredningar före behandlingen av fallet, även om de inte har 'officiell' status som brottsofferdeltagare (sådan status beviljas på basis av ansökan). Offer som kräver gottgörelse bör vidta processuella åtgärder för att få gottgörelse för den skada de har utsatts för och som har en koppling till brott som lagförs vid ICC och Kambodjedomstolen, inklusive specifika gottgörelseprocesser vid dessa domstolar. Offer kan kräva och erhålla individuell/kollektiv gottgörelse (ICC) eller kollektiv och moralisk gottgörelse (ECCC). Gällande implementeringen av dessa kan mekanismer såsom brottsofferfonden som har inrättats i anslutning till ICC användas.

Under den andra forskningsfrågan argumenterar författaren för att granskningen av de sätt på vilka offrens ställning vid internationella och hybrida straffrättsliga domstolar fungerar inte endast bör rikta uppmärksamheten mot offrets intressen utan också mot andra parallella och/eller tävlande intressen

såsom den åtalades rättigheter, effektiva processer, sökande efter sanningen i en rättslig process, och/eller utmaningar gällande implementeringen. Allt detta existerar inom ramen för en verklighet med stort antal offer och domstolar med begränsade resurser.

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⁵⁰¹⁰ A large majority of the French case law used in this thesis has been cited or referred to by Pignoux (2008). For specific references, see the respective footnotes.

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14.4. Other National Systems

Milorad Trbić (X-KRŽ-07/386), Court of Bosnia and Herzegovina, First Instance, 16 October 2009.

Juan Pablo Pérez León Acevedo

Victims' Status at International and Hybrid Criminal Courts

Victims' Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants

Punishment of international crimes at international and hybrid criminal courts has been traditionally and primarily guided by retributive justice and adversarial proceedings rather than by restorative justice and an inquisitorial model. Thus, victims' status has been fundamentally limited to be witnesses at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). However, the International Criminal Court (ICC) has meant a pivotal change in how victims are considered at international and hybrid criminal courts, i.e., from a paternalistic view regarding them only as witnesses to a judicial scenario at which they can also voice their views and concerns (victim participants) as well as claim reparations. This trend has continued at the international criminal justice level as evidenced in hybrid criminal courts created after the ICC such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) at which victims can be civil parties and the Special Tribunal for Lebanon (STL) at which victims can be victim participants, in addition to the existence of victims' status as witnesses in both courts.

The present study seeks to address two main research questions. The first one is: *What is the victims' status at international and hybrid criminal courts?* and the second one is: *How does victims' status as witnesses, victim participants/civil parties and reparations claimants work at international and hybrid criminal courts?* Besides the legal framework and case law/practice of the courts considered, other areas of law such as comparative criminal procedural law and international human rights law have been examined in this study. Moreover, victims' status considered in a triple dimension as witnesses, victim participants/civil parties and reparations claimants has been analyzed paying attention to not only the victims' status as such but also other interests existing at the courts. Therefore, this study seeks to present a comprehensive and integrated critical view of the victims' status across six international and hybrid criminal courts.



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