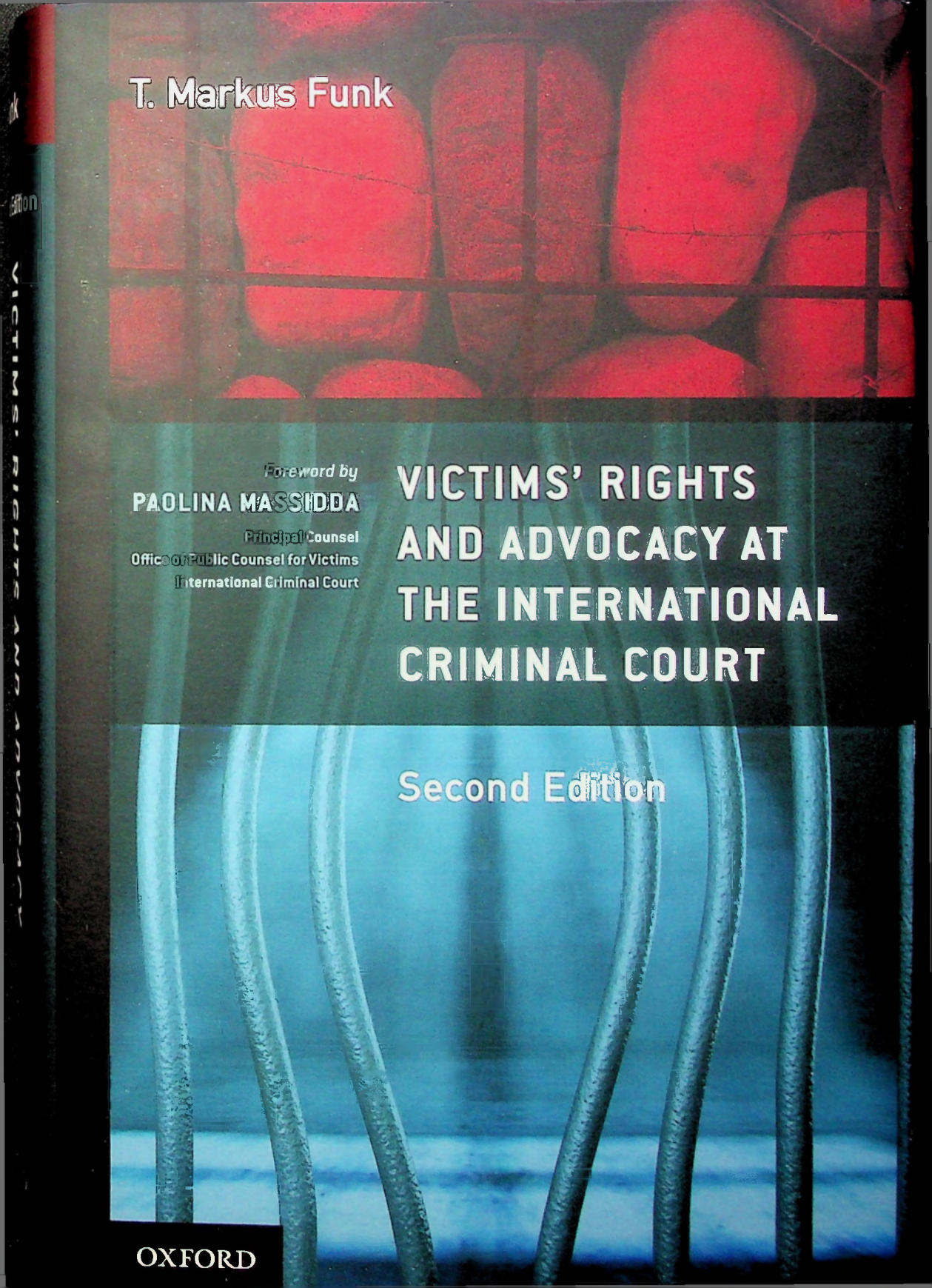
T. Markus Funk
Foreword by
PAOLINA MASSIDDA
Principal Counsel
Office of Public Counsel for Victims
International Criminal Court
VICTIMS' RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT
Second Edition
OXFORD

Victims' Rights and Advocacy at the International Criminal Court

SECOND EDITION

T. MARKUS FUNK

Foreword by Paolina Massidda
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To Kate, Heidi, and Annelise

—Lady ranchers and my daily joy.

Special thanks also to Regina Trillo, whose excellent research and editorial assistance helped this second edition come to pass.

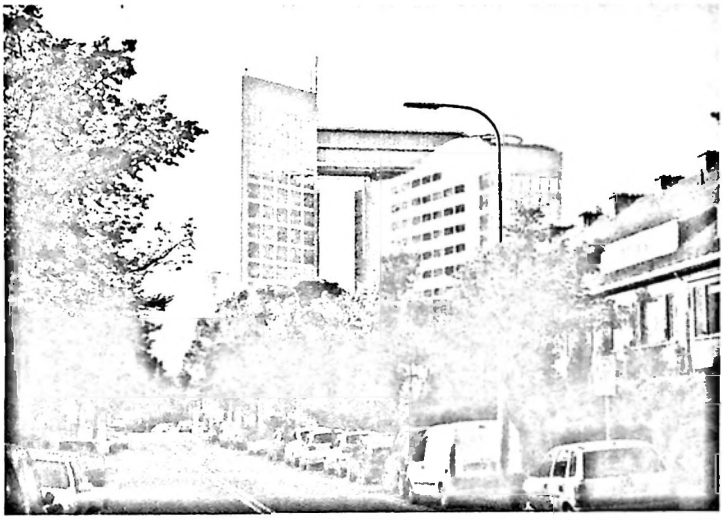
We must establish incredible events by credible evidence.

—Nuremberg Trial United States Chief Prosecutor,
United States Supreme Court Justice Robert Jackson,
June 7, 1945

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....

—Rome Statute of the International Criminal Court,
Article 68(3)

Contents



The International Criminal Court
The Hague, Netherlands

Foreword

One of the main innovations of the Statute of the International Criminal Court (ICC) has been the change of the role of victims from witnesses—constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings—to autonomous participants. From now on, they no longer support the thesis developed by one of the parties in the proceedings, namely the prosecution or the defense, as traditionally understood, but they present "their views and concerns" in an independent manner, benefiting from rights and obligations deriving from their status of *participants* in the proceedings.

In 2010, Markus Funk was at the forefront of this discussion with the first edition of his groundbreaking work, *Victims' Rights and Advocacy at the International Criminal Court*. This second edition updates lawyers, advocates, court observers and personnel, and other interested parties on recent developments at the Court. But at least equally important, the updated book takes to the next level its exploration of many of the frequently underexamined practical, strategic, and theoretical issues of greatest concern to those seeking to give real meaning to the promise of "victims' rights." As such, this well-timed book gets us up to date precisely when the international community is prepared to move the rights of victims through its next evolutionary stages.

Despite the advances being made, participation of victims in proceedings before the ICC continues to be the subject of controversy and heated debate since its introduction in the founding legal texts of the Court as agreed upon and endorsed by the negotiators of the Rome Statute.

Victims expect a careful, independent, fair, transparent, effective, and watchful justice, mindful of the rights of all participants in the proceedings. A justice which is protective and restorative, able to establish the truth about the crimes that have been committed.

Victims mention a multitude of reasons for claiming this right. The right to the truth seems one of the components of the right to justice. In this regard, the main interest of victims in the establishment of the facts and the identification of the perpetrators is in itself the essence of the right to the truth generally recognized for the benefit of victims of serious violations of human rights. In the process of implementing this right through criminal proceedings, victims have a key interest in the outcome of the proceedings, which ought to bring clarity in relation to what really happened and fill the gaps which might persist between the procedural findings and the truth itself.

Victims wish to contribute to the search and the establishment of the truth. This process entails the speaking out, the sharing of events which happened to them, the recognition of the harm suffered from, as well as of the crimes which generated said harm.

The right to reparations is also one of the essential components of the right to justice. Indeed, the process of participation has a cathartic and healthy virtue at an individual level, as well as a restorative virtue at a family, social, and community level. If the choice of victims to ask to participate in the proceedings is first and foremost an individual step, which allows each of them, mostly through their counsel, to convey part of their experience and knowledge of the events, said choice also sometimes becomes a collective step, getting together communities, neighbors, and families.

Finally, it is also an opportunity for victims to advance the facts so that reconciliation can be achieved through the punishment of the persons responsible for the crimes committed, and so that justice is done; by doing so, they can hope that their courage will set an example to prevent the commission of crimes "*of concerns to the international community.*"

Numerous challenges arise when ensuring that the principles established by the negotiators of the Rome Statute are efficiently and effectively implemented, and that the role of victims finally given recognition be meaningful not only in the texts but in practice. Implementing an international criminal justice system (establishing a new necessary balance between three participants in the proceedings before the ICC) is a challenge for the institution itself on many levels (structural, budgetary), for legal representatives (legal challenges, a lot of creativity being required in this emerging practice, human and logistical challenges), and mainly for the victims, who are at the heart of the proceedings and also in the heart of the events that gave rise to such proceedings.

In light of these considerable challenges, this book contributes significantly to practitioners' efforts to understand what has been described as the main novelty of the Rome Statute.

The book carefully details the proceedings before the ICC, lays out the role of different actors, and explains the major achievements in the matter, identifying avenues for the effective implementation of victims' rights in the proceedings before the Court.

The author's considerable experience and competence in international criminal law and litigation allow him to adroitly analyze crucial issues on both a theoretical and a practical level that is understandable to practitioners, but also will be of great value to the nonspecialized public. The result is a book which expertly provides the reader with an insight into the profound issues at stake, as well as with a comprehensive picture of the proceedings before the ICC and the challenges faced by both the Court and actors in said proceedings.

In this second edition of his indispensable reference work, Mr. Funk significantly advances the debate on victims' participation within the framework of the Rome Statute, and contributes to enhance the understanding of how to most effectively and responsively address victims' needs as well as their interest in participating in the proceedings.

Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims
International Criminal Court
October 16, 2014
The Hague, The Netherlands

About the Author

T. MARKUS FUNK, now in private practice, served as a decorated Chicago federal prosecutor, Section Chief with the U.S. State Department-Balkans, clerk with the federal court of appeals (Judge Morris S. Arnold) and district court (Chief Judge Catherine D. Perry), and law professor at institutions including the University of Chicago, Oxford University, Northwestern University, and the US Department of Justice's National Advocacy Center. He also trained and advised international war crimes judges, defense attorneys, victim advocates, investigators, and prosecutors in the Balkans and elsewhere. Mr. Funk has the distinction of being the only person to have received both the Department of Justice's Attorney General's Award and the State Department's Superior Honor Award.

PART I

Introduction

WAR AND ITS ACCOMPANYING ATROCITIES have been part of the human experience since the earliest days of man. Although the refined, reassuring language of modernity and diplomacy may now ring familiar, as a practical matter, war's severity and toll on humankind have hardly relented. Indeed, since World War II there have been some two hundred fifty conflicts throughout the world, leading to an estimated 70–170 million victims.[1] Experts estimate that during the twentieth century, warlords and military leaders subjected approximately four times more civilians to crimes against humanity and war crimes than the combined total of soldiers killed in all international wars during the same time. Unlike diseases or natural disasters, the injuries and tragedies of war are largely self-inflicted.

With the advent of the modern media, however, the world has become increasingly sensitive to episodes of organized and methodical state-sponsored killing, maiming, mutilating, raping, and torturing of civilians. Such conduct, often broadcasted live, is now near-universally condemned as out of bounds, striking at the very heart of civilized society. In response to well-documented outrages committed openly and notoriously in now-familiar places like Rwanda, Cambodia, Bosnia, and Kosovo, the international

1. *See generally* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203, 209–10 (2006) ("Despite the post-WWII human rights conventions, within 50 years of WWII conflicts of an international and non-international character resulted in casualties double those of the two World Wars. An estimated 70–170 million people have died since WWII in over 250 conflicts around the world."); *see also* STÉPHANE COURTOIS, ET AL., THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 4 (1999) (providing an exhaustive chronicle of crimes perpetrated to advance communist political ideology); RUDOLPH RUMMEL, DEATH BY GOVERNMENT 9 (1994) (examining some eight thousand reports of government-caused death—which Rummel terms "democide"—and estimating that during the approximately two hundred fifty post–World War II conflicts, governments killed some 169 million of their own people).

community in the late 1990s joined together to establish the International Criminal Court (ICC).[2]

The ICC is the first permanent juridical body with the stated purpose of bringing to justice perpetrators of "atrocity crimes" such as genocide, war crimes, and crimes against humanity.[3] The ICC, however, does not, as observers often assume, sit above all other courts as the world's supreme adjudicator of atrocity crimes. Instead, the ICC is designed to function more like an "international catch-all court," capturing those cases that fall through the cracks when domestic legal systems are unwilling or unable to investigate and prosecute them. The Court's mandate is, therefore, to deliver justice when no other mechanisms are available.

Despite a slow and rocky start, the ICC's efforts to hold the perpetrators of atrocity crimes accountable have intensified in recent years. But beyond simply investigating and prosecuting humanity's most ruthless villains, the ICC has ambitiously sketched out a broader restorative mandate for itself.[4] More specifically, the ICC, itself a first-of-its-kind institution, among its many innovative missions singularly enshrined the rights of atrocity crime victims to participate directly in the actual proceedings instituted against their alleged victimizers. The ICC empowers victims to participate in the proceedings of, and to seek recompense from, those who terrorized and abused them. This book focuses on these considerable efforts to stanch

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2. The ICC is alternatively referred to herein as "the Court."

3. The term "atrocity crime" is an all-inclusive reference to the four so-called "core crimes" (war crimes, genocide, crimes against humanity, and the as of yet undefined crime of aggression) and, in this context, was coined by Ambassador David Scheffer. *See generally* David Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389 (2002); *see also* David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law,"* 2 GENOCIDE STUD. & PREVENTION 91, 91–96 (2007); David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 229–50 (2006).

4. "Restorative justice" refers to a theory of criminology dating back centuries in which the crime and wrongdoing are considered acts against the individual rather than against the state or the collective (more on this later). Advocates of restorative justice posit that the person harmed must play the central role in the criminal justice process and that the person who culpably did the harming should be accountable and accept personal responsibility for his conduct. Although the traditional criminal justice systems seek to determine what laws were broken, who broke those laws, and what sentence the lawbreaker should receive, restorative justice's aim is to determine who was harmed, what that person's needs are, and who should be obligated to meet those needs. Restitutional sanctions, intended to force the wrongdoer to "make whole" the person wronged, are therefore a traditional, and indeed ancient, restorative aspect of criminal justice systems.

human suffering and piece together the lives of the victims of unspeakable affronts to human dignity.

Invoking its undoubtedly noble purpose, proponents of the ICC steadfastly demand that the world community take the Court seriously, both as a model of reform and as a crime-fighter. Why, ask Court supporters, would any country interested in justice and world peace not support the Court's mission by signing on as a state party?

One of the persistent challenges, however, is that the international community's track record for bringing to justice the world's most notorious criminals and their henchmen has at times, sadly been somewhat underwhelming.[5] From the skeptics' perspective, the ICC, for reasons discussed later, to some extent continues to suffer from this perceived broader deficiency.[6]

Consider that the ICC has a present annual budget of over approaching $200 million, with more than seven hundred employees (including 34 full-time judges). Despite its significant resources, and a plethora of worthy targets, in its first seven years of operation, the Court had not issued a single verdict, sentence, or victim reparations order. As of this writing, the Court publicly indicted thirty-six people and has issued arrest warrants for twenty-seven. Proceedings against ten have been completed, but since the publication of the first edition of this book only two (Thomas Lubanga Dyilo and Germain Katanga) have been convicted and sentenced. (Four have had the charges against them dismissed; one has had the charges against him withdrawn; one has had his case declared inadmissible before the Court; and three have died before trial.)

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5. Consider, for example, the International Criminal Tribunal for the Former Yugoslavia (ICTY), with a broad jurisdiction covering four separate bloody conflicts (namely, Croatia, Bosnia and Herzegovina, Kosovo, and the Former Yugoslav Republic of Macedonia), and as of 2009 employing more than 1,100 persons. As discussed in more detail in Part II, since becoming operational some sixteen years ago, the ICTY has spent over $1.5 billion pursuing Balkan war criminals. To date, however, the ICTY has only sentenced sixty-one individuals (in rough numbers, this equates to a present total expenditure of some $25 million per final sentence). Moreover, although convicted of genocide, war crimes, and crimes against humanity, more than a third of the sixty men (and one woman) with "completed cases" received prison sentences of *less* than ten years. Indeed, only *ten* received sentences in excess of twenty years. It is, therefore, debatable to what extent the ICTY has truly lived up to its own motto of "[b]ringing war criminals to justice, bringing justice to victims." *See* www.icty.org.

6. For a discussion of some of the likely causes of this present lack of more tangible results, as well as suggestions for reform, *see* Part IV(J).

What is more, the relatively modest Dyilo and Katanga sentences have, in light of the magnitude of alleged misconduct, understandably left many disappointed.[7] Two convictions after roughly a dozen years of the Court's existence and over a billion dollars in expenditures is an average that, to the thinking of many, must be improved.

Skeptics may, as a consequence, be tempted to reject out of hand the ICC's victim-centric efforts as yet another example of the international community's much-talk-little-action routine. Well-intentioned rhetoric, deployed by diplomats often possessing only the vaguest understanding of what it takes to achieve a criminal conviction, is, after all, not a substitute for professionally conducted investigation and prosecution leading to the imprisonment of the world's premier wrongdoers. Indeed, threats and promises not followed up by concrete action can, in the long run, become justice's most devastating enemy. To the skeptic, the significant, and often quite obvious, institutional flaws discussed herein reveal a Court ill-equipped to handle the monumental task it is facing. The Court, the skeptic's argument goes, is, therefore, in a particularly weak position to demand the world community's respect and dutiful adherence.

But, whatever the Court's present deficiencies (and, as we will discuss, there certainly are some), the answer is not to give up on it, or, even worse, to seek to chop it down. In fact, there is no indication that the relatively young Court, despite its admittedly mixed record to date, will not continue on as international justice's focal point. Put simply, the Court is here to stay. Pointing to the Court's shortfalls, throwing one's arms in the air, and walking away from the entire enterprise is, therefore, not a wise response.

Instead of focusing purely on the more lackluster aspects of the Court's performance vindicating the interest of victims, and punishing

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7. Rebels under Dyilo's command are accused of engaging in ethnic massacres, murder, torture, rape, and mutilation. Dyilo was convicted of forcibly conscripting child soldiers, but on July 10, 2012, was only sentenced to fourteen years' imprisonment. On March 7, 2014, in turn, Patriotic Resistance Force in Ituri Leader Katanga was convicted, as an accessory, of five counts of war crimes and crimes against humanity (including murder and the February 2003 massacre in the village of Bogoro in the Democratic Republic of the Congo). On May 23, 2014, Katanga was sentenced to twelve years' imprisonment.

Sentences of fourteen and twelve years' imprisonment, respectively, after having been convicted of committing some of the most heinous crimes imaginable, are unlikely to have much of a deterrent effect (and will surely leave few victims feeling vindicated). *See generally* T. Markus Funk, *The ICC Investigates—But Should Gadhafi Worry?*, NATIONAL LAW JOURNAL, March 7, 2011, *available at* www.nationallawjournal.com/id=1202484174659.

perpetrators the solution this second edition proposes is real and meaningful reform, which, if applied in a targeted manner, can help catapult the ICC toward its full restorative potential. This is, in part, because at its core, the ICC offers something unique and unavailable anywhere else for millions of victims, namely, the opportunity for victim participation in the trials of their victimizers. The ICC, for all of its arguable shortfalls, seeks to break a new path by promising victim-centric restorative justice to those who traditionally have remained voiceless outsiders to the legal process and by providing the legal framework and tools necessary for this undertaking.

And with millions massacred in the many post–World War II conflicts, and considering the increased visibility of such opprobrious crimes, the need for internationally coordinated victim redress indeed presses. In order to meet its restorative objectives, the ICC announced a host of ambitious and laudable victim-oriented goals. One need not look further for instances of this forward-looking agenda than the ICC's mission statement, set forth in the Rome Statute's Preamble, which describes the ICC's goal as "guarantee[ing] lasting respect for and the enforcement of international justice" by "put[ting] an end to impunity for the perpetrators of [international] crimes and thus...contribut[ing] to the prevention of such crimes...."

The Preamble leaves little room for doubt: The primary purpose of the ICC is to end cruelty and to bring those responsible for atrocities "to justice"—the same desires as those of the victims, of course. To effectuate the expansive aim of providing a more fulsome measure of restorative justice, and to reflect the recognition that "during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,"[8] the Assembly of States Parties of the ICC enacted a host of provisions addressing the protection and restoration of atrocity crime victims.

This second edition continues to shine a light on this particularly important and complex, but underexamined, aspect of the ICC's broader agenda. The goal here is to equip lawyers, victim representatives,[9] academics,

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8. Preamble, Rome Statute. *See also* George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 551 (2005) ("The purpose of the Rome Statute is to vindicate the interests of these victims.").

9. The term "victim representative" used herein is a reference to those legal advocates to whom the Chamber has granted formal recognition as in-court legal representatives of victims. The term "victim advocate," on the other hand, is a broader term referring to individuals—lawyers and nonlawyers alike—who wish to assist victims at the ICC. *See generally* Part VI.

victim-related nongovernmental organizations, government officials, legal advisors, and other interested parties with a meaningful understanding of the promises, and potential challenges and pitfalls, of pursuing victims' rights and engaging in victim advocacy at the ICC.

Referenced throughout this book is the kaleidoscope of at times confusing ICC articles, rules, and regulations, all of which the victim representative must disentangle and understand.[10] Familiarity with these enactments is, indeed, the critical preparatory step toward competent victim advocacy. That said, the principal focus must be on sound, effective advocacy skills, not on the full range of fine nuances and idiosyncrasies of developing ICC procedure and practice. To that end, these pages will summarize key ICC rulings and provisions to illustrate current, ever-evolving ICC practices as they relate to victim advocacy. Of course, it remains the victim representative's responsibility to conduct factual and case-specific legal research in order to determine the contemporary state of the law as it relates to a particular situation.

Effective advocacy, in the end, is both an art and a science. Diligent representation of victims' rights—whatever form these rights take over the next years, decades, and beyond—requires the representative to consider all options at his disposal suited to addressing the client victim's personal, emotional, financial, philosophical, and legal goals. The paramount purpose of this book, therefore, is to empower victim representatives and other interested ICC participants and observers with a realistic and practical understanding of the ICC's victim-centric promises, mandates, challenges, and shortcomings. In the course of doing so, this book will attempt to advance the discussion of best practices and will frankly raise some basic questions and concerns that, to date, have remained notably unaddressed during the otherwise heated public debate over this central international institution.

10. Certain key victim-related provisions and materials are included in the appendix.

PART II

A Legacy of Abuse and Suffering Leads to the Birth of the ICC

THE WELL-DOCUMENTED "ROAD TO ROME," a common reference to the ICC's founding Rome Statute, was as long as it was serpentine. Well before lawyers and politicians gathered in the 1990s to begin the drafting process, there were those who, grappling with the evidence of man's capacity for inhumanity, expressed their belief in the need for a transnational tribunal with the capacity to deter atrocities and punish those who engineered and executed them.

Back in 1873, Swiss lawyer, Nobel Prize nominee, and cofounder of the International Committee of the Red Cross,[1] Louis Gabriel Gustave Moynier, presented one of the first proposals for the creation of a permanent and impartial international criminal court. Moynier, still deeply disturbed by the atrocities committed during the Franco-Prussian War, observed:

> A treaty was not a law imposed by a superior authority on its subordinates... [but] only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience.... The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other.[2]

1. During its early years, the Red Cross was also known as the "International Committee for Relief of the Wounded."

2. LOUIS GABRIEL GUSTAVE MOYNIER, ETUDE SUR LA CONVENTION DE GENEVE POUR L'AMELIORATION DU SORT DES MILITAIRES BLESSES DANS LES ARMEES EN CAMPAGNE 300 (1870) (English translation *in* PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 282 (1963)).

Moynier's proposal, however, failed to garner the support of the world community because the nations feared surrendering sovereignty to such an international adjudicating body.

Following World War I, the drafters of the 1919 Treaty of Versailles picked up on Moynier's earlier call for internationalized justice by seeking to set up an ad hoc international court to try German Kaiser Wilhelm II, as well as his Prussian military leaders. Kaiser Wilhelm II was Germany's third and final kaiser, losing his throne as a consequence of Germany's defeat during World War I. This push for such a transnational system of justice, however, for a host of practical and political reasons, did not prove successful. Not only did neutral Holland provide the Kaiser (now ironic) refuge,[3] but the French and British were weary of fermenting latent public anger in Germany against the weak Weimar Republic. At bottom, the victors were concerned that hostile public sentiment would boil over in the face of such trials.

The German Supreme Court was left to handle the criminal cases that the German prosecutors brought under German penal law against the dozen mid- and lower-level German officers.[4] The postwar proposal for an international court, nonetheless, was historic in its own right, as it reflected the Allied victors' belief that they had the right (if not the duty) to set up an international court for the purpose of holding to account, through law, those accused of war crimes.

The Treaty of Versailles also led to the creation of the League of Nations, which in 1920, through the Commission of Jurists, began drafting legal instruments to establish the Permanent Court of International Justice, called for by the League's Covenant.[5] In 1937, the League in fact adopted a treaty for the creation of an international criminal court. The proposal, however, as during Moynier's day, once again failed due to insufficient state support.[6] Events in history a few decades later were to provide the necessary impetus for a more robust call for "international justice."

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3. The Kaiser in fact remained in Holland until his death in 1941.

4. *See generally* Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Policy, and International Law*, 29 VAND. J. OF TRANSNAT'L L. 119, 132–40 (1995) (describing the war tribunals in Leipzig).

5. *See* Protocol of Signature Relating to the Statute of the Permanent Court of International Justice Provided for by Article 14 of the Covenant of the League of Nations Articles 1–6, Dec. 16, 1920, 6 L.N.T.S. 380 (1921).

6. As of January 1, 1941, no state had ratified this early international criminal court treaty.

In 1948, following the atrocities of World War II chronicled so graphically at the Nuremberg trials[7] and in the Tokyo Tribunal,[8] the United Nations (U.N.) General Assembly formally recognized the need for a permanent international court. Such a court had to be capable of addressing the type of state-sanctioned terror that, at the time, was so vividly in the minds of world leaders, as well as the world's public at large.[9]

The General Assembly in 1948 took the first steps, adopting the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention called for accused war criminals to be tried "by such international penal tribunals as may have jurisdiction," and formally invited the International Law Commission (ILC) to "study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide." Perhaps for the first time, the establishment of a permanent international criminal court appeared to be just over the horizon.

In the early 1950s, the ILC was, in fact, fully occupied with the serious undertaking of drafting just such a foundational statute. Gridlock caused by the Cold War, however, temporarily derailed the effort. The General Assembly abandoned the proposal pending agreement on an international Code of Crimes, as well as on an acceptable definition of the "crime of aggression."[10] In the intervening years, the states at the United Nations

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7. Although there were other trials held in the various German zones the Allies occupied, the most famous proceedings were the twelve held before the American court in Nuremberg.

8. The Tokyo Trials were based on the January 19, 1946, Charter for the Far East. The prosecution team charged twenty-eight high-ranking defendants, including four premiers, three foreign ministers, and one colonel. In the end, sixteen of the twenty-eight were convicted, and seven were sentenced to death. For a detailed accounting of the Tokyo Tribunal, *see* YUMA TOTANI, THE TOKYO WAR CRIMES TRIBUNAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2009).

9. *See* Leila Nadya Sadat, *The Establishment of the International Criminal Court: From The Hague to Rome and Back Again*, 8 J. INT'L. L. & PRAC. 97, 100–16 (1999) ("The atrocities of the Second World War rekindled interest in the establishment of a permanent international criminal court. The model statutes proposed by jurists gave way to the pressure of political events, however, and the Charters of the Nuremberg and Tokyo tribunals took their place. Although not the first international criminal trials in history, the Nuremberg and Tokyo trials are the first major precedents of our time.").

10. *See generally* Jonathan A. Bush, *"The Supreme... Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2390–91 (2002) ("But the UN congealed into the familiar Cold War blocs almost as fast as Nuremberg eased up against aggressive criminality. As a result, by 1950, both conversations about aggression were routinized. In the Security Council, the world of diplomacy and politics, aggression was a political accusation, and it was almost

intermittently discussed the creation of a permanent institution in which to try alleged war criminals.[11]

Ironically, it took the proliferating narcotics trade of the late 1980s to cause an unlikely international prime mover, Trinidad and Tobago, to once again resurrect the long-retired concept of an international tribunal created by the world community, and purpose-built to handle international crimes. In 1989, at the request of Trinidad and Tobago's then Prime Minister (and later President) Arthur Robinson,[12] the General Assembly requested the ILC include within its consideration of a draft code a discussion of the potential for an international criminal court or other mechanism with jurisdiction over, among other offences, what Trinidad and Tobago viewed as the evolving international crime of drug trafficking.[13]

Some five years later, in 1994, the ILC presented to the General Assembly its first draft statute establishing the ICC. The ILC, moreover, recommended that a conference be convened at which the plenipotentiaries[14] would negotiate the necessary treaties to enact the Court's statute. In response,

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always log-jammed by the rigidity of the Cold War alliances and the Security Council veto. In the other world of law schools and the International Law Commission..., the entity affiliated with the UN to which the General Assembly had referred Nuremberg issues and aggression for further study, aggression meant the opportunity for unrealistic proposals and pie-in-the-sky debates about improved definitions."). Defining the crime of aggression, as discussed in Part IV(C)(4), continues to be an endeavor steeped in considerable controversy.

11. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide (Jan. 12, 1951), 78 U.N.T.S. 277 (1951) (the Convention declared the need for establishing a permanent international court); United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex paras. 4, 6(b), U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985) (providing that victims should have "access to the mechanisms of justice and to prompt redress...for the harm they have suffered," and that the "views and concerns of victims [should] be presented and considered at appropriate stages of the proceedings"). *See also* Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT. L.J. 665, 677 (1996).

12. President Robinson later explained his view that the purpose of the Court was to protect "the little [ordinary] people all over the world" by holding "people at the top...accountable, particularly in the case of gross violations of human rights and atrocities, such as those that had occurred in Rwanda, the former Yugoslavia, Cambodia and Burundi." United Nations Press Briefing (October 9, 1997), www.un.org/News/briefings/docs/1997/19971009.tnt.html.

13. *See* G.A. Res. 44/39, P 1, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/39 (December 4, 1989).

14. The Latin term "plenipotentiaries" translates into "full powers," and in this context refers to diplomats who are fully authorized to act on behalf of their respective governments.

the General Assembly created the Ad Hoc Committee on the Establishment of the ICC. The Committee met twice in 1995. A complex treaty process unfolded, during which the participating sovereign nations negotiated the circumstances under which they would cede the primacy of their jurisdiction to an international body for the purpose of investigating, and prosecuting, alleged perpetrators of atrocity crimes.[15]

After the U.N. General Assembly reviewed the Committee's report, it organized the U.N. Preparatory Committee on the Establishment of the ICC. The Committee was tasked with generating a comprehensive draft text for the creation of an international court. Between 1996 and 1998, the Preparatory Committee met on six occasions at the U.N. headquarters in New York City.

In January 1998, the Preparatory Committee gathered for an intercessional meeting in Zutphen, Holland, to restructure and consolidate the various draft articles into a final omnibus draft. The General Assembly found promise in the Preparatory Committee's draft, and convened the U.N. Conference of Plenipotentiaries on the Establishment of an ICC in the Netherlands. The objective was to "finalize and adopt a convention on the establishment" of a permanent international court. This institution, proponents argued, would have the benefit of being free from mandates of a specific time and place, unlike the ad hoc tribunals with narrow jurisdictional mandates set up during the aftermath of the atrocities in Rwanda, Sierra Leone, Cambodia, the former Yugoslavia, East Timor, and elsewhere.

The purpose-built tribunals following these conflicts, after all, took years to become operational and, to some extent, failed to garner the full measure of public support or tangible results the victims and the international community had hoped (and richly paid) for. Consider, for example, that as of March 23, 2009, the ICTY, staffed and fully operational since the early 1990s, had 1,118 employees and a generous annual budget of $342,322,300.[16] The total cash outlay for the ICTY has exceeded $1.5 billion, yet the Tribunal in sixteen years only sentenced sixty-one perpetrators. These sixty men and one woman with "completed cases" committed genocide, war crimes,

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15. For a firsthand account of this treaty process, *see* David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 989–93 (2008).

16. *See* www.icty.org./sid/325. The ICTY had jurisdiction over the conflicts in Croatia (1991–95), Bosnia and Herzegovina (1992–95), Kosovo (1998–99), and the Former Yugoslav Republic of Macedonia (2001).

and crimes against humanity, yet over a third of them received terms of imprisonment of ten years or less.[17] Moreover, as noted above, only ten received sentences in excess of twenty years imprisonment. To many, this relatively feeble record places into doubt whether the ICTY lived up to its self-described purpose of "bringing war criminals to justice and bringing justice to victims."[18] In any event, establishment of a permanent court, it was hoped, would lead to swifter and more sure justice by overcoming many of the deficiencies hampering ad hoc tribunals like the ICTY.

The now-famous June 15–July 17, 1998, "Rome Conference" involved representatives of some one hundred sixty countries, as well as countless nongovernmental organizations. The negotiators hoped to overcome the omnipresent dilemma of reconciling the interests of "sovereignty" with the "international rule of law."[19] The negotiators' central agreement in this regard was the introduction of the principle of "complementarity," which was designed to ensure that the Court would only have jurisdiction over those cases which national jurisdictions were either unable or unwilling to effectively investigate and prosecute. In large part due to the considerable efforts on the part of the ILC, as well as the intense drafting negotiations among governments (including, prominently, the United States), on July 17, 1998, the negotiating countries approved the Rome Statute to thunderous applause, jubilation, handshakes, and hugs.

When the votes were tallied, one hundred twenty nations had voted in favor of adopting the Rome Statute of the ICC, with the United States, Israel, China, Iraq, Libya, Yemen, and Qatar voting against the treaty, and twenty-one other states abstaining. Although the United States was, as discussed below, among the handful of nations that voted against the final text, it, as one of the permanent members of the U.N. Security Council, unquestionably played a major role in creating the Court and advancing administration objectives by being fully involved in the drafting of the ICC's Rules of Procedure and Evidence and the Elements of Crime.[20] The U.S. negotiation

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17. *See* www.icty.org./action/cases/4; www.icty.org./sections/TheCases/KeyFigures.

18. *See* www.icty.org.

19. *See generally* BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 68 (2003) ("The former President of the [ICTY], Antonio Cassese, describes the choice in stark terms: either one supports the international rule of law, or one supports state sovereignty. The two are not, in his view, compatible.").

20. These important documents were adopted by consensus, with the United States' approval, in June 2000. *See* Barbara Crossette, *U.S. Gains Compromise on War Crimes Tribunal*, N.Y. TIMES, June 30, 2000, at A6.

team, headed by Ambassador David Scheffer, was, for example, instrumental in efforts to define "war crimes" and "crimes against humanity" and to exclude drug trafficking from the statute.[21]

The Preparatory Commission thereafter specifically tackled the task of negotiating the complementary documents, including the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, and the Agreement on the Privileges and Immunities of the Court. During the September 2000 Millennium Summit, U.N. Secretary General Kofi Annan, as anticipated, lent his support to this undertaking and backed the drafters and negotiators: "I strongly urge all countries to sign and ratify the Rome Statute of the International Criminal Court...."[22]

On December 31, 2000, the day marking the deadline for signature of the Rome Statute without nations first having ratified it, U.S. President Bill Clinton joined the 137 other governments who signed the Rome Statute. Even though few at the time viewed U.S. ratification as likely, with the president's signature the United States could remain formally involved in the follow-on negotiations over the Court's establishment.

Next began the ratification process by the individual nations. The halfway mark for bringing the Rome Statute into force was reached on April 30, 2001, when the small, landlocked principality of Andorra became the thirtieth state to ratify the Rome Statute. Roughly one year later, on April 11, 2002, the much-anticipated sixtieth ratification was deposited during

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21. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12–14 (1999) ("[United States] Administration lawyers subjected the ILC drafts to extensive internal review and analysis. U.S. objectives included a significant role for the United Nations Security Council in the referral of cases to the court, specific and properly defined war crimes in the statute of the court, exclusion of drug trafficking and the hard-to-define crime of aggression from the statute, and further study of our deep concerns about including crimes of international terrorism in the statute....The U.S. delegation succeeded in its effort to broaden the complementarity regime to include a deferral to national jurisdictions at the outset of a referral of an overall situation to the ICC rather than only at a preliminary stage of the work on any particular case. We also succeeded, with the help of many governments, in restructuring the procedures of the court into a more comprehensible and rational sequence of steps. We were unsuccessful at stemming the support for the ICC prosecutor to initiate cases himself absent any referral of an overall situation by a state party or the Security Council. There was also growing opposition to any role for the Security Council in determining which situations should be referred to the court, even those situations regarding which the Council was exercising its Chapter VII responsibilities.").

22. KOFI A. ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 69 (2000).

a special ceremony at U.N. headquarters.[23] Marking this occasion, General Assembly President Han Seung-soo stated:

> Since 1948, following the Nuremberg and Tokyo tribunals after the Second World War, the establishment of a permanent international criminal court has remained one of the most important goals of the General Assembly of the United Nations. The scope, scale, and nature of atrocities that have been committed in many parts of the world during the last 20 years reminded us of the urgency of creating a permanent mechanism to bring to justice the perpetrators of such inhuman crimes as genocide, ethnic cleansing, sexual slavery, and maiming.[24]

On May 6, 2002, however, U.S. President George W. Bush, concerned in large part with the possibility of ICC prosecutions of American soldiers, military leaders, and government officials, informed the United Nations that the United States no longer considered itself bound by the treaty as a signatory nation. President Bush formally rendered inactive the U.S. signature.[25]

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23. The countries depositing their treaty instruments during this ceremony were Bosnia and Herzegovina, Bulgaria, Cambodia, Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia.

24. United Nations Press Release, GA/SM/292 L/T/4367 (November 4, 2002).

25. The U.S. Congress, concerned with American involvement in the ICC, passed the American Service Members Protection Act. *See* 22 U.S.C. § 7421(9) ("In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States."). The act not only prohibited U.S. cooperation with the ICC, but in fact sought to punish those nations that joined the ICC. In 2007, however, the U.S. Congress repealed the punitive measures of this act. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 1210, 120 Stat. 2083 (amending the American Service-Members' Protection Act to remove International Military Education and Training restrictions); National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1212, 122 Stat. 3 (amending the American Service-Members' Protection Act to eliminate restrictions on Foreign Military Financing assistance laws). The Obama Administration, for its part, has reengaged with the Court.

The Rome Statute took formal force and effect of law on July 1, 2002, and the Assembly of States Parties met for the first time in September 2002. September 9, 2002, marked the official opening of the ICC Article 36 nomination period to fill the judicial and prosecutorial positions (the closing date was November 30, 2002). Between March and June 2003, the Assembly swore in the first eighteen judges of the ICC,[26] as well as the first prosecutor (Luis Moreno-Ocampo), and appointed the Registrar of the Court (Bruno Cathala). The initial election of eighteen judges—based on anonymous ballots cast by the representatives of the state parties—was made from a field of forty-three candidates. The winning judges drew lots to determine whether they were assigned to three-, six-, or nine-year terms (with those serving a three-year term being eligible for re-election in 2006). One hundred thirty years after Moynier's vision of an international body adjudicating atrocity crimes, the Court was ready to accept investigations and to hear cases.

The overriding hope shared by the signatory states at the ICC's founding continued to be that this permanent Court—with a mandate to hold accountable those responsible for the world's most serious crimes, atrocities, and mass murders—would be more effective and efficient than the predecessor after-the-fact tribunals. One of the primary wellsprings for this widespread optimism was the shared belief that the ICC would be able to

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The Bush administration's concerns about U.S. involvement with the ICC were, however, more nuanced than many have recognized. Consider, for example, the November 2008 statement of Department of State Legal Advisor John Bellinger:

> [E]ven if the United States is not a party to the Rome Statute, there are many ways for the United States and ICC parties to work constructively on international criminal justice issues. In recent years, this Administration has sought to steer the focus away from unnecessary wrangling over the issues that divide the ICC's supporters and opponents towards finding practical and constructive ways to cooperate in advancing our common values and our shared commitment to international justice.
>
> We've re-emphasized as a core principle of our policy our respect for the decisions of other states to join the ICC, and have acknowledged that the court can have a valuable role to play in certain cases. On this point, Darfur is exhibit A.

John B. Bellinger III, U.S. Perspectives on International Criminal Justice, Remarks at the Fletcher School of Law and Diplomacy (November 14, 2008), *at* www.amicc.org/docs/Bellinger_11_14_2008.pdf.

26. The sitting judges' backgrounds are summarized at www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/. Judge Fumiko Saiga (Japan) passed away on April 24, 2009. Only one judge (Tuiloma Neroni Slade from Samoa) was defeated in the 2006 election. Although judges can be removed for "serious misconduct" or "a serious breach of his or her duties," a lack of legal acumen, or failure to properly perform one's judicial duties, is not an available basis for dismissal. *See* Article 46 (setting same removal standard for prosecutors, judges, the Registrar, and the Deputy Registrar).

more quickly respond to atrocity crimes within its jurisdiction because it was free from having to receive a special mandate from the U.N. Security Council.[27] Supporters of the Court viewed the capacity for rapid response by a permanent international court with broad jurisdiction as likely limiting the duration and extent of violent episodes, while providing a more enduring general deterrent.

Potential war criminals, proponents hoped, would reconsider carrying out their illegal plans if they knew a court was likely to hold them individually responsible, regardless of their political power and leadership position within a state.[28] In fact, supporters of the ICC considered potential atrocity crimes perpetrators to be particularly susceptible to the deterrent effect of international justice. Unlike perpetrators of "ordinary" domestic crimes, they hypothesized, war criminals as a group are not "hardened criminals," but rather are "politicians or leaders of the community that have up until now been law-abiding people.... If people in leadership positions know there's an international court out there, that there's an international prosecutor, and

27. *See, e.g.*, Scheffer & Cox, *supra* note 15, at 1047–59.

28. On this point, as we shall see, there are sharply disparate view. *Compare* Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 Nw. U. L. Rev. 1257, 1263 (2007) ("Scholarship in the field often explicitly states that the objective of international criminal justice is to respond to war crimes and mass atrocities."); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 77, 79 (2005) ("Contemporary international criminal law is largely concerned with holding individual defendants responsible for mass atrocities."); Greg Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 Yale J. Int'l L. 89, 92 (2000) ("Individual criminal responsibility, and command responsibility in particular, are important because, to deter human rights abuses, potential perpetrators must perceive ICC prosecution as a possible consequence of their actions."); and International Crimes, Peace, and Human Rights: The Role of the International Criminal Court xi (Dinah Shelton ed., 2000) ("The aim of international criminal justice is essentially to deter crime and help restore international peace and security by punishing those responsible for international crimes committed during armed conflicts."); *with* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 Fordham Int'l L.J. 473, 488 (1999) (observing that international criminal prosecutions may "strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative"); and Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 Am. J. Int'l L. 7, 31 (2001) ("No one should entertain the illusion that the relative success of the ICTY, the ICTR, and the ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes from our midst.").

that the international community is going to act as an international police force, [they will] think twice as to the consequences...."[29]

Whether creating this dichotomy between political and apolitical criminals is justified, and whether the presence of the ICC is likely to have the desired deterrent impact, will be explored in Part IV. Suffice it to say that, given the performance of the ICC to date, it is arguably unlikely that the leader of a rogue state engaged in mass murder, as well as organized mutilations, rape, and torture, will concern himself all that deeply with today's ICC. The somewhat remote chance that the Office of the Prosecutor will effectively investigate and charge him, law enforcement capture him, the jurisdiction seizing him thereafter extradite him, the Trial Chamber try, convict, and then sentence him, and the Appeals Chamber affirm the conviction is unlikely to keep any but the most risk-averse and pessimistic war criminal up at night. And this is the exact sort of person who is not likely to become a war criminal to begin with. What is more likely to plague such a leader's thoughts is the tangible, and often indeed likely, possibility that he[30] will come to know death at the hands of political or military rivals.

Stated plainly, although the ICC provides the educational, symbolic, and coercive benefits discussed later, the deterrent effect of the ICC, as it presently operates, is more limited. And this is bad news for victims, their advocates, and others who desperately want to see their former tormentors convicted and who hope that the tangible threat of international legal action will, in the long term, deter potential perpetrators of atrocity crimes from engaging in their planned abuses.

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29. Michael P. Scharf, *The Prosecutor v. Dusko Tadic, An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 869 (1997) (quoting former South African Constitutional Court judge and Tadic prosecutor Richard Goldstone).

30. Because strict adherence to gender-neutral language makes for awkward reading, the reader must forgive the default use of masculine antecedents.

PART III

Tracing the Development of Victims' Rights Under International Law

ALTHOUGH SOME MAY THINK of victims' rights as a fairly recent and enlightened legal innovation, the principle that individuals who have suffered personal harm or material injury as a result of another's conduct are entitled to be "made whole" is in fact quite an ancient one. Whether through a tribe, religious order, or the state, the collective traditionally provided a forum offering victim-centric dispute resolution, as well as enforcement mechanisms for judgments. In earlier cultures, however, the victim, his family, or the collective (such as his tribe or village) predominantly visited such punishment directly on the wrongdoer or his kin. Anglo-Saxon communities as early as the fifth century A.D., for example, resolved interpersonal conflicts between individuals, families, and clans through slayings and blood feuds.[1] These direct enforcement mechanisms were, indeed, part of the natural order for societies in which the family or tribe occupied a position of centrality within the political and administrative systems.

For example, following the collapse of the Roman Empire, and in the general absence of powerful central governments throughout Europe and in England, blood feuds and self-help constituted the "justice system" of the day.[2] "Public law," in the sense of centralized and state-provided justice, gave way to the private resolution of legal disputes. People of the time viewed lawbreakers as having gone to war against the victim and the victim's community and, in so doing, subjected themselves and their property to communal responses, such as banishment, destruction of their property

1. *See* James R. Acker & Jeanna Mastrocinque, *Causing Death and Sustaining Life: The Law, Capital Punishment, and Criminal Homicide Victims' Survivors, in* WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 141, 142–45 (James R. Acker & David R. Karp eds., 2006).

2. *See generally* Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STANFORD L. REV. 937, 938–40 (1985) ("The available historical work in the field of the criminal law reveals a steady evolution away from the 'private,' or individual, sphere to the 'public' or societal one.").

and houses, or death. In pre-modern societies, therefore, offenders faced both a private right of action, as well as a public one.

The earliest recorded legal systems and religious traditions—from the eighteenth-century B.C. Babylonian Code of Hammurabi to the Visigothic Law Codes of the fifth century A.D.—in fact reflect the near-universal belief that those wronged *must* have a right to redress. Indeed, no justice system has refused to recognize the general principle that the system must accord the victim a right to private redress of wrongs. Providing a forum for personal and direct redress has, thus, traditionally formed the very heart of the social contract between the individual and the collective.

Tribal societies and their heirs relied on notions of social responsibility as their organizing principle, providing not only for restorative, but also for punitive, damages.[3] As such, dispute resolution between the accused and the victim was a matter to be addressed by the collective, rather than a matter left for the two parties to resolve. This, in turn, provided for individualized vindication, while at the same time cabining additional escalating violence and disturbances of the peace.[4]

Ancient customary laws worldwide, as a consequence, were almost exclusively victim-centric. A searching examination of such codes, though interesting, is, however, beyond the scope of this book. But, in order to flesh out how domestic customary laws enshrined the victim's primacy, we will examine one set of customary laws in some detail immediately below.

The *Code of Leke Dukagjini* stands as a proxy for similar ancient victim-centric codes found around the world, in that it placed the personal interests of wronged victim at the very center of the legal framework. Individual victim redress and, relatedly, the punishment of the wrongdoer, were the *Code*'s overriding concerns, to the exclusion of any collectivist or utilitarian tendency to elevate the "communal good" over the interests of particular victims.

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3. *See generally* HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861).

4. In later years, Italian criminal groups, collectively and popularly known as the "Mafia," similarly established their own polycentric legal systems to resolve disputes in the absence of real, or accepted, state power and control and to, in theory at least, vindicate the rights of victims. With time, however, these groups moved from dispute resolution to the exploitation of their fellow citizens and, in so doing, firmly established their corrosive and anti-social reputations.

A. Victim-Centric Justice of the 1400s—Customary Law as Exemplified by the *Code of Leke Dukagjini*

In Greek, the word *Kanun* means "rule," "measure," or "standard of excellence." By Byzantine times, the Ottoman Turks had introduced this word into the Albanian language. Albanians soon relied on the word as common reference to the then-prevailing code of law.

The *Code of Leke Dukagjini* (the "*Kanun*")[5] deeply marked Albanian cultural and legal history. For centuries, the *Kanun* dominated economic and interpersonal relationships, providing clear (and at times somewhat unorthodox) guidelines for everyday life among the ethnic Albanian populations of what is now Albania, Kosovo, Montenegro, Macedonia, and Serbia.[6] Often referenced only in the context of legitimizing, and in fact encouraging, uncompromising blood feuds, the *Kanun* in fact was a far more nuanced code of conduct. The *Kanun* reflected the rural and anti-statist views prevalent to this day in Albania's countryside, and particularly in the mountains of northern Albania. What follows is a brief discussion highlighting some of the *Kanun*'s victim-centric provisions.

Protecting the victim's honor—considered a person's most important possession—was a central and reoccurring theme in the *Kanun*. Dishonor could be brought upon the victim in a variety of ways, including by the victim being threatened, pushed, spit on,[7] having his wife insulted or having

5. THE CODE OF LEKE DUKAGJINI (Leonard Fox Translation, 1989). Although the *Kanun* is commonly viewed as the product of prominent and wealthy aristocrat Leke Dukagjini's (1410–1481) efforts, in reality the *Kanun* has evolved over centuries, developing long before Dukagjini was born, and continuing on after his death. Nevertheless, it was Dukagjini who collected and published what we today consider Albanian customary law.

6. The *Kanun* addresses subject matters in the following order: offenses relating to the church, the cemetery, and church employees including the priest, *id.* at §§ 1–17; structure of the family, *id.* at §§ 18–27; the wedding and marriage, *id.* at §§ 28–55; familial rights and obligations, *id.* at §§ 56–63; property division/inheritance, *id.* at §§ 64–117; relationship between master and servant, *id.* at §§ 117–31; offenses against house, livestock, and other property, *id.* at §§ 132–212; property rights, *id.* at §§ 213–88; work/employment, *id.* at §§ 289–395; hunting and fishing, *id.* at §§ 396–451; trades, *id.* at §§ 452–98; transfer of property, *id.* at §§ 499–508; promises and gifts, *id.* at §§ 511–19; oaths, *id.* at §§ 520–92; personal and social honor/hospitality, *id.* at §§ 593–694; blood and kinship, *id.* at §§ 695–734; damages, *id.* at §§ 735–65; crimes, *id.* at §§ 766–990; and judicial law, *id.* at §§ 991–1220.

7. *Id.* at § 601(b).

her "run off with someone,"[8] having his hospitality violated,[9] or by virtue of the offender taking his weapon.[10] The *Kanun*, indeed, treated honor as such a fragile possession that a visitor could insult the victim-homeowner by "remove[ing] the cover of a cooking pot on [the owner's] hearth."[11] According to the *Kanun*, any victim who was so dishonored was "considered dead"[12] until the "spilling of blood"[13] or "magnanimous pardon (through the mediation of good friends)"[14] removed the stain. As to the former method, which sanctioned the price of blood for dishonor, the *Kanun* clearly envisaged some form of self-help:

> The [dishonored victim] has every right to avenge his honor: no pledge is given, no appeal is made to the Elders, no judgment is needed, no fine is taken. The strong man collects the fine himself.[15]

In addition to restoring honor, the *Kanun* provided extensive guidance on criminal matters.[16] In theft cases, for example, liability followed the principal or accomplice's "participation in the crime," but, "if the theft is discovered, [those involved] must make restitution [to the victim] for the stolen object."[17] In fact, the *Kanun* provided not only for restitution but also required punitive damages in the form of a fine. Theft of livestock, for example, required the offender to "restore" the victim's animals, as well as to pay a fine of 500 *grosh* (which was the price of a building site for a house or the price of a "good rifle"[18]).[19] Moreover, the *Kanun* proclaimed that "every stolen

8. *Id.* at § 601(d).
9. *Id.* at § 601(f).
10. *Id.* at § 601(e).
11. *Id.* at § 601(i).
12. *Id.* at § 600.
13. *Id.* at § 598.
14. *Id.*
15. *Id.* at § 599.
16. *See generally id.* at §§ 766–990.
17. *Id.* at § 768.
18. The *Kanun* even provided a noninflationary price schedule to reflect the value of a *grosh*: a building site or a rifle cost 500 *grosh*, a donkey cost 300 *grosh*, a "good olive grove" cost 100 *grosh*, a beehive with bees cost 50 *grosh*, and a pair of sandals cost a mere 5 *grosh*. *See id.* at § 484.
19. *Id.* at § 790.

object is subject to double compensation."[20] Similarly, a person who stole a "bellwether" goat or ram, "wishing to cause affront or because of some hatred towards the herdsman, and is not killed on the spot, must pay a fine of 500 *grosh* and double compensation."[21] The *Kanun*, therefore, provided to the victim both restitution for the harm suffered, as well as a fine designed to punish the offender and deter similar future conduct.

In terms of enforcing the punishment, if a particular accused failed to submit to the judgment, the village could place the individual "under ban" (that is, ostracize him) and could even withdraw all legal protection from the accused who committed the act, "leaving those whom he has offended free to do whatever they like to him."[22] Moreover, in those cases in which the offender's house was ordered burned as punishment, and other property, such as vineyards, were ordered destroyed, the offender himself (or, if he was not available, someone from, or close to, the offender's family)[23] had to give the signal to begin the burning and destruction, saying, "May the evils of the village and the Banner fall upon me!"[24] The offender, in the spirit of restorative justice and acceptance of personal responsibility for the harm he caused the victim, therefore, had to personally commence his own punishment.

An even deeper act symbolizing the restorative aspects of the *Kanun* occurred once "the hearts of the members of the family of the murderer and the family of the victim [had] been reconciled."[25] Upon reaching this level of forgiveness and healing, the former adversaries took two half-full glasses of *raki* (a high-proof grape alcohol), tied their little fingers together, and pricked them with a needle.[26] The two men then dropped blood from their fingers into the two half-full glasses of *raki* and mixed the *raki* and the blood.[27] Thereafter, "the two men exchange glasses and, with arms linked,

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20. *Id.* at § 804. Note that the killing of a rooster, on the other hand, carried a fixed (and rather high, by most standards) penalty of "500 *grosh* to the owner" because the rooster was said to be "the poor man's clock." *See id.* at § 808.

21. *Id.* at § 154.

22. *Id.* at § 1183.

23. *Id.* at § 1199.

24. *Id.* at § 1198.

25. *See id.* at §§ 988–90.

26. *Id.* at § 989.

27. *Id.*

they [held] the glasses to each other's lips, drinking each other's blood."[28] This symbolic act signaled true reconciliation between the offender and the victim, as well as an end to the impending, or ongoing, cycle of violence. "Guns are fired in celebration and they become like new brothers, born of the same mother and father."[29] Even the most cynical critic of restorative justice would consider such an outcome—the creation of such a "blood brotherhood"—if sincere, to be the pinnacle of justice-system success. Righting the social equilibrium was, thus, one of the customary law's goals; but making the victim whole was primary.

B. Centralized State Power in the 1700s and 1800s, the "Scientification" of Criminal Law, and the Decline of Victims' Rights Under Domestic Law

Customary law, as exemplified by the *Code of Leke Dukagjini*, has, as we have seen, long put the victim at the center of the proceeding. Making the victim whole was, indeed, ancient law's paramount purpose.

Beginning in the 1700s, however, Western customary law's focus on protecting the interests of victims gave way to broader societal objectives, namely, reducing crime and consolidating state power. Regional leaders increasingly viewed customary law's private "dispute resolution" approaches as tearing at the societal fabric.

Centralized authority, accompanied by community judicial control, accelerated the influence of the state on the administration of criminal justice. Medieval kings and feudal lords restricted blood feuds by introducing tariff systems. The tariff systems required victims to petition for pecuniary compensation from offenders, instead of resorting to private vengeance. As societies became more consolidated, fines payable to the victims—and then to the king—took the place of the collective's grant of permission that victims seize or destroy the offender's property.

As kings and lords consolidated power, compensation to victims gradually became the exception to the rule. Significantly, legal systems began to view lawbreakers as having committed offenses against the "crown," the "king's peace," or "society," rather than against the particular victim. The

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28. *Id.* at § 990.

29. *Id.*

king and his representatives punished minor crimes with fines and relied on more serious corporal punishments for graver offenses.[30] Victims, in turn, were left to "seek justice" by testifying for the prosecution.

As the law began to embark on this slow transformation from mediator to punisher, victims became increasingly restricted in their ability to dispense punishment and collect compensation. The victim, once the central figure, now was little more than a source of evidence against the accused. As the criminal justice system's purpose shifted in this manner, the importance of restitution to victims waned to the point that restitution morphed into a fine payable to the state. The focus, unmistakably, moved from the victim's welfare to the welfare of the community at large.[31] (Private citizens, of course, retained the right to bring a private cause of action in tort against those who had injured them.) By cleaving individual claims for restitution from the perpetrator from those brought against the perpetrator by the "government," the law relegated the victim to a distinctly secondary role.[32]

By the early 1700s, governments went beyond simply consolidating the justice system's authority. Increasingly, they began elevating the study of law and the process of lawmaking to a "legal science." Under this re-conception of the justice system's purpose, the idea of victims' rights and victims' centrality to the justice system represented little more than an antiquated vestige of a bygone era. European thinkers started to develop widely divergent theories on the origins of crime and the optimal methods of crime prevention. As discussed below, the one common thread running through these new modes of thinking was that none of them contemplated a meaningful role for victims.

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30. Although customary law, as noted above, continued to play a dominant role in rural stretches of Albania, as a general matter it disappeared in the rest of western and central Europe.

31. *See generally* STEPHEN SCHAFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 12–14 (1977) (discussing this collectivist trend in Germany and England).

32. *See generally* ROBERT REIFF, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY xi (1979) ("Society—sensitive to the issues of social justice for the offender—spends millions of dollars on programs for offender-oriented court reform and rehabilitation. On the other hand, society fails to protect crime victims, degrades them socially, and refuses them aid."); MARGARET O. HYDE, THE RIGHT OF THE VICTIM 4 (1983) ("[F]or the most part, victims are the innocent and neglected element in the criminal justice system.").

1. The Classical School of Criminology

The "Classical School of Criminology" was a criminological movement which emerged during the late 1700s and the early 1800s. Scholars called this school of thought "classical" because of the similarity in thinking between those scholars and early Greek philosophers such as Aristotle, Euripides, and Plato, all of whom placed great emphasis on the centrality and importance of free will. Proponents of the Classical School considered deterring crime through carefully calibrated punishment a great humanitarian reform, superior in many ways to the medieval practices it replaced. Some of the defining features of the Classical School included the idea that people acted on the basis of free will; that behavior was guided by hedonism (pleasure/pain calculation); that crime was the result of free will and hedonism; that punishment should fit the offense; and that wrongdoers were little more that the products of bad laws.

The Italian thinker and abolitionist Cesare Beccaria was one of the father's of the Classical School. In 1767, Beccaria wrote the book *On Crimes and Punishment*, which argued that the social contract forms the basis of society, in that a violation of another's liberties equates to a violation of the social contract binding all civilized people. The criminal law, the theory went, must necessarily have a restricted scope, presuming people innocent until proven guilty. The law must also be codified, and crimes must be made widely known and understood, so that all citizens are "on notice" of what conduct is proscribed. Moreover, adherents of the Classical School contended that the justice system must limit the severity of punishment so that it never exceeds that required to deter people from committing the crime (explaining why the Classical School rejected capital punishment). That said, punishment must be certain and swift and must be popularly viewed as such. At bottom, the justice system had to accurately calculate the citizen's pleasure/pain threshold in order to incentivize "good" conduct and deter "bad" behavior.

By synthesizing and applying revolutionary Enlightenment notions of universal and self-evident rights[33] to the problems of crime, Beccaria shifted

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33. Conceptions of rights during the Enlightenment of course were not uniform; the differences between German and French Enlightenment thinkers, for example, were significant, as were the differences between Thomas Hobbes', Jean-Jacques Rousseau's, and John Locke's conceptions of liberty and freedom. *Compare* THOMAS HOBBES, LEVIATHAN (1651) (arguing that powerful central government is the only way to bring man out of the chaotic state of nature, which is characterized by the "war of all

the focus from criminals and retribution-based punishment to crime control, reform of the criminal justice system, and the "science" of making good laws. Englishman Jeremy Bentham then took this approach to a new level in his book, *An Introduction to the Principles of Morals and Legislation*, which developed utilitarianism (Bentham's version of hedonism) as the basis for sound social governance. In this epoch of emerging socio-legal engineering, the victim's role, like the offender's role, became secondary, and achieving the broader societal objective of crime control emerged as the justice system's reason for being.

2. The Positivist School of Criminology and Beyond

During the mid 1800s and early 1900s, a social movement most closely associated with Cesare Lombroso, known as the "Positivist School," began gaining popularity. The Positivist School adopted forward-looking attitudes toward social and personal betterment and extolled the (perhaps overoptimistic) belief in the perfectibility of both society and human nature. The aim was to explain and, more important, predict human behavior, much like a natural scientist observes, and then predicts, uniform patterns in the natural world. The Classical School's reliance on hedonism and utilitarianism, in contrast, fell from favor as justice officials began to view it as an oversimplified philosophy that did not adequately account for the full range of factors driving human conduct. The new focus was thus away from the Classical School's belief in the promise of legal science as a means of effective crime control, and on the inner workings of the "criminal mind." Punishment now was supposed to fit the individual and not the crime. A scientific elite/technocracy, devoted to treating, correcting, and rehabilitating criminals, was to guide the justice system down this complex path toward a fuller understanding of what makes criminals "tick."

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against all") and JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689) (developing a theory of political and civil society based on natural rights and contract theory) *with* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT (1762) (arguing for direct, not representative, democracy and contending that government can only be legitimate if it has been sanctioned by the people in the role of the sovereign). However, for our purposes it is sufficient to recognize that Enlightenment thinkers did share certain central themes.

In the 1960s, mainstream criminologists, expanding the positivist position, began to look away from the individual and toward society for answers to the question of what makes criminals criminal. Robert Merton's "Strain Theory," part of the Chicago School of Criminology, exemplifies this surging progressive criminological philosophy. Adherents hypothesized that the "lower socio-economic classes" were most vulnerable to social pressure, or "strain," resulting from the purported gap, imbalance, or disjunction between culturally induced aspirations for economic success ("I want a nice car and designer clothes"), and limited structurally distributed possibilities of ever achieving that success ("But I don't have the high school or college education, or steady job, that will permit me to legitimately obtain the nice car and designer clothes").

The lower socio-economic classes, theorists contended, would maintain their unfulfilled economic aspirations in spite of frustration and failure. Although providing rewards for noneconomic pursuits (such as public service, family, sport, and entertainment) could stabilize the system, the stress, or "strain toward anomie," would continue. Imperfect coordination of means and ends ultimately would fatally undermine the regularity and predictability of the social structure.

This focus on societal culpability, rather than individual responsibility, made followers of the positivist position view both perpetrators and persons they wronged as victims of society. For it was society, the argument went, that left the perpetrator with no choice but to commit crime in order to bridge the gap between what modern commercial culture told him he should have and what his meager legitimate means permitted him to acquire.

Followers of "Conflict Theory" and "Radical Criminology" later adopted this societal-blame philosophy, championing the neo-Marxist view that the criminal justice system and criminal law was, indeed, deliberately rigged to operate on behalf of rich and powerful social elites, with resulting crime control policies put into place solely as a means of controlling the poor. The criminal justice establishment's goal, their theory went, was to impose standards of morality and good behavior, as dictated by the powerful minority who directly benefited from a permanently subjugated underclass.

Once again, the ideology of the day considered the victim of a particular crime, committed by a particular perpetrator, to be, in reality, a victim of the collective. Only this time the "collective" was made up of the rich and powerful "ruling elite," rather than capitalist society generally. Academics and sympathetic lawmakers pushed this position beyond its natural breaking point, resulting in a public law-and-order backlash against what the

citizenry viewed as an unacceptable ideological trend away from crime control and toward blanket excuses for criminal conduct.

C. Twentieth-Century Resurgence of Victims' Rights Under Domestic Law

As we have seen, the dominant criminological theory of the 1960s was rehabilitation, the central tenet of which was "fixing" perpetrators by fixing society. The rehabilitative model, with its reliance on penological experts who examined and tried to explain the offender's criminal pathology, left little room for the involvement of victims. For under this view of punishment, victims added nothing to the quasi-clinical "diagnosis" and "treatment" of offenders.

In the United States, where adherence to the philosophy of rehabilitation by the late 1960s began to give way to policies favoring retribution, the majority of states began to institute pro-victim compensation programs and the like.[34] The "victimology" movement viewed such government-paid compensation to victims as an effective way to increase victim participation in criminal prosecutions, helping victims feel that the state and society has taken an active interest in their plight.[35] Those who viewed retribution and deterrence as the true purposes of the criminal law, moreover, felt victims had been unfairly

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34. For example, Wisconsin adopted its first compensation statue in 1975. *See* 1975 Wis. Laws ch. 344, § 3. Minnesota enacted its victim's compensation statue in 1974. *See* 1974 Minn. Laws ch. 463, § 3. New Jersey adopted victim compensation in 1971, Alaska in 1972. *See* 1971 N.J. Laws ch. 317, § 1; 1972 Alaska Sess. Laws ch. 203, § 1. Indeed, even victims' rights amendments to state constitutions became common. *See, e.g.*, Alaska Const. Article I, § 24; Ariz. Const. Article II, § 2.1; Cal. Const. Article I, §§ 12, 28; Colo. Const. Article II, § 16(a); Conn. Const. Article I, § 8(b); Fla. Const. Article I, § 16(b); Idaho Const. Article I, § 22; Ill. Const. Article I, § 8.1; Ind. Const. Article I, § 13(b); Kan. Const. Article 15, § 15; La. Const. Article 1, § 25; Md. Decl. of Rights Article 47; Mich. Const. Article I, § 24; Miss. Const. Article 3, § 26(A); Mo. Const. Article I, § 32; Neb. Const. Article I, § 28; Nev. Const. Article I, § 8(2); N.J. Const. Article I, § 22; N.M. Const. Article 2, § 24; N.C. Const. Article I, § 37; Ohio Const. Article I, § 10(a); Okla. Const. Article II, § 34; Or. Const. Article I, §§ 42–43; R.I. Const. Article I, § 23; S.C. Const. Article I, § 24; Tenn. Const. Article 1, § 35; Tex. Const. Article I, § 30; Utah Const. Article I, § 28; Va. Const. Article I, § 8-A; Wash. Const. Article 1, § 35; and Wis. Const. Article I, § 9(m).

35. *See generally* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 64–77 (1982) (explaining use of restitution at different stages of criminal proceedings); Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 71–80 (1970) (discussing history of restitution).

neglected by a justice system concerned chiefly with the accuseds' rights. They considered the victim a much more sympathetic figure than the accused and, in support of their position, pointed to the failure of the environmental and sociologically-based crime control models to meaningfully predict or deter criminality.

One possible, but underexamined, explanation for the revival in concern for victims and victims' rights during the 1960s–1980s is that ordinary citizens gained a greater understanding of, and level of empathy with, victims of crime. Crime rates during this time were on the rise.[36] Moreover, television news reports and shows graphically depicted victims' suffering, rendering their plight more tangible. Put simply, victims no longer existed in the abstract. Rather, citizens sitting in their living rooms could see, and empathize with, victims in a direct manner previously impossible. As a result, the average citizen became more worried about crime and victimization than he would have been in the late 1800s or early 1900s. These factors, in turn, translated into increased pressure on the criminal justice system to better protect and treat victims.

International comparisons, however, reveal that the United States' recognition of victims' rights in the 1960s lagged behind Western Europe. In most civil-law countries, victims ("injured persons") long possessed the right to participate at various stages of the criminal process, from the pre-trial phase to the appeal. Such participatory rights included the qualified right

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36. For example, violent crime in England started to rise in the mid-1950s; England's contemporary violent crime rates for every type of crime, except murder and rape, have in fact surpassed the United States' rates, and the English and American murder rates are now converging, with the U.S. murder rate declining over the past decade, and the English murder rate increasing during the same time. *See generally* Joyce Lee Malcolm, *Lessons of History: Firearms Regulation and the Reduction of Crime*, 8 TEX. REV. L. & POL. 175, 177–79 (2003); *see also* Michael Tonry, *Preface*, CRIME AND JUSTICE (2007) ("Crime rates everywhere in Europe rose steeply from the late 1960s through the early to mid 1990s."); Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining the Differences Is National Penal Policies*, 37 CRIME & JUSTICE 313, 341 n. 14 (2008) (noting that crime rates in Scandinavian countries increased between the 1960s and 1990s); Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 CRIME AND JUSTICE 297, 302–303 (2007) (noting steadily increasing crime rates in Canada and the United States between the 1960s and 1990s). Moreover, although Asian countries have dramatically lower crime rates relative to their level of income development, industrialization, and urbanization, they have followed the trend of increasing levels of criminality from the 1950s to the 1990s. With a worldwide increase in social and cultural mobility and diversity, then, came a decrease in social control, civic republicanism, communal solidarity, and interpersonal accountability; the result has been a worldwide rise in crime rates.

to cross-examine witnesses, introduce evidence, brief motions, and seek additional investigation.[37]

For example, Italian victims, through their attorneys, traditionally participated on an equal basis with the *Publico Ministero* (the prosecutor) and defense counsel.[38] Natural or legal persons, as well as their heirs, who were injured could join the proceedings the public prosecutor initiated as *partecivile.* Victims injured as a result of an offense (*persona offesa dal reato*) were permitted to put forward supporting evidence and to present to the court a statement of their case. Once the trial opened, the victim was given the right to preview for the court the evidence the victim intended to present in support of establishing certain facts. The victim also had the right under certain criminal codes, as well as civil tort law, to obtain restitution and/or reparations for injuries suffered at the hands of the offender.

In France, the justice system likewise permitted victim participation in the proceedings[39] and allowed the victim, in some instances, to substitute for the public prosecutor. Although the French system accorded victims no participatory or other rights during the investigative stage, it provided that a victim who had suffered harm as a result of the offense could come before the court as a *partie civile* and could opt to either join the ongoing prosecution or initiate his own prosecution.[40] If the victim joined an ongoing case (before the *juge d'instruction*), then he was permitted to demand compensation. Alternatively, the victim could bypass the public prosecutor's decision not to prosecute, or could directly accuse the defendant before the *tribunal correctionnel* or the *tribunal de police.*[41] Once at trial, the victim was permitted to produce evidence (and, interestingly, the exclusionary rules

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37. *See generally* William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 14 (1992). Note, however, that in most civil-law jurisdictions, witnesses, following a short preamble, are asked to describe what occurred in an unconstructed narrative fashion (following the epistemological premise that evidence should be presented in a manner most closely approximating its "original" form). *See, e.g., Strafprozessordnung* § 69(1) (F.R.G.).

38. *Codice di Procedura Penale* Articles 410, 493, 496, 498, and 523.

39. Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim, in* MIREILLE DELMAS-MARTY & J. R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 543 (2002).

40. *See generally* Proc. Code Articles 183, 197, and 217 (right to notice of rulings and hearings); *id.* Articles 198, 281, 315, 316, 346, 454, and 460 (right to be heard); and *id.* Articles 186, 186-1, and 497 (appeal rights).

41. *See generally* Valerie Dervieux, *The French System, in* MIREILLE DELMAS-MARTY & J. R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 226–27 (2002).

did not pertain to him, since he was not a state actor). This system of relatively broad victim participation was part of the French Code of Criminal Procedure, which stated that any

> [c]ivil 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.[42]

Under the German system, certain minor offences directly impacting the privacy of the victim (*Verletzte*) required the victim first to file a complaint. The German *Privatklaeger* (private accuser) was traditionally permitted to exercise significant quasi-prosecutorial powers (in such cases, the victim, or *Verletzte*, conducted the prosecution[43]). Victims were also permitted to nominate themselves as accessory complainants through a legal process called *Nebenklage*.[44] Those authorized to lodge such an accessory complaint included victims of bodily injury, victims of white-collar crimes, and relatives of homicide victims. These victims were permitted to join the proceedings at any time, provided they first filed a request for compensation (*Anschlusserklaerung*).

Although the United States may have been playing catch-up with European countries in matters of victims' rights,[45] by the late 1970s a somewhat watered-down version of victim participation (providing for, among other things, the filing of victim impact statements) had become accepted. International law, however, at that point had not yet come to fully recognize victims' rights.

D. Victims' Rights Recognized as Part of International Law

The gradual movement toward "internationalized victims' rights," extending beyond private actors and individual responsibility to public actors and state

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42. C. PR. P'EN. Article 2, *available at* www.legislationline.org/legislations.php?jid=19&ltid=15.

43. *Strafprozessordnung* §§ 374–94.

44. *Id.* at §§ 395–402.

45. For a thorough review of the role of victims in U.S. domestic courts, *see* Markus Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3 (1999).

responsibility, can be traced to the international community's growing focus on transnational criminal culpability following the tragic victimization and destruction of human life during the two world wars. States, after all, bore the responsibility for the large-scale human rights violations occurring during World War I and World War II. Recognizing the state and state actors as directly responsible for human atrocities provided the necessary push for a broader notion of responsibility and obligation extending beyond the traditional municipal law boundaries. No longer were individual rights and obligations solely a matter between the individual and the state, governed by local law.[46]

1. International Law's Recognition of Individual Rights

The rights of the individual that the Nuremberg Tribunal and the International Military Tribunal for the Far East, also known as the "Tokyo Trials" or the "Tokyo War Crimes Tribunal," sought to uphold were calculated to safeguard the most basic conditions of human life and human decency. The drafters of the tribunals criminal charges considered the crimes to be violations of bedrock preconditions to a "normal" life, and thus termed them "crimes against humanity." Breaches of these fundamental standards included extermination, enslavement, and forced deportation, as well as other "inhumane acts" committed against civilian populations.[47]

Following the Allied tribunal's trials of Nazi leaders on such charges of crimes against humanity, the 1945 Charter of the newly formed United

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46. *See generally Chorzow Factory Case*, PCIJ Reports 1927, Series A No. 8, 21 (July 26, 1927) (Permanent Court for International Justice finding that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparations therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself"); *Selmouni v. France*, 29 EHRR 403 (1999) (European Court of Human Rights ruling that an effective remedy requires that the state conduct a thorough and effective investigation making it possible for the investigators to identify and punish those responsible for the alleged violations); *Velasquez Rodriguez* IACtHR Series C, No. 4 (1988) (Inter-American Court of Human Rights ruling in case of unresolved disappearance of individual in Honduras that states are required to "effectively ensure...human rights" and must investigate alleged human rights violations "in a serious manner and not as a mere formality preordained to be ineffective").

47. Charter of the International Military Tribunal, August 8, 1945, Article 6(c), 59 Stat. 1544, 82 U.N.T.S. 279.

Nations incorporated the notion of human rights. The U.N. Charter provided, *inter alia*, that all signatory governments would promote the expansive objectives of "universal respect for, and observance of, human rights and fundamental freedoms."[48]

The 1948 Universal Declaration of Human Rights,[49] in contrast, was more of an aspirational document. The Universal Declaration promised the world's citizens various "rights," including the right to "rest and leisure" and "periodic holidays with pay";[50] the right to "free choice of employment";[51] the right to a "standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care";[52] and the right to "enjoy the arts and to share in scientific advancement."[53] These social, political, economic, and cultural self-actualization rights amounted to a conception of the good and as such were fundamentally different from the Nuremberg trials' protection of rights that were basic preconditions to human life and civilized society.[54]

As a practical matter, of course, guaranteeing such expansive rights to every person in the world—including people languishing in abject poverty simply because they had the misfortunate of being born in areas of the world where industrialization is in its infancy—threatens to deprecate the goals of those seeking "international justice." Fortunately, the pursuit of more achievable rights, such as the right to vote, the right to equal pay, the right to due process, and the right to be free from cruel and unusual punishment and torture, has occupied international bodies more than the right to "rest and leisure," "periodic holidays with pay," "free choice of employment," and the enjoyment of the arts.

As international law began to subject individuals—and not just states—to criminal sanctions, it also began to vest individuals with personal rights and to view accountability as a component of victim redress. Various post–World War II international instruments and corresponding monitoring bodies, such

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48. U.N. Charter Article 55(c).

49. G.A. Res. 217 (December 10, 1948).

50. *See id.* at Article 24.

51. *See id.* at Article 23.

52. *Id.* at Article 25(1).

53. *Id.* at Article 27.

54. The Universal Declaration, unsurprisingly, contained no enforcement mechanisms, describing itself simply as a "common standard of achievement." *Id.* at Preamble.

as the 1948 Universal Declaration on Human Rights,[55] the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[56] and the 1966 International Covenant on Civil and Political Rights,[57] reflected the emergence of these rights. These documents went beyond traditional notions of simple state responsibility to other states and increasingly provided individuals with mechanisms to press their claims against states. Individuals no longer had to go to their states of nationality to submit claims through either diplomatic channels or judicial means. The traditional (that is, pre–Nuremberg trials) notion that harm of a state citizen was solely injury to the state, in short, had begun to erode.[58]

2. Victims' Rights Under International Law

Beyond according individuals a general right to redress, the United Nations by the 1960s sought to enforce the personal rights described in the 1948 Universal Declaration (labeled an "International Bill of Human Rights") through the 1966 Optional Protocols[59] of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (seeking to protect "economic" rights, such as shelter, food, employment, education, and health care), as well as through the International Covenant on Civil and Political Rights (ICCPR) (seeking to protect "political" rights, such as physical

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55. GA Res. 217A (December 10, 1948).

56. ETS No. 5 "ECHR."

57. G.A. Res. 2200A (December 16, 1966).

58. Under the Hague Conventions of 1899 and 1907, for example, noncombatants physically or materially harmed as a result of a state engaging in armed conflict could petition their state of nationality to request compensation on their behalf from the state that is alleged to have committed these violations. Similar provisions are contained in, *inter alia*, the Geneva Convention Relative to the Treatment of Prisoners of War, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights. These conventions require states to provide a remedy/reparations for human rights violations. *See also* Universal Declaration of Human Rights ("[E]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

59. *See* Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 302; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, adopted December 15, 1989, G.A. Res. 44/128, U.N. GAOR Supp. No. 49, U.N. Doc A/RES/44/128 (1989).

integrity of the person, legal proceedings, free speech, and free thought rights).[60] Although the ICCPR provided a mechanism for submitting and processing complaints and was written in mandatory language, the ICESCR did and was not.[61]

Significantly, the ICCPR's Article 2.3 provided that states must generally accord an effective remedy to any person whose rights are violated. The U.N. Human Rights Committee, a body of independent experts monitoring the implementation of the ICCPR, in turn interpreted Article 2.3 as requiring states to conduct an effective prosecution to remedy the harm caused to victims in cases involving arbitrary detentions, forced disappearances, torture, and extrajudicial executions.[62]

On June 23, 1983, the Committee of Ministers of the Council of Europe issued a regional recommendation titled "Participation of the Public in Crime Policy."[63] The bulk of the recommendation covered topics of "social prevention," including encouraging architects and town planners to "give cities a more humane layout aimed at crime prevention."[64] Other matters of accommodation included alternatives to custodial sentences,[65] nondiscrimination against offenders,[66] and publicity campaigns to increase public understanding of the penal and social consequences of criminality.[67] The recommendations suggested that the member states' justice systems take into consideration the victims' interests. The recommendations

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60. Adopted December 19, 1966, Sen. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171.

61. A discussion of this two-tier notion of human rights is beyond the scope of this book, but suffice it to say that some of the most prominent/activist human rights nongovernmental organizations, such as Human Rights Watch and Amnesty International, the World Bank, and the European Bank, structure their institutional priorities in this same fashion, reflecting the belief that respecting political rights merely requires states to abstain from violating the rights, whereas meeting a population's economic needs is a practical matter impossible without huge (and unavailable) cash outlays.

62. *See, e.g., Chonwe v. Zambia*, Communication No. 821/1998, at 7 (2000), *available at* www.unhchr.ch/tbs/doc.nsf (attempted murder); *Vicente* et al. *v. Colombia*, Communication No. 612/1995, at 10 (1997), *available at* www.unhchr.ch/tbs/doc.nsf (arbitrary detention, torture, and forced disappearance); and *Tshiongo v. Zaire*, Communication No. 366/1989, at 7 (1993), *available at* www.unhchr.ch/tbs/doc.nsf (arbitrary detention and torture).

63. Recommendation of the Committee of Ministers, Doc. No. R(83) 7 (June 23, 1983).

64. *Id.* at III(B).

65. *Id.* at III(6).

66. *Id.* at III(2).

67. *Id.* at III(14).

also proposed that victims have "access to justice at all times,"[68] and that member states establish systems of legal aid to help victims gain access to justice.[69]

The Inter-American Court of Human Rights,[70] an autonomous judicial institution based in Costa Rica and established in 1979, similarly in the 1990s began interpreting various articles of the American Convention on Human Rights as guaranteeing victims the right to the effective prosecution of their victimizers, the right to access and to be heard, the right to procedural fairness, and the right to effective recourse and reparations. The American Convention in Chapter 2 accords a comprehensive catalogue of due process, fair trial, freedom of expression, personal liberty, and other rights. Although the Convention does not expressly have much to say on the topic of victims' rights, the Inter-American Court has held that family members have the right to know what happened to their loved ones and that a denial of this right to the truth is the equivalent of a state's denial of victim access to effective justice and to procedural fairness.[71]

The European Court of Human Rights, established as a regional judicial body by the 1950 European Convention on Human Rights, and operational as of March 1, 1998, similarly accorded victims various procedural and substantive rights.[72] Not only can the forty-seven member states of the Council of Europe bring Applications against the state parties for alleged human rights violations, but so also can individuals and other parties. The European Court of Human Rights, for example, faulted the British criminal justice system for not informing victims of the reasons the prosecutors decided to decline a case and for failing to subject the declination decision to judicial review.[73]

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68. *Id.* at III(29).

69. *Id.*

70. The Court both interprets and enforces provisions of the American Convention on Human Rights. Cases are brought to the Court by member states of the Organization of American States, and its functions are both advisory and adjudicatory (if the accused is a state party accused of human rights violations that has accepted jurisdiction). Cases are referred either by the Inter-American Commission on Human Rights or a state party. Citizens, unlike in the European human rights system, are not permitted to bring cases directly to the Court.

71. *Velasquez Rodriguez*, Inter-Am. C.H.R., Ser. C, No. 4 (1988).

72. *See* May 4, 2001, decisions in *Jordan*, 1020 Eur. Ct. H.R. 300, P 123; *McKerr*, 34 Eur. H.R. Rep. 20, P 131; *Kelly*, 2004 Eur. Ct. H.R. 240, at 117; *Shanaghan*, 1814 Eur. Ct. H.R. 400, P 107.

73. *See id.*

The Council of the European Union has similarly adopted a Council Framework Decision meant to improve victims' standing in criminal proceedings. This Decision urged member states to ensure that victims have a "real and appropriate role in its criminal legal system."[74] These international courts and conventions laid the groundwork for the ICC's more aggressive victims' rights agenda.

Victims' rights under international law received a significant boost in 1985 with the drafting of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[75] Although the Basic Principles did not provide victims with any new rights, they embody the first formal recognition by the United Nations that, in order to comply with emerging norms of international justice, states had to "adequately recognize" victims' rights[76] by providing victims with "access to the mechanisms of justice and to prompt redress, as provided for by domestic legislation, for the harm that they have suffered."[77] The Basic Principles, moreover, defined "victims,"[78] stated that victims are entitled to access to justice and "prompt redress,"[79] emphasized the importance of keeping victims informed of case-related activities and of providing victims with assistance throughout the legal process,[80] and advised that domestic justice systems should permit victims to present their "views and concerns" at "appropriate stages of the proceedings where their personal interest are affected, without prejudice to the accused...."[81] The Basic Principles, in short, sought to internationalize victim-centric rights that by the mid-1980s had received broad acceptance in many domestic justice systems.

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74. Council Framework Decision 2001/220/JHA, 2001 O.J. (L 82) 1–4 (2001), Article 2. Indeed, the decision also urged member states to ensure that victims may be heard during the proceedings, can supply evidence, and are informed of the status of the case. *Id.* at Articles 3, 4, and 7.

75. G.A. Res. 40/34 (November 29, 1985). *See* www.un.org/documents/ga/res/40/a40r034.htm.

76. *Id.* at Preamble.

77. *Id.* at Article 4.

78. *Id.* at Article 1.

79. *Id.* at Article 4.

80. *Id.* at Articles 6(a) and 6(c).

81. *Id.* at Article 6(b).

Commenting on the December 11, 1985, adoption of the Basic Principles, Professor Bassiouni wrote:

> Victims of crime and abuse of power are by the very fact of their victimization persons whose basic human rights have been violated.... Throughout history, in the so-called primitive societies, victims of aggression have usually found support and assistance from their tribe, family, or village. But in modern societies, which pride themselves on their heightened levels of development and civilization, this is seldom the case. In these societies, the incidence of crime and state sponsored abuses of human rights have dramatically increased. At the same time traditional patterns of social solidarity and dependency have significantly decreased and, frequently, victims become relegated to a worse social and human position than those who have victimized them. Thus, the time has come for the world community to take a position on the rights of victims in modern society.[82]

Judges at the International Criminal Tribunal for the Former Yugoslavia (ICTY), commenting on the significance of the Basic Principles, similarly observed:

> While issues relating to what might generally be referred to as "victims' rights" have been addressed in many domestic law systems for long periods of time, consideration of these issues under international law is of relatively recent vintage. In 1985, the General Assembly adopted a Declaration of Basic Principles for Victims of Crime and Abuse of Power, which has served as the cornerstone for establishing legal rights for victims under international law and has led to a number of developments relating to victims.[83]

The Basic Principles, thus, for the first time recognized a victim's right to receive information and to present his views and concerns to a domestic

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82. M. CHERIF BASSIOUNI, INTERNATIONAL PROTECTION OF VICTIMS 9 (1988).

83. International Criminal Tribunal for the Former Yugoslavia, Judges' Report, Victims' Compensation and Participation, 1, CC/P.I.S./528-E (September 13, 2000), *available at* www.un.org/icty/pressreal/tolb-e.htm.

judicial body, as well as other rights that collectively can be described as "access to justice rights."[84]

On March 21, 2006, following a series of revisions and political compromises, the U.N. General Assembly adopted by consensus the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These "2006 Basic Principles" were intended to provide something akin to an international bill of rights, whereas the 1985 Basic Principles had focused on the rights of crimes victims under national justice systems.[85]

The 2006 Basic Principles, which make explicit reference to the Rome Statute's victims' rights provisions,[86] seek to provide "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law...."[87] Under the 2006 Basic Principles, "victims" can include the immediate family or dependents of the direct victim who have suffered harm while intervening to assist victims or to prevent victimization.[88]

The General Assembly explicitly adopted the 2006 Basic Principles so that states:

> [T]ake the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general....[89]

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84. *See* Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 79 (2008) ("[A]mong the rights promoted by the Victims Declaration are the right of victims to be treated with respect, the right to receive information regarding relevant judicial proceedings, and the right to present their views and concerns to a court. Although some national jurisdictions involve victims to an even greater extent in criminal proceedings, these principles—being treated with respect, receipt of information, and the opportunity to present views and concerns—are seen as fundamental to providing victims 'access to justice.'").

85. G.A. Res. 60/147 (March 21, 2006).

86. *Id.* at Preamble.

87. *Id.*

88. *Id.* at V(8).

89. *Id.* at 2.

International law once considered victims to be little more than the *objects* of rights and obligations. Today, in stark contrast, both domestic justice systems and international law increasingly view victims as the *subjects* of such rights and obligations.[90] This shift in thinking is critical, and the ICC follows—and expands upon—this developing legal trend.

90. Consider the Geneva Convention Relative to the Treatment of Prisoners of War, the European Convention on Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, and the Universal Declaration of Human Rights. State practice has similarly increasingly begun to provide reparations to victims. *See, e.g.*, Germany's *Wieder Gut Machung* law (providing over $104 billion in compensation to victims of Nazi crimes and continuing to provide some $624 million annually to 100,000 pensioners) and the United States' "1988 Civil Liberties Act" (providing $20,000 to each citizen of Japanese ancestry interned during World War II). That said, state practice of providing compensation to non-state actors is at best an emerging norm. *See generally* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. Rev. 223 (2006).

PART IV

Primer on the ICC

THE FOLLOWING IS A PRIMER to generally familiarize the reader with the ICC's functions and procedures, particularly as they relate to victims.

A. Breaking New Ground for Victims' Rights

There are, as discussed above, legitimate grounds for contending that the ICC to date has not lived up to the international community's expectations and for believing that there remains significant room for improvement. But one promising area in which the ICC has in fact assumed a true leadership role is in the field of victims' rights. The ICC's host of victim-centric laws at bottom strive to empower victims by providing them with a substantive seat at the proverbial table. In contrast to national models of direct victim redress, such as provided by European justice systems, representative, class action–style group litigation grounds the ICC's conception of victim representation.

Being prepared to accept the considerable responsibility placed on victim representatives' shoulders requires them to carry effective and flexible advocacy techniques in their arsenal, as well as to gain an intimate familiarity with the structure and challenges of the forum in which they must advocate.[1] The ability to alter course in the face of obstacles is, therefore, this book's continuing theme. Although full trial participation may be the goal, the prepared victim representative must give plenary thought to effective alternatives having the potential of meeting the victims' needs and desires.

1. Outside and inside observers agree that, while the Office of Public Counsel for Victims is staffed with a small cadre of lawyers who are very familiar with the ICC's articles, rules, and regulations, the larger groups of "external" legal representatives too frequently have failed to adequately prepare themselves for this unique venue and its unusual rules of play. Relying on sheer good will and optimism about doing "the right thing," while laudable, is never a substitute for a careful reading and understanding of the applicable legal provisions.

B. The ICC's Operation

The ICC stands alone as an international organization created by treaty among sovereign nations, enjoying a recognized international legal personality, yet neither bound nor controlled by any particular government. Headquartered in The Hague (Netherlands), with a liaison office in New York City and various field offices, the Court, at its core, is a high-profile and richly funded institution with significant political clout. As of 2010, the ICC employed more than seven hundred attorneys and professional staff from approximately eighty different states, with an annual operating budget approaching $200 million.

Member states' contributions finance the Court. In fact, the Court employs the same method used by the United Nations to determine the amount payable by each state party—the Court bases a state's contribution on the state's capacity to pay, which in turn reflects factors such as a national income and population. The Court, however, limits the maximum amount a single country can pay in any year to 22 percent of the Court's budget.

Pursuant to Article 34, the ICC comprises the Presidency,[2] the Pre-Trial Chamber,[3] the Trial Chamber,[4] the Appeals Chamber,[5] the Office of the Prosecutor,[6] and the Registry.[7] (For a flow-chart outlining the organization of the Court, see *infra* Figure IV.1.) The Assembly of States Parties nominates

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2. The duties of the Presidency are summarized in Article 38.

3. The duties of the Pre-Trial Chamber are summarized, among other places, in Articles 56–61. Whether the Pre-Trial Chamber consists of a single judge or three judges is determined by the Pre-Trial Chamber, *see* Rule 7(1), and is governed by Article 39(2)(b)(iii) (giving option between one and three judges); Article 57(2) (same); Rule 7(1) (stating that decision to designate single judge must be made "on basis of objective pre-established criteria"); and Regulation 47(1) (listing, as noncomprehensive list of criteria for selecting a single judge, the seniority and criminal trial experience of the judge, the circumstances of the proceedings, and the workload of the individual judges). *See generally* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Decision on the Designation of a Single Judge of Pre-Trial Chamber I* (March 26, 2009) (justifying appointment of single judge to carry out functions of the Pre-Trial Chamber in *The Prosecutor v. Bosco Ntaganda*); *see also* Situation in Uganda, Case No. ICC-02/04: *Decision Designating a Single Judge on Victims' Issues* (March 23, 2009), at 3–5 (Pre-Trial Chamber's decision that a single judge designated to handle victims' issues was needed to "ensure proper management and efficiency in the handling of victims' issues in the proceedings before the Chamber").

4. The primary duties of the Trial Chamber are outlined in Articles 64–76.

5. The primary duties of the Appeals Chamber are outlined in Articles 81–85.

6. The Prosecutor's primary duties are outlined in, among other places, Articles 42 and 54.

7. The Registry's primary duties are outlined in Article 43 and Rules 12–16.

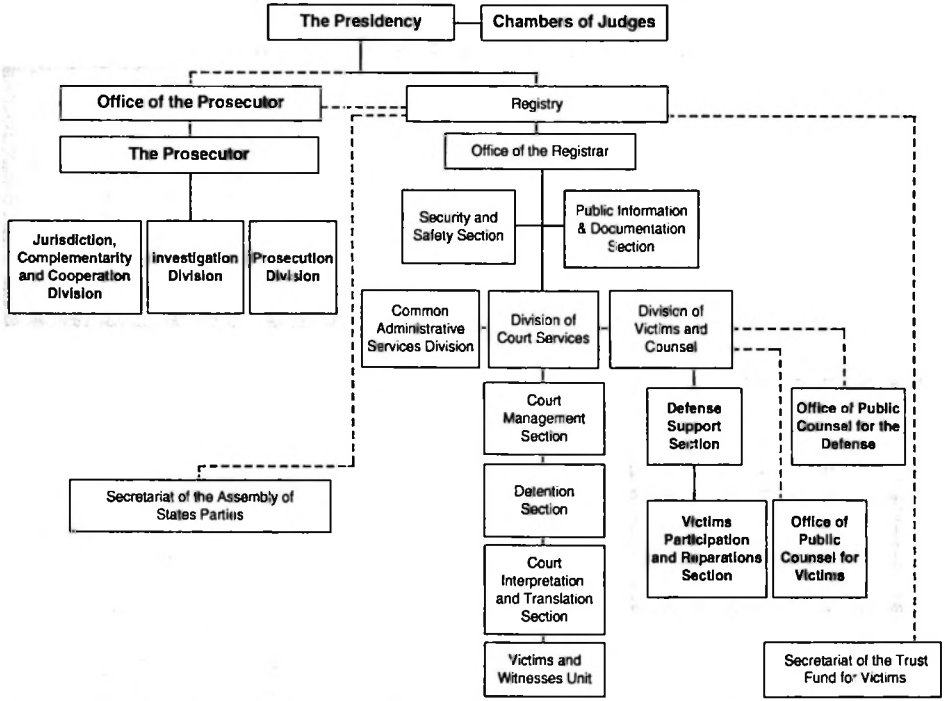

Figure IV.1 "Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court." Copyright © International Criminal Court 2006.

and confirms the Prosecutor and judges who, as a group, are required to represent diverse geographic, gender, and legal backgrounds.[8] The Office of the Prosecutor, in order to preserve independence, operates as a separate organ of the Court. Some two hundred fifty lawyers, investigators, and staff are employed by the Office of the Prosecutor. The Registry, on the other hand, is responsible for all nonjudicial aspects of the Court, including the Victims and Witnesses Unit. The Registry also sets up the Office of Public Counsel for Victims, which employs three attorneys and five staff.

Unlike the International Court of Justice (ICJ), the ICC is legally and functionally independent from the United Nations. The "Relationship Agreement between the International Criminal Court and the United Nations" governs the arrangement between the ICC and the United Nations. That said, the Rome Statute does grant certain powers to the U.N. Security Council. Article 13(b), for example, allows the Security Council to refer to the ICC situations that would not otherwise fall under the Court's jurisdiction. (The Security Council, in fact, used this legal mechanism in relation to the situation in Darfur, which the ICC could not otherwise have prosecuted because Sudan is not a state party.) Moreover, Article 16 empowers the Security Council to require the Court to defer a case's investigation for a renewable period of twelve months. The Security Council may renew such a deferral indefinitely. The ICC also cooperates with the United Nations in many other areas, including in the exchange of information and logistical support.

C. The ICC's Limited Subject-Matter Jurisdiction

Article 5 of the Rome Statute grants the ICC jurisdiction over four broad categories of crimes, which the article characterizes as the "most serious crimes of concern to the international community as a whole." Thus, the crimes listed under Article 5 of the Rome Statute, and defined in Articles 6, 7, and 8, all require the Prosecutor to prove specific, and more "serious,"

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8. *See* Article 36(7)-(8). As of this writing, more than one hundred twenty countries are state parties (at times alternatively referred to as "states parties") to the Rome Statute of the ICC. Thirty-four of the state parties are African states, eighteen are Asian states, eighteen are Eastern Europe states, twenty-seven are Latin American and Caribbean states, and twenty-five are Western European and other states. Senegal was the first country to ratify the Rome Statute (on February 2, 1999); Cot d'Ivoire was the last (on February 15, 2013).

forms of intent as *mens rea* elements of the crime. The physical act of killing somebody is, by way of example, not itself a crime within the jurisdiction of the ICC unless the physical act is also (1) "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group" (as required to convict an accused[9] of having committed genocide under Article 6); (2) "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (as required to convict an accused of having committed crimes against humanity under Article 7); or (3) "wilful," in the sense of being intentional (as required to convict an accused of having committed war crimes under Article 8). Academics, government officials, and international lawyers have advanced a variety of reasons for restricting the ICC's jurisdiction to such "super crimes," including the need to strengthen universal acceptance of the ICC and to avoid overburdening it so that it can remain focused on its principal role and function.[10] As it stands, the crimes over which the ICC has jurisdiction are the least controversial, as they represent the most brazen attacks on bedrock human-rights principles.

1. The Crime of Genocide

Elements of Crime Article 6 defines the crime of genocide by reference to a number of particular acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group." These proscribed criminal acts include killing members of a group; forcibly transferring children from one group to another; imposing measures intended to prevent births within a group; inflicting conditions of life calculated to physically destroy the group; and causing serious bodily or mental harm to members of the group.

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9. For ease of reading, the terms "accused" and "defendant" will be used somewhat interchangeably herein, even though the ICC and other international tribunals typically only use the term "accused."

10. *See* David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1007 (2008) (discussing possibility that drug trafficking and terrorism could be "resurrected as candidates for inclusion in the ICC's subject matter jurisdiction"); *see also* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12–13 (1999) (noting that "U.S. objectives [when considering the early ILC drafts] included...exclusion of drug trafficking and the hard-to-define crime of aggression from the statute").

Noteworthy is that, under Article 6's definition, the accused need not commit the crime through a government or its military, but rather can also be found guilty if he committed the offense through a terrorist or guerrilla organization, a nongovernmental organization (NGO), and so forth. Moreover, the offence is limited to ethnic, national, racial, and religious groups, which (with the exception, perhaps, of some "converted" members of religious groups) are "indelible" groups into which one is born. What is not covered by Article 6, therefore, are acts committed with the intent to destroy, say, certain ideological, political, professional, or similar groups which one typically joins as a matter of choice. Finally, the offense language requires that the Prosecutor establish the accused's intent to "destroy" the group in question, rather than to simply remove, or "cleanse," the group from a particular region.

2. Crimes Against Humanity

Elements of Crime Article 7 defines crimes against humanity as the commission of acts such as murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced disappearance, and persecution constituting "part of a widespread or systemic attack directed against any civilian population." Article 7's crimes against humanity demands that the Prosecutor establish the existence, or at least the emergence, of a broader, systematic attack directed against a civilian population. Article 7 provides that the "humanity" sought to be protected contemplates the individuality of all human beings, apart from their membership in a particular group. Sudanese President Omar al-Bashir has been indicted, in part, on allegations that he committed such crimes against humanity. Specifically, al-Bashir was charged with violating Article 7(1)(a) (murder); Article 7(1)(b) (extermination); Article 7(1)(d) (forcible transfer); Article 7(1)(f) (torture); and Article 7(1)(g) (rape).[11]

3. War Crimes

Elements of Crime Article 8 defines war crimes extremely broadly to include violations of the Geneva Convention of August 12, 1949, as well as specified

11. *See* www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm.

"serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law," and "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character." With regard to the requirement that the accused realize that the conduct took place in the context of, and was associated with, an international armed conflict, and that the accused was aware of the factual circumstances establishing the existence of "an" armed conflict, Article 8 provides that:

— There is no requirement for a legal evaluation by the perpetrator as to the *existence* of an armed conflict or its character as international or noninternational.
— In that context, there is no requirement for awareness by the perpetrator of the facts that established the *character* of the conflict as international or noninternational.[12]

Article 8's only requirement is that the accused have an awareness of the *factual circumstances* that establish the existence of an armed conflict.

4. The Crime of Aggression

On June 11, 2010, a definition for the "crime of aggression" was adopted at the Review Conference of the Rome Statute in Kampala, Rwanda. Article 8 *bis* now defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[13] However, the Court will not exercise its jurisdiction over the crime until after January 1, 2017, when state parties decide upon activating its jurisdiction.[14]

Of course, at present the ICC has subject-matter jurisdiction over a host of crimes falling within the above-described categories. To date, however,

12. Emphasis added.
13. ICC. RC/Res.6* (June 11, 2010).
14. Id.

the Court has only investigated and prosecuted a minute number of cases, when compared to the universe of perpetrators. Moreover, few in the Office of the Prosecutor will argue, either privately or on the record, that they are all that interested in adding this particularly politically charged offense. Although much is written about the purported promise of adding the crime of aggression to the Prosecutor's arsenal, formally defining the offense, setting aside its symbolism, is politically difficult and will not likely open any new (or meaningful) avenues of prosecution.

The prosecutors have, as they will candidly concede, enough on their plates already, without also wading into the political morass of determining whether one state has committed a crime of aggression (however defined) against another. This debate thus once again highlights politicians' and diplomats' emphasis on the "symbolic" value of the ICC, while at the same time drawing into focus how unfamiliar many of them are with the existing abundance of prosecutorial legal tools and the limits on prosecutorial resources and capacity. Adding new crimes may not be needed; increasing the number of investigations, prosecutions, and convictions, however, is very much required. Whether the crime of aggression is formally defined will, by itself, thus likely do little to address the prevailing need to enhance the ICC's efficiency and professionalism.

D. Territorial and Personal Jurisdiction Requirements

The ICC is headquartered, has its offices, and has its detention facility in the Netherlands. But its venue is effectively worldwide, as its proceedings may take place anywhere. The ICC, moreover, can exercise jurisdiction in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, *or* if the U.N. Security Council referred the situation to the ICC. (For an overview of how a case progresses at the Court, see *infra* Figure IV.2.)

During the negotiations over the Rome Statute there was substantial disagreement over whether the ICC should be granted universal jurisdiction.[15] The United States, together with other states, ultimately defeated the universalist position. Negotiators, however, reached a compromise

15. *See* Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF. (July/August 2001), at 86, 92–93.

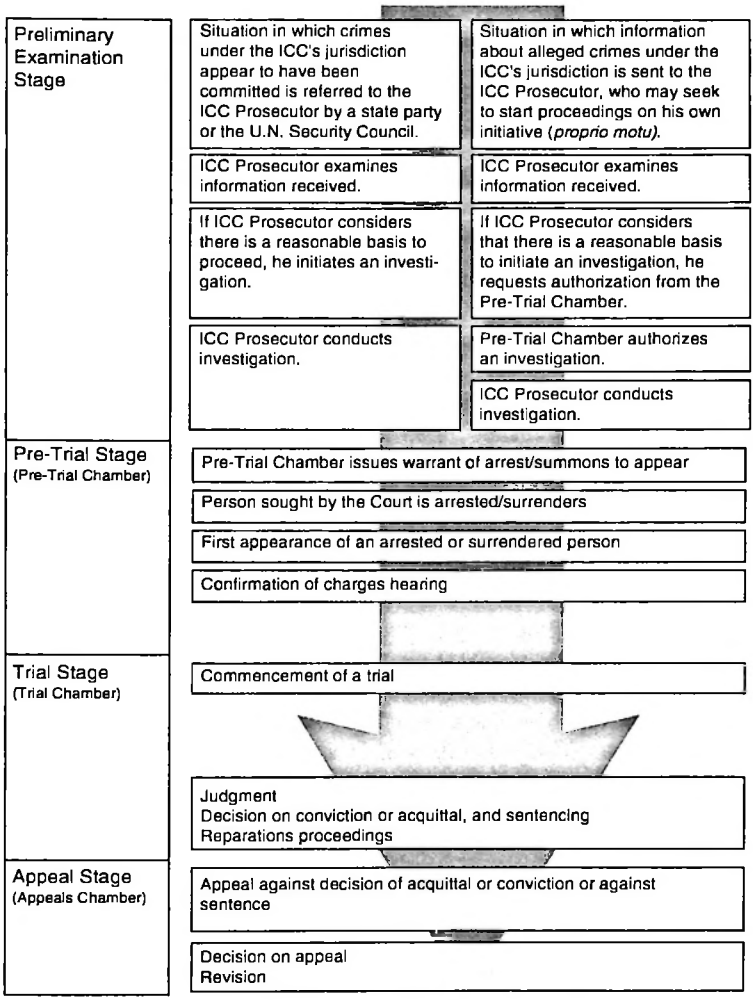

Figure IV.2 **Case Progression Chart**

"Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court." Copyright © International Criminal Court 2006.

permitting the ICC to exercise jurisdiction under the following limited circumstances, as set forth in Articles 12 and 13:

1. The accused is a *national* of a state party (or, in some cases, where the accused's state has accepted the ICC's jurisdiction);[16]

2. The alleged crime was *committed* on the territory of a state party (or, in some cases, where the state on whose territory the crime was committed has accepted ICC jurisdiction);

3. The U.N. Security Council *referred* the situation to the ICC (in which case the above-preconditions do not apply; a national of a non-party state can be prosecuted, and there is no requirement that the accused commit the alleged crime on the territory of a state party); *or*

4. A non-state party files a declaration with the ICC, inviting the ICC to investigate a crime alleged to have occurred within its territory, or to have been committed by one of its nationals.[17]

E. The ICC's Limited Temporal Jurisdiction

Pursuant to Article 11, the ICC's nonretroactive jurisdiction limits the cases it can hear to crimes committed on or after July 1, 2002 (the date on which the Rome Statute entered into force). For a state that acceded to the Rome Statute *after* that date, the ICC can exercise jurisdiction automatically with respect to crimes committed after the effective date for that particular state.

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16. Most of the situations within the purview of the ICC will involve complex civil conflicts, with atrocities committed by both sides. The danger with self-referrals is that they will usually come from a government seeking to have the ICC indict members of the opposition rebel forces. Indeed, other than the Security Council's referral of the Darfur situation, the Prosecutor has targeted not state authorities, but rather those who are the state authorities' enemies. *See generally* William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 752–53 (2008) ("The attention to non-state actors is closely related to the concept of 'self-referral,' which has the practical consequence of establishing a degree of complicity between the Office of the Prosecutor and the referring state.... Indeed, no government anywhere would respond anymore to an invitation to the Prosecutor to, in practice, prosecute themselves. Self-referral will be viewed as a trap, a Trojan horse of the Court.").

17. Note that three of the four situations currently before the ICC are the result of such self-referrals.

F. The ICC's Due Process Guarantees

With the exception of the right to a jury trial, the fundamental due process rights accorded by the ICC's Rome Statute roughly mirror those provided under the U.S. Constitution.[18] These rights include, but are not limited to, the presumption of innocence (Article 66(1)); the right to confrontation and cross-examination (Article 67(1)(e)); the right to remain silent (Articles 55(2)(b) and 67(1)(g)); the right to a speedy trial (Article 67(1)(c)); the right to assistance of counsel (Article 67(1)(b) and (d)); the right to a written statement outlining the charges against the accused (Article 61(3)); the right of compulsory process to bring in witnesses on the accused's behalf (Article 67(1)(e)); the prohibition against ex post facto crimes (Article 22(1)); the protection against double jeopardy (Article 20(3)); the right to be free from warrantless searches and arrests (Articles 57(3)(a) and 58); the right to be present during the trial (Article 63); and the limited right to exclude unreliable evidence obtained illegally (Article 69(7)).[19] This list of rights is one of the more comprehensive codifications of due process guarantees promulgated to date.[20]

G. The "Complementarity" Firewall: Understanding the ICC's Key Admissibility Test

Despite the ICC's generally clear statutory language, in many circles confusion abounds over the scope of the ICC's jurisdiction. Failure to understand the narrow universe of cases triable at the ICC results in victim representatives overlooking fundamental defense strategies calculated to circumvent altogether an ICC prosecution.

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18. *See generally* Scheffer & Cox, *supra* note 10, at 1047–59 ("[T]here is no fundamental due process right protected by the U.S. Constitution that is not also found in significant form in the Rome Statute.").

19. *See generally* Sasha Markovic, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. ST. L. REV. 263, 291–97 (2004) (comparing constitutional rights of Americans with rights guaranteed in the Rome Statute).

20. For a full analysis of this topic, *see* SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS (2003) (taking a procedural approach to human rights guarantees in international proceedings, including those at the ICC).

The pivotal point here is that the ICC is purpose-built to *complement*, rather than replace, existing national judicial systems. The ICC is, thus, intended to function as a backstop court of last resort, investigating and prosecuting only where national courts have failed to, or are unable to, bring perpetrators of atrocity crimes to justice. That is, the complementarity principle stands for the proposition that the primary responsibility to investigate and punish crimes remains with the individual states; the "complementarity privilege," accordingly, *extinguishes* ICC jurisdiction.

Both non-party states and state parties are entitled to avail themselves of the complementarity privilege.[21] In this sense, complementarity is a reverse-federalism paradigm, in that the overarching ICC yields to the subsumed states whenever the states are able and willing to adjudicate those cases over which the ICC otherwise would have jurisdiction. More specifically, Article 17(1) of the Rome Statute provides that a case is "inadmissible" (that is, the ICC lacks jurisdiction) if:

1. The state that has domestic jurisdiction over the case is investigating or prosecuting it, unless the state is *unwilling or genuinely unable* to carry out the investigation or prosecution;

2. A state that has jurisdiction over the case has investigated it and decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute the matter;

3. The domestic prosecutors have already tried the target of the investigation for conduct which is the subject of the complaint, and a trial at the ICC is therefore not permitted pursuant to Article 20(3); *or*

4. The Prosecutor determines the case to be of insufficient gravity to justify further action by the ICC.

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21. *See generally* Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 501 (2009) ("The complementarity regime virtually assures that the ICC will not hear cases against major international military actors such as the United States because a state can avoid prosecution of its national by initiating a credible investigation or prosecution; the only states likely to have their nationals prosecuted are those that either (1) want the prosecution to go forward (say because of domestic regime change) and with the international community to bear the costs of prosecution, or (2) have too little state capacity to initiate a credible prosecution or investigations. Sudan forms a potential third category: a recalcitrant state that wishes to avoid prosecution.").

As discussed in greater detail in Articles 17(2) and 17(3), the ICC, therefore, exercises its jurisdiction *only* when national courts are (1) *unwilling* or (2) *unable*—due to inadequacies in the domestic legal capabilities, for political reasons, or as the result of some other circumstance—to investigate and prosecute in their domestic courts crimes otherwise within the ICC's jurisdiction. Certain governments and individuals, concerned with the possibility of ICC investigation and prosecution, are as a consequence carefully studying the complementarity firewall in order to use it proactively to frustrate ICC jurisdiction.

By way of example, in the case of Sudan,[22] the Khartoum government appears to be keenly aware of Article 17. The government, even prior to the ICC's indictment of Sudan President Omar al-Bashir on war crimes and crimes against humanity charges, signaled its intent to update and modernize Sudan's criminal justice system. It is not much of a leap to conclude that the Khartoum government did this solely to demonstrate its institutional "readiness" to "genuinely carry out" in its domestic courts the investigation and prosecution of Darfur-related war crimes over which the ICC may otherwise have jurisdiction.

Such ICC-inspired "law reform" may of course bring genuine advances to a country's legal system.[23] It can just as easily, however, represent a thinly veiled ploy to evade ICC jurisdiction and the corresponding international human rights spotlight that accompanies an ICC trial. By invoking the privilege, a state such as Sudan can seek to strip the ICC of its jurisdiction, thereby aiding its alleged war criminals' efforts to avoid prosecution by the Court.

The concern about the Court's potential political bias in evaluating whether a state is "unwilling" to prosecute a matter within its domestic courts has been a substantial stumbling block for non-party states, including the United States. ICC skeptics point to this language as amendable to

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22. For a humanized history of the Darfur conflict, *see* DAVID K. EGGERS, WHAT IS THE WHAT (2008).

23. This is a development that even opponents of the Khartoum government view as positive. Although they may favor full ICC involvement in bringing cases against the government's leadership, they also realize that the present law reforms are a positive externality of the ICC's complementarity firewall. *See generally* William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 92–93 (2008) ("Through a policy of proactive complementarity, the ICC may be able to facilitate domestic judicial reform efforts that can transform a state previously unable to prosecute international crimes into a state both able and willing to undertake domestic investigations and prosecutions. This policy might include the training of officials, the provision of resources, or assistance with investigations.").

broad, politically motivated construction (and, even worse, application). If a nation, such as the United States, becomes a state party, and thereafter fails to prosecute certain political officials or members of the military leadership for their roles in what some in the international community may regard as atrocity crimes, it would certainly be within the ICC's competence to declare that state "unwilling" to pursue the matter, thus deactivating the complementarity privilege as it relates to the particular case.[24]

Proponents of the United States joining the ICC may, in rebuttal, contend that, given the United States' significant political power and standing in the world, it is a practical impossibility that the Office of the Prosecutor would ever seriously consider charging members of the U.S. military or U.S. political leaders, absent unforeseeable and extraordinary circumstances. However, even members of the Office of the Prosecutor will privately concede that such arguably politically motivated prosecutions are more than a purely hypothetical possibility. By way of example, they will point to the fact that the Office came quite close to formally investigating—and perhaps charging—alleged war crimes involving British troops during the Iraq war (specifically, Britain's use of "indiscriminate weapons systems" to attack purported "urban areas").

Britain undoubtedly is a politically powerful nation with a long history of safeguarding human rights, and it certainly has the ability to properly investigate and prosecute such cases in its domestic courts. That the Office of the Prosecutor, in a world chock-full of past and current dictators, militia leaders, and military commanders responsible for mass homicides and gross human rights abuses, would, despite the existence of the complementarity

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24. *See generally* Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 861 (2002); *see also* David B. Rivkin Jr. & Lee A. Casey, *That's Why They Call It War*, WASH. POST (March 16, 2003), at B04 ("[International human rights] NGOs suggest that United States armed forces, precisely because they have better weapons, should be held to a higher standard than less advanced militaries. This would apply particularly to the question of civilian casualties, or 'collateral damage,' where a rule of near zero tolerance is promoted."); Lee A. Casey & David B. Rivkin Jr., *Court Dismissed: The ICC Is a Snare and a Monstrosity—with No Standing*, NAT'L REV. (November 11, 2002) (asserting that the United States considers the Rome Statute "an open invitation to abuse by ambitious and/or biased prosecutors and judges"). For an intriguing discussion of the constitutionality of U.S. participation in the ICC and of the changes in U.S. law required prior to the complementarity preempting ICC jurisdiction, *see* Scheffer & Cox, *supra* note 10, at 983 (pointing out that persecution, which encompasses ethnic cleansing, is not criminalized by U.S. law and calling for the United States to "modernize its codes, civilian and military, so that the United States has the ability to investigate and prosecute U.S. nationals before U.S. Courts for the full range of atrocity crimes falling within the subject matter jurisdiction of the ICC").

firewall, consider devoting scarce time and resources toward investigating British troops at a minimum undercuts the categorical claim that the Court would realistically *never* think of investigating and charging the military or political leaders of rule-of-law-driven democracies.

Consider in this regard also the U.N. Economic and Social Council's 2001 decision to vote the United States off of the fifty-three-seat, Geneva-based U.N. Commission on Human Rights, of which the United States in 1947 was a founding member. The fact that the U.N. Commission at the time had among its ranks states with significant, established histories of human rights abuses, such as Libya, China, Cuba, Pakistan, Sudan, Uganda, and Sierra Leone, continues to fuel the fires of ICC skeptics. The skeptics point to this incident as a relatively clear example of international retaliation against, or animosity toward, the United States.

If the United States one day decided not to prosecute a particular political or military leader, there is nothing in the ICC's legal provisions formally stopping the Prosecutor or the Chamber from concluding therefrom that such a decision is the result of the kind of corrupt, or atrocity-crimes-tolerating, failed-state judicial system for which the ICC was meant to be a substitute. Moreover, there is no system of democratic accountability that would necessarily prevent such arguable overreaching by an unaccountable and unreviewable prosecutor, who has virtually unfettered discretion to charge atrocity crimes all the way up the chain of command.

Weighing the benefits to the United States of joining the ICC against the unpredictable dangers down the road might fortify ICC skeptics' belief that becoming a state party is not necessarily in the nation's best interest. It is of course possible, however, that the ICC skeptics are simply overreacting, selectively singling out isolated incidents in an ongoing attempt to discredit the demand that the United States, like all member states, give up some level of sovereignty in the pursuit of international justice. Moreover, any sovereign nation has in its arsenal the ability to rely on self-help. The United States, satisfied that it has the capacity and willingness to properly investigate a particular matter in its own courts, or convinced that the ICC breached the complementarity firewall for purely political reasons, could simply refuse to comply with the ICC's requests for assistance in investigating, apprehending, or extraditing individuals within its domestic jurisdiction. But such inaction would represent a clear breach of the United States' treaty obligations.

If such an impasse were reached, the Court, pursuant to Article 87(7), could "make a finding [of non-compliance] and refer the matter to the Assembly of State Parties or, where the [U.N.] Security Council referred

the matter to the Court, to the Security Council." Article 112(2)(f), in turn, enables the Assembly of States Parties to "[c]onsider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation." However, Article 112 fatally contains no enforcement mechanisms.

In theory, the Security Council could, pursuant to Article 39 of the Charter of the United Nations, make a determination that the United States' act of noncompliance constitutes a "threat to the peace, breach of the peace, or act of aggression," thus permitting the Security Council to take enforcement measures discussed in Charter Articles 40–42 to prompt compliance. Such drastic action against the United States is, however, highly unlikely, particularly given the United States' seat on the Security Council. In the end, then, this issue is more complicated than it may at first appear.

H. Case Initiation

Victims are, by article and rule, formally independent, co-equal "participants" (though not necessarily co-equal "parties," which, pursuant to Article 82(1) and its grant of appeals rights to "[e]ither party," is a term of art referring only to the prosecution and defense). That said, victims are also to a significant extent reliant on the Prosecutor. The victims' interest in the Prosecutor's action reaches its apex when it comes to the Prosecutor's charging decision. Whether a given victim will have any involvement in the Court's litigation, indeed, depends on the threshold question of who the Prosecutor decides to charge, and with what. It is, therefore, important to understand the role prosecutorial discretion plays at the ICC.

The analysis of prosecutorial discretion at the ICC requires a two-stage process, divided into a review of the Prosecutor's discretion in the context of "situations," and the application of this discretion with respect to individual "cases" encompassed within a given situation. The Prosecutor, in short, must obtain jurisdiction over the broad situation prior to indicting specific cases arising out of that situation. Distinguishing situations from cases in this manner is unique to the ICC. Prior ad hoc tribunals, including the post–World War II tribunals convened at Nuremberg, Tokyo, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), did not have to select situations, since their enabling legislation was inherently situation-specific.[25]

25. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., Article 3, U.N. Doc. S/RES/827 (1993); Statute of

Situations can be identified in one of three ways: (1) state party referral (such as Uganda), pursuant to Article 14; (2) Security Council referral (such as Darfur), pursuant to Article 13(b); or (3) at the initiation of the Prosecutor, pursuant to Article 15. Neither the Court nor the Prosecutor may decline a situation referred by the state party or U.N. Security Council mechanisms, since referrals under both processes are manifestations of state sovereignty.[26] Cases within the situation, on the other hand, are a different matter.

1. State Party Initiation or Security Council Referral

If the state party or Security Council referral process activates the Court's jurisdiction, then the Prosecutor, pursuant to Article 53, must decide what particular cases, if any, to charge.

Article 53 provides in relevant part:

> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court was or is being committed;
>
> (b) The case is or would be admissible under Article 17;[27] *and*
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> (c) Taking into account the gravity of the crime and *the interests of victims*, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[28]

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the International Criminal Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., Article 4, U.N. Doc. S/RES/955 (1994).

26. *See generally* Schabas, *supra* note 16, at 734–40 (providing an excellent analysis of the promises and pitfalls of prosecutorial discretion, as exercised at the ICC).

27. Article 17 provides that the Court shall determine a case inadmissible if (1) the complementarity firewall is triggered, or (2) the "case is *not of sufficient gravity* to justify further action by the Court." (emphasis added).

28. Emphasis added.

Should the Prosecutor determine there is no reasonable basis to proceed with the prosecution, and that decision is based solely on the subsection 1(c) "safety-valve,"[29] then the Prosecutor must inform the Pre-Trial Chamber of his decision.[30] If, on the other hand, the Prosecutor bases his declination decision on the other two criteria discussed above, then the Prosecutor must inform (1) the Pre-Trial Chamber, and (2) either the state making the Article 14 referral or the Security Council of this decision.[31] Note, however, that, in addition to the criteria listed in Article 53(1), Article 53(2)(c) permits the Prosecutor to decline prosecution if he determines that the prosecution is "not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, *the interests of the victims* and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime...."[32]

The referring state party and the U.N. Security Council have the right to request that the Pre-Trial Chamber review the Prosecutor's finding that there is no sufficient basis for prosecution.[33] The Pre-Trial Chamber, moreover, on its own initiative may review the Prosecutor's decision not to proceed if the Prosecutor based his decision solely on Article 53 subparagraph 1(c) or 2(c).[34] Of course, if new facts come to light, the Prosecutor can always reconsider his decision to charge, or to decline, a particular case.[35] This statutory framework, as a practical matter, therefore gives the Prosecutor notably broad discretion over case-related charging decisions.

2. The Prosecutor's Initiation of a Case

As touched on above, the Rome Statute authorizes the Prosecutor to initiate investigations on his own accord (*proprio motu*), provided the alleged crimes are within the jurisdiction of the Court.[36] This power is one of the

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29. I employ the term "safety valve" because both Article 53(1)(c)'s "gravity" criteria and the "interests of justice" criteria are extremely broad, giving the Prosecutor significant discretion to decline prosecutions.

30. *See* Article 53(a).

31. *See* Article 53(2).

32. Emphasis added.

33. *See* Article 53(3)(a).

34. *See* Article 53(3)(b).

35. *See* Article 53(4).

36. Article 15(1).

most distinctive features of the ICC, not found in previous ad hoc and international tribunals. As one might imagine, such power vested in the Prosecutor and the Court also raises considerable concerns, including the above-described fears that such independent power could undermine the credibility of the Court by leading to "frivolous and politicized" prosecutions.[37]

The Rome Statute expects the "seriousness of the information received [from written or oral witness statements, state actors, organs of the U.N., NGOs, intergovernmental organizations, and 'other reliable sources that he or she deems appropriate']" to inform the Prosecutor's charging decision. After the Prosecutor undertakes such an analysis, he may seek the Court's permission to commence an investigation.[38] If, however, the Prosecutor concludes from his investigation that there is no "reasonable basis for an investigation," then the Prosecutor must inform those parties who provided him with information of this decision.[39] Although the drafters clearly included this last "notification" provision in the interest of transparency, the "shall inform" language only requires the Prosecutor to inform the parties of his *decision*, but not of the underlying *reasoning* leading to the Prosecutor reaching the decision.

The charging decision is formally made by the Prosecutor, but at least some victim representatives take the position that they have the legal authority to request that the Chamber expand the indictment to include other charges supported by the trial evidence. For example, on May 22, 2009, victim representatives in the *Lubanga* trial formally requested that the Chamber include sexual slavery and cruel and inhumane treatment charges in the indictment. The prosecution did not appreciate such interference with "its" case, and the defense understandably also complained that such last-minute attempts to expand the charges threatened to deprive the accused of due process. How the ICC will grapple with such unorthodox, but creative, legal maneuvering on the part of the victims remains to be seen, but it is likely that this particular request will ultimately be rejected.

The Pre-Trial Chamber, moreover, can approve or decline any investigations the Prosecutor conducts *proprio motu*. The Pre-Trial Chamber

37. *See* Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 219 (2007–08).

38. Article 15(2), (3), and (4).

39. Article 15(6).

may authorize such an investigation if, having reviewed the Prosecutor's request, together with any collected supporting materials, it concludes that there is a reasonable basis to proceed with the investigation and the case appears to fall within the jurisdiction of the Court. Of course, the Trial Chamber reviews any *prima facie* determination by the Pre-Trial Chamber as to the jurisdiction and the admissibility of a case. If, on the other hand, the Pre-Trial Chamber determines that the case-accepting criterion is not met, the Prosecutor either may decide not to proceed with the investigation or may opt to re-present a further request involving the same situation, but based on new facts or evidence.[40]

Despite the broad powers possessed by the Prosecutor, to date the Prosecutor has not relied on this Article 15 statutory authority to initiate cases at his own initiative[41] (though reports indicate that the Office of the Prosecutor is actively investigating certain national officials with an eye on possible charges). Therefore, there is no way to prospectively gauge how deferential judges will be in reviewing the Prosecutor's *proprio motu* charging decisions.

3. Prosecutorial Guidelines: Determining the "Gravity" of a Case

Although in most domestic contexts there is a presumption that the Prosecutor will pursue all non–*de minimus* crimes, the ICC Prosecutor, no different from a federal prosecutor in the United States, must select from a fairly vast pool of meritorious cases, isolating those that are most significant and most deserving of prosecution. The Prosecutor's "Prosecutorial Strategy" policy paper reflects this fairly simple and expected accommodation, stating that "the Office adopted a policy of focusing its efforts on the most serious crimes and on those [individuals] who bear the greatest responsibility for these crimes."[42] The Office of the Prosecutor assesses the

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40. *See* Article 53(4).

41. One possible explanation for the absence of cases initiated by the Prosecutor is that the very grant of this authority was a highly contentious part of the drafting process.

42. *See* Schabas, *supra* note 16, at 735–36 (quoting the Office of the Prosecutor: "Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute clearly foresees and requires an additional consideration of 'gravity,' whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court.... [F]actors relevant in assessing gravity include: the scale of the crimes; the

"gravity" of a particular case on the basis of the scale of the crimes, the nature of the crimes, the manner of commission of the crimes, and the impact of the crimes."[43] These criteria seem reasonable, in that they take into account not only the harm caused to the victims but also the degree of participation and the degree of barbarism of the alleged acts. In the end, however, these words do little (and in reality, little can be done in this regard) to help outsiders identify those cases the Prosecutor is most likely to pursue.[44] Indeed, when one compares recent history's extensive rogues gallery of perpetrators with the few accused brought (or sought to be brought) to account at the ICC, one cannot help but wonder to what extent the ICC is, in fact, effectively pursuing today's most deserving violators of international criminal law and human rights (and human decency) norms.[45]

I. A New Paradigm: The ICC's Hybrid System of Advocacy

The ICC's new forum brings with it unique challenges. Lawyers advocating on behalf of victims must first and foremost gain familiarity with the ICC's idiosyncratic mix of legal principles. In terms of trial practice at the ICC, the Court, like the ICTY and the ICTR before it, incorporates elements of both the common-law and civil-law legal systems into its "hybrid" system

nature of the crimes; the manner of commission of the crimes and the impact of the crimes.").

43. *Id.; see also* Statements on Communications Concerning Iraq, The Hague (February 9, 2009), at 8–9 (the Prosecutor explains his decision not to proceed on complaints filed concerning alleged crimes committed by British troops in Iraq following the 2003 invasion, concluding that there is no evidence that war crimes, as defined by Article 8, had been committed and noting that the "4 to 12 [alleged] victims of willful killing and the limited number of victims of [alleged] inhuman treatment... was of a different order than the number of victims found in other situations under investigation or analysis by the Office [of the Prosecutor]"; the matter therefore also failed Article 53(1)(b) and, by cross-reference Article 17's, gravity requirement).

44. *See generally* Schabas, *supra* note 16, at 743 ("There is no attempt within the ICC Statute itself to rank crimes based on gravity, and it might be claimed, as judges have done at the ICTY, that there is no objective distinction between war crimes, crimes against humanity and genocide in terms of seriousness. In reply, however, there is implicit evidence in the ICC Statute that war crimes are less serious than genocide and crimes against humanity.") (citations omitted).

45. Though, in fairness to the prosecution, the state of the available evidence against some of the potential accused may make prosecution difficult (though, perhaps, not impossible).

of procedural and substantive law.[46] The ICC's brand of justice is, therefore, neither purely adversarial (that is, based on the common-law tradition) nor purely inquisitorial (that is, based on the Napoleonic civil-law tradition).

Practitioners accustomed to ICTY and ICTR proceedings will, nonetheless, recognize many of the ICC's features, such as the requirement that law enforcement officials instruct the accused of the right to remain silent during questioning, the right to have legal assistance, and the right to the presence of counsel prior to and during questioning by the ICC prosecutor or national authorities.[47] Lawyers versed in the U.S. and English common-law tradition, on the other hand, will notice that the ICC departs from common-law procedure in many respects.

The most notable difference between practice at the ICC and common-law trial practice is that the accused at the ICC has no right to a trial by jury,[48] which in the United States is constitutionally engraved in the Sixth Amendment. Moreover, rulings at the ICC merely represent persuasive authority and therefore do not constitute binding precedent (*stare decisis*[49]).[50]

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46. *See generally* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 106–09 (2009) ("In combining retributive and restorative justice principles the Court has maintained the primary goal of seeking to establish the truth as it pertains to the guilt or innocence of an accused through efficient and fair proceedings. Yet it has also expanded its mandate by incorporating ancillary goals pertaining to, *inter alia*, victim participation in the proceedings."); Alexandra H. Guhr, *Victim Participation During the Pre-Trial Stage at the International Criminal Court*, 8 INT'L CRIM. L. REV. 109 (2008).

47. *See* Article 55 ("Rights of Persons During an Investigation").

48. Not only is the jury system a relative outlier in terms of the global administration of the criminal law (though some civil-law countries, such as Belgium, Norway, Spain, and France, permit jury trials), but the very act of using an international tribunal to (in theory, at least) prosecute only the "masterminds" having command responsibility for inherently complex atrocity crimes would present serious challenges for the jury selection process.

49. The term "stare decisis" is derived from the maxim "*stare decisis et non quieta movere*." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). As Justice Douglas observed, "there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon." William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

50. Article 21(2) provides that "[t]he Court *may* apply principles and rules of law as interpreted in *its previous* decisions." (Emphasis added.) Indeed, in terms of the order of priority, earlier decisions of the Chamber take a back seat to the Rome Statute, Elements of Crimes, Rules of Procedure and Evidence, applicable treaties, principles and rules of international law, and general principles of law derived from by the Court from national laws of legal systems of the world (including the laws of the state that would

Other elements of the civil-law system incorporated into ICC procedure include the Court's active Pre-Trial Division, which determines, among other things, whether a case should proceed to trial.[51] The Rome Statute, indeed, authorizes judges to play a much more active role during the course of the main trial than is the norm in adversarial proceedings. The ICC's Office of the Prosecutor, likewise, is more powerful than its counterparts in many common-law jurisdictions. This is because the Office acts as the principal investigator for the prosecution *and* the defense, with the stated goal of impartially "establish[ing] the truth" by investigating "incriminating and exonerating circumstances equally."[52]

Lawyers from civil-law countries, on the other hand, will notice aspects of ICC law with which they may not be familiar. For example, an accused at the ICC may plead guilty to charges against him to avoid trial,[53] which is a procedure generally unavailable in civil justice systems. To the extent that the Trial Chamber concludes that the interests of justice, and in particular, the interests of the victims, require a more complete presentation of the facts of the case than is contained in the accused's Article 64 guilty plea *colloqui* or factual basis, Article 65(4) authorizes the Chamber to order the trial continued and to order that the Prosecutor present specific additional evidence. This additional evidence should complete the factual record by elaborating on the accused's precise role in the offense, or by further detailing the surrounding circumstances leading up to the offense. Victims must pay particular attention to ensuring that such guilty pleas contain admissions as to all relevant facts, including, where possible, those facts demonstrating specific instances of victimization.

Although ICC procedures, therefore, have inquisitorial aspects, the ICC trial process in the main follows the adversarial model, with the accused having the important right to call and cross-examine witnesses.[54] In addition, the ICC's substantive law provides for criminal liability in a

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normally exercise jurisdiction over the crime). Judges from civil-law countries, where judicial precedents only have persuasive weight and criminal codes enjoy a decisive legal status, do not see the same binding value common-law attorneys attach to prior rulings on the same issue.

51. *See generally* Article 57 ("Functions and Powers of the Pre-Trial Chamber"); *see also* the discussion on the Pre-Trial Chamber's role, at Part XII(A).

52. Article 54(1)(a) ("Duties and Powers of the Prosecutor with Respect to Investigations").

53. *See* Articles 64(8)(a) and 65 ("Proceedings on an Admission of Guilt").

54. *See* Article 67 ("Rights of the Accused").

manner similar to common-law conspiracy and joint criminal enterprise doctrines;[55] these concepts are generally foreign to civil-law systems.

Although the discussion to this point has attempted to provide a bird's-eye view of the ICC's dual-nature system, it must be said that the relative looseness of the statutory language leaves to the ICC's judiciary the demanding task of fixing the precise balance between the adversarial and inquisitorial elements. As cases are brought before the Court, as the "fear of the unknown" concerning victim participation abates, and as judges issue rulings interpreting the Rome Statute's articles and the ICC's rules, the ICC's jurisprudence will naturally develop and gain in uniformity and predictability. By way of example, the early fights at the ICC revolved around who qualified as a victim (that is, what qualifications victims had to possess to receive permission to participate in the proceedings pursuant to Rule 85). The Chamber has answered this question, leaving the precise contours of Article 68's "victim participation" as the next major battlefield for victim representatives.[56] Faced with unique challenges, and opportunities, flowing from such a new system fairly early in its development, victim representatives will have substantial substantive input and must make their views known.

J. Reconciling the ICC's Sweeping Promises to Victims with the Realities on the Ground

The ICC, as well as the various ad hoc tribunals that preceded it, are said to fulfill a variety of both historic and practical goals, not the least of which are: (1) fostering accountability by bringing the perpetrators of some of the most barbaric criminal acts imaginable to justice and punishing them;[57]

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55. *See generally* Article 25 ("Individual Criminal Responsibility"); Article 28 ("Responsibility of Commanders and Other Superiors"); Article 30 ("Mental Element"); and Elements of Crime General Introduction 2 and 3.

56. *See, e.g.*, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 13–14 (holding that "[Article 68] establishes the unequivocal right of victims to present their views and concerns when their interests are affected, provided this is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial," but recognizing that the ICC's legal framework has failed to provide for any guidance concerning "the manner of questioning").

57. *See* Preamble to the Rome Statute ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished....").

(2) stemming the ongoing cycles of violence; (3) removing the perpetrators from power (or at least staving their effectiveness); (4) introducing the rule of law to effectively lawless regions and/or societies; (5) deterring future leaders who might consider engaging in the same, or similar, conduct;[58] (6) planting the seeds of reconciliation between the warring sides; (7) providing closure, and perhaps reparations,[59] for those victimized by the wrongdoer; (8) bringing the charged conduct to public light and scrutiny; and (9) impressing on the rest of the world the moral condemnation such conduct deserves.[60]

Following the Nuremberg trials' imposition of individual accountability on those convicted of committing human rights violations, the international community appropriately no longer considers the brutal treatment of civilians by ruling groups a purely "domestic" affair. Instead, these are now matters subject to international justice. And so the negotiators established the ICTY with the stated goal of "the restoration and maintenance of peace."[61] The Security Council resolution creating the ICTR similarly listed as one of the Court's primary objectives "the process of national reconciliation and [] the restoration and maintenance of peace."[62] In addition, the Royal Government of Cambodia and the United Nations established the Extraordinary Chambers in Cambodia to try senior members of the Khmer Rouge for crimes against humanity, including genocide, and to ensure

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58. *See id.* ("Determined to put an end to impunity for perpetrators of these crimes and thus to contribute to the prevention of such crimes....").

59. Although reparations were originally viewed as being owed to an aggrieved state in order to compensate for international wrongs, under contemporary international human rights law and the law of the ICC, reparations now include procedural rights accorded to victims seeking reparations for harm they personally suffered.

60. *See* Preamble to the Rome Statute ("Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, [m]indful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity....").

61. S.C. Res. 827 at 1, U.N. Doc. S/RES/827 (May 25, 1993); *see also* The Secretary-General, Report on the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, at para. 16, delivered to the Security Council and the General Assembly, U.N. Doc. S/1994/1007, A/49/342 (August 29, 1994); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 13 (1996) ("If peace is not intended to be a brief interlude between conflicts," then it must be accompanied by justice).

62. S.C. Res. 955, at 1, U.N. Doc. S/RES/955 (November 8, 1994).

"reconciliation and stability within the state."[63] The ICC in its Preamble likewise notes that "such grave crimes threaten the peace, security, and well-being of the world...."[64] This renewed period of focus on human dignity, and the near-universal agreement on the inviolability of certain autonomy rights, led to the creation of these courts during a time that some observers have labeled the "Age of Rights."[65]

Despite the ICC's significant resources, and the considerable efforts of talented, hard-working, and dedicated personnel, critics, as touched on above, note that the ICC's practical impact to date, in terms of vindicating atrocity crimes (that is, successfully investigating, prosecuting, and convicting individuals responsible for such crimes), has been underwhelming.[66] As things stand, ICC supporters will likely find themselves hard-pressed to argue that today's ICC, as an institution, successfully deters the world's criminals, who on a day-by-day basis are much more likely to be murdered by rivals or erstwhile supporters than to be arrested, extradited, tried, convicted, and sentenced at the ICC.

This reality goes some way to explaining why some present and former prosecutors at the ICC privately do not describe their primary role as bringing perpetrators to justice. Rather, they view their role as a symbolic one in which they build international consensus concerning certain wrongdoing, expose to the world how certain groups or governments are mistreating their people, and attempt to persuade and cajole domestic courts to do the work that may otherwise fall to the ICC.

This self-perception of prosecutors as one-person, roving hybrid politicians, diplomats, and public educators may well be consistent with the Court's present activities, but will no doubt strike many victims and international observers as worrying and, perhaps, inappropriate. Are ICC prosecutors, they may ask, charged with these general public-service functions, or are they, instead, to simply investigate, charge, and win cases, leaving public relations activities to the diplomats and politicians?

In the end, the drafting of well-intentioned international documents, and the increased emphasis placed on individual/human rights by the

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63. G.A. Res. 57/228 at 1, U.N. Doc. A/RES/57/228 (December 18, 2002).

64. Preamble to the Rome Statute.

65. LOUIS HENKIN, THE AGE OF RIGHTS (1990).

66. *See, e.g.*, Katy Glassborow, et al., *ICC Struggles to Reach Out to Darfuris*, Institute for War & Peace Reporting's AllAfrica.com (October 20, 2007) (noting concern over "the lack of arrests, the slow pace of investigations and the [ICC's] low profile on the ground").

international legal community and in international law, has to date sadly done relatively little to curtail human rights abuses. Considering that the twentieth century not only led to the birth of the ICC and its predecessor tribunals but also represents the all-time high-water mark for human barbarity and killing, international conventions appear not to have had the hoped-for general preventative/deterrent effect on those intent on committing atrocity crimes. Instead, actual accountability, regrettably, continues to be the exception, rather than the rule.

More specifically, since becoming functional in 2002, the ICC has actively heard cases involving eight situations—including one involving the Democratic Republic of Congo[67] and the other the Central African Republic.[68] Although the ICC has received complaints about eight alleged crimes occurring in over 139 countries, the Office of the Prosecutor as of this writing has only opened investigations into the eight already identified "situations," namely, those in Uganda, the Democratic Republic of Congo, the Central African Republic, Darfur (Sudan), Kenya, Libya, Côte d'Ivoire and Mali.[69] The Court, moreover, publicly indicted thirty six, issuing twenty-eight arrest warrants and eight summonses. In terms of the ICC's much-maligned "success rate," proceedings against eleven have been completed: four have had the charges against them dismissed, one has had the charges against him withdrawn, one has had his case declared inadmissible before the Court, and three have died before trial—put another way, only two (Thomas Lubanga Dyilo and Germain Katanga) have been convicted and sentenced.

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67. The Democratic Republic of Congo, a state party, referred that situation to the Court in April 2004.

68. The Central African Republic, a state party, referred that situation to the ICC in December 2004, with the investigation formally being opened on May 22, 2007.

69. As noted above, cases come before the ICC through the referral of "situations" involving atrocity crimes. Such situations involve large-scale, multiple commissions of crimes within a particular event, such as the alleged ethnic cleansings against African tribes in the Darfur region of Sudan, the mass atrocities in the Ituri region of the Democratic Republic of the Congo (DRC), the mass rapes in the Central African Republic, and the conflict between the Lord's Resistance Army (LRA) and the Ugandan Army.

    To date, four state parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, and the Central African Republic—have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan—a non-state party (the U.N. Security Council referred the situation in Darfur to the Court in March 2005, with the first two arrest warrants issued the Pre-Trial Chamber I on May 2, 2007).

The ICC, out of respect for national sovereignty, and because it lacks the ability to do so, must, however, rely on states and international organizations to effect the arrests and deliver the accuseds to The Hague.[70] The bottom line is that, in the first six years of the ICC's existence, the Court held not a single trial. Because of the absence of trials, during this time no victims sat at counsel's table, and victims received not a single cent in court-ordered reparations.[71] Even the most ardent supporter of the ICC will likely agree that this is not a sustainable state of affairs.

In 2009, the ICC finally began its long-awaited first trial, namely, the trial of forty-eight-year-old accused former Democratic Republic of Congo rebel leader Thomas Lubanga Dyilo. International observers accuse rebels under Dyilo's direct command of significant human rights violations, including systematic and strategic mutilation, rape, torture, murder, and ethnic massacres, as well as the killing of peacekeepers. The Office of the Prosecutor, however, only charged Dyilo with enlisting and conscripting children under the age of fifteen as soldiers, as well as with using them to participate actively in hostilities. Critics argue that the charges leveled against Dyilo dramatically understated his extensive criminal activities.[72]

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70. *See generally* Rene Blattman & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT'L CRIM. JUST. 711, 723 (2008) ("[E]nsuring the necessary cooperation [to affect arrests] is a primary challenge for both the ICC and the State Parties.").

71. The Trust Fund for Victims, however, in 2008 spent some $2,500,000 on thirty-four different projects in Uganda and the Democratic Republic of Congo. The projects included providing physical rehabilitation and psychological support for men, women, and children who experienced sexual violence and who were ex-child soldiers and abducted children. The projects tangibly benefited victims, but at bottom they are simply transfer payments, not Court-ordered reparations.

72. Prosecutors contended that they simply did not have sufficient evidence to convict Lubanga of the sex-related charges many victims and outside observers have called for. Moreover, the Democratic Republic of Congo filed charges against Lubanga in its domestic courts. The prosecution team argued that the complementarity principle discussed in Part IV(G), therefore, precluded the prosecution from pursuing similar charges at the ICC. Observers have raised similar arguments in the proceedings against Germain Katanga, whom local prosecutors in the Democratic Republic of Congo had charged with crimes against humanity by the time he was surrender to the ICC; in that case, at least, the Prosecutor was clearly not impressed with the accused's complementarity argument. Dyilo was convicted, and, on July 10, 2012, was sentenced to fourteen years in prison. On May 23, 2014, the ICC's Trial Chamber II, in turn, sentenced Katanga to twelve years' imprisonment, following his March 7, 2014, conviction for accessory liability to one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging) committed on February 24, 2003, during the

On March 14, 2012, Dyilo was sentenced to fourteen years in prison—making him eligible for release between July 16, 2015 (after he has served two-thirds of his sentence), and March 16, 2020.

In any event, ICC insiders will privately agree that the *Lubanga* case, as charged, was particularly legally or factually complex. This, of course, may be a good thing, given the relative inexperience of some of the judges and many (though certainly not all) of the prosecutors. When bringing the Court's first accused to trial, carefully selecting a "winnable" case evidences sound thinking.

Although optimism surrounding the ICC's promise and potential in many political, diplomatic, and academic circles continues on undiminished,[73] few representatives of the ICC's 122 current member states would argue that the ICC has fully lived up to the expectations it has created through its many relatively broad public proclamations and promises to victims. Alas, the proof of the pudding is in the eating, and thus far indictments and trials have been few, delays common, and frustration on the part of victims widespread.[74] Defense counsel considers these delays, which have kept accused such as Lubanga incarcerated for some four years prior to his trial, as violating the accuseds' speedy trial and due process rights. In the words of one ICC expert, "the ICC has shown itself to be the slowest institution of its kind since the beginnings at Nuremberg."[75]

The proclaimed benefits of international justice, such as promoting peace, fostering reconciliation, and deterring similar conduct in the future,[76] although

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attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo. Once again, hardly a "harsh" sentence, given the enormity of the proven crimes.

73. *See, e.g.*, DAVID SCHEFFER & JOHN HUTSON, STRATEGY FOR U.S. ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT (CENTURY FOUNDATION REPORT, 2008).

74. In this context, it must be noted that the Court's official vacation schedule indicates that the Court is in recess some *sixty-two* days a year (not counting weekends and leave time). Suffice it to say that few domestic prosecutors or judges enjoy such a generous vacation schedule. Moreover, the ICC presently only has one full courtroom at its disposal; the Court is, therefore, as a matter of simple logistics, unable to properly accommodate multiple simultaneous trials. Facts such as these may leave the first-time visitor to the Court wondering whether it genuinely views itself as charged with bringing the world's multitude of notorious criminals to justice.

75. Schabas, *supra* note 16, at 758.

76. *See, e.g.*, Michael P. Scharf, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade*, 37 NEW ENG. L. REV. 915, 916 (2003) (describing the ambitions of the ICTY as making it "easier for victims to eventually forgive, or at least, reconcile with former neighbors caught up in the

of course laudable, must, therefore, be analyzed realistically. International institutions such as the ICC risk rendering themselves impotent if people begin to regard them as representing "all talk and no action." A promise not delivered is, as the saying goes, often worse than not making the promise at all. Similarly, making exaggerated, and perhaps ultimately unsupportable, claims concerning the ICC's prospective benefits to the world threatens to marginalize the Court's actual work.

At bottom, living up to the Rome Statute's promises of ending the impunity of the atrocity lords, making victims "whole," and deterring the inhumane treatment of civilians will likely require a more efficient, professional, and effective ICC, generally, and more experienced prosecutors and judges, specifically.[77] The admittedly sensitive, and to some extent controversial, topic of how to best improve the ICC's performance must, therefore, be addressed.

The judges and prosecutors of the ICC are routinely given high marks in terms of their earnestness, their enthusiasm for ensuring that justice is done, and their hope that the ICC, as a new institution, is respected. That said, when questioned further on the topic, most ICC insiders with whom the author has spoken privately share the view that the ICC's performance must be improved. More specifically, observers believe the Prosecutor must investigate and indict more cases, the parties must file briefs that are more polished and well-researched, and the judges must become better at moving cases along and delivering rulings that are more timely, consistent, and

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institutionalized violence. This would also promote a political catharsis in Serbia, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trial would educate the Serb people, long subject to Milosevic's propaganda, about what really happened in Kosovo, Croatia, and Bosnia, and help ensure that such horrific acts are not repeated in the future."); *see also* Michael P. Scharf, *Trading Justice for Efficiency*, 2 J. INT'L. CRIM. JUST. 1070, 1072–73 (2004) (same); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003).

77. The Court describes the expectations it sets for itself as follows:

> With the strategic goal being to [e]xcel in achieving the desired results with minimal resources and through streamlined structures and processes, while maintaining flexibility, guaranteeing accountability, and drawing upon sufficient qualified and motivated staff within a caring environment, senior management has made clear its intention to maintain continuous scrutiny of its internal organization in order to achieve state-of-the-art administrative and core processes, putting strong emphasis on efficiency in terms of non-bureaucracy, flexibility and accountability.

See www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-10.Proposed%20Programme%20Budget%20for%202010.ADVANCE.17Jul1630.pdf (citation and quotation omitted).

sound. Without exception, however, both ICC employees and ICC observers who have discussed the matter with the author to varying degrees single out the collective performance of the ICC's judges as the prime institutional weakness, followed by the relative inexperience within the ICC's cadre of ambitious and bright prosecutors. These two key components of the ICC—the Judiciary and the Office of the Prosecutor—will therefore be subjected to closer examination.

1. Understanding ICC Judges' Backgrounds, Habits, and Competence

The discussion up to this point has made repeated note of the vagueness and imprecision characterizing many of the ICC's statutory provisions. Compounding the inherent difficulty in divining the meaning of a given rule or article in a system that has a mix of adversarial and inquisitorial elements is the reality that the judges at the ICC come from varying legal traditions and backgrounds. It is only natural, then, that these judges will tend to embark on the task of interpreting the statutory provisions—many of which have limited objective content—with a considerable bias toward how the given legal issues are resolved within the particular judge's own legal tradition. Therefore, it is not surprising to encounter the drastically divergent interpretations of elemental legal terms such as "representation," "submission of observations," and "participation."[78] To gain a fuller understanding of the backgrounds and points of view of the ICC's judiciary, however, we must also consider *who* the state parties have appointed to these pivotal positions.

As it turns out, the ICC's judiciary has historically comprised perhaps an unexpected mix of experienced jurists, as well as individuals with no real criminal law backgrounds, no trial experience, no judicial

78. *Compare* the January 17, 2007 Pre-Trial Chamber I Ruling in Situation in the Democratic Republic of Congo, Case No. ICC-01/04-101-tEN-Corr: *Decision on the Application of Participation in the Proceedings* (January 17, 2007) (defining Rule 68(3)'s "personal interests [of victims]" broadly to accord victims significant participatory rights, while creating two-phase process for victims during the investigatory phase and victims once the prosecution of a particular case has been decided) *with* the September 22, 2006 Pre-Trial Chamber I ruling in Situation in the Democratic Republic of Congo, Case No. ICC-01/04-01-06-462: *Decision on the Arrangements for Participation of Victims* (September 22, 2006) (balancing rights of anonymous victims against rights of accused, and according victims only limited participation in the proceedings).

records, and indeed, in at least one case, no law degree or legal training. The somewhat surprising decision to occasionally transform judicial laymen, with backgrounds in diplomacy, at NGOs, or in the academy, into practicing judges in a criminal court of the ICC's stature, and then to pay them some $22,000 a month (tax free and not accounting for the various Court vacations), is a difficult one to defend. One does not, after all, usually play one's first concert at Carnegie Hall, and the ICC is arguably the worst place for judicial novices to don for the first time their black robes and make their maiden appearances in a criminal courtroom. Yet, this is precisely what on occasion regrettably has been done at the ICC. If the Court is indeed designed to handle some of the most weighty, difficult legal and moral matters, then it is reasonable to expect those at the institution's helm to be fully equipped to perform at the highest level. The reason this may not, as a rule, always be the case requires a frank discussion of the judicial selection process.

Self-selection generally begins the process. ICC judges are recommended to the Assembly of States Parties. In other words, the first step is for an aspiring ICC judge to gain the endorsement of his state-party government. What will—or at least should—be surprising to the uninitiated is that there is *no* requirement that ICC judges have any experience as a domestic judge. Indeed, there in fact is no general requirement that ICC judges have *any* practical in-court experience or, for that matter, even have attended law school or obtained a law degree.

Receiving the endorsement of one's home country, pursuant to Article 36(4)(b), is of course in itself a highly politicized task. As expected, some of the best and brightest judges may not be all that motivated to leave secure positions in their domestic court for the temporal and substantive vagaries of overseas work at The Hague.

Once the aspiring ICC judge has used his political and professional connections to successfully gain his country's endorsement, the lobbying process starts in earnest. Given the large number of state parties, and the much more limited universe of judicial vacancies, election to a judicial position at the ICC can be an exhausting exercise in negotiation and diplomacy. By way of example, assume State Party A wishes to receive support for its country's judicial pick. The ambassador from State Party A, therefore, meets with State Party B's ambassador, knowing that State Party B needs State Party A's support on some other international/U.N./treaty issue, such as import limitations, technical assistance, sanctions, or tariff issues. If State Party B wishes to receive State Party A's support, then one way to gain it is to

endorse State Party A's judicial pick. It is through such a negotiation process, conducted by diplomats typically possessing a highly limited understanding of the merits or demerits of the particular judge, or of what professional background or personal characteristics are most desirable, that applicants assume the prestige and authority of the Court.

The unwritten reality of the ICC, therefore, has been that judicial candidates in the end frequently obtain their positions after surviving a gauntlet of negotiations, lobbying, and old-fashioned "horse trading." Although many of the ICC's judges are, in fact, highly competent and dedicated professionals, appointments unfortunately can routinely be as much a product of politics as they are of professional merit. Article 36(3)(b), indeed, explicitly distinguishes between judicial candidates who have actual criminal law and procedure experience ("List A" judges), and others who either have some unspecified "competence in relevant areas of international law" or "experience in a professional legal capacity" which is relevant to the judicial work of the Court ("List B" judges).

This bifurcation between experienced List A judges and those falling under List B is the loophole through which diplomats, politicians, and others with little or no relevant in-court experience can obtain judicial appointments. Added to this mix, Article 36(8)(b) provides that the state parties must "take into consideration" the "need" to include judges with "legal expertise on specific issues, including, but not limited to, violence against women and children." This process of judicial selection arguably contributes little to ensuring that the judges are the "best and brightest" of their profession.

Those who deeply care about the institution of the Court are understandably gravely concerned that it is possible—and has in fact happened—that some of the ICC's judges for the first time participate in a criminal case after they arrive at the Court. Regrettably, there is no realistic way to change this process in the short term, even though it is likely responsible for bringing some judges to the Court who, by most accounts, are professionally, experientially, and temperamentally unsuited for the job. Such deficits predictably prevent cases from efficiently moving through the system, spawn further delays, raise significant speedy trial concerns for the defense, contribute to the creation of additional uneven case law, and institutionalize a lack of judicial predictability. Moreover, they threaten to vest the judges' various young legal officers, who work in a capacity similar to law clerks in the United States, with disproportionately great power to shape the law.

The state parties should, in the interest of much-needed transparency, moreover, consider abandoning Article 36(6)(a)'s practice of electing judges by "secret ballot." Instead, the international community should strive to hold publicly accountable those state parties who nominate and elect unqualified or underqualified judges, and in so doing risk seriously diminishing the stature, credibility, and performance of the Court.

Setting aside possible reform in the judicial selection process, the reality is, and always will be, that the Court's judges will be drawn from vastly different legal cultures and backgrounds. Considering the broad discretion the ICC's legal provisions vest in the Chamber,[79] the victim representative must thus in all cases at the outset gain familiarity with the judges' individual backgrounds and practices in order to customize an appropriate "message" and legal strategy. Lawyers who have practiced before other international tribunals will be familiar with the unwritten rule that the personalities and legal backgrounds of the judges of a particular Chamber are likely to significantly influence the proceedings. And these backgrounds are, indeed, diverse. At the time of this writing, the President of the Court is from the South Korea, the First Vice-President is from Botswana, and the Second Vice-President is from Italy; the other judges of the Court hail from Ghana, Kenya, Nigeria, Argentina, the Czech Republic, Trinidad and Tobago, the Dominican Republic, Finland, the United Kingdom, Japan, Brazil, Bulgaria, Latvia, and Belgium. Recognizing this dynamic, and reacting to it proactively, is the job of each participant in the proceedings.

2. The Office of the Prosecutor

The job of prosecutor at the ICC is prestigious and much sought-after, and the salary of ICC prosecutors is competitive. Although starting salaries are

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79. The Registry in one case has in fact brought to the Chamber's attention that, when it comes to issues such as processing victim applications, dealing with protective measures for victims, and handling the issue of reparations, there was "conflicting jurisprudence and practice among the Court's chambers." *See* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Order Instructing the Participants and the Registry to File Additional Documents* (December 10, 2008), at 8. The Chamber, in response, commendably asked the Registry to file a list of the requested directions and a summary of the purported conflicting rulings, as well as "practical proposals for the improvement of current practices, explaining how the latter should be modified." *Id.* at 8–9.

determined by a variety of factors, on average senior trial attorneys begin with a salary of approximately $150,000, and the most junior prosecutors begin with a salary of approximately $45,000. Of the two hundred fifty or so employees in the Office of the Prosecutor, roughly thirty have the formal title of "prosecutor."

The complaint heard on occasion about the ICC's prosecutors is not that they are unmotivated, educationally or temperamentally unqualified, or unprofessional. Rather, it is that a number of the prosecutors, having previously occupied nonlitigation positions such as researchers, NGO lawyers, and junior legal officers in other tribunals, have little or no actual courtroom experience. Although victim representatives, assistants to counsel, and counsel for the defense face fairly strict minimum qualifications, no such prerequisites exist for the Office of the Prosecutor, which is in charge of its own hiring.

To better understand the inherent recruiting challenges facing the Office of the Prosecutor, it is necessary to understand the impact going to the ICC can have on a prosecutor's career. In most non-U.S. domestic jurisdictions, becoming a prosecutor, like becoming a judge, is a lifetime career-track position. As with judges, prosecutors who are competent and well respected in their home jurisdictions often have their eye on moving up the professional ladder and on handling more important and complex cases. To leave his domestic jurisdiction and begin working at the ICC, the typical prosecutor must resign, thereby all but abandoning his prior prosecutorial career. For example, a German prosecutor who decides to spend some years at the ICC will likely find that, upon his return to Germany, his civil service career prospects have significantly suffered.

The anticipated trade-off for the aspiring ICC prosecutor is a long-term career at the Court, perhaps punctuated by a position teaching international law or as part of some other international legal venture. Once at the ICC, moreover, these prosecutors, now planning on a full career at the Court, may consider it prudent to conduct themselves in a manner that guarantees their (now necessary) long-term employment. This dynamic, in turn, risks breeding a certain sense of institutional conformity. Recruiting experienced prosecutors who are willing to challenge the Court, to criticize the process, to recommend change, or to otherwise, when necessary, "make waves," may be exactly what the ICC needs.

One way to attract top-flight prosecutors to the ICC is to persuade the prosecutors' home jurisdictions to provide temporary two-, three-, or four-year waivers so that the prosecutors are guaranteed to receive their

civil service positions back upon their return. Although prosecutors going to the ICC may still suffer some professional setbacks because of their absence from the domestic arena, this may at least help alleviate some of their concerns. Moreover, since the prosecutors know they have secure positions back home, they may feel they have more freedom to speak their minds and to act with greater independence.

Although there is much good to be found in the performance of those working at the ICC, many insiders will in private candidly point out that the Court must improve its performance if the institution is to gain greater legitimacy. Victim participation, it is generally agreed, is not the problem. Rather, it is a relatively inexperienced and, at times, overmatched judiciary, combined with prosecutors who on occasion lack sufficient real-world trial experience, that contribute to keeping the ICC from performing at peak capacity. As the ICC matures, however, one can expect some of these shortfalls to work themselves out, for institutional capacity to increase, and for multiple simultaneous trials to become the rule, rather than the exception. That said, maturity alone, without thoughtful and targeted institutional reform, is not likely to deliver the Court to where it should be.

PART V

The Rome Statute's Groundbreaking (and Expansive) Recognition of Victims' Rights

THE MOST INNOVATIVE FEATURE distinguishing the ICC from other predecessor tribunals and regional courts is that it formally, and comprehensively, enshrines the rights of victims to participate in proceedings,[1] state their views and concerns, and claim reparations, including compensation, rehabilitation, and restitution.[2] The ICC's restorative system of victim rights, indeed, finds no equal in any other tribunal or regional court, with victim-related provisions distributed throughout the ICC's legal framework. Such rights did not exist in predecessor international criminal courts, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), or the Special Court for Sierra Leone.

The ICC's forward-thinking treatment of victims is, indeed, part and parcel of the broader restorative trend and emerging consensus in international law described in Part III, namely, that victims' rights extend beyond those possessed by witnesses. By way of example, the ICC describes victims as "participants" at the trial, provides official protection to victims during the proceedings,[3] and accords victims the explicit right to reparations/

1. *See, e.g.*, Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims* (January 8, 2009), at 3–9 (noting that victims, as participants to the proceedings, have the right to: attend public parts of hearings and certain *in camera* hearings, depending on the circumstances; gain access to all public decisions and documents contained in the record; gain access all nonconfidential evidence adduced by the parties; and make succinct oral submissions on issues of law and fact if granted by, and subject to any other direction from, the Chamber).

2. *See generally* Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Fourth Decision on Victims' Participation* (December 12, 2008), at 29. The general notion that victims should be awarded damages is of course nothing new—it can be found in ancient Assyrian, Hittite, and Roman law, as well as in the Code of Hammurabi (1750 B.C.), *see* Part III(A).

3. *See* Article 68.

compensation derived directly from their victimizers,[4] as well as from a partially state-funded victim Trust Fund.[5] Such victim-centric provisions reflect the unique collective restorative ambition that victim representatives have been pressing for decades.

Moving from the general to the specific, the Rome Statute recognizes that victims of atrocity crimes, such as genocide, crimes against humanity, and war crimes, have a variety of legitimate needs that the Court must address in order to break the recurring cycles of violence. Victimized groups, in turn, must feel that the international community recognizes their plight, is taking their situations seriously, remains intent on creating a historic record of their abuse, and will ensure that meaningful justice is done.[6]

Victims' needs encompass but are not limited to:

- A legitimate and unbiased forum in which the victims can speak and can be heard.
- Recognition and validation of their victimization.
- Promotion of a sense of social solidarity among the victims.
- Creation of a permanent historic record of the criminal activity generally, as well as a record of how the conduct affected particular victims.
- Closure and truth about the political and social environment which permitted the crimes to take place.

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4. Whether reparation proceedings will be separated from the guilt/innocence phase remains to be determined. *See generally* Part XIV(B). In Trial Chamber I, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06-1191: Prosecutor v. Thomas Lubanga Dyilo, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008* (February 26, 2008), the majority stated that some evidence regarding reparations may be heard during the trial.

5. Article 79(2) provides that the Trust Fund is to be financed through property and/or funds collected through fines and forfeitures, but any reparation orders may only be made against individual offenders (rather than against the state); *see also* Resolution ICC-ASP/4/Res. 3 (Regulations of the Trust Fund for Victims). Applications for (1) participation and (2) reparations are, however, treated separately. Although both participation and reparations applications may be submitted concurrently, the mere application for participation does not automatically result in an application for reparations being lodged.

   As a matter of strategy, it is, therefore, probably preferable to submit the reparations application early in the process, thereby making it easier to argue that the particular victim has a "personal interest" in the Article 68(3) sense and that the Chamber, thus, should permit victims to participate at certain stages.

6. For a discussion on the increased focus on victim compensation at the international and national law level, *see* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006) ("An individual victim's right to redress has increasingly become an indispensable component of efforts to protect individual human rights.").

- An explanation of the victimization and a corresponding answer to the pivotal question of "why me/us."
- An opportunity for victims to regain a sense of control over their lives.
- Avoidance of future victimization.
- Financial compensation for the harm the accused caused to the victims and their family members.
- A means of ensuring that those responsible for the criminal activity receive just punishment and that the victims play some part in determining this punishment.[7]

The ICC, as summarized below, provides a variety of statutory modalities for addressing these needs and aspirations.

A. Victims' Rights Enshrined in the ICC's Rome Statute

The Rome Statute contains broad language guaranteeing victims the right to security, to meaningful participation, and to reparations. Understanding these provisions is the first step to competent victim advocacy. For ease of reference, the key provisions of the founding Rome Statute relating to victims are summarized immediately below.

Key Rome Statute Victims' Rights Provisions	
Article 15(3)	Permits victims to make representations to the Pre-Trial Chamber concerning the Prosecutor's decision to proceed with an investigation.
Article 19(3)	Grants victims permission to submit observations concerning jurisdiction of the ICC and the admissibility of cases.
Article 43(6)	Empowers the Registrar to set up Victims and Witnesses Unit within the Registry.
Article 53(1)(c)	Requires the Prosecutor to consider the interests of victims when deciding whether to initiate an investigation.

7. *See generally* Situation in the Democratic Republic of Congo, Case No. ICC-01/04-101: *Decision on the Applications for Participation in the Proceedings* (January 17, 2006) (summarizing cases from European Court of Human Rights holding that victims, defense, and prosecutors have different interests in criminal proceedings, as well as decisions from the Inter-American Court of Human Rights, etc.); Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249 (2007).

Article 57(3)(c)	Grants to the Pre-Trial Chamber the authority to provide for the security and privacy of victims.
Article 64(2)	Requires the Trial Chamber to ensure the trial is conducted with due regard for the protection of victims.
Article 65(4)	Vests the Trial Chamber with discretion to require, in the context of plea agreements, a more complete presentation of the facts of the case if the interests of the victims require it.
Article 68	Governs victim "participation in the proceedings": - Requires the Court to protect the safety, physical and psychological well-being, dignity, and privacy of victims. - Permits *in camera* proceedings, video conferencing, and other modes of evidence presentation, as well as the redaction of discovery, in order to protect victims. - Mandates that victims be given an opportunity to present their "views and concerns" when their "personal interests" are affected. Such views and concerns are 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."
Article 75	Provides for reparations to victims.
Article 79	Sets up Trust Fund for Victims.
Article 82(4)	Accords to victims the right to appeal reparations orders.

B. Summary of the ICC's Victim-Related Rules of Procedure and Evidence

Understanding the strategic choices impacting when and how, as a matter of procedure, to secure victims' rights is as important as understanding the above-described substantive victim rights. The ICC's most relevant Rules, summarized for ease of reference, follow.

Key ICC Rules of Procedure and Rules of Evidence	
Rule16	Describes the responsibilities of the Registrar as they relate to victims. These responsibilities include: - Assisting victims in obtaining legal advice and organizing their legal representation. - Providing victims' legal representatives with adequate support, assistance, and information at all stages of the proceedings. - Ensuring that victims are kept updated on the Court's decisions that may have an impact on their interests.

Rules 17 and 18	Outline the functions and responsibilities of the Victims and Witnesses Unit, which include: – Providing victims with adequate long- and short-term protective and security measures. – Assisting victims in obtaining medical, psychological, and other appropriate assistance. – Making training on issues involving trauma, sexual violence, security, and confidentiality available to the Court and the parties.
Rule 43	Requires the Court to ensure that all published documents comply with the relevant rules governing the confidentiality of the proceedings, as well as witness security.
Rule 50	Mandates that the Prosecutor notify victims of his intent to initiate an investigation. Such notice is not, however, required if the Prosecutor believes it may pose a danger to the integrity of the investigation or to the life or well-being of victims and witnesses. Rule 50 also permits victims to make written representations concerning the Prosecutor's decision to initiate a particular investigation. If the Pre-Trial Chamber concludes that it needs more information prior to issuing its decision on whether to authorize the commencement of the requested investigation, it may seek such information from the victims.
Rule 59	Requires the Registrar to inform victims who have communicated with the Court of any questions concerning, or challenges to, jurisdiction or admissibility.
Rule 69	Allows the Chamber to consider the interests of the victims when deciding whether to accept certain stipulated facts.
Rules 70 and 72	Address issues relating to a victim's "consent" in cases of sexual violence.
Rule 81(3)	Restricts, for security reasons, disclosure of confidential information relating to victims.
Rule 85	Defines victims: "'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."
Rules 87 and 88	Provide protective and other special measures for victims.
Rule 89	Grants the Chamber broad discretion to consider victims' applications to participate and to determine the nature and scope of such participation during any phase of the proceedings: "[T]he Chamber shall...specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements."

Rules 90 and 91	Provide legal representation to victims. – "Where there are a number of victims, the Chamber 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." Rule 90(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." Rule 91(2)
Rule 92	Sets forth the victim-notification requirements.
Rule 93	"A Chamber may seek the views of [participating] victims or their legal representatives [on any issue]. In addition, a Chamber may seek the views of other victims, as appropriate."
Rule 94	Describes the information required of a victim who wishes to submit a formal reparations request.
Rule 95	Sets forth the notification requirements in those cases in which the Court proceeds *sua sponte* on reparations.
Rule 96	Requires the Registrar to notify victims of upcoming reparations proceedings.
Rule 97	Authorizes the Court to appoint an expert to assist in determining the scope of reparations and provides that victims may request such an expert be appointed.
Rule 98	Provides that reparations awards be deposited in the Trust Fund for Victims.
Rule 119(3)	Requires the Court, in possible conditional release cases, to consult with victims whom the Chamber deems to be at potential risk.
Rule 121(10)	Provides victims and their representatives with the right to access the record of the proceedings prior to the confirmation hearing.
Rule 131(2)	Permits victim access to the record of proceedings transmitted by the Pre-Trial Chamber.
Rule 144(1)	Instructs the Trial Chamber that, when possible, it must deliver rulings concerning admissibility of the case, jurisdiction of the Court, criminal responsibility of the accused, sentence to be imposed, and reparations publicly and in the presence of the victims or their representatives.

Rule 145	Governs sentencing and mandates that the Court consider the harm caused to the victims and their families, whether the victim was defenseless, whether there were multiple victims, the nature of and motivation for the offense, any efforts made by the convicted person to compensate victims, and any cooperation offered by the convicted person when determining an appropriate sentence.
Rule 221	Allows victims to express their views concerning the disposition of the convicted person's assets.
Rule 224	Requires Appeals Chamber to invite victim input whenever a convicted person submits a sentencing reduction request.

C. Exploring the Role of Victims as "Participants" in ICC Proceedings

Article 68(3) is the key provision of the Rome Statute with regard to victims' participatory rights. It provides:

> 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.[8]

This broad language vests the ICC judges with significant discretion over when and how victims may participate in the criminal proceedings.

8. Emphasis added. *See also* Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Redacted Version of "Decision on 'Indirect Victims'"* (April 8, 2009), at 15, 19–22 (holding that applicants who were alleged to have been victims of crimes committed by children who were conscripted into the army when under fifteen years of age, or who were used to participate in the hostilities, did not qualify as either "direct" or "indirect" victims of the crimes confirmed against the accused). *See also* Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06-2842: *Judgment Pursuant to Article 74 of the Statute* (March 14, 2012), paras. 624–28.

As discussed above, the ICC judiciary's differing interpretations of this language demonstrate the inherent statutory ambiguity the drafters intended, and built into, the legal framework in order to overcome political/drafting impasses.

Article 68, nevertheless, reflects an unmistakable concern that the rights of the victims be limited and that the Court at all times carefully balance them against the rights of the accused. The prepared victim representative must bear in mind that, regardless of what persuasive statutory arguments he might develop, and despite certain "pro-victim" rulings, the judges working in the ICC, to some extent fearful of the unknown, can, during these formative years of the ICC's existence, be expected to be inherently resistant to an expansive role for victim representatives, or aggressive victim representation, once cases reach the trial stage.

Those familiar with staffing at the ICC understand that few of the experienced judges view the Rome Statute as having opened the proverbial floodgates for victims. And, as borne out by the case law to date, fewer yet will permit conduct on the part of victim representatives potentially impinging on the prerogatives and authority of the prosecution or leading to the presentation of evidence by victim representatives that is systematically at odds with the prosecution's theory of the case.

Understanding the context of this somewhat ingrained reluctance to permit "full" victim participation requires a brief historical detour. The very inclusion of victim rights in the Rome Statute was a matter of some controversy, with advocates of many governments arguing for a very *limited* role for victims. Their concern was, in part, that victim participation could threaten the accused's due process rights by lowering the prosecution's burden of proof, shifting the burden to the defense, undermining the presumption of innocence, interfering with the Prosecutor's strategic decisions, and impeding the Chamber's ability to effectively manage the proceedings.

Many of today's ICC judges will be aware of this contentious history and may well frown on victim representatives who view the Rome Statute as an open invitation to demand an aggressive, quasi-prosecutorial role for victims in the proceedings. The victim representative must, therefore, remain mindful of the careful case-by-case balancing act the Chamber will conduct and of his burden to persuade the Chamber (and the prosecution) that the victim representative (1) understands the limited nature of his involvement and, having that understanding, (2) presents little danger of impinging upon, or undermining, the Prosecutor's role under the Rome Statute and Rules or the fairness of the proceedings.

The Office of the Prosecutor has also consistently expressed concern that the participation of a large number of putative victims not adversely impact the Prosecutor's independence and efficiency, particularly during the investigative phase.[9] Specifically, the prosecutors (and, for that matter, defense counsel) are concerned that victims may attempt to improperly influence the outcome of the investigation or the charging decisions. Although this should not typically concern prosecutors, given that victims lobbying for a particular outcome is a common phenomenon, it is true that, for victims in a case to prevail, they must establish certain central facts and that the legal elements essential to the victims will typically overlap substantially with those the prosecution must prove. To the extent that the evidence important to victims differs from that necessary to establish the elements of the charged crime(s), victim representatives should either bring this to the prosecution's attention or convince the Chamber that it should grant the victims an opportunity to present this evidence.

Fears that victim participation in the prosecution of a case can jeopardize the appearance, integrity, and objectivity of proceedings,[10] while understandable, are largely overemphasized. Although prosecutorial independence and objectivity are frequently challenged by those who disagree with a given prosecutor's decision to charge, or to decline charging, a particular crime, the true mark of a prosecutor's integrity is whether he objectively evaluates the existing evidence. Those familiar with both domestic and international criminal cases understand that victims (and, for that matter, many witnesses, as well as a host of third parties) will have significant interests—whether financial, personal, or otherwise—in the outcome of particular prosecutions. An experienced prosecutor will be vigilant in ensuring that such potential interests do not adversely impact the fairness of the proceedings or improperly influence the prosecutor's independence.[11]

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9. *See generally* Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 84–85 (2004) ("Prosecutorial independence is a fundamental component of fulfilling the human rights norm of receiving a fair trial and is a crucial element in determining the long-term legitimacy of the ICC.").

10. *See* Article 42(1) (mandating prosecutorial independence and impartiality).

11. Such fairness could, for example, be impacted if the victim provided biased, fabricated, or otherwise unreliable information or evidence in order to further the victim's personal agenda. *See* Timothy Kuhner, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95 (2004) (critical of victim involvement in ICC proceedings and contending, *inter alia*, that such participation threatens fairness of the proceedings).

D. The Modality and Extent of Victim Participation Remain Unsettled

The parties for some time have hotly debated whether the Rome Statute permits victim representatives to independently present witnesses and introduce evidence. In fact, this issue has in recent years supplanted, as the current legal battlefield, the debate over the requisite qualifications for victim participation in proceedings. The ICC's articles and rules of course further confuse the matter by using, interchangeably, the term "participant" (implying more limited procedural rights)[12] and "party" (implying more substantial involvement at trial and broader procedural rights, including the victims' right to present evidence and witnesses).[13]

In 2006,[14] and again in 2007,[15] the Pre-Trial Chamber granted victims broad participatory rights, including the right to take part during the investigative phase of the proceedings. Many familiar with the back-room workings of the Court interpret these early "pro-victim" rulings as the real-world result of the judges making a statement and standing their ground against the Office of the Prosecutor for initially adopting a very hard-line position that there must be *no* victim participation. This reported quasi-absolutist position may have resulted from prosecutors being somewhat new to the job, still unfamiliar with the full contours of the ICC's provisions relating to victim participation. The ICC judges, who clearly did not appreciate this apparent inflexibility and nonadherence to the plain language and spirit of the Rome Statute, responded by permitting *full* participation, including during the investigative stages.

Such rulings, understandably, created great frustration and anxiety within the Office of the Prosecutor, as well as in the defense bar. Prosecutors feared that the Chamber had irrevocably opened the floodgates. In direct and calculated response, the prosecutors began commenting on—and

12. *See, e.g.*, Rule 87(3)(b).

13. *See, e.g.*, Rule 87(2)(c); *see also* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. Rev. 244 (2006) (recognizing the discrepancy, but concluding that "there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant").

14. Situation in the Democratic Republic of Congo, Case No. ICC-01/04-101: *Decision on the Applications for Participation in the Proceedings* (January 17, 2006).

15. Situation in Uganda, Case No. ICC-02/04-101: *Decision on Victims' Applications for Participation* (August 10, 2007).

indeed challenging—virtually all newly filed victim applications to participate in the proceedings. Prosecutors apparently intended this tactic to slow the proceedings and to signal to all involved the Office's frustration with the Chamber's ruling. This tactical nitpicking approach, by which the Prosecutor threatened to challenge all applications, may have, in fact, been the reason the Chamber subsequently dramatically reversed course.

In 2008, the Appeals Chamber in *Lubanga* confirmed victims' participatory rights.[16] The Chamber, however, held in relevant part:

> [T]he 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. For example, should a victim demonstrate that his personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify or if a piece of evidence (which would have ramifications on the safety and security of the victim) were to be declared admissible, then the victim would be able to move the Chamber to exercise its powers under Article 69(3) to present the evidence or challenge the admissibility of the evidence, respectively.[17]

With these safeguards in place, the Appeals Chamber viewed participatory rights of victims—including submission of evidence pertaining to the guilt of the accused and challenges to the admissibility or relevance of evidence—to be in keeping with the Prosecutor's burden of proving the accused's guilt, as well as with the accused's right to a fair trial.[18]

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16. Interim appeals are governed by Article 82. *See generally* Situation in Darfur, Sudan, In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09: *Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir"* (June 24, 2009), at 4.

17. Appeals Chamber, Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (July 11, 2008), at 33.

18. *Id., cited in* Situation in the Democratic Republic of the Congo, Case No. ICC 01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 15–16 ("[D]epending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the

This pronouncement from the Court has (for now at least) answered the question of whether the Chamber will grant victims full and co-equal participation. No such blanket right exists, the Chamber concluded. Rather, the Trial Chamber will evaluate victim requests to participate during the trial on a "case-by-case" basis. It must be noted, however, that some prosecutors at the ICC interpret this ruling, although on its face fairly neutral and nondefinitive, as signaling that the Chamber will not *ever* permit victims to present evidence (though, given the nonbinding/ nonprecedential nature of ICC rulings,[19] no such conclusion can really be drawn). Article 68(3) of the Rome Statute provides that victim participation is restricted to specific "stages of the proceedings" but does not define the meaning of such "stage." Instead, it is at the Court's discretion to determine at which stages of proceedings is victim participation appropriate.[20]

In terms of the precise modality of victim participation, the ICC Rules do not explicitly vest in victim representatives the right to personally question witnesses, as opposed to having the Chamber or Prosecutor pose the questions.[21] However, Article 68(3) provides the groundwork for victim participation, and Article 69(3), in addition to granting "parties" permission to submit evidence, also grants the Court the broad "authority to request the submission of *all evidence* that it considers necessary for the determination of the truth."[22] Thus, even under the stingiest reading of Article 68(3), Article 69(3) continues to explicitly permit the Court to consider victims' submissions of evidence for possible admission at trial.

Victim representatives must rely on the rules and rulings to date to argue that unduly limiting victim participation is fundamentally at odds with the ICC's victim-centric framework discussed herein. If the Chamber does not permit victims, as defined in Rule 85, to, for example, present evidence, then, as a practical matter, it will be virtually impossible for victims to prevail and

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personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorize the victims' legal representative to question witnesses on subjects related to this issue....It follows that victims' legal representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.").

19. *See* Article 21(2).

20. Situation in Darfur, Sudan, Case No. ICC-02/05-03/09: *Decision on the Participation of Victims in the Trial Proceedings* (March 20, 2014).

21. *See generally* Rule 89(1) (Chamber may specify manner of victim participation as the Chamber deems "appropriate").

22. Article 69(3) (emphasis added).

receive reparations unless they have the full cooperation of the Prosecutor.[23] For example, although the Prosecutor can prove his case by establishing, say, that the accused committed particular charged atrocities in a given village, the victim must *additionally* establish that a particular accused, or group of persons under the accused's control, harmed the victim (or perhaps a relative, depending on how Rule 85(a) is construed) on a particular day, and in a particular manner.

In October 2012, the Trial Chamber V set out new procedures for victims interested in participating in the Kenya trials. *Direct individual participants* are individuals who wish to appear directly before the court, in person or via video-link, and are required to fill in an application according to Rule 89 of the Rules of Procedure and Evidence. *Participation through a common legal representative*, in turn, refers to victims who wish to participate without appearing before the Chamber and wish to be recognized solely as participants without having to go through the procedure established in Rule 89. In this case, the common legal representative will act as a point of contact for the victims, access confidential information, and make opening and closing statements.[24]

The most sensible, and legally supportable, solution to any such prosecutor/victim conflict is to ask the Chamber to rule early in the proceedings on victim requests to present supplemental evidence and witnesses and to limit such participatory rights in a manner that ensures the smooth and efficient presentation of the evidence. Consequently, it is incumbent on victim representatives to focus on those issues that matter most to their clients, so as to assure the Chamber and the Office of the Prosecutor that the victims' proposed participation will not interfere with the effective and proper administration of justice. Victim representatives must, therefore, carefully prepare narrowly tailored, and persuasive, arguments for why the Chamber should permit them to participate at specifically outlined stages in the proceedings and in the manner proposed.

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23. And if the Prosecutor were deemed bound to do as the victim representatives wish, this would risk bringing an improper influence to bear on the prosecutorial function, which is inconsistent with Articles 42 and 51, as well as Articles 5 and 6 of the ICC Code of Professional Conduct.

24. Trial Chamber V, Situation in the Republic of Kenya In the Case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11: *Decision on Victims' Representation and Participation* (October 3, 2012).

PART VI

Qualifying as Legal Counsel for Victims

MANY CASUAL OBSERVERS of the ICC misunderstand a lawyer's ability to participate in the Court's proceedings. For example, many believe that attorneys from war-torn areas, such as Sudan's Darfur region, who are well placed to represent victims at the ICC, given their intimate familiarity with the tragic events that took place (and are taking place) in that region, will be regularly involved in the ICC's work.[1] Often overlooked, however, are the surprisingly demanding barriers to entry for attorneys. These barriers assure that many aspiring victim representatives will in reality never appear before the ICC. In an unfortunate twist of irony, the very conflict and devastation in their home countries effectively precludes most of these attorneys from obtaining the requisite below-described legal and linguistic background demanded of a registered ICC victim representative. Understanding these threshold requirements is, therefore, the first step on the long road to a lawyer's substantive in-court victim advocacy.

A. Becoming a Formally Recognized ICC "Victim Representative"

The process of becoming formally qualified as an "ICC Victim Representative" is quite involved. To qualify, the applicant must demonstrate sufficient

1. The importance of having attorneys with some "local knowledge" has in fact been emphasized by Trial Chamber II. *See generally* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07: *Order on the Organisation of Common Legal Representation of Victims* (July 22, 2009), at 10 ("[T]he Chamber considers that it would be desirable if the common legal representative (or at least one member of his or her team) has a strong connection with the local situation of the victims and the region in general. This will assist the common legal representative in presenting the genuine perspective of the victims, as is his or her primary role.").

relevant legal experience, knowledge of international or criminal law, and the requisite language skills.[2]

According to Rule 90(6), the legal representative of victims "shall have the same qualifications" as a counsel for the defense. The qualifications for counsel for the defense are, in turn, set out in Rule 22(1). Rule 22(1) requires counsel to furnish proof of the following:

1. Established competence in international or criminal law and procedure;

2. Ten years of relevant experience in criminal proceedings, whether as a judge, prosecutor, advocate, or in another similar capacity;

3. "Excellent knowledge" of, and "fluency" in, at least one of the "working languages" of the ICC;[3] *and*

4. A record free of convictions for "serious" criminal or disciplinary offences considered incompatible with the nature of the office of counsel before the Chamber.[4]

The aspiring legal representative must submit a Candidate Application Form, including the following documentation establishing his ability to meet the above criteria:[5]

- A Certificate of Good Standing from the applicant's home bar or licensing association.
- A valid practicing certificate.
- A certificate issued by the relevant authority of each state of which the applicant is a national, or where the applicant is domiciled, stating the existence, if any, or the absence, of criminal convictions.

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2. *See also* Appendix VI.

3. The "working languages" of the Court are English and French, as well as any other authorized language, as determined on a case-by-case basis. *See* Article 50(2); *see also* Rule 41 (authorizing use of official language of the Court as working language when majority involved in case and participants request it, or if it otherwise would "facilitate the efficiency of the proceedings"). The "official languages" of the Court, on the other hand, are Arabic, Chinese, English, French, Russian, and Spanish. *See* Article 50(1).

4. *See* Regulation of the Court 67.

5. *See generally* Regulation of the Court 67 (criteria to be met by counsel); Regulation of the Court 68 (assistants to counsel); Regulation of the Court 69 (proof and control of criteria to be met by counsel); and Regulation of the Court 70 ("Inclusion in the List of Counsel").

- A detailed *curriculum vitae* allowing for the appraisal of the applicant's competence and experience.
- A valid copy of the applicant's professional insurance policy.
- A legible copy of the applicant's birth certificate.
- A legible copy of the applicant's identity card.
- A legible copy of the applicant's passport/travel document.
- Two passport-size photographs of the applicant.

Lawyers who successfully submit their applications and are assigned victims should immediately contact the Office of Public Counsel for Victims (OPCV). The OPCV has the greatest institutional and legal familiarity with the Court's written and unwritten rules governing victims. Moreover, the OPCV may have advised, or represented, these victims prior to the victim receiving assigned legal representation,[6] and victim representatives must of course gather all possible information relating to any such prior contacts.

In order to properly organize the common legal representation of victims, the Registrar has developed a sensible selection process: (1) submit a request of expression of interest sent to the lawyers on the Registry's list of counsel; (2) perform an initial review of the candidates; (3) prepare a written evaluation; and (4) conduct a telephone interview. The Registrar then proposes a counsel for the position of common legal representative in the case. An appropriate legal and administrative support may be provided to the common legal representative.[7]

The common legal representative is responsible for being the point of contact for the victims represented, to formulate their views and concerns, provide justice to their needs, and appear on their behalf. For instance, in *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V expressed the view that geographic proximity between victims and the common legal representative is important for communication

6. *See generally* Situation in the Democratic Republic of Congo, Case No. ICC-01/04-01/06: *Decision on the Role of the Office of Public Counsel for Victims and Its Request for Access to Documents* (March 6, 2008), at 13–17 (limiting OPCV's legal representation of victims to the point in time that "the Chamber issues a decision on [the victims'] application to participate").

7. Situation in the Republic of Kenya, In the Case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11-267: *Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings* (August 26, 2011).

purposes. That said, proximity is not to be applied as a peremptory rule overriding all other considerations—meaningful, competent representation continues to be the overriding objective.[8]

B. An Alternative Mode of Legal Representation: "Assistant to Counsel"

Although the Rules may preclude many aspiring victim representatives from becoming qualified ICC counsel, oft-overlooked ICC Registry Regulations 124 and 125[9] allow lawyers with more limited experience to formally register as "Assistants to Counsel." This fallback option, while still requiring the applicant to demonstrate knowledge of international or criminal law, constitutes the most promising avenue of ICC participation for many lawyers hailing from regions where relevant courtroom experience, and the necessary language skills, are difficult to come by.[10]

To become an Assistant to Counsel, the applicant must have either (1) five years of relevant experience in criminal proceedings, *or* (2) "specific competence" in international or criminal law and procedure. Lawyers with five years of criminal law experience, therefore, can qualify, as can members of the legal academy or lawyers working for nongovernmental organizations that have "specific competence" (a term that remains undefined) in international law or criminal law and procedure. This wording, moreover, is notably vague, leaving significant room for argument that a given lawyer is qualified to be an ICC Assistant to Counsel.

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8. Situation in the Republic of Kenya, In the Case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11: *Decision on Victims' Representation and Participation* (October 3, 2012). *See also* Dissenting Opinion of Judge Eboe Osuji in ICC-01/09-01/11-479 (November 23, 2012).

9. By reference to Rule 22(1) and Regulation of the Court 68.

10. Of particular significance to potential Assistants to Counsel is that they are not required to have Rule 22(1)'s "excellent knowledge of," and fluency in, at least one of the working languages of the Court.

Steps to Formal Recognition as a "Victim"

RULE 85(a) defines the term "victims." Full participation at the ICC requires victims to first obtain official ICC registration. The task of becoming a registered victim, however, is, like many of the ICC's procedural hurdles, more challenging than it might appear at first blush. (Figure VII.1 on this page outlines the steps to becoming a registered victim.)

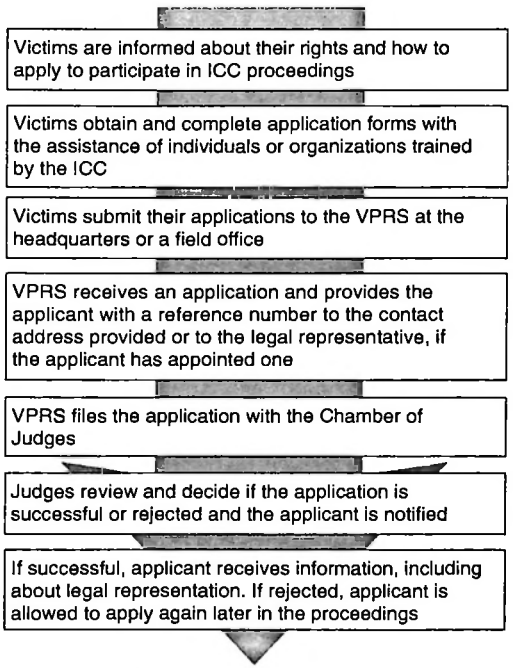

Figure VII.1 "Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court." Copyright © International Criminal Court 2006.

A. The Long Road to Formal Recognition as a "Victim"

In order to qualify for victim status in ICC proceedings under Rule 85, the Chamber must first determine whether, based on the putative victim's application, there are "grounds to believe"[1] the putative victim meets the following criteria:

1. The putative victim is a natural (or legal) person;
2. The putative victim has suffered cognizable harm;
3. The alleged crime from which the harm resulted falls within the jurisdiction of the ICC; *and*
4. The alleged crime and the harm are causally linked.[2]

In the past, applications prepared by nongovernmental organizations have contained errors, prompting the Court to dismiss them. Victim representatives must therefore take great care that information, such as a prospective victim's age, be accurate and verified, and that the time, date, nature, and location of the alleged harm carefully correspond with the criminal conduct alleged in the charging document. If the Court deems a victim's application incomplete, Rule 89(2) permits the applicant later in the proceeding to file a new application containing the missing or incomplete information.[3]

In the *Lubanga* Trial Chamber's January 18, 2008, ruling, the Chamber summarized and condensed Rule 85(a)'s requirements for victim participation at trial. The Chamber required a showing that (1) there exists a "real evidential link" between the (likely) proffered evidence at trial and the victim, and that (2) the trial could impact the victim's personal interests because those interests "are in a real sense engaged" by "an issue arising" during the trial.[4] The second element of having a personal interest impacted

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1. Note also that this "pre-judging" of these criteria by necessity also requires the Chamber to, in a sense, provide at least its preliminary judgment on the underlying case.

2. *See* Rule 85(a); *see also* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Redacted Version of "Decision on 'Indirect Victims'"* (April 8, 2009), at 15, 19–22 (pursuant to Rule 85, victims must have suffered either direct or indirect harm; "indirect victims" suffered harm as a result of the harm suffered by direct victims).

3. *See, e.g.*, Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications for Participation* (November 4, 2008), at 13.

4. *See* Situation in the Democratic Republic of the Congo, Case No. II-01/04-01/06-1119: *Decision on Victims' Participation* (January 18, 2008), at 32–34.

by the proceedings appears to particularly favor victims who may also be witnesses at trial, because it focuses on a connection between the proposed participation and the evidence (or issues) likely to arise during the trial.[5]

In order to maximize the chances of securing participatory rights, then, it is advisable that the victim representative go beyond the minimum statutory requirements by (1) identifying for the Chamber the victim's *personal* interests (as opposed to common interests shared by all victims) impacted by the charged conduct, and (2) demonstrating, with some specificity, why the vindication of the victim's personal interests will not outweigh or negatively impact the fairness or efficiency of the proceedings.[6]

Grounds resulting in the rejection of a victim's application have included that (1) the applicant was a minor, and the person who submitted the application on his behalf had not yet attained the age of majority;[7] (2) the applicant applies to participate in the proceedings on behalf of a deceased person;[8] (3) the applicant failed to sufficiently identify the date and location

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5. *See id.* at 37. Note, however, that Judge Pikis in his separate opinion criticized the majority view that the victim need only show a link between the victim and a crime within the Court's jurisdiction and, instead, argued in favor of a requirement that the victim's involvement be linked to the facts or circumstances of the *charged* conduct. *See id.* at 8. Judge Pikis further criticized the majority opinion as requiring an overly burdensome case-by-case evaluation of each victim's involvement "for every procedural action." *Id.* at 60.

6. *See generally* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Defence Application for Disclosure of Victims' Applications* (January 21, 2009), at 7 ("The critical tension revealed by this application [for disclosure of dual victim-witnesses' unredacted applications for participation and reparations] is between the rights of victims to appropriate protective measures and the right of the accused to a fair trial, and, in the particular context of this application, to the exculpatory material in the possession of the prosecution and the VPRS.").

7. Note, however, that under certain circumstances the Court may permit children to apply to participate without an intermediary. *See* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008) (permitting, on a case-by-case basis, child conscripts who were separated from their parents and other adult relatives at a relatively young age to apply on their own behalf).

8. Situation in the Republic of Kenya, in the Case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11: *Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings* (August 5, 2011). However, on occasions, the Chamber has authorized the person mandated by the family of the deceased to continue the action before the Court on behalf of the victim. *See, e.g.*, Situation in the Democratic Republic of The Congo, In the Case of The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07: *Decision on the Application to Resume Action, Submitted by a Family Member of Deceased Victim a/0253/09* (June 10, 2013).

of the alleged crimes; (4) the proof of the victim's identity was insufficient; (5) the applicant merely submitted a legal conclusion of harm (torture), rather than specific facts which, *prima facie*, constitute harm within the meaning of the statute; (6) no reports or similar external sources confirm the alleged attacks in the area of residence of the applicant; (7) the emotional harm described by the applicant resulted from information the applicant received from others, as opposed to having witnessed the harmful conduct firsthand; and (8) that the person acting on behalf of the applicant suffered the harm alleged, rather than the applicant himself.[9] A review of the cases, and Rule 85's language, leads to the conclusion that the Chamber will grant a victim's application if it meets the following specific requirements:[10]

1. The applicant has reached majority,[11] or a person who has reached majority submits the application on behalf of a minor,[12] or someone who is disabled;[13]

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9. *See generally id.*

10. The victim representative must be sure to include the actual proof—such as the applicant's voting card—as part of the application. Moreover, the standard of proof is proof "to a level which might be considered satisfactory for the limited purposes of rule 85(a)." Situation in Uganda, Case No. ICC-02/04: *Decision on Victims' Applications for Participation* (November 17, 2008), at 7.

11. Under certain circumstances, the Chamber may permit children to apply to participate without an intermediary. *See* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008) (permitting, on a case-by-case basis, child conscripts who were separated from their parents and other adult relatives at a relatively young age to apply on their own behalf).

12. In the case of a deceased person, the primary applicant may be the person acting on behalf of the deceased person. In *The Prosecutor v. c. Germain Katanga and Mathiwu Ngudjolo Chui*, families of deceased victims appointed a person to act on behalf of the deceased victims. (ICC- 01/04-01/08: *Decision Publique a propos de cinquieme soumission du représentant légal relative a la notification du déces de cinq victimes, a la reprise des dossiers de certaines victimes décédées et a la divulgation de l'identité de victimes et/ou de repreneurs d'action de certaines victimes* (February 15, 2011). Trial Chamber II ruled that security measures ordered for deceased victims who once participated in proceedings also apply to the persons appointed by their families to continue the action. (Situation in the Democratic Republic of Congo, The Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-01/04-01-07-3018-tENG: *Decision on the Applications to Resume Actions Submitted by the Family Members of Deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09* (June 14, 2011)).

13. Situation in the Republic of Cote d'Ivoire in the case of The Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11: *Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings* (June 4, 2012).

2. The applicant submitted sufficient proof of identity (such proof includes voting cards);[14]

3. The application includes the necessary date and location of the alleged crimes;

4. The applicant sufficiently describes the alleged "harm" suffered within the meaning of Rule 85.

Such "harm" includes:

Moral Harm: Emotional harm suffered, for example, as a result of the militia killing a family member, or making death threats; witnessing events "of an exceedingly violent and shocking nature," such as a militia person's sexual abuse and torture of an applicant's mother or the mutilation of a child; or abducting a victim's child and forcing that child to participate in armed fighting.[15]

Material Harm: Economic loss, for example, as a result of the pillaging of the victims' personal belongings, destruction of household items, cattle, goats, and sheep, or the destruction of the victim's home.

Physical Harm: Rape, sexual enslavement, assaults and battery, and other similar acts.

5. The alleged crimes within the jurisdiction of the ICC (*ratione materiae*) appear, *prima facie*, to have caused the alleged harm;

6. The harm caused by the alleged crimes within the ICC's jurisdiction occurred within the Court's temporal jurisdiction (*ratione temporis*). As a general rule, this means the crime(s) were alleged to have occurred after the Rome Statute entered into force, or after the state party joined the ICC;

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14. *See generally* Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Fourth Decision on Victims' Participation* (December 12, 2008), at 14–17 (deeming, in instances where victims are unable to obtain standard identification documents, a "statement signed by two witnesses attesting to the identity of the victim applicant and including, where applicable, the relationship between the victim applicant and the person acting on his or her behalf" to be sufficient).

15. *See generally* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Redacted Version of "Decision on 'Indirect Victims'"* (April 8, 2009), at 19–22 (distinguishing "direct" from "indirect" victims, noting that a "close personal relationship, such as those between parents and children, are a precondition of participation by indirect victims" and emphasizing that a "causal link must exist between the crimes charged and the victims' harm....").

7. The harm caused by the alleged crimes within the ICC's jurisdiction occurred within the Court's territorial jurisdiction (*ratione loci*); *and*

8. The applicant signed, or placed his thumbprint on, the application.[16]

To illustrate how in practice the Pre-Trial Chamber analyzes such applications, consider the terse ruling on the fairly routine application of "Applicant a/0031/08":

> Applicant a/0031/08 appears *prima facie* to have suffered moral harm (emotional suffering) as a result of the killing of members of his family and material harm (economic loss) as a result of the pillaging of his cattle, allegedly by members of a militia. The moral and material harm suffered by Applicant a/0031/08 appears *prima facie* to have been caused by crime(s) within the jurisdiction of the Court, such as, among others, those enumerated in Articles 7(1)(a), 8(2)(a)(i), or 8(2)(c)(i), and 8(2)(b)(xvi), or 8(2)(e)(v). The Applicant alleges that the harm caused by the crime(s) within the jurisdiction of the Court occurred within the Court's temporal and territorial jurisdiction: in February 2003 on the territory of the DRC.[17]

Defense teams may contend that Rule 85(a)'s pre-trial qualification requirement conflicts with Article 68(3), since Rule 85(a) requires the Chamber to "pre-judge" the case. Although it is true that the Chamber will formally acknowledge the connection between the victim and the interests involved at trial before the Chamber has ruled on the guilt of the accused, this is not inconsistent with Article 68. Put simply, the standard of proof for victim qualification ("grounds to believe") is substantially lower than the

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16. *See generally* Situation in Uganda, Case No. ICC-02/04: *Decision on Victims' Applications for Participation* (November 21, 2008), at 6–7 (setting out requirements for victim participation, and noting that "[e]ach statement by Applicant victims will...be assessed both on the merits of its intrinsic coherence and on the basis of information otherwise available to the Chamber....[F]ailure by applicants to submit certificates relating to the injuries allegedly sustained in the incidents does not hinder the holding that the alleged harm is proved to a satisfactory degree for the purposes of the present proceedings."); Situation in Darfur, Sudan, Case No. ICC-02/05: *Corrigendum to Decision on the Applications for Participation in the Proceedings* (December 17, 2007) (discussing requirements of Regulation of the Court 86(2)); *see also* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Decision on the Applications for Participation* (November 4, 2008), at 13–38.

17. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Decision on the Applications for Participation* (November 4, 2008), at 21.

standard required for conviction ("the Court must be convinced of the guilt of the accused beyond a reasonable doubt"[18]). Indeed, the "grounds to believe" standard also governs detention rulings, whether the Chamber provides a witness with counsel and whether an individual has a right to be warned against the possibility of self-incrimination. None of these preliminary conclusions require the Chamber to make any final determinations concerning the guilt or innocence of the accused, and they certainly do not place any doubt on the fairness of the proceedings. Victim representatives should, therefore, resist defense claims that a finding of "victimization" somehow as a general matter undermines the accused's right to a fair and impartial trial.

In addition to the Chamber's formal recognition of individuals as "victims," Rule 50(1) requires the Office of the Prosecutor to inform potential victims and the Victims and Witnesses Unit of any decision to seek Pre-Trial Chamber authorization to initiate an investigation in accordance with Article 15(3). Such an informal decision by the Prosecutor to consider a person a "victim" necessarily precedes any formal victim-status determination by the Pre-Trail Chamber pursuant to Article 69(3) and Rule 85. Victim representatives should, therefore, also be on guard against attempts by the defense to argue that such an informal and preliminary determination of victimhood is inconsistent with the Prosecutor's duty to remain "neutral" during the investigation of the case.

B. Victims as Witnesses

Experienced criminal law practitioners realize that, in many cases, victims may also be witnesses.[19] This dynamic of course also holds true at the ICC. Although certain rules relating to pre-trial contact between parties in the proceedings and witnesses differ from the rules relating to victims (Figure VII.2 provides a summary of the differences.), there is nothing inherently inconsistent about being both a victim and a witness (indeed, in practice, victim representatives may suggest to the prosecution certain victims—perhaps not already be known to the prosecution—who may serve as particularly effective witnesses).

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18. Article 66(3).

19. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Public Decision on Certain Practicalities Regarding Individuals Who Have the Dual Status of Witness and Victim* (June 5, 2008) (regulating contact and disclosure obligations of victims who are expected to testify as witnesses).

Victim as a participant	Victim as a witness
Participation is voluntary	Called by the defense, the prosecution, other victims participating in the proceedings or the Chamber
Communicating to the Court his own interests and concerns	Serves the interests of the Court and the party that calls him
It is up to the victim to decide what he wants to say	Give evidence in testifying and answering related questions
Participation is possible at all stages of proceedings when considered appropriate by the judges	Called to testify at a specific time
Always entitled to be represented before the ICC by a legal representative	Does not normally have a legal representative
Normally participates via a legal representative and need not appear in person	Always testifies in person

Figure VII.2 "Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court." Copyright © International Criminal Court 2006.

In each case of a common legal representative application to the Chamber to call a witness, the Chamber will determine whether (1) the testimony affects the victim's personal interests, (2) is relevant to the issue of the case, and (3) contributes to the determination of the truth and consistency of testimony with the rights of the accused, specifically the right to adequate time and facilities to prepare a defense.[20]

That said, the Chamber has demonstrated some vacillation concerning the proper treatment of such "dual" victim/witnesses. What is clear, however, is that legal representative must provide the prosecution with the names and identifying details of victims who the legal representative believes may also be witnesses *as soon as* the legal representative becomes aware of this possibility.[21] The prosecution, which must treat this

20. Situation in Darfur, Sudan, Case No. ICC-02/05-03/09: *Decision on the Participation of Victims in the Trial Proceedings* (March 20, 2014).

21. *Id.* at 22.

information confidentially, then makes a determination of whether the victim has such dual status and informs the legal representative of its conclusion.[22] Similarly, the legal representative of a victim must also furnish such information to the defense, which in turn must inform the victim if the defense intends to call the victim in its case.[23] Notice to the legal representative, therefore, must precede all contacts between prosecution, defense, and a victim with dual status.[24]

In *The Prosecutor v. Jean- Pierre Bemba Gombo*, Trial Chamber III held that legal representatives of victims are entitled to present evidence at trial and ask to be heard as witnesses. Individual victims may be asked to present their views and concerns to the Chamber by submitting unsworn statements.

The victims' legal representative may present to the Chamber a comprehensive signed written statement detailing facts about the victims' wish to testify and/or present views and concerns. The legal representatives' written applications should include a statement concerning:

- the manner in which the victims' views and concerns are to be presented;
- the estimated time needed for the victims' presentation;
- whether or not the victims' identity can be disclosed to the parties;
- how the personal interests of the victims may be affected by the presentation of their views and concerns to the Chamber; and
- the relevance of the victims' testimony to the charges.[25]

22. *Id.* at 22–23.

23. *Id.* at 24.

24. *Id.* at 24–27.

25. *See generally* Situation in the Central African Republic In the Case of the Prosecutor v. Jean- Pierre Bemba Gombo, Case No. ICC-01/05–01/08; *Public Document on Order Regarding Applications by Victims to Present Their Views and Concerns or to Present Evidence* (November 21, 2011).

PART VIII

Preparing for Complex Group Representation

THE COMPLEXITY OF ATROCITY CRIMES CASES is one of the chief explanations advanced for the cumbersome, and at times halting, progress of ICC investigations and prosecutions.[1] Such complexity presents challenges not only to the Prosecutor and the Chamber but also to victim representatives. Complicating matters, in light of the professional backgrounds of the lawyers and judges at the ICC discussed previously in Part IV(J), a number of ICC practitioners will likely not have previously dealt with large, multi-defendant criminal cases. Given the sheer number of potential victims in ICC cases, as well as the practical problems presented by having, say, two hundred victims represented in court by two hundred separate victim representatives, group representation will probably (and, indeed, should) emerge as the norm.

A. Promises and Potential Pitfalls of Group Representation—The Class Action Model

For a graphic illustration of how unfeasible individual representation is, consider the situation involving the Democratic Republic of Congo, where the individual victim can seem, and be made to feel, like a firefly in a canyon. With literally millions of potential victims, the Chamber, the Office of the Prosecutor, and defense counsel would not be able to address individual *en masse* pre-trial filings submitted by hundreds, or thousands, of lawyers representing individual victims. Likewise, the Victims and Witnesses Unit

1. *See generally* Rene Blattman & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT'L CRIM. JUST. 724 (2008) ("[B]oth the complexity and the magnitude of international crimes are exceptional circumstances that influence the pace of conducting and concluding such trials."). As discussed above, however, the cases the ICC is currently processing are not necessarily exceptionally complex.

and the Registry would be unable to meet the needs of, and to provide notice to, such a far-flung group.[2] Moreover, pursuant to Rule 90(5), the Court covers the costs if a "victim or group of victims... lack the necessary means to pay for a common legal representative chosen by the Court...." The financial and logistical burdens—which already at times appear to buckle the ICC's capacity—occasioned by individual or small-group representation of victims would bring to an almost certain grinding halt the criminal proceedings, thereby prejudicing all participants.[3]

Victims who wish to present their views and concerns individually and appear directly before the Chamber (in person or via video-link) are required to go through the procedure established under Rule 89. Those victims who wish to participate without physically appearing before the Chamber can present their views and concerns through a common legal representative (without having to abide by Rule 89). This registration process is less detailed than the application forms requires by Rule 89(1). The number of victims, moreover, may make it impossible for a common legal representative to present the victims' views and concerns.[4]

As a result of these time, space, capacity, and financial constraints,[5] the Court has repeatedly signaled its intention to assign a common legal representative to groups of victims who have suffered "mainly similar crimes

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2. Consider, for example, the basic resource and capacity problems that would be posed by Rule 90(5), which requires the Registry to provide financial and logistical assistance to a victim, or group of victims, who do not have the necessary means of paying for legal representation. Moreover, there is an open question concerning from what point in time protective measures must be taken and who must pay for them.

3. *See generally* Prosecution's Application for Leave to Appeal PTC I's Decision in the Situation in the Democratic Republic of Congo, Case No. ICC-01/04-103: *Applications for Participation in the Proceedings* (January 23, 2006), at 14 (arguing that Court's limited resources would be stretched beyond capacity if virtually unlimited victim participation were permitted); *see also id.* at 14–15 (warning of flood of petitions to Court and detrimental impact on efficiency of pre-trial proceedings and expressing concern about Registrar's ability to provide notice, legal advice, etc., as provided for by Rules 16, 90, 92, and Regulation of the Court 86).

4. Situation in the Republic of Kenya, In the Case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11: *Decision on Victims' Representation and Participation* (October 2, 2012).

5. Even the relatively modestly sized main courtroom at the ICC (there are two smaller courtrooms as well) could barely accommodate the participants in the one-defendant *Lubanga* case. The main courtroom, moreover, is the only full-size courtroom in the cavernous building housing the Court. The time will soon come when the Court will have to accommodate two (or more) trials in the same room. Multiple trials, something that should be the rule, rather than the exception, will undoubtedly further delay the proceedings unless necessary changes are made.

[occurring in the same geographic region] and...allegedly committed by the same group of perpetrators."[6] The Chamber in the *Lubanga* case in fact noted that "there is likely to be joint representation of, and joint presentation of common issues by, participating victims...."[7] Nevertheless, at least one Chamber has, in the context of arranging group representation for victims, emphasized that it "attaches the greatest importance to the requirement that the participation of victims, through their legal representatives...be as meaningful as possible as opposed to being purely symbolic."[8] If the Chamber chooses to order group representation, it can do so pursuant to Rule 90 and Regulation of the Court 79(2).[9]

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6. Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims* (December 16, 2008), at 5–8 ("In case the victims participating in the present case are unable to choose a common legal representative, the Single Judge requests, pursuant to rule 90(3) of the Rules, the Registrar to choose one common legal representative from the CAR"; in the case of victims objecting to the common legal representative, or a the presence of a possible conflict of interest, the OPCV is to be appointed as interim victim representative, "if need be").

7. Trial Chamber I, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06-1191: *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008* (February 26, 2008), at 10–11; *see also* Situation in Uganda, Case No. ICC-02/04: *Decision on Legal Representation of Victims* (February 9, 2009), at 5–6 (ordering joint representation in light of the "similarity of [the victims'] respective experiences and with a view to preserving the efficiency of the proceedings"); Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications for Participation* (November 4, 2008) (ordering the Registrar to assist persons to whom the Chamber granted the procedural status of victims so that they "may choose one or more common legal representatives," and directing the prosecution and defense to abstain from any direct contact with such persons without their legal representatives' approval).

8. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07: *Order on the Organisation of Common Legal Representation of Victims* (July 22, 2009), at 7 ("[T]he Chamber considers it of utmost importance that there be a steady and reliable flow of information about the proceedings to the victims and that there is real involvement by the victims in terms of instructing the legal representatives on how their interests should be presented.").

9. Regulation of the Court 79 and, by reference, Rule 90(3) govern the criteria for common legal representation. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008), at 34 (noting that the Chamber granted ninety-one applicants the right to participate in the trial and finding that, "[g]iven that the views and concerns of many victims will coincide or overlap, the opportunity in this case for joint representation must be carefully explored"); Situation in Uganda, Case No. ICC-02/04: *Decision on Victims' Applications for Participation* (November 21, 2008), at 65 ("As regards applicants granted the status of victims in the Case, in light of the similarity of their experiences and statements,

Rule 90 starts out broadly permissive, stating that "[a] victim shall be free to choose a legal representative."[10] However, Rule 90(2) quickly adds:

> Where there are a number of victims, the Chamber may, for the purpose 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. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

This language gives the Chamber broad discretion to appoint counsel of its choosing to the victims and to subdivide the representation in whatever manner it deems appropriate under the circumstances of the case.

It is, therefore, likely that the Chamber will rely on Rule 90(2) to appoint a small group of attorneys to represent the many victims expected in any atrocity crimes case of the type likely to be brought before the ICC. Rule 90(4) provides that the Chamber and 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." Regulation of the Court 79 goes on to state that the Chamber may combine the decision to permit victims, or groups of victims, to participate in the proceedings with the decision to appoint them a common legal representative.

Although the Chamber may aggregate victims in a number of ways, victim representatives should assume that they will represent the victims on a group basis—whether as individual attorneys working alone or as teams of attorneys who coordinating among themselves. In the *Lubanga* trial, for example, there were three teams of victim representatives: Paolina Massidda, the Principal Counsel of the Office of Public Counsel for Victims, headed one team, and "external" (that is, non-ICC) legal representatives headed the other two.

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the Single Judge is of the view that they also should be jointly represented by one common legal representative."); Situation in Uganda, Case No. ICC-02/04: *Decision on Victims' Applications for Participation* (November 17, 2008), at 18 (appointing Office of Public Counsel for Victims' attorney Adesola Adeboyejo to represent all victims of the situation).

10. Rule 90(1).

The initial question, then, is how will the Chamber handle the inevitability of group representation? The options are twofold: (1) the Chamber may call upon a single lawyer (or team of lawyers) to represent a large number of victims, or (2) the Chamber could call on multiple lawyers, each representing subgroups of similarly situated clients, to work together and aggregate their efforts on behalf of the victims as a whole. In either case, there exists the danger that victims will enter the case with a belief that the lawyer will represent them individually in the classic sense, in that they will have at least some meaningful control over their attorney's conduct and decisions. In reality, however, victims will be involved in collective litigation. In *Mbarushimana*, the Single Judge ordered that victim participants with no representation will be assigned a common legal representative from one of the three counsels representing the other victims.[11] The representatives were allowed to attend public hearings, make opening and closing statements at the confirmation of charges hearing, and access documents containing charges.[12]

Regardless of the aggregation method settled on by the Chamber, group representation will encompass preparing pleadings for the group, handling collective discovery issues, and preparing for pre-trial hearings and the main trial. Depending on the number of victims assigned to a particular attorney, or group of attorneys, and where the victims are situated, it is unlikely that the attorney will have significant personal involvement with each victim, or will have the level of personal interaction and discussion that would be the norm if the attorney only represented a small number of victims. The fact that, in most cases, the Chamber will have appointed the attorneys to represent victims, as opposed to the victims seeking out the representative themselves, compounds this problem.

There are certainly significant challenges posed by the group representation mechanism, but there are also real, notable advantages. For example, victim representatives can collaborate in their efforts to produce high-quality legal briefs, thereby avoiding the need to inundate the Chamber with duplicative submissions and time-consuming appeals from

11. Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10: *Decision on the "Defence Request to Deny the Use of Certain Incriminating Evidence at the Confirmation Hearing" and Postponement of Confirmation Hearing* (August 16, 2011).

12. Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10: *Decision Postponing the Commencement of the Confirmation Hearing* (August 16, 2011).

individually filed matters. Moreover, given the enormity of the stakes for the victims, and considering the suffering they have already endured, the Chamber can be expected to be more sensitive to the victims' needs and to permit greater victim involvement, if the victims' issues are collectively addressed by one lead victim representative, who speaks on behalf of all victims or groups of victims and who keeps the litigation moving.

Of course, it is also conceivable that the Chamber will employ formal aggregation processes in order to handle larger numbers of victims. Under such a scenario, it is likely that a number of trial teams will be assembled and that a "hub" or "lead" victim representative will bear responsibility for addressing the Chamber and filing all submissions. Even without such formal aggregation, to the extent that groups of lawyers represent individual groups of victims, careful coordination and a decision on who will be the lead attorney is required.

Considering the somewhat politicized nature of the ICC, and the need to know the written and unwritten ins and outs of handling a case at the Court, victims will ideally be represented by a "mixed" team of victim representatives, namely, one or more ICC "insiders" with knowledge of the politics and the rules of the ICC, and one or more experienced trial attorneys from the victims' domestic jurisdiction ("external representatives") who can best relate to the victims and help the victims feel comfortable. By following this approach, the ICC insiders, who know the written and unwritten rules and practices of the ICC, will be in a position to augment the "on-the-ground" knowledge of the lawyers from the victims' home jurisdiction, thereby improving the victims' comfort and quality of representation.

That resources for victims are not limitless is not only a practical truism.[13] Regulation of the Court 83(1) and (2) make it clear that, although the Court will cover all "reasonably necessary" defense costs, providing

13. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07: *Order on the Organisation of Common Legal Representation of Victims* (July 22, 2009), at 8 ("[A]lthough victims are free to choose a legal representative, this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require.") (citations omitted).

legal assistance to indigent victims is subject to a determination by the "Registrar in consultation with the Chamber, where appropriate." Thus, under virtually all scenarios, the victim representatives will have to select a lead attorney, and set up logistical mechanisms, in order to effectively and efficiently coordinate efforts and develop a sound trial strategy. The pooling of resources in such a manner permits the victim representatives to reap the benefits of economies of scale by dividing up investigative and research efforts among the attorneys and by spreading the limited financial and intellectual resources, know-how, and contacts among many victims. Not only will the victim representatives be able to focus more directly on those issues impacting the victims as a group, but they will also be able to expend resources on investigators and research in a manner that maximizes utility.

In terms of strategy, victim representatives must tailor their approach very much like a class action lawyer approaches representing the interests of a large number of individuals in a class action lawsuit. Counsel must be prepared to address the complex questions of how to frame the case and how to present persuasive evidence of harm to a large group of similarly situated victims, frequently in the context of a "leadership crime." In this sense, ICC litigation involving victims resembles what Professor Abram Chayes in 1976 described as "public law litigation," that is, litigation relating to matters such as union governance, school desegregation, employment discrimination, environmental management, and securities fraud. In those classes of cases, the putative victims are aggregated, and counsel, through litigation, seeks to achieve certain collectively-held group ambitions.

Addressing such complexity requires creative thinking. Although group representation may have some of the above-described upsides (for example, it may be easier to demonstrate harm to a group of victims as a result of the accused's systematic planning of, say, the ethnic cleansing of the village in which they all resided), the corollary downside is that the victim representative will have to formulate a more complex strategy to successfully advocate the victims' collective position.[14]

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14. *See also* Appeals Chamber, Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432: *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (July 11, 2008), at 42 ("The burden of proof of the guilt of the accused lies squarely with the Prosecutor (Article 66 (2) of the Statute).").

Since the ICC's legal provisions make group representation the likely default position for qualified victims, victim representatives must turn to analogous non-ICC group litigation situations for guidance on how to proceed, both ethically and strategically. The class action attorney's ethical and practical challenges are probably the closest analogy the victim representative can draw on, whether the Chamber has asked him to represent five, fifty, or five hundred victims.[15]

In federal court in the United States, where class action lawsuits are not unusual, Federal Rule of Civil Procedure 23 sets forth the four prerequisites to any class action: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Federal Rule 23's requirement of numerosity is, to some extent, analogous to ICC Rule 90(1)'s requirement that the Chamber must determine a grouping that ensures the "effectiveness of the proceedings"[16] by, for example, limiting duplicative filings and allowing the victims to benefit from the efficiencies and focus provided by litigation economies of scale.

Turning next to the commonality and typicality of claims, the Chamber at the victim qualification stage, likewise, must conclude that there are questions of law and/or fact common to the group. Federal Rule 23's requirement that the proposed class members have adequate representation, moreover, mirrors ICC Rule 90(4)'s mandate that the Chamber select counsel for victims based on the "distinct interests of the victims," while striving to ensure that "any conflict of interest is avoided." It is, however, as discussed below, virtually impossible for an attorney representing a large

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15. Class action litigation is commonly viewed as being one of a group of "entrepreneurial" legal practices (along with contingency-fee financing of litigation, reliance on juries as fact-finders, costly pre-trial discovery, rejection of "loser-pays" rules dictating who must pay for the litigation on the basis of who loses the litigation, and the availability of punitive tort damages and the like) popular in the United States—and unpopular among European lawyers. Such a view is a bit antiquated, however, given that class action litigation is making significant gains in Europe. Consider, for example, that class action–style litigation is permitted, and increasingly popular, in Germany (in the securities litigation context, *see Kapitalanleger-Musterverfahrensgesetz*), England (in the group litigation orders context, *see* Civil Procedure Rules 1998, S.I. 1998/3123, Part 19, Section III), Holland (in the collective settlements context, *see Burgerlijk Wetboek* Articles 3:305a-b), Italy (in the class action context, *see Codice di consume*, Article 140), and in other Continental jurisdictions.

16. Federal Rule 23, in contrast, requires that the Court initially find that naming each individual member of the class as a separate party in the lawsuit would be logistically inconvenient or otherwise impractical; in ICC proceedings, however, the qualified victims are all named participants in the proceedings and, therefore, do not constitute a "class" in the Federal Rule 23 sense, but rather operate as a group.

number of victims to avoid "any" conflict of interest among the victims, as is required by Rule 90(4). Rather, the attorney must attempt to avoid conflicts of interests between the attorney's interests and the *group's* objectives, as well as conflicts among the victims within the group.

B. The Victim Representative's Duty of Loyalty to Clients

The attorney's duty of loyalty traditionally runs to each individual client. In the context of group representation, however, lawyers exercise their duty of loyalty by properly representing the interests of the group in a diligent, transparent, and conflict-free manner. Most victims of atrocity crimes, given their likely cultural, socio-economic, and educational backgrounds, as well as the ICC's relative novelty, will not truly understand what they can expect from their attorney.

The need to explain to victims the potential conflicts inherent in group representation is critical. The ICC's Code of Professional Conduct in fact takes the position that the attorney has created a representation agreement once he accepts the Chamber's assignment.[17] Although the rational victim may, *ex ante*, prefer group representation and wish the attorney to advance collective, rather than individual, interests, this does not absolve counsel from the requirement to, at the outset, inform all victims of the scope, nature, and limitations of the representation, as well as of potential conflicts of interest that inhere in collective representation. Prior to discussing these potential conflicts, however, we must distinguish between class action and collective representation litigation.

The ICC's Code of Professional Conduct for Counsel, which claims primacy over any inconsistent ethics code which may bind the victim representative in his home jurisdiction,[18] reflects the drafters' foresight by appropriately recognizing the ethical difficulties involved in group litigation. The Code starts out by requiring all counsel, including counsel for victims, to perform their duties with "integrity and diligence, honourably, freely, independently, expeditiously and conscientiously...."[19] Article 12 of the Code prevents counsel, absent consent,[20] from representing a client in

17. *See* Code Article 11.

18. Code of Professional Conduct for Counsel, Article 4.

19. *Id.* at Code Article 5.

20. *Id.* at Code Article 12(2).

any case in which that client's interests are incompatible with the interests of another client counsel has or had.[21] Article 14, in turn, mandates that counsel act with candor, fairness, and integrity toward each client, and that counsel also "[a]bide by the client's decisions concerning the objectives of his or her representation..." and "[c]onsult the client on the means by which the objectives of his or her representation are to be pursued."[22] Moreover, Article 16(1) requires counsel to "put the client's interest before counsel's own interests or those of any other person...." These ethical provisions seem to operate against large-group representation of victims.

The Code, fortunately, anticipates some of the above-described ethical problems, which are part and parcel of group representation. Article 16(2), for example, provides:

> Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.

In terms of what action to take when a conflict of interest arises, Code Article 16(3) instructs counsel to inform all "potentially affected clients of the existence of the conflict," and to thereafter either seek Chamber's consent to withdraw from representing one or more clients, or to obtain the "full and informed consent—in writing—of all potentially affected clients to continue representation." Although the Code, therefore, goes a long way toward recognizing that conflicts may arise in group representation, it surprisingly does not define what actually constitutes a conflict of interest or what qualifies as Article 16(2)'s "different yet consistent positions" among clients.

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21. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Decision on the Apparent Conflict of Interest in Relation to Legal Representative of Victims* (July 16, 2008), at 8-11 (finding that victim representative's prior legal contacts with an accused did not provide the requisite indicia of the existence of a conflict of interest).

22. It must be noted that the ICC's Victims booklet states that the Court will, except in undefined "exceptional circumstances," not cover the cost of travel and lodging for victims who wish to personally appear before the Court. *See* VICTIMS BEFORE THE INTERNATIONAL COURT 27.

In any event, the attorney's duty of loyalty encompasses not only the avoidance of conflicts of interest but also requires diligence in the individual case and imposes a duty to inform and advise clients of case-related developments. In aggregate litigation, the client usually retains two critical phases where he can traditionally exercise his autonomy, namely, at the outset by opting into (or, more commonly, opting out of) the litigation, and again at the settlement phase. One could argue that this arrangement still provides the client insufficient autonomy. However, in ICC proceedings, even these limited instances of autonomy may be absent; the Court at the "opt-in" stage provides the oft-impoverished victim living in fear of retribution, and generally located thousands of miles from the courtroom in remote communities, with an attorney who will represent him. The victim has little control at this initial stage. Additionally, outside of the Prosecutor's guilty-plea negotiations and the reparations stage, there is nothing approximating a "settlement phase."

Victim representatives, in the end, must ensure themselves that their clients understand the nature of the proceedings, as well as the above-described inherent potential conflicts of interest, so that they can provide informed consent going forward. Victim representatives, therefore, at a minimum must explain to their clients (1) the nature of the litigation, (2) the number and nature of the other victims the attorney represents, (3) the advantages provided to victims by a collective and coordinated group effort, (4) the trade-offs involved in such litigation, such as more limited contacts with counsel and diminished ability to enforce individual objectives if those objectives are deemed by counsel to be at odds with the group's interests, and (5) the reality that, in cases of conflicts between the individual and the group's interests, the attorney must engage in priority-setting, resolving such client-client conflicts in favor of pursuing the group's interests. Once victims have this basic information, they will be in a better position to accept the representation, reject the representation and opt out, or reject the representation and petition the Chamber pursuant to Regulation 79(3) to grant them alternative counsel.[23]

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23. The ICC's Victims booklet discusses this topic in a slightly more optimistic (or, at least, victim-centric) fashion:

> Where there are many victims, the judge may contact a victim and ask him or her to join with other victims to become part of a group of victims that will be represented by the same legal representative or team of representatives. This is called common legal representation, and the purpose is to help to make the proceedings

To understand why the likelihood of having alternative or additional counsel appointed is low, consider that Regulation 79(3) provides that "[v]ictims may request the relevant Chamber to review the Registrar's choice of a common legal representative... within 30 days of the Registrar's decision." The Regulation's restrictive thirty-day window to raise objections makes it highly unlikely that the attorney and victims will have had substantive interactions or discussions relating to trial strategy or to the conflicts that will necessarily inhere in group representation situations. Without such interactions, a victim will generally be unable to ground a claim of extraordinary circumstances warranting an alternative appointment. The thirty-day window for objections raised by a victim (who necessarily will be appearing *pro se*) to the Chamber's choice of counsel, therefore, is likely to ensure that most victims will not be in a position to timely raise the necessary objections (or, for that matter, to even form a basis for such an objection) to the appointment of counsel.

Opting out of the litigation altogether after the thirty days have passed due to dissatisfaction with appointed counsel will be a drastic decision that leaves the victim with no alternative methods of participation. Victims are, therefore, as a practical matter assigned counsel, and they can either take it or leave it. In establishing this procedural reality, the ICC arguably fails to live up to its own promise of treating each victim as a true "participant" in the proceedings who, as such, is entitled to qualified counsel (per Rule 90).

In light of these many uncertainties, as well as the power imbalance between the victim and his attorney, best practices counsel victim representatives to summarize the terms of representation in a form document (either a standard terms-of-representation contract, or a power-of-attorney contract[24]). Each victim must review, understand, and sign the form document if the victim consents to the group representation. Such a procedure

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more efficient. Their own interests will *always* be protected even through common legal representation.

If for any reason the victims are unable to organize themselves in this way and to choose a common legal representative, the judges may ask the Registrar of the ICC to do so. If the victims are not happy with the Registrar's choice, they may ask the judges to review it. Victims who prefer not to be joined with other victims in the same groups, for instance because they believe that their interests need to be represented separately due to a conflict of interest, can also ask the judges to review this decision.

VICTIMS BEFORE THE INTERNATIONAL COURT 22 (emphasis added).

24. *See generally* Regulation of the Court 123 ("Acknowledgment of Appointment").

is not contemplated in the ICC's present rules and regulations. However, the virtual minefield of conflicts, necessary priority setting, and aggregation focus inherent in group representation, combined with the likely lack of familiarity victims will have with legal proceedings, speaks to the wisdom of making such a formal informed-consent document part of the victim representative's routine practice.

Some traditionalists will no doubt consider even this proposed method of ensuring (or, at least, promoting) informed consent insufficient. They may argue that the victim, in actuality, has no realistic alternative but to accept the Chamber's appointment decision, as well as the victim representative's aggregate litigation strategy. Such *de facto* compelled group representation, the argument might go, dilutes the duty of loyalty the attorney owes each individual client. If the victim does not like this arrangement, the victim is simply out of luck because the Chamber will not permit dozens or hundreds of attorneys, each representing one or a small group of similarly situated victims, to participate in the proceedings. The traditionalist may sum up his position by re-emphasizing that such compulsory, take-it-or-leave-it group representation deprives the individual victim of the dignity conferred by pursuing his own litigation strategy and prevents the victim from truly participating in the trial of his former tormentors.

A candid response to the traditionalist's complaint requires the concession that there is some force to the argument that compulsory large-group representation is, indeed, inconsistent with "participation" in the truest sense of the term. However, under the current system, the Chamber in the final analysis dictates that Attorney X will be responsible for representing victims A–Y. This is the current state of the law, and there is no indication that this will change. The other alternative, which is for victims to simply bypass participation in the ICC, is not much of an option, and in the end some participation will be better than no participation at all. Despite the current system's shortcomings, victim representatives advance their clients' individual autonomy by being sensitive to the potential conflicts between clients, as well as conflicts between clients and their attorneys, by explaining these conflicts to the victims and by seeking the victims' informed authorization to proceed.

PART IX

Understanding Victims' Interests and Recognizing the Importance of Managing and Guiding Expectations

AS INTERNATIONAL LAW PRACTITIONERS and interested observers appreciate, the drafting of aspirational legislation containing sweeping, optimistic preambles is a far more simple and straightforward undertaking than lending substantive meaning to those codified ambitions. As with many things in life, reality can be an enemy. The ICC's articles and rules, on their face, may lead to the reasonable belief that victim participation will be both substantive and widespread. In truth, however, the ICC to date has not lived up to the high expectations it has set for itself in this regard.

A. Promises Collide with Reality

Once again, the numbers tell the tale. Consider, for example, the number of potential victims in the Democratic Republic of the Congo, where ethnic cleansing, systematic rape, forced labor, torture, killing, maiming, and looting by government troops and rebel fighters spread terror throughout the countryside.[1] Between August 1998 and April 2004, the war resulted in the deaths of more than three million people from murder, starvation, and disease.[2] Millions more were displaced. Even given these mass atrocities, as well as those committed in Darfur, northern Uganda, and the Central African Republic, the ICC in the first seven years of its existence received fewer than one thousand victim applications to participate in proceedings. This number obviously represents only a tiny sliver of the literally millions of potential victims from these conflicts. Moreover, only a small fraction of

1. *See generally* Human Rights Watch, *Seeking Justice: Prosecution of Sexual Violence in the Congo War* (March 7, 2005).

2. *See* Karl Vick, *Death Toll in Congo May Approach 3 Million: Conflict Leaves Trail of Starvation, Disease and Carnage*, WASH. POST (April 30, 2001), at A01.

these putative victims have actually obtained the "status of victim" in the Democratic Republic of Congo, Uganda, and Darfur proceedings.

By most estimates, applicants on average wait in excess of a year for a determination on their "status as a victim," which itself is merely a preliminary finding signifying nothing more than that the individual in principle *may* participate in the specific proceedings. Those to whom the Court accords such participatory rights represent only the tiniest subset of the universe of actual victims. And even this small number of applications has resulted in logistical burdens the ICC has been hard-pressed to effectively tackle.

Those lucky few who are given actual participatory rights will be additionally put upon in ways not immediately obvious. One side effect of the ICC's slow handling of victim applications is that the few "official" victims will become the *de facto* spokespersons for the sea of individuals who suffered at the hands of their alleged victimizers. The simple act of the Court adjudicating their applications as meeting the requisite criteria, thus, saddles this subgroup of victims, who never sought such status, with this daunting responsibility.

The mounting delays resulting from the processing of relatively few applications are emblematic of the ICC's ongoing struggle with how to reconcile the Rome Statute's broad invitation for victim participation with the practical realities of running a functioning Court. Unfortunately, this is a struggle the ICC is presently losing. Indeed, members of the Office of the Prosecutor fear that the actual involvement of thousands of victims, or even hundreds of victims, is a logistical impossibility and that the realities of daily ICC practice cannot be reconciled with the broad language of the ICC's Preamble and the equally broad language of Article 68. Compounding the frustration resulting from such inefficiencies, the ICC has publicly given victims explicit guarantees of substantively meaningful participation in the proceedings, the vindication of their interests, the timely resolution of the underlying cases, and the creation of a historical record.

Subtle messages delivered during the victim-application process can trigger unjustified expectations. For example, the seventeen-page standard form to participate in ICC proceedings for "Individual Victims and Persons Acting on Their Behalf" provides as follows:

> Please complete this Application Form if you believe you have suffered harm as a result of a crime under the jurisdiction of the [ICC] and wish

to participate in the proceedings before the ICC by putting forward your observations, views or concerns, or if you are acting on behalf of such a person.[3]

The form goes on to state that the "ICC can help victims find a legal representative by providing a list of qualified counsel."[4] (The ICC's Standard Application Form for Reparations' language almost verbatim tracks that of the Victim Application Form).[5] Nothing in these materials, however, gives applicants an honest sense of how exceedingly unlikely it is that the Chamber will grant a given application or that, if granted, the Chamber will accord the victim an opportunity to substantively participate in the proceedings. These applications, therefore, run the risk of fostering false hopes on the part of victims who will often have little, if any, education and who have already endured tremendous pain and suffering.

Delays, and the unwitting creation of potentially false expectations, can of course, in part, be attributed to the reality that the ICC is a new system that is still establishing itself and to the fact that the drafters may not have given sufficient consideration to the sheer numbers of victims and the resulting flood of applications that threaten to block all organs of the ICC. It nonetheless remains important that victim representatives appropriately manage victim expectations, guarding against any unrealistic promises of a timely "day in court."

Stated plainly, to date, there is a want of meaningful outlets for victim involvement of a type that would justify promising victims that they will play an active role in the process of ensuring that justice is done. The victims of atrocity crimes have endured unspeakable and dehumanizing degradation and pain. Re-victimizing these vulnerable individuals by giving them false hopes of recompense and personal participation in the process of delivering justice is the last thing the international community, or for that matter, victim representatives, should be doing. Realism must, therefore, supplant bald hope and optimism in all dealings with victims.

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3. *See* Appendix VII.

4. *Id.*

5. *See* Appendix VIII.

B. Managing Expectations

In light of the aforementioned, victim representatives must take great care to prepare victims for the real possibility that they will receive no reparations or substantive in-court involvement in their alleged victimizers' criminal proceedings. As with any group dynamic, there will be some members of the victim group who will accept a given outcome, while others will not. The key for the victim representative is to determine what the victims, as a group, wish to accomplish, to personally explain clearly to the victims the realistic range of outcomes, and to instill in the victims an understanding that the lawyer is committed to their case and will do his best to most effectively represent the victims' interests.

In this regard, the Principal of the Office of Public Counsel for Victims reports that her office in 95 percent of all cases personally meets the victims well in advance of trial. This, of course, takes time and costs money. Depending on the security limitations, moreover, the victim representative may face difficulty arranging such in-person meetings for each and every client. But the Office of Public Counsel for Victims (OPCV) appropriately has concluded that such meetings are necessary in order to build trust between the lawyer and the client and to assure the victims that their hopes and concerns are of the utmost interest to the victim representative.

Of course, even the prospect of meeting with lawyers may overwhelm and scare many victims involved in ICC proceedings. Victims can further be expected to feel varying levels of discomfort when it comes to discussing their alleged victimizers and the very personal details of their victimization. Differing cultural mores will impact on such communication patterns; the self-perception of the victim, and the victims' understanding of the purpose of the questioning, are matters the victim representative must expect and prepare for. Conducting the necessary background investigation, and becoming attuned to the likely challenges posed by different groups of victims from a particular region, is, therefore, compulsory.

In this regard, the Office of the Prosecutor has recently adopted a commendable approach toward giving victims an early sense that the "system" takes their views seriously. The Office of the Prosecutor conducts victim outreach by holding "town hall" meetings in the impacted regions (that is, in the "field"). These village-based field meetings help the prosecution team identify the best witnesses to call at trial, but they also

permit the victims, in a cathartic group setting, to express their views and concerns and to tell their stories. The Office of the Prosecutor considers these meetings extremely valuable to both the Office, as well as to the victims. Such early involvement of victims is, indeed, laudable. Whether such airings of grievances with a branch of the ICC amount, as some prosecutors believe, to substantive victim "participation," however, remains open to debate.

In the final analysis, the practical toll of administrative burdens foisted on this court of limited jurisdiction, with finite resources and at times limited practical experience to draw on, will undoubtedly dissuade many potential victims from joining the process. Other victims, to date all hailing from war-torn countries in Africa, may be left feeling that the largely Western international community—flush with good intentions and promises often unmatched by observable real-world results—is merely paying lip service to the victims' understandable thirst for justice. It is up to the victim representative to not exacerbate these very real concerns; instead, the victim representative, in the course of engaging in a frank discussion of the realities of victim participation, must seek to provide victims with his honest and plainly worded assessment of what to expect.

C. Ensuring Victims' Safety

> *By the terms of Article 68 (1) of the Statute, the Prosecutor is bound to take measures protective of the safety and well-being of victims. The Prosecutor is equally under obligation to take measures or request that measures be taken for the protection of any person including no doubt victims.*[6]

Most victims have good reason to fear reprisals resulting from their involvement with the Court. The perpetrators, or their criminal associates and followers, may direct such reprisals against the victims and their property or, alternatively, against the victims' families and friends. The role of the competent

6. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Judgment on Victim Participation in the Investigation State of the Proceedings* (December 19, 2008), at 23–24 (citations omitted).

victim representative, therefore, includes ensuring that the Chamber and the Prosecutor[7] are aware of any security issues relating to the victims.[8]

Rule 89(1) requires that the Victims and Witnesses Unit provide both the accused and the Prosecutor with copies of the victims' applications. The Rule further mandates that the Chamber provide both the accused and the prosecution an opportunity to "comment" on all such applications. This, of course, is a ripe opportunity for the accused (or other, uncharged, perpetrators and their allies) interested in silencing victims to learn who will be involved in the proceedings, where they live, and how to locate them and their families. To the extent that victims have a grounded fear of reprisals, their representatives have a duty to submit requests for protective measures (in this regard, note that Article 68(1) requires the Chamber to ensure the victims' protection).[9] As the Chamber ruled in *Lubanga*, "[p]articipation by an individual as a victim in the proceedings shall not compromise his or her security...."[10]

At the application stage, protecting the victims may simply involve a request to ensure that the necessary redactions to protect the victims'

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7. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *On the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I* (November 26, 2008), at 52–54 (dissenting opinion of Judge Pikis arguing that Article 68(1) and (4) "confer and acknowledge power on the Prosecutor to take protective measures for victims and witnesses, including, no doubt, relocation whenever their safety to requires.... The provision of protection and support to victims and witnesses is a cause common to the Victims and Witness Unit and the Prosecutor.").

8. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Defense Application for Disclosure of Victims' Applications* (January 21, 2009) (Trial Chamber ruling that victims who hold dual status as both victims and witnesses are entitled to notice through their legal representatives when the prosecution intends to turn over information relevant to them; victims must be given an opportunity to raise security-related objections to such planned disclosures).

9. *See also* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008), at 36 ("Depending on the facts, it may be acceptable for the victim to remain anonymous as regards the public, whilst revealing his or her identity to the accused.").

10. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Public Decision on Certain Practicalities Regarding Individuals Who Have the Dual Status of Witness and Victim* (June 5, 2008), at 20.

identities are made to the applications prior to the accused receiving them.[11] At subsequent stages of the proceedings, however, victim representatives, pursuant to Rule 17, may have to request more extensive protective measures from the Victims and Witnesses Unit, such as temporary, or even permanent, relocation.[12]

On October 25, 2013, the Victims and Witnesses Unit developed a protocol for assessment and support of vulnerable witnesses. The protocol focuses on ways of assisting vulnerable witnesses before and during testimony, and identification of vulnerable witnesses.[13] Rule 16(4), in fact, provides that "[a]greements on relocation and provision of support services [for traumatized and/or threatened victims, witnesses, and others] may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential." Moreover, in the context of witnesses, the Chamber has ruled that, on balance, "putting in place arrangements to enable [certain witnesses'] voices and faces to be distorted does

11. *See generally* Article 43(6) (creating a Victims and Witnesses Unit within the Registry of the Court responsible for protecting victims and witnesses); Article 68(2) (allowing for evidence to be presented *in camera* when safety of witness, victim, or accused may be endangered); Article 68(5) (allowing Prosecutor to submit evidence in summary form in pre-trial proceedings when disclosure of witness identity could cause grave threat to witness's safety).

12. *See* Rene Blattman & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT'L CRIM. JUST. 723 (2008) (discussing seven agreements between the ICC and state parties governing the protection of witnesses and relocation arrangements, with Austria in October 2005 being the first state party to sign such an agreement). Moreover, the majority of the Appeals Chamber, over a powerful dissenting opinion written by Judge Pikis, has barred the Prosecutor, except in extraordinary circumstances where the victim or witness is facing "a serious threat of imminent harm that requires and immediate response," from "preventatively relocating" witnesses (or, by logical extension, victims) either before the Registrar has decided whether the relocation of a particular witness was required, or after the Registrar has concluded that the individual should not be relocated. *See* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04–01/07: *On the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I* (November 26, 2008), at 26–39.

13. *Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses*, ICC-01/05-01/08-974-Anx2 25-10-2010 1/10 SL T, October 25, 2013. *See also* Prosecution's Request to adopt a Protocol on the Handling of Confidential Information and on Contact with Witnesses of the Opposing Party, ICC-01/04-02/06-167-Red, December 9, 2013.

not jeopardize the interests of the accused persons any more than it is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[14] Victim representatives, starting well before the trial, must therefore think of the best way to ensure the safety of their clients.[15]

14. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chu, Case No. ICC-01/04–01/07: *Decision on the Prosecutor's Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules* (March 25, 2009), at 5–6.

15. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Redacted Decision on the Disclosure of Information from Victim's Applications Fund* (a/0225/06, a/0229/06 and a/0270/07) (February 4, 2011).

PART X

Holding a Pre-Trial Evidentiary Hearing to Establish the Historic Record

WHATEVER ONE MAY SAY about the present impact of international justice and international trials, when it comes to deterring future perpetrators of atrocity crimes, one of the clear benefits of such proceedings is the possibility of creating a (relatively) neutral, and reliable, historic record. There, indeed, is a considerable consensus among victims that making such a record available to future generations is a prime motivator of victim participation, since it will help memorialize, and perhaps explain, the atrocities.[1]

A. Litigation Aimed at Creating Present and Future Individual (and Group) Accountability

Survivors of atrocity crimes, as well as the families and loved ones of those who were injured or murdered, want to know first and foremost what happened, who committed the crimes, and why the crimes were committed. Put another way, victims seek the truth because the truth, to some extent at least, alleviates their anguish, vindicates their status, encourages individual accountability, and has the potential of removing the perpetrators and their allies from power.

Such a record, moreover, makes it more difficult for those accused to create fictionalized, self-serving accounts of what occurred. A proper understanding of the historic events, and even public outrage over the conduct that often took place in the public's name, can replace the twin dangers of complacency and resentment toward victims.

Substitutes for trial, such as truth commissions, are largely reliant on state cooperation and, therefore, frequently avoid naming individual

1. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 123–28 (1998).

perpetrators or imposing any sanctions (no court of law, after all, has formally found these persons guilty of anything). Although amnesty-based truth commissions and state-sponsored panels, as alternatives to prosecution, may well help address some of the concerns born by victims, they also permit the state to potentially whitewash inconvenient episodes, and fail to affix blame, create accountability, or punish the perpetrators.

Nuremberg Chief Prosecutor Robert J. Jackson famously remarked that he felt entrusted with the duty to "establish incredible events by credible evidence."[2] Justice Jackson, reporting to U.S. President Harry Truman, noted that the true legacy of the Nuremberg prosecutions was that they carefully documented the scope of the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."[3]

Some fifty years later it would be the trial of Dusko Tadic at the International Criminal Tribunal for the Former Yugoslavia (ICTY) which similarly created a comprehensive historic record of the abuses in the Balkans, including what happened to individual victims, a description of the planning and execution of the crimes, and who it was that bore command responsibility for the offenses. Both the Nuremberg trials and the

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2. *Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals* (June 7, 1945), *in* 39 AM. J. INT'L L. 178, 184 (Supp. 1945); *see also* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 19 (1963) ("For it was history that, as far as the prosecution was concerned, stood in the center of the [Adolf Eichmann] trial."); GIDEON HAUSNER, JUSTICE IN JERUSALEM (1966) (former Israel attorney general recalling that Prime Minister David Ben-Gurion told Hausner his (Hausner's) job was to create a permanent record of what occurred during the Holocaust); STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (2005) (describing "successor trials" as demonstrating the inherent tensions in proceedings that have the dual mission of determining guilt and innocence, while attempting to establish a detailed historical record of atrocities). Of course, criminal cases involving individuals (or small groups of individuals) will, by necessity, lead to the creation of a more limited historical record. That said, the prosecutors in Nuremberg, in the Adolf Eichmann trial, at the ICTR, and at the ICTY clearly endeavored to show how the criminal episodes fit within the broader historic context.

3. Jackson, *supra* note 2, at 184. For a concise, and very interesting, firsthand account from a member of Justice Jackson's prosecution team during the Nuremberg trials, *see* Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 689 (2007) (discussing the work of the Nuremberg Tribunal and how the argument that trials would commend maximum public support, receive the respect of history, and create a permanent and authentic record of the Nazi crimes won the day over the proposed alternative of summary executions).

Tadic case demonstrate that there is no more authoritative rendering of the historic record than that created in the crucible of a fair trial. During such a proceeding both sides have subpoena power, are represented by competent and experienced counsel, deal with witnesses subject to perjury prosecutions, and have the evidence tested by a court prior to its admission.[4]

Trial, moreover, provides the most likely mechanism for meaningful institutional reform, and sets the stage for a committed and honest confrontation with the state's dark pasts. Even grappling with emotionally difficult issues such as exhumations, confirmation of death through forensic exams, and proper burials can be crucial in the process of permitting the survivors to grieve. These processes also allow survivors to come to grips with their anger and desires for revenge and, in the end, achieve some sense of closure. It is, therefore, crucial that there be a process of learning *why* a loved one was murdered or otherwise brutalized. The historic record also serves as a moral educator, preventing the perpetrators from wrongfully accusing the victims of wrongdoing or misconduct, such as subversion or spying, or from otherwise justifying their own criminal acts.

Some argue that the creation of a neutral judicial record will not contribute significantly toward long-term reconciliation,[5] or to the creation of a

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4. Some argue that truth commissions are useful alternatives to courts. *See generally* Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenge of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1107 (2008) ("A Sudanese truth commission, unlike a court or tribunal, does not necessarily have to engage in the tasks of assigning blame on particular individuals for past conduct and punish those individuals as a result of that conduct. As a result, Sudanese actors themselves will be more likely to participate in a truth commission and be more willing to include individuals from diverse backgrounds in the work of the commission."). However, for the reasons set forth above, truth commissions are a significantly inferior method of establishing an accurate factual record of events.

5. Indeed, the term "reconciliation" is inherently ambiguous, meaning drastically different things to different people. The meaning of the term can range from a minimalist interpretation, in which to be "reconciled" means to no longer kill each other, to a truth-commission-style maximalist interpretation, according to which being reconciled encompasses mutual healing, forgiveness, repentance, redemption, and ultimately solidarity between former foes/victimizers. *See generally* Sheri P. Rosenberg, *What's Law Got to Do With It: The Bosnia v. Serbia Decision's Impact on Reconciliation*, 61 RUTGERS L. REV. 131, 139 (2008) ("Commentators have suggested that the idea of societal repentance and forgiveness is a utopian dream and, in fact, illiberal and undemocratic, as it expects an entire society to prescribe to a single comprehensive moral idea about the past. The moderate understanding of reconciliation lies between simple coexistence and complete repentance and forgiveness.... Reconciliation is so vague that some authors prefer to jettison the term for other terms, such as coexistence or social reconstruction. That said, reconciliation is a concept often employed by public policymakers,

future national consensus.[6] The skeptic's core contention is that locally held versions of the truth are not amendable to being shifted by findings or proclamations coming from an international tribunal, and that the creation of such a historic record, therefore, is of only limited utility.

The weakness of this reasoning is that it assumes the paramount objective of the historic record to be the creation of a shift in the thinking of those individuals who were actually *involved* in the crimes (or those who sympathize with them). Although it indeed may be true that no historic record will, for example, convince some contemporary Serbians that the Serbian government did anything wrong in Bosnia, Croatia, or Kosovo, it is entirely unclear that *anything* will shift such deeply entrenched views.

Following the Nuremberg trials, after all, there was also no immediate universal recognition of the extent of the German state's responsibility for the atrocities that occurred under the Nazi regime. Nor was the German population necessarily convinced that the trials were fair and even-handed, rather than simple "victor's justice."[7] The full measure of benefits flowing from the Nuremberg trials' detailed and neutrally created historic record, however, is the impact it has had on subsequent generations who were not hands-on participants in the crimes, and who, therefore, had less reason

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academics, and the NGO community.") (citations omitted). The "civic view" of reconciliation is, arguably, the most realistic. In this view, a society is "reconciled" when citizens who were former foes trust each other as citizens, meaning that they are committed to shared bedrock norms and democratic values.

6. *See id.* at 156 ("The impact of the BiH v. Serbia decision belies the claim that the 'authoritative' power of the law will dismantle locally held versions of the truth about what happened during the conflict and lead to reconciliation. Locally held versions of the 'truth' remain strong in BiH, entrenched as they are in a very particular sense of ethnic identification. It is a fallacy to think that abstracted, arguably western notions of the value of the 'rule of law' will displace these deep feelings."); *see also* Ruti Teitel, *Bringing the Messiah Through the Law*, *in* HUMAN RIGHTS IN POLITICAL TRANSITION: GETTYSBURG TO BOSNIA 177, 181–83 (1999) ("It has almost become dogma in contemporary foreign policy that establishing the 'truth' about a state's repressive past can lay the foundation for national reconciliation."); Christopher D. Totten, *The International Criminal Court and Truth Commissions: A Framework for Cross-Interaction in Sudan and Beyond*, 7 Nw. U. J. INT'L. HUM. RTS. L. 1 (2009) (examining ICC's likely future interactions with truth commissions).

7. *See generally* Rosenberg, *supra* note 5, at 158 ("It was only a generation later where the lessons [of the Nuremberg trial] apparently took place. It is common sense that psychologically it may be that only the next generation, which is not directly implicated in the crimes, can absorb these facts."); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 334–37 (1993) (describing as a modern myth the notion that the majority of the German people at the time of the Nuremberg trials accepted the trials' legitimacy and fairness).

to rationalize or justify them. Few contemporary Germans born after the 1940s, for example, are not intimately familiar with their country's wrongdoing during World War II, including the identities of the chief perpetrators. Today's Germans revile Nazi henchmen such as Joseph Goebbels, Heinrich Himmler, Hermann Goering, and Adolf Eichmann. Virtually every German, moreover, has seen the extensive footage of the Nuremberg trials, as well as the graphic images of the carnage and atrocities committed by, or at the direction of, the Nazis, which the prosecution introduced into evidence during the proceedings.

Of course, this is not to say that everyone will necessarily accept as neutral, complete, or accurate the historic trial record—whether beamed live into the world's living rooms, or summarized in written form. As any experienced prosecutor can attest, there will always be those sympathetic to a defendant who, despite the admission of mountains of compelling evidence at trial, will steadfastly claim that the prosecutor or the court conducted a "sham trial" during which the "cards were stacked" against the (morally, factually, or legally "innocent") accused.

It is not difficult, as a matter of psychology, to trace the origins of such intransigence. But whether *everyone* accepts the historic record should not be outcome determinative. Instead, the purpose of the prosecution must be to create a record that will, in Justice Jackson's words, persuade "informed people" (that is, people with knowledge of, and reasonably open minds about, the given historic events). Moreover, consider the ICC Preamble's, perhaps slightly overstated, observation that the common bonds and shared heritage of all people form a "delicate mosaic [which] may be shattered at any time."[8] The drafters went to some lengths to send the message that geography and culture do not immunize any group from the possibility of similar atrocities taking place where they live. The prosecutors in Nuremberg, in the Adolf Eichmann trial, at the International Criminal Tribunal for Rwanda (ICTR), and at the ICTY clearly saw as part of their mission the creation of trial records which vividly demonstrated to future generations precisely how the charged criminal episodes fit within the broader historic context. The discussion below examines some methods victim representatives should consider in pursuit of this fundamental objective.

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8. Rome Statute Preamble.

B. Convening a Pre-Trial Evidentiary Hearing to Develop the Common Factual Backdrop of the Case

One problem with using individual "successor" criminal cases as vehicles for creating the historic record is that the piecemeal record (historic or otherwise) developed through criminal cases involving individuals, or small groups of individuals, is, by necessity, limited. In each case, the prosecutor charges the accused, or group of accuseds, with specific misconduct. The prosecutor, therefore, must investigate and establish that the accused, with a specific state of mind, committed specific alleged criminal acts. In addition to these very case-specific criminal acts, however, the prosecution teams at the ICC must also establish certain more general "chapeau elements."

Chapeau elements are the common elements conferring international jurisdiction over the offense. An example of such a chapeau element is proof that the alleged crime was part of, or connected to, a widespread or systematic attack against a civilian population.[9] Proving chapeau elements typically requires evidence establishing the broader context of the violence and of the organized activity leading to it. For example, the chapeau elements may include (1) whether there were manifest patterns of the specified charged conduct (or similar conduct) directed against a national, ethnic, racial, or religious group that had the effect of destroying those groups (if the prosecution charged genocide, pursuant to Elements of Crime Article 6); (2) whether there at the time existed a pattern of widespread or systematic attack directed against a civilian population (if the prosecution charged crimes against humanity, pursuant to Article 7); or (3) whether there existed either an international armed conflict, or an armed conflict not of an international character (if the prosecution charged war crimes, pursuant to Article 8).

Thus, to convict an accused of genocide by killing, the Prosecutor must establish that the charged conduct took place "in the context of a manifest pattern of similar conduct directed against [a national, ethnic, racial, or religious group the accused intended to 'destroy'] or was conduct that could itself affect such destruction."[10] Similarly, to prove an accused guilty

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9. *See, e.g.*, Elements of Crime Article 7 (Crimes Against Humanity).

10. ICC Elements of Crime, Article 6(a) (Genocide by Killing); *see similarly* Article 6(b)(4) (Genocide by Causing Bodily or Mental Harm); Article 6(c)(5) (Genocide by Deliberately Inflicting Conditions of Life Calculated to Bring About Physical Destruction); Article 6(d) (5) (Genocide by Imposing Measures Intended to Prevent Births); and Article 6(e) (7) (Genocide by Forcibly Transferring Children).

of engaging in any of the enumerated crimes against humanity, there must be evidence that the accused's conduct was "part of a widespread or systematic attack directed against a civilian population."[11] Finally, "war crimes" also contain a shared element that the charged conduct "took place in the context of and was associated with" either an "international armed conflict,"[12] or an "armed conflict not of an international character."[13]

In all cases of genocide, crimes against humanity, and war crimes, there are, therefore, certain "macro" or "background" elements that must be proved in each individual case, but that do not necessarily bear on the particular accused's conduct or state of mind. Given the nature of such elements, virtually all cases charged as part of a situation will involve these chapeau elements, and the findings will not likely change much from case to case.

Experience teaches that proving these background facts takes up a very significant amount of time and resources. Compounding this problem is that the Prosecutor must re-establish these historic/situational elements at each individual trial. At the ICTY, for example, the prosecution had to prove breaches of the Geneva Conventions. To do so, the prosecution used the same group of expert witnesses in each trial to testify that the conflict was not a civil war, but, rather, was an international armed conflict. This practice necessarily consumed considerable resources, resulting in unnecessary delays, duplication, and inefficiencies.

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11. *See, e.g.*, Elements of Crime Article 7(1)(a)(2) (Crime Against Humanity of Murder); Article 7(1)(b)(3) (Crime Against Humanity of Extermination); Article 7(1)(c)(2) (Crime Against Humanity of Enslavement); Article 7(1)(d)(4) (Crime Against Humanity of Deportation or Forcible Transfer of Population); Article 7(1)(e)(4) (Crime Against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty); Article 7(1)(f)(4) (Crime Against Humanity of Torture); Article 7(1)(g)-1(3) (Crime Against Humanity of Rape); Article 7(1)(g)-2(3) (Crime Against Humanity of Sexual Slavery); Article 7(1)(g)-(3) (Crime Against Humanity of Enforced Prostitution); Article 7(1)(j)(4) (Crime Against Humanity of Apartheid); and Article 7(i)(k)(4) (Crime Against Humanity of Other Inhumane Acts).

12. *See, e.g.*, Article 8(2)(a)(i)(4) (War Crime of Willful Killing); Article 8(2)(a)(ii)-1(5) (War Crime of Torture); Article 8(2)(a)(ii)-2(4) (War Crime of Inhumane Treatment); Article 8(2)(a)(v)(4) (War Crime of Compelling Service in Hostile Forces); Article 8(2)(a)(vii)-1(4) (War Crime of Unlawful Deportation and Transfer); Article 8(2)(b)(i)(4) (War Crimes of Attacking Civilians); Article 8(2)(b)(iv)(4) (War Crime of Excessive Incidental Death, Injury, or Damage); Article 8(2)(b)(x)-1(5) (War Crime of Mutilation); Article 8(2)(b)(xvii)(3) (War Crime of Employing Poison or Poisoned Weapons); and Article 8(2)(b)(xxii)-1(3) (War Crime of Rape).

13. *See, e.g.*, Article 8(2)((c)(i)-1(4) (War Crime of Murder); Article 8(2)(c)(i)-4(5) (War Crime of Torture); Article 8(2)(e)(vi)-5(3) (War Crime of Enforced Sterilization); and Article 8(2)(e)(vi)-1(3) (War Crime of Rape).

One way to assemble the complete historic record of the situation, while at the same time remaining efficient and guaranteeing the accused procedural fairness, is for the Chamber to convene a pre-trial evidentiary hearing prior to the main trial of the first case within the situation to determine the chapeau elements of the various cases that are part of that situation. All parties would have a right to participate and present evidence and argument at the hearing. At the conclusion of the hearing, which the victim representatives should of course petition to participate in, the Chamber delivers its comprehensive factual findings. Those judicial findings will most likely be based on the "grounds to believe" standard of proof employed for factual findings other than the ultimate guilt of the accused (which, pursuant to Article 66(3), is of course guilt beyond a reasonable doubt). These macro findings, moreover, will be binding on all participants in all cases.

The Chamber could take judicial notice of this record during subsequent trials of cases within the situation. In order to preserve an accused's right to due process, however, the Chamber must of course permit those accused added after the date of the preliminary hearing to present evidence to the Court challenging the Court's record and earlier conclusions. Likewise, the accused would be permitted to present newly discovered evidence bearing on the earlier finding. Such a proceeding, however, would be far less time-consuming and cumbersome than re-litigating the full historic backdrop of the case over and over again. Moreover, the record will likely be more comprehensive and carefully prepared since more participants will be involved in its creation, and the defense, prosecution, and victims know they will get only one opportunity to provide their input and focus their efforts.

Alternatively, the Pre-Trial Chamber handling the first case within a situation could notify all participants of its intent to conduct a full evidentiary hearing to establish the chapeau elements. The Chamber would permit all participants—including accuseds that have been charged as part of other cases—to participate and present evidence during these discrete proceedings. The Trial Chamber in subsequent trials could then take judicial notice of the first Pre-Trial Chamber's written findings, subject, again, to the Trial Chamber granting the participants permission to present supplemental evidence or argument.

Such a comprehensive record would educate the target population specifically, and the world community generally, help counteract propaganda and systemic regional biases and claims of right, and streamline the proceedings by preventing a rehash of the same factual and legal arguments.

This proposed procedure would also conserve time and resources, promote more orderly and focused litigation, and provide future generations with one central source summarizing the macro events occurring at the time of the charged offenses.

The ICC already has procedures in place to maintain, and make publicly available, such findings. Rule 137, for example, gives the Registrar the responsibility of ensuring the proper maintenance a "full and accurate record of all proceedings," and the Chamber, in turn, may order that the entire record be made public following the close of the case. Moreover, the Chamber can authorize persons other than the Registrar to capture "the sound or image of the trial." The Registrar, pursuant to Article 138, is also to maintain the evidence and other materials offered during the trial.

Those on the "losing" side of the record will always complain that there is nothing "neutral" about the proceedings taking place in international tribunals, and nothing "irrefutable" about the historic record produced in the course of such proceedings. A more promising alternative, however, is not available. Indeed, of all the claimed benefits of international justice, the creation of a historical record, tested in court and subject to adversarial examination, stands out as most unambiguously invaluable.

PART XI

Compiling a "Victimization Dossier" as a Permanent Historic Record of Abuse

ALTHOUGH HOLDING A PRE-TRIAL HEARING to establish the historic background and chapeau elements is one method of establishing the record of abuse, there is another, perhaps additional, way for victims to tell their particular side of the story. The discussion to this point has shown that a victim representative's involvement in ICC proceedings is never guaranteed, and even if achieved, will to some extent likely be limited. Actual conflicts, such as in the Democratic Republic of Congo, moreover, involve mass murders, rapes, forced labor, torture, looting, displacement, and maiming. In that example alone, the total number of victims is in the millions.[1] It is, therefore, entirely unrealistic to expect a victim representative, or the independent prosecutors, to act on behalf of, and take into account in a meaningful sense, the disparate views of such a large number of victims. Given the significant hurdles that potential victims must overcome prior to the Chamber certifying them in a given case, actual victim participation in ICC litigating will be the rare exception, not the rule. And even if the Chamber permits a victim's participation, such participation will in all likelihood be many years removed from the crimes. Victim representatives must, therefore, be creative and consider all available alternatives to full in-court participation.

A. The Carefully Tailored Dossier as a Useful Tool for Victim Representatives

In order to make a meaningful contribution to the ICC proceedings, and to advance the victims' concrete interests, victim representatives should consider compiling a dossier summarizing, in a professional manner, the victims'

1. *See* Alexandra H. Guhr, *Victim Participation During the Pre-Trial Stage at the International Criminal Court*, 8 INT'L CRIM. L. REV. 13 (2008).

experiences and evidence. Such a dossier can provide an extremely valuable tool for future prosecutions, can be used as a persuasive means of influencing the Prosecutor, government officials, or the media, and can be relied on by the Chamber when it rules on the chapeau elements.[2] A victimization dossier, moreover, represents an accessible method of creating a permanent, historic record from the victims' perspective, identifying how, where, when, why, and who took part in the alleged abuses. Victim representatives, moreover, can compile these dossiers well in advance of the Office of the Prosecutor formally charging a specific case.

A factually accurate dossier, compiled as close as possible to the time of the incident(s) at issue,[3] and put together in a manner that, if possible, does not undermine, or work at cross-purposes with, the Prosecutors' efforts, will go far in creating a permanent account of the facts of history. Such a record, moreover, serves to secure testimony that may not be available in future years, and will provide investigators and prosecutors with important investigative leads to later follow up on.[4]

Victim representatives can submit dossiers in advance of any formal Rule 85 determination addressing the question of who is a "victim." Where and how to submit the dossier, however, deserves careful attention, for there are a number of potential alternative legal bases for incorporating it into the ICC's permanent record.[5] A carefully prepared, accurate, and professional dossier, submitted to the Prosecutor and Chamber pursuant to stated legal authority, will significantly assist the Prosecutor in conducting the investigation and framing possible charges. Such a dossier will also aid the Chamber in assessing the merits of the case.

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2. For more on establishing the chapeau elements, *see* Part X.

3. In light of the slow pace of ICC investigations and proceedings, it is, indeed, quite possible that such dossiers will serve as one of the best—and in some cases perhaps the only—sources of evidence against particular identified perpetrators.

4. The Kosovo experience with such investigative files/dossiers gives reason to believe that, when properly compiled, such documents can be of great value to investigators and prosecutors. The Kosovo files, compiled in Pristina shortly after the cessation of hostilities in 1999, were not acted upon for many years; now—over a decade later—prosecutors and investigators are finally examining them, as they are the only evidentiary links to many of the atrocities committed in and around Kosovo. Although the collection of the materials contained in these files did not always live up to the highest standards of investigative professionalism, to a large extent they today constitute the only investigative option.

5. Note that the ICC, like most Continental legal systems and the various ad hoc tribunals, permits "hearsay" evidence; dossiers can therefore be considered by the Court even if they contain such evidence.

B. Devising Standard Procedures for Compiling Evidence

Creating a sound dossier begins with devising reliable standard procedures for collecting evidence. In the context of investigating atrocity crimes, forensic experts help determine the "forensic truth."[6] Legal experts, in turn, translate this forensic truth into the "procedural truth" used in the legal arena to establish a factual account of the events integrated into the legal narrative. This interplay between lawyers and forensic experts can occur during the pre-forensic investigative phase, during the actual forensic investigation and in preparation for the forensic experts' testimony. The types of forensic documentation and evidence potentially of value in the dossier include, but are not limited to: reports on exhumations/victimization; laboratory analysis; photographic evidence; material artifacts; expert witness testimony; and evidence of adherence to relevant scientific protocols. Victim representatives should always include in the dossier expert reports, the expert's *curriculum vitae*, methodology employed, and similar supporting documentation establishing the use of standard procedures.

C. Developing Interview Protocols

In addition to this forensic evidence, victim representatives must also develop standard interview protocols those who interview potential witnesses and victims must adhere to.[7] Such interview protocols must be specifically tailored to each investigation, and must focus on the key elements the victim representative wishes to establish. That said, the protocols must allow for sufficient flexibility to adjust to the answers provided by the interviewees in the field.

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6. The construction of the "forensic truth" may involve experts from the fields of forensic anthropology (specialists in the analysis of skeletal and dental remains, as well as taphonomic alterations), pathology (specialists in post-mortem examinations of bodies and human remains, with a focus on establishing cause of death and identity of the victim), and archaeology (specialists in site-surveying and excavation, with particular experience in identifying, excavating, and recording complex features).

7. Note, however, that victim representatives, like all parties, must be careful to keep up to date on the ICC's latest case law relating to the appropriateness of witness interviews. *See generally* Situation in the Democratic Republic of the Congo, Case No. II-01/04-01/06: *Decision Regarding the Protocol on the Practices to Be Used to Prepare Witnesses for Trial* (May 23, 2008), at 15–16 and 19–20 ("The party calling the witness is not to hold discussions with the latter about the topics that are to be dealt with in court during their evidence or the exhibits which may be produced."). More on this in Part XII(E).

D. Submitting the Dossier to the Court

As touched on above, the dossier may, in many cases, be the victim representative's best—and perhaps only—opportunity to comprehensively summarize the victims' case for future generations, and to explain to the Chamber why the victims are legally (and morally) entitled to be heard. The mechanics of such a submission, however, will depend on a number of contingencies. The victim representative should, therefore, consider all available alternative procedures for making the submission.

1. The Most Promising Submission Options

Rule 103(1) allows the Chamber to, at any stage in the proceedings, grant leave to "persons" to submit, in writing or orally, "*any* observation on any issue that the Chamber deems appropriate."[8] Pursuant to Article 103(3), the victim representative must file any such written observations with the Registrar, who in turn provides copies to the Prosecutor and the defense. Such an "observation" can of course include a dossier, to which either party may respond. Rule 145(1), moreover, permits the Chamber to consider "all" relevant mitigating and aggravating factors. The dossier, properly constructed, contains relevant evidence bearing on such aggravating, and perhaps even mitigating, factors.

2. Other Submission Alternatives

— Article 19(3) permits victims to "submit observations" on the issues of jurisdiction and admissibility of a case.
— Article 56(2)(f) permits the Pre-Trial Chamber to "[t]ak[e] such other action as may be necessary to collect or preserve evidence." Dossiers, the factual contents of which the victim representatives can often compile

8. Emphasis added. *See, e.g.*, Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence* (April 20, 2009) (30-page report submitted by Amnesty International).

well in advance of any formal ICC investigation, can help preserve such evidence for the Pre-Trial Chamber.

- Article 68(3) permits victims who have "personal interests" affected during the proceedings to present their "views and concerns... at stages of the proceedings determined to be appropriate by the Court...."[9] Although "victims" are formally defined in Rule 85, and although Rule 89 requires official registration and limits the participation of victims in formal "proceedings," the statutory scheme does not prevent "other" victims from simply submitting dossiers pursuant to Article 68(3). Whether such submissions, if they occur in bulk and require individual examination, negatively impact the accused's due process and speedy trial rights will depend on the specifics of the particular case.
- Article 69(3) vests the Chamber with the authority to "request the submission of all evidence that it considers necessary for the determination of the truth." The victim representative can include the dossier made on the victims' behalf.
- Article 75(3), dealing with victim reparations, allows "other interested persons" to make representations to the Chamber prior to the Chamber issuing reparations orders. Victims, including those not formally so recognized, are undoubtedly such "interested persons."
- Article 76(2) permits the Trial Chamber to consider "any additional evidence or submissions relevant to the sentence...." The dossier will likely contain such additional evidence bearing on sentencing.
- Pursuant to Rule 89(1)'s "views and concerns" clause, a victim who is formally recognized as such under Rule 89 may submit a dossier prepared by a nonregistered victim, provided the Rule 89 victim can show that the contents of the dossier are relevant to his case.

E. Submitting the Dossier to the Office of the Prosecutor

Along with the Chamber, the Office of the Prosecutor may find victim dossiers useful. Recall that Article 15(1) permits the Prosecutor

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9. *See generally* Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-10/05-01/08: *Fourth Decision on Victims' Participation* (December 12, 2008), at 27–39 ("Under the regime of the Statute, victims are not assigned the role of mere observers. To the contrary, pursuant to article 68(3) of the Statute, they may participate in the proceedings before the Court by expressing their views and concerns.") (quotation omitted).

to initiate investigations on his own accord (*proprio motu*). Neither Article 15 nor Article 53, however, limit the sources of evidence and information the Prosecutor may rely on when initiating an action, thereby making the dossier a potentially fertile predecessor component of case-initiation.

- Article 15(3) provides that the Prosecutor, if he concludes there is a reasonable basis to proceed on an investigation, must submit "any supporting material collected," along with the Prosecutor's request for authorization of an investigation, to the Pre-Trial Chamber; "[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."
- Article 53(1)(c) requires the Prosecutor to take into account the "interests of victims" when deciding whether to initiate an investigation.
- Article 54(1)(a) requires the Prosecutor to "extend the investigation to cover *all* facts and evidence relevant to an assessment of whether there is criminal responsibility...."[10]
- Article 54(1)(b) directs prosecutors to respect the interests and circumstances of not only witnesses, but also of victims.[11] A properly prepared dossier will contain facts and evidence bearing on these issues.

Rule 10, moreover, vests in the Prosecutor the responsibility for the retention, storage, and security of "information and physical evidence obtained in the course of the investigations...." There is no restriction on what types of information the Prosecutor must retain. Rule 104(2), furthermore, allows the Prosecutor to "seek additional information from...other reliable sources that he or she deems appropriate...." The format of this "additional information" is not specified; Rule 104(2), therefore, does not exclude dossiers.

In 2009, the Appeals Chamber provided additional support for the idea of submitting dossiers to the Prosecutor. The Appeals Chamber, although it rejected the Pre-Trial Chamber's decision that Article 68(3) gave victims a right

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10. Emphasis added.

11. *See also* THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 8 (September 14, 2006).

to participate in the investigative phase of the proceedings, ruled that victims are permitted to provide information to the Prosecutor:

> [T]here is ample scope within the statutory scheme of the Statute for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally accorded "a general right to participate." For example under Article 15(2) the Prosecutor is authorized to receive information from, *inter alia*, any "reliable source"—including victims. He is similarly authorized under Article 42(1) to receive and consider "any substantiated information on crimes within the jurisdiction of the Court." Victims may thus make representations to the Prosecutor on any matter pertaining to the investigations and to their interests. They are also specifically granted the right to make representations under Articles 15(3) and 19(3) of the Statute.[12]

The Appeals Chamber went on to emphasize the Prosecutor's duty to consider victims' interests:

> [V]ictims should be reminded that their protection and the sustenance of their interests is a recurring theme of the Statute. Article 54(1)(b) of the Statute lays down that in carrying out his investigations, the Prosecutor must...respect the interests and personal circumstances of victims and witnesses....Article 53(1)(c) of the Statute makes the interests of victims one of the factors to which the Prosecutor should attach due importance in deciding whether to start an investigation into a particular crime. The interests of victims are likewise a factor to be taken into account by the Prosecutor in deciding whether to mount a prosecution....*Information that victims can provide to the Prosecutor about the scope of his investigations cannot but be welcome as it could provide nothing other than assistance.*[13]

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12. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Judgment on Victim Participation in the Investigation State of the Proceedings* (February 2, 2009), at 14.

13. *Id.* at 14–15 (emphasis added).

For those harmed as a result of atrocity crimes, the dossier creates a permanent chronicle of their victimization. This public record will help ensure that the Prosecutor, the Chamber, the defense, the public, and the writers and students of history do not forget, or overlook, the victims' experiences. And the dossier—as well as the process through which it was created—will demonstrate to the victims that their experiences matter to the international community. In short, even if full formal participation in trial proceedings is not likely to become a reality for many groups of victims and aspiring victim representatives, the alternative modality of "participating" through the submission of a dossier furthers justice within the parameters of the ICC's statutory scheme, while at the same time advancing the victims' litigative, as well as psychological/emotional, interests.

PART XII

Pre-Trial Proceedings

TO THIS POINT WE HAVE examined the history and the operation of the ICC, as well as various statutory provisions relating to victims. The discussion can therefore now turn to some more "practical" issues. This section draws on the earlier discussion of the promises and pitfalls of the ICC's legal provisions, as well as the realities of practice at the ICC, to sketch out trial strategies and trial skills necessary for effective victim representation.

A. Functions of the Pre-Trial Chamber

The Pre-Trial Division is composed of no less than six judges serving three-year terms (or until the completion of any cases they are hearing).[1] Regulation of the Court 14 demands that the judges of the Pre-Trial Division elect a President of the Division from among their members.[2] Pursuant to Article 38, the President oversees the administration of the Division.

Article 57 summarizes the functions and powers of the Pre-Trial Chamber. In accord with Article 36(3)(b), the Pre-Trial judges elected under "List A" must have criminal law and international law experience, regardless of whether that experience is gained as a judge, prosecutor, advocate, or in a similar capacity. "List B" judges, on the other hand, need not have any legal experience of the kind traditionally deemed necessary even for "novice" domestic judges.

The Pre-Trial Chamber, in turn, carries out the Pre-Trial Division's judicial functions. Regulation 46(1) gives the Presidency the authority to set up the Pre-Trial Chambers. A single judge, or three judges, make up the

1. *See* Article 39(1) and (3)(a).

2. The President of the Division is elected to a one-year term. *See* Regulation 14.

Pre-Trial Chamber.[3] At present, Pre-Trial Chamber I handles the situations in the Democratic Republic of the Congo, as well as in Darfur, Sudan. Pre-Trial Chamber II has been assigned to the Situations in Uganda and the Central African Republic.

In terms of the Pre-Trial Chambers' functions, they essentially are responsible for all judicial proceedings prior to, and including, the confirmation of the Prosecutor's charges.[4] Thus, the Pre-Trial Chamber is, in the end, tasked with overseeing the overall integrity and fairness of the proceedings during the investigation phase of cases.

Article 57(3)(c) also charges the Pre-Trial Chamber during the entire pre-trial phase with safeguarding the security and other interests of victims, including the victims' physical and psychological well-being, as well as their dignity and privacy. For this purpose, the Pre-Trial Chamber may issue such orders as are necessary, and commence any other measure as may be required, taking into account the rights of the accused. The Pre-Trial Chamber may also seek the cooperation of states to take protective measures once it issues a warrant of arrest or summons to appear.

In cases in which a state refers the situation for investigation, in accord with Article 14, the Prosecutor may ask the Pre-Trial Chamber for permission to authorize the continued investigation of a particular case that one or more states have asked the Court to defer.[5] The Pre-Trial Chamber must also deal with any Article 19 jurisdictional challenges, or a state's challenge to the admissibility of a case, as well as such challenges lodged by an accused for whom the Chamber has issued an arrest warrant or summons to appear.

The Rome Statute also vests the Pre-Trial Chamber with authority to review the Prosecutor's decision not to proceed with an investigation.[6] Such a review can occur on the Pre-Trial Chamber's own motion, following the request of a state that had made an Article 14 referral, or after the Security Council refers the case pursuant to Article 13(b).

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3. *See* Article 57(2) and Rule 7.

4. *See generally* Article 61 (setting out the Pre-Trial Chamber's duty to, within a reasonable time of the person's surrender or voluntary appearance before the Court, hold a hearing to confirm the Prosecutor's charges, and outlining the procedures to be followed during such a hearing); Rules 121–26 (detailing the procedures to be followed prior to, and during, the confirmation hearing).

5. *See* Article 18(2).

6. *See* Article 53(2) and (3).

After the prosecution has initiated an investigation, the Prosecutor may apply to the Pre-Trial Chamber for the issuance of a warrant of arrest or a summons to appear.[7] The Pre-Trial Chamber must issue a warrant of arrest or a summons to appear once it has satisfied itself that there are indeed reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

In the event law enforcement or the military arrest the accused, or he appears pursuant to a summons, the Pre-Trial Chamber may issue orders or seek the cooperation of states as may be necessary to assist the accused in the preparation of his defense. The Pre-Trial Chamber must also ensure that the accused is not subjected to unreasonable pre-trial detention.[8]

Following the surrender or voluntary appearance of an accused, the Pre-Trial Chamber is required to hold a hearing in the presence of the Prosecutor, the accused, and the accused's counsel to determine whether to confirm the charges. At the confirmation hearing, the Prosecutor must support the charges with sufficient evidence to establish substantial grounds to believe that the person committed the charged crime(s). The accused has the right to object to the charges, to challenge the evidence presented by the Prosecutor, or to present his own evidence. The Pre-Trial Chamber can either confirm the charges, decline to confirm the charges, or adjourn the hearing to give the Prosecutor additional time to provide certain missing evidence, conduct additional investigation, or amend the charges to bring them into conformity with the Pre-Trial Chamber's requirements.

Once the Chamber confirms the charges, the formal written confirmation decision, the committal of the accused to the Trial Chamber, and the record of the proceedings are transmitted to the Presidency.[9] The Presidency, thereafter, must constitute a Trial Chamber[10] and transmit to the Trial Chamber the records received from the Pre-Trial Chamber.[11] However, Article 64(4) provides that the Trial Chamber may, at its discretion, refer preliminary issues either back to the Pre-Trial Chamber, or to an available judge of the Pre-Trial Division, for resolution. Once the case is in the Trial Chamber, moreover, Regulation of the Court 55 provides that the Chamber may modify the charges,

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7. *See* Article 18.

8. *See* Article 60(1)-(4) and Rule 119.

9. *See* Rules 129–30.

10. *See* Article 61(11).

11. *See* Rule 130.

provided that it does not exceed the charged facts and circumstances—which is a procedure the victims in *Lubanga*, over the heavy opposition by the prosecution and the defense, attempted to avail themselves of.

B. The Office of Public Counsel for the Defense

Like the Office of Public Counsel for Victims,[12] the Office of Public Counsel for the Defense is an independent office inside the Court[13] that is, for administrative purposes, linked to the Registry.[14] The core function of the Office is to protect the rights of the accused by providing technical and legal assistance to defense counsel. Notably, the five attorneys in the Office do not involve themselves in the facts of the case or in trial strategy, concerning themselves solely with assisting external defense counsel, as well as with reviewing, and at times challenging under their own name, the perceived legal sufficiency of victim participation applications.

Although the Rules require external counsel to have competence in international or criminal law, as well as necessary relevant experience,[15] the ICC's legal provisions and practical realities are such that the Registry has set up both the Office of Public Counsel for Victims and the Office of Public Counsel for the Defense in order to provide ICC-internal expertise to the external victim representatives and defense attorneys, respectively. The paramount objective, therefore, is to assure the equality of arms between the parties.

Although the Office of Public Counsel for Victims provides both technical and legal assistance to external victim representatives, it has gone beyond this original mandate in the *Lubanga* case, and now represents registered victims in the proceedings. This expansion of its initial mission—and particularly the Office's request on behalf of victims in the *Lubanga* case to expand

12. The Office of Public Counsel for Victims was established on September 19, 2005, pursuant to Regulation 81. The explicit mandate of the Office of Public Counsel for Victims is to provide support and assistance to victim representatives, who often will be unfamiliar with the ICC's legal framework and practical realities, legal support, and advice. Moreover, Regulation 80 allows that members of the Office of Public Counsel for Victims may be appointed as *pro bono* victim representatives. The Office of the Public Counsel for Victims acts as Legal Representative if the victim applicant has not been appointed with one. *See* Situation in the Republic of Kenya, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11: *First Decision on Victims' Participation in the Case* (March 30, 2011).

13. *See* Regulation 77.

14. *See generally* Rule 20 (requiring the Registry to provide technical assistance to the defense); Regulation 77 (governing the operation of the Office of Public Counsel for the Defense).

15. *See generally* Rules 22 and 90(6).

the charges pursuant to Regulation 55[16]—has been of some concern to the Office of the Prosecutor, as well as to defense counsel. The Office of Public Counsel for the Defense, for example, is in particular worried that victim representatives not become back-up prosecutors, or be treated like parties to the trial, rather than simply as participants.[17] The Office considers the present balance between the prosecution and the defense extremely fragile, and views the grant of broader rights to victims, and expansive collaboration between victims and the prosecution, as serious threats to this tenuous balance.

That said, from the defense perspective, the interests between the prosecution and the victims are not necessarily aligned. This, the defense believes, will prevent victims and prosecutors from being overly collaborative. The Office of Public Counsel for the Defense can in any event be expected to continue filing objections to greater victim involvement, premised, in part, on speedy trial and due process grounds; the defense will likely specifically note the additional work required of the defense if and when victim participation is expanded. These defense arguments must be taken seriously. However, as the Office of Public Counsel for Victims has demonstrated, meaningful victim participation is not necessarily accompanied by this feared parade of horribles. Victim involvement in the proceedings, furthermore, is explicitly provided for by the ICC's legal framework.

C. Victim Participation in Pre-Trial Investigative Activities

One of the most contentious and uncertain issues for victim representatives involves the nature and extent of the representatives' involvement in pre-trial investigation. Some victim representatives will want to seek authority to fully participate in the investigative phase of the proceedings. It can, however, also be argued that such participation threatens to undermine the actual, and perceived, integrity and independence of the Prosecutor's function, and threatens to make the proceedings inefficient and slow. The net result, it may be contended, is that these negative impacts have a tendency to bias the outcome of the proceeding in contravention of Article 68(3)'s

16. *See generally* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Prosecution and the Defence Applications for Leave to Appeal 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) of the Regulations of the Court* (September 3, 2009) (this ruling has since been reversed).

17. *See generally id.* at 21 (distinguishing between the "parties [defense and prosecution]" and the "legal representatives," but using the term "participants" to describe both).

admonition that victim participation not be "prejudicial or inconsistent with the rights of the accused and a fair and impartial trial." Although some of these concerns may be slightly exaggerated, they cannot be dismissed out of hand as meritless. Pursuant to Rules 47–50 and 104–106, the Pre-Trial Chamber may, following the Prosecutor's request, take such measures as may be necessary to ensure the efficiency and integrity of the investigatory proceedings. In particular, the Chamber can appoint an attorney or a judge from the Pre-Trial Chamber to be present during the taking of witness testimony in order to protect the rights of the defense in those cases where there exists a serious risk that the defense may not be able to subsequently take such testimony.

The Pre-Trial Chamber's role in safeguarding the defense's rights may also come into play when the Prosecutor informs the Pre-Trial Chamber of a unique investigative opportunity. For example, the Chamber may opt to recommend, or order, that certain procedures be followed, appoint an expert, authorize appointment of counsel to arrested persons, or order that certain actions necessary for the collection or preservation of evidence be taken.[18] The Pre-Trial Chamber may additionally authorize the Prosecutor to take specific investigative steps within the territory of a state party, without having first secured the state's cooperation. This process, it must be noted, would only take place in those rare cases in which the state is unable to comply with the request because it possesses no authority competent to execute the request for cooperation.

There are, in summary, three statutory regimes regulating victim involvement in the pre-trial investigative phase:

1. Rule 93's "seeking the views of victims" by the Chamber;
2. Submission of "observations" or "representations" under Articles 15(3)[19] and 19(3);[20] and
3. Victim participation in accordance with Articles 53(3), 61, and 69(3), and Rules 89–92. (Article 54(1)(b), moreover, directs the Prosecutor investigating and prosecuting crimes to respect the interests and circumstances of not only witnesses, but also victims.[21])

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18. *See* Article 56.

19. Permitting victim to make "representations" to the Pre-Trial Chamber at the time the Prosecutor concludes that there exists a reasonable basis to proceed with the investigation.

20. Allowing victim to "submit observations" concerning the jurisdiction of the Court or the admissibility of the case.

21. *See also* THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 8 (September 14, 2006).

It is incumbent upon victim representatives to reference these statutory provisions when addressing whether, and to what extent, the Chamber should sanction victim participation in the pre-trial investigative phase. Victim representatives must also remember that the Prosecutor is charged with ensuring the integrity, independence, and efficiency of the investigation,[22] and, as such, the Prosecutor must be equally interested in obtaining and examining incriminating, as well as *exculpatory*, evidence. The prosecution, therefore, may have strong feelings concerning who is a (likely) victim, and at what stage of the proceedings victim involvement will be most helpful.[23] In fact, the Appeals Chamber has held:

> Manifestly, authority for the conduct of investigation vests in the Prosecutor. Acknowledgement by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute [Article 42] by reading into it power outside its ambit and remit.... [The position that Rule 68(3) confers participatory rights to victims during investigative proceedings] can find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.[24]

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22. The Rome Statute in fact requires that the Prosecutor act as an independent and separate organ of the Court and, in furtherance of this objective, warns that no member of the Office of the Prosecutor shall act on, or seek instructions from, any external sources. *See* Article 42(1).

23. Though perhaps not formally a "stage" of the proceedings, consider also Rule 89(1), which permits the Prosecutor and the defense to submit observations on applications. This has been done both for "general" case applications, but also in regard to specific instances, i.e., applications to participate in the interlocutory appeals processes In *Ruto, Kosgey and Sang*, the Pre-Trial Chamber II stated that the submission of an application for reparations is not sufficient; applicants should manifest their intention to participate in the proceedings. Situation in the Republic of Kenya, In the Case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11-14: *Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings* (March 30, 2011). If applicants wish to participate at the appeal stage, they must be able to demonstrate that their personal interests are effected as they were during trial. *See* Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2951: *Decision on the Participation of Victims in the Appeals Against Trial Chamber I's Conviction and Sentencing Decisions* (December 13, 2012).

24. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04: *Judgment on Victim Participation in the Investigation State of the Proceedings* (December 19, 2008), at 22–29.

An application is considered complete if it contains:

1. the applicant's identity;
2. the date and location of the alleged crimes(s);
3. a description of the harm suffered; and
4. a signature or thumbprint of the applicant on the document.

If the application is made by a person acting on behalf of a victim, the applicant must submit proof of kinship or legal guardianship (in the case of a child or a victim with disabilities).[25]

D. Pre-Trial Preparation with a Clear Focus on the Main Trial

The prepared victim representative strives to present the case in a clear, logical, and orderly manner consistent with the applicable law and facts, and must distill the victims' case for the Chamber. The victim representative at all stages of the proceedings—from the confirmation hearing until the final verdicts—should be organized, in control, well-prepared, and familiar with all aspects of the case.[26] A polished presentation, however, is possible only if the victim representative early in the litigation process establishes a sound organizational framework. Although this advice may seem obvious, even experienced lawyers frequently fail to develop, or adhere to, a consistent, efficient method of trial preparation. Those lawyers, as a consequence, can find themselves in the unenviable position of trying to put things into place at the last moment.

1. Developing the Theory of the Case

Despite the maze of legal jargon, lawyers' mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story.[27]

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25. Situation in Darfur, Sudan, In the Case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09: *Decision on the Registry Report on Six Applications to Participate in the Proceedings* (October 17, 2011), at 14.

26. Organization will be aided by keeping an up-to-date case chronology, or "case tag."

27. W. L. BENNETT & M. S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 4 (1981).

As this discussion has shown, most actual atrocity crimes victims will not have the opportunity to participate in the ICC's proceedings. In the first instance, most potential victims are, to a large extent, randomly "selected" by members of humanitarian and other nongovernmental organizations (NGOs) working in, or near, the country or region in question. Experience teaches that the NGOs usually have their own internal set of criteria concerning what makes a "good" victim (wealthier victims, for example, are, for sympathy reasons, routinely passed over in favor of poorer victims). The Chamber, thereafter, will likely only qualify a small subset of the hand-selected group of victims the NGOs have brought to the Court's and the prosecution's attention. And even once the victims are so qualified, substantive involvement in the proceedings will likely be strictly limited. That said, regardless of whether the victim wishes to participate during the pre-indictment phase, seeks qualification to participate at the trial, or elects to file a dossier, the victim representative must first develop a theory of the case framed by the available facts, and accounting for the victims' often-divergent interests.

The success of the victims' case is, indeed, largely determined long before the prosecution ever calls its first witness. As most experienced lawyers will attest, the preliminary stages frequently determine the outcome of a case. This is equally true in ICC proceedings, where the victim representative at the outset must establish that the accused victimized his clients, thereby justifying the victims' seat at the table.[28] Without a sound theory of the case to build on, such hands-on involvement is unlikely to come to fruition.

The victims' theory of the case must, therefore, clearly identify the elements of the crimes within the situation that the prosecution has—or should have—charged. This analysis, in turn, will lead to a theory of responsibility under which the accused is liable for certain discrete crimes. The theory of the case needs to identify how the crimes affected the victims, and answer the question of how the personal interests of the victims are potentially impacted at various stages in the proceedings. The objective is to crystallize for the Court and the Prosecutor the victims' position and/or

28. *See generally* Rule 89(1) (granting the Chamber broad discretion to determine the nature and scope of victim participation in all phases of the proceedings, including during opening and closing statements); Rule 91 (same); and Rule 92 (victim-notification requirements); *see also* Gerard J. Mekjian & Matthew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 8 (2006) (summarizing victims' right of participation).

to demonstrate to them why they should consider taking certain additional actions on the victims' behalf.

The theory of the case for the victim representative is, therefore, likely to be a specific version of the facts showing that: (1) the accused is guilty of the charged conduct; (2) the accused's alleged criminal conduct harmed the victims; and (3) the victims are, therefore, entitled to participate in the proceedings and are entitled to various remedies, including reparations.[29] The execution of this proposed three-phase approach to theme-driven case presentation depends on whether the victim representative is at the trial stage, is advocating for his client in the media, or is simply supplementing the permanent historical record by filing a dossier with the Prosecutor or the Chamber.

Consider, for example, a hypothetical case involving coordinated rapes of women in a particular village by a government militia. In such a case, the victim representative's theory of the case might be that the accused, a high-ranking government official not present during the commission of the alleged crimes, knew about, condoned, or coordinated the rapes as part of an organized attempt to terrorize those the government believed tacitly or actively supported rebel factions. The theory in such a case will focus on establishing the accused's command responsibility, in addition to demonstrating how the available facts fit within the legal framework, and must carefully explain how and why these facts compel a pro-conviction outcome.

In terms of organization, it may be helpful to think of the case theory as a newspaper or magazine headline which provides, in summary form, the essence of "what happened." For example, a possible headline in a case in which the ICC Prosecutor charged a battalion commander with permitting the torture and killing of captured combatants might read:

> Victims tortured and murdered by battalion members–
>
> > Commander Holguin, who knew his troops would follow him to their deaths, and who, therefore, was certain that his soldiers would

29. Reparations for victims are explicitly provided for by the ICC. *See, e.g.*, Article 75 (setting forth rules relating to reparations); Article 79 (setting up Trust Fund for purpose of paying reparations, signaling an effort to impose collective responsibility to compensate victims); Article 82(4) and Rule 153 (permitting, *inter alia*, victim representative to appeal reparations decision); Rules 94–99 (dealing with various aspects of reparations); Rule 143 (noting that the Chamber may set hearing date for issues dealing with reparations); Rule 147 (providing for forfeiture of proceeds, property, and assets); and Rules 217–19 (allowing for enforcement of reparation orders).

strictly adhere to his wishes, condoned, and at times even directly encouraged, the acts of his foot soldiers.

Such a simple, straightforward summary of the theory is the headline of the story that gives everyone the same picture, and that conveys what happened in a form that the Chamber (and the public) can readily understand.

The theory of the case also serves as a guide to what additional investigation needs to be undertaken. In the above example, the victim representative may, for instance, want to locate relatively contemporaneous photographs taken of the accused and his battalion members for in-Chamber examination by witnesses and/or for submission to the Chamber, if permitted. The victim-witnesses may help the Prosecutor determine that the accused shaved or otherwise changed his appearance since being charged; perhaps the accused altered his appearance to make positive in-Chamber identification more difficult. Alternatively, a group photograph may reveal the accused's relative position among his fellow soldiers. For example, is the accused in the middle of the group, or is he sitting when everyone else is standing?

The theory of the case also involves psychological/emotional aspects. Contemplating what was in the minds of those involved in the charged crimes may suggest a different, or opposing, version of the prosecution's case. Therefore, consider the following questions: What would be going through the minds of those involved if the events occurred the way the prosecution or accused say they did? What was the accused's likely perspective and access to information at the time of the alleged crimes? Consider how the parties reacted at various times; were they confused, angry, or gleeful? What if the victim was in an area typically occupied by hostile and armed combatants? What if the victim threatened the battalion members, or was known or believed to be an active combatant? What if the victim was drunk or had a history of violence? Might a self-defense argument be available to the accused?

To be fully prepared, the victim representative must also evaluate whether two different "stories" or "scenarios" can co-exist. The investigation must gather additional information to explain the events from the victims' perspective. The victim representative's job is to understand the *whole* picture, including actions occurring prior to the event that may give meaning to the alleged criminal acts. Developing a complete theory of the case is of course not possible until the investigation is finished, but the

victim representative's preliminary theory—which always remains subject to revision—will help identify particular focal areas for forensic and other investigation.

Even when the investigation is complete, the theory of the case will dictate what evidence to seek and present at trial, as well as which legal arguments to advance. A well-thought-out theory of the case will ultimately increase the victims' chances of success by focusing the victim representative's and the Chamber's thinking, thereby conserving scarce time and resources.

2. Framing the Elements of the Crime(s)

During the pre-trial stage, the victim representative must understand the elements of the crime charged by the prosecution, and gain an appreciation for how the crime affected the victims. Obviously, the prosecution's case is based on proving all elements of the charged crimes.[30] In some cases, there may be only one element of the crime that is in dispute, and the investigation and preparation may focus on that crucial element. For example, if the accused is charged with Element of Crimes Article 7(1)(f)'s crime against humanity of torture, the element of the crime in dispute may be whether the accused *knew* that the conduct (torture) was "part of a widespread or systematic attack directed against civilian populations,"[31] rather than a one-off or otherwise isolated incident.

The elements of the crimes that are most crucial to the Prosecutor will likely substantially overlap with the points the victim representative wishes to make. However, the Prosecutor's objectives may not encompass other areas, such as establishing that the accused harmed a *particular* victim, or group of victims, in a particular manner or on a particular date. The Prosecutor's goal, after all, is simply to present evidence proving the accused's overall culpability as to the charged crimes. The victim representative's goal may be far more discrete and detailed.

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30. The crimes chargeable in the ICC are discussed in Part IV(C), and are set forth in Elements of Crimes 5–8. During the pre-trial phase, victim representatives must also consider theories of liability, such as joint-enterprise, aider/abettor, and co-conspirator liability. *See* Articles 25 and 30 (*mens rea* elements); and Articles 31 and 32 (mistakes and other defenses).

31. Elements of Crimes Article 7(1)(f)(5).

Compounding the challenge of potentially divergent litigation objectives, institutionally mandated prosecutorial independence may to some extent limit victim representatives' abilities to urge prosecutors to introduce certain evidence, or call certain witnesses, to help establish the victims' legal case. The victim representative, therefore, must engage in an independent review of the available evidence, must evaluate the probative quality of the evidence, and must argue persuasively to the Chamber that his clients were victims of the charged crimes, and that the Chamber should, accordingly, permit the victims to augment the record in order to pursue their litigation strategy. The victim representative, bearing in mind the limitations of his role, should request permission to present certain evidence to ensure that the trial covers all of the elements required for a successful outcome from the *victims'* perspective. Depending on whether or not the Chamber determines that reparations proceedings are bifurcated, the scope and timing for victim submissions may differ.

As touched on above, it is crucial for the Chamber to trust the victim representative's capability and professionalism. The Chamber will use its extremely broad discretionary powers to determine the victim representative's appropriate level of participation in the proceedings, taking into account factors such as the interests of the victim in the witness, the interests of the witness and the accused, and the need for a fair and efficient trial.[32] If the representative demonstrates from the outset that his questions and submissions are well thought out, advance the victims' concrete interests without unfairly prejudicing the accused's right to a fair trial, and thus add net value to the proceedings, the Chamber is more likely to grant broader permission to participate.[33]

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32. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (Article 64(3)(a) of the Statute)* (November 13, 2008), at 10 (inviting the victim representatives to inform the Chamber of their intention to "lead evidence pertaining to the guilt or innocence of the accused," to "apply for protective measures," and to "call witnesses and lead evidence pertaining to the issue of reparations at the same time as for the purpose of trial").

33. *See also* Mekjian & Varughese, *supra* note 28, at 27 (noting "presumption" in favor of participation during hearings).

3. Identifying and Developing the Critical Facts

Once the victim representative has developed a persuasive and comprehensive theory of the case, and has gained a firm grasp of the legal elements he needs to prove in order to prevail, he can begin to focus on the critical facts the Prosecutor and he must prove at trial. Some questions to consider when thinking about the relevance of potential evidence include:

- What happened just before the alleged crime(s)?
- Why was this crime committed?
- Who would have a motive to commit this crime; who benefited from the crime?
- What are the agendas of the different parties involved?
- What are the relationships among the parties involved?
- What are the personal backgrounds of the parties (age, education, familial background, military rank, mental state, social status, economic circumstances, etc.)?
- Are there aspects of this case that just do not seem to fit together?
- Is this an unusual way to commit this type of crime?
- Who else could have committed or authorized this crime?

To develop a full set of potentially relevant facts, it may help to organize the facts into categories such as "situational/tangible issues" and "state of mind/psychological issues."

Regarding the former, the victim representative should consider whether the events could have physically occurred in the way the prosecution or defense claim. An investigator's report may say that "X, and then Y, occurred," but photographs taken of the scene may make that particular sequence of events either impossible or highly unlikely. Further analysis or information-gathering may be required.

Visiting the place where the crimes in question took place can be crucial in this regard. The victim representative may feel that something in an official report does not make sense, and upon visiting the scene of the crime it becomes clear that the report author's recorded recollection of the witness is likely not the whole story. Similarly, a certain claim made by the accused or a witness during an interview, or at trial, may be inconsistent with the physical realities of the location where the alleged crime took place. Physically visiting the locations and acting out or imaging the

events may well provide additional valuable clues. The victim representative has, therefore, not fully prepared the victims' case without at least considering a visit to the scene of the alleged crime(s).[34]

4. Constructing an "Order of Proof'"

To understand the interplay between the elements of the charged offense, the evidence tending to prove each of these elements, what portion of the universe of potential evidence relates most directly to the victims' case, and the best way to structure the presentation of this evidence, victim representatives should create an "order of proof" for their case. An order of proof is nothing more than a detailed, chronological list of the evidence arranged to support the victim representative's theory of the case. Examples of types of evidence to consider are witness testimony, documents, photographs, expert reports, and forensic evidence.

The order of proof must clearly identify the elements of the charged offense that each piece of evidence tends to establish. In addition, a complete order of proof delineates evidence tending to prove the nexus between the crime and the harms the victim suffered. The victim representative should consider the evidence element by element, but must also be mindful not to improperly impinge upon, or interfere with, the role of the Prosecutor. Failure to keep this in mind will likely result in drawing the ire of both the Chamber and the prosecution, and that will obviously not advance the victims' long-term objectives.

Although the order of proof outline must be detailed, it should also be flexible enough for the victim representative to revise it as evidence and arguments develop. An integrated method of case preparation permits the victim representative to identify areas where additional evidence may be needed and to avoid overlooking important documents or facts, provides a solid sense of how the case will unfold during the main trial, and allows the victim representative to present the case in an orderly, concise, and strategically sound fashion.

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34. Note, however, that the victim representative, as a practical matter, prior to the travel will have to determine precisely who will cover these costs (put another way, do not simply assume that the costs will be borne by the ICC).

5. Outlining Direct and "Adverse" Examination

The victim representative should dedicate one section of his order of proof to identifying each witness the prosecution, the defense, and the victim representative (pending Chamber approval) will likely call. For each witness, moreover, the victim representative must explicitly delineate what elements of the crime the witness's testimony will support, and outline areas to be covered during the questioning. Prior to asking any questions in court, a direct examination outline should be prepared for each witness. Complete examination outlines will contain questions designed to elicit evidence establishing elements of the crimes and information showing how the alleged crime harmed the victims. Such preparation will make it easier to persuade the Chamber that a given witness should be called, convince the prosecution that the presentation is not inconsistent with their litigation strategy, and assure all participants that the proposed questions are probative.

Victim representatives must of course also be prepared for the possibility that the Chamber will not permit the representative to independently call a witness, but instead will call the witness on the representative's behalf. The victim representative must plan for such a situation, having all the questions ready to give to the Chamber. (Note, however, that, per ICC practice, the victim representative will in any event likely be required to have all questions ready to give to the Chamber for *in camera* review, regardless of who calls the witness.)

Victim representatives should also outline potential cross, or "adverse," examination questions for each witness.[35] Cross-examination questions can be designed to highlight areas tending to further the victim representative's specific theory of the case, or they can be designed to attack the credibility of the witness's testimony. That said, victim representatives must resist the urge to cross- examine all witnesses, since the Chamber will likely only grant limited permission to pose cross-examination questions. Put simply, the victim representative must choose his cross-examination targets carefully.

As the Chamber has announced, "a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete written application the nature and the detail of the proposed

35. For each anticipated witness, the victim representative should create a separate witness file, and place in this file direct and cross-examination questions and any exhibits or evidence the representative wants to have the witness examine.

intervention (e.g., by providing the questions that he or she seeks to put)."[36] A sound order of proof, combined with thought-out examinations, will significantly increase the odds that the Chamber will grant the victims' written application to participate.

6. Preparing the Exhibit List

In terms of practical preparatory steps, another key element is the drafting of an exhibit list delineating the evidence expected at trial, and identifying what element(s) of the charged crime the particular pieces of evidence/testimony support. For each piece of evidence, the victim representative should understand, and be prepared to articulate, why it is relevant to the case and is admissible under the ICC Rules. Some exhibits will be entered by the Prosecutor, and some by the defense. If there is additional evidence the victim representative would like to have admitted at trial, he must identify which witness will establish the admissibility of that evidence.[37] The exhibit list should, accordingly, clearly identify the witnesses through whom each piece of evidence will be presented and admitted.

The victim representative should also list any arguably exculpatory evidence potentially rebutting elements of the crimes charged, such as evidence that the accused had no meaningful control over his troops, evidence that the accused acted in self-defense or defense of others, and so forth. Of course, the disclosure obligations on the defense are not as exacting as those on the Prosecutor, and this will make it more difficult to determine with precision the defense's trial strategy.

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36. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008), at 37 (citation and quotation omitted).

37. It is noteworthy that the July 11, 2008, Appeals Chamber ruling in *Lubanga* specified that, if the victim representatives are permitted to independently submit evidence, then the appropriate disclosure obligations have to be fulfilled. *See* Appeals Chamber, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (July 11, 2008), at 43-44. This ruling is of course intended to safeguard the rights of the accused. Nevertheless, at present there are no explicit disclosure obligations for victim representatives (the disclosure obligations for defense and the prosecution, in contrast, are quite detailed). The victim representative must be aware of this apparent gap in the existing rules, as it will likely need to be addressed.

7. Honest Evaluation Required: Critical Examination of the Victims' Case

Although looking at the obvious aspects of a case, such as how the accused's alleged conduct harmed the victims, is of course important, it is also critical to equally consider facts beyond the obvious. To be successful at trial, the victim representative must understand fully any and all weaknesses of the victims' and Prosecutor's case.

Too often, inexperienced lawyers forge ahead with their case, blinded by their purely positive view of it, only to be surprised at trial by damaging evidence they are unable to counter or explain. To avoid this pitfall, prepared victim representatives must hold their case up to the light, examine it from all sides, and honestly identify not only the case's strengths, but also the parts of the case that are weak and most likely to be successfully attacked by the other parties or the Chamber. This can be a difficult process, as trial lawyers typically convince themselves of the merits of their case, and somewhat instinctively do not want to pay attention to any weaknesses in their evidence. However, the victim representative must put aside personal feelings about the case and examine it from every angle to avoid being caught unprepared at trial or confronted with unanticipated arguments or lines of questioning. Such a full and honest evaluation of the evidence will assist in the competent development of a viable theory of the case and will focus the victims' presentation.

8. Preparing a Preliminary Trial Checklist

To avoid the problems stemming from a poorly organized trial system, the victim representative should consider compiling a brief pre-trial checklist of issues to cover, including the following:

- Understand the victims' case, as well as their desires, and discuss with them the aim of their participation (that is, getting a voice, setting the historical record straight, receiving reparations, punishing the perpetrators, etc.).
- Once the victim representative understands the victims' litigation goals, determine whether large or small group representation makes the most sense (or, alternatively, decide how the victim groups should best be split up).

- Obtain a signed acknowledgement or power of attorney from the victims signifying their knowing and voluntary assent to the representation, as well as their understanding of potential conflicts of interest inherent in group representation.
- To the extent that the victim representative has access to discovery,[38] carefully review all physical and documentary evidence.
- Review elements of the offense and the order of proof, and amend as necessary.
- Identify all potential witnesses, including experts.
- Develop a sound theory of the case.
- Draft a preliminary order of proof.
- Match the witnesses to the evidence by interviewing and confirming the witness's familiarity with the exhibits, subject to the limitations on witness "proofing" discussed in Part XII(E), below.
- Create a "Contacts" and "To-Do" list containing all important telephone numbers, names, and tasks the victim representative must complete by particular dates.
- Gather and categorize all relevant documents and reports, including interview reports and notes, witness and accused background information, lab reports, and forensic analysis.
- Listen to any audio tapes, and watch any videotapes, prepared as part of the investigation.
- Prepare accurate transcripts.
- Develop appropriate arguments relating to victim security.
- If appropriate, compile information to present to the Chamber and/or the Prosecutor in favor of detaining the accused,[39] or of imposing other

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38. Persons granted victim status by the ICC do not necessarily have access to nonpublic documents registered in the record of the investigation. *See, e.g.*, Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications for Participation* (November 4, 2008).

39. Article 59(3)-(6), Rule 118, and Rule 119 authorize detention when there are *reasonable grounds to believe* that (1) the accused *committed* a crime within the jurisdiction of the ICC, and (2) detention is *necessary to ensure the accused's appearance* at trial, that the accused does not obstruct or endanger the investigation or proceedings, or to prevent the continued commission of the subject offense or related offenses within the ICC's jurisdiction. *See* Rule 119(3) (requiring that Pre-Trial Chamber seek view of relevant victims potentially at risk if accused is released); *see also* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Review of the "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga"* (August 18, 2008), at 11 (ruling that the accused's detention should continue, in part, because release may "lead

restrictive measures to assure the safety of the community and the accused's presence at future proceedings.

9. Creating a Trial Notebook

A common and simple organizational method is to maintain a comprehensive trial notebook containing the most important information about the case, as summarized above. The trial notebook, therefore, includes everything from the contacts and to-do list, order of proof, and the "document containing the charges" (in the parlance of the ICC; more commonly known as the indictment), to the victim representative's preliminary thoughts on how to argue certain issues which may arise at trial.[40] The trial notebook should also contain the victim representative's legal research; drafted (and filed) pre-trial motions; evidence to be presented; outlines of opening statements, direct examinations, cross-examinations, and draft closing argument; and other similarly important materials. Each section should be separately divided within the trial notebook. This organization method

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to the grave endangerment of the security of victims and witnesses and that therefore continued detention is necessary to ensure that the suspect does not obstruct or endanger the court proceedings"); Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chu, Case No. ICC-01/04-01/07: *Third Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo* (March 17, 2009), at 5–8 (reviewing, pursuant to Article 60(3) and Rule 118(2), the Chamber's earlier decision on interim release, and concluding that continued detention was required in light of, *inter alia*, the seriousness of the charges, the length of the potential sentence, the short time to the hearing on the merits, and the threat the accused would pose to "victims and witnesses whose identity had been disclosed").

The victims may have information not in the Prosecutor's possession bearing on these flight and danger-related issues. If so, such material should generally be provided to the Chamber or the Office of the Prosecutor to help in assuring the accused is appropriately detained pending trial. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Decision Inviting Observations from the Participants Concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))* (October 30, 2008), at 4 (providing the legal representatives of anonymous and non-anonymous victims with the opportunity to "file their observations on the detention of [the accused]"). Note that Rule 118(3) requires a hearing on interim release or continued detention be held at least once a year. *See generally* Situation in the Central African Republic In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Decision to Hold a Hearing Pursuant to Rule 118(3) of the Rules of Procedure and Evidence* (June 16, 2009), at 4.

40. Note that internal documents prepared for purposes or the investigation or trial are generally *not* discoverable. *See* Rule 81(1).

provides the victim representative with one central source to easily locate material and information when needed, and enables the victim representative to separate, outline, and arrange the different aspects of the case. The inability to find a document during trial, after all, is the same as not having the document at all.

10. Complying with Pre-Trial Discovery and Disclosure Obligations

The Pre-Trial Chamber may well order the first round of discovery prior to the Confirmation Hearing.[41] Additional discovery rules and obligations are set forth in Article 64(3)(c) (vesting Trial Chamber with power to require disclosure of documents or information); Article 64(6)(b) (requiring state cooperation in fulfilling discovery requirements); Article 64(6)(d) (providing for general discovery order); Rule 76 (pre-trial disclosure requirements for prosecution witnesses); Rule 77 (requiring the Prosecutor to permit defense to inspect documents and physical evidence the Prosecutor may use at the Confirmation Hearing or at trial, or that may be material to the preparation of the defense); Rule 79 (governing disclosures by the defense); Rule 81(2)-(6) (relating to disclosure of sensitive discovery); Rule 82 (dealing with disclosure of items obtained confidentially, and solely for purpose of generating new evidence); Rule 84 (providing Chamber with authority to fashion discovery deadlines and schedules), and Rule 121 (relating to disclosures prior to the confirmation hearing).[42] Victim representatives, however, must bear in mind that none of these provisions explicitly grant victims the

41. *See* Article 61(3).

42. The Chamber, relying on the relative looseness of the statutory language, has gone so far as to require the Prosecutor to submit to all parties, including the victims, a summary table listing the charges confirmed by the Pre-Trial Chamber and the modes of responsibility accompanying the alleged acts, as well as the evidence the Prosecutor intends to rely on at trial. The Prosecutor also has to identify all potentially exculpatory pieces of evidence, and the "modes of responsibility" these potentially exculpatory pieces of evidence *may* be related to. *See* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *Order Instructing the Participants and the Registry to File Additional Documents* (December 10, 2008), at 5-13. The prosecution objected, reasonably contending that this analysis is "incumbent on the Defence, and not on the Prosecutor...." This approach is a powerful example of the Chamber following procedures in keeping with the inquisitorial model of litigation.

right to receive any nonpublic information and that the broadly permissive Rule 84, therefore, may end up being the victims' most promising avenue.

According to the ICC's fairly liberal discovery and admissibility rules, the victim representative should move the Chamber to permit pre-trial inspection of a broad range of documents and evidence. This evidence may include records of examination of the accused, material obtained from, or belonging to, the accused, material concerning investigative actions in which defense counsel would have participated, expert analysis, and all records and physical evidence available after the investigation is complete.[43]

The victim representative may well be limited in what discovery the Chamber will permit the representative to receive (consider, in this context, motions practiced under Rule 91, governing victim representative's participation in the proceedings). Indeed, in the *Lubanga* case the prosecution reportedly only provided the legal representative for the victims with the nonredacted discovery one day prior to the commencement of the trial and did not complete the disclosures until one month into the trial. Thus, once again, the fate of the victim representative's access to evidence is almost entirely in the hands of the prosecution and the Chamber.

To the extent the Chamber includes the victim representative in the discovery process, the victim representative must keep a careful written record of what materials he tendered to the other participants, as well as when he tendered those materials. This will prevent subsequent questions about (or accusations concerning) alleged failures to turn over documents. The written discovery records can be in the form of a short note, e-mail, or one-page letter to the other participant, and should indicate the date and precise description of the documents or items turned over. The victim representatives should stamp the documents themselves with the case tag and the date of production, and should also consider requiring the other participant to sign an acknowledgement that he received certain discovery. Victim representatives should keep these records in the trial notebook for easy reference.

Relying on Article 68(2), victim representatives should also ask the Chamber to rule on sensitive discovery issues *in camera*. This applies in particular to cases involving conduct of a sexual nature, such as sexual violence.[44] Although the evidence may be in the Prosecutor's possession, the victim representative may have reason early in the proceedings to challenge,

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43. *See also* Rule 78.

44. *See* Rules 70–72.

on privacy or security grounds, the tendering of certain unredacted and other discovery to the defense. Moreover, although Rules 76 and 77 admittedly do not grant victims an affirmative right to inspect the discovery or to receive witness names and certain other related statements and documentation,[45] the victim representatives should file discrete motions for the disclosure of particular discovery relating to certain witnesses. This way, the Chamber can better understand what the victim representatives are seeking, why they are seeking these materials, and why turning these materials over to the victims on the eve of trial will unfairly disadvantage them.

The discovery regime's unresolved paradox, however, is that the Chamber requires victim representatives, by written motion, to exceptionally demonstrate that the victims' interests are affected by particular nonpublic discovery prior to gaining access to that discovery. Suffice it to say that in the typical case it is exceedingly difficult to demonstrate that a certain category or item of discovery directly affects victims' interests when the victim representative does not even know about the documents and other evidence in the possession of the other parties.

E. Some Observations on Pre-Trial Meetings with (Potential) Witnesses

Nothing in the ICC regulations categorically prohibits victim representatives from meeting, and talking with, potential witnesses prior to, or during, the formal initiation of an investigation.[46] The formal bar on witness contact is not raised until the participants announce that a particular person will be a witness. Once the witness is "official," the Victims and Witnesses Unit takes over, and the other participants may not discuss any substantive matters with the witness. Note, moreover, that a record of the questioning may be required[47] and that at least one ICC ruling has prohibited

45. In this regard it must be noted that, although Rules 76 and 77 do not define victim applications for participation as "statements," to the extent they contain information inconsistent with other statements made by the victim/witness, or are otherwise impeaching, they must be disclosed.

46. *See generally*, Articles 53–56 (setting out limitations/restrictions on the Prosecutor's ability to conduct pre-trial interviews) and Rule 74 (dealing with self-incrimination by the witness; arguably inapplicable to questioning by victim representatives).

47. *See* Rule 111(1) (requiring that a record be made relating to "formal statements made by any person" who is questioned "in connection" with an investigation or proceeding) and Rule 112 (laying out particular requirements for the recording of questioning in

prosecutors from, in the context of an ongoing investigation, "proofing" (coaching) a witness. It is therefore permissible—and indeed advisable—for the victim representative, if possible in coordination with the Prosecutor, to interview potential witnesses as soon as they are available (and well before they are officially named as trial witnesses). Credibility of a witnesses may be determined by considering factors such as the nature and length of the relationship of the witnesses with the applicant, or their standing in the community.

Even after a participant has officially identified a specific person as a witness, victim representatives may conduct very basic "field interviews." During these interviews, the victim representative simply reintroduces himself to the victim or witness and attempts to subtly gain a sense of whether the witness continues to have the right frame of mind and willingness to testify truthfully. Such a nonsubstantive meeting will not likely raise any eyebrows, but can be extremely valuable in terms of assuring the witness that the victim representative has not forgotten him. This approach, moreover, will allow the victim representative to gauge whether anybody has attempted to intimidate the witness, or whether there are any other factors rendering the witness unwilling to truthfully testify.

In the context of pre-trial meetings, it is important for all participants to be aware of the possibility that NGO representatives have early on interviewed the potential victim or witness. In the *Lubanga* case, for example, an NGO set up a program to demobilize putative child soldiers. In order to do so, the NGO offered any child who turned in his or her gun a "reintegration kit." Although the thought behind the program was of course noble, it understandably also incentivized lying among youths. In the course of interviewing the children, the NGO created reports of interviews that were factually at odds with subsequent interviews conducted by Prosecutors and the Victims and Witnesses Unit. Even as to issues such as some of the putative child soldiers' ages, the NGO, the prosecution, the Victims and Witnesses Unit, and the Chamber received conflicting information.

Victim representatives must, therefore, be vigilant in seeking out any prior statements, even in those cases in which the NGO refuses to turn them over. Moreover, victim representatives must request any such statements from the prosecution or defense, as they are obviously relevant to

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particular cases, including giving the person questioned the right to clarify anything he said, and announcing the requirement that the tape be sealed in the presence of the person questioned or his counsel).

the witness's credibility, and because the other participants interested in confronting the witness at trial may wish to use them.

In *Lubanga*,[48] the Chamber considered a Prosecutor's interview of a witness scheduled to testify at a confirmation hearing. In the course of examining defense complaints about this interview, the Chamber distinguished two types of pre-trial contact with witnesses. The Chamber labeled one type of contact "witness familiarization," which the Chamber described as giving the witness an overview of what was likely to happen, how the ICC and the Chamber function, and so forth.[49] The Chamber described the second type of contact, namely "witness proofing," as having witnesses read their prior statements, refreshing the witness's memory concerning anticipated questions, and putting to the witness the same questions in the same order as the Prosecutor intends to ask them during the trial.[50]

The *Lubanga* Chamber had little problem with "witness familiarization," provided the Victims and Witnesses Unit conducted the meeting, rather than the Prosecutor.[51] The second type of contact, however, found much more resistance. The Chamber, basing its decision in part on the national law of the Democratic Republic of Congo, and finding the Prosecutor's conduct inconsistent with the Code of Conduct of the Bar Council of England and Wales, declared the practice of more aggressive witness preparation/"proofing" prohibited.[52]

This "ban on witness proofing," however, arguably only bars the "coaching" of possible trial witnesses and may not prohibit all contact with potential witnesses made merely to enhance the fairness and efficiency of the proceedings by providing a better understanding of the information in the witness's possession. This latter type of meeting, particularly during early stages of the proceedings, offers the participants an opportunity to learn

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48. Situation in the Democratic Republic of the Congo, Case No. ICC-0/04-01/06: *Decision on the Practices of Witness Familiarization and Witness Proofing* (November 8, 2006).

49. *Id.* at 8–12.

50. *Id.* at 19–20.

51. *Id.* at 17–20.

52. *Id.*; *see also* Case No. IT-05-87-T: *Decision on Ojdanic Motion to Prohibit Witness Proofing* (December 12, 2006), at 18 (ruling that witness proofing "assists (a) in providing a 'detailed review [of relevant and irrelevant facts] in light of the precise charges to be tried'; (b) in aiding 'the process of human recollection'; (c) in 'enabling more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial'; and (d) in identifying and putting the Defence on notice of differences in recollection thereby preventing undue surprise....").

what information the witness has to offer. Such a meeting also permits the victim representative to gain a sense of whether this information is reliable and probative; interviews of this kind can easily be distinguished from the type of "proofing"—in the sense of "coaching" or "rehearsing"—prohibited by the *Lubanga* Chamber. As practitioners with experience in criminal trials know, such properly conducted pre-trial meetings enable the participants to determine whether the witness will in fact be able to present relevant evidence at trial.

A 2008 ruling by the Chamber, however, once again placed doubt on whether trial witness interviews are permitted.[53] The Trial Chamber ruled that "parties" (presumably, though not necessarily, including victims) intending to call witnesses may not "hold discussions" with those witnesses about "topics that are to be dealt with in court during their evidence or the exhibits which may be produced."[54] The Chamber went on to state that witnesses, however, were entitled to receive copies of any prior statements they made in order to "refresh potentially fallible memories."[55] The Chamber distinguished such permissible reviewing of prior statements from "evidence-checking"—"Any discrepancies [between the statement and the witness's present recollection] should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence. The Chamber is more likely to identify the truth if the witness explains any reservations about the written account during their oral testimony...."[56] In light of this reasoning, it appears that the Chamber will, at present, rule improper any attempts by victim representatives to "prep" a witness's testimony prior to trial.[57]

It is of course also possible that the Court in the future will reverse course and permit more expansive witness preparation, particularly given

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53. *See* Situation in the Democratic Republic of the Congo, Case No. II-01/04-01/06: *Decision Regarding the Protocol on the Practices to Be Used to Prepare Witnesses for Trial* (May 23, 2008).

54. *Id.* at 15–16.

55. *Id.* at 19–20.

56. *Id.*

57. *See also* Situation in the Democratic Republic of the Congo, Case No. II-01/04-01/06: *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial* (November 30, 2007), at 22–23 (expressing concern that "preparation of witnesses" may "diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.").

that the rulings to date are nonbinding and have been subject to heated debate and some controversy. Such a change should be welcomed, since the benefits of such pre-trial encounters are considerable. Proper pre-trial witness interviews permit the victim representative to evaluate the witness's personality, knowledge, and recollection of the relevant facts, and the witness's ability to verbalize those recollections.[58] During such sessions, the victim representatives can also give the witness a sense, from the victim representative's perspective, of what to expect during the trial. Witnesses, after all, are likely to be insecure about appearing in a strange environment with unfamiliar rules and will therefore typically welcome such a preview.

Of course, as previously noted, the above-described ICC rulings to date only relate to interviewing *identified* witnesses prior to trial. They do not prevent victim representatives from interviewing *potential* witnesses prior to the formal launch of an ICC investigation. Consider also that Articles 3 and 13 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, require the government (and therefore Prosecutors) to investigate criminal cases fully.[59] Prosecutors, and perhaps victim representatives attempting to independently uncover relevant information, could thus argue by analogy that, to comply with the affirmative obligation to properly investigate a case, they must assure themselves personally of the veracity and accuracy of the information provided by the various witnesses.

Considering that NGOs are often the first to take victim statements, moreover, and that some of these NGOs have refused to turn these statements over to the prosecution, the defense, or the victim representatives, the importance of gaining a full and unfiltered understanding of the victims' knowledge, and basis for such knowledge, is paramount. Thus, the victim representative should, within the permissible bounds discussed above, pursue an opportunity to speak to potential witnesses in order to enhance

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58. A word of caution on note-taking: If the representative, or one of his colleagues, takes verbatim notes of what the witness says, those notes may be discoverable. If, however, the notes relate only to impressions and legal conclusions, then they will probably not have to be handed over as part of pre-trial discovery. *See generally* Rule 81(1) (providing that internal documents prepared for purposes of the investigation or trial are *not* discoverable).

59. *See generally Tanrikulu v. Turkey*, Case No. 1999-IV EUR. Ct. H.R. 459, 487–88 ("[T]he duty to investigate is not confined to cases where it has been established that the killing was caused by an agent of the state."); *see also* Alastair Mowbray, *Duties of Investigation Under European Convention on Human Rights*, 51 ICLQ 437 (2002).

the truth-seeking process and to ensure that the Chamber's time is not wasted with potentially unnecessary questioning.

That said, a word of caution is certainly in order. Victim representatives, even if only meeting potential witnesses or interviewing witnesses prior to the Prosecutor initiating formal proceedings, must proceed carefully and conservatively when conducting any interviews or meetings. The victim representative's adversaries in any future cross-examination will naturally, and appropriately, inquire into the substance and nature of the discussions between the victim representative, the victim representative's investigator, and the witness. The purpose of these inquiries by opposing counsel or the Chamber is to determine whether a victim representative exerted any inappropriate pressure on the witness, or whether the witness changed his version of events as a result of being coached. Such cross-examination is entirely appropriate and justified, and victim representatives should therefore expect in-court inquiry into the nature and circumstances of their interactions with victims.

The most effective, and most ethical, way to commence such a witness meeting is to explicitly instruct the witness that he is only expected to tell the truth, and that the victim representative is not coaching the victim or asking the victim to alter his testimony. In fact, it is sound practice to draft a short, standardized letter, written in the witness's native tongue, summarizing these reciprocal expectations, and to have the witness review, sign, and date the letter prior to commencing the interview. This procedure minimizes subsequent questions concerning the instructions given to, or expectations created in, the witness. If, during a hearing or cross-examination, opposing counsel claims a particular witness met with the victim representative, and that as a result his testimony was improperly influenced, the victim representative need simply ask the witness to repeat the admonitions given at the outset of the meeting to effectively deflect this attack.

Properly interviewing a witness permits the victim representative to understand the evidence and allows for a more effective streamlining of the case. However, in the final analysis there is still a shortage of reliable guidance on what the Chamber will likely rule permissible in terms of witness contact during the early stages of the investigation. It, therefore, bears repeating that victim representatives must proceed with exceeding caution when it comes to having pre-trial contact with potential witnesses and must carefully abide by the ICC's restrictions.

The following are some basic witness interview guidelines for victim representatives and their investigators:

- Ensure that any translators facilitating the meeting are properly qualified and are capable of providing accurate translation.
- Research the latest rulings to verify the contemporary state of the law regarding meetings with witnesses and victims.
- Be sure that the potential witness is meeting with the victim representative freely and voluntarily, and note this either in a report, or through a consent or agreement-to-cooperate/meet form.
- At the outset, give the potential witness a sense of the topics to be covered, and probe the extent of his knowledge concerning these topics. The victim representative should *not*, however, coach the victim or witness by, for example, telling him what to say. Continue to emphasize that the only expectation of the potential witness is that he will tell the truth to the Chamber and/or the investigators (depending on the stage of the proceedings).
- Never make any promises of benefits, and always ask a colleague, investigator, or other person to be present as a "prover" when talking to a potential witness. That way, any claims of having threatened, coached, or made promises to the potential witness, or of having engaged in any other misconduct relating to the potential witness, can be rebutted.
- Avoid casual interaction with the potential witness, and never say anything to him that should not be repeated from the witness stand or in some other formal forum.
- Explain the trial process to the potential witness in simple and lay terms. Put the potential witness in contact with staff of the Victims and Witnesses Unit, as appropriate.
- Be mindful of the difficult task faced by the potential witness and of the risk that the mere fact of the questioning may inherently be re-traumatizing.
- Go over the key sequences of events in a logical and easily followable manner that works for the victim representative and for the potential witness.
- Show the potential witness the relevant exhibits.
- Make sure the potential witness understands that he must answer all questions truthfully. And because "the truth" may mean different things to different people, also ask whether the potential witness personally

perceived the events at issue; this avoids the situation encountered, for example, in Rwanda in which witnesses at trial described events they had learned about from others.

— Ensure that the potential witness knows that it is acceptable to admit he has spoken with the victim representative.

— Maintain any records of interviews, and be prepared to turn them over to the Chamber or to the other participants. Consider, also, video or audio taping the interviews (or at least the statement portion of the interview), provided this process will not distract the interviewee or otherwise be counterproductive.

F. Self-Representation and the Corresponding Threat to the Historic Record

One issue that is the subject of considerable ongoing controversy is whether an accused has, or should have, a right to represent himself (that is, proceed *pro se*) when charged in an international tribunal. Victim representatives must be familiar with the ICC provisions relating to self-representation, as well as the potential problems occurring when a defendant elects to represent himself. As discussed below, vivid examples of how self-representation can undermine the dignity of the proceedings and the creation of a neutral historic record abound. Victim representatives must therefore remain alert to the dangers of this procedure and must be prepared to step in and voice their objections to an accused's continued self-representation if that accused is abusing the privilege and, in so doing, threatens to undermine the victims' interests.

By way of some background, Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), as well as the articles and rules of the ad hoc international tribunals, accord an accused the right to defend himself in person *or* through legal assistance of his own choosing. Although international judges at various tribunals have accepted this as the general state of the law, the position is not universally endorsed.[60] There is, indeed,

60. Michael Scharf, *Self-Representation Versus Assignment of Defence Counsel before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31, 32 (2006) (questioning whether the ICCPR, customary international law, and the statutes of international tribunals can be "read as permitting an international criminal tribunal to appoint counsel over the objections of the defendant, as the [ICTR] held in the Barayagwiza

some weight to the argument that self-representation is *not* a fundamental right enshrined in international law (though, as discussed below, for better or worse it is a limited right accorded to all accused during ICC proceedings).

When observers raise the topic of self-representation in the international justice context, the discussion invariably turns to the now-infamous International Criminal Tribunal for the Former Yugoslavia (ICTY) trial of Serbian strongman Slobodan Milosevic. During Milosevic's proceedings, the accused, himself a highly educated lawyer, attempted to make a mockery of the process. Milosevic's almost daily outbursts, stream-of-consciousness speeches, intemperate challenges to the Court's jurisdiction, highly aggressive, threatening, and improper cross-examinations of witnesses, and overall lack of respect and compliance with Presiding Judge Richard May's orders made for at-times entertaining viewing, but also served to embolden Milosevic's supporters. Milosevic's efforts, in the end, to a significant extent succeeded at distorting the trial record and undermining the legitimacy and solemnity of the proceedings.

Milosevic's conduct turned what should have been a historic trial of the facts into a political stage, and in so doing caused excessive, and unnecessary, delays.[61] The victims' interest in creating a complete and impartial historic record of events in the end to a significant extent lost out because the Court did not control Milosevic.

Judicial failure to keep order, ensure that all participants exhibit the proper decorum, adhere to the rules of evidence and procedures, and strictly comply with the Court's orders can be highly disruptive in domestic trials.[62] However, in atrocity crimes cases, such shortfalls can have devastating effects. Not only are the stakes higher for the international community

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case? How international tribunals answer this question in the future will have a significant effect on their ability to contribute to peace, reconciliation and the rule of law by establishing an historic record of atrocities committed by the former regime that is accepted by the target population.").

61. Of course, the length and somewhat disjointed structure of the 108-paragraph 1999 Second Amended Indictment against Milosevic and his four top aides did not help matters in this regard. *See generally* www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-2ai011029e.htm. The indictment charged the defendants with deportation (a crime against humanity), two counts of murder (a crime against humanity and a violation of the customs of war, respectively), and one count of persecution (a crime against humanity). The theories of liability were command responsibility and personal responsibility. Absent from the indictment, however, was a charge of genocide. *Id.*

62. *See, e.g., United States v. Mannie*, 509 F.3d 851 (7th Cir. 2007) (describing case in which accused's conduct "spiraled out of control" to such an extent that the co-defendant was granted a new trial).

and for the credibility of institutions of international justice, but an accused who engages in theatrics and similar improper conduct threatens to cloud the entire trial record.[63]

Professor Michael Scharf, using the Milosevic example to describe the dangers of self-representation, made the following apt observations:

> In the case of Slobodan Milosevic...the tactic of self-representation enabled the former Serb leader to: (1) generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators, when in fact he had a squadron of legal counsel assisting him from behind the scenes; (2) make unfettered caustic speeches throughout the trial which were not restricted by the rules of relevance or subject to cross-examination by the prosecution; (3) repeatedly challenge the legitimacy of the proceedings and treat the witnesses, Prosecutors, and judges in a manner that would earn ordinary Defence Counsel expulsion from the courtroom. [O]pinion polls in Serbia indicate that [this conduct has] had the effect of convincing the majority of the Serb people that this trial was unfair and that [Milosevic] was not guilty of the charges.[64]

Critics of the right to self-representation contend that the Court should compel the accused in war crimes trials to work through counsel. They reason that such representation will reduce the likelihood that an accused will act in a manner that disrupts the proceedings. These critics also argue that the nature of the required investigative efforts, and the inherent complexity of international atrocity crimes litigation—demanding a fluid knowledge not only of the specific hybrid substantive and procedural rules governing the Court but also of international humanitarian law, comparative law, and oral and written advocacy skills—markedly distinguish such trials from ordinary domestic criminal cases. Permitting an accused to represent himself in such an international forum makes it more likely that he will engage in dilatory tactics, attempt to undermine the legitimacy of the proceedings, and otherwise seek to prevent an orderly trial.[65] Moreover, in almost

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63. *See* Scharf, *supra* note 60, at 33.

64. *Id.* at 32.

65. *Id.* at 33–40 ("[T]he underlying purpose of the defendant's right to defend himself in person or through legal assistance of his own choosing; is to ensure a fair trial—an objective that can best be met in cases of former leaders accused of international crimes by assigning the defendant a highly qualified attorney who is vigilantly

all cases where an accused represents himself, the Chamber will be forced to proactively participate in the proceedings in order to ensure a fair trial, thereby arguably involving itself more than is desirable, or appropriate, in the actual litigation of the adversarial proceeding.[66]

The ICTY's Trial Chamber in the trial of Serbian ultra-nationalist paramilitary leader Vojislav Seselj echoed these concerns when it ruled that the accused was to receive appointed counsel over his objections:

> [T]he complex legal, evidential, and procedural issues that arise in a case of this magnitude may fall outside the competence even of legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.[67]

The argument that self-representation is an absolute and universal right is itself a weak one. For one, civil-law countries such as Germany and France do not permit defendants to represent themselves. Moreover, the European Court of Human Rights has ruled that, in the administration of justice, states are permitted to assign counsel over the defendant's objections.[68] In

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committed to representing his client's interests."), *citing* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 283 (1993) ("[T]he right to self-representation complements the right to counsel and is not meant as a substitute thereof.... [R]epresentation of counsel is not only a matter of interest to the accused, but it is also paramount to due process of the law and to the integrity of the judicial process.").

66. *See generally* Decision on the Application of Samuel Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court, Sam Hinga Norman (SCSL-10-14-T), Trial Chamber (June 8, 2004), at § 26.

67. Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, Seselj (IT-03-67-PT), Trial Chamber (May 9, 2003), at §21. Incidentally, the ICTY subsequently convicted Seselj of contempt, and sentenced him to fifteen months incarceration, for revealing in a book the identities of three officially protected witnesses.

68. *See generally* MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 259 (1993); *see also* Reasons for Decision on Assignment of Defence Counsel, Milosevic (IT-02-54-T), Trial Chamber (September 22, 2004), at § 33 ("If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel.").

addition, even in common-law jurisdictions, the right to self-representation is certainly not absolute.[69] The ICC and the various ad hoc tribunals of the past are, moreover, *sui generis* institutions not bound by rules and rulings made in predecessor tribunals. These institutions are armed with their own substantive and procedural rules, which include significant civil-law elements (the right to self-representation generally being a characteristic of common-law jurisdictions).[70]

Although self-representation, thus, may not be a right under international law, or be particularly popular among court observers, a plain-language reading[71] of the ICC's statutory language, specifically Article 67, nevertheless leads to the conclusion that self-representation *is* a right the ICC grants to all accused. The article states, in relevant part, that the accused has a right to a "public hearing conducted impartially, and to the following minimum guarantees, in full equality":

> [T]o 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....[72]

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69. *See generally Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975) (holding that there is no absolute right to self-representation, and certainly no right "to abuse the dignity of the courtroom").

70. Scharf, *supra* note 60, at 36, *citing* Sean Murphy, *Progress and Jurisprudence in the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. OF INT'L L. 80 (1999) ("The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.").

71. On the issues of statutory interpretation, the ICC follows the principal rule of interpretation set forth in Article 31(1) of the Vienna Convention on the Law of Treaties, which provides that "[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." The Court thus follows the textualist model, under which recourse to supplementary means of interpretation, including the *travaux preparatoires*, is only appropriate if the statutory language is ambiguous or obscure, or "leads to a result which is manifestly absurd or unreasonable." Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07: *On the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I* (November 26, 2008), at 49.

72. Article 67(1)(d) (emphasis added).

Regulation of the Registry 119(2), moreover, provides that the Registrar shall "provide appropriate assistance to a person *who has chosen to represent himself or herself.*"[73]

Article 67, thus, clearly grants the accused the right to self-representation,[74] but the right, like all rights, is subject to reasonable restrictions. The cross-reference to Article 63(2), for example, addresses disruptive behavior on the part of the accused:

> If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial *and instruct counsel* from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.[75]

Article 63(2), therefore, provides the Chamber with some clear guidance on how to deal with an obstructive accused, permitting it to, as a last resort, remove the accused from the courtroom and limit the accused's participation to remotely observing the trial through a television. The accused can use communications technology, such as computers, to maintain contact with counsel as the trial proceeds.

Article 63(2), however, unfortunately fails to address removal of an accused who is proceeding *pro se*. Despite this oversight, it is certainly consistent with due process, and the ICC's statutory framework, to require an otherwise self-represented accused to communicate through in-court counsel in the manner envisioned by Article 63(2) if the accused's conduct forces the Chamber to remove him from the courtroom. These are, after all, circumstances created by the accused, and in such a case the accused's right to self-representation is forfeited, yielding to the institutional interests in a

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73. Emphasis added.

74. There is one cannon of statutory interpretation that, at we know, rises above all others: If the text of a statute is unambiguous, then judicial inquiry is complete and the need to consult the statute's legislative history extinguishes. Here, Article 67 unambiguously accords the accused the right to represent himself. The text, therefore, settles the dispute definitively.

75. Article 63(2) (emphasis added).

fair, balanced, and orderly trial.[76] In such a case, then, the Chamber must appoint stand-by counsel to represent the accused's in-court interests.

Another noteworthy quirk in the ICC's provisions is that an accused can only plead guilty after "sufficient consultation with defense counsel."[77] Although Article 65(1)(b) does not mention self-represented accuseds who want to plead guilty, this appears to simply be a drafting oversight. Including "if the accused is represented" at the end of Article 65(1)(b) would easily correct this issue. Provided the judges during the plea colloquy satisfy themselves that the accused understands the proceedings and his rights, and that his waiver of his trial rights is knowing and voluntary, accepting the self-represented accused's plea under Article 65, even as currently drafted, does not improperly deprive the accused of any rights or privileges.

The danger a disruptive defendant poses to the creation of a credible historic record, and to the legitimacy of both his trial and the institution, is undeniable. Victim representatives, like the prosecutors, must therefore keep a close eye on the conduct of the self-represented accused. They must not hesitate to demand that the Chamber use its considerable discretion to enforce Article 63(2) in order to maintain the dignity of the institution, ensure the overall fairness of the trial, and prevent an obstructive defendant from derailing the proceedings and creating a muddled historic record of the events or, even worse, making a mockery of the judicial system.

G. The Benefits of Guilty Pleas

Whether international tribunals and courts should grant the accused in atrocity-crimes cases the option of pleading guilty is a topic which has generated a surprising amount of controversy. On the upside, guilty pleas permit the accused to accept responsibility and avoid trial, while saving the prosecution and the court valuable time and resources. For these reasons, guilty pleas are routine for attorneys working in common-law counties. (Indeed, approximately 97 percent of U.S. federal convictions taking place within one year of arrest are the result of defendants pleading guilty).[78]

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76. *See generally* Case of Barayagwiza, Decision on Defense Counsel Motion to Withdraw (ICTR-97-19-T) (November 2, 2000) (the court ruled that the statutory right to self-representation, pursuant to both international and certain domestic law, was not absolute, and noted that the purpose of assigned counsel is to "ensure that the Accused receives a fair trial").

77. Article 65(1)(b).

78. U.S. Dept. of Justice, Criminal Case Processing Statistics (2008), www.ojp.usdoj.gov/bjs/cases.htm.

International tribunals, however, have historically been leery of plea bargains, considering them to be inherently at odds with the symbolic purposes of international justice.[79] Plea agreements, the argument goes, permit the accused to take the "easy way out," allowing him to avoid being held to account in the public forum of a trial. As the caseloads of these international courts increased over the years, however, they have started to give accuseds the opportunity to plead guilty, and in some cases imposed reduced sentences in return for such guilty pleas.[80]

Article 65, titled "Proceedings on admission of guilt," has resolved this dispute by following the modern trend of permitting guilty pleas. Prior to accepting the accused's guilty plea, however, the Chamber must assure itself that the accused understands the nature and consequences of his admission of guilt,[81] that the accused voluntarily made the admission after sufficient consultation with defense counsel,[82] and that an adequate factual basis tracking the charging document supports the plea of guilty.[83] To the extent the Chamber determines that the interests of justice (or, critically, the interests of the victims) require a more complete presentation of the facts, the Chamber may ask the Prosecutor to present additional evidence, or can simply reject the accused's request and continue the trial in the ordinary course.[84]

Unlike in the United States, however, accused at the ICC cannot enter into "cooperation agreements" with the prosecution guaranteeing them reduced sentences. That said, the Chamber nevertheless can (and in most cases surely will) take an accused's contrition, acceptance of responsibility reflected by a plea of guilty, as well as any cooperation, into account when fashioning an appropriate sentence.

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79. *See, e.g.*, Statement by the President [of the ICTY] Made at a Briefing to Members of Diplomatic Missions 649, 652, IT/29 (February 11, 1994), *reprinted in* VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Vol. 2 (1995) (ICTY President Antonio Cassese stating view that plea bargaining would be inappropriate in a tribunal "charged with the task of trying persons accused of the gravest possible of all crimes").

80. *See, e.g.*, Sentencing Judgment, Plavsic (IT-00-39 & 40/1S), Trial Chamber III (February 27, 2003), at § 132 (in the prosecution of "Serbian Iron Lady" accused of, *inter alia*, committing genocide, the accused was permitted to plead guilty in exchange for prosecution dropping charges; after admitting responsibility for the killing of tens of thousands of civilians, the accused, who refused to cooperate with the prosecution, was sentenced to a relatively paltry eleven years imprisonment).

81. Article 65(1)(b).

82. Article 65(1)(b).

83. Article 65(a)(c)(i)-(iii).

84. Article 65(4)(a) and (b).

The statutorily mandated timing of ICC guilty pleas contains an unfortunate oversight, however. Article 65 cross-references Article 64(8)(a), but that article only provides an accused the opportunity to plead guilty "[a]t the commencement of the trial." Whether the Chamber will permit an accused to plead guilty later in the litigation—once the accused has had more time to review the discovery and other evidence amassed against him, or otherwise realizes the strength of the prosecution's case or the futility of continuing his denials—is therefore unclear.

Permitting an accused to plead guilty, and to even receive a reduced sentence in return for his contrition or cooperation, although undoubtedly unpalatable to some victims, is a practice victim representative should, as a general matter, embrace. An accused's plea of guilty to the charged crimes permits the victim representatives and the Prosecutor to focus their limited resources on those accused who refuse to accept responsibility for their conduct (consider, in terms of this resource reallocation argument, that the typical ICTY and ICTR trial lasted over a year, and cost well over $50 million[85]). Guilty pleas also allow the prosecution to concentrate on investigating and charging new cases, rather than on proving a particular accused's guilt during a lengthy and costly trial, and reduce the administrative burdens on the Court. To the extent that the victims view the accused's factual admissions as overly narrow, incomplete, inaccurate, or otherwise insufficient, the victim representative, relying on Article 65(4), must petition the Court either to reject the plea[86] or to request that the Prosecutor present (and the accused admit to) a more complete and accurate picture of the accused's factual guilt.[87] A guilty plea supported by such an adequate factual basis, therefore, should be welcomed as providing victims with a valuable piece of historic information that, to a significant extent, will erase doubts over the nature and extent of the accused's criminal conduct.

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85. Scharf, *supra* note 60, at 1067. Note, however, that the cost of achieving even a *single* final conviction for a *single* defendant at the ICTY hovers in the neighborhood of $25 million.

86. As provided for in Article 65(4)(b).

87. *See* Article 65(4)(a).

PART XIII

The Main Trial

BY THE TIME OF THE ICC'S "MAIN TRIAL," the prepared victim representative will have a thorough understanding of his theory of the case, as well as of the full spectrum of relevant facts. The representative will have dealt with any outstanding discovery issues, compiled an order of proof, put together his trial notebook, drafted the appropriate motions to assure substantive participation, and addressed any remaining witness issues. Having laid this significant groundwork, the victim representative is now prepared to take on the challenges of actually litigating the case in the Trial Chamber (The physical layout of the Chamber is shown in Figure XIII.1.).

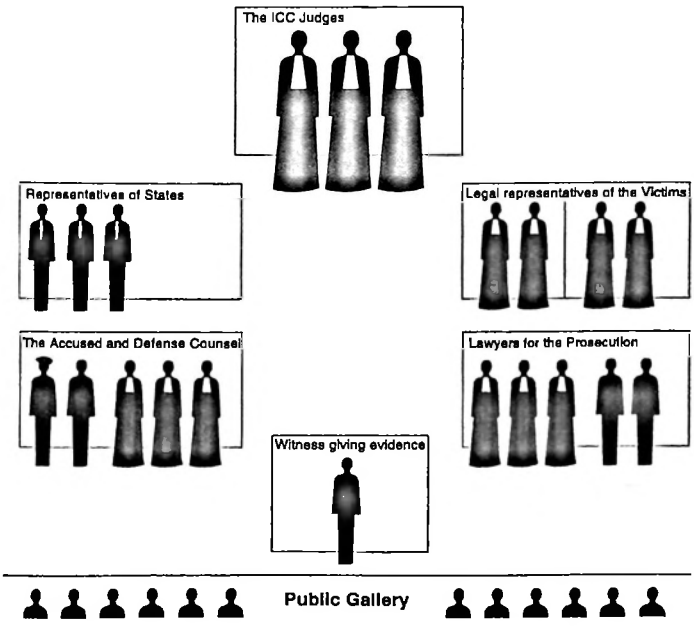

Figure XIII.1 **Layout of ICC Trial Chamber**

"Victims Before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court." Copyright © International Criminal Court 2006.

A. Opening Statement

The opening statement formally begins the trial. In terms of substance and format, victim representatives can think of the opening as the first scene in a play. The opening, in that sense, paves the way to successful advocacy of the victims' interests. Victim representatives must carefully lay out their factual and legal positions during the opening and demonstrate to the Chamber how the Prosecutor's evidence will establish both the accused's guilt, as well as the legitimacy of the victims' claims.

During the opening, the victim representative must describe for the Chamber his theory of the case in a manner that is "alive," well organized, and persuasive. The theory of the case should be clear and concise, highlighting the anticipated witnesses that are most important to the victims. The victim representative must never risk losing credibility in the eyes of the Chamber by overstating the evidence; first impressions count for much in the law, as well as in life.

The goal during this early stage of the proceedings is to gain the Chamber's attention and to generate an appreciation for the aspects of the case most crucial to the victims. The Prosecutor's opening statement, after all, is unlikely to identify for the Chamber the specific evidence the victims believe is most critical, how that evidence fits within the elements of the charges, what evidence and theories have emerged since the Prosecutor's drafting of the charging documents, and the nuances of the victims' theory of the case. Opening statements, in short, are beneficial to both the Chamber and the participants, and victim representatives must, therefore, make separate applications for permission to deliver them.[1]

During the *Lubanga* case's confirmation hearing, the Pre-Trial Chamber gave victim representatives the opportunity to provide the Chamber with an opening statement.[2] Moreover, the Trial Chamber has confirmed that there is in fact a "presumption" that victims will receive the opportunity to deliver

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1. Whether the Chamber will require the various teams of victim representatives to work together to present one comprehensive opening statement, or will instead permit each team to present their own discrete opening statement, will likely be decided on a case-by-case basis.

2. *See* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *The Prosecutor v. Thomas Lubanga Dyilo, Confirmation of Charges Hearing* (November 9, 2006) (allowing 90 minutes each for the confirmation hearing opening statements of the prosecution and the legal representatives of the victims, and 135 minutes for the opening statement of the defense).

opening statements during the main trial.[3] That said, if the victims are permitted to deliver opening statements, the Chamber will likely also require them to provide it and the other participants with written outlines of their openings in advance.[4] How precise and inclusive these outlines must be will be determined on a case-by-case basis, but the Chamber at a minimum will likely expect the outlines to contain the victim representatives' main legal and factual points. Although one can certainly question the wisdom of the Chamber's decision to require the advance exchange of written opening outlines,[5] the rulings to date at a minimum reflect the Chamber's shared agreement that judges benefit from a concise, thought-out, nontheatrical, and earnest opening statement.[6]

When organizing the opening statement, victim representatives must remember that judges tend to recall best what they hear first and last. This is called the rule of primacy and recency.[7] Victim representatives should therefore draft opening statements which are book-ended by the victims' strongest arguments. The victim representative should, in contrast, introduce the weakest portions of their case somewhere in the middle. "Fronting" the case's weakness in this manner, and placing the defensive aspect of the opening in the middle, takes the wind out of the defense's sails.

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3. *See* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on Opening and Closing Statements* (May 22, 2008), at 7 (noting permissive nature of ICC provisions' language, such as Rule 89(1)'s permission to victims to make opening and closing statements).

4. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Applications by Victims to Participate in the Proceedings* (December 15, 2008), at 38 (requiring victim representatives to inform the Chamber of their intent to deliver opening and closing statements, and to provide the Chamber and the other participants with outlines seven days in advance of the commencement of trial).

5. *See* Judge Rene Blattman's dissent in Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on Opening and Closing Statements* (May 22, 2008), at 10 ("I do not believe that the disclosure of these statements in advance is necessary in order for the Chamber to manage the case effectively and I am concerned that this requirement of disclosure takes away an important element of spontaneity which may undermine the goal of the trial to search for truth.").

6. *See* Rule 89(1) (vesting in the Chamber the discretion to permit victim representative to give opening statement).

7. "Both social scientists and lawyers have long debated how the order in which information is delivered influences the listener. Researchers suggest that we are more likely to believe the presentation or message we hear first (primacy) and remember the presentation or message we hear last (recency)." RICHARD LUKAS & K. BYRON MCCOY, THE WINNING EDGE: EFFECTIVE COMMUNICATION AND PERSUASION TECHNIQUES FOR LAWYERS 114 (1993), *citing* RONALD J. MATLON, COMMUNICATION IN THE LEGAL PROCESS (1988).

As one of the most critical aspects of the main trial, the opening statement must be fully developed and carefully prepared. Although the Chamber will, as noted above, likely require a written outline of the opening statement, the victim representative should not simply read, or rush through, the opening, but instead must speak in a manner that is relaxed, easy to understand, and persuasive. Victim representatives must also avoid acting as if they are the Prosecutor, or as if they intend to overly aggressively litigate the case; such an approach will immediately alienate the defense (concerned with maintaining the equality of arms and the fragile balance between the prosecution and the defense) and the prosecution (concerned with noninterference in its prosecutorial strategy). The Chamber is unlikely to appreciate any attempt by the victim representatives to go beyond the role the Chamber deems appropriate.

The opening statement, no matter how sound, will of course not by itself guarantee a positive outcome for the victim. However, a properly crafted opening will set the stage for such an outcome, providing the Chamber with a clear roadmap of the case by previewing how the anticipated evidence matches up with the elements of the charge and the victim representative's position.

Victim representatives should consider the following general guidelines for a persuasive opening statement:

- Present a clear and concise explanation of the most important facts proving the accused violated the law, as well as the victims' rights.
- As a default position, be deferential toward the Prosecutor, while emphasizing that there were actual living and breathing victims who suffered harm as a result of the crimes listed in the formal charging document.
- Carefully and strategically choose the subject and timing of divergence from the Prosecutor's position and, if possible, seek to informally resolve any conflicts or to come up with a compromise.
- Be humble, and accept the victim representative's more limited role in the proceedings.
- Remain aware that the defense and the Chamber will be concerned that the victim representative's participation not negatively impact the fairness of the proceedings, for example, by placing undue litigation burdens on the defense. Victim advocates should also bear in mind the argument that the victims' rights accorded by the Extraordinary Chambers within the Courts of Cambodia are greater than those offered by the ICC; victims at the ECCC, for example, may request a specific

investigation, appeal a decision and are not required to evidence their personal interests in order to participate.[8]

- Do not discuss in granular detail the content of every witness's anticipated testimony. The opening is not the time to argue the case. Rather, it is the first time for the Chamber to hear about the case.
- Provide a roadmap of the case, and refer to what will be established through the "evidence" or the "facts," that is, "the evidence will show/prove" or "the facts will show/prove."
- Answer the six crucial questions: "Who, what, why, when, where, and how?"
- In most cases, explain the facts chronologically.
- Practice and rehearse the opening before a relative, friend, or colleague who will honestly critique the statement.
- Recognize that the opening is a prologue or synopsis of what the victim representative expects to follow.
- Understate the case rather than overstating it. The defense, whether at the guilt phase or at the sentencing, may well point out things that the victim representative promised in the opening, but did not establish at trial.
- Admit weaknesses to enhance credibility. The victim representative must explain, without vouching for the credibility of any witness, what the victim representative expects the evidence to show.
- Explain for the Chamber's benefit how nontainted testimony and exhibits will corroborate the key witnesses.

The victim representative can structure an effective opening as follows:

1. "If the Chamber please...."

2. Acceptance or rejection of the issues as defined by the defense and the Prosecutor, plus a summary of any additional issues the victim representative anticipates raising, including particularly how the accused harmed the victims.[9]

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8. LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT 126 (2014),. The author obtained this information from the ECCC Internal Rules, specifically, Rules 23bis, 55(10), 74(4), 80(2).

9. *See* Appeals Chamber, Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims'*

3. A cohesive, succinct, confident, and nonargumentative reference to anticipated deficiencies of the defense case, plus a summary of the anticipated evidence. If appropriate, include reference to weaknesses in the victims' case, and touch on how the victim representative will overcome these weaknesses.

4. A brief statement focusing on why the victims deem their participation necessary. The drafters of the Rome Statute, after all, included victim participation not only for the sake of reparations but also to advance more general restorative goals in the context of post-conflict justice, such as to help victims break cycles of violence by giving them a voice and to rehabilitate and empower them, allowing them to regain some sense of normalcy in their lives. Victim representatives must not forget these goals and, therefore, must present robust and well-considered opposition to the Prosecutor or defense if they seek to marginalize victims.

5. A conclusion that indicates that at the close of the case the victim representative will ask the Chamber to render a finding in favor of the victims.

A sample condensed outline of a victim representative's opening statement follows:

> "This case is about the January 31, 2003, murder of 20 civilians living in village A. The prosecution will establish that the man responsible for these criminal attacks is Mr. Kalady."
>
> * * *
>
> "During the course of this trial you will hear the testimony of...." [summarize the basic facts the witnesses will (or should) establish].
>
> * * *
>
> "There is little question that someone is responsible for the bloody attacks on [victim groups], and we firmly believe the responsible party to be this accused, sitting in this courtroom on this day. Justice requires that this Chamber hold Mr. Kalady accountable for his horrific and base deeds."
>
> * * *
>
> "If this Chamber at the end of the evidence agrees with the facts as we have described them, and concludes that Mr. Kalady is in fact responsible

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Participation of 18 January 2008 (July 11, 2008) (ruling that, in order to reach the trial stage, victims will have to file written applications demonstrating (1) that they are victims within the meaning of Rule 85; and (2) that, pursuant to Article 68(3), they have personal interests that are affected by the trial).

for these atrocities, then we will stand prepared to assist the Chamber's understanding of why the victims, who stand humbly before you, are entitled to a just sentence in this case, as well as to reparations, for the horrible harms they suffered at the hands of Mr. Kalady and his henchmen."

If the Chamber permits it, victim representatives should use demonstrative evidence ("visual aids") during the opening to give the Chamber a more tangible understanding of the case from the victims' perspective.[10] Psychologists have found that people learn much more from seeing and hearing, rather than from hearing alone.[11] The use of demonstrative evidence will help focus the Chamber's attention and maintain its interest and can be used to explain matters relevant to the trial. Consider, for example, an aerial photograph of the area where the alleged crimes took place, or a chart outlining the hierarchy of a particular military unit and the accused's position within that hierarchy. Demonstrative evidence may also include items such as models, diagrams, sketches, and objects at issue. Applications for permission to use such exhibits must be made to the Chamber at least fourteen days, and to the other parties at least seven days, prior to the intended use.[12]

The Majority of the Chamber has admitted as evidence reports from nongovernmental organizations (NGOs). The Majority held that such reports were considered reliable because they details concerning sources, information, and methodology.[13] (However, Judge Ozaki considered the probative value of reports from NGOs low due to the lack of guarantees regarding the reliability and sources of reports.)

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10. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Public Decision on the Use of Visual Aids* (December 2, 2008) (Trial Chamber ruling that any proposed visual aids must be disclosed to the other side at least seven days prior to their use at trial and must be provided to the Registry in electronic format at least three days prior to their use at trial; visual aids may be used during opening and closing statements to "enhance the presentation of previously disclosed evidence." Application to use visual aids must be made to Chamber no less than fourteen days prior to their intended use at trial).

11. *See generally* Cheryl Riechmann-Hruska, *Differences in Learning*, 24 EQUITY & EXCELLENCE 25–26 (1989).

12. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Public Decision on the Use of Visual Aids* (December 2, 2008), at 7–8.

13. Situation in the Central African Republic, The Prosecutor v. Jean- Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Partly Dissenting Opinion of Judge Ozaki on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 69(4) of the Rome Statute* (September 6, 2012).

B. Direct Examination of Witnesses

The purpose of direct examination (also referred to as "examination-in-chief") is to "adduce by the putting of proper questions...relevant and admissible evidence which supports the contentions of the party who calls the witness."[14] Direct examination is the first opportunity the examining lawyer has to present testimony and evidence that is most relevant and most likely to help move the case to a positive outcome.

The ICC Rules set out the order of examination for prosecutors and the defense, but (nonbinding) developing ICC practice in the *Lubanga* trial has been that the victim representatives typically ask limited questions after the prosecution has concluded its examination of a witness, but before the defense has begun its cross-examination. (The ICC's legal framework, although it speaks on certain trial procedures, in fact provides no formal guidance on the manner of questioning.)[15] In each case, however, the victim representative must first file a request outlining the proposed questioning; such a request is ideally filed only *after* consultation with the prosecution. This customary procedure is, of course, consistent with the prevailing view that victim representatives augment the prosecutorial function.

In the *Bemba* Trial Chamber's November 18, 2010 ruling, the Chamber adopted a protocol submitted by the Victims and Witnesses Unit on witness familiarization aimed at assisting witnesses prior and during the trial.[16]

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14. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 14 (*quoting* ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE 1304 (2009)).

15. *See* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 13–14 (noting that although the parties have developed the custom of using the Romano Germanic terms "examination-in-chief," "cross-examination," and "re-examination," those terms do not appear in the Rules or Articles).

16. ICC Victims' Rights Legal Update 29 November 2011–21 February 2012, Victims' Rights Working Group, 3–4.

1. Purpose of Direct Examination: Telling the Story of the Case from the Victims' Perspective

1. The fundamental purpose of any witness examination, of course, is to elicit information. The direct examination is vitally important to both the victim representative and the Prosecutor (who, naturally, at all times has the burden of proof, and must prove each and every element of the charged crimes). The ICC regulations and rulings, as discussed above, provide for court-sanctioned direct and adverse examination of trial witnesses by victim representatives. The ability to examine witnesses in open court is, indeed, the most critical skill of a trial lawyer in any type of adversarial justice system. The testimony must be clear and credible. The evidence is essentially worthless, from an evidentiary standpoint, if the Chamber does not understand or believe it. Applications to question witnesses may be presented confidentially.[17] *Criteria for evaluating applications for victims' testimony include that the proffered testimony must be closely related to the issues the Chamber is considering, and must promise to bring to light substantial information relevant to the case.*

The basic format for conducting a direct examination is an interrogative dialogue with the witness. The direct examination tells the story of the case in the manner that will be most persuasive to the Chamber. It is, therefore, important at the outset for the victim representative to candidly evaluate the weaknesses of the testimony he intends to elicit and to be sure not to offer testimony that is, or will be perceived as, unnecessarily cumulative.

To prepare the direct examination properly, the victim representative must review the law and determine the elements necessary to establish the victim's case. Next, the victim representative must outline the key points sought to be elicited through the testimony of each witness. Such a general outline should provide the solid foundation necessary for additional testimony, or the introduction of exhibits or demonstrative exhibits.

Preparing such an outline permits the victim representative to coordinate with the Prosecutor so that the victim representative does not inadvertently undermine the Prosecutor's strategy without good reason. Although such coordination presently is not a common occurrence, and although

17. Office of the Public Counsel for Victims, Representing Victims Before the International Criminal Court, A Manual for Legal Representation (December 2012), 132.

the defense perceives the prosecutorial function as generally at odds with the victims' interests, there are indications that the victim representatives are beginning to discuss what questions they intend to ask and to otherwise informally collaborate with the prosecution. This is a very promising and important development that should be encouraged, since there is no profit to either the victim or the prosecution in maintaining the adversarial relationship that marked victim-prosecution interactions during the early years of the Court. If such cooperation requires the victim representative to, in some sense, pull back a bit in terms of the nature and extent of the victim's hoped-for presentation, then this in most cases will prove to be a worthwhile accommodation yielding benefits down the road. The prosecution, after all, must be victim-friendly, or at least victim-tolerant, if the victim is to get the most out of the proceedings.

During the trial, the victim representative should develop the direct examination through the use of conversational—but not overly informal—language. Victim representatives should prepare a separate file for each witness that includes the outline, copies of the exhibits to be used with the witness, the relevant interview record/statement(s), and any working notes relating to the witness. Mechanically reading questions to the witness should be avoided. The outline should be used as a reference, but not as a script. Assuming victim representatives are permitted to present witnesses and to conduct direct examinations, they must remember to guide the witnesses through the testimony so as not to waste the Chamber's and other participants' time.

The questions must be kept short, simple, and straightforward. If working through a translator, the victim representative must be sure to speak slowly and clearly. Obvious advice, perhaps, but even experienced lawyers will attest that it is difficult to conduct examinations through translators.

One method of developing an effective direct examination is to imagine oneself as an investigative reporter at the scene of a breaking story. The victim representative should wipe out his knowledge of the case and attempt to become educated on the issues through the witnesses on the stand. He should ask the types of questions a reporter or investigator would ask to become fully informed of what happened, bearing in mind the victim representative's more limited role of filling in the evidentiary gaps and watching over the clients' interests. This technique will allow the victim representative to view the case from the Chamber's perspective. The victim representative may know everything about the case, but the Chamber is hearing the full scope of the testimony for the first time at trial. And it is

the Chamber—not the Prosecutor—that needs to decide the lofty matter of guilt or innocence.

The Chamber's focus during direct examination should be on the witness, not on the lawyer. The majority of questions should be open-ended, allowing the witness to provide the answer. If the representative's question is difficult to formulate, he should return to the basics: "Who, what, why, when, where, and how?" The victim representative should stay focused on the testimony to be elicited,[18] listen to the answers, and at all times appear interested and engaged in the testimony the witness provides.

2. Structuring the Direct Examination

The simplest approach to structuring the direct examination is to do so chronologically, starting at the beginning of a series of events that the victim representative hopes to establish through a given witness. The victim representative can then walk the witness and the Chamber through the events leading up to the charged crimes and the arrest of the accused. This approach works particularly well for most "primary" witnesses, such as investigators.

Alternatively, the victim representative should consider starting in the middle of the story, emphasizing only a particular topic or piece of evidence. This works best for corroborating witnesses, evidence custodians, witnesses to the crime, criminal confederates, and the like.

In any event, the victim representative should remember to have his outline handy and to only cover those matters the Prosecutor either neglected or that are otherwise vital to the clients' interests. The victim representative should make sure that his arguments do not undermine the Prosecutor's position unless the Prosecutor, or the evidence, forces the victim representative's hand.

To the extent possible, the victim representative should open and close the direct examination with the strongest testimony. As noted previously, psychologists have established that people remember best what they hear

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18. Although some attorneys write out their questions, an alternative approach is to simply outline the discrete bits of information the victim representative wishes to elicit. This procedure keeps the questioning flexible and ensures that the victim representative gets the desired *information* from the witness (rather than simply assuring that the victim representative asks all of the *questions* he outlined).

first and last. The victim representative must anticipate and localize the most troubling, harmful, or difficult testimony in the middle of the presentation to diffuse his opposition's anticipated cross-examination. Additionally, for consistency's sake the witness order should match the order of events discussed in the opening.

Consider also issues of foundation. Even under the ICC's permissive evidentiary rules, certain facts must be in evidence before other testimony will be ruled admissible. Similarly, certain evidence must be introduced through an investigator or evidence custodian before another witness can comment on it. If possible, the victim representative should put strong witnesses in key spots, and position weaker witnesses between strong witnesses.

3. Conducting the Direct Examination

If a witness gives an unexpected answer, the victim representative should remain professional and calm, never showing frustration or annoyance. Although lawyers who gesticulate, nod when things are going their way, shake their heads when things are not, and raise their voices may feel they are passionately making a point, the reality is that they are more likely to be distracting the Chamber and the witness.

The victim representative should conduct the direct examination with certain guidelines in mind:

- Have prepared witness folders, complete with copies of exhibits and prior statements, ready.
- Think about the questions ahead of time. Write them out, if necessary, but do not read them in a monotone or mechanical voice.
- Ask questions in a natural, conversational tone, and be prepared to deviate from the "script" if the answers given are different than expected. That said, be sure not to go beyond the areas the Chamber has given permission to inquire into.
- Questions should be short, simple, and understandable to the witness and Chamber on both direct and cross-examination. Only ask one clear question at a time. On direct examination, the witness's inability to understand the questions will only exacerbate his insecurity and anxiety.
- Be mindful of areas that are consistent with the Prosecutor's theory of the case, but that the Prosecutor may have missed or intentionally left

out. If possible, coordinate such questioning with the Prosecutor prior to the examination.

- Make sure that witnesses answer key questions.
- Have at hand the order of proof chart that lists the elements and identifies what each witness is going to say in support of those elements. Do not ask questions of a witness who does not have testimony related to one of the elements of the crime, to the restitution issues, or to a defense.
- Never waste the Chamber's time. Always have enough witnesses ready to fill the day. Be organized. Pre-mark exhibits. Test all equipment ahead of time, and retest it every day.
- Sparingly use a technique called "looping" to emphasize particular parts of the testimony. That is, repeat all or part of a prior answer in the form of the next question. (For example, "You testified that you saw the accused on the outskirts of your village on the day of the attack. How were you able to recognize him?").
- Use transition statements to alert the Chamber of a shift to a new topic. (For example, "Now I would like to turn your attention to the morning of January 25.")
- Ask general leading questions to establish background (more on this later).
- Elicit enough detail to tell the story and rebut defense theories, but do not go overboard and create inconsistencies.
- Remember always that the Chamber may be hearing some of the information for the very first time, and, in some cases, a given panel will contain judges who are not particularly familiar with criminal litigation. Develop the testimony gradually and with sufficient detail to allow the Chamber time to fully digest it.
- Listen to the answers and remain flexible. Be prepared to change topics if the witness brings up a point deserving, or requiring, follow-up.
- Clarify points brought out by the prosecution, defense, or the Chamber, as needed.
- Control the witness within the parameters permitted by the Court. Interrupt the "runaway witness" who is getting ahead of himself (e.g., "Sir, let me just stop you for a moment to clarify a few points....").
- Protect the witness: anticipate cross-examination and organize the testimony to minimize vulnerabilities.
- Take great care to protect the trial record. Make sure the witness's answers are complete. Do not use shorthand. (For example, a given witness answers: "Yes, it was that one." Follow up with: "When you say 'that

one,' are you referring to the village outlined in red depicted in 'Aerial Photo 1'?"). Think about whether the record would make sense to someone reading the transcription. If the victim makes special references or uses gestures, have the witness explain "for the record" what he is doing or what he is referring to.

- Anticipate objections or evidentiary issues the opposing party may raise.
- Avoid duplicative testimony or other unnecessary testimony resulting in diminished returns.
- Sound and look interested at all times. The Chamber certainly will not listen to the testimony if the lawyer is not listening.
- Keep an eye on the Chamber. Gauge the Chamber's reactions and level of interest, and adjust accordingly.
- Do not rustle papers or move around unnecessarily.
- Keep the attention on the witness. Minimize the use of body language, as the Chamber may be composed of judges who, for cultural reasons, may be unfamiliar or uncomfortable with certain physical gestures.
- Observations and/or objections by legal representatives must be submitted four days before the witness is scheduled to testify; any replies to such observations must be filed at least two days before witness is scheduled to testify.[19]

The basic direct examination of an investigator might begin as follows:

- Please state your name.
- Where are you presently employed?
- How long have you been so employed?
- Are you assigned to investigate the activities that occurred on May 12, 2002, in a particular region?
- What area did that assignment cover?
- Where were you assigned on [date]?
- What did you do/what happened/whom did you interview?

Ask the investigator whether he can identify the accused in the courtroom and have him describe what the accused is wearing so that the official trial record is clear that the investigator has positively identified

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19. Situation in the Central African Republic, In the Case of The Prosecutor v. Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to questions witnesses* (September 9, 2011), at 13–14.

the accused. If the investigator provides a positive identification, ask the Chamber to verify on the record that the investigator identified the accused.

The direct examination approach should be varied depending on the subject matter the victim representative elicits. The following are examples.

a. Official Witnesses

Make strategic use of the investigator who can provide a good overview at the start of the proceedings, or who may serve as an excellent summary witness at the end. The investigator may need to testify twice (with the Chamber's permission) to address specific issues. Do not call every possible investigator, as this can lead to unnecessary inconsistencies in the testimony, to say nothing of delay, inefficiency, and distraction. Think about which witnesses will admit the bulk of the evidence, and identify those witnesses who can corroborate important points. Make sure to explain terms of art. Establish experience and expertise when necessary, and always pay attention to the "tone" of the testimony.

b. Third-Party Witnesses

Establish clearly a witness's ability to perceive the events supporting the charge. Anticipate, and deal with, any inconsistencies among witnesses. Highlight witnesses with no personal stake in the outcome, or witnesses who are reluctant to testify. If the witness is also a victim, deal up front with issues of anger and revenge.

c. Cooperating Witnesses

Disclose all information relating to a cooperating witness. Discuss the individual's criminal background, prior inconsistent statements, potential substance abuse, protected status, anger at the accused, potential benefits from cooperating, and other relevant areas worthy of probing. Bring out the fact that the witness is aware of the consequences of testifying falsely. Corroborate the testimony, whenever possible, with pictures, documents, additional testimony from other witnesses, and so forth.

Try to introduce any tape or video recordings of an earlier witness interview using a law enforcement official or investigator present when the tape or video was made to establish the tape or video's authenticity and probative value.

d. Expert Witnesses

The first objective in presenting expert evidence on direct examination is to establish for the Chamber the expert's experience and expertise in an easily understandable way. The victim representative should, when possible, use approved visual aids or common-sense analogies to explain complex or potentially confusing testimony. The victim representative must explain technical terms and listen for words the witness needs to define as the testimony progresses. The Chamber will likely provide the necessary cues.[20]

4. Leading Questions

Leading questions are based on actual facts in evidence, and the victim representative should take care to use them sparingly to guide the witness's narrative during direct examination. Leading questions can be based on previous statements of witnesses or the accused, or on facts that emerged during the investigation. The primary purpose of leading questions during an examination is to point out or rebut inconsistencies in prior statements, or between the witness's statement and other evidence, in a focused and time-saving manner that limits the witness's ability to avoid or deflect the question posed.

There is nothing inherently improper about using leading questions during direct examination in ICC proceedings, provided that the lawyer is not "testifying" through the questions, and that the Chamber has not registered any concerns. That said, at least one Trial Chamber has ruled that leading questions, unless unopposed, are generally inappropriate during the direct examination of a witness.[21] The Chamber, however, also noted that leading questions can be appropriate during cross-examination, where the objective is to raise pertinent questions concerning relevant issues, or to attack the witness's credibility.[22]

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20. In some cases, the Chamber may invite the victim representative to suggest questions to be asked of the Chamber's expert. *See* Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Instruction to the Court's Expert on Child Soldiers and Trauma* (February 6, 2009), at 5–7.

21. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 14.

22. *Id.*

The Trial Chamber in *Lubanga*, however, noted that victim representatives, "[a]s participants in the proceedings, rather than parties,...have *a unique and separate role* which calls for a *bespoke approach* to the manner in which they ask questions."[23] "[D]epending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims....[T]he Trial Chamber may authorize the victims' legal representative to question witnesses on subjects related to this issue...."[24] The Chamber reasoned that the victim representative's broad purpose in the proceedings is to assist the Court in its pursuit of the truth, and that victim representatives are, therefore, "less likely than the parties to need to resort to the more combative techniques of 'cross-examination.' "[25]

The Chamber's reasoning, however, is questionable, given (1) that victims in the main *do* come before the Court in an inherently adversarial posture, and (2) that cross-examination is just as—or perhaps even more—supportive of the "pursuit of truth" as is direct examination. On the last point, most experienced litigators would indeed agree with Northwestern University School of Law Dean John Henry Wigmore's famous observation that "cross examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[26]

In any event, the Chamber in the final analysis accorded victim representatives an (oddly vague) qualified right, on a case-by-case basis, to use leading questions during examinations:

> In certain circumstances...it may be fully consistent with the role of the victims' legal representative to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' legal representatives to use closed, leading or challenging

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23. *Id.* at 15 (emphasis added).

24. *Id.*

25. *Id.* at 17 ("In the judgment of the Trial Chamber, this link (as approved by the Appeals Chamber) between the questioning of witnesses by the victims participating in the proceedings and the power of the Chamber to determine the truth tends to support a presumption in favour of a neutral approach to questioning on behalf of victims.").

26. 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940), *quoted in California v. Green*, 399 U.S. 149, 158 (1970) (ruling that to deprive a defendant of the opportunity to cross-examine a witness is to deprive him of "the greatest legal engine ever invented for the discovery of truth").

questions, if approved by the Chamber. In conclusion, it follows from the object and purpose of questioning by the victims' legal representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.[27]

An example of the proper use of leading questions during cross-examination follows:

QUESTION: You said previously that at the time when the executions you witnessed occurred, between 12:00 and 13:00, you were at Restaurant Rron in Veternik for lunch, correct?

ANSWER: Yes.

QUESTION: You also testified on direct examination that you saw Mr. Rama on the same day at Dragodan at 12:55, correct?

ANSWER: I have always had a hard time with times and dates. When I said that I saw Mr. Rama at the same time I was at lunch at a different location, perhaps I was somewhere else.

QUESTION: Please answer the question: Did you testify that you saw Mr. Rama at Dragodan at 12:55? Yes or no?

ANSWER: Yes.

Conducting the examination in such a leading manner points out for the Chamber inconsistencies in the witness's testimony, thereby directly, and appropriately, challenging witness credibility.

Defense counsel can of course always ask additional questions on redirect examination, but the use of leading questions formulated on facts in evidence helps guide the witness's testimony and directs the Chamber's and witness's attention to the specific, and important, inconsistencies. This avoids redundancy and waste of time, while concurrently promoting the search for truth. However, prior to asking such leading questions, the

27. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims* (September 16, 2009), at 17.

victim representative must be sure to first orally articulate to the bench its reasons for why he should receive permission to do so.[28]

C. Introducing Exhibits

2. Inexperienced lawyers often spend too much time focusing on which witnesses to call, how to structure the presentation, and how to argue the case, while devoting insufficient energy to properly introducing into evidence exhibits, testimony, and tangible objects. If the Chamber fails to understand what makes a particular item of evidence probative, collecting and presenting the evidence was pointless. Therefore, the victim representative, once granted permission to participate, should follow the guidelines set forth below to ensure that the Chamber understands why the evidence or testimony the victim representative is presenting is in fact relevant and authentic, and why the Chamber should therefore admit it.[29] *Victims may participate anonymously, but only if they are not directly participating in the proceedings. More specifically, in Chui, the Appeals Chamber ruled that the need to disclose a victim's identity is contingent upon the victim's modality of participation in the proceedings.*[30]

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28. *Id.* at 18.

29. Consider, in this context, that the defense is also required to make certain disclosures. *See generally* Trial Chamber I, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06: *Prosecutor v. Thomas Lubanga Dyilo, Decision on the Defence Request for Leave to Appeal the "Decision on Disclosure by the Defence"* (May 8, 2008). The defense must, among other things:

> Furnish the Chamber, the prosecution and the participants [including, presumably, victims] three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules).
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> [I]f the defence decides prior to the commencement of the trial that a particular legal issue will be raised as regards admissibility, relevance or otherwise, pending any further order from the Chamber, as a matter of courtesy and to promote efficiency the Court and the other party and the participants should be informed.

30. Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12 A: *Decision on the Participation of Anonymous Victims in the Appeal and on the Maintenance of Deceased Victims on the List of Participating Victims* (September 23, 2013), at 17.

1. The ICC's General Rules of Admissibility

The ICC continues a trend, observed in other international tribunals and civil-law systems, of broadly favoring the admissibility of virtually all relevant evidence. Article 21(1) provides that the Rome Statute and the Rules of Procedure and Evidence (which are an instrument for the application of the Rome Statute; the Rules of Procedure and Evidence are, therefore, always subordinate to the Rome Statute) are the primary authorities on evidentiary and procedural issues, followed by principles and rules of law consistent with international law and internationally recognized norms and standards. Article 64(9), in turn, vests in the Trial Chamber the authority to rule on the admissibility of evidence.[31]

As it happens, the ICC's provisions have surprisingly little to say on the topic of admissibility and are largely modeled after the porous rules of evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which provide for the introduction of virtually all evidence.[32] Consistent with international tribunals since Nuremberg, the ICC thus follows permissive European civil-law rules on the admissibility of evidence, merely requiring the Court to "take[] 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...."[33]

To provide a partial answer for why, in contrast to common-law systems, international tribunals favor such expansive admissibility standards, readers must bear in mind that civil-law systems do not offer the accused the right to trial by a lay jury. Civil-law systems in fact operate on a built-in assumption that *professional* judges are most capable of filtering out evidence which is not relevant, not credible, and so forth. This reliance on the impartiality of professional judges is particularly evident in the context of

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31. *See also* Article 69(4) (Chamber to rule on admissibility of evidence, taking into account probative value and danger of unfair prejudice).

32. *See generally Prosecutor v. Delalic*, Case No. IT-96-21-T: *Decision on the Motion of Prosecution for Admissibility of Evidence* (January 19, 1998), at 16 ("The approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value...."); *see also Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), at 79 ("The Court is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of any kind....").

33. *See* Article 69(4).

hearsay (which is permissible in international tribunals). The ICC regulations, accordingly, give extraordinarily broad discretion to the Chamber on decisions relating to what relevance, probative value, and weight the Chamber accords a particular item of evidence or a particular witness's testimony.[34] Whether such broad discretion is equally appropriate in a forum where many of the judges are new to the bench, and in some cases indeed resemble laypersons when it comes to their lack of first-hand experience with criminal trials, is of course open to question.

The ICC's legal provisions, in any event, grant the Chamber broad power to reject requests to admit certain evidence not only on the grounds of irrelevance or repetition but also if the Chamber deems admission unnecessary because the matter is common knowledge.[35] The Chamber may further reject such requests if the evidence is "inappropriate," that is, if the Chamber determines the request to be motivated by a desire to cause delay or prejudice, or for other reasons provided by the Chamber.

The Chamber, interpreting the provisions, has described its "general approach to the admissibility of documents" as consisting of an analysis of (1) the relevance of the material which the victim representative seeks to admit, (2) whether the material has probative value, and (3) whether the

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34. *See generally* Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1402 (2001) ("The current Draft Rules of Evidence and Procedure of the proposed ICC reveal little in the way of indicators as to the models for admissibility of evidence.... Although the Rome Statute articulates strong norms for the rights of the accused, the wide-ranging discretion afforded judges in their decisions on the admissibility of evidence is worrisome. Without more specific provisions restricting the admission of hearsay evidence, the evidentiary bases upon which convictions are obtained run the risk of being unclear. In the absence of more specific evidentiary provisions, however, the developing jurisprudence at the ad hoc Tribunals is the proper starting point for drawing up rules of thumb for the enhancement of procedural protections in the future court."); *see also* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Request by Legal Representatives of Victims [] for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence* (September 22, 2009), at 11–12 ("The Chamber... will focus, first, on the *relevance* of the materials (viz. does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); second, on whether or not it has *probative value*; and third, on the *probative value of the evidence as against its prejudicial effect.*") (emphasis in original).

35. Consider also that the Chamber must support its evidentiary rulings with reasoned opinions, *see* Rule 64(2), and that evidence ruled inadmissible must be ignored, *see* Rule 64(3).

evidence's "[unfairly] prejudicial effect" outweighs its probative value.[36] The ICC provisions, however, lack nuanced rules governing admissibility. As a matter of sound trial practice, then, the victim representative should proceed on the bedrock understanding that, to be admissible, evidence must be:

1. relevant,
2. material, *and*
3. credible.[37]

Evidence is *relevant* if it reasonably tends to make the fact that it is offered to prove or disprove either more or less probable. To be relevant, a particular item of evidence need not make certain the fact for which it is offered. The evidence is only required to have *some tendency* to increase the likelihood of the fact for which the party is offering it.

Weighing the probative value of the evidence is a task for the Chamber, and although a particular piece of evidence, standing by itself, may only be minimally probative, the Chamber should admit it as relevant, unless the evidence is otherwise incompetent or inadmissible. For example, if the fact to be proved is that the accused inflicted grave bodily injuries on the victim while he and his cohorts detained the victim, testimony by a witness concerning the witness's presence during the act would clearly be relevant, as would be testimony by a witness who heard the victim and the accused exchange angry words while in a government building.

Evidence is *material* if the participant offers it to prove a fact that is at issue in the case. For example, if the Prosecutor offers the testimony of a witness to prove that it was warm on the day the accused burned a particular inhabited village to the ground, such evidence may be relevant to prove the fact for which it is offered. However, the fact that it was warm on that particularly day is, by itself, probably not material to any of the issues in the case (other than, perhaps, to corroborate the witness's presence on that day).

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36. Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Admission of Material from the "Bar Table"* (June 24, 2009), at 19; *see also* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Request by Legal Representatives of Victims [] for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence* (September 22, 2009), at 11–12.

37. The parties may also stipulate that certain evidence is admissible. *See* Rule 69.

Evidence is *credible* if it meets certain traditional requirements of reliability. Put another way, the factor used to determine whether evidence is credible is whether there are sufficient indicia that the testimony should be believed, that the evidence is what it purports to be, or that it is authentic. In broad terms, victims are authorized to introduce evidence that assists the Chamber in determining the truth.[38]

Note also that, under ICC procedures, the Chamber can rule inadmissible evidence obtained through an illegal search. Article 69(7), read in conjunction with Rule 63, represents a limited species of the common law's "exclusionary rule." More specifically, Article 69(7) provides that the Chamber must deem evidence inadmissible only if it was obtained through a violation of the Rome Statute or "internationally recognized human rights," and (1) the nature and extent of the violation places "substantial doubt on the reliability of the evidence," *or* (2) admitting the evidence would be "antithetical to and would seriously damage the integrity of the proceedings."

Attempting to provide some guidance as to what constitutes "serious damage to the integrity of the proceedings," the Court stated that "a balance must be achieved between the seriousness of the violation and the fairness of the trial as a whole"; furthermore, "only serious violations of human rights should lead to the exclusion of evidence."[39] The common law's exclusionary rule, itself premised on the questionable assumption that exclusion of evidence will deter law enforcement misconduct,[40] thus lives on, albeit in blunted form, at the ICC.

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38. *See also* Situation in the Central African Republic, In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims* (February 22, 2012), at 18.

39. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Admission of Material From the "Bar Table"* (June 24, 2009), at 11–26 (summarizing with approval the Pre-Trial Chamber's ruling concerning an unlawful search and seizure, and finding that, in the context of the specific violations at issue and having received the victim representatives views on the matter, exclusion of the evidence was not appropriate because "(i) the violation was not of a particularly grave kind; (ii) the impact of the violation on the integrity of the proceedings is lessened because the rights violated related to someone other than the accused; and (iii) the illegal acts were committed by the Congolese authorities, albeit in the presence of an investigator from the prosecution.").

40. For criticisms of this public policy foundation for the exclusionary rule, *see* Randy Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938–40 (1983) (arguing that the exclusionary rule unnecessarily bars reliable evidence and that the alternative of providing

2. Developing the Necessary Foundation to Admit Evidence

To establish the necessary foundation for the admission of evidence, the victim representative must, thus, make a preliminary showing that the evidence is relevant, material, and credible, and that it meets the other prerequisites for admissibility.[41] When an attorney raises an objection, arguing that a question, document, or thing lacks the proper foundation, the objector is asserting that a showing of competence, or of another prerequisite of admissibility, needs to be made.

The victim representative must ensure that the Prosecutor has introduced all useful and relevant documentary and other physical evidence, such as military rosters and maps of the areas where the victims claim they were harmed, as well as letters, diagrams, charts, and photographs. Regardless of the type of evidence, the victim representative, if permitted by the Chamber to supplement the evidence presented by the other participants, must lay the proper foundation before the Chamber will enter the documents into evidence. The Chamber must assure itself that the proposed evidence is relevant, material, and credible, and that it has the above-described probative value. The Chamber, in the context of such victim applications to participate in the proceedings, provided some critical guidance:

> The Trial Chamber has identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the participants, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness, and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory

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restitution to victims of police misconduct is, as a matter of public policy, preferable); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411, 422 (1971) (Burger, C.J., dissenting) (advocating as a remedy against the government compensation and restitution to persons whose Fourth Amendment rights were violated); *see also* Steven D. Clymer, *Are the Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 450 (2002) (arguing that the exclusionary rule insufficiently deters law enforcement conduct that is not directed at securing conviction).

41. *See generally* Article 69(4).

> rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.[42]

Based on the above, then, victim representatives should always abide by the following:

1. Submit discrete applications;
2. Provide notice to all participants;
3. Lay out the personal interests affected by the specific proceedings;
4. Comply with all disclosure obligations and protection orders;
5. Demonstrate to the Chamber the appropriateness of participation at each stage; *and*
6. Show that the victims' participation at all times complies with fair trial and due process guarantees.

The participants may raise issues of admissibility, as can the Chamber on its own motion (*sua sponte*). To the extent possible, victim representatives should deal with such issues prior to the main trial through carefully thought-out motions *in limine*.[43] This saves the Chamber time, and ensures a more careful examination of foreseeable evidentiary disputes. It also allows the victim representative to proceed to trial with a fuller understanding of the evidence the participants are likely to introduce.

The Chamber will reject applications to admit evidence it deems duplicative, superfluous, irrelevant, inappropriate, or unobtainable, or when the Chamber is of the opinion that permission is being sought solely for the

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42. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06: *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* (July 11, 2008), at 6–7, *quoted in* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on the Request by Legal Representatives of Victims [] for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence* (September 22, 2009), at 10.

43. *See* Rule 64(1) (providing that the Chamber may request that evidentiary issues be raised in writing).

purpose of delaying the proceedings. Once the Chamber rules a piece of evidence inadmissible, the Chamber may not rely on, or consider, that evidence in arriving at its verdict.

A victim representative who has developed a sound theory of the case, and has carefully examined the strengths and weaknesses of his client's position, will know exactly what evidence to introduce and will understand the value and impact each piece of evidence has on the parties' theories and proofs. To present evidence in the most persuasive and logical manner, and to avoid foundational problems, the victim representative should consider the following reliable default approaches.

a. Tape Recordings

The victim representative should ask the following types of questions to establish the foundation for tape recordings:

— Have you previously had the opportunity to hear the voice of Mr. Olorunfemi?
— Tell us, how are you familiar with Mr. Olorunfemi's voice?
— How many times have you heard his voice?
— Have you heard the recording marked for identification as Victim Exhibit A?
— Is that your signature on the recording, indicating that you have reviewed it?
— Did you recognize the voice on the recordings?
— To whom does the voice belong?
— "Your honors, we offer Victim Exhibit A into evidence."

b. Photographs

The victim representative should ask the following types of questions to establish the foundation for photographs:

— I am showing you what has been marked for identification as Victim Exhibit A.
— Do you recognize what this photograph depicts?
— Are you familiar with the scene [town, person, etc.] portrayed in this photograph?

— How are you familiar with the scene portrayed in the photograph?
— Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on [date in question]?
— "Your honors, we offer Victim Exhibit A into evidence."

c. Business Records

The victim representative should ask the following types of questions to establish the foundation for business records:

— Are you familiar with Victim Exhibit A [business records]?
— Can you identify these documents?
— Were these documents prepared by you or your colleagues in the ordinary scope of the business of your organization?
— Where are these documents stored after they are prepared?
— Where were these documents retrieved from?
— Is it a regular part of your business to keep and maintain records of this type?
— Are these documents of the type that would be kept under your custody or control?
— Based on your previous testimony, is the information contained in the documents correct, and was it correct on [the date of the document's creation]?
— "Your honors, we offer Victim Exhibit A into evidence."

d. Signatures

The victim representative should ask the following types of questions to establish the foundation for signatures:

— Are you familiar with the signature of Mr. Omosanya (the person who signed letter or decree)?
— How are you familiar with Mr. Omosanya's signature?
— I am showing you Victim Exhibit A.
— Do you recognize the signature at the bottom of Victim Exhibit A? Whose signature is it?
— "Your honors, we offer Victim Exhibit A into evidence."

e. Handwritten Documents

The victim representative should ask the following types of questions to establish the foundation for handwritten documents:

— Are you familiar with the handwriting of Mr. Mallon?
— How are you familiar with Mr. Mallon's handwriting?
— I am showing you Victim Exhibit A.
— Do you recognize the handwriting in this document?
— To whom does it belong?
— "Your honors, we offer Victim Exhibit A into evidence."

f. Diagrams and Demonstrative Exhibits

Part of the prerequisite foundation for the introduction of diagrams and demonstrative exhibits ("visual aids") is a showing that the exhibits will assist the witness in explaining his testimony. The content of such exhibits is, therefore, limited: "[A]ny visual aids to be used by a party or participant shall explain, and be restricted to, previously disclosed evidence."[44]

Visual aids enhance the probative value of the testimony. The victim representative must, however, anticipate relevancy objections, founded on arguments that the exhibit raises unnecessary collateral issues, wastes time, or is unduly prejudicial. The Chamber will address these issues, the resolution of which requires reciprocal disclosure of such exhibits seven days in advance of their use. To allow the Chamber time to deal with such issues, participants must, as noted above, make application for the use of such visual aids no later than fourteen days before their intended use at trial.[45]

In ruling on the use of such visual aids, the Chamber will employ the classic relevancy-balancing test, meaning the use of such aids is, at bottom, fully discretionary with the Chamber. That said, most judges will likely be inclined to permit their use as aids to understanding witness testimony.

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44. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06: *Public Decision on the Use of Visual Aids* (December 2, 2008), at 7.

45. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Public Decision on the Use of Visual Aids* (December 2, 2008). One would think that the Chamber would want reciprocal exchange of such visual aids *prior* to the consideration of applications concerning their use; such a practical requirement, however, to date has not been announced.

Victim representatives should ask the following types of questions to establish the foundation for diagrams and other demonstrative exhibits:

— Are you familiar with the warehouses located near the government buildings in your hometown?
— How are you familiar with this area?
— I am handing you what has been marked as Victim Exhibit A.
— Based on your familiarity with the area, can you tell us whether the scene depicted in Victim Exhibit A fairly and accurately represents the area as you recall it on the date in question?
— "Your honors, we offer Victim Exhibit A into evidence."

When "stuck" attempting to introduce evidence at trial, the victim representative should recall the basic steps to establishing an evidentiary foundation:

— Establish the witness's familiarity with the document the victim representative is seeking to admit into evidence.
— Have the witness authenticate the exhibit.
— Establish that the exhibit is what it purports to be.
— Demonstrate the exhibit's relevance to the case.
— Move the exhibit into evidence.

Once the victim representative has accomplished these steps, it is likely that he has laid the proper foundation for the Chamber to admit the exhibit into evidence. The victim representative should then simply offer it as the next exhibit in the case and proceed on the assumption that the Chamber will accept this foundation as adequate.

It is important to distinguish between presentation of evidence by victims, on the one hand, and the expression of the victims' views and concerns in person, on the other. In *Bemba*, the Chamber ruled that expressing a victims' views and concerns is the equivalent of presenting submissions, but ruled that such statements will not form part of the formal trial evidence. For participating victims to contribute to the evidence in the trial, they are required to present evidence under oath from the witness stand.

In *Bemba*, Trial Chamber III held that, if a victim wishes to present its views and concerns, or if the legal representative wishes to present evidence on behalf of his clients, then the victim/legal representative must file a written

application seeking leave from the Chamber. This written application must include the:

1. nature of the evidence;
2. manner in which it will be presented;
3. anticipated time required for presentation of evidence;
4. manner in which the personal interests of participating victims will be impacted (that is, the relevance of the evidence); and
5. legal representative's intent to apply for protective measures.

The Chamber will authorize a victim's testimony if it is likely to make a "genuine contribution to the ascertainment of the truth."[46]

Judge Sylvia Steiner noted her belief that allowing victims to present evidence should be measured in relation to the avoidance to "undue delays."[47] Generally, victim participation is supposed to provide victims with an independent voice consistent with the intention to ensure justice for victims. As of December 2013, the Court has called ten victims to testify based on petitions by their legal representative.[48]

D. Cross-Examination

Rule 140 governs cross-examination, which at the ICC is sometimes termed "adverse examination."[49] Cross-examination is a vital skill in a victim representative's arsenal and is the trial skill that generally is most difficult to perfect (and is virtually impossible to conduct skillfully without extensive

46. Situation in the Central African Republic In the Case of The Prosecutor v. Jean- Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Order regarding Applications by Victims to Present their Views and Concerns or Present Evidence* (November 21, 2011), at 3. *See also* THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS, REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT, A MANUAL FOR LEGAL REPRESENTATIVES (December 2012), at 124.

47. Situation in the Central African Republic In the Case of The Prosecutor v. Jean- Pierre Bemba Gombo, Case No. ICC-01/05-01/08: *Partly Dissenting Opinion of Judge Sylvia Steiner of the Decision on the Supplemented Applications by the Legal Representative of Victims to Present Evidence and the Views and Concerns of Victims*, ICC-01/05-01/08-2138 (February 23, 2012), at 17.

48. MOFFETT, *supra* note 8, 105–106.

49. Rule 140 sets out, *inter alia*, the right to examine a witness on "relevant matters related to the witness' testimony and its reliability, the credibility of the witness and other relevant matters." Rule 140(2)(b). However, the examination must be performed in a

in-court experience). As with direct examination, the goal of effective cross-examination is to provide factual support for the theory of the case advanced by the participant conducting the cross-examination.

Effective cross-examination can enhance the strength of the victims' case in three general ways:

1. It can reveal factual support for the theory of the case that would otherwise not be available because, for example, the witness refused to speak to investigators during the investigative phase, or the direct examination avoided asking certain specific follow-up questions;

2. It can bring out information supportive of the evidence brought out on direct examination of another witness by, for example, demonstrating that the other witness's recollection on certain important facts is consistent with that of the person being cross-examined; or

3. It can demonstrate that the witness being cross-examined by the victim representative should not be believed because, for example, he has a faulty memory, or is biased against the victims.

The manner in which the victim representative structures and conducts the cross-examination will, therefore, depend in large part on the type of evidence the victim representative wants to elicit, as well as on the extent to which the Chamber permits victim representative involvement.

1. Cross-Examining on Prior Inconsistent Statements

As previously touched on, one of the most effective ways to impeach a witness at trial is through the use of prior inconsistent statements. Practical experience at the ICTR and ICTY has taught, however, that many perceived inconsistencies in statements are the product of earlier inadequate questioning, rather than the result of faulty, or intentionally false, memory. For example, in many cases a prior statement will be taken in the context of the general investigation of crimes that may have taken place within the situation (rather than with an eye toward a specific case). As a result, the investigator in the field may, through no fault of his own, fail to ask the

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respectful and courteous manner. *See* Code of Professional Conduct Article 7; *see also* Rule 88(5) ("[A] Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation....").

"right" questions because he does not yet know how the case will develop and lacks the benefit of understanding the ultimate prosecution strategy. The predictable result is that statements may appear inconsistent, or lacking answers to pertinent questions, because the investigator/questioner, without the benefit of hindsight, failed to ask certain key questions.

In this regard, the Office of the Prosecutor of late has wisely abandoned its earlier practice of sending relatively inexperienced investigators and prosecutors into the field with a largely generic list of questions which they simply read to potential witnesses and victims. Under this routine, follow-up questions were understandably rare. The better practice is to have the Senior Trial Attorneys thoroughly discuss with the team going into the field what they intend to get out of the interviews, what follow-up questions may be appropriate, and how each of the planned interviews fits within the overall prosecutorial strategy.[50] Answering these questions prior to in-the-field meetings with potential witnesses will focus the team's thinking and maximize the benefits of these resource-intensive trips.

In addition to the inherent difficulty of questioning potential witnesses during early stages of the investigation, such meetings are typically also fraught with language, and timing, challenges. The language problems are relatively obvious, as most witnesses will have to rely on interpreters relaying the question in the exact way it was asked, and then providing back the answer in the exact way it was given. Of course, the same problem arises if the original statement requires translation. Given limited resources and the difficult circumstances present in post-conflict areas, there also may be a shortage of qualified interpreters/translators. This will only compound the pre-existing challenge of interviewing witnesses who speak a different language and of having materials properly translated.

In terms of "timing" problems, the rather plodding nature of the typical ICC investigation will frequently result in parties taking statements many years after the events in question occurred. The accuracy of such statements naturally suffers. Conversely, when statements are taken closer in time to the events, the time lag between the initial questioning and when the witness actual testifies in court will also encompass many years. During such extended time periods, memories will fade, recollections will change, and witnesses can be expected to provide answers that will differ to varying degrees from what they said shortly after the events. These challenges,

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50. This process, of course, should also be followed by victim representatives conducting field interviews.

well known to trial lawyers, are exacerbated by the ICC's general prohibition against pre-trial witness preparation/"proofing," discussed above.[51]

Considering these complicating factors, inconsistencies between a witness's statement and the witness's trial testimony are to be expected. This is particularly so if, as often happens, inexperienced NGO employees or volunteers, who are often the first on the ground, prepare or summarize victim statements, or assist victims in completing their applications to participate at ICC proceedings, without first ensuring that all of the information supplied by the putative victim is correct, both in form and in substance. Although the participant offering the witness's testimony will, of course, argue that these inconsistencies are a product of the just-discussed time lag, and while the Chamber may have some sympathy with this explanation, these inconsistencies may well present an opportunity for the opposing party to place doubt on the witness's veracity and memory.

When a witness makes a statement at trial that is inconsistent with a prior statement, the victim representative must first highlight the question the witness answered differently. The victim representative must make sure the trial testimony he seeks to impeach is *clearly* inconsistent with the witness's prior statement. Victim representatives should be sure not to place undue emphasis on inconsistencies that are minor, or that can be easily explained. To this end, many experienced trial lawyers find it beneficial to create a chart that sets out the key prior testimony or statements of each witness. This allows the victim representative to easily compare such prior statements with what the particular witness says at trial.

The victim representative should ask the following types of questions:

— Do you remember having given a statement to [name of person or organization] regarding how the incident occurred?
— Who was present when you gave your statement?
— When did you give your statement?
— Where did you give your statement?
— What were the circumstances under which you gave the statement?
— Did you give that statement freely and voluntarily?
— I show you what has been marked as Victim Exhibit A. Is this a copy of your earlier statement?

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51. *See generally* Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No ICC-01/04-01/06: *Decision on Practices of Witness Familiarization and Witness Proofing* (November 8, 2006), at 15-16 (Pre-Trial Chamber's rejection of the prosecution's assertion that witness-proofing is a "widely accepted practice in international criminal law").

[The victim representative should then read the relevant portion of the statement directly contradicting the in-court testimony of the witness, or, better yet, ask the witness to read the statement.]

The victim representative must undertake impeachment through the use of documented inconsistent statements in an organized fashion, conducting such impeachment smoothly and directly. The relevant pages and sections of the statement or letter at issue should be marked and highlighted beforehand so that the victim representative does not fumble through pages or lose control of the witness. Seeing a lawyer properly impeach a witness through the use of inconsistent statements is impressive and will certainly draw the Chamber's attention. Such cross-examination is a relatively straightforward procedure to learn and, once mastered, will become an invaluable tool.

2. Cross-Examining Expert Witnesses

At trial, the presentation and cross-examination of expert witnesses is likely to be extremely challenging.[52] To cross-examine an expert witness effectively, the victim representative must first understand fully the subject matter testified on by the expert. The victim representative should seriously consider cross-examining any expert whose opinion undermines the victim representative's case. On the other hand, it is likely that forensic or medical experts put on by the Prosecutor to demonstrate how the accused committed the alleged crimes will testify in a manner supportive of the victims' case. Of course, victim representatives should also consult with their own experts to frame possible cross-examination questions, since such victims' experts will often be in the best position to critique the findings or testimony offered by the other side's expert.[53]

If the expert testimony seeks to negate the criminal culpability of the accused, the victim representative should develop cross-examination questions for that witness in case the prosecution team does not cover all of the necessary bases. The Chamber may, in fact, view the failure to cross-examine the expert as signaling acceptance of the expert's opinion.

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52. The calling of experts is provided by Article 48(4), Article 93(2), Rule 91(3)(b), Rule 91(4), and Rule 97(2). Whether the Chamber will permit victim representatives to call or examine experts is a matter decided on a case-by-case basis, however.

53. Victims likewise have the right to offer such reports in order to more fully explain the context and history of the charges against the accused. *See generally* Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga

Further, the victim representative should consider, if necessary, identifying and calling his own expert to counter such testimony.

The victim representative who cross-examines an expert witness needs to be very careful and well-prepared. Effective cross-examination of any expert is challenging, because the expert is likely more knowledgeable on the substantive subject matter. Nevertheless, the successful cross-examination of an expert witness is possible by narrowly focusing on the limited qualifications of the expert, or on the weaknesses of the expert's testimony, and exposing them to the Chamber.

In preparing to cross-examine an expert witness, the victim representative as an initial matter must read and summarize the reports or other prior statements of the expert. There will likely be many helpful items in these reports or prior statements or testimony. The victim representative must be thoroughly prepped on the subject area that will form the basis of the cross-examination, though it is in most cases not advisable to directly challenge an expert on an area squarely within his expertise. Of course, if the expert's testimony deviates from accepted norms, the victim representative may be able to expose the expert as a hired mouthpiece, or as an otherwise biased or unreliable advocate.

Additionally, the victim representative must research whether the expert has written any articles, books, or editorials that may contradict his opinion in the case or demonstrate bias. (Has the expert, for example, authored an opinion piece arguing that there should be no such thing as an atrocity crime, or that the ICC's prosecutions are motivated by political considerations?) Next, the victim representative should determine what schools the expert graduated from, and see if any of the professors who taught the expert have different published opinions the victim representative may want to introduce and compare to the expert's opinion at trial.

An effective way to begin such a cross-examination is to subtly place into doubt the expert witness's credibility by exposing the expert's potential biases. The expert witness may be biased because of political motivations, money, or a relationship with the accused. The victim representative

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Dyilo, Case No. ICC-01/04-01/06: *Decision on the Request by Legal Representatives of Victims [] for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence* (September 22, 2009), at 11–18 (discussing inadmissibility of an expert report concerning economic exploitation, and the financing of the conflict in the DRC and in Ituri, proffered by the victim representatives).

can effectively bring such biases to the Chamber's attention by using succinct and precise (leading) questions.

Once the victim representative explores the expert's bias, he can attack the expert's qualifications. No matter how qualified an expert witness may be in a given field, there are probably levels of achievement or training that the expert has not reached. For example, if the expert witness only has a master's degree, the victim representative can point out that he lacks a Ph.D. If applicable, the victim representative can point out that the expert witness has not published any articles on the subject area, or has not held any relevant teaching positions in colleges or universities. Obviously, it is necessary to discover this information before the cross-examination. One way to learn this information is to obtain the expert's *curriculum vitae* or detailed résumé in advance of trial and to conduct an online review focusing on the expert's background.

Another means of cross-examining an adverse expert witness is to turn the expert into the victim representative's witness. If possible, the victim representative should have the opposing expert testify as to general principles that are consistent with the victims' theory of the case. If the expert is honest, and if the questions asked are basic questions that he cannot deny, there is a good chance the expert will have to admit the facts suggested, or risk appearing less than credible.

Although there are many ways to cross-examine an opposing expert, the victim representative at trial should choose only two or three areas of attack. Without such limitations, the cross-examination may become too lengthy or overly confused, and may annoy the Chamber. Moreover, the longer an opposing expert witness is on the stand, the greater the likelihood that the expert will hurt the victims' and/or the prosecution's case. Therefore, when cross-examining an opposing expert, the victim representative should be prepared, be thorough, address two or three areas, expose the expert's weak points, and then, following the less-is-more principle, politely thank the expert, and sit down.

E. Re-Direct Examination

Following cross-examination, the counsel who called the witness may conduct re-direct examination (sometimes referred to by ICC attorneys as "reexamination") to clarify for the Chamber certain testimony the witness provided during the witness's cross-examination. To keep the Chamber focused on relevant

information, victim representatives must strive to limit re-direct examination to only those issues or facts, brought out in the cross-examination, requiring additional explanation. It is sometimes more beneficial not to conduct any re-direct examination of a particular witness. Victim representatives should, therefore, pay close attention to what the witness said during the cross-examination so that they can make a calculated decision as to whether it is necessary or advisable to conduct re-direct examination.

If another participant during cross-examination has successfully attacked the credibility or reputation for truthfulness of the witness, the lawyer whose witness has been damaged may wish to "save" or "rehabilitate" the witness. The lawyer's questions should be limited to the weaknesses in the testimony exposed during the cross-examination and must be designed to enhance the witness's truth-telling appearance in the eyes of the Chamber. If the victim representative's witness is having problems answering questions, or is becoming fatigued or agitated, follow-up questions may only make matters worse. Sometimes it is best to say, "Thank you, nothing further of this witness, your honors."

The following are some parting thoughts on redirect examination:

- The victim representative should be brief and to the point.
- The victim representative should use transitions to alert the Chamber to the specific points being clarified.
- Generally, avoid new topic areas.
- Re-direct examination to rehabilitate a witness is not the time to rehash direct examination testimony.
- The victim representative should *never* ask a question without first having a reasonably good sense of what the answer will be.

The victim representative must bear in mind that it is not routine for the Chamber to permit the victim representative to present witnesses. The victim representative must, therefore, take care not to abuse the privilege by presenting cumulative or irrelevant testimony, lest the Chamber deny the privilege the next time, and the victim representative lose credibility.

PART XIV

Summation and Sentencing

A. Summation: Capturing the Whole Story

The summation, known in common-law countries as the "closing argument," is a vital part of trial, and, as such, the victim representative must give it considerable thought. The entire trial, in a sense, leads up to this point.[1] The victim representative must seek permission to give a summation; the summation must be simple and precise and, to the extent possible, should buttress the summation of the prosecution, while adding those factual and legal arguments of particular importance to the victims. During the summation, the victim representative brings all evidentiary pieces together, presenting them in a strong, robust, and persuasive manner. The victim representative, after all, has the task of bringing into sharp focus all points that help prove the victims' theory of the case. Some of the judges may not have extensive experience in criminal trials, so the victim representative must be particularly thorough, going through the elements of the charges one by one, and explaining how the evidence adduced at trial supports each of the charging elements.

The goal with any summation is, of course, to highlight and tie together the evidence introduced at trial that best and most directly supports the advocate's position. The victim representative's professionalism and control, command of the facts, and ability to convey them without hyperbole or exaggeration will keep the Chamber's attention and leave the adjudicators with a favorable parting impression.

The Chamber, consistent with civil practice, will likely require victim representatives to furnish the judges with written outlines in advance of the summation.[2] To what extent a participant can remain flexible and

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1. *See* Rule 141(2) (providing that the defense always has right to speak last).

2. At present, this requirement has formally been applied to the Prosecutor and the defense, but all indications are that victims will have to comply as well. *See* Situation in

alter his summation will likely depend on the proclivities of the judges and, therefore, be a matter for case-by-case determination. One would hope, however, that the Chamber will accord some latitude to the participants, including to the victim representatives.[3]

The victim representative should consider developing a demonstrative chart that lists the elements of the particular charged crimes relevant to the victims, as well as the key points in favor of a restitution award (if the proceedings are not bifurcated). The below points represent a starting outline of the essential elements the victim representative should seek to cover during the summation:

- Think about, prepare, and modify the summation before trial, leaving sufficient flexibility to meet litigation exigencies; avoid unnecessarily impinging on the prosecution's function. The summation will represent the victims' theory of the case. The earlier the victim representative begins to give thought to the summation, the sounder the trial strategy and analysis of the evidence is likely to be.
- The victim representative must remember that judges also have limited attention spans (and patience) and that some of them may have little in-court experience. The victim representative should, therefore, not read in a monotonous voice from a sheet of paper. By the time of the summation, the victim representative must know the facts well enough that only a rough outline is necessary to keep the presentation dynamic, responsive, and persuasive. This approach is more likely to keep the Chamber interested and engaged.
- The summation must not stray from the key issues, or from the actual evidence presented during the trial, and must highlight the most important evidence from the victims' perspective.

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the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on Opening and Closing Statements* (May 22, 2008) (Trial Chamber requiring that the Prosecutor and defense lawyers provide written outlines of opening statements seven days in advance).

3. Situation in the Democratic Republic of the Congo In the Case of The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06: *Decision on Opening and Closing Statements* (May 22, 2008) (persuasive dissent by Judge René Blattmann criticizing the majority decision as undermining the search for truth because it eliminates the critical element of spontaneity).

As a matter of *format*, the victim representative should:

- Formally address the Chamber and the other participants.
- Inform the Chamber of the victims' objectives, summarize the facts, and relate these facts to the issues in the case (regardless of whether the victim representative is at the guilt phase, or at the sentencing/reparations phase of the proceedings).
- Deliver the summation in a short, concise, and appropriately limited fashion.
- Inform the Chamber of what the victims consider a just outcome.

As a matter of *delivery*, the victim representative must:

- Avoid excessive or dramatic affectations or body language.
- Not engage in personal attacks or other sorts of *ad hominems*.
- Not tell the Chamber about his personal beliefs, but instead write, act, and speak with appropriate conviction on the victims' behalf.
- Not repeat in chronological order the testimony of each witness. The Chamber, after all, has heard the witnesses. The victim representative must bind the facts elicited during the direct and cross-examination into a cohesive and persuasive whole.

℅ B. Sentencing: Imposition of Justice

If the proceedings result in a conviction, whether through a trial or plea, the Trial Chamber, pursuant to Article 78(1), must determine an appropriate sentence.

1. Available Categories of Punishment: Imprisonment, Fines, Forfeiture, and Reparations

The sentence can include a term of imprisonment,[4] a fine,[5] or the forfeiture of proceeds, property, or assets the accused derived, directly or indirectly,

4. *See* Article 77(1).

5. *See* Article 77(2)(a).

from his crime.[6] In addition, the Chamber has the option of imposing reparations, which the Rome Statute defines as encompassing "restitution, compensation, and rehabilitation."[7] In terms of fixing a specific sentence, the Rome Statute provides:

> To determine an appropriate sentence, the Chamber must take into account both mitigating and aggravating circumstances.[8] The Court as a general matter may not impose a term of imprisonment greater than 30 years.[9] However, in cases involving extremely grave crimes or extremely aggravated circumstances, as evidenced by the existence of one or more of the enumerated aggravating circumstances, the Court may impose a life sentence.[10]

Mitigating circumstances include, but are not limited to, criminal culpability falling short of grounds for exclusion of criminal responsibility (such as an accused's substantially diminished mental capacity or duress), as well as the convicted person's post-crime conduct (such as an accused's efforts to compensate victims and cooperate with the Court).[11] Aggravating circumstances, on the other hand, include prior criminal convictions, abuse of power or official capacity, vulnerability of the victim(s), and notable cruelty or particular reprehensibility motivating the commission of the crime.[12]

Whether the Chamber holds a separate sentencing hearing to develop additional evidence bearing on the various aggravating and mitigating sentencing factors depends, in part, on whether either the prosecution or the accused requests such a hearing (in which case the Chamber is required to convene it). The Chamber, however, is also empowered to schedule such a hearing *sua sponte*.[13]

In light of the seriousness of the cases the ICC will hear, and the range of criminal matters of over which the ICC has jurisdiction, it is likely that most, if not all, aggravating factors will pertain in virtually every case. It

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6. *See* Article 77(2)(b).
7. Article 75(1).
8. *See* Rule 145; *see also* Article 78.
9. *See* Article 77(1)(a).
10. *See* Article 77(1)(b); *see also* Rule 145(3).
11. Rule 145(2)(a).
12. Rule 145(2)(b).
13. *See* Article 76(2).

is indeed difficult to review the ICC's Elements of Crimes and identify any offenses that, by their very nature, do not involve either military, government, or militia leaders abusing their power or official capacity, harming victims who are particularly vulnerable, or committing offenses notably cruel or motivated by reprehensible reasons. In most cases, then, the Prosecutor will have ample justification for requesting the highest available sentence, and the victim representative will have little reason to take a divergent position in this regard.

However, Article 77, which also governs sentencing, inexplicably is worded permissively, providing that "the Court *may* impose one of the following penalties [namely, imprisonment, fine, forfeiture, or restitution] on a person convicted of a crime...."[14] Thus, in theory, a person convicted of atrocity crimes under the ICC's present provisions can escape even a fine, regardless of the fact that the ICC's offenses are drafted with the purpose of punishing crimes so gross that they are condemned by the world as being outside the boundaries of civilized life.

Considering the serious nature of the available offenses, the rigorous screening process undertaken by the prosecution prior to initiating an investigation, bringing charges, and obtaining a conviction, and the considerable resources involved in bringing a case to trial and achieving a conviction, the Assembly of States Parties should consider modifying the statutory language to require mandatory minimum sentences in the case of conviction, or at least in cases involving Rule 145(2)(b) aggravating factors. Such mandatory minimum sentences are consistent with the Rome Statute Preamble's promise to punish the "most serious crimes of concern to the international community as a whole."

And, in the context of sentencing, the Assembly of States Parties should also consider amending the Rules to provide for a system of sentencing guidelines that give the judges some guidance as to what types of cases and conduct deserve what levels of punishment and condemnation. Such sentencing guidelines would also provide the parties some semblance of sentencing predictability and offer the opportunity for a transparent discussion of what makes (or should make) some crimes "worse" than others. Beyond the basic Rule 145 aggravating factors (prior convictions, abuse of

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14. Emphasis added. Article 75 is also worded permissively, stating that the Chamber "may" order restitution. It is, therefore, the victim representative's responsibility to demonstrate to the Chamber why the Chamber should exercise its discretion in favor of a particular reparations award. Any reparations award can be either collected directly from the accused or awarded through the Trust Fund for Victims.

power, defenseless victims, etc.), characteristics of the crime of conviction, such as the number of victims, the number of perpetrators under the convicted person's control, use of minors to commit the crimes, and evidence of attempts to tamper with witnesses, or otherwise obstruct justice in the proceedings, should be enumerated, along with any mitigating factors and should result in explicit increases or decreases in the guideline sentence. Judges, of course, could remain free to deviate above or below a particular guideline sentence, but, in all cases, the judges should be required to address all aggravating and mitigating factors and to explain their sentencing decisions in a written ruling.

2. Reparations

Of particular relevance to victims, the Chamber may impose reparations and issue forfeiture orders.[15] Article 75 provides:

> 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. Individual and collective reparations are not mutually exclusive and may be awarded concurrently. Collective reparations should award the harm the victims suffered.[16]
> 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. Other types of reparations such as those with a symbolic or transformative value may also be appropriate.[17]

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15. *See* Rule 146 (governing imposition of fines) and Rule 147 (governing orders of forfeiture).

16. REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT, A MANUAL FOR LEGAL REPRESENTATIVES. THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS (December 2012), 297.

17. Ibid.

3. Before making an order under this article, the Court *may* invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court *may*, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 [governing enforcement of fines and forfeiture measures] were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.[18]

Article 75, therefore, explicitly allows victims to participate at the reparations phase, placing victims at the center of the proceedings. Reparations may be granted to direct, indirect victims and/or legal entities.[19] Reparations should be proportionate and adequate to the harm/injury/loss/damages to the victim(s).[20] In *Lubanga*, the Chamber expressed the view that reparations should, "when possible," aim to create reconciliation between the victims of the crime, the convicted person, and the affected communities.[21]

3. Bifurcating the Guilt Phase from the Reparations Phase

In the earliest days of the ICC's existence, victim representatives thought it a good strategy to request permission to present reparations and sentencing-related evidence at the same time participants introduced evidence of an accused's guilt. The thinking behind this combined approach, contemplated by Regulation of the Court 56,[22] was that it would maximize the

18. Emphasis added.

19. *See* Rule 85 and Rule 85(b).

20. REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, 299.

21. Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2904: *Decision Establishing the Principles and Procedures to Be Applied to Reparations* (August 7, 2012).

22. Regulation 56 provides that "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 [the provisions dealing with reparations for victims], at the same time as for the purposes of trial."

victims' chance to introduce evidence and participate at trial, since victims have the most obvious stake in determining what, if any, reparations are or should be awarded. Moreover, given the limited resources available to victims, the victim representatives reasoned that combining these phases of the proceedings would save time and money. This was a bit of a gamble, however, since the victim representatives did not yet know how the Chamber would treat their requests for participation. Combining the proceedings, moreover, had the potential of leading to confusion, thereby generating additional resistance to victim participation.

Although the Chamber has yet to settle on a uniform approach, bifurcating the proceedings allows a cleaner logical and evidentiary separation between the guilt phase and the sentencing/reparations phase. Such bifurcation focuses the proceedings and prevents extraneous information relating to physical, pecuniary, and moral harm suffered by the victims from potentially tainting the fairness of the accused's trial. As a matter of best practices, therefore, the Chamber as a general rule should bifurcate the trial into a guilt phase, with the Chamber, in the event of a conviction, moving on to a sentencing/reparations/forfeiture phase.

Well in advance of the Chamber's verdict, then, the victim representative should move the Court to bifurcate the proceedings. The accused is likely to agree to, and join in, such a motion. Assuming the Chamber grants the request for bifurcation, following a conviction the victim representatives must be ready to immediately switch hats and proceed to the next phase. The convicted person, of course, retains the right to appeal both the conviction, as well as the sentence (including any reparations orders).[23]

4. Preparing the Victims' Sentencing Memorandum

Considering the central role victims play during sentencing proceedings, the different types of sentences the Chamber has at its disposal (namely, imprisonment, fines, forfeiture, and reparations), the various identified mitigating and aggravating sentencing factors, the breadth of information the Chamber may consider in fixing the sentence, and the potential vastness of facts relevant to the Chamber's determination of an appropriate sentence, victim representatives should in all cases prepare a sentencing

23. *See generally* Rules 149–61.

memorandum for submission to the Chamber. The sentencing memorandum, made part of the Court record, and provided to the other parties with sufficient notice, should contain a concise summary of those facts the victim representative considers most relevant to the above-described sentencing factors. The sentencing memorandum should additionally explain clearly how the accused's criminal conduct resulted in direct harm to the victims' interests and carefully lay out the nature and impact of that harm. Moreover, the sentencing memorandum should impress on the Chamber how these facts serve to aggravate the accused's case, and why they call out for a particular sentence, fine, forfeiture, or reparations award.

A sensible way to organize such a sentencing memorandum is to include the following sections: an introduction; a factual summary of the charges, and the established (as well as the disputed) criminal conduct resulting in the conviction; a summary of the harm suffered by the victim, and the linkage between that harm and the convicted person's criminal conduct; a victim impact statement; a discussion of reparations, fine, and forfeiture issues; and a detailed analysis of *all* applicable Rule 145 aggravating and mitigating sentencing factors.

The appropriate legal basis for submitting such a victims' sentencing memorandum is Article 75(3), which requires the Chamber to "take account of representation from" victims prior to imposing reparations, as well as Article 76(1), directing the Chamber to consider "submissions made during the trial that are relevant to the sentence." (To determine an appropriate sentence, moreover, the Chamber must also weigh the "gravity of the crime," a topic victims are arguably in the best position to comment on.) Finally, the applicability of Article 68(3)'s catch-all, requiring the Chamber to permit the presentation and consideration of the victims' "views and concerns" when the victims' personal interests are affected, is at its zenith at the sentencing phase of the proceedings. Depending on how the Chamber decides to structure the sentencing hearing, the victim representative should consider requesting, based on the legal arguments laid out above, that some of the victims personally address the Court. Such an in-person presentation will put a human face on the inhumane acts of the convicted perpetrator(s).

PART XV

Conclusion

MEANINGFUL VICTIM PARTICIPATION at the ICC is a significant step forward in the international community's continuing pursuit of its collective restorative ambitions. Changes in the ICC's jurisprudence and rules reflect an emerging sense of how best to accommodate the victims' interests within the existing legal framework, but they also point to the ICC's developing institutional needs. Ensuring that this laudable, and potentially cathartic, process translates into substantive, constructive participation is the victim representatives' most fundamental obligation.

Whether the ICC will accord victims of atrocity crimes the full promised measure of substantive rights, or whether "victims' rights" instead will translate into little more than notional aspirations showing the international community's good will, remains to be seen. But what is clear is that the ICC, despite its ongoing struggle to deliver to the world community its promised impact, has the long-term potential to transcend cultural, geographic, and geopolitical constraints, and to render justice on the world's most prominent legal stage. In this regard, motivated victim representatives who understand the law, and know their way around a courtroom, can do a great deal to assist the ICC in reaching its full capacity and, in the process, can help victims regain some sense of control over their shattered lives.

There indeed should be no doubt that victim representatives will continue to help guide the ICC's developing jurisprudence during the Court's formative years. Robust victim participation, when properly conducted, represents sound public policy, and confirms to the world a genuine institutional desire to create a complete historic record of victim abuse, while not diminishing the fairness or efficiency of the proceedings. Future generations will envy the present time, when attorneys at the ICC spend their days shaping the law during its foundational stages. Although the areas crying out for institutional reform, as identified herein, are many, today's ICC lawyers and advocates have the power to clear the path toward just, compassionate, and effective handling of victims' cases. The history books will one

day judge whether the international legal establishment enhanced—and lived up to—the ICC's noble mission. The international legal and political community's handling of this opportunity will, indeed, stand as a profound testament to the authenticity of the world's concern for accountability and for those exposed to the worst of humanity.

Selected Articles from the Rome Statute [Articles: 5, 11–21, 42, 51, 53–57, 63–69, 74–79, 81, 82, 103, 106, 109, and 110]

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed

requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. 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 collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. 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.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

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.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in

doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its

judicial system competent to execute the request for cooperation under Part 9;

(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.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

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.

Article 68
Protection of the victims and witnesses and their participation in the Proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so 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.

2. 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 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.

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. 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.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. 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.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. 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 accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. 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.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

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.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, 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 accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(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.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. 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.

2. 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.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) 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.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. 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.

Article 103
Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in sub-paragraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 106
Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 109
Enforcement of fines and forfeiture measures

1. 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.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Selected Rules of Procedure and Evidence [Rules 10, 16–18, 21, 22, 47–64, 67–69, 76–79, 81–99, 103–06, 118, 119, 121, 137–40, 144–48]

Rule 10
Retention of information and evidence

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his or her Office.

Rule 16
Responsibilities of the Registrar relating to victims and witnesses

1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

(a) Providing notice or notification to victims or their legal representatives;

(b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;

(c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91;

(d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.

2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for

the performance of the following functions in accordance with the Statute and these Rules:

(a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;

(b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.

3. For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.

4. Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential.

Rule 17
Functions of the Unit

1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.

2. The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

(a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;

(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

(iii) Assisting them in obtaining medical, psychological and other appropriate assistance;

(iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;

(v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;

(vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule;

(b) With respect to witnesses:

(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;

(ii) Assisting them when they are called to testify before the Court;

(iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.

3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.

Rule 18
Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

(a) Ensure that the staff in the Unit maintain confidentiality at all times;

(b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;

(c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;

(d) Ensure training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity;

(e) Where appropriate, cooperate with intergovernmental and nongovernmental organizations.

Rule 21
Assignment of legal assistance

1. Subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.

2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.

3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

4. A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.

5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 22
Appointment and qualifications of Counsel for the defence

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the

Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.

3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

Rule 47
Testimony under article 15, paragraph 2

1. The provisions of rules 111 and 112 shall apply, *mutatis mutandis*, to testimony received by the Prosecutor pursuant to article 15, paragraph 2.

2. When the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, he or she may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence. If the testimony is subsequently presented in the proceedings, its admissibility shall be governed by article 69, paragraph 4, and given such weight as determined by the relevant Chamber.

Rule 48
Determination of reasonable basis to proceed with an investigation under article 15, paragraph 3

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).

Rule 49
Decision and notice under article 15, paragraph 6

1. Where a decision under article 15, paragraph 6, is taken, the Prosecutor shall promptly ensure that notice is provided, including reasons for his or

her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings.

2. The notice shall also advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.

Rule 50
Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation

1. When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims if he or she determines in the particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. In performing these functions, the Prosecutor may seek the assistance of the Victims and Witnesses Unit as appropriate.

2. A request for authorization by the Prosecutor shall be in writing.

3. Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations.

4. The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing.

5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations.

6. The above procedure shall also apply to a new request to the Pre-Trial Chamber pursuant to article 15, paragraph 5.

Rule 51
Information provided under article 17

In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

Rule 52
Notification provided for in article 18, paragraph 1

1. Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.

2. A State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the onemonth time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis.

Rule 53
Deferral provided for in article 18, paragraph 2

When a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and provide information concerning its investigation, taking into account article 18, paragraph 2. The Prosecutor may request additional information from that State.

Rule 54
Application by the Prosecutor under article 18, paragraph 2

1. An application submitted by the Prosecutor to the Pre-Trial Chamber in accordance with article 18, paragraph 2, shall be in writing and shall contain the basis for the application. The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber.

2. The Prosecutor shall inform that State in writing when he or she makes an application to the Pre-Trial Chamber under article 18, paragraph 2, and shall include in the notice a summary of the basis of the application.

Rule 55
Proceedings concerning article 18, paragraph 2

1. The Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing.

2. The Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.

3. The decision and the basis for the decision of the Pre-Trial Chamber shall be communicated as soon as possible to the Prosecutor and to the State that requested a deferral of an investigation.

Rule 56
Application by the Prosecutor following review under article 18, paragraph 3

1. Following a review by the Prosecutor as set forth in article 18, paragraph 3, the Prosecutor may apply to the Pre-Trial Chamber for authorization in accordance with article 18, paragraph 2. The application to the Pre-Trial Chamber shall be in writing and shall contain the basis for the application.

2. Any further information provided by the State under article 18, paragraph 5, shall be communicated by the Prosecutor to the Pre-Trial Chamber.

3. The proceedings shall be conducted in accordance with rules 54, sub-rule 2, and 55.

Rule 57
Provisional measures under article 18, paragraph 6

An application to the Pre-Trial Chamber by the Prosecutor in the circumstances provided for in article 18, paragraph 6, shall be considered ex parte

and in camera. The Pre-Trial Chamber shall rule on the application on an expedited basis.

Rule 58
Proceedings under article 19

1. A request or application made under article 19 shall be in writing and contain the basis for it.

2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.

4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

Rule 59
Participation in proceedings under article 19, paragraph 3

1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:

(a) Those who have referred a situation pursuant to article 13;

(b) The victims who have already communicated with the Court in relation to that case or their legal representatives.

2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of

information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.

3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

Rule 60
Competent organ to receive challenges

If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130.

Rule 61
Provisional measures under article 19, paragraph 8

When the Prosecutor makes application to the competent Chamber in the circumstances provided for in article 19, paragraph 8, rule 57 shall apply.

Rule 62
Proceedings under article 19, paragraph 10

1. If the Prosecutor makes a request under article 19, paragraph 10, he or she shall make the request to the Chamber that made the latest ruling on admissibility. The provisions of rules 58, 59 and 61 shall be applicable.

2. The State or States whose challenge to admissibility under article 19, paragraph 2, provoked the decision of inadmissibility provided for in article 19, paragraph 10, shall be notified of the request of the Prosecutor and shall be given a time limit within which to make representations.

Rule 63
General provisions relating to evidence

1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

4. Without prejudice to article 66, paragraph 3, 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.

5. The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

Rule 64
Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

Rule 67
Live testimony by means of audio or video-link technology

1. In accordance with article 69, paragraph 2, a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of

audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

Rule 68
Prior recorded testimony

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Rule 69
Agreements as to evidence

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber 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.

Rule 76
Pre-trial disclosure relating to prosecution witnesses

1. The Prosecutor shall 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. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77
Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 78
Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rule 79
Disclosure by the defence

1. The defence shall notify the Prosecutor of its intent to:

(a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or

(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.

3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.

4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.

Rule 81
Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an exparte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

4. 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.

5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 82
Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.

2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the

production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.

3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.

4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.

5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.

Rule 83
Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

Rule 84
Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 85
Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(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.

Rule 86
General principle

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.

Rule 87
Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted ex parte;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular video-conferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

Rule 88
Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own

motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, 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. 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.

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

3. For *inter partes* motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply *mutatis mutandis*.

4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to *inter partes* motions or requests filed under seal shall also be filed under seal.

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Rule 89
Application for participation of victims in the proceedings

1. 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 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.

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.

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Rule 90
Legal representatives of victims

1. A victim shall be free to choose a legal representative.

2. Where there are a number of victims, the Chamber 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. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

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.

4. 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, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

5. 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.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

Rule 91
Participation of legal representatives in the proceedings

1. A Chamber may modify a previous ruling under rule 89.

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.

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.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

Rule 92
Notification to victims and their legal representatives

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.

2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.

3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.

4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.

5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:

(a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.

7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications. Where necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).

8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

Rule 93
Views of victims or their legal representatives

A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

Rule 94
Procedure upon request

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;

(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.

2. 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.

Rule 95
Procedure on the motion of the Court

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.

Rule 96
Publication of reparation proceedings

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. 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.

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.

Rule 97
Assessment of reparations

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.

2. 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.

3. In all cases, the Court shall respect the rights of victims and the convicted person.

Rule 98
Trust Fund

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 scope, forms and modalities of reparations makes a collective award more appropriate.

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.

5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

Rule 99
Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4

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.

2. Notice is not required unless the Court determines, in the particular circumstances of the case, that notification could not jeopardize the effectiveness of the measures requested. In the latter case, the Registrar shall provide notification of the proceedings to the person against whom a request is made and so far as is possible to any interested persons or interested States.

3. If an order is made without prior notification, the relevant Chamber shall request the Registrar, as soon as is consistent with the effectiveness of the measures requested, to notify those against whom a request is made and, to the extent possible, to any interested persons or any interested States and invite them to make observations as to whether the order should be revoked or otherwise modified.

4. The Court may make orders as to the timing and conduct of any proceedings necessary to determine these issues.

Rule 103
Amicus curiae and other forms of submission

1. At any stage of the proceedings, a Chamber may, if it considers it 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.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

Rule 104
Evaluation of information by the Prosecutor

1. In acting pursuant to article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received.

2. For the purposes of sub-rule 1, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. The procedure set out in rule 47 shall apply to the receiving of such testimony.

Rule 105
Notification of a decision by the Prosecutor not to initiate an investigation

1. When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform in writing the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

2. When the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorization of an investigation, rule 49 shall apply.

3. The notification referred to in sub-rule 1 shall contain the conclusion of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion.

4. In case the Prosecutor decides not to investigate solely on the basis of article 53, paragraph 1 (c), he or she shall inform in writing the Pre-Trial Chamber promptly after making that decision.

5. The notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion.

Rule 106
Notification of a decision by the Prosecutor not to prosecute

1. When the Prosecutor decides that there is not a sufficient basis for prosecution under article 53, paragraph 2, he or she shall promptly inform in writing the Pre-Trial Chamber, together with the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

2. The notifications referred to in sub-rule 1 shall contain the conclusion of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion.

Rule 118
Pre-trial detention at the seat of the Court

1. If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.

2. The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.

3. After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.

Rule 119
Conditional release

1. The Pre-Trial Chamber may set one or more conditions restricting liberty, including the following:

(a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber;

(b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber;

(c) The person must not contact directly or indirectly victims or witnesses;

(d) The person must not engage in certain professional activities;

(e) The person must reside at a particular address as specified by the Pre-Trial Chamber;

(f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber;

(g) The person must post bond or provide real or personal security or surety, for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber;

(h) The person must supply the Registrar with all identity documents, particularly his or her passport.

2. At the request of the person concerned or the Prosecutor or on its own initiative, the Pre-Trial Chamber may at any time decide to amend the conditions set pursuant to sub-rule 1.

3. Before imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have 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.

4. If the Pre-Trial Chamber is convinced that the person concerned has failed to comply with one or more of the obligations imposed, it may, on such basis, at the request of the Prosecutor or on its own initiative, issue a warrant of arrest in respect of the person.

5. When the Pre-Trial Chamber issues a summons to appear pursuant to article 58, paragraph 7, and intends to set conditions restricting liberty, it shall ascertain the relevant provisions of the national law of the State receiving the summons. In a manner that is in keeping with the national law of the State receiving the summons, the Pre-Trial Chamber shall proceed in accordance with sub-rules 1, 2 and 3. If the Pre-Trial Chamber receives information that the person concerned has failed to comply with conditions imposed, it shall proceed in accordance with sub-rule 4.

Rule 121
Proceedings before the confirmation hearing

1. A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under sub-rule 7, are made public.

2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued.

During disclosure:

(a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her;

(b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;

(c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

3. The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

4. Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.

5. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing.

6. If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay. The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.

7. The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.

8. The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired.

9. The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.

10. The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

Rule 137
Record of the trial proceedings

1. In accordance with article 64, paragraph 10, the Registrar shall take measures to make, and preserve, a full and accurate record of all proceedings, including transcripts, audio- and video-recordings and other means of capturing sound or image.

2. A Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

3. The Trial Chamber may authorize persons other than the Registrar to take photographs, audio- and video-recordings and other means of capturing the sound or image of the trial.

Rule 138
Custody of evidence

The Registrar shall retain and preserve, as necessary, all the evidence and other materials offered during the hearing, subject to any order of the Trial Chamber.

Rule 139
Decision on admission of guilt

1. After having proceeded in accordance with article 65, paragraph 1, the Trial Chamber, in order to decide whether to proceed in accordance with article 65, paragraph 4, may invite the views of the Prosecutor and the defence.

2. The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.

Rule 140
Directions for the conduct of the proceedings and testimony

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

2. In all cases, subject to article 64, paragraphs 8 (b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows:

(a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness;

(b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);

(d) The defence shall have the right to be the last to examine a witness.

3. Unless otherwise ordered by the Trial Chamber, a witness other than an expert, or an investigator if he or she has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who

has heard the testimony of another witness shall not for that reason alone be disqualified from testifying. When a witness testifies after hearing the testimony of others, this fact shall be noted in the record and considered by the Trial Chamber when evaluating the evidence.

Rule 144
Delivery of the decisions of the Trial Chamber

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.

2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:

(a) All those who participated in the proceedings, in a working language of the Court;

(b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

Rule 145
Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in

particular the harm caused to the victims and their families, the nature of the unlawful behaviour 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.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when 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.

Rule 146
Imposition of fines under article 77

1. In determining whether to order a fine under article 77, paragraph 2 (a), and in fixing the amount of the fine, 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 in accordance with article 77, paragraph 2 (b), and, as appropriate, any orders for reparation in accordance with article 75. The Court shall take into account, in addition to the factors referred to in rule 145, whether and to what degree the crime was motivated by personal financial gain.

2. A fine imposed under article 77, paragraph 2 (a), shall be set at an appropriate level. To this end, the Court shall, in addition to the factors referred to above, in particular take into consideration the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator. Under no circumstances may the total amount exceed 75 percent 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.

3. In imposing a fine, the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of instalments during that period.

4. In imposing a fine, the Court may, as an option, calculate it according to a system of daily fines. In such cases, the minimum duration shall be 30 days and the maximum duration five years. The Court shall decide the total amount in accordance with sub-rules 1 and 2. It shall determine the amount of daily payment in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependants.

5. If the convicted person does not pay the fine imposed in accordance with the conditions set above, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Presidency, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five years, whichever is less. In the determination of such period of extension, the Presidency shall take into account the amount of the fine, imposed and paid. Any such extension shall not apply in the case of life imprisonment. The extension may not lead to a total period of imprisonment in excess of 30 years.

6. In order to determine whether to order an extension and the period involved, the Presidency shall sit in camera for the purpose of obtaining the views of the sentenced person and the Prosecutor. The sentenced person shall have the right to be assisted by counsel.

7. In imposing a fine, the Court shall warn the convicted person that failure to pay the fine in accordance with the conditions set out above may result in an extension of the period of imprisonment as described in this rule.

Rule 147
Orders of forfeiture

1. In accordance with article 76, paragraphs 2 and 3, and rules 63, sub-rule 1, and 143, at any hearing to consider an order of forfeiture, Chamber shall hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime.

2. If before or during the hearing, a Chamber becomes aware of any bona fide third party who appears to have an interest in relevant proceeds, property or assets, it shall give notice to that third party.

3. The Prosecutor, the convicted person and any bona fide third party with an interest in the relevant proceeds, property or assets may submit evidence relevant to the issue.

4. After considering any evidence submitted, a Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets if it is satisfied that these have been derived directly or indirectly from the crime.

Rule 148
Orders to transfer fines or forfeitures to the Trust Fund

Before making an order pursuant to article 79, paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations to it.

Selected Regulations of the Registry [Chapters 3 & 4]

Chapter 3
Responsibilities of the Registrar Relating to Victims and Witnesses

Section 1
Assistance to Victims and Witnesses

Regulation 79
General provisions

1. Pursuant to article 43, paragraph 6, and rules 16, 17 and 18, the Registrar shall develop and, to the extent possible, implement policies and procedures to enable witnesses to testify in safety, so that the experience of testifying does not result in further harm, suffering or trauma for the witnesses.

2. The Registrar shall exercise his or her functions regarding witnesses, victims who appear before the Court and persons at risk with no distinction of any kind, whether of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Regulation 80
Services to victims and witnesses

1. In order to receive services provided by the Registry, the Prosecutor and counsel shall complete a form requesting the provision of services. Such services may also be requested *proprio motu* by a Chamber. The Registry may request from the Prosecutor and counsel any additional information necessary for the provision of services.

2. Services such as relocation, assisted move, accompanying support persons, dependent care, extraordinary allowances for lost earnings and clothing allowances shall be provided on a case-by-case basis, in accordance with an assessment made by the Registry.

Regulation 81
Travel

1. The Registry shall arrange transportation for witnesses, victims who appear before the Court and persons at risk and where applicable dependants of all such persons in accordance with regulation 90, and accompanying support persons who, pursuant to an order of a chamber, need to travel in order to appear before the Court. The Registry may also arrange such transportation for support or protection-related purposes.

2. The mode of transport shall be determined on a case-by-case basis, having regard to protection, safety and health considerations.

3. Unless otherwise justified for support or protection reasons, travel shall be based on:

(a) An economy class return trip by the shortest route, subject to prior authorisation by the Registry; or

(b) The practice of the Court for staff members for all other means of transport.

Regulation 82
Accommodation

1. Where required for the purposes of the Court and for such time as is necessary, the Court shall provide appropriate full board and accommodation in locations selected by the Registry for witnesses, victims who appear before the Court, persons at risk, and where applicable dependants of all such persons in accordance with regulation 90, and accompanying support persons.

2. Witnesses and victims who appear before the Court who have chosen not to accept full board and accommodation provided by the Court shall only receive an incidental allowance in accordance with regulation 84 and an attendance allowance in accordance with regulation 85.

Regulation 83
Support programme

1. The Registry shall develop a support programme, which shall also apply in the field, in order to provide psychological and social assistance and advice to witnesses, victims who appear before the Court, the dependants

of all such persons, accompanying support persons and persons at risk at the earliest stage possible.

2. In addition, the support programme shall provide, where appropriate, and for the duration of their stay at the seat of the Court or at the site of its judicial proceedings, appropriate assistance to witnesses, victims who appear before the Court and, where applicable the dependants of all such persons in accordance with regulation 90, and accompanying support persons.

Regulation 84
Incidental allowance

1. An incidental allowance for personal expenses may be provided to witnesses, victims who appear before the Court, persons at risk, and where applicable dependants of all such persons in accordance with regulation 90, and accompanying support persons who need to spend at least one night outside of their place of residence at any stage of their journey.

2. The amount of the incidental allowance shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish the table of the rate of incidental allowance yearly on the website of the Court.

3. The provision shall not apply to persons appearing before the Court who receive an allowance from the Court other than by virtue of regulations 85 and 86.

Regulation 85
Attendance allowance

1. Witnesses, victims who appear before the Court and accompanying support persons may be provided with an attendance allowance as compensation for wages, earnings and time lost as a result of their absence from their place of residence in connection with the appearance before the Court. Witnesses, victims who appear before the Court and accompanying support persons shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance.

2. The daily minimum wage rate shall be determined by dividing:

(a) The annual salary of the staff of the Court at the General Services, step 1 level 1 in the country in which the person is residing at the time he or she appears before the Court; by

(b) The number of days per year.

3. The attendance allowance shall be calculated by multiplying:

(a) A percentage rate of the daily minimum wage rate applicable for the staff of the Court in the country in which the person is residing at the time he or she appears before the Court. The percentage shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish yearly on the website of the Court the table of the rate of attendance allowance; by

(b) The number of days the person is required at the seat of the Court or where proceedings are held, including travel days. For the purpose of calculating the attendance allowance, a part of a day used in connection with the court appearance shall be considered a full day.

Regulation 86
Extraordinary allowance for lost earnings

1. The Registrar may provide an extraordinary allowance for lost earnings for witnesses, victims who appear before the Court and accompanying support persons who suffer undue financial hardship as a result of being absent from legal income earning activities for the purposes of the Court.

2. Witnesses, victims who appear before the Court and accompanying support persons shall submit their request accompanied by any supporting documentation.

3. The Registrar shall inform the participants of any payment of such allowance.

Regulation 87
Expert witnesses

Transportation for expert witnesses who travel for testimony or for support or protection-related purposes shall be arranged by the Registry, in accordance with regulation 81. A daily subsistence allowance shall also be provided.

Regulation 88
Information management

1. The Registry shall keep information relating to witnesses, victims who appear before the Court, persons at risk, as well as dependents of all such

persons, and accompanying support persons in a secure environment. The Registry shall gather, monitor and keep information on areas where operations related to witnesses, victims who appear before the Court or other persons at risk are conducted and on potential or known threats.

2. Such information shall be used by the Registry to perform security threat analyses and assess risk to individuals.

3. A secure electronic database shall be maintained for any information relating to persons referred to in sub-regulation 1. This database can only be accessed by designated staff members of the Registry. Where ordered, the Registry shall disclose specific information contained in the database to the relevant chamber.

Regulation 89
Healthcare and well-being

1. The Registry shall assist witnesses and victims who appear before the Court, where applicable the dependents of all such persons, and accompanying support persons by:

(a) Organising medical care and assistance, as appropriate, during their travel, their absence from their place of residence and for the duration of their stay at the seat of the Court or where proceedings are held; and

(b) Providing psychological assistance, as appropriate, particularly for children, the disabled, the elderly and victims of sexual violence.

2. The Registry shall, in consultation with local partners, endeavor to develop local networks, particularly in the field, to address the healthcare and well-being of witnesses, victims who appear before the Court and persons at risk, and the dependents of all such persons.

Regulation 90
Dependent care

1. The Registry may provide dependent care to witnesses and victims who appear before the Court.

2. Dependent care is the provision of appropriate assistance to those who have the primary responsibility in caring for another person, the non-provision of which would prevent their attendance at the Court.

3. The type of assistance shall be based on a case-by-case needs assessment.

Regulation 91
Accompanying support persons

1. Witnesses, victims who appear before the Court and persons at risk may be permitted to bring an accompanying support person with them to the Court or during travel outside their place of residence for the purposes of the Court. The Registry shall cover the costs of the accompanying support person, in accordance with regulations 81, 82, 83, 84,85, 85 and 89, sub-regulation 1(a)

2. In order to determine the eligibility of a witness, a victim who appears before the Court or a person at risk to bring an accompanying support person with him or her to the Court, the following criteria, shall be, *inter alia*, taken into account:

(a) The fact that the person has no surviving close family members;

(b) The presence of severe trauma-related symptoms;

(c) The existence of possible suicidal tendencies;

(d) The potential for violence;

(e) The fear or anxiety of the person to the extent that it would prevent him or her from attending the Court;

(f) The age;

(g) The fact that the person is a victim of sexual or gender violence;

(h) The fact that the person suffers from a pre-existing disease of a physical and/or psychological nature; and

(i) The severity of physical or psychological symptoms.

3. The Registry shall assess the suitability of the accompanying person to provide support.

Regulation 92
Security arrangements

1. The Registry shall implement and coordinate appropriate procedures and measures for the protection and security to ensure the safety of witnesses, victims who appear before the Court and persons at risk, including accompanying support persons.

2. Procedures and measures referred to in sub-regulation 1 shall be confidential.

Regulation 93
Local protection measures

1. The Registry shall implement measures for the protection of witnesses, victims who appear before the Court and persons at risk on the territory of the State of their residence.

2. The Registry shall, where appropriate, be responsible for establishing and maintaining an immediate response system as a local security measure for witnesses, victims who appear before the Court and persons at risk. The system shall operate round-the-clock for the purposes of extricating and bringing to safety those witnesses, victims who appear before the Court and persons at risk who fall within its purview.

3. Procedures and measures referred to in sub-regulations 1 and 2 shall be confidential.

Regulation 94
Protective measures in Court

Measures taken pursuant to an order of a Chamber under rule 87 to protect the identity of witnesses, victims who appear before the Court and persons at risk may include, *inter alia*:

(a) Pseudonyms, where the person is assigned a pseudonym that is used during the proceeding instead of his or her real name;

(b) Facial distortion, where the image of the person is rendered unrecognisable by an electronic mosaic in the audiovisual feed;

(c) Voice distortion, where the voice of the person is rendered unrecognisable by electronic means in the audiovisual feed;

(d) Private sessions, where the hearing is not open to the public and there is no audiovisual stream broadcast outside the Court;

(e) Closed sessions, where the hearing is held in camera;

(f) Videoconferences, where the person takes part in the proceeding via a direct video link;

(g) Expunctions from the public record of the proceeding of any information which might lead to the identification of the victim, witness or person at risk; or

(h) Any combination of the protective measures listed above or any modification of a measure ordered by the Chamber which is technically feasible.

Regulation 94 *bis*
Special measures for vulnerable witnesses and victims appearing before the Court

1. In pursuance of rule 88, the Chamber may order special measures to protect witnesses and victims who appear before the Court against psychological harm by reason of the process of appearing before the Court and to facilitate such persons' appearance in Court.

2. Vulnerable persons are those persons at an increased risk of psychological harm by reason of the process of appearing before the Court and/or who experience psychosocial or physical difficulties which affect their ability to so appear. The vulnerability of a person may be determined by different factors, *inter alia*:

(a) Factors related to the person: age (for example, children or elderly persons), personality, disability (including cognitive impairments), mental illness or psychological problems (such as trauma-related problems and/or lack of social support);

(b) Factors related to the nature of the crime, in particular sexual or gender- based violence, violence against children, torture or other crimes involving grave violence;

(c) Factors related to particular circumstances, such as significantly increased stress or anxiety due to relocation or resettlement, fear of retaliation or adaptation difficulties related to cultural differences or other factors.

3. Psychological assessment of vulnerable persons shall be conducted by the psychologist within the Registry who works with victims and witnesses. Such assessment shall be conducted prior to the court appearance in order to establish a person's capacity to appear before the Court and current mental health and to identify special needs. The Registry psychologist may recommend special measures to the Chamber, *inter alia*:

(a) Measures to adapt the courtroom to the needs of vulnerable persons, such as prevention of eye contact between the witness and the victim who appears before the Court and the suspect or accused, use of video-link or restriction of the number of people in the courtroom or other measures;

(b) In-court assistance as foreseen by rule 88, sub-rule 2, such as the presence of an accompanying support person or assistance to or monitoring of vulnerable persons by the Registry;

(c) Measures pursuant to rule 88, sub-rule 5 to adapt the manner of questioning to the needs of the person and his or her capacity to appear before the Court.

Regulation 95
Assisted move

1. Where risk to a witness, a victim who appears before the Court or a person at risk cannot be managed in the geographical area where the person is staying and said person has initiated a move to another area, the Registry may assist therewith, where such move is considered necessary to the person's security.

2. Such assistance may consist of limited financial or logistical support for the move of the person and his or her dependents to a safe location. The move shall remain the decision and responsibility of the person.

3. The Prosecutor or counsel shall not assist a witness, a victim who appears before the Court or a person at risk to move without the prior consultation and agreement of the Registry. In case of disagreement, a chamber may authorise assistance proposed by the Prosecutor or counsel. Assisted move may also be effected at the request of a chamber.

4. Procedures and measures referred to in the present regulation shall be confidential.

Regulation 96
Protection programme

1. The Registry shall take all necessary measures to maintain a protection programme for witnesses, victims who appear before the Court and persons at risk.

2. An application for inclusion in the protection programme may be filed by the Prosecutor or by counsel. A Chamber may also request the inclusion of a person in the protection programme.

3. In assessing admission to the protection programme, in addition to the factors set out in article 68, the Registry shall consider, *inter alia*, the following:

(a) The involvement of the person before the Court;

(b) Whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court; and

(c) Whether the person agrees to enter the protection programme.

4. Inclusion in the protection programme shall be subject to the decision of the Registrar after the assessment made under sub-regulation 3.

5. Before being included in the protection programme, the person or – where the person is under the age of 18 or otherwise lacks the legal capacity to do so – his or her representative, shall sign an confidential agreement with the Registry.

6. The need for continued participation in the protection programme shall be reassessed every 12 months.

7. Procedures and measures referred to in the present regulation shall be confidential.

Regulation 96 *bis*
Termination of the participation in the protection programme

1. The Registrar may terminate a person's participation in the protection programme where such participation is no longer required, the person so requests or the person has breached the terms of the confidential agreement provided for by regulation 96, sub-regulation 5.

2. Within 14 days of notification of a decision under sub-regulation 1, the person, the Prosecutor or counsel who referred the person may apply to the Registrar for review of the decision, whereafter the Registrar shall issue a final decision. Within 7 days of the notification of the final decision, the Prosecutor or counsel may challenge the decision before the relevant chamber. The protection programme shall remain in force throughout the period encompassed by this sub-regulation.

3. Before termination is effected, the Registrar shall, in consultation with the person where possible, devise an exit plan to ensure that the person leaves the protection programme in optimal circumstances and within a reasonable timeframe.

Section 2
Victims Participation and Reparations

Subsection 1
General provisions

Regulation 97
Confidentiality of communications

1. Where required for reasons of safety and security of the victim, the Registry shall take all necessary measures within its powers to ensure the confidentiality of the following communications: communications within the Court relating to specific victims, including communications within the Registry and between the Registry and other organs of the Court; between the Court and victims who have communicated with the Court; between the Court and victims' legal representatives; between the Court and persons or organisations acting on behalf of victims; and between the Court and persons or organisations serving as intermediaries between the Court and victims.

2. If a victim decides to withdraw an application for participation or reparations at any time, the Registry shall maintain the confidentiality of the communication.

Regulation 98
Protection of information and communications

1. The Registry shall maintain a secure electronic database for the storage and processing of information provided in applications from victims, any documentation or further information supplied by victims or their legal representatives, and any communications received from or in respect of such victims including communications or other information from or relating to specific victims that have been made available to the Registry by other organs of the Court.

2. Information contained in the database referred to in sub-regulation 1 may only be accessed by designated staff members of the Registry and, where appropriate, by the Chamber and by participants.

Regulation 99
Assessment of the disclosure of information

1. Upon receipt of an application from a victim and pending any decision by the Chamber, the Registry shall review the application and assess whether the disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety and security of the victim concerned or any third person.

2. Such review shall take into account the factors set out in article 68, paragraph 1, any request for non-disclosure made by the victim, consultations held with legal representative(s) of the victim, where appropriate, and *inter alia*, the level of security in the area where the victim lives and the feasibility of implementing local measures for their protection and security and/or protective measures where necessary.

3. The Registry shall inform the Chamber of the results of the assessment and may make recommendations regarding the disclosure of all or part of the information provided by the victim.

4. If a victim requests that all or part of the information he or she has provided to the Registry not to be disclosed to the Prosecutor, the defence, or other participants, the Registry shall inform the victim that such requests may be granted or rejected by the Chamber. The Registry shall communicate the victim's request, together with the result of the assessment made pursuant to sub-regulations 1 and 2, to the Chamber and to the legal representative of the victim.

Regulation 100
Protection and security of victims

1. Where the Registry is in direct communication with victims, it shall ensure that it does not endanger their safety, physical and psychological well-being, dignity and privacy. The Registry shall also take all possible measures to ensure that groups referred to in regulation 86, sub-regulation 1 of the Regulations of the Court and counsel pursue the same objective in their communications and interactions with victims.

2. Where a victim who communicated with the Court fears that his or her application is putting him or her or a third person at risk, or where the assessment undertaken under regulation 99, sub-regulations 1 and 2, concludes that such a risk might exist, the Registry may take measures under

regulations 92 to 96 and/or advise the Chamber on appropriate protective measures and/or security arrangements in order to protect the safety and the physical and psychological well-being of the victim or third person.

3. The Registry may request non-publication of information in accordance with regulation 43, sub-regulation 3.

Regulation 101
Withdrawal of applications

1. If a victim decides to withdraw an application for participation or reparations before the Registry has presented the application to the Chamber, the Registry shall retain this application in its records.

2. If the application has already been presented to the Chamber, the Registry shall present the withdrawal to that Chamber, including any reasons given for the withdrawal.

Subsection 2
Information and notice to victims

Regulation 102
Assistance in providing information under article 15

1. Where the Prosecutor intends to seek authorisation from the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, the Registry may assist in providing information to victims.

2. Where the Prosecutor has a duty to inform victims who have provided information to him or her under article 15, paragraph 6, the Registry may, when so requested assist in providing information to victims.

Regulation 103
Publicity and notice by general means

1. In determining what measures are necessary to give adequate publicity to the proceedings, as referred to in rule 92, sub-rule 8, and in rule 96, sub-rule 1, the Registry shall ascertain and take into account factors relating to the specific context such as languages or dialects spoken, local customs and traditions, literacy rates and access to the media. In giving such publicity, the Registry shall seek to ensure that victims make their

applications before the start of the stage of the proceedings in which they want to participate, in accordance with regulation 86, sub-regulation 3, of the Regulations of the Court.

2. Where the Prosecutor decides to give notice by general means in accordance with rule 50, sub-rule 1, the Registry may take steps to ensure that victims are informed thereof.

3. Information sent by victims in confidence to the Registry shall not be disclosed to participants, unless a Chamber orders otherwise.

Subsection 3
Participation of victims in the proceedings and reparations

Regulation 104
Standard application forms

1. The standard application forms provided for in regulations 86 and 88 of the Regulations of the Court, and the explanatory material shall, to the extent possible, be made available in the language(s) spoken by the victims. The Registry shall endeavour to prepare the standard application forms in a format that is accessible, that can be used by the Court, and that is compatible with the electronic database referred to in regulation 98.

2. The Registry may propose amendments to the standard application forms on the basis of, *inter alia*, experience in using the forms and the context of specific situations. The proposed amendments shall be submitted to the Presidency for approval in accordance with regulation 23, sub-regulation 2, of the Regulations of the Court.

Regulation 105
Dissemination and completion of standard application forms

1. In order to ensure that standard application forms, as referred to in regulation 86, sub-regulation 1 of the Regulations of the Court, are completed as efficiently as possible, the Registry may establish contact and maintain regular relations with the groups mentioned in regulation 86, sub-regulation 1 of the Regulations of the Court, and may, *inter alia*, prepare guidance booklets and other materials, or provide education and training, in order to guide those assisting victims in completing the standard application forms.

2. The Registry shall, as far as possible, take measures to encourage victims to complete their applications using the appropriate standard application form.

Regulation 106
Receipt of applications

1. Applications for participation or reparations may be submitted either to the seat of the Court or to a field office of the Court. In countries where there is no Court field office, the Registry shall endeavor to establish means of ensuring the safe and secure submission of applications.

2. The Registry shall take measures to encourage victims to complete their applications and to provide further information and communications in a working language of the Court. Such steps may include, *inter alia*, seeking the assistance of groups mentioned in regulation 86, sub-regulation 1 of the Regulations of the Court.

3. Documents and material relating to an application and submitted after the initial application shall be dealt with in accordance with regulation 107.

Regulation 107
Review of applications

1. Where an application is received in hard copy, the Registry shall convert it into image file format, ensuring that the application is not altered in any way.

2. In seeking further information in accordance with regulation 86, sub-regulation 4, or regulation 88, sub-regulation 2 of the Regulations of the Court, the Registry shall consider the interests of the victim and shall take into account, *inter alia*, whether the victim is represented, the security of the victim, and any time limits for the filing of documents with the Court. When contacting victims or their legal representatives to request further information, the Registry shall inform them that their request may be granted or rejected by the Chamber on the basis, *inter alia*, of information provided by them and that they may submit a new application later in the proceedings if their application is rejected by the Chamber.

3. The Registry shall endeavour wherever possible to obtain further information in writing, but where the victim has expressed a preference for

contact by telephone, and taking security considerations into account, it may receive such information by telephone. In so doing, the Registry shall, to the extent possible, verify the identity of the person and record the conversation.

Regulation 108
Access to applications

1. Applications and related documents and material shall be available to the Chambers and the participants through electronic means, in accordance with their level of confidentiality.

2. Consultation of the original form of the applications and related documents and material shall be requested using the approved standard form.

3. Regulation 16 shall apply *mutatis mutandis*.

Regulation 109
Report to the Chamber regarding participation in the proceedings

1. In order to facilitate the decision of the Chamber and to comply with regulation 86, sub-regulations 5 and 6 of the Regulations of the Court, the Registry shall provide the Chamber with access to the record of applications or to the secure room where the originals are stored.

2. The format and content of the report to be provided in accordance with regulation 86, sub-regulations 5 and 6 of the Regulations of the Court shall be determined to the extent possible in consultation with the Chamber.

3. For the purpose of preparing the report, the Registry may seek additional information in accordance with regulation 86, sub-regulation 4 of the Regulations of the Court, and may consult with the legal representatives, if any.

Regulation 110
Submission of applications for reparations

1. The Registry shall present all applications for reparations to the Chamber, together with a report thereon, where requested.

2. For the purpose of rule 97, at the request of the Chamber, the Registry may present information or recommendations regarding matters such

as the types and modalities of reparations, factors relating to the appropriateness of awarding reparations on an individual or a collective basis, the implementation of reparations awards, the use of the Trust Fund for Victims, enforcement measures, and appropriate experts to assist in accordance with rule 97, sub-rule 2.

3. In order to prepare the information and recommendations referred to in sub-regulation 2, the Registry may consult with, *inter alia*, victims, victims' legal representatives and the Trust Fund for Victims.

Regulation 111
Assistance in the enforcement phase

The Registry may, if so requested, provide the Presidency with relevant information, including information received in applications for participation or reparations, to assist it in its decision-making on matters relating to the disposition or allocation of property or assets in accordance with rule 221.

Subsection 4
Legal representation of victims

Regulation 112
Assistance to victims in choosing legal representatives

1. In order to assist victims in choosing a legal representative or representatives in pursuance of rule 16, sub-rule 1(b) or rule 90, sub-rule 2 the Registry may provide victims with information on qualified counsel and common legal representation. The Registry shall inform victims that it may choose a common legal representative for victims at the request of the Chamber pursuant to rule 90, sub-rule 3 and/or organise a process for the selection of common legal representatives through a public call for the expression of interest from those counsel who meet the requirements of rule 22. Whenever possible, the Registry shall also afford victims notice of its intended, recommended grouping of victims for the purpose of common legal representation. The Registry shall take appropriate measures, such as outreach activities in the field, to ensure that victims understand such information. The Registry may also, in pursuance of these rules, consult victims regarding their preferences in respect of legal representation.

2. Where requested to choose a common legal representative under rule 90, sub-rule 3, the Registry shall take account, *inter alia*, of:

(a) The preferences of participating victims and applicants for participation in respect of legal representation and their views on common legal representation;

(b) The particular circumstances of the case and the characteristics of the victims concerned;

(c) Any legal representation hitherto provided to victims;

(d) The competencies, expertise and experience in representing victims possessed by any other qualified counsel who have expressed an interest in acting as common legal representatives of victims; and

(e) Potential or actual conflicts of interest.

Regulation 113
Legal assistance paid by the Court

1. For the purpose of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant form(s).

2. In determining whether to grant such assistance, the Registrar shall take into account, *inter alia*:

(i) The means of the victims;

(ii) The factors mentioned in article 68, paragraph 1;

(iii) Any special needs of the victims,

(iv) The complexity of the case;

(v) The possibility of asking the Office of Public Counsel for Victims to act; and

(vi) The availability of *pro bono* legal advice and assistance.

3. Regulations 130 to139 shall apply *mutatis mutandis*.

Subsection 5
Office of Public Counsel for Victims

Regulation 114
Appointment of members of the Office

The members of the Office of Public Counsel for Victims are appointed in accordance with the rules and regulations governing the recruitment of

the staff of the Court. A representative of the legal profession shall sit on the selection panel.

Regulation 115
Independence of members of the Office

1. The members of the Office shall not receive any instructions from the Registrar in relation to the conduct of the discharge of their tasks as referred to in regulations 80 and 81 of the Regulations of the Court.

2. In discharging their responsibilities under sub-regulation 1, the members of the Office shall be bound by the Code of Professional Conduct for counsel adopted pursuant to rule 8.

3. For issues other than the conduct of the representation of a person entitled to legal assistance under the Statute and the Rules or assistance to legal representatives of victims, members of the Office shall be bound by the provisions applicable to all staff members.

4. Where a member of the Office is representing a victim or a group of victims, regulation 113 shall apply *mutatis mutandis*.

5. The Registry shall ensure that the confidentiality necessary for the performance of the functions of the Office be respected.

Regulation 116
Information provided by the Registrar to the Office

Where members of the Office act as duty counsel or as legal representatives of victims or appear before a Chamber on behalf of a victim or victims in respect of specific issues, the Registrar shall, having regard to confidentiality, provide them with such information received in the applications sent by victims and such further information and documents as are necessary for the fulfilment of those functions.

Regulation 117
Report on administrative issues relating to the Office

The Office shall report on administrative issues related to its activities to the Registrar on a regular basis and submit an annual report of its work to the Registrar having regard to confidentiality.

Subsection 6
Trust Fund for Victims

Regulation 118
Cooperation with the Trust Fund for Victims

1. For the purpose of rule 98, sub-rule 4, rule 148 and rule 221, sub-rule 1, the Registry shall, where requested by the Chamber or by the Presidency, and after consultation with the victims or their legal representatives, provide information received from or in respect of victims to the Secretariat of the Trust Fund for Victims, and shall provide general advice and information of a non-confidential nature relating to victims.

2. Where an order is issued by the Chamber for an award of reparations through the Trust Fund for Victims, the Registrar shall, having regard to confidentiality, provide the Secretariat of the Trust Fund for Victims with such information received in the applications sent by victims and such further information and documents as are necessary for the implementation of the order.

Chapter 4
Counsel Issues and legal assistance

Section 1
General provisions

Regulation 119
Duties of the Registrar in relation to the defence

1. In order to give full effect to the rights of the defence, and pursuant to the provisions of rule 20, the Registrar shall, *inter alia*:

(a) Assist counsel and/or his or her assistants in travelling to the seat of the Court, to the place of the proceedings, to the place of custody of the person entitled to legal assistance, or to various locations in the course of an on-site investigation. Such assistance shall encompass securing the protection of the privileges and immunities as laid down in the Agreement on the Privileges and Immunities of the Court and the relevant provisions of the Headquarters Agreement; and

(b) Establish channels of communication and hold consultations with any independent body of counsel or legal association, including any such

body the establishment of which may be facilitated by the Assembly of States Parties.

2. The Registrar shall also provide appropriate assistance to a person who has chosen to represent himself or herself.

3. In the event of disputes occurring between the person entitled to legal assistance and his or her counsel, the Registrar may propose mediation. The Registrar may request the Office of Public Counsel for the Defence or another qualified independent person to act as a mediator.

Regulation 120
Principles governing consultations with legal associations

1. In carrying out his or her responsibilities including those in rule 20, sub-rule 3, the Registrar shall, as appropriate, hold consultations with any independent representative body of counsel or legal association, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

2. International associations of bars and counsel, as well as associations offering specific expertise in fields of law that are relevant to the Court, shall in particular be consulted.

3. The Registrar may also consult any expert he or she identifies on specific issues relating to his or her mandate, as appropriate.

Regulation 121
Forms of consultations

1. Consultations shall be carried out periodically through non-institutionalised channels, including written and oral communication, as well as bilateral and multilateral meetings.

2. The Registrar may, as appropriate, organise seminars for the purpose of holding in-depth discussions on the role of the legal profession before the Court. Associations and individual experts, as well as representatives of other international criminal tribunals, may take part in these seminars.

Section 2
Provisions on counsel and assistants to counsel

Regulation 121 *bis*

Provision of information concerning counsel and assistants to counsel

Where information referred to in regulation 69, sub-regulation 3 of the Regulations of the Court or regulation 125, sub-regulation 7 is received, including *prima facie* reliable information on facts which may affect a person's inclusion on the list of counsel or the list of assistants to counsel, the Registrar may invite the person to submit all relevant information and material. Where necessary, the Registrar may request the assistance of the relevant authorities for the purpose of obtaining such information.

Regulation 122
List of counsel

1. The Registry shall produce a standard form for counsel seeking inclusion in the list. The form shall be available on the website of the Court, as well as through other appropriate means, and shall also be provided upon request.

2. Unless counsel requests otherwise, the Registry may publish the following data:

(a) Counsel's full name;

(b) The name, place and country of the bar association to which counsel is affiliated or, if counsel is not a barrister or attorney, his or her profession, including the name of the institution for which he or she works;

(c) The language(s) spoken by counsel; and

(d) Whether counsel would prefer to represent the accused, victims, or both.

Regulation 123
Acknowledgment of appointment

1. The Registrar shall acknowledge the issuance of power of attorney or the appointment of counsel in writing, stating that he or she has been included in the list. The acknowledgment shall be notified to the person who has chosen the counsel, to the counsel, to the Chamber and to the competent

authority exercising regulatory and disciplinary powers over counsel in the national order.

2. Where a common legal representative of victims is appointed, the Registrar shall, where possible, notify the acknowledgment referred to in sub-regulation 1 to all victims represented by such representative.

Regulation 124
Assistants to counsel

Persons who assist counsel in the presentation of the case before a Chamber, as referred to in regulation 68 of the Regulations of the Court, shall have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure. The names of these persons are on the list of assistants to counsel created and maintained by the Registry.

Regulation 125
List of assistants to counsel

1. The Registry shall create and maintain a list of persons who may assist counsel in the presentation of the case before a Chamber and who meet the requirements set out in regulation 124.

2. The Registry shall produce a standard form for persons seeking inclusion in the list. The form shall be available on the website of the Court as well as through other appropriate means, and shall be provided upon request.

3. A person seeking to be included in the list shall complete the standard form and provide the following documentation:

(a) A detailed curriculum vitae; and

(b) An indication of the relevant experience or specific competence in accordance with regulation 124.

4. The decision as to whether a person shall be included in the list shall be notified to that person. If the application is refused, the Registrar shall provide reasons and information on how to apply to the Presidency for review of that decision within 15 calendar days of its notification.

5. The Registrar may file a response within 15 calendar days of notification of the application for review.

6. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

7. Persons included in the list shall inform the Registrar immediately of any change in the information provided by them pursuant to this regulation. The Registrar may take measures to verify the information provided by such persons at any time.

Regulation 126
Removal from the list of assistants to counsel

1. The Registrar shall remove a person from the list of assistants to counsel if that person:

(a) No longer meets the requirements set out under regulation 124;

(b) Has been found guilty of an offence against the administration of justice as described in article 70, paragraph 1;

(c) Has been permanently interdicted from exercising his or her functions before the Court in accordance with rule 171, sub-rule 3; or

(d) Has solicited or accepted a bribe from a person entitled to legal assistance paid by the Court.

2. The Registrar shall notify the relevant person of his or her decision under sub-regulation 1 and shall provide the reasons therefor.

3. The Registrar shall inform the person on how to apply to the Presidency for review of that decision within 15 calendar days of notification.

4. The Registrar may file a response within 15 calendar days of notification of the application for review.

5. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

Regulation 127
Appointment of assistants to counsel

Persons who assist counsel in the presentation of the case before a Chamber shall be appointed by counsel and selected from the list maintained by the Registrar.

Regulation 128
Assistance by the Registry

1. The Registry shall provide a person seeking legal assistance in the framework of proceedings before the Court with the list of counsel, along with the *curricula vitae* of counsel appearing on that list.

2. The Registry shall provide assistance when a person entitled to legal assistance under the Statute and the Rules is to be questioned pursuant to article 55, paragraph 2 or in any other case where legal assistance is needed by a person entitled to it.

Regulation 129
Appointment of duty counsel

1. In accordance with regulation 73, sub-regulation 2, of the Regulations of the Court, the Registry shall guarantee the availability of counsel at the place and the time indicated by the Prosecutor or the Chamber.

2. When requested by a person entitled to legal assistance, the Prosecutor or the Chamber, the Registry shall contact the duty counsel and provide him or her with all the information available.

Section 3
Legal assistance paid by the Court

Regulation 130
Management of legal assistance paid by the Court

1. The Registrar shall manage the legal assistance paid by the Court with due respect to confidentiality and the professional independence of counsel.

2. The Registry staff responsible for managing the funds allocated to legal assistance paid by the Court shall treat all information known with the utmost confidentiality. They shall not communicate such information to any person, except to the Registrar or to the legal aid commissioners where required for the performance of the tasks specified in regulation 136.

3. The Registrar may transmit to the auditors the necessary information to perform their tasks. They are responsible for ensuring the confidentiality of such information.

Regulation 131
Application procedure for legal assistance paid by the Court

1. As soon as the Registry contacts a person entitled to legal assistance under the Statute and the Rules in order to assist him or her in accordance with regulation 128, it shall provide him or her with the relevant form(s) to submit an application for legal assistance paid by the Court.

2. The Registry shall immediately acknowledge receipt of an application for legal assistance paid by the Court as described in sub-regulation 1. The Registrar shall then establish whether or not the applicant has provided the requisite supporting material as described in regulation 132. He or she shall inform the applicant as soon as possible if, and to what extent, such material is incomplete and shall direct him or her to provide the missing material within a specified time period.

Regulation 132
Proof of indigence

1. A person applying for legal assistance paid by the Court must fill out the approved standard forms and provide the information necessaries to support their request.

2. Where there are grounds to believe that an application for legal assistance paid by the Court and the supporting evidence are not accurate, the Registry may carry out an investigation into the matter. In doing so, it may request information and/or documents from any person or body that it deems appropriate.

3. The Registrar should make a decision as to whether legal assistance should be paid in full or in part by the Court within 30 calendar days of the submission by the person concerned of all the documentation required. Legal assistance may be provisionally paid by the Court during that period.

4. The person shall communicate to the Registry any change in his or her financial situation that might affect eligibility for legal assistance paid by the Court. The Registry may carry out random checks to verify whether any changes have occurred.

5. If legal assistance paid by the Court has been granted provisionally, the Registry may investigate the person's means. The person shall cooperate with the Registry in its investigation.

Regulation 133
Remuneration under the scheme of legal assistance paid by the Court

Remuneration of persons acting within the scheme of legal assistance paid by the Court shall accord with the relevant documents adopted or approved by the Assembly of States Parties.

Regulation 134
Action plan and modalities of payment

1. Before each phase of the proceedings, or every six months, counsel shall establish an action plan. The action plan shall be approved by the Registrar who may consult the legal aid commissioners appointed pursuant to regulation 136, sub regulation 1.

2. At the end of every month, the Registry shall issue an order for payment in accordance with the action plan referred to in sub-regulation 1.

3. Every six months, or at the end of each phase of the proceedings, the Registry shall review the action plan and the remaining fees, if any, shall be paid to counsel.

4. When a mission has been carried out in accordance with the action plan, the relevant funds shall be paid upon presentation of the appropriate travel request, as approved by the Registry, together with any supporting documentation.

Regulation 135
Disputes relating to fees

1. The Registrar shall take a decision on any dispute concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly.

2. Within 15 calendar days of notification, counsel may request the Chamber to review any decision taken under sub-regulation 1.

Regulation 136
Legal aid commissioners

1. The Registrar, after receiving the proposals and having heard the views of any independent representative body of counsel or legal association, including any such body the establishment of which may be facilitated by the Assembly of States Parties, shall appoint three persons to serve as legal aid commissioners for three years. This appointment shall not be renewable.

2. Legal aid commissioners shall provide the Registrar with advice regarding the management of the funds allocated by the Assembly of States Parties to legal assistance paid by the Court. To that effect, the commissioners shall:

(a) Evaluate the performance of the system put in place regarding legal assistance paid by the Court, and propose amendments to such system; and

(b) At the request of either counsel or the Registrar, assess whether the means requested by legal teams in their action plans are reasonably necessary for the effective and efficient representation of their client(s).

3. Legal aid commissioners shall perform their tasks independently and with due regard to confidentiality.

Regulation 137
List of professional investigators

1. The Registry shall create and maintain a list of professional investigators.

2. A professional investigator shall have established competence in international or criminal law and procedure and at least ten years of relevant experience in investigative work in criminal proceedings at national or international level. A professional investigator shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Subject to exceptional circumstances, he or she shall speak at least one of the languages of the country in which the investigation is being conducted.

3. The Registry shall produce a standard form for professional investigators seeking inclusion in the list. The form shall be available on the website of the Court, as well as through other appropriate means, and shall also be provided upon request.

4. A person seeking to be included in the list of professional investigators shall complete the standard form and provide the following documentation:

(a) A detailed curriculum vitae;

(b) An indication of competence in the relevant field in accordance with sub-regulation 2; and

(c) Where applicable, a statement of whether he or she is included in any list of investigators acting before any national court, or whether he or she is registered with any association of investigators.

5. The decision on whether a person shall be included in the list shall be notified to that person. If the application is refused, the Registrar shall provide reasons and information on how to apply to the Presidency for review of that decision within 15 calendar days of notification.

6. The Registrar may file a response within 15 calendar days of notification of the application for review.

7. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

8. Professional investigators included in the list shall immediately inform the Registrar of any change in the information provided by them in accordance with this regulation. The Registrar may take steps to verify the information provided by a professional investigator included in the list at any time.

9. Regulation 121 *bis* shall apply *mutatis mutandis* to the provision of information concerning persons admitted to the list of professional investigators.

Regulation 138
Removal from the list of professional investigators

1. The Registrar shall remove a person from the list of professional investigators if the person:

(a) No longer meets the criteria required in accordance with regulation 137, sub-regulation 2;

(b) Has been found guilty of an offence against the administration of justice as described in article 70, paragraph 1;

(c) Has been permanently interdicted from exercising his or her functions before the Court in accordance with rule 171, sub-rule 3; or

(d) Has solicited or accepted a bribe from a person entitled to legal assistance paid by the Court.

2. The Registrar shall notify the relevant person of his or her decision under sub-regulation 1 and shall provide the reasons therefor.

3. The Registrar shall inform the investigator on how to apply to the Presidency for review of that decision within 15 calendar days of its notification.

4. The Registrar may file a response within 15 calendar days of notification of the application for review.

5. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

Regulation 139
Selection of professional investigators

1. Where legal assistance is paid by the Court and includes the fee of a professional investigator, counsel shall select the professional investigator from the list referred to in regulation 137.

2. A person not included in the list of investigators but who has relevant experience with regard to investigations in criminal proceedings, is fluent in at least one of the working languages of the Court and speaks at least one of the languages of the country in which the investigation is being conducted, exceptionally and after confirmation by the Registrar that the above criteria have been met, can be selected by counsel as a resource person in a given case. That resource person shall not be related to the person entitled to legal assistance, to the counsel or any person assisting him or her.

Section 4
Training of counsel

Regulation 140
Role of the Registrar

For the purpose of promoting the specialisation and training of lawyers in the law of the Statute and the Rules, and subject to the availability of resources, the Registrar shall, *inter alia*:

(a) Ensure access to a database of the case law of the Court;

(b) Provide comprehensive information on the Court;

(c) Identify and publish the names of persons and organisations carrying out relevant training;

(d) Provide training materials; and

(e) Offer training enabling persons to qualify to train counsel.

Regulation 141
Training programmes

1. The Registry shall develop a standard for training programmes aimed at fostering knowledge of the law of the Statute and the Rules.

2. To this end, the Registry may make a survey of existing training programmes on a regular basis, and consult with any independent body of counsel or legal association, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

3. Where training programmes receive the Registrar's approval, the organisation offering training may expressly refer to it in its promotional material and in any certificates issued.

4. The Registry shall promote the standard programme amongst organisations offering training, and shall, as appropriate, and in consultation with any independent body of counsel or legal association, including any such body the establishment of which may be facilitated by the Assembly of States Parties, review the standard programme in light of the practical experience gained through such training and the performance of counsel before the Court.

Regulation 142
Equal access and geographical distribution

1. The Registrar shall take all necessary steps to encourage an equal geographical and gender distribution of training opportunities. Training should in particular be made available in countries where the infrastructure does not allow for regular training, or where a situation has been brought before the Court.

2. In view of the limited financial capacity of lawyers in certain countries, the Registrar shall support programmes for the training of counsel in such

countries. For this purpose, the Registrar may in particular address the relevant States and their bar associations or ask the relevant organisations to provide the training free of charge.

Section 5
Office of Public Counsel for the defence

Regulation 143
Appointment of members of the Office

The members of the Office of Public Counsel for the Defence are appointed in accordance with the rules and regulations governing the recruitment of the staff of the Court. A representative of the legal profession shall sit on the selection panel.

Regulation 144
Independence of members of the Office

1. The members of the Office shall not receive any instructions from the Registrar in relation to the discharge of their tasks as referred to in regulations 76 and 77 of the Regulations of the Court.

2. In discharging their responsibilities under sub-regulation 1, the members of the Office shall be bound by the Code of Professional Conduct for counsel adopted pursuant to rule 8.

3. For issues other than the conduct of the representation of a person entitled to legal assistance under the Statute and the Rules or assistance to defence counsel, members of the Office shall be bound by the provisions applicable to all staff members.

4. Where a member of the Office is representing a person entitled to legal assistance under the Statute and the Rules, the relevant provisions of section 3 of this chapter shall apply *mutatis mutandis*.

5. The Registry shall ensure that the confidentiality necessary for the performance of the functions of the Office be respected.

Regulation 145
Information provided by the Registrar to the Office

Where members of the Office act as duty counsel or as counsel before a Chamber on behalf of a person entitled to legal assistance in respect of

specific issues, the Registrar shall, having regard to confidentiality, provide them with all information and documents as are necessary for the fulfilment of those functions.

Regulation 146
Report on administrative issues relating to the Office

The Office shall report on administrative issues related to its activities to the Registrar on a regular basis and submit an annual report of its work to the Registrar having regard to the obligation of confidentiality.

Section 6
Provisions relating to articles 36 and 44 of the Code of Professional Conduct for counsel

Regulation 147
Election of the members of the Disciplinary Board

The permanent and alternate members of the Disciplinary Board referred to in article 36 of the Code of Professional Conduct for counsel shall be elected as follows:

(a) At an appropriate time before an election is due under article 36 of the Code of Professional Conduct for counsel, the Registrar shall send a letter to national bar associations and, where appropriate, to any independent representative body of counsel or legal association, as well as to all counsel on the list of counsel, informing them that an election will take place and inviting announcements of candidacy. The letter shall, *inter alia*, set out the procedure to be followed for the election and shall state that those standing for election must have established competence in professional ethics and legal matters.

(b) Persons who wish to stand for election shall announce their candidacy to the Registrar by letter, attaching a curriculum vitae and a statement setting out their specific competence in professional ethics and legal matters. Announcements of candidacy shall be sent to the Registrar by postal or courier services and shall be received at the Court within 90 calendar days of the date of the letter of the Registrar referred to in (a). Persons whose announcements of candidacy are received at the Court after the expiration of that 90 day time period shall not be eligible.

(c) If fewer candidates stand for election than the number of members of the Disciplinary Board who must be elected, all counsel on the list of counsel who have indicated on their application form for the list of counsel that they have been a member of a disciplinary body or had specific responsibilities relating to ethics, shall be considered to have announced their candidacy and are eligible, subject to the provisions of article 36, paragraph 6, and article 44, paragraph 7, of the Code of Professional Conduct for counsel. The Registrar shall, by letter, request such counsel to provide their curriculum vitae and a statement setting out their specific competence in professional ethics and legal matters within 30 calendar days of the date of dispatch of the letter.

(d) When the periods referred to in (b) and (c) have expired, the Registrar shall distribute the list of candidates by postal or courier services, together with the curriculum vitae and the statement setting out the specific competence in professional ethics and legal matters of each candidate as well as a confidential voting slip, to all counsel on the list of counsel and request counsel to vote within 45 calendar days of the date of dispatch.

(e) Counsel shall vote for as many candidates as there are members of the Disciplinary Board to be elected.

(f) The vote shall be secret. Counsel shall cast their vote by completing and returning the confidential voting slip to the Registry by postal or courier services within the time limit set out in (d). All correspondence received shall be treated with due regard for confidentiality. Any votes received after the expiry of that time period shall not be counted.

(g) Once the ballot is closed, the Registry shall count the votes and submit the results to the Registrar.

(h) At the first election, pursuant to article 36, paragraph 4, of the Code of Professional Conduct for counsel, the two candidates having obtained the most votes shall be elected as permanent members. The candidate having obtained the next highest number of votes shall be elected as the alternate member. If two or more candidates obtain the same number of votes, lots shall be drawn between them.

(i) At subsequent elections, the candidate having obtained the most votes shall be elected as the permanent member. Where required, the candidate having obtained the next highest number of votes shall be

elected as the alternate member. If two or more candidates obtain the same number of votes, lots shall be drawn between them.

(j) The Registrar shall notify the successful candidate or candidates of their election to the Disciplinary Board, inform counsel on the list of counsel of the outcome of the election and have the results published on the Court website.

(k) Within 15 calendar days of the publication of the outcome on the Court website, a candidate who has not been elected may file a complaint with the Registrar concerning any issue relating to the election procedure. After having considered the complaint, the Registrar shall take a decision, of which the candidate concerned shall be notified.

(l) Within 15 calendar days of notification of the decision taken by the Registrar, a candidate whose complaint has been rejected may apply to the Presidency for review.

(m) The Registrar may file a response within 15 calendar days of notification of the application for review.

(n) The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

Regulation 148
Election of the members of the Disciplinary Appeals Board

The election of the members of the Disciplinary Appeals Board referred to in article 44, paragraphs 4 (b) and 5 of the Code of Professional Conduct for counsel shall be governed, *mutatis mutandis*, by the provisions applying to the election of the permanent and alternate members of the Disciplinary Board under regulation 147.

Regulation 149
Appointment of the Commissioner conducting the investigation

At the request of the Presidency, the Registrar shall assist in the appointment of the Commissioner.

Selected Regulations of the Court [Regulations: 20–32, 41–56, and 67–88]

Chapter 3
Proceedings before the Court

Section 1
Provisions relating to all stages of the proceedings

Subsection 1
General provisions

Regulation 20
Public hearings

1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.

3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

Regulation 21
Broadcasting, release of transcripts and recordings

1. The publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry or release of transcripts or recordings, unless otherwise ordered by the Chamber.

2. In order to protect sensitive information, broadcasts of audio- and video-recordings of all hearings shall, unless otherwise ordered by the Chamber, be delayed by at least 30 minutes.

3. Witnesses and participants shall be informed that the public hearings of the Chamber are broadcast in accordance with this regulation. Any

objection raised shall be ruled on by the Chamber in accordance with sub-regulations 4 and 5.

4. Any objection to the release of transcripts or recordings, or requests that certain testimony be excluded from broadcast, shall be made as soon as possible and, in any event, no later than at the commencement of the session at which the witness or participant is to appear.

5. The Chamber may decide to prohibit the broadcasting of any hearing of an objection until that objection has been ruled on.

6. The Chamber may order the termination of the broadcast of a hearing at any time.

7. All documentary evidence and other evidence introduced by a participant during a public hearing shall be available for broadcast, unless otherwise ordered by the Chamber.

8. At the request of a participant or the Registry, or *proprio motu*, and when possible within the time set out in sub-regulation 2, the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing.

9. The audio- and video-record of hearings shall be made available to the participants and the public in accordance with the procedures set out in the Regulations of the Registry, unless otherwise ordered by the Chamber.

Regulation 22
Definition of documents

The term "document" shall include any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court.

Regulation 23
Content of documents

1. Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, any document filed with the Court shall, as far as practicable, state:

(a) The identity of the person filing the document;

(b) The situation or case number, the name of the person to whom article 55, paragraph 2, or article 58 applies, the accused, convicted or acquitted person, the name of counsel or representative, if any, and the Chamber to which the matter has been assigned;

(c) A brief summary of the reason for filing the document which is not a response or reply and the relief sought, if any;

(d) All relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon.

2. All standard forms and templates for use during the proceedings before the Court shall be approved by the Presidency. The Presidency may refer any matter relating to the standard forms and templates to the Advisory Committee on Legal Texts for its consideration.

3. Subject to any order of the Chamber, a participant shall file, with each document, copies of any authorities relied upon or, if appropriate, internet links. Participants are not required to file copies of decisions or orders of the Court. Authorities shall be provided in an authorised version together with a translation in at least one of the working languages of the Court if the original is not in one of those languages.

Regulation 24
Responses and replies

1. The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

2. 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.

3. States participating in the proceedings may file a response to any document, subject to any order of the Chamber.

4. A response referred to in sub-regulations 1 to 3 may not be filed to any document which is itself a response or reply.

5. Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

Regulation 25
Communications other than in writing

A person making a communication to the Court under rule 102 shall indicate at the start of the communication:

(a) His or her identity;

(b) The situation or case number, if known;

(c) The Chamber seized of the matter, if known;

(d) The name of the person to whom article 55, paragraph 2, or article 58 applies, the accused, convicted or acquitted person, if known;

(e) The purpose of the communication;

(f) When referring to a specific event, to the extent possible, the location, date and individuals involved.

Regulation 26
Electronic management

1. The Court shall establish a reliable, secure, efficient electronic system which supports its daily judicial and operational management and its proceedings.

2. The Registry shall be responsible for the implementation of the system described in sub-regulation 1, taking into account the specific requirements of the judicial activity of the Court, including the need to ensure authenticity, accuracy, confidentiality and preservation of judicial records and material.

3. Documents, decisions and orders shall, whenever possible, be submitted in electronic version for registration by the Registry. The electronic version of filings shall be authoritative.

4. In proceedings before the Court, evidence other than live testimony shall be presented in electronic form whenever possible. The original form of such evidence shall be authoritative.

Regulation 27
Transcripts

1. Real time transcripts of hearings shall be provided in at least one of the working languages of the Court to the extent technically possible. Transcripts of proceedings other than hearings may be provided upon request.

2. The transcripts constitute an integral part of the record of the proceedings. The electronic version of transcripts shall be authoritative.

Regulation 28
Questions by a Chamber

1. A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.

2. A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.

3. These provisions are without prejudice to the inherent powers of the Chamber.

Regulation 29
Non-compliance with these Regulations and with orders of a Chamber

1. In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.

2. This provision is without prejudice to the inherent powers of the Chamber.

Regulation 30
Status conferences

A Chamber may hold status conferences by way of hearings, including by way of audio- or video-link technology or by way of written submissions. The Chamber may require use of standard forms at a status conference as appropriate. Such standard forms shall be approved in accordance with regulation 23, sub-regulation 2.

Subsection 2
Distribution of documents

Regulation 31
Notification

1. Subject to the Statute, Rules, these Regulations or any order of a Chamber, all participants in the relevant proceedings shall be notified of

any document registered by the Registry or any decision or order, unless, with regard to a document, the participant submitting that document requests otherwise. All participants shall provide to the Registry an electronic, facsimile or postal contact address for notification of documents, preferably in The Hague.

2. Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, a participant is deemed notified, informed of or to have had communicated to him or her, a document, decision or order on the day it is effectively sent from the Court by the Registry. Such date shall be written on the notification form to be appended to all copies of the document, decision or order, as relevant. If the document, decision or order is not received, a participant may raise the issue and, as appropriate, may ask for a variation of the time limit in accordance with regulation 35. The Registrar shall retain and, if required, produce proof that the document, decision or order was effectively sent.

3. The relevant person shall be notified by way of personal service of the following documents:

(a) Warrants of arrest;

(b) Summonses to appear;

(c) Documents containing the charges; and

(d) Such other documents, decisions or orders ordered by the Chamber to be notified by way of personal service.

4. Notification by way of personal service may be proved in the following manner:

(a) By confirmation in writing on the prescribed form by the person serving the document that notification by way of personal service has been effected; and

(b) By a signed acknowledgement of notification by way of personal service on the prescribed form by the relevant person.

Where the relevant person declines or is unable to sign an acknowledgement of notification by way of personal service, the confirmation in (a) above shall be proof of such notification.

5. In respect of oral decisions or orders, notification shall be deemed effective on the day the decision or order is rendered orally by the Chamber unless:

(a) A participant was not present or represented when the decision or order was pronounced, in which case that participant shall be notified of the oral decision or order in accordance with sub-regulation 2; or

(b) The Chamber has indicated that a written decision or order will follow, in which case participants shall be notified of the written decision or order in accordance with sub-regulation 2.

Regulation 32
Recipients of documents, decisions and orders notified by the Court

1. A State shall be deemed notified when the official representative designated for proceedings before the Court has been notified of a document, decision or order. If a State does not designate such a representative, the State shall be deemed notified of the document, decision or order when it has been notified through the channel designated by that State in accordance with article 87.

2. Intergovernmental organisations and other organisations and institutions shall be deemed notified when the designated representative identified by the Registrar or the appropriate channel referred to in rule 177 has been notified of a document, decision or order.

3. A participant represented by counsel shall be deemed notified when his or her counsel has been notified of a document, decision or order at the electronic, facsimile or postal address which that counsel has indicated to the Registry in accordance with regulation 31, sub-regulation 1, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

4. A person who is not represented by counsel shall be deemed notified when that person or the person, organisation or institution designated by that person has been notified of a document, decision or order.

5. The Prosecutor shall be deemed notified when the Office of the Prosecutor has been notified of a document, decision or order, unless it is explicitly specified that the Prosecutor shall be notified of the document, decision or order in person.

Subsection 5
Protective measures

Regulation 41
Victims and Witnesses Unit

The Victims and Witnesses Unit may, pursuant to article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.

Regulation 42
Application and variation of protective measures

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall 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.

Subsection 6
Evidence

Regulation 43
Testimony of witnesses

Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

(a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;

(b) Avoid delays and ensure the effective use of time.

Regulation 44
Experts

1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be

included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.

2. The Chamber may direct the joint instruction of an expert by the participants.

3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.

4. The Chamber may *proprio motu* instruct an expert.

5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.

Section 2
Pre-trial

Regulation 45
Information provided by the Prosecutor

The Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, sub-paragraph (b); and shall provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber, including, in particular, the intention of the Prosecutor to submit a request under article 15, paragraph 3.

Regulation 46
Pre-Trial Chamber

1. The Presidency shall constitute permanent Pre-Trial Chambers with fixed compositions.

2. The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with regulation 45. The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information

arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.

3. Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division.

Regulation 47
Single judge

1. The designation of a single judge in accordance with article 39, paragraph 2 (b) (iii), and rule 7 shall be based on criteria agreed upon by the Pre-Trial Chamber, including seniority of age and criminal trial experience. Other criteria may include consideration of the issues involved and the circumstances of the proceedings before the Chamber, as well as the distribution of work within the Chamber and the proper management and efficiency in the handling of cases.

2. The single judge designated by the Pre-Trial Chamber shall, as far as possible, act for the duration of a case. The Pre-Trial Chamber may designate more than one single judge when the efficient management of the workload of the Chamber so requires.

Regulation 48
Information necessary for the Pre-Trial Chamber

1. The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c).

2. The Pre-Trial Chamber shall take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-regulation 1 and under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families.

3. Nothing in this regulation shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f).

Regulation 49
The request for authorization

1. A request by the Prosecutor to a Pre-Trial Chamber for authorisation of an investigation pursuant to article 15, paragraph 3, shall be in writing and shall contain:

(a) A reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed;

(b) A declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court.

2. The statement of the facts referred to in sub-regulation 1 (a) shall indicate, as a minimum:

(a) The places of the alleged commission of the crimes, e.g. country, town, as precisely as possible;

(b) The time or time period of the alleged commission of the crimes; and

(c) The persons involved, if identified, or a description of the persons or groups of persons involved.

3. The appendix to the request shall include, if possible:

(a) The chronology of relevant events;

(b) Maps showing relevant information, including the location of the alleged crimes; and

(c) An explanatory glossary of relevant names of persons, locations and institutions.

Regulation 50
Specific time limits

1. The time limit for victims to make representations under article 15, paragraph 3, and rule 50, sub-rule 3, shall be 30 days following information given in accordance with rule 50, sub-rule 1.

2. The time limit for a State Party to express its views on a request by the Prosecutor for authorisation to take certain measures within its territory in accordance with rule 115, sub-rule 2, shall be ten days from notification.

Regulation 51
Decision on interim release

For the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released.

Regulation 52
Document containing the charges

The document containing the charges referred to in article 61 shall include:

(a) The full name of the person and any other relevant identifying information;

(b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

Regulation 53
Decision of the Pre-Trial Chamber following the confirmation hearing

The written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends.

Section 3
Trial

Regulation 54
Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues:

(a) The length and content of legal arguments and the opening and closing statements;

(b) A summary of the evidence the participants intend to rely on;

(c) The length of the evidence to be relied on;

(d) The length of questioning of the witnesses;

(e) The number and identity (including any pseudonym) of the witnesses to be called;

(f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;

(g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;

(h) The issues the participants propose to raise during the trial;

(i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given;

(j) The presentation of evidence in summary form;

(k) The extent to which evidence is to be given by an audio- or videolink;

(l) The disclosure of evidence;

(m) The joint or separate instruction by the participants of expert witnesses;

(n) Evidence to be introduced under rule 69 as regards agreed facts;

(o) The conditions under which victims shall participate in the proceedings;

(p) The defences, if any, to be advanced by the accused.

Regulation 55
Authority of the Chamber to modify the legal characterisation of facts

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber

may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

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.

Chapter 4
Counsel issues and legal assistance

Section 1
List of counsel and duty counsel

Regulation 67
Criteria to be met by counsel

1. The necessary relevant experience for counsel as described in rule 22 shall be at least ten years.

2. Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

Regulation 68
Assistants to counsel

Persons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber.

The criteria to be met by these persons shall be determined in the Regulations of the Registry.

Regulation 69
Proof and control of criteria to be met by counsel

1. A person seeking to be included in the list of counsel shall complete the forms provided by the Registrar for this purpose.

2. A person referred to in sub-regulation 1 shall also provide:

(a) A detailed *curriculum vitae*;

(b) A certificate issued by each Bar association the person is registered with, and/or each relevant controlling administrative authority confirming his or her qualifications, the right to practise and the existence, if any, of disciplinary sanctions or ongoing disciplinary proceedings; and

(c) A certificate issued by the relevant authority of each State of which the person is a national or where the person is domiciled stating the existence, if any, of criminal convictions.

3. A person referred to in sub-regulation 1 or counsel already included in the list of counsel shall immediately inform the Registrar of any changes to the information he or she has provided that are more than *de minimis*, including the initiation of any criminal or disciplinary proceedings against the person.

4. The Registrar may at any stage take steps to verify the information provided by any person referred to in sub-regulation 1 and by counsel already included in the list of counsel.

Regulation 70
Inclusion in the list of counsel

1. On receipt of an application by a person seeking to be included in the list of counsel, the Registrar shall establish whether the person has provided the information required under regulation 69. Thereafter, the Registrar shall acknowledge receipt of the application and, where relevant, direct the person to submit additional information.

2. The decision as to whether a person shall be included in the list of counsel shall be notified to that person. If the application is refused, the Registrar shall provide reasons and information on how to apply for review of that decision in accordance with regulation 72.

Regulation 71
Removal and suspension from the list of counsel

1. The Registrar shall remove a counsel from the list of counsel where he or she:

(a) No longer meets the criteria required for inclusion in the list of counsel;

(b) Has been permanently banned from practising before the Court as a result of disciplinary proceedings held in accordance with the Code of Professional Conduct for counsel;

(c) Has been found guilty of an offence against the administration of justice as described in article 70, paragraph 1; or

(d) Has been permanently interdicted from exercising his or her functions before the Court in accordance with rule 171, sub-rule 3.

2. The Registrar shall suspend a counsel from the list of counsel where he or she has been:

(a) Temporarily suspended in a disciplinary proceeding according to the Code of Professional Conduct for counsel; or

(b) Temporarily interdicted from exercising his or her functions before the Court for a period exceeding 30 days in accordance with rule 171, sub-rule 3.

3. The Registrar shall notify the relevant counsel of his or her decision under sub-regulations 1 or 2. The Registrar shall provide reasons and information on how to apply for review of that decision in accordance with regulation 72.

Regulation 72
Review of decisions of the Registrar

1. Application may be made to the Presidency for review of:

(a) A decision under regulation 70, sub-regulation 2, refusing to include a person in the list of counsel;

(b) A decision under regulation 71, sub-regulation 1, removing counsel from the list of counsel; or

(c) A decision under regulation 71, sub-regulation 2, suspending counsel from the list of counsel.

2. Applications as described in sub-regulation 1 shall be set out in accordance with regulation 23 and be filed within 15 days of notification of the relevant decision of the Registrar.

3. The Registrar may file a response within 15 days of notification of the application as referred to in sub-regulations 1 and 2.

4. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

Regulation 73
Duty counsel

1. The Registrar shall establish and maintain a roster of counsel included in the list of counsel who are available at any time to represent any person before the Court or to represent the interests of the defence.

2. If any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

Section 2
Defence through counsel

Regulation 74
Defence through counsel

1. Defence counsel shall act in proceedings before the Court either when chosen by the person entitled to legal assistance in accordance with rule 21, sub-rule 2, or when the Chamber has appointed counsel in accordance with the Statute, Rules or these Regulations.

2. When represented by defence counsel, the person entitled to legal assistance shall, subject to article 67, paragraph 1 (h), act before the Court through his or her counsel, unless otherwise authorised by the Chamber.

Regulation 75
Choice of defence counsel

1. If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is

willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.

2. If the person entitled to legal assistance chooses a counsel not on the list of counsel who is willing and ready to represent him or her and to be included in the list, the Registrar shall decide on the eligibility of that counsel in accordance with regulation 70 and, upon inclusion in the list, shall facilitate the issuance of a power of attorney. Until the filing of a power of attorney, the person entitled to legal assistance may be represented by duty counsel in accordance with regulation 73.

Regulation 76
Appointment of defence counsel by a Chamber

1. A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require.

2. Where the Chamber decides to appoint counsel in accordance with sub-regulation 1, and where the counsel considered for appointment is not included in the list of counsel, the Registrar shall first decide on the eligibility of that counsel to be included in the list in accordance with regulation 70. The Chamber may also appoint counsel from the Office of Public Counsel for the defence.

Regulation 77
Office of Public Counsel for the defence

1. The Registrar shall establish and develop an Office of Public Counsel for the defence for the purpose of providing assistance as described in sub-regulations 4 and 5.

2. The Office of Public Counsel for the defence shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.

3. The Office of Public Counsel for the defence may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.

4. The tasks of the Office of Public Counsel for the defence shall include representing and protecting the rights of the defence during the initial stages

of the investigation, in particular for the application of article 56, paragraph 2 (d), and rule 47, sub-rule 2.

5. The Office of Public Counsel for the defence shall also provide support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate:

(a) Legal research and advice; and

(b) Appearing before a Chamber in respect of specific issues.

Regulation 78
Withdrawal of defence counsel

Prior to withdrawal from a case, defence counsel shall seek the leave of the Chamber.

Section 3
Legal representatives of victims

Regulation 79
Decision of the Chamber concerning legal representatives of victims

1. The decision of the Chamber to request the victims or particular groups of victims to choose a common legal representative or representatives may be made in conjunction with the decision on the application of the victim or victims to participate in the proceedings.

2. When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

3. Victims may request the relevant Chamber to review the Registrar's choice of a common legal representative under rule 90, sub-rule 3, within 30 days of notification of the Registrar's decision.

Regulation 80
Appointment of legal representatives of victims by a Chamber

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.
2. The Chamber may appoint counsel from the Office of Public Counsel for victims.

Regulation 81
Office of Public Counsel for victims

1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.

2. The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.

3. The Office of Public Counsel for victims may include a counsel who meets the criteria set out in rule 22 and regulation 67. The Office shall include assistants as referred to in regulation 68.

4. 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.

Regulation 82
Withdrawal of legal representatives of victims

Prior to withdrawal from a case, legal representatives of victims shall seek the leave of the Chamber.

Section 4
Legal assistance paid by the Court

Regulation 83
General scope of legal assistance paid by the Court

1. Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.

3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.

4. Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance.

Regulation 84
Determination of means

1. Where a person applies for legal assistance to be paid by the Court, the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance.

2. The means of the applicant shall include means of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose, including, but not limited to, direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held, but excluding any family or social benefits to which he or she may be entitled. In assessing such means, account shall also be taken of any transfers of property by the applicant which the Registrar considers relevant, and of the apparent lifestyle of the applicant. The Registrar shall allow for expenses claimed by the applicant provided they are reasonable and necessary.

Regulation 85
Decisions on payment of legal assistance

1. In accordance with the procedure set out in the Regulations of the Registry, the Registrar shall decide within one month of the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry, whether legal assistance should be paid by the Court. The decision shall be notified to the applicant together with the reasons for the decision and instructions on how to apply for review. The Registrar may, in appropriate circumstances, make a provisional decision to grant payment of legal assistance.

2. The Registrar shall reconsider his or her decision on payment of legal assistance if the financial situation of the person receiving such legal assistance is found to be different than indicated in the application, or if the financial situation of the person has changed since the application was submitted. Any revised decision shall be notified to the person together with the reasons for the decision and instructions on how to apply for review.

3. Persons as referred to in sub-regulations 1 and 2 may seek review of the decisions described in those provisions by the Presidency within 15 days of notification of the relevant decision. The decision of the Presidency shall be final.

4. Subject to rule 21, sub-rule 5, where legal assistance has been paid by the Court and it is subsequently established that the information provided to the Registrar on the applicant's means was inaccurate, the Registrar may seek an order from the Presidency for recovery of the funds paid from the person who received legal assistance paid by the Court. The Registrar may seek the assistance of the relevant States Parties to enforce that order.

Chapter 5
Victims participation and reparations

Regulation 86
Participation of victims in the proceedings under rule 89

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and nongovernmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims.

2. The standard forms or other applications described in sub-regulation 1 shall contain, to the extent possible, the following information:

(a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent;

(b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102;

(c) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in rule 85 (b);

(d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85;

(e) Any relevant supporting documentation, including names and addresses of witnesses;

(f) Information as to why the personal interests of the victim are affected;

(g) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought;

(h) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative.

3. Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.

4. The Registrar may request further information from victims or those presenting an application in accordance with rule 89, sub-rule 3, in order to ensure that such application contains, to the extent possible, the information referred to in sub-regulation 2, before transmission to a Chamber. The Registrar may also seek additional information from States, the Prosecutor and intergovernmental or non-governmental organizations.

5. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.

6. Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with

sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.

7. Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.

8. A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.

9. There shall be a specialised unit dealing with victims' participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims.

Regulation 87
Information to victims

1. The Prosecutor shall notify the Pre-Trial Chamber as to information provided pursuant to rule 50, sub-rule 1, including the date the information was provided.

2. The Prosecutor shall inform the Registry of his or her decision not to initiate an investigation or not to prosecute pursuant to article 53, paragraphs 1 and 2, respectively, and shall provide all relevant information for notification by the Registry to victims in accordance with rule 92, sub-rule 2.

Regulation 88
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 nongovernmental organizations which may assist in its dissemination, as widely as possible. This standard form shall be approved in accordance with

regulation 23, sub-regulation 2, and shall, to the extent possible, be used by victims.

2. The Registrar shall seek all necessary additional information from a victim in order to complete his or her request in accordance with rule 94, sub-rule 1, and shall assist victims in completing such a request. The request shall then be registered and stored electronically in order to be notified by the unit described in regulation 86, sub-regulation 9, in accordance with rule 94, sub-rule 2.

Code of Professional Conduct for Counsel

Chapter I
General provisions

Article 1
Scope

This Code shall apply to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court, hereinafter referred to as "counsel".

Article 2
Use of terms

1. Unless otherwise defined in this Code, all terms are used as defined in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. In this Code:

— "Court" refers to the International Criminal Court;

— "associate" refers to lawyers who practise in the same law firm as counsel;

— "national authority" refers to the bar association of which counsel is a member or any other organ competent to regulate and control the activity of lawyers, judges, prosecutors or professors of law, or other qualified counsel according to rule 22, paragraph 1, of the Rules of Procedure and Evidence;

— "client" refers to all those assisted or represented by counsel;

— "defence team" refers to counsel and all persons working under his or her oversight; and

— "agreement" refers to the oral or written legal relationship which binds counsel to his or her client before the Court.

Article 3
Amendment procedure

1. States Parties, judges, the Registrar, counsel and independent organizations representing lawyers' associations and counsel may submit proposals for amendments to this Code. Any proposal for amendments to this Code shall be submitted to the Registrar, together with explanatory material, in one or both working languages of the Court.

2. The Registrar shall transmit the proposals to the Presidency, together with a reasoned report prepared after consultation with the Prosecutor and, as appropriate, with any independent organization representing lawyers' associations and counsel.

3. Any proposal to amend this Code, submitted by one or more States Parties, shall be transmitted by the Presidency to the Assembly of States Parties together with any comments the Presidency may have, taking into account the report of the Registrar.

4. Any proposal to amend this Code, other than one submitted by one or more States Parties, shall be transmitted by the Presidency to the Assembly of States Parties together with any comments the Presidency may have, taking into account the report of the Registrar. In such circumstances, the Presidency shall provide the Assembly of States Parties with the Presidency's reasoned recommendations as to whether or not any such proposal should be adopted. If the Presidency recommends adoption, it shall submit a draft amendment in relation to that proposal to the Assembly of States Parties for the purpose of adoption.

5. Amendments to this Code shall be adopted by the Assembly of States Parties in accordance with article 112, paragraph 7, of the Statute.

Article 4
Primacy of the Code of Professional Conduct for counsel

Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practising before the Court.

Article 5
Solemn undertaking by counsel

Before taking office, counsel shall give the following solemn undertaking before the Court: "I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court".

Article 6
Independence of counsel

1. Counsel shall act honourably, independently and freely.

2. Counsel shall not:

(a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or

(b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7
Professional conduct of counsel

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.

2. Counsel shall maintain a high level of competence in the law applicable before the Court. He or she shall participate in training initiatives required to maintain such competence.

3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court, including the enforcement of this Code.

4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

Article 8
Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. The relevant provisions referred to in paragraph 1 of this article include, inter alia, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.

3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.

4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

Article 9
Counsel-client relationship

1. Counsel shall not engage in any discriminatory conduct in relation to any other person, in particular his or her client, on grounds of race, colour, ethnic or national origin, nationality, citizenship, political opinions, religious convictions, gender, sexual orientation, disability, marital status or any other personal or economic status.

2. In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

3. Where a client's ability to make decisions concerning representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence.

4. Counsel shall not engage in any improper conduct, such as demanding sexual relations, coercion, intimidation, or exercise any other undue influence in his or her relations with a client.

Article 10
Advertising

Counsel may advertise provided the information is:

(a) Accurate; and

(b) Respectful of counsel's obligations regarding confidentiality and privilege.

Chapter 2
Representation by counsel

Article 11
Establishment of the representation agreement

The agreement is established when counsel accepts a request from a client seeking representation or from the Chamber.

Article 12
Impediments to representation

1. Counsel shall not represent a client in a case:

(a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation; or

(b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

2. In the case of paragraph 1 (a) of this article, where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained. Such notice shall be provided in a manner consistent with counsel's duties of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence.

3. Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless:

(a) The testimony relates to an uncontested issue; or

(b) The testimony relates to the nature and value of legal services rendered in the case.

4. This article is without prejudice to article 16 of this Code.

Article 13
Refusal by counsel of a representation agreement

1. Counsel has the right to refuse an agreement without stating reasons.

2. Counsel has a duty to refuse an agreement where:

(a) There is a conflict of interest under article 16 of this Code;

(b) Counsel is incapable of dealing with the matter diligently; or

(c) Counsel does not consider that he or she has the requisite expertise.

Article 14
Performance in good faith of a representation agreement

1. The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client.

2. When representing a client, counsel shall:

(a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code; and

(b) Consult the client on the means by which the objectives of his or her representation are to be pursued.

Article 15
Communication between counsel and the client

1. Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.

2. When counsel is discharged from or terminates the agreement, he or she shall convey as promptly as possible to the former client or replacement counsel any communication that counsel received relating to the representation, without prejudice to the duties which subsist after the end of the representation.

3. When communicating with the client, counsel shall ensure the confidentiality of such communication.

Article 16
Conflict of interest

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.

2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.

3. Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either:

(a) Withdraw from the representation of one or more clients with the prior consent of the Chamber; or

(b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

Article 17
Duration of the representation agreement

1. Counsel shall advise and represent a client until:

(a) The case before the Court has been finally determined, including all appeals;

(b) Counsel has withdrawn from the agreement in accordance with article 16 or 18 of this Code; or

(c) A counsel assigned by the Court has been withdrawn.

2. The duties of counsel towards the client continue until the representation has ended, except for those duties which subsist under this Code.

Article 18
Termination of the representation

1. With the prior consent of the Chamber, counsel may withdraw from the agreement in accordance with the Regulations of the Court if:

(a) The client insists on pursuing an objective that counsel considers repugnant; or

(b) The client fails to fulfil an obligation to counsel regarding counsel's services and has been given reasonable warning that counsel will withdraw unless the obligation is fulfilled.

2. Where counsel withdraws from the agreement, he or she remains subject to article 8 of this Code, as well as any provisions of the Statute and the Rules of Procedure and Evidence relating to confidentiality.

3. Where counsel is discharged by the client, counsel may be discharged in accordance with the Regulations of the Court.

4. Where counsel's physical or mental condition materially impairs his or her ability to represent the client, counsel may be withdrawn by the Chamber at his or her request or at the request of the client or the Registrar.

5. In addition to complying with the duties imposed by article 15, paragraph 2, of this Code, counsel shall convey to replacement counsel the entire case file, including any material or document relating to it.

Article 19
Conservation of files

Following the termination of the representation, counsel shall keep files containing documents and records of work carried out in fulfilment of the agreement for five years. Counsel shall allow the former client to inspect the file unless he or she has substantial grounds for refusing to do so. After this time counsel shall seek instructions from the former client, his or her heirs or the Registrar on the disposal of the files, with due regard to confidentiality.

Article 20
Counsel's fees

Prior to establishing an agreement, counsel shall inform the client in writing of the rate of fees to be charged and the criteria for setting them, the basis for calculating the costs, the billing arrangements and the client's right to receive a bill of costs.

Article 21
Prohibitions

1. Notwithstanding article 22, counsel shall not accept remuneration, in cash or in kind, from a source other than the client unless the client consents thereto in writing after consultation and counsel's independence and relationship with the client are not thereby affected.

2. Counsel shall never make his or her fees contingent on the outcome of a case in which he or she is involved.

3. Counsel shall not mix funds of a client with his or her own funds, or with funds of counsel's employer or associates. Counsel shall not retain money received on behalf of a client.

4. Counsel shall not borrow monies or assets from the client.

Article 22
Remuneration of counsel in the framework of legal assistance

1. The fees of counsel where his or her client benefits from legal assistance shall be paid exclusively by the Registry of the Court. Counsel shall not accept remuneration in cash or in kind from any other source.

2. Counsel shall neither transfer nor lend all or part of the fees received for representation of a client or any other assets or monies to a client, his or her relatives, acquaintances, or any other third person or organization in relation to which the client has a personal interest.

3. Counsel shall sign an undertaking to respect the obligations under this article when accepting the appointment to provide legal assistance. The signed undertaking shall be sent to the Registry.

4. Where counsel is requested, induced or encouraged to violate the obligations under this article, counsel shall advise the client of the prohibition of such conduct.

5. Breach of any obligations under this article by Counsel shall amount to misconduct and shall be subject to a disciplinary procedure pursuant to this Code. This may lead to a permanent ban on practising before the Court and being struck off the list of counsel, with transmission to the respective national authority.

Chapter 3
Relations with the Court and others

Article 23
Communications with the Chambers and judges

Unless the judge or the Chamber dealing with a case permits counsel to do so in exceptional circumstances, counsel shall not:

(a) Make contact with a judge or Chamber relative to the merits of a particular case other than within the proper context of the proceedings; or

(b) Transmit evidence, notes or documents to a judge or Chamber except through the Registry.

Article 24
Duties towards the Court

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.

2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.

3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.

4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.

5. Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings.

Article 25
Evidence

1. Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.

2. If counsel, while collecting evidence, reasonably believes that the evidence found may be destroyed or tampered with, counsel shall request the Chamber to issue an order to collect the evidence pursuant to rule 116 of the Rules of Procedure and Evidence.

Article 26
Relations with unrepresented persons

1. When required in the course of representation, counsel may communicate with and meet an unrepresented person in the client's interest.

2. When counsel communicates with unrepresented persons he or she shall:

(a) Inform them of their right to assistance from counsel and, if applicable, to their right to legal assistance; and

(b) Without infringing upon the confidentiality of counsel-client privilege, inform them of the interest that counsel represents and the purpose of the communication.

3. If counsel becomes aware of a potential conflict of interest in the course of a communication or meeting with an unrepresented person, he or she shall, notwithstanding paragraph 1 of this article, refrain immediately from engaging in any further contact or communication with the person.

Article 27
Relations with other counsel

1. In dealing with other counsel and their clients, counsel shall act fairly, in good faith and courteously.

2. All correspondence between counsel representing clients with a common interest in a litigated or non-litigated matter and who agree on exchanging information concerning the matter, shall be presumed confidential and privileged by counsel.

3. When counsel does not expect particular correspondence between counsel to be confidential, he or she shall state clearly at the outset that such correspondence is not confidential.

Article 28
Relations with persons already represented by counsel

Counsel shall not address directly the client of another counsel except through or with the permission of that counsel.

Article 29
Relations with witnesses and victims

1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom.

2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

Chapter 4
Disciplinary regime

Article 30
Conflict with other disciplinary regimes

Subject to article 38 of this Code, the present chapter is without prejudice to the disciplinary powers of any other disciplinary authority that may apply to counsel subject to this Code.

Article 31
Misconduct

Counsel commits misconduct when he or she:

(a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her;

(b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this article, or does so through the acts of another person; or

(c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.

Article 32
Liability for conduct of assistants or other staff

1. Counsel shall be liable for misconduct under article 31 of this Code by his or her assistants or staff when he or she:

(a) Orders or approves the conduct involved; or

(b) Knows or has information suggesting that violations may be committed and takes no reasonable remedial action.

2. Counsel shall instruct his or her assistants or staff in the standards set by this Code.

Article 33
The Commissioner

1. A Commissioner responsible for investigating complaints of misconduct in accordance with this chapter shall be appointed for four years by the Presidency. The Commissioner shall be chosen from amongst persons with established competence in professional ethics and legal matters.

2. The Commissioner shall not be eligible for re-appointment. A Commissioner who is involved in an investigation when his or her mandate expires shall continue to conduct such an investigation until it is concluded.

Article 34
Filing a complaint of misconduct

1. Complaints against counsel regarding misconduct as referred to in articles 31 and 32 of this Code may be submitted to the Registry by:

(a) The Chamber dealing with the case;

(b) The Prosecutor; or

(c) Any person or group of persons whose rights or interests may have been affected by the alleged misconduct.

2. The complaint shall be made in writing or, if the complainant is unable to do so, orally before a staff member of the Registry. It shall identify the complainant and the counsel against whom the complaint is made and shall describe in sufficient detail the alleged misconduct.

3. The Registrar shall transmit the complaint to the Commissioner.

4. The Registrar may, on his or her own initiative, make complaints to the Commissioner regarding the misconduct referred to in articles 31 and 32 of this Code.

5. All complaints shall be kept confidential by the Registry.

Article 35
Limitation period

The right to file a complaint against counsel for misconduct shall lapse five years after the termination of the representation agreement.

Article 36
Composition and management of the Disciplinary Board

1. The Disciplinary Board shall comprise three members, two of whom shall be permanent and one ad hoc.

2. The members of the Disciplinary Board shall perform their functions under this Code in an independent and impartial manner.

3. The Registry shall make appropriate arrangements for the elections, provided for in paragraph 4 of this article, in consultation with counsel and, as appropriate, national authorities.

4. The two permanent members, as well as one alternate member who may serve as a replacement in accordance with paragraph 10 of this article, shall

be elected for four years by all counsel entitled to practise before the Court. They shall be chosen from amongst persons with established competence in professional ethics and legal matters.

5. The ad hoc member shall be a person appointed by the national authority competent to regulate and control the activities of counsel subject to the disciplinary procedure.

6. The permanent members shall not be eligible for re-election.

7. Notwithstanding paragraph 4 of this article, at the first election one of the permanent members shall be selected by lot to serve for a term of six years.

8. After each election and in advance of the first meeting of the newly-elected Disciplinary Board, the permanent and alternate members shall elect one of the permanent members as a chairperson.

9. All members of the Disciplinary Board shall have the same rights and votes. The Disciplinary Board shall decide by majority vote. An alternate member serving on a case pursuant to paragraph 10 of this article shall have the same rights and votes as permanent and ad hoc members serving on the same case.

10. If one of the permanent members is unavailable to deal with the case or serve on the Disciplinary Board, the chairperson or, where the chairperson is the permanent member concerned, the other permanent member, shall request the alternate member to serve as a replacement on the Disciplinary Board.

11. Permanent members or the alternate member whose mandates have expired shall continue to deal with the cases they already have under consideration until such cases are finally determined including all appeals.

12. The Registrar shall appoint a staff member of the Registry who will render secretariat services to the Disciplinary Board. Once appointed, the relevant staff member of the Registry shall act at arm's length from the Registry and, subject to article 44, paragraph 12 of this Code, solely as the secretariat of the Disciplinary Board.

Article 37
Preliminary procedures

1. If the complaint filed meets the requirements in article 34 of this Code, the Commissioner shall forward it to counsel subject to the disciplinary

procedure, who shall submit a response within sixty days from the date the complaint is forwarded.

2. The response shall indicate whether the alleged misconduct has been or is the subject of a disciplinary procedure before the national authority. If so, it shall include:

(a) The identity of the national authority deciding on the alleged misconduct; and

(b) A certified communication by the national authority stating the alleged facts that are the basis of the disciplinary procedure before it.

Article 38
Complementarity of disciplinary measures

1. The disciplinary procedure in this Code shall be applied by the Disciplinary Board.

2. The ad hoc member of the Disciplinary Board shall serve as the contact point with the relevant national authority for all communication and consultation regarding the procedure.

3. Counsel subject to the disciplinary procedure shall request the national authority dealing with the matter to inform the Disciplinary Board of the progress of any national disciplinary procedure concerning the alleged misconduct and of its final decision, and shall take all measures necessary to facilitate such communication.

4. When the alleged misconduct is the basis of a disciplinary procedure which has already been initiated before the relevant national authority, the procedure before the Disciplinary Board shall be suspended until a final decision is reached regarding the former procedure, unless:

(a) the national authority does not respond to communications and consultations in accordance with paragraph 2 of this article within a reasonable time;

(b) the Disciplinary Board considers that the information received is not satisfactory; or

(c) the Disciplinary Board considers that, in the light of the information received, the national authority is unable or unwilling to conclude the disciplinary procedure.

5. As soon as it receives the decision of the national authority, the Disciplinary Board shall:

(a) declare the procedure closed, unless the decision adopted does not adequately address a complaint of misconduct under this Code; or

(b) declare that the decision of the national authority does not cover or only partially covers the misconduct brought before the Disciplinary Board and that therefore the procedure is to be continued.

6. In the case of paragraphs 3 and paragraph 4 (b) of this article, the Disciplinary Board may ask counsel subject to the disciplinary procedure to provide detailed information about the procedure, including any minute or evidence which might have been submitted.

7. A decision by the Disciplinary Board based on this article may be appealed before the Disciplinary Appeals Board.

Article 39
Disciplinary procedure

1. The Commissioner conducting the investigation may dismiss a complaint without any further investigation if he or she considers on the basis of the information at his or her disposal that the allegation of misconduct is unfounded in fact or in law. He or she shall notify the complainant accordingly.

2. Should the Commissioner consider otherwise, he or she shall promptly investigate the counsel's alleged misconduct and decide either to submit a report to the Disciplinary Board or to bring the procedure to an end.

3. The Commissioner shall take into consideration all evidence, whether oral, written or any other form, which is relevant and has probative value. He or she shall keep all information concerning the disciplinary procedure confidential.

4. The Commissioner may try to find an amicable settlement if he or she deems it appropriate. The Commissioner shall report the outcome of any such efforts to reach an amicable settlement to the Disciplinary Board, which may take it into consideration. Any amicable settlement shall be without prejudice to the competence or powers of the Disciplinary Board under this Code.

5. The report of the Commissioner shall be submitted to the Disciplinary Board.

6. The Disciplinary Board hearing shall be public. However, the Disciplinary Board may decide to hold a hearing or parts of it in closed session, in particular to safeguard the confidentiality of information in the report of the Commissioner or to protect victims and witnesses.

7. The Commissioner and the counsel subject to the disciplinary procedure shall be called and heard. The Disciplinary Board may also call and hear any other person deemed useful for the establishment of the truth.

8. In exceptional cases, where the alleged misconduct is of such a nature as to seriously prejudice the interests of justice, the Commissioner may lodge an urgent motion with the Chamber before which the counsel who is the subject of the complaint is appearing, so that it may, as appropriate, declare a temporary suspension of such counsel.

Article 40
Rights of counsel subject to the disciplinary procedure

1. Counsel subject to the disciplinary procedure shall be entitled to assistance from other counsel.

2. Counsel shall have the right to remain silent before the Disciplinary Board, which may draw any inferences it deems appropriate and reasonable from such silence in the light of all the information submitted to it.

3. Counsel shall have the right to full disclosure of the information and evidence gathered by the Commissioner as well as the Commissioner's report.

4. Counsel shall be given the time required to prepare his or her defence.

5. Counsel shall have the right to question, personally or through his or her counsel, any person called by the Disciplinary Board to testify before it.

Article 41
Decisions by the Disciplinary Board

1. The Disciplinary Board may conclude the procedure finding no misconduct on the basis of the evidence submitted to it or finding that counsel subject to disciplinary procedure committed the alleged misconduct.

2. The decision shall be made public. It shall be reasoned and issued in writing.

3. The decision shall be notified to counsel subject to the disciplinary procedure and to the Registrar.

4. When the decision is final, it shall be published in the Official Journal of the Court and transmitted to the national authority.

Article 42
Sanctions

1. When misconduct has been established, the Disciplinary Board may impose one or more of the following sanctions:

(a) Admonishment;

(b) Public reprimand with an entry in counsel's personal file;

(c) Payment of a fine of up to €30,000;

(d) Suspension of the right to practise before the Court for a period not exceeding two years; and

(e) Permanent ban on practising before the Court and striking off the list of counsel.

2. The admonishment may include recommendations by the Disciplinary Board.

3. The costs of the disciplinary procedure shall be within the discretion of the Disciplinary Board.

Article 43
Appeals

1. Sanctioned counsel and the Commissioner shall have the right to appeal the decision of the Disciplinary Board on factual or legal grounds.

2. The appeal shall be notified to the secretariat of the Disciplinary Board within thirty days from the day on which the decision has been delivered.

3. The secretariat of the Disciplinary Board shall transmit the notification of the appeal to the secretariat of the Disciplinary Appeals Board.

4. The Disciplinary Appeals Board shall decide on the appeal according to the procedure followed before the Disciplinary Board.

Article 44
Composition and management of the Disciplinary Appeals Board

1. The Disciplinary Appeals Board shall decide on appeals against decisions of the Disciplinary Board.

2. The members of the Disciplinary Appeals Board shall perform their functions under this Code in an independent and impartial manner.

3. The Registry shall make appropriate arrangements for the elections provided for in paragraph 5 of this article, in consultation with counsel and, as appropriate, national authorities.

4. The Disciplinary Appeals Board shall comprise five members:

(a) The three judges of the Court who take precedence under regulation 10 of the Regulations of the Court, not including:

(i) the judges dealing with the case from which the complaint subject to the disciplinary procedure arose; or

(ii) any members or former members of the Presidency who appointed the Commissioner.

(b) Two persons elected in accordance with paragraph 5 of this article.

5. The two members of the Disciplinary Appeals Board referred to in paragraph 4 (b) of this article, as well as an alternate member who may serve as a replacement in accordance with paragraph 6 of this article, shall be elected for four years by all counsel entitled to practise before the Court. They shall be chosen from amongst persons with established competence in professional ethics and legal matters.

6. If one of the elected members is unavailable to deal with the case or serve on the Disciplinary Appeal Board, the chairperson shall request the alternate member to serve as a replacement on the Disciplinary Appeals Board.

7. The functions of members of the Disciplinary Appeals Board are incompatible with those of members of the Disciplinary Board.

8. The elected members shall not be eligible for re-election.

9. The judge who takes precedence among the three judges referred to in paragraph 4 (a) of this article shall be the chairperson of the Disciplinary Appeals Board.

10. All members of the Disciplinary Appeals Board shall have the same rights and votes. The Disciplinary Appeals Board shall decide by majority

vote. An alternate member serving on a case pursuant to paragraph 6 of this article shall have the same rights and votes as other members serving on the same case.

11. Members whose mandates have expired shall continue to deal with the cases they already have under consideration until such cases are finally determined.

12. The staff member of the Registry appointed by the Registrar pursuant to article 36, paragraph 12, of this Code to provide secretariat services to the Disciplinary Board shall also act as the secretariat of the Disciplinary Appeals Board. Once appointed, the relevant staff member of the Registry shall act at arm's length from the Registry.

Chapter 5
Final provisions

Article 45
Entry into force

This Code and any amendments to it shall enter into force 30 days after their adoption by the Assembly of States Parties in accordance with article 112, paragraph 2, of the Rome Statute.

Article 46
Publication

The Code adopted by the Assembly of States Parties shall be published in the Official Journal of the Court.

APPENDIX VI

Counsel Participation Form

This form is also available at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/Legal+Research+and+Advice.htm

Cour Pénale Internationale

International Criminal Court

ANNEX 1

Candidate application form list of counsel

Candidates are requested to fill in the form below and answer all the questions. The form and the required documents should be sent to the following address: Registry of the International Criminal Court, Division of Victims and Counsel, P.O. Box 19519, 2500 CM The Hague, The Netherlands, quoting "Reference: list of counsel".

Surname of candidate:	**Candidate's home address:**
First name(s):	**Candidate's office address:**
Sex: ☐ **M** ☐ **F**	
Other names used now or in the past (e.g. maiden name):	**Other addresses:**
Date of birth:	**Telephone number (home):**
Place and country of birth:	**Telephone number (office):**
Present nationality/nationalities:	**Mobile phone number:**
Candidate's father's full name:	**Fax number (home):**
Candidate's mother's full name:	**Fax number (office):**
	E-mail address:

Do you have any connection whatsoever with a member of the list of counsel and/or any investigator? ☐ Yes (please provide details) ☐ No	**Do you or any member of your family have any connection whatsoever with a person seeking representation before the Court?** ☐ Yes (please provide details) ☐ No
Do you have any connection whatsoever with a person seeking legal assistance from the Court? ☐ Yes (please provide details) ☐ No	**Do you have any connection whatsoever with a staff member of the Court?** ☐ Yes (please provide details) ☐ No

Language proficiency				
What is your mother tongue?				
Other languages **(Please indicate your level in each skill as follows: Basic/Intermediate/Advanced)**				
Language	**Written comprehension**	**Oral comprehension**	**Writing**	**Speaking**

Knowledge of law:	
How would you describe your knowledge of the common law system? ☐ Excellent ☐ Good ☐ Quite good ☐ Basic (please provide details)	**How would you describe your knowledge of international law and procedure?** ☐ Excellent ☐ Good ☐ Quite good ☐ Basic (please provide details):
How would you describe your knowledge of the civil law system? ☐ Excellent ☐ Good ☐ Quite good ☐ Basic (please provide details)	**How would you describe your knowledge of criminal law and procedure?** ☐ Excellent ☐ Good ☐ Quite good ☐ Basic (please provide details)

Education	
Secondary and university education. Please give details of diplomas, degrees and merits obtained, specifying the year, university, institute or other institution attended, and area of specialisation. Please provide the full address and contact details of the institutions attended, specifying the name of a contact person in each case.	Other studies: Other significant information:

Computer skills	
How would you describe your computer skills? ☐ Excellent ☐ Good ☐ Quite good ☐ Basic **Have you ever used computer tools for document management?** ☐ Yes (please provide details) ☐ No **Would you describe your knowledge of computerised case management systems as:** ☐ Excellent ☐ Good ☐ Quite good ☐ Basic (please provide details)	Please list the computer tools or computer equipment that you use in your work: Please list any computer programs you use:

If you are a judge, lawyer or prosecutor, please indicate:	
Years of experience in criminal proceedings:	**Have you worked or are you currently working for an international criminal court?** ☐ Yes (please provide details) ☐ No
Your field of expertise and years of experience in that field:	**Have you ever appeared before a court as an expert witness?** ☐ Yes (please provide details) ☐ No
Total number of years of experience:	**Have you ever appeared before a court as *amicus curiae*?** ☐ Yes (please provide details) ☐ No
	Have you ever appeared before a court as a legal representative of a victim or victims? ☐ Yes (please provide details) ☐ No
Other activities related to criminal proceedings:	

If you are an academic in law, please indicate:	
Your field of expertise:	**Have you ever appeared before a court as an expert witness?** ☐ Yes (please provide details) ☐ No
Total number of years of experience:	**Have you ever appeared before a court as *amicus curiae*?** ☐ Yes (please provide details) ☐ No
Please list any significant publications relating to international criminal law, international humanitarian law or human rights of which you are the author:	**Have you ever appeared before a court as a legal representative of a victim or victims?** ☐ Yes (please provide details) ☐ No
Other activities related to criminal proceedings:	

Additional information	
Name, telephone number, fax number, e-mail address of the bar association(s) and/or the controlling administrative authority with which you are registered:	**Have you ever been the subject of a disciplinary sanction by the bar association(s) or the controlling administrative authority with which you are registered or by an international criminal court?** ☐ Yes (please provide details) ☐ No **Are you eligible for appointment as counsel at an international criminal court?** ☐ Yes (please provide details) ☐ No **Have you ever been convicted of a criminal offence, excluding minor traffic violations?** ☐ Yes (please provide details) ☐ No **Are any criminal proceedings currently being brought against you?** ☐ Yes (please provide details) ☐ No

Please enclose the following with this form:

1. **Detailed *curriculum vitae*,**
2. **Original or certified copy of the certificate issued by the bar association and/or the controlling administrative authority with which you are registered,**
3. **Completed "certificate of good standing for candidates to the list of counsel",**
4. **A certificate issued by the relevant authority of the State(s) in which you are domiciled, stating the existence, if any, of criminal convictions,**
5. **Valid practicing certificate,**
6. **Copy of your professional insurance policy,**
7. **Legible copy of your birth certificate,**
8. **Legible copy of your passport/travel document,**
9. **Two passport-size photographs (colour).**

N.B.: The original version of all these documents must be submitted. If the original version is in neither English nor French, it must be accompanied by a certified translation.

In the event that you are admitted to the list of counsel, would you object to the list being published, inter alia on the Court website?

☐ Yes
☐ No

If your answer to the previous question is negative, would you object to your contact information also being posted on the "list of counsel" page of the Court website.

☐ Yes
☐ No

Please specify if you have ever been or are a member of a disciplinary body or if you have specific responsibilities relating to ethics.

Please specify if you have any preferences in respect of an eventual appointment.

Preferences:

None	Defence	Victims	Other
☐	☐ Yes ☐ No	☐ Yes ☐ No	☐ (please provide details)

In the event that you are appointed, would you be willing to use an electronic signature?

☐ Yes

☐ No (please provide additional information)

Would you object to the Registry contacting the professional authority with which you are registered, and/or the institutions and persons mentioned on this form?

☐ Yes

☐ No (please provide additional information)

Please provide below any information that you consider ought to be brought to the attention of the International Criminal Court.

I certify on my honour that I have verified the information in this form and that it is true and correct. I hereby undertake to inform the Court in the event of a change in my circumstances.

I understand that any decision to appoint me at the Court will be based on the information provided herein. I also understand that, should any item of information herein prove to be incorrect or false, the Court would be at liberty to terminate my appointment without notice. I hereby undertake to inform the Court of any future criminal proceedings that may be initiated against me.

I undertake not to enter into any fee-splitting arrangement with any person seeking representation or relative, friend or associate of the same.

Date: **Signature:**

Request for Participation in Proceedings and Reparations at the ICC for Individual Victims

This form is also available at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/Contribution+Form+regarding+the+Participation+of+Victims+in+the+Proceedings.htm

Cour Pénale Internationale

International Criminal Court

Application Form for Individuals

Request for Participation in Proceedings and Reparations at the ICC
For Individual Victims

PART A

PERSONAL INFORMATION

Part A: If any of the information provided here is different from the information on your identity documents, please explain why next to your answer.

1. Has the victim already submitted an application for participation or for reparations to the ICC? ☐ Yes ☐ No
2. If yes and the victim has a registration number, please indicate it here:

   ☐/☐☐☐☐/☐☐

3. Name(s) of the victim:
   Please give all names, as completely as possible

   _____

4. Sex: ☐ Female ☐ Male
5. Date of birth:

   ☐☐ ☐☐ ☐☐☐☐ and / or Age ☐☐
   (day) (month) (year)

   _____

   5. Where the victim's date of birth and age are unknown, please give approximate date of age or provide any information that will enable the age to be identified.

6. Place of birth:

   _____
   (village/town) (country)

7. Number of dependants:

   _____

   7. Indicate the number of people such as children, orphans or other family members who are dependant on the victim for financial or other support.

8. Tribe/ethnic group (optional):

   _____

9. Occupation (specify any work, duties):

   _____
   _____

   9. Please indicate what work the victim does, if any, or whether the victim is a student or unemployed.

10. What language(s) does the victim speak?

_____

11. What proof of identity is the victim providing?
Please specify:

_____

_____

11. It is a requirement that the victim provide proof of identity. This can include, for example, national identity card, birth certificate, voting card, passport, driver's licence, student or employee card, letter from a local authority, camp registration card, card from a humanitarian agency, tax document or other document identifying the victim.

12. Where does the victim currently live?

Village / City / Town: _____

County / District / Province: _____

Country: _____

13. Is the victim applying on his / her own behalf?

☐ Yes ☐ No

If yes, go to question 22.

13. Usually a victim will apply for him / herself. In some cases this is not possible, for example because the victim is a child or is disabled, deceased or disappeared. In such cases, another person may be permitted to act on behalf of the victim. The victim should consent to have another person act on his / her behalf if the victim is able to. If somebody is acting on behalf of the victim, then answer 'no' to question 13 and complete questions 14 to 21.

14. If no, what is the name of the person acting on behalf of the victim?
Please give all names, as completely as possible

_____

15. Why is this person acting on behalf of the victim?
Please tick only one box

a. The victim is a child under 18 years of age ☐

b. The victim is unable to act for him or herself because of disability ☐

c. The victim is an adult and gives his or her consent ☐

d. Any other reason? *Please specify as completely as possible* ☐

_____

_____

16. What is the relationship between the victim and the person acting on behalf of the victim?
Proof of this relationship must be attached

_____

_____

_____

16. Where answer a, b or d has been ticked in question 15, proof must be provided of the relationship between the victim and the person acting on behalf of the victim. See note 11 for examples of documents that might prove the relationship. If c is ticked, the victim must give his / her consent by signing at the end of this form.

17. Sex of the person acting on behalf of the victim:

☐ Female ☐ Male

18. Date of birth of the person acting on behalf of the victim:

☐☐ ☐☐ ☐☐☐☐ and/or Age ☐☐
(day) (month) (year)

19. What language(s) does the person acting on behalf of the victim speak?

_____

20. What proof of identity is the person acting on behalf of the victim providing?
Please specify.

20. See note to question 11.

_____

_____

21. Did the person acting on behalf of the victim also suffer harm as a result of the crimes?

☐ Yes ☐ No

If yes, the person acting on behalf may complete his or her own standard application form.

22. How can the victim or the person acting on behalf of the victim be contacted?
Please fill in as much information as possible

22. This could be the victim's own address or the address of an organisation, a family member or other individual if the victim prefers to be contacted through someone else.

Contact person / organisation: _____

Street: _____ Number/Plot: _____

P.O. Box: _____ Sector/Cell/Zone: _____

Village/City/Town/Camp: _____

Sub-county/Parish: _____

County/District/Province: _____

Postal Code: _____ Country: _____

Email: _____ Telephone Number(s): _____

23. Is somebody assisting the victim to fill in this form?

☐ Yes ☐ No

24. If yes, what is that person's name and organisation (if any)?

_____
(name) (organisation)

25. Is an interpreter assisting with the filling in of this form? ☐ Yes ☐ No

PART B

INFORMATION ABOUT THE ALLEGED CRIME(S)

26. What happened to the victim? Describe the event(s) in as much detail as possible.
If more space is needed, please attach answers to this question on a separate sheet of paper

27. When did the event(s) occur?
If possible, please specify day(s), month(s) and year(s), or where the exact dates are not known please provide any information that will enable us to identify the dates

28. Where did the event(s) take place?
If necessary, attach a drawing or a map of the location

28. Please be as specific as possible, and also, if possible, please refer to the district/province or the nearest town/city.

29. Who does the victim believe is responsible for the event(s)? If possible, explain why the victim believes this.

PART C

INFORMATION ABOUT THE INJURY, LOSS OR HARM SUFFERED

30. What effect did the events have on the life of the victim and others around him/her?

Describe physical or mental injury, emotional suffering, harm to reputation, economic loss and / or damage to property or any other kind of harm

30. If the victim has documents demonstrating the harm he / she suffered, copies of these can be attached. This includes, for example, medical records or proof of economic loss or damage to property.

PART D

PARTICIPATION IN THE PROCEEDINGS

31. Does the victim want to present his/her views and concerns in ICC proceedings?

☐ Yes ☐ No

32. If yes, why does the victim want to participate in the proceedings?

31. Usually a victim presents his/her views and concerns through a lawyer who represents the victim in The Hague. In a small number of cases there may be an opportunity for a victim to be involved in person, but this is not a requirement.

PART E

REPARATIONS

33. Would the victim like to apply for reparations?
i.e does the victim want something to be done for what he / she suffered?

☐ Yes ☐ No

34. If yes, what would the victim want?

33/34. What is the victim expecting if the accused person is found guilty? Reparations can be anything which can help the victim to repair the harm suffered. This can include compensation, various forms of assistance, returning back lost land or property, and / or symbolic or moral measures such as apologies and monuments. Please list any measures which the victim would like.

35. If reparations are ordered, who does the victim want the benefit to go to?
Tick more than one box, if necessary

☐ The victim
☐ The victim's family
☐ The victim's community (please specify the community) _____
☐ Other: _____

PART F

LEGAL REPRESENTATION

36. Does the victim have a lawyer? ☐ Yes ☐ No

37. If yes, please provide the lawyer's contact details:

Name: _____

Address: _____

Email: _____ Telephone number(s): _____

36. In order to represent victims before the ICC, a lawyer must be on the ICC list of counsel. Lawyers who are not on the list may apply for inclusion.

38. If the victim does not have a lawyer, would the victim like assistance from the ICC to find a lawyer? ☐ Yes ☐ No

39. Until the victim has a lawyer, would he/she like to be represented by the Court's lawyers for victims (the Office of Public Counsel for Victims)?

☐ Yes ☐ No

39. The OPCV is an independent office within the Court which looks after the legal interests of victims and which represents victims free of charge.

PART G

COMMUNICATION OF IDENTITY

Please note that the present application will be given to the defence (the accused person and his/her lawyers) and to the ICC Prosecutor. When this happens, the Judges may decide not to reveal the identity of the victim.

40. Would the victim have any reason to be concerned about his or her security, well-being, dignity or privacy or that of any other person if his or her identity were to be revealed to the defence or the ICC Prosecutor?

☐ Yes ☐ No

If yes, what are the reasons?

_____

_____

_____

_____

40. The victim may have concerns not only about physical danger but also about harm to his or her psychological well-being, reputation, privacy and/or dignity or those of his or her family. The identity of the victim will not be revealed to the public while the application is being considered. If the application is accepted, the victim may be asked again about disclosure of information.

PART H

SIGNATURES

SIGNATURE OF THE VICTIM

I hereby declare that:

- To the best of my knowledge and belief, the information I have given in the present Application Form is correct
- If I have named someone to act on my behalf in question 14 of this form, I hereby give my consent to that person to act on my behalf

Signature, thumbprint or other mark of the victim

Date: _____ Location: _____
(day) (month) (year)

SIGNATURE OF THE PERSON ACTING ON BEHALF OF THE VICTIM

If the victim is acting on his/her own behalf and has answered "yes" to question 13 then there is no need to fill in this part.

I hereby declare that:

- To the best of my knowledge and belief, the information contained in this Application Form is correct

Signature, thumbprint or other mark of the person acting on behalf of the victim

Date: _____ Location: _____
(day) (month) (year)

REMINDER:
THE FOLLOWING DOCUMENTS SHOULD BE ATTACHED TO THIS APPLICATION FORM

For the victim:

- ☐ Photocopy of proof of identity (REQUIRED)
- ☐ Photocopy of medical records or similar documents

For the person acting on behalf of the victim (if applicable)

- ☐ Photocopy of proof of identity (REQUIRED)
- ☐ Photocopy of proof of relationship to victim (REQUIRED unless the victim is an adult who has given consent)

NOTE:
This Application Form and the process of applying are free of charge

The ICC does not charge any fees at any stage of the application process.

ANNEX
Public

ICC-01/04-02/06-67-Anx 28-05-2013 2/2 CB PT

Cour Pénale Internationale

International Criminal Court

Application for Victims' Participation

Name: _____ Date of Birth or Age: _____

Sex: ◻ M ◻ F Ethnic Group or Tribe: _____

Proof of identity of victim or proof of relationship to victim(s): _____

Proof of identity of person acting on behalf of victim or proof of relationship to victim (if applicable): _____

1. I, or the victim on whose behalf I am acting, confirm to have personally suffered from the following events:

_____

_____

_____

_____

_____

_____

_____

_____

2. Resulting in the following personal harm:

_____

_____

_____

_____

_____

_____

On this date: _____

At this location: _____

Who, in the view of the applicant, is responsible for the events? _____

3. In the event of a conviction of the suspect, does the victim intend to apply for reparations?
◻ Yes ◻ No

_____

Signature of the victim or person acting on behalf of the victim

Date: _____ Location: _____

If you are acting on behalf of a victim please specify if it is because:

◻ You are acting on behalf of a child who is under 18 years of age

◻ You are acting on behalf of a disabled adult

◻ The victim is an adult and gives his or her consent

Helping Victims Make Their Voice Heard

The Office of Public Counsel for Victims

5 Years of activities

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Content: Paolina Massidda, Sarah Pellet, Maria Victoria Yazji, Tamara Margitic.

Illustrations and design: El-Tayeb Saeed

Office of Public Counsel for Victims | International Criminal Court,
PO Box 19519, 2500 CM The Hague, The Netherlands

www.icc-cpi.int | Telephone: + 31(0) 70 515 8515 | Facsimile: + 31(0) 70 515 85 67 | E-mail: opcv@icc-cpi.int

For the first time in the history of international criminal justice, the negotiators of the *Rome Statute* placed victims at the heart of proceedings, recognising in the second paragraph of the preamble that States Parties were *"mindful that during* [the last] *century millions of children, women and men have been victims of unimaginable atrocities that deeply shocked the conscience of humanity."*

The *Rome Statute,* especially article 68(3), enables victims of crimes falling under the jurisdiction of the Court to make representations, to submit observations and to have their views and concerns presented and considered *"when* [their] *personal interests* [. . .] *are affected"* at all phases of the

proceedings. In addition, victims can seek reparations for the harm suffered as a result of these crimes pursuant to article 75 of the *Rome Statute*.

In order to assist victims in exercising their rights under the *Rome Statute*, rule 90(1) of the *Rules of Procedure and Evidence* provides that *"victim*[s] *shall be free to choose a legal representative."* However, given the potentially high number of victims who might wish to participate in the proceedings before the Court and to strengthen the capacity of their legal representation, regulation 81 of the *Regulations of the Court*, read jointly with regulation 80, directs the Registrar to *"establish and develop an Office of Public Counsel for victims."*

Accordingly, the Office of Public Counsel for Victims was established on 19 September 2005.

The Establishment of the Office of Public Counsel for Victims

The establishment of the Office of Public Counsel for Victims (OPCV) in September 2005 in accordance with regulation 81 of the *Regulations of the Court* was an effective step in strengthening the legal representation of victims in proceedings before the ICC. Its main aim was to reinforce the capacity of external legal representatives by providing legal advice and research, and, where deemed appropriate by Chambers, representing victims, as well as appearing before the Chambers in respect of specific issues.

The establishment of the Office presented a real challenge. Since the ICC was the first institution in the international criminal justice system to allow victims to participate in the proceedings, the OPCV had nothing on which it could model itself. All it had to rely on was the personal knowledge, experience, and expertise of its staff members, their awareness of victims' representation issues, and their creativity. A Principal Counsel was duly appointed to develop the new Office, which rapidly became well structured and ready to fulfill its mandate of providing support and assistance, both to legal representatives of victims and to victims themselves.

Whilst the Offices of Public Counsel,—the OPCV and its sister office, the Office of Public Counsel for the Defence (OPCD)—fall within the remit of the Registry solely for administrative purposes, they are otherwise totally independent, both from the Registry and from each

other. It is important to note, however, that the OPCV and those sections of the Registry responsible for ensuring victims' rights do co-operate to ensure that they support each other effectively. I believe that a strong dynamic exists at the ICC to ensure that the right of victims—to be properly represented, well advised, and kept informed of the status of the proceedings—cannot be called into question. In this regard, the OPCV and the Registry work together in harmony to achieve their common goal of assisting victims to have their rights fully recognised.

I hope that this booklet will give you an insight into how this unique Office operates within the international criminal justice system: its role, how it fulfils its mandate, and the new challenges it faces. In the last five years, the OPCV has proved its effectiveness in allowing victims, directly or often through their legal representatives, to have their voices heard.

Silvana Arbia, Registrar of the International Criminal Court

Pursuant to regulation 81(4) of the Regulations of the Court, the Office *"shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate, legal research and advice; and appearing before a Chamber in respect of specific issues."*

Moreover, members of the Office can be appointed as legal representatives of victims in accordance with regulation 80(2) of the *Regulations of the Court*. When appointed as legal representative, their mandate does not differ from that of external legal representatives. Therefore, in fulfilling their responsibilities, members of the Office enjoy the same rights and prerogatives as external legal representatives of victims and they are bound by the same obligations, including those arising from the Code of Professional Conduct for Counsel before the ICC.

The role of the Office of Public Counsel for Victims in trial proceedings

Under the *Regulations of the Court*, the OPCV is mandated to provide support and assistance to victims and their legal representatives, including by way of legal research and advice, and appearing in court

on specific issues. During the ICC's first trial, the Lubanga case, the OPCV has played an active and extensive role. It has represented a number of individual victims, and more generally it has provided, on occasion, notable assistance to the Court by undertaking what has been, in effect, a coordinating and *amicus curiae* role. Although the bench in this case has supported the stance that participating victims should be represented by (limited) teams of counsel who are independent of the Court, in particular circumstances—when sufficient justification has been provided—Principal Counsel of the OPCV has been permitted to act as their representative. In these various ways, it has played a key role in assisting victims.

Although these are early days for the Court, and bearing in mind that time and experience alone will dictate what in the long-term is the correct role for the Office, in the current trial the present arrangements appear to have afforded the twin advantages of enabling the OPCV to provide support and assistance to the teams of victims' representatives, whilst allowing counsel to develop first-hand experience of appearing for individual victims during a trial at the ICC. It is likely to be an advantage for the OPCV to gain real experience of the vicissitudes of acting for those who have been allowed to participate as victims in the Court's trials. This first-hand experience will assist the Office, particularly in its role of advising those legal representatives of victims who have not previously appeared before international criminal tribunals or who do not have experience of victim participation in criminal proceedings.

The precise nature of the relationship between the OPCV and individual teams of victims' representatives will become clear as the jurisprudence of the Court develops, and particularly as regards any suggested conflict of interest on the part of the OPCV when it acts as a general resource for all participating teams, whilst representing individual victim participants. These issues were raised and resolved in the context of the present trial.

Indeed, the jurisprudence of the Court on participation by victims grows apace, and I anticipate that over the years to come the presence of a permanent body at the ICC which is able to provide expert advice and assistance, particularly to new victims' representatives, will prove to be an invaluable resource. The issues that can arise in our cases are

manifold, and having an established guide through the labyrinth will be essential for those participating on behalf of victims in these international war crimes trials.

I look forward with interest to see how the role of the OPCV develops over time.

Judge Sir Adrian Fulford

In accordance with regulation 81 of the *Regulations of the Court,* the Office functions as an independent office. Members of the Office do not receive instructions from anybody in relation to the fulfillment of their mandate. Therefore, the Office falls within the Registry solely for administrative purposes. This independence is a prerequisite for carrying out its mandate of assisting external legal representatives of victims and assisting and representing victims. It also allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their legal representatives.

Furthermore, the role of the Office is in constant evolution since it is intrinsically linked to the jurisprudence of the Court concerning victims.

Since its inception in September 2005, the Office has assisted 30 external legal representatives of victims in all situations and cases and provided close to 600 legal advices and researches to them.

The Office of Public Counsel for Victims and the external legal representatives

In September 2010, the Office of Public Counsel for Victims (OPCV) celebrates its 5 years of existence.

Five years ago, so to say not a very long time ago, none of the numerous mandates assumed today by the Office was fulfilled within the Court.

Hence, the very creation of the Office reflected the evolution and the maturity reached by the Court with regard to victims' participation, as well as the necessity to face such an innovation by constituting a team able to implement it. Innovating is a difficult mission.

Without precedent or case law to refer to, lot of energy, imagination, competence and will were necessary in order to meet the great

expectations and correlative needs that did exist in respect of this particular issue.

Complex mandate, indeed, sensitive even and requiring some subtlety since one of the first impediments to be faced was by no mean the least: existing was not sufficient and finding the right place was necessary. This required the ability to find its own identity, strenuous task of self-development, which depended so much on the others' perception.

The Office managed to endow itself with a young and competent team, brilliant even, able to act, react, adapt to and evolve according to the needs and circumstances.

A genuine feat has been achieved and if many challenges remain, the feared difficulties regarding the implementation of victims' participation in the proceedings have been progressively overcome.

Moreover, the intervention of the Office in the proceedings in its capacity of legal representative constituted an important evolution. It also represents, in many respects, a difficult step—if not dangerous—for the Office since the workload requires an unquestionable adaptation involving a reassessment of its resources.

Furthermore, thank to a partnership characterized by a rare loyalty with the external legal representatives, the Office has contributed to the setting up and the implementation of the procedural rights of victims. The role of the Office has indeed been fundamental in this gathering of competencies and went far beyond the provision of legal researches and legal advices.

The quality of its support has contributed to the development of a genuine dynamic collaboration with the victims as well as with their legal representatives, making the Office an inevitable actor in the process allowing the optimisation of the legal representation and the defense of victims' interests.

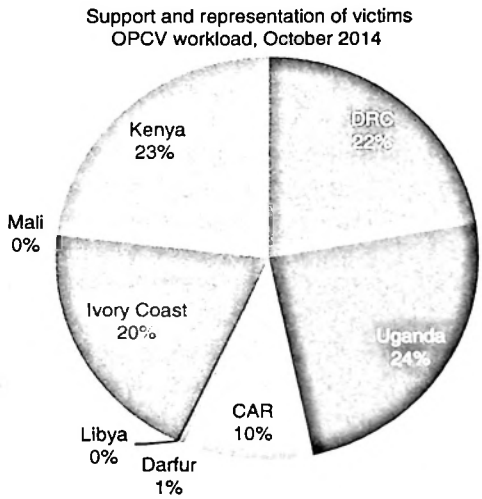
Therefore, the Office can be proud of having admirably fulfilled its mandate of support and assistance to the external legal representatives and to the victims themselves.

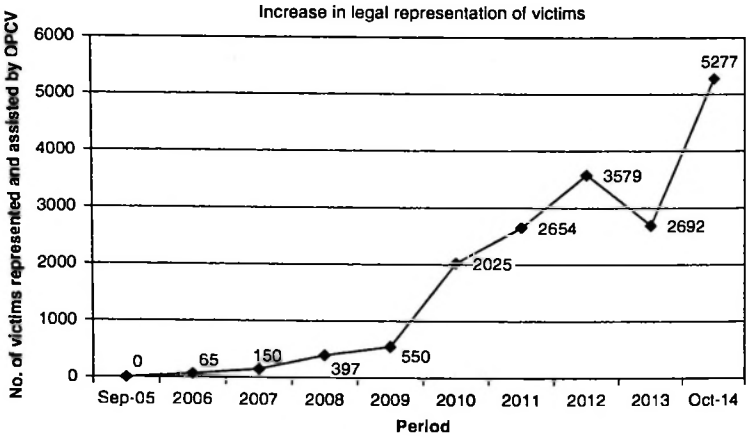
I am personally amongst those who praise and battle in favour of team work, the fertility and potentialities of mixing cultures and of identities endowed with complementary skills. Together, the members of the Office and the external legal representatives belonging to the

"bar of the world" can continue working on the evolution of the rights of victims in the proceedings towards more favourable results and more Justice.

Jean-Louis Gilissen
Lawyer registered at the Liège Bar (Belgium)
Legal representative of victims in the case
The Prosecutor v. G. Katanga and M. Ngudjolo Chui

Furthermore, the Office has assisted approximately 2000 victims and has submitted approximately 300 submissions in the various proceedings before the Court. The task of providing support and assistance to victims includes direct legal representation in the proceedings, and Chambers have maintained their practice in accordance to which the Office is appointed as legal representative for unrepresented applicants. It is noteworthy to mention that the number of victims represented by the Office mentioned above does not include victims and affected communities contacted through joint efforts with other sections of the Court in order to reach targeted groups, and increase awareness of the proceedings before the Court and encourage victims' applications for participation.





The involvement of victims in the proceedings requires taking into account the realities of the situation in each specific country, as well as factors such as the prosecution of complex and lengthy trials, likely involving hundreds or thousands of victims, in locations far from where the relevant crimes have occurred. To that end, the Office, within the framework of the privileged relationship between lawyer and client, undertakes missions in the field in order to meet with its clients, to collect their views and concerns, to collect evidence and material to be used in the proceedings, and to keep them updated on the proceedings before the Court.

Nonetheless, there remain multiple challenges faced by the Office with respect to fulfilling its mandates, not the least pertinent of which in recent times has been the increase per staff member of the workload faced by the Office. Another challenge is the ability to maintain contact with its clients, who often live in remote, non-urban areas without access to telephone lines. To further complicate this situation, victims are subject to relocating often due to security concerns or in order to simply survive. In such cases, the Office attempts to reach victims via intermediaries in the field or by soliciting the help of ICC staff from other departments who have a permanent presence there. It is crucial for the Office to be able to maintain contact with its clients in order to keep them informed as well as to obtain any necessary information and input from them concerning their participation in the proceedings.

Another pervasive challenge is that of ensuring that victims understand the proceedings which concern them before the Court. This does not only

entail an issue of possible language barriers between counsel and his/her client and a need for translation of relevant documents and transcripts of the proceedings themselves, but also involves explaining to the victims complex substantive and procedural aspects thereof, which can be daunting concepts for them to grasp due to the oftentimes lack of previous exposure to either national or international courts of law. The Office deals with the language challenges by ensuring that there will always be an interpreter present during its interviews with clients in the field, as is the case where clients' mother tongue is Lingala, Alur, Swahili or Sango. The challenge of making sure that victims comprehend the nature of the proceedings is a more difficult one, and one which takes a consistent effort on the part of the Office during the entire period of the representation. This effort includes regularly updating the client and explaining to him/her the most recent developments in the relevant situation or case. Different ways are used by the Office to keep clients constantly updated and informed of the proceedings: direct communication, when possible, is always preferred and can be achieved via phone conversations, individual or group meetings in the field, e-mail communications. On occasion, the Office has also used radio programmes or published information sheets in newspapers in the countries concerned to this effect.

Finally, and as part of its related role of representing the general interests of victims and raising the awareness on victims' rights and prerogatives under the *Rome Statute* and the *Rules of Procedure and Evidence*, the Office has been and continues to be involved in outreach activities for members of the judiciary, the legal profession and the civil society in countries were investigations and/or cases are ongoing, as well as in other countries. The Office has also participated in several conferences and seminars on victims' issues and in several publications.

Notwithstanding the challenges confronted by the Office, it has still managed to promote, in a short period of time, numerous goals which champion victims' rights in international criminal law, by, *inter alia*,

i) Facilitating the process by which victims, through their participation before the Court, can "tell their story" and have a recognised voice in the proceedings,

ii) Contributing to victims' general awareness of their ability to influence the proceedings before the Court by actively responding to any requests for information and by helping them navigate the procedural steps required for their participation, thereby promoting their sense of empowerment,

iii) Legally advocating victims' rights to hold the dual status of victims and witnesses before the Court, thereby promoting their sense of dignity as a witness while at the same time helping to meet their need for international recognition as victim of crimes within the jurisdiction of the Court,

iv) Paving the way for victims' rights in international criminal law through the Office's active advocacy in the proceedings.

Representing Victims Before the International Criminal Court: A Manual for Legal Representatives

2. Modalities of victims' participation in the proceedings

Articles 15(3), 19(3), 68(1) and (2), 68(3), 75(3), 87(4), 93(1)(j) of the *Rome Statute* Rules 16, 69, 70 to 73, 87 to 91, 94, 95, 97 to 99, 101, 132(2), 136, 139, 143, 144(1) and (2), 145, 191, 217 and 221 of the *Rules of Procedure and Evidence*

Regulations 21(8), 24(2), 28(1) and (2), 31(1) and (2), 54, 79(2) and (3), 86(1) and (2), 86, 88 and 117(c) of the *Regulations of the Court*

Regulations 64(4), 66(4), 99(2) and (4) and 109(3) of the *Regulations of the Registry*

1. Modalities of participation in general

Pursuant to article 68(3) of the Statute, the Chamber considers that victims may present their views and concerns at the investigation stage of the situation in the Democratic Republic of the Congo once the Chamber grants them victim status.

See No. ICC-01/04-164, Pre-Trial Chamber I, 7 July 2006, p. 3.

Article 68(3) of the *Rome Statute* grants discretion to the Chamber to determine the modalities of participation which are attached to such procedural status. The Chamber must exercise its discretion to delineate the modalities of participation in a manner which is not prejudicial to or inconsistent with the rights of the accused.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 5.

The Single Judge embraces a systematic approach which consists of a clear determination of the set of procedural rights that those granted the procedural status of victims in the pre-trial stage of the case may exercise.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 49.

By adopting a systematic approach the Single Judge aims to ensure that the rule attributed to those granted the procedural status of victim at the pre-trial stage of a case before the Court is: [...] (iv) meaningful—and not purely symbolic—as would be the case if victims were required to ask for the leave of the competent Chamber to perform the most simple procedural activity, such as responding to the submissions of a party.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 51.

The Single Judge wishes to point out that, in the 5 August 2011 Decision, it was held that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues of law and/or fact if: (i) the Legal Representative of victims proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems such submissions appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

The Single Judge also stresses that the assessment of applications pursuant to article 68(3) of the Statute cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the Legal Representative of victims.

The Single Judge acknowledges the well-established rights of victims and the mandate of their Legal Representative to bring to the attention of the Chamber any views and concerns of victims in relation to issues which affect their interests. Consequently, the fact that the Legal Representative was only able to consult the victims on the issues included in the Application after the end of the confirmation of charges hearing, does not in principle preclude these views and concerns to be brought before the Chamber through the Legal Representative. This, however, must be subject to the conditions laid down in article 68(3) of the Statute and elaborated in the 5 August 2011 Decision.

The Single Judge recalls that the functions and powers of the Pre-Trial Chamber are clearly determined under article 57 of the Statute. Thus, the power to conduct investigations concerning the commission of crimes and/or to direct the Prosecutor to investigate certain offences or persons do not fall among the prerogatives of the Pre-Trial Chamber as reflected in the said provision of the Statute. Pursuant to the law the power of the Pre-Trial Chamber is to evaluate, in light of the standards of proof envisaged in the

Statute, the results of such investigations, namely the evidence collected and placed before the Chamber.

Hence, article 54 of the Statute vests the Prosecutor with autonomous and independent investigative powers, which poses on him more concretely the obligation to: ensure effective investigation and Prosecution; cover all facts and relevant evidence, in particular investigate incriminating and exonerating circumstances equally; respect the interests of victims and witnesses; and to fully respect the rights of persons arising under the Statute. Accordingly, in the view of the Single Judge and provided the legal framework under consideration, the appropriate addressee of the victims' concerns about the alleged flaws in the investigations in the present case as described in the Legal Representative's request, should be the Prosecutor.

See No. ICC-01/09-01/11-371, Pre-Trial Chamber II, 9 December 2011, paras. 11-17.

The OPCV requests the Single Judge to order the parties to file suitable redacted versions of their respective submissions in the case record and to evaluate whether certain parts of the Hearing might be held in public sessions with the attendance of the Common Legal Representative.

[...]

Single Judge considers the request admissible, in spite of the Defence objections. As the Defence noted correctly, the OPCV may make written submissions only with leave of the Chamber. However, considering its substance, the filing in question must be seen as a request for participation in relation to the specific matter and, as such, must be considered as properly filed and the submissions therein considered on the merits.

See No. ICC-02/11-01/11-249, Pre-Trial Chamber I (Single Judge), 20 September 2012, paras. 25 and 30.

Victims who do not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through common legal representation, will not be required to submit an application under rule 89(1) of the Rules. However, these victims may, if they so wish, register with the Registry, indicating their names, contact details as well as information as to the harm suffered. The Registry shall enter these victim registrations into a database, which it will administer and make accessible to the Common Legal Representative.

The purpose of this registration is threefold: first, to provide victims with a channel through which they can formalise their claim of victimhood; second, to establish a personal connection between the victim and the Common Legal Representative, enabling victims to provide their input

and allowing the Common Legal Representative to give relevant feedback to the victims; third, to assist the Court in communicating with the victims and in preparing the periodic reports.

Victims wishing to present their views individually by appearing directly before the Chamber, in person or via video-link, may be allowed to do so at various stages of the trial and in a manner to be determined by the Chamber. The Common Legal Representative shall submit a request on behalf of these individuals, explaining why they are considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns. For the purpose of the preparation of this filing, the Common Legal Representative may seek the assistance of the OPCV, as required.

See No.ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, paras. 49-50 and 56; and No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, paras. 48-49 and 55.

In accordance with regulation 24 of the *Regulations of the Court*, the victims' legal representatives are also entitled to file written motions, responses and replies in relation to all matters for which the Statute and the Rules does not exclude their intervention and for which the Chamber has not limited their participation either proprio motu or at the request of the parties, the Registry or any other participants.

Accordingly, the Single Judge considers that the Common Legal Representative of the victims admitted to participate by the present decision may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be exercised upon the conditions that (i) the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 58-59.

2. Modalities of participation at the investigation stage

In the light of the core content of the right to be heard set out in article 68(3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the

framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, par. 71.

In exercising their procedural rights pursuant to article 68(3) of the *Rome Statute*, victims may, before the Pre-Trial Chamber and in connection with the investigation:

Present their views and concerns;
File documents;
Request the Pre-Trial Chamber to order specific measures.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, p. 42.

The Single Judge recalls that a) the investigation stage of a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in article 68(3) of the Statute; and that b) it is therefore possible to have the status of victim authorised to participate in situation and case-related proceedings before the Pre-trial Chamber. Furthermore, the Chamber also held that a) article 68(3) of the Statute grants discretion to the Chamber to determine the modalities of participation which are attached to such status; and b) that the Chamber must exercise its discretion to delineate the modalities of participation *"in a manner which is not prejudicial to or inconsistent with the rights of the accused."*

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, par. 5. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, par. 8; No. ICC-02/05-110, Pre-Trial Chamber I (Single Judge), 3 December 2007, par. 2 and No. ICC-01/04-417, Pre-Trial Chamber I (Single Judge), 7 December 2007, par. 2.

The notion of procedural status of victims is nowhere defined, and it is difficult to attach a specific meaning to it. Are there other forms of victim status? Is the term *"procedural status of victim"* used in order to distinguish such status from the status of a victim having a right to participate in concrete judicial proceedings? Moreover, is there a substantive victim status in contrast to a procedural one?

The term *"procedural status of victim"* is not a phrase with a distinct meaning or a word coined as a term of art. The word *"procedural"* indicates something pertaining to procedure. Procedure is the code regulating the exercise of judicial power, known as adjectival law. It is contrasted to substantive

law, definitive of the rights, duties and obligations of a person. The word *"status"* signifies a person's legal condition, whether personal or proprietary. Procedure is not of itself determinative of the status of any person.

The article of the Statute that confers power upon a victim to participate in any proceedings is article 68(3). What emerges from the case law of the Appeals Chamber is that 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. The modalities of participation under article 68(3) of the Statute must be specified by the Chamber in a manner not prejudicial to the rights of the person under investigation or the accused, and in a way non-antagonistic to a fair and impartial trial. A person has the right to participate in proceedings if a) he/she qualifies as a victim under the definition of this term provided by rule 85 of the Rules, and b) his/her personal interests are affected by the proceedings in hand in, i.e. by the issues, legal or factual, raised therein.

Rules 89, 91 and 92 of the Rules relied upon by the Pre-Trial Chamber as supporting the position that victims can participate at the investigation stage of a situation outside the framework of judicial proceedings, far from supporting the position adopted, contradict it. Rule 89 of the Rules is specifically fashioned to the provisions of article 68 of the Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings. Rule 91 of the Rules acknowledges that victims may participate through a Legal Representative whereas rule 92 of the Rules adverts to notification of judicial proceedings to victims and their Legal Representatives in which they may have an interest to seek participation and decisions which may affect them. The class of victims to whom notification must be given is also specified.

Rule 92 of the Rules has one other aspect that merits reference to. It exempts from its provisions proceedings under Part 2 of the Statute (see rule 92(1) of the Rules). Articles 15(3) and 19(3) do belong to that Part of the Statute. They make provision, the former for representations by victims in relation to the authorisation of an investigation, and the latter for the submission of observations by victims with regard to the jurisdiction of the Court to take cognisance of a case or its admissibility. Rules 50 and 59 of the Rules regulate, respectively, the procedure applicable to a) victims' representations, and b) the submission of victims' observations.

Rule 93 confers power upon a Chamber to seek the views of victims or their Legal Representatives on any matter arising in the course of proceedings before it, including issues referred to it pursuant to rules 107, 109, 125, 128, 136, 139, and 199 of the Rules. The views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber. Victims may express their views on any given subject identified by the Chamber. Here again, the process is distinguished from victim participation under article 68(3) of the Statute.

Regulation 86(6) of the *Regulations of the Court* does not envisage participation outside the confines of rule 89 of the Rules. It merely regulates victim participation under article 68(3) of the Statute.

There is yet another species of proceedings that must be distinguished from participation under article 68(3) of the Statute. These are proceedings which the victims may initiate themselves under statutory provisions. Pursuant to the provisions of article 75 of the Statute and rule 94 of the Rules, they may make a request for reparations against the convicted person in the manner envisaged by the aforesaid rule. Furthermore, victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy as foreseen *inter alia* in article 68(1) and (2) of the Statute and rules 87 and 88 of the Rules. The protection of victims and witnesses and that of members of their families may justify the nondisclosure of their identity prior to the trial, as provided in rule 81 of the Rules.

The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations *proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

The domain and powers of the Prosecutor are outlined in article 42 of the Statute, paragraph 1 of which reads: The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source. Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the

investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.

[...]

Participation pursuant to article 68(3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.

The Pre-Trial Chamber also acknowledges in its decision that article 68(3) of the Statute is the provision that confers a right upon victims to participate in any proceedings before a Chamber. Nevertheless, the Pre-Trial Chamber adopts the position that the provision could be extended beyond its self-evident confines, to areas outside its ambit. Article 68(3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the *Rules of Procedure and Evidence* or the *Regulations of the Court*. On the other hand, it must be clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.

Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future, in the absence of specific facts. It is for the Pre-Trial Chamber to determine how best to rule upon applications for participation, in compliance with the relevant provisions of the Court's texts. The Pre-Trial Chamber must do so bearing in mind that participatory rights can only be granted under article 68(3) of the Statute once the requirements of that provision have been fulfilled.

Having determined that victims cannot be granted procedural status of victim entitling them to participate generally in the investigation, leading to the collapse of the foundation of the decisions of the Single Judge, the particulars to be provided for a person to qualify as a victim on grounds of moral harm becomes a theoretical one and need not be answered.

In the result, the decisions of the Pre-Trial Chamber acknowledging procedural status to victims, entitling them to participate generally in the investigation of a situation are ill-founded and must be set aside. The reversal of the Impugned Decisions is the unavoidable outcome of these proceedings.

See No. ICC-01/04-556 OA4 OA5 OA6, Appeals Chamber, 19 December 2008, paras. 43-52 and 55-59. See also No. ICC-02/05-177 OA OA2 OA3, Appeals Chamber, 2 February 2009, paras. 43-51 and 55-59.

3. Modalities of participation at the pre-trial stage

Although the Statute and Rules provide an indication on some of the procedural rights that the Chamber could attach to the procedural status of victim at the pre-trial stage of a case, they do not pre-establish per se any specific procedural right apart from the general right to file requests with the competent Chamber.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 56.

Discretion granted to the Chamber in the determination of the role of victims in the pre-trial stage of a case before the Court must be exercised by applying, in addition to the general principle of interpretation set out in article 21(3) of the Statute, the interpretative criteria provided for in article 31(1) of the Vienna Convention on the Laws of Treaties, according to which *"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 light of its object and purpose."*

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 78.

The specific procedural rights for the pre-trial stage of a case can be divided into six groups. The first group is comprised of the right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defense pursuant to rule 121 of the Rules. This access includes access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as "*ex* parte." The first group also includes the right to be notified on the same basis as the Prosecution and the Defense of all

decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified "ex parte." The right to have access to the transcripts of hearings contained in the record of the case regardless of whether such hearings were held in public or in closed session also falls within this first group, with the exception of ex parte transcripts. The first group also includes the right to be notified of all proceedings before the Court, including public and closed session hearings (including those held ex parte) and any postponements thereof, and the date of delivery of decisions. The right to have access to the evidence proposed by the Prosecution and the Defense and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the data required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it. The right to have access to non-public filings and decisions included in the Registry's record of the situation to which the relevant case is related falls outside this first group of rights.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 127-133.

The second group of rights is comprised of the rights (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defense intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 134.

The third group relates to the examination of witnesses. When the limitations deriving from the principle of prohibiting anonymous accusations are not applicable, this third group includes the right to examine, at the confirmation hearing, any witness proposed by the Prosecution and the Defense, as this is part of the evidentiary debate that takes place at the confirmation hearing.

The examination of witnesses by those granted the procedural status of victims should take place after their examination by the Prosecution and within the amount of time allocated by the Chamber. Moreover, the victims are not required to file the list of questions that they intend to pose to the relevant witness prior to the examination of the witness.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 135 and 137-138.

The fourth group is comprised of the right to attend all public and closed session hearings convened in the proceedings leading to the confirmation hearing, as well as in all public and closed sessions of the confirmation hearing. However, it does not include the right to attend those hearings held on an ex parte basis.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 140.

The fifth group includes the right to participate by way of oral motions, responses and submissions in: (i) all those hearings in which those granted the procedural status of victim have the right to attend; and (ii) in relation to all matters other than those in which their intervention has been excluded by the Statute and Rules—for instance, matters relating to the *inter partes* disclosure process or any discussion of the evidence which aims at extending the factual basis contained in the Prosecution Charging Document.

The sixth and last group is comprised of the right to file written motions, responses and replies in accordance with regulation 24 of the Regulations, in relation to all matters other than those in which the victim's representative has been excluded by the Statute and Rules.

The fifth and sixth groups of rights also include the right to (i) file, in accordance with rule 121(7) of the Rules, written submissions with the Pre-Trial Chamber on evidentiary and legal issues to be discussed at the confirmation hearing; (ii) make opening and closing statements at the confirmation hearing as provided for in rule 89(1) of the Rules; and (iii) raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing in accordance with rule 122(3) of the Rules. The right to make challenges to, or raise issues relating to, the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2) and (3) of the Statute and rule 122(2) of the Rules falls outside the last two groups of rights.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 141-144.

The set of procedural rights [outlined by the Single Judge] 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.

The scope of any such limitation shall be carefully delimited on the basis of the principle of proportionality.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 147-148.

According to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, preventing victims, when victims are not granted anonymity, from accessing confidential materials is the exception and not the general rule—at least in relation to the pre-trial proceedings of a case, where the record of the case is certainly limited.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 150.

4. Modalities of participation at the confirmation of charges hearing

Subject to their intervention being restricted to the scope determined by the charges brought against the accused, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, p. 5. See also No. ICC-02/05- 02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 16-20.

Since victims have requested that their identities remain confidential at the confirmation hearing, in order not to violate the principle prohibiting anonymous accusations, they will only receive notification of the public documents contained in the record of the case *The Prosecutor v. Thomas Lubanga Dyilo* and will only assist to public sessions of the confirmation hearing.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, pp. 7-8.

1. Public hearing on the confirmation of charges

The Single Judge considers that Legal Representatives of victims recognised as participants in the present proceedings have the right to attend the public parts of the hearing on the confirmation of charges against the suspect. In case the Chamber decides to hold parts of the hearing *in camera* or ex parte, the Chamber reserves its position on whether to grant Legal Representatives of victims the right to attend those sessions.

The Single Judge holds that pursuant to rule 89(1) of the Rules, Legal Representatives of victims recognised as participants in the present proceedings are granted the right to explain the reasons for their participation in a brief opening statement (20 minutes in total) at the confirmation hearing. They will also be allowed to make a closing statement.

2. Access to public decisions and documents

The Single Judge notes rule 121(10) of the Rules, according to which the record of all proceedings before the Pre-Trial Chamber *"may be consulted by victims and their Legal Representatives participating in the proceedings pursuant to rules 89 to 91."* The Single Judge is of the view that Legal Representatives of victims recognised as participants in the present proceedings must gain proper knowledge of the case and prepare themselves for the confirmation hearing. Therefore they must be granted access to all public decisions and documents contained in the record of the case effective as of the date of their recognition to participate in the present proceedings pursuant to rule 121(10) of the Rules, subject to any restrictions concerning confidentiality and protection of national security information. The right of access to decisions and documents does not extend to those filed on a confidential basis or, if applicable, under seal and/or ex parte.

3. Access to public evidence

With a view to their proper preparation for the confirmation hearing and possible claim of reparations at a later stage, the Single Judge is of the view that victims should have access also to evidence adduced by the parties. Therefore, the Single Judge holds that Legal Representatives of victims recognised as participants in the present proceedings must have access to all public evidence disclosed by the Prosecutor and the Defence which is contained in the record of the case effective as of the date of their recognition to participate in the present proceedings. The right of access to evidence does not include the right of access to evidence filed on a confidential basis.

4. Access to transcripts

The Single Judge further considers that due to their presence in court, Legal Representatives of victims recognised as participants in the present proceedings must have access to the transcripts of the public part of the hearing on the confirmation of charges as well as previously held public hearings and

status conferences. In case the Chamber decides to hold parts of the hearing *in camera* or ex parte, the Chamber reserves its position on whether to grant Legal Representatives of victims the right to access those transcripts.

5. Notifications

The Single Judge holds that pursuant to rule 92(6) of the Rules Legal Representatives of victims recognised as participants in the present proceedings must be notified of all public decisions and filings filed effective as of the date of their recognition to participate in the present proceedings. However, if a party or participant wishes to notify Legal Representatives of victims of a confidential document, this filing shall include the names of the Legal Representatives of the victims and be notified by the Registrar accordingly.

Further, this right includes that Legal Representatives of victims recognised as participants in the present proceedings be notified in a timely manner of the confirmation hearing and any postponement thereof as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

[...]

8. Written submissions

The Single Judge is of the view that Legal Representatives of victims recognized as participants in the present proceedings have a right to make succinct written submissions to specific issues of law and fact if (i) victims prove first by way of application that their interests are affected by the issue under examination and (ii) it is deemed appropriate by the Chamber.

See No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 101-107 and 110. See also ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 11-20 and 25; No. ICC-02/05-03/09-89, Pre-Trial Chamber I, 29 October 2010, paras. 58-68; No. ICC-02/05-03/09-103, Pre-Trial Chamber I, 17 November 2010, par. 8 and No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 49-60.

The Victims' Representatives may:

a. make opening and closing statements at the confirmation hearing;

b. request leave to intervene during the public sessions of the confirmation hearing, but will not be able to add any point of fact or any evidence. Victims' representatives will not be able to question the witnesses.

See No. ICC-01/04-01/06-462-tEN, Pre-Trial Chamber I, 22 September 2006, pp. 6-7. See also No. ICC-01/05-01/08-320, Pre-Trial Chamber III (Single Judge), 12 December 2008, paras. 101-108.

In their opening and closing statements, the Legal Representatives may, *inter alia*, address any point of law, including the legal characterisation of the modes of liability with which the Prosecutor has charged the suspect under article 25 of the Statute.

See No. ICC-01/04-01/06-678, Pre-Trial Chamber I (Single Judge), 7 November 2006, p. 7.

Any victim's right to participate in the evidentiary debate held at the confirmation hearing must be subject to an absolute prohibition to extend the factual basis contained in the Prosecution Charging Document.

The same limitation does not apply in relation to the legal characterization of the facts contained in the Prosecution Charging Document, insofar as the Chamber can always, pursuant to article 61(7) of the Statute, adjourn the hearing and request the Prosecution to consider amending the legal characterization of such facts if it considers that the evidence submitted appears to establish a different crime.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 122-123.

The Prosecution has informed the Defence and the Chamber of its intention to call three witnesses to testify at the confirmation hearing. The Defence, according to its List of Evidence, also intends to call a witness to testify at the confirmation hearing.

At the outset, the Chamber wishes to recall that, bearing in mind the principle of prohibiting anonymous accusations, the victims who are granted anonymity throughout the pre-trial stage of a case, are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.

However, when the identities of the victims are disclosed to the parties, the Chamber considers that the aforementioned limitation may not be applicable. Thus, pursuant to rule 91(3) of the Rules, if any of the victims' Legal Representatives wish to question any of the witnesses called to testify at the confirmation hearing, they must make an application to the Chamber.

If a request is made in that sense, the Chamber will decide, at that time, on the procedure that must be followed, taking into account, among other factors, the stage of the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and the requirements under article 68(3) of the Statute.

See also ICC-02/05-02/09-136, Pre-Trial Chamber I, 6 October 2009, paras. 21-24.

The Single Judge recalls that, in accordance with rule 91(2) of the Rules, the Legal Representative of victims has the right to participate in the proceedings. With respect to this case, the Single Judge considers that Legal Representative of victims has the right to attend all public sessions of the confirmation hearing as well as all public hearings convened in the related proceedings. In the event that the Chamber decides to hold *in camera* or ex parte hearings, it retains the option to decide, on a case-by-case basis, upon motivated request, whether to authorise the Legal Representative of victims to attend those in camera hearing convened in the confirmation of charges hearing according to rule 91(2) of the Rules. The same applies to any other ex parte or *in camera* hearing convened in the present case.

Turning to the matter of participation at the hearings, the Single Judge notes that the provision of rule 91(2) of the Rules specifies that the rights of the Legal Representatives of victims "*shall include participation in hearings, unless, in the circumstances of the case, the Chamber is of the view that the representatives' intervention should be confined to written observations or submissions.*"

In the present case, the Single Judge considers that victims' Legal Representative may, upon motivated request specifying why and how the victims' personal interests are affected by the issues concerned, be authorized to make oral submissions during the confirmation of charges hearing, subject to any direction of the Chamber. In its determination, the Chamber will, *inter alia*, take due account of the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

Finally, the Single Judge recalls the provision of rule 89(1) according to which participation in the proceedings may include making opening and closing statements. Consequently, the Single Judge considers that the victims' Legal Representative shall be entitled to make a brief opening statement at the confirmation of charges hearing as well as a brief closing statement at the end of the hearing. The said rights shall be exercised in accordance with the schedule of the confirmation of charges hearing which will be issued in due course.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 86-89. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 103-106.

The Single Judge takes note of the provision of rule 91(3) of the Rules, which, in principle, allows victims' Legal Representatives to question witnesses and experts called to testify before the Chamber. The very same provision, however, clarifies that the questioning of witnesses by the victims' Legal Representative can take place only pursuant to an authorisation of the Chamber and subject to a number of restrictions. Therefore, if the Legal Representative of victims wishes to question witnesses called to testify at the confirmation of charges hearing, she must make an application to the Chamber, which shall include demonstration of personal interests that are affected by the issue(s) under consideration. In this regard, rule 91(3)(a) of the Rules entrusts the Chamber with the authority to request the Legal Representative to provide, together with the request to question a witness, a written note of the questions, which shall be communicated to the Prosecutor and, if appropriate, to the Defence, in order for them to make observations thereto. The Chamber will then decide on the application, taking into account, as provided for by 91(3)(b) of the Rules, *inter alia*, the stage of the proceedings, the rights of the suspects, the interests of the witness and the principle of fairness and expeditiousness of the proceedings. If a request to question a witness is granted, the Chamber, in accordance with rule 91(3)(b) of the Rules, will also decide at that point of time on the procedure to be followed.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 99 and 100. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 116-117.

The Single Judge considers that the Legal Representative of the victims admitted to participate in the present proceedings may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be employed if the Legal Representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake and the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, par. 101. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, par. 118.

The Single Judge, in considering the rights of participation to be granted to those victims' recognised as participants in the present proceedings, takes note of rules 91, 92 and 121(10) of the Rules. The Single Judge is, thus,

of the view that it is appropriate that the Legal Representatives of the victims authorised to participate in the proceedings relating to the pre-trial stage of the case, be granted the following rights:

1. To be notified, on the same basis as the Prosecution and the Defence, of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of the delivery of the decision;

2. To be notified, on the same basis as the Prosecution and the Defence, of all public requests, submissions, motions and other public documents filed in the record of the present case;

3. To be notified of all public decisions of the Chamber in the relevant proceedings;

4. To have access to all public filings, public decisions and public documents, contained in the record of the present case;

5. To have access to transcripts of hearings, including status conference hearings, held in public sessions throughout the course of the proceedings in the present case;

6. To have access to all public evidence, provided and disclosed by the Prosecution and the Defence pursuant to rule 121 of the Rules and contained in the record of the present case, in the same format (redacted, unredacted or summary, as well as electronic versions with the data required by the E-Court Protocol) in which it has been made available to the party which has not proposed it;

7. To make an opening statement at the commencement of the Confirmation Hearing and a closing statement at the end of the Confirmation Hearing, in accordance with the schedule of the Confirmation Hearing which will be issued in early course;

8. To attend and participate by way of oral submissions, in accordance with rule 91(2) of the Rules, in all hearings held in public in the course of the pre-trial Proceedings, as well as public sessions of the Confirmation Hearing, subject to the instructions of and in accordance with the schedule of the Confirmation Hearing, unless, in the circumstances of the case, the Chamber is of the view that the Legal Representatives' intervention should be confined to written observations or submissions. In the event that parts of hearings are held *in camera* or ex parte, the Single Judge will determine on a case-by-case basis whether victims' legal representatives will be granted authorisation to attend those sessions, upon request; and

9. To file written motions, responses and replies, in accordance with regulation 24 of the *Regulations of the Court*, in relation to all matters for which the Statute and the Rules does not exclude their intervention and for which the Chamber has not limited their participation either *proprio motu* or at the request of the parties, the Registry or any other participants.

The Single Judge wishes to point out that a party or participant may notify a confidential document to the Legal Representatives of victims, if he/she so wishes, by including the name(s) of the Legal Representative(s) to whom it is to be notified in the document in question. With respect to filings, documents and decisions filed on a confidential basis or under seal and/or ex parte, the Chamber may determine on a case-by case basis and upon receipt of a specific and motivated request whether victims' Legal Representatives will be granted access to such documents. In the same vein, the Single Judge will decide on a case-by-case basis whether transcripts of hearings held in camera or ex parte will be made available to victims' Legal Representatives

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, paras. 41-43.

The Chamber received the Request, in which the victims' Legal Representative seeks leave to make written submissions on article 61(7)(c)(ii) of the *Rome Statute*, with a view to suggesting that the charges brought by the Prosecutor against the Suspects should reflect acts of destruction of property, looting and infliction of physical injuries and that *"the Chamber should exercise its power* [...] *under [the said provision] to request the Prosecutor to consider amending the charges:*

a. by expressly specifying that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and

b. by adding counts of the crime against humanity or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (Article 7(l)(k) of the Statute), in relation to the acts of destruction of property, and looting, and the infliction of physical injuries."

The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Statute.

In the 5 August 2011 Decision, the Single Judge held that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues of law and/or fact if: (i) the

Legal Representative of victims proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concemed, the rights of the suspects and the principle of fairness and the expeditiousness of the proceedings. The Single Judge also stressed that the assessment of applications pursuant to article 68(3) of the Statute cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the Legal Representative of victims.

Having considered the submissions of the Legal Representative of victims, the Single Judge is of the view that the personal interests of the victims in the present case are indeed affected by the issue raised during the confirmation of charges hearing and reiterated in the Request. The Single Judge also considers that no prejudice would be caused to the rights of the suspects and to the fairness and expeditiousness of the proceedings if the victims' Legal Representative was authorised to make written submissions on the issue outlined in the Request. However, the Single Judge wishes to point out that this is without prejudice to the final determination by the Chamber on the subject-matter of the proposed submissions. Accordingly, the Request may be granted to the extent that the victims' Legal Representative is authorised to include in her final written submissions, which are due on 30 September 2011, observations on the issue(s) proposed in the Request.

See No. ICC-01/09-01/11-338, Pre-Trial Chamber II (Single Judge), 22 September 2011, paras. 5-12.

The Single Judge further finds, in accordance with article 68(3) of the Statute, that the Legal Representative of victims may be authorised by the Chamber to make written submissions on specific issues "upon the conditions that (i) the Legal Representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, inter alia, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings."

See No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, par. 60. See also No. ICC-02/11-01/11-211, Pre-Trial Chamber I (Single Judge), 15 August 2012, par. 12.

The Common Legal Representative of the victims authorised to participate at the pre-trial stage of the present case has the right, during the confirmation hearing and in the related proceedings, to:

(i) have access to all public filings and public decisions contained in the record of the case;

(ii) be notified on the same basis as the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;

(iii) be notified of the decisions of the Chamber in the proceedings;

(iv) have access to the transcripts of hearings held in public sessions;

(v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and

(vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format [i.e. unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which such evidence has been made available to either party.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, par. 54.

5. Modalities of participation at the trial stage

The right to introduce evidence during trials before the Court is not limited to the parties. Victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has *"requested"* the evidence.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 108. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 81-84; No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 29-37; No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 37-40 and No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, par. 18.

Rule 91(3) of the *Rules of Procedure and Evidence* enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant) whenever their personal interests are engaged by the evidence under consideration; thus questioning by victims won't be restricted to reparations issues.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 108. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 72-78; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 38-40.

The right to make submissions on matters of admissibility or relevance of evidence is not reserved to the parties, consequently, in appropriate circumstances, the victim's Legal Representatives may have the opportunity to challenge evidence.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 109. See also No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 104.

To give effect to article 68(3) of the Statute, upon request by the Legal Representatives of the victims, the Prosecution shall provide individual victims with any materials within the possession of the prosecution, provided that: victims asking for such materials have been granted the right to participate in the proceedings; the material requested are relevant to the personal interests of the victims; the Chamber have permitted that the material targeted be investigated during the proceedings; and the victims have identified with precision in writing the materials requested.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 111.

The Trial Chamber may, *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and ex parte hearings, depending on the circumstances. Whether or not participation by victims could exceptionally encompass hearings that are ex parte, victims only (e.g. when considering protective measures) is an issue that can only be resolved by reference to the facts of the particular application. To the extent that it is possible and necessary, the Chamber will consult with the parties whenever the victims apply to participate in such hearings.

The above applies *mutatis mutandis* with regard to the right of victims to make confidential or ex parte written submissions.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras. 113-114.

Victims' participation may include opening and closing statements.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 117. See also No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, p. 9.

The three participating victims wish to address the court on four discrete issues, by way of presenting their views and concerns or by giving evidence:

i. their individual histories, within the context of the charges faced by the accused;

ii. the harm they individually experienced;

iii. the approach to be taken to reparations, focussing particularly on any relevant facts not canvassed thus far during the trial (in accordance with article 68(3) of the Statute); and

iv. the issue, including the extent, of child recruitment in the region;

It will be necessary to determine in this Decision whether these issues properly arise for consideration in the context of this trial, and, if so, how each is to be presented by these participating victims, but first it is convenient to set out the principles that are to be applied to applications of this kind.

As rehearsed above, article 68(3) establishes the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected, although the opportunity is expressly created for their Legal Representatives to undertake this task on their behalf, if the Court considers that course appropriate. However, any intervention by victims must be in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Accordingly, the content and the circumstances of their participation must not undermine the integrity of these criminal proceedings.

[...]

Finally, it needs to be stressed that 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.

In the result, careful decisions will need to be made by victims as to whether to give evidence under oath, or to present their views and concerns, or both. If they wish to express their views and concerns, they will need to determine whether they are best placed to undertake this exercise or whether the relevant matters would be more effectively introduced by their Legal Representatives. Furthermore, the Chamber will need to ensure that issues and facts are not unnecessarily repeated (e.g. first in a victims' personal presentation of his or her views and concerns, then repeated by them in evidence and finally addressed on a third occasion by the Legal Representatives in submissions). Although evidence can be commented upon in submissions or during the process of presenting views and concerns, overall this exercise must be proportionate and consistent with a fair trial.

[...]

It would be undesirable—indeed impossible—for the Chamber to describe in greater detail the circumstances in which the personal intervention by victims in order to express their views and concerns will be appropriate. Fact-specific decisions will be required, taking into account the circumstances of the trial as a whole. For instance, the personal contributions of a few victims are unlikely have the same impact on the proceedings as when a large number of victims individually wish to express their views and concerns. To take an extreme example, if all the participating victims in this case (94) sought to present their views and concerns, depending always on the circumstances of their discrete interventions, that course may be antithetical to the fair trial of the accused. Accordingly, it will be necessary for the Chamber to consider these applications on their individual merits, balancing a wide variety of factors that will include the requirements and circumstances of the trial as a whole. This is an area in which the Legal Representatives have a crucial role to play: it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation by them in this trial.

Turning, first, to the merits of the requests to give evidence, written applications have been submitted and notified to the parties. Therefore, the first two requirements, as approved by the Appeals Chamber, have been satisfied.

As to whether the personal interests of the victims are affected and whether their testimony may be relevant to the charges against the accused, the issue of child recruitment in the region, and its extent, are of *prima facie*

relevance to the suggested use, recruitment or enlistment of child soldiers during the relevant period by the accused. Moreover, this evidence may assist the Chamber in its consideration of reparations for certain victims, if these arise later in the proceedings. The region is a relevant area in the Democratic Republic of Congo ("DRC"), falling potentially under the alleged control or influence of the accused during the timeframe of the charges, and this evidence may therefore assist the Chamber in its determination of the truth.

[...]

In all the circumstances, these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence.

Once the three participating victims have completed their evidence, they will be in the best position, at that stage, to determine whether they wish to express their views and concerns personally. As set out above, the Chamber expects the Legal Representatives to give detailed and careful advice on this issue, and it will entertain oral submissions at the relevant time. Although as a matter of principle it is open to these participating victims to request an opportunity to present their views and concerns personally on issues such as the harm they individually experienced and the approach to be taken to reparations, if they have chosen to give evidence on all relevant matters within their knowledge and experience, it may be more appropriate for any additional submissions (which may involve complex legal issues) to be advanced by their Legal Representatives. However, the Chamber will deal with the position of each victim following their evidence, once the individual circumstances of, and the detail of the requests from, each of these three participating victims are clear. At that stage the Chamber will determine, if relevant, when and by whom any views and concerns are to be presented, bearing in mind the situation of the victims and the need to ensure that the trial of the accused is fair.

See No. ICC-01/04-01/06-2032-Anx, Trial Chamber I, 9 July 2009, paras. 15-17, 25-29 and 39-40. See also No. ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, paras. 4 and 104.

Victims may under certain circumstances be allowed to participate in the proceedings by way of giving oral testimony. This possibility is subject to authorisation by the Chamber.

1. Conditions

As a general principle, the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representative clearly explains the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts.

In determining whether and how the Legal Representatives are allowed to call victims they represent to testify, the Chamber will be guided by the overriding concern that this takes place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Accordingly, the possibility for the Legal Representatives to call victims who participate in the proceedings to testify in person, is subject to three important limitations:

a. The Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay, in accordance with article 67(1)(c).

b. The Chamber will only allow Victims' Legal Representatives to call witnesses to the extent that this does not in effect transform them into auxiliary prosecutors.

c. Under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence.

Furthermore, the Chamber must ensure that the Defence have adequate time to prepare, which implies that the participation by a victim may not be the cause of unfair surprise for the Defence, to which it is not able to respond adequately.

Bearing in mind these important pre-conditions, the Chamber may authorise the Legal Representatives of the victims to call one or more of their clients in order to testify in person before the Court and give evidence under oath. The Chamber will only allow this after the Prosecution has concluded its case and insofar as it does not undermine the integrity of the proceedings.

2. Application for calling a victim to testify

When a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber before the completion of the Prosecution case.

The application must be accompanied by a signed statement by the victim, containing a comprehensive summary of the testimony that is to be given by the victim. If the Chamber grants the application, the attached statement shall count as disclosure in accordance with regulation 54(f) of the *Regulations of the Court.*

The Chamber urges the Legal Representatives to avoid the need for unnecessary redactions in the said statement. However, if it is necessary to protect the safety, physical or psychological well-being of the victims or third persons who are implicated by the participation of a victim, the Chamber may authorise redactions. Under no circumstances may the Legal Representatives apply redactions without prior authorisation by the Chamber.

The application and the statement must be notified to the parties, who will have seven days to make observations. The Chamber will rule on the application and determine the appropriate moment for the victim to testify.

In the event the Chamber authorises the application, the Legal Representative must enter into contact with the Victims and Witnesses Unit in order to make all necessary arrangements and discuss any possible security concerns.

3. Criteria for evaluating applications for giving testimony by victims

In evaluating applications for participation through oral testimony by victims, the Chamber may take into consideration, among others, the following factors:

a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.

c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.

d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 19-30; see also No. ICC-01/05- 01/08-2138, Trial Chamber III, 22 February 2012, paras. 23-25.

The Chamber will grant the Legal Representatives the opportunity to call one or more victims to give evidence under oath at trial. In its view, the most appropriate stage, having regard to the rights of the accused, to hear any victims called by the Legal Representatives is directly after the Prosecution has presented its case. Since the persons concerned will give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused, the Defence should be given the opportunity to present its case once all victims of the crimes to which the accused must answer have given their evidence, including any victims called by the Legal Representatives.

Again, any application for this purpose must state the relevance of the testimony to the issues of the case and how it may help the Chamber to gain a better understanding of the facts.

[...]

Regarding the question whether their status as participating victims in the proceedings might preclude them from giving evidence under oath, the Chamber concurs with Trial Chamber I that the possibility of their giving evidence cannot be totally excluded. Furthermore, that Chamber authorized three of the victims participating in the *Lubanga* case to come to give evidence under oath after the conclusion of the Prosecution case. Indeed, it would be contrary to the Chamber's obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims. Nevertheless, the Chamber is aware of the objections raised by the Defence in this regard. It is further mindful of the fact that, in those legal systems which attribute an active role to victims in criminal proceedings, such victims are usually not authorised to testify under oath. However, the Chamber notes that the fact that a victim gives evidence under oath—which in itself gives him or her the status of a witness—allows the Defence to cross-examine him or her, which acts as a safeguard and makes the said victim liable to prosecution under article 70(1)(a) of the Statute if he or she gives false testimony.

Furthermore, it should be noted that, if the victim were authorised merely to make a written statement, that could not be taken into account in the final judgment, which would be contrary to the objective of contributing to the determination of the truth that justifies intervention by victims.

It is therefore incumbent upon the Chamber, when determining whether it is appropriate to allow a particular victim to testify in person, to satisfy itself that his or her dual status as victim and witness does not compromise the probative value of the testimony. Prior to ruling on such a request, the Chamber may ask for the observations of the parties.

The Chamber recalls, in this respect, that the participation of victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth. Consequently, 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.

The Chamber emphasises that it will not authorise testimony from any victims who wish to remain anonymous to the Defence. On this point, it recalls that, in its decisions of 6 and 18 November 2009, it ordered the disclosure of the identity of the majority of the victims who did not oppose such disclosure. Lastly, it points out that some victims have yet to specify whether or not they agree to their identity being disclosed to the parties.

Nevertheless, the Chamber does not rule out the possibility of anonymous victims participating in the proceedings. In the event that they are called to appear as witnesses in accordance with this Decision, they must relinquish their anonymity.

See No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 86-93.

As a matter of principle, Victims' Legal Representatives will not be able to call witnesses other than the victims they represent. However, in case the Legal Representatives have identified persons other than participating victims, who may be able to give evidence to the Chamber about issues that concern the victims' interests, they may take the initiative to bring this to the attention of the Chamber.

If the Chamber considers that the proposed witness may indeed provide the Chamber with important information, that was not hitherto included in the evidence called by the parties, it may decide to call the witness on its own motion, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.

As a general rule, the Chamber will only call witnesses whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representatives clearly explain the

relevance of the proposed testimony in relation to the contentious issues of the case.

When the Chamber has called a witness on the suggestion of one of a Legal Representative, it may allow that Representative to question the witness, either before or after the Chamber examines him or her. The remainder of the examination will follow the same order as for witnesses called by the Chamber *proprio motu*.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 45-48.

The questioning of witnesses by the victims' Legal Representatives pursuant to rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the Legal Representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant provisions in the *Rome Statute* framework, the manner of questioning falls to be determined by the Chamber.

The terms *"examination-in-chief," "cross-examination"* and *"re-examination,"* which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

The purpose of the *"examination-in-chief"* is *"to adduce by the putting of proper questions relevant and admissible evidence which supports the contentions of the party who calls the witness."* It follows from this purpose that the manner of such questioning is neutral and that leading questions (i.e. questions framed in a manner suggestive of the answers required) are not appropriate. However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of *"cross-examination"* is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate.

The victims' Legal Representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' Legal Representatives that uses the concepts of *"examination in chief," "cross-examination"* and

"re-examination" is not necessarily helpful. This particular aspect of the proceedings at trial—the manner of questioning by the victims' Legal Representatives—is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems. As participants in the proceedings, rather than parties, the victims' Legal Representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.

By article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: the *"onus is on the prosecutor to prove the guilt of the accused."* However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not *"preclude the possibility for victims to lead evidence pertaining to the guilt of the accused."* It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' Legal Representatives to question witnesses on subjects that relate to this issue:

> In addition the Trial Chamber finds support for this approach in the provision under rule 91 (3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the Legal Representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.

It follows that the victims' Legal Representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

Under the scheme of the Statute, questioning by the victims' Legal Representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. The framework establishing the rights of victims as regards their participation during trial has been coupled expressly with the statutory powers of the Trial Chamber, pursuant to article 69(3) of the

Statute, *"to request the submission of all evidence that it considers necessary for the determination of the truth."* The Appeals Chamber explained that:

> The framework established by the Trial Chamber [...] is premised on an interpretation of article 69(3), second sentence, read with article 68(3) and rule 91(3) of the Rules, pursuant to which the Chamber, in exercising its competent powers, leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.

In the judgment of the Trial Chamber, this link (as approved by the Appeals Chamber) between the questioning of witnesses by the victims participating in proceedings and the power of the Chamber to determine the truth tends to support a presumption in favour of a neutral approach to questioning on behalf of victims. Putting the matter generally, they are less likely than the parties to need to resort to the more combative techniques of *"cross-examination."* In certain circumstances, however, it may be fully consistent with the role of the victims' Legal Representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' Legal Representatives to use closed, leading or challenging questions, if approved by the Chamber.

In conclusion, it follows from the object and purpose of questioning by the victims' Legal Representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.

Otherwise, any attempt to pre-empt the circumstances in which a particular manner of questioning is to be conducted will be unhelpful, because the Chamber will need to respond on a case-by-case basis. The victims' Legal Representatives shall bear in mind, therefore, the presumption in favour of neutral questioning, unless there is a contrary indication from the bench. By way of procedure, if a representative of victims wishes to depart from a neutral style of questioning, an oral request should be made to the bench at the stage in the examination when this possibility arises.

See No. ICC-01/04-01/06-2127, Trial Chamber I, 16 September 2009, paras. 21-30. See also No. ICC-01/05- 01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 38-40.

The Chamber decides that victims may, at the end of the questioning by the prosecution, request leave to ask questions in addition to those questions filed in the application as set out in the paragraph above. Such request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected, in compliance with the conditions of rule 91 of the Rules. The Trial Chamber will determine such applications on a case-by-case basis.

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, par. 19.

With regard to the scope of questioning, the Legal Representatives are expected only to question a witness to the extent relevant to the victims' interests. The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused.

See No. ICC-01/05-01/08-1023, Trial Chamber III, 19 November 2010, par. 20.

As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

The following rules apply to questioning by victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

1. Procedure for authorizing questions by victims' Legal Representatives

a) Questions under article 75

When a victims' Legal Representative wants to question a witness in relation to matters that pertain to a potential order on reparations in accordance with article 75 of the Statute, the Legal Representative shall make a written application to that effect, which shall be notified to the parties. The application shall provide a written note of the questions, in accordance with rule 91(3)(a). The filing shall further explain the precise purpose and scope of the questions and include any relevant documents that will be used for questioning. Finally, the application shall indicate on behalf of which (group of) victim(s) the questions are being put.

The application shall be filed as early as possible in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations. Under normal circumstances the Chamber will only consider applications that were received at least seven days before the witness' first appearance.

In case the Chamber grants the application, it will make a ruling under regulation 56 of the *Regulations of the Court*, determining whether and to what extent rule 91(4) of the Rules will apply.

b. Anticipated questions by the Legal Representatives

When the victims' Legal Representatives know in advance that they have certain specific questions for a particular witness, expert or the accused, which do not relate to issues of reparation, they shall notify the Chamber and the Prosecution about this in a written application, at least seven days before the witness appears for the first time. The application shall indicate which questions the Legal Representative proposes to ask and explain how they relate to the interests of the victims represented. If the Chamber considers that the application must be submitted to the Defence for observations, in accordance with rule 91(3)(a), it may decide to reclassify the application so as to allow the notification thereof to the Defence. In that case, the Defence will have three days to formulate its observations.

If, after examination-in-chief by the party calling the witness, the Chamber is of the view that the matters raised in the proposed question(s) of the victims have not been sufficiently addressed by the witness, it may authorise the Legal Representative to put the question(s) before cross-examination commences. In deciding whether it is appropriate to grant such authorisation, the Chamber will take into consideration the rights of the accused, the interests of the witness, the need for a fair, impartial and expeditious trial and the need to give effect to article 68(3) of the Statute, in accordance with rule 91(3)(b) of the Rules. The Chamber recalls, in this regard, that this provision also authorises it to put the question to the witness, expert or accused on behalf of the Victims' Legal Representative.

c) Unanticipated questions by the Legal Representatives

When the victims' Legal Representatives did not anticipate putting questions to a particular witness, but during examination-in-chief by the party calling the witness, an unforeseen issue arises that directly pertains to the

interests of the victims, the victims' Legal Representatives may submit a question to the Chamber, which may decide to put it to the witness, if it considers this necessary for the ascertainment of the truth or to clarify the testimony of the witness.

2. Scope of questioning

In principle, questioning by victims' Legal Representatives should be limited to questions that have as their purpose to clarify or complement previous evidence given by the witness. Nevertheless, victims' Legal Representatives may be allowed to ask questions of fact that go beyond matters raised during examination-in-chief, subject to the following conditions:

a) Questions may not be duplicative or repetitive to what was already asked by the parties.

b) Questions must be limited to matters that are in controversy between the parties, unless the victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.

c) In principle, victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness' testimony, unless the victims' legal representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.

d) Unless the Chamber specifically gave authorisation under regulation 56 of the *Regulations of the Court*, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.

3. *Mode of questioning*

The victims' Legal Representatives shall conduct their questioning in a neutral manner and avoid leading or closed questions, unless specifically authorised by the Chamber to deviate from this rule. If the victims' Legal Representative is authorised to challenge the credibility/accuracy of a witness's testimony, leading, closed as well as questions challenging the witness's reliability are allowed, subject to the same limitations as outlined in relation to cross-examination.

See No. ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009, paras. 82-91. See also, No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January

2008, paras 108-111; and No. ICC-01/05-01/08-807-Corr, Trial Chamber III, 30 June 2010, paras. 30-40.

The Chamber considers that the aforementioned provisions of the Statute do not preclude the Legal Representatives from asking it to decide whether it should order that certain documentary evidence be tendered. Again, the Chamber considers this a means for the victims to express their *"views and concerns"* within the meaning of article 68(3) of the Statute. In the Chamber's view, making it possible for the Legal Representatives of the victims to propose the presentation of documentary evidence would indeed assist it in its implementation of article 69(3) of the Statute, and by the same token in its search for the truth.

Accordingly, the Chamber will allow the Legal Representatives this possibility, provided that they comply with the following procedure. They must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present, must be notified to the parties and other participants for their observations.

If the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness's testimony to allow the Chamber and the parties to take proper note of the application's content. In any other circumstance, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible.

It should be recalled that the Chamber will only authorise the presentation of such evidence provided that it is not prejudicial to the Defence or to the fairness and impartiality of the trial. It will assess the evidence thus tendered pursuant to its power to *"rule on the admissibility or relevance of evidence"* under article 64(9) of the Statute.

See No. ICC-01/04-01/07-1788-tENG,Trial Chamber II, 22 January 2010, paras. 98-101.

The Appeals Chamber underscores that the Statute and the *Rules of Procedure and Evidence* provide that disclosure by the Prosecutor should, in principle, take place prior to the commencement of trial. Pursuant to article 61(3) of the Statute and rules 121(3) and (5) of the *Rules of Procedure and Evidence*, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64(3)(c) of the Statute, the Trial Chamber shall *"provide for disclosure of documents or information not previously disclosed,*

sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." The Statute, *Rules of Procedure and Evidence* and *Regulations of the Court* also emphasise the duty of the Chamber to ensure that the Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case.

However, the possibility of the Trial Chamber requesting victims to submit evidence is contingent on (i) the victims fulfilling the requirements of article 68(3) of the Statute, and (ii) the Trial Chamber deciding to exercise its authority under article 69(3) of the Statute. The submission of such evidence therefore falls within the regime provided for the Trial Chamber to exercise its authority to request the submission of "evidence that it considers necessary for the determination of the truth." Since the Trial Chamber may not know in advance of the trial which evidence will be necessary for the determination of the truth and, as far as evidence submitted by victims is concerned, whether the victims' personal interests are affected, the Trial Chamber has the power to order the production of such evidence during the course of the trial. Thus, article 64(6)(d) of the Statute provides that "*in performing its functions* [...] *during the course of a trial, the Trial Chamber may, as necessary:* [...] *(d) Order the production of evidence in addition to that already* [...] *presented during the trial by the parties.*" Because article 64(6)(d) of the Statute specifically refers to evidence in addition to that which has been presented during the trial by the parties, it is clear that it is intended to give effect to the power of the Trial Chamber under the second sentence of article 69(3) of the Statute.

In light of the above, the necessary implication is that there may be circumstances under which evidence called by the Trial Chamber may not be communicated to the accused before the commencement of the trial. Insisting otherwise would deprive the Trial Chamber of its ability to make its assessment as to what is necessary for the determination of the truth after having heard the evidence presented by the parties. Thus, while it is correct that the Statute emphasizes disclosure of evidence by the Prosecutor prior to the commencement of the trial, this does not apply to evidence submitted at the request of the Trial Chamber under article 69(3) of the Statute.

The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68(3) of the Statute, which requires that they demonstrate that their personal interests are affected by the evidence they request to submit. Secondly, when

requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69(3) of the Statute. In addition, the Trial Chamber will *"ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the so accused,"* which includes the right to "have adequate time and facilities for the preparation of the defence."

See No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 43-48.

As recalled by the Trial Chamber and conceded by the accused neither the Statute nor the *Rules of Procedure and Evidence* expressly oblige the Victims to disclose exculpatory evidence to the accused. Rather, article 67(2) of the Statute provides that the Prosecutor is responsible for disclosure of exculpatory evidence. In addition, rule 77 of the *Rules of Procedure and Evidence* provides that the Prosecutor shall disclose evidence which is material for the preparation of the defence, and evidence which will be used at trial.

The Appeals Chamber also recalls that the drafting history of the Statute supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstance equally under article 54(1)(a) of the Statute. In contrast, as explained in greater detail in the preceding section relating to the first ground of appeal, pursuant to article 68(3) of the Statute, the victims' role in the proceedings is significantly more limited. The Appeals Chamber considers that imposing a general disclosure obligation on the victims to disclose evidence to the accused would disregard the limited role of the victims of presenting their views and concerns where their personal interests are affected. Bearing in mind the differing roles of the victims *vis-à- vis* the parties, the Appeals Chamber finds that it is inappropriate simply to extend the Prosecutor's statutory obligations to victims participating in the proceedings.

See No. ICC-01/04-01/07-2288 OA11, Appeals Chamber, 16 July 2010, paras. 72 and 75.

The Appeals Chamber recalls that under article 54(1)(a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54(3)(b) of the Statute, the Prosecutor may, with respect to his investigations *"request the presence of and question persons being investigated, victims and witnesses."* The Appeals Chambers therefore considers that it is reasonable that, in particular where the

submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the *Rules of Procedure and Evidence.*

See No. ICC-01/05-01/07-2288 OA11, Appeals Chamber, 16 July 2010, par. 81.

Where a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber, accompanied by a statement signed by the witness, containing only such redactions as are strictly necessary. The victim must also submit, prior to the completion of the Prosecution case, a comprehensive summary of the testimony to which the application pertains.

[...]

The Chamber notes that the Legal Representative has complied with the formal requirements set out in its Decision on Rule 140. It recalls that, in accordance with the requirements of that decision and its Decision on the Modalities of Participation, the identities of the four victims in question are known to the Defence teams. It further recalls that, by e-mail of 14 September 2010, it instructed the Legal Representative to notify the parties of the redacted version of the four victims' statements. The Chamber notes that the Legal Representative's redactions are limited in scope and were intended to ensure the safety of the four victims concerned, for whom an application for protective measures is envisaged. It further notes that the redactions are consistent with the recommendations of the Victims and Witnesses Unit ("VWU"). Moreover, out of concern to ensure the effectiveness of any protective measures considered necessary, which must be proportionate to the current circumstances of each of the four victims, the Chamber already asked the Legal Representative, by e-mail of 27 September 2010, to consult with VWU, without, of course, predetermining the outcome of the Application. Accordingly, at this stage, pursuant to articles 64(2), 64(6)(e) and 67(1) of the Statute, the Chamber authorises the temporary redactions of the statements as proposed, while leaving it for the Legal Representative to consider whether to apply for the authorised redactions to be maintained within two days of the implementation of any protective measures ordered for the victims granted leave to testify by this Decision.

[...]

The Chamber recalls that it is particularly incumbent upon it to assess whether each proposed victim testimony is related to the charges in the case and is not unnecessarily repetitive of evidence already tendered by the parties - it being noted that it is not a matter of rejecting any possible repetitions, only those which do not contribute significantly to the determination of the truth. This is how the Decision on Rule 140 must be read where it instructs a legal representative filing such an application to *"explain the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts."*

The evidence of Victim a/0381/09 covers, according to the Legal Representative, paragraphs 275, 277, 302, 303, 306, 307, 403, 405 and 424 of the Decision on the Confirmation of Charges. The Chamber notes that this person is a Hema civilian who was in Bogoro with her family well before the attack, and that she lived in a classroom at the Institute alongside numerous other refugees. Given her links with certain members of the Lendu community and the warnings which they had issued to her Hema husband, the Chamber is of the view that this victim could provide significant clarification about the prevailing atmosphere in Bogoro and the change in mental states prior to the attack, in particular the workings of the interethnic communication channels which might have conveyed information about an impending attack. Moreover, this victim may shed new light on the events which took place inside the Bogoro Institute in the two days prior to the fighting and on the day of the hostilities.

As for Victim a/0018/09, whose evidence, the Legal Representative submits, covers paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 403, 405 and 422 of the Decision on the Confirmation of Charges, the Chamber is of the view that, on account of the occupation she held in 2003, which put her in contact with the residents of Bogoro, she could provide the Chamber with a clearer picture of the existing family, ethnic and social networks there, which could explain why some civilians remained, despite the threats. Furthermore, like Victim a/0381/09, this second victim, as a survivor from the Institute, may also provide a number of further details about the atmosphere and the events of the two days leading up to the attack and the day itself. Since a/0381/09 states that she lost consciousness whilst escaping from the Institute, the Chamber considers that these two testimonies could in fact complement each other effectively. Lastly, the Chamber considers that a description of Bogoro before and after the attack of 24 February 2003 could enable it to assess its significance and impact more accurately.

The evidence of Victim a/0191/08 covers, according to the Legal Representative, paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 405 and 424 of the Decision on the Confirmation of Charges. He states that this victim can provide the Chamber with information about "[TRANSLATION] *the methods used by the assailants during the attack,*" "[TRANSLATION] *the strategy of surrounding the entire locality beyond the UPC camp*" and "[TRANSLATION] *the attacks to which the civilian population of Bogoro was subjected beyond any military objective.*" The Chamber accepts that the proposed testimony supports the evidence of many Prosecution witnesses to a great extent, in particular that of P-233, P-287 and P-268. However, it notes that, having been warned by a Lendu pastor of the imminence of an attack, a/0191/08 could provide the Chamber with fresh information as to continuing solidarity between civilians belonging to different ethnic communities. Furthermore, the Chamber considers that this testimony could elucidate the circumstances in which civilian victims fled and how it was impossible for them to protect their family members and, notably, even the youngest of their children.

Lastly, the evidence of pan/0363/09 representing minor victim a/0363/09 covers, according to the Legal Representative, paragraphs 275, 277, 282, 306, 307, 322 to 325, 334 to 338 and 405 to 424 of the Decision on the Confirmation of Charges. In light of her statement, the Chamber considers that the testimony of pan/0363/09, acting as the representative of Victim a/0363/09, could provide it with new and useful information about possible methods of selecting houses to attack based on ethnicity, in particular with respect to the dwelling of an individual who was neither Hema nor Lendu.

According to the statement, all of the Hema family members of Victim a/0363/09 - whose father had previously received threats - were killed in their house at the time of the attack, whereas the neighbouring family of pan/0363/09, who herself belongs to a different ethnic group and was asked by the child's mother to look after the child, was spared. The Chamber further notes that only the minor, a/0363/09, has been granted victim status. Accordingly, the statement of the representative, pan/0363/09, should be restricted to issues concerning the personal interest of the child being represented.

Nevertheless, in light of the relevant information she may provide, which could contribute significantly to the determination of the truth, the Chamber intends now to call her as a witness of the Chamber regarding any issue extending beyond the personal interest of Victim a/0363/09, to avoid having to recall her.

Accordingly, the Chamber is of the view that the appearance of Victims a/0381/09, a/0018/09 and a/0191/08 and Witness pan/0363/09 would contribute significantly and effectively to the search for the truth and the process of establishing the facts. It notes further that these victims' testimonies may be of use in the future if it should need to assess the entirety of the harm suffered by the victims.

See No. ICC-01/04-01/07-2517-tENG, Trial Chamber II, 9 November 2010, paras. 6, 8, 14- 20.

The Chamber has first one issue that can be dealt with in open session and it is related to an email received from the case manager of the Legal Representatives for victims, asking the Chamber whether requests for Legal Representatives to question witnesses should be in a specific format or whether it suffices to make such requests by email. The Chamber draws the Legal Representatives' attention to its decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings of 12 July 2010, filing 807, *corrigendum,* which explicitly says that the discrete applications to participate in the trial should be made in writing, paragraph H of the disposition. The exact quote is, the Chamber instructs the Legal Representatives of victims who wish to participate during trial proceedings to set out in a discrete written application the nature and the detail of their proposed questions to witnesses seven days before the witness is scheduled to testify. This is the end of the quotation. In addition, the decision on common legal representation of victims for the purpose of trial is filing 1005 of 10 November 2010, paragraph 39, repeats the same language. The decision on directions for the conduct of the proceedings, filing 1023 of 19 November 2010, paragraphs 18, 19, refers back to these two decisions and sets out that the Legal Representatives who wish to participate during trial should set out the nature and detail of their proposed questions as well as specify in what way the personal interests of the victims are affected in a discrete application at least seven days before the witness is scheduled to testify.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-45-Red-ENG CT WT, 12 January 2011, from p. 25, line 15 to p. 26, line 11.

It doesn't matter if the witness is also a victim and represented by another Legal Representative in the case. Once the clients of one of the Legal Representatives show interest in the information to be given by a given witness, the Legal Representative concerned, even if he or she is not representing the dual victim/witness concerned can ask for permission to ask questions.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/086-T-45-Red-ENG CT WT, 12 January 2011, p. 27, lines 14-16.

However, the Chamber will not allow question 5, as proposed by the Legal Representative in its Request to be granted leave to question the witness, relating to whether or not the witness tried to resist when she was being raped. This is not acceptable since it sets a dangerous precedent for future questioning of this nature. The Chamber takes the opportunity to remind all parties and participants of the content of rule 70 of the *Rules of Procedure and Evidence* for guidance on the principles of evidence in cases of sexual violence.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-47-Red-ENG CT2 WT, 14 January 2011, p. 47, lines 10-16.

First, on Friday 14 January 2011, the Legal Representatives of victims made a public filing of his application to question Witness 23. Due to the fact that the filing contains the actual list of questions that the Legal Representatives request to ask the witness, and regardless of whether the information itself is sensitive, the filing should have been classified as confidential in order that the witness does not know the questions in advance and cannot prepare the answers to the questions, negating the very purpose of questioning, should the Chamber grant the application. I just like to remind Legal Representatives of victims that, in future, such application to question witnesses may be made confidentially.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-48-Red-ENG WT, 17 January 2011, from p. 1, line 23 to p. 2, line 10.

When the witness will be brought outside of the courtroom, having completed his testimony before the Chamber and before the hearing resumes, the witness and the Legal Representative of this dual status victim/witness may maintain contact.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-54-Red-ENG CT WT, 26 January 2011, p. 48, lines 11-12.

As for the Legal Representatives of the vctims, the Chamber recalls that they may put questions to Defence's witnesses with the Chamber's leave. In this respect, it refers to the *Directions for the conduct of the proceedings and testimony in accordance with rule 140* of 1 December 2009.

See No. ICC-01/04-01/07-2775-tENG, Trial Chamber II, 15 March 2011, par. 19.

The logic underlying rule 141(2) of the Rules that establishes the right of the Defence to examine witnesses last also applies to these final written submissions. The Defence is therefore entitled to file its closing submissions

once the arguments of the Prosecution and the Legal Representatives have been submitted.

The page limit for each filing has been extended pursuant to regulation 37 of the *Regulations of the Court* and the deadlines are set out hereafter: a) The Prosecution is to file its closing submissions in the case not later than 16.00 on 1 June 2011 in a document not exceeding 250 pages. b) The Legal Representatives of victims team V01 and team V02 as well as the Office of Public Counsel for victims ("OPCV") are also to file their closing submissions in the case no later than 16.00 on 1 June 2011. The page limit is extended up to 50 pages for each team and for the OPCV. There is to be a single filing for each team. c) The Defence is to file its final submissions in the case no later than 16.00 on 15 July 2011 in a filing not exceeding 300 pages and any accompanying annex should not exceed 25 pages. Although the defence requested the same overall number of pages as the prosecution and the Legal Representatives in order to respond to the filings of each team, the Chamber considers that 300 pages will be sufficient to enable the accused to address the closing arguments of the prosecution and the Legal Representatives, some of which are likely to be repetitive. d) The Prosecution may file a reply of up to 50 pages by 16.00 on 1 August 2011. e) The Defence may file a final reply of up to 50 pages by 16.00 on 15 August 2011.

The final submissions shall address all the relevant legal and factual issues arising in the case. These should include, *inter alia*:

i) Whether there was an armed conflict in Ituri, Democratic Republic of Congo, between 1 September 2002 and 13 August 2003?

ii) If there was an armed conflict for the purposes of i) above, is there a nexus between the armed conflict and the alleged crimes?

iii) Was the armed conflict of an international character or not of an international character, for the purposes of article 8 of the Statute?

iv) If the Chamber concludes that it was not of an international character, what factors should be taken into account if the Chamber considers modifying the legal characterisation of the facts (under regulation 55 of the *Regulations of the Court*) for the period of early September 2002 to 2 June 2003?

v) What does the Prosecution need to establish in this case under article 25 (3) (a) of the Statute?

vi) What is the meaning of the terms *"conscripting"* or *"enlisting"* children under the age of fifteen years into the national armed forces, into armed

forces or armed groups or *"using them to actively participate in hostilities,"* for the purposes of articles 8(2)(b)(xxvi) and 8(2) (e)(vii) and the corresponding Elements of the Crimes?

vii) What does the prosecution need to establish under article 30 of the Statute, bearing in mind article 8(2)(b)(xxvi)(3) and article 8(2)(e)(vii)(3) of the Elements of Crimes?

For the documents that have been admitted into evidence without having been introduced during the examination of a witness *(viz.* the bar table documents), as set out by the Chamber during the hearing on 1 April 2011 in their final submissions the parties and participants are to identify the documents, or parts thereof, that are relied on, and to provide a sufficient explanation of relevance. Similarly, the parts of the oral evidence relied on by the parties and participants and the documents relied on during the examination of witnesses must be clearly identified. There is a duty on the parties and participants to indicate the principal facts arising out of the oral evidence that are relied on, and to provide a sufficient explanation of relevance. The Chamber will hear public oral closing statements on Thursday 25 August 2011 and Friday 26 August 2011 (rule 141 of the Rules). The prosecution and the defence may make oral closing statements of up to 2 hours each. The two Legal Representatives' teams and the OPCV may make oral submissions of up to 40 minutes each. The order of public oral closing statements will be: the Prosecution, the participating victims and finally the Defence.

The parties and participants should be prepared to entertain questions from the Bench when their closing statements are delivered. It follows that for each team at least one counsel should be present in court with a detailed knowledge of the facts and issues in the case, having been present in court throughout the majority of proceedings (regardless of which counsel present the final closing statement).

See No. ICC-01/04-01/06-2722, Trial Chamber I, 12 April 2011, paras. 2-8.

Since there is no prejudice to the Defence, I think we should allow the Legal Representatives [in the course of its questioning of a witness and although the specific question was not anticipated by the Legal Representative and thus not included in the latter's request to the Chamber] to ask a clarification in some points that are rising from the transcript [and corresponding to information given by the witness in the course of its testimony before the Chamber before the Legal Representative took the stand].

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-101-ENG CT WT, 14 April 2011, p. 4, lines 20-22.

The Chamber has already informed the Defence that Legal Representatives are allowed to put questions that arise from the transcript, because they cannot preview in advance the questions to be put in relation to the realtime transcript of today.

See Oral decision, Trial Chamber III, No. ICC-01/05-01/08-T-104-Red-ENG CT WT, 4 May 2011, p. 50, lines 3-5.

Before ruling on the merits of the applications, the Chamber will address a procedural issue regarding the timing for the filing of responses to applications by Legal Representatives to question witnesses. This is governed by rule 91(3)(a) of the Rules, which allows the parties to make observations on the Legal Representatives' applications *"within a time limit set by the Chamber."* While the Chamber decided that Legal Representatives are required to file their applications to question witnesses *"at least seven days before the witness is scheduled to testify,"* the Chamber has never set such a time-limit for the filing of observations thereto and considers it appropriate to do so now.

The Chamber decides that from now on, any observations on, or objections to, applications by Legal Representatives to question witnesses are to be submitted at least four days before the relevant witness is scheduled to testify. Any replies to those observations are to be filed at least two days before the witness is scheduled to testify.

See No. ICC-01/05-01/08-1729, Trial Chamber III, 9 September 2011, paras. 13-14.

The Chamber will now turn to the merits of the applications and related observations. As an initial matter, the Chamber rejects the Defence suggestion that so-called *"insider witnesses"* are *"collectively unlikely to be able to give evidence which impacts upon the personal interests of the victims."* In the view of the Chamber, the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses. This is borne out by rule 91(3) of the Rules, which provides that Legal Representatives may be permitted to question experts and the accused, as well as fact witnesses.

For the purpose of questioning Witness 33, the Chamber is of the view that both Legal Representatives have provided sufficient reasons to demonstrate that the victims they represent have a personal interest in putting

questions to Witness 33. Indeed, Witness 33 is an insider witness who will testify, *inter alia*, on the alleged mode of liability of the accused and on the alleged crime of pillage in the Central African Republic, which, according to the victim application forms received by the Chamber, appears to have directly affected a significant number of victims.

For these reasons, the Chamber grants the Legal Representatives' applications to question the witness.

See No. ICC-01/05-01/08-1729, Trial Chamber III, 9 September 2011, paras. 15–17.

The Chamber developed a protocol on how to conduct a judicial site visit in the DRC as annex to the present order. The Chamber holds, among others that, (i) owing to budgetary constraints, besides the judges, the delegation shall be composed of two representatives of each party and a representative of each team of Legal Representatives; (ii) the delegation shall visit the majority of the locations and sites suggested by the parties and participants, subject to any security restrictions; (iii) the Chamber shall retain control of the conduct of the visit; (iv) parties and participants may not tender evidence; (v) parties and participants shall not be authorised to file oral or written submissions; (vi) at the request of the Chamber, the parties and participants may be requested to identify locations, sites or buildings and, if necessary, to provide any further pertinent information on the events which took place there. In the event of disagreement over identification, any challenge shall be entered in the transcript of the visit; (vii) parties and participants shall refrain from any contact with media; and (viii) during the site visit, a Court Managment Section representative shall be present in order to prepare a written report of the visit and prepare the transcripts to be produced upon completion of the visit.

See No. ICC-01/04-01/07-3203-tENG and No. ICC-01/04-01/07-3203-anxB, Trial Chamber II, 18 November 2011, pp. 7-9 and paras. 1-6.

Article 68 of the *Rome Statute* and rule 91 of the *Rules of Procedure and Evidence* permit victims, through their Legal Representatives, to present *"their views and concerns 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 an impartial trial."*

The Appeals Chamber, confirming the jurisprudence of the Trial Chambers, has held that the above provisions may permit Legal Representatives of victims to present evidence at trial. The presentation of evidence by Legal Representatives is not an *"unfettered right"*; it must be overseen and regulated by the Chamber, with due regard to the

rights of the accused and the fairness of the trial. To the extent that Legal Representatives wish to adduce evidence, they are required to make an application to the Chamber in advance. In light of the above principles, and pursuant to articles 64(6)(d), 64(6)(f), 64(8)(b), 68(3) and 69(3) of the *Rome Statute*, rules 86, 89 and 91 of the Rules and regulations 43 and 54(o) of the *Regulations of the Court*, the Chamber hereby establishes the procedure to be followed by the Legal Representatives if they wish to seek leave to present evidence or for individual victims to present their views and concerns to the Chamber.

a. If the Legal Representatives wish to present evidence on behalf of their clients, or wish individual victims to be permitted to present their views and concerns to the Chamber, the Legal Representatives must file a written application seeking leave from the Chamber;

b. If the Legal Representatives wish to present evidence, their written applications are to explain:

i. The nature of the proposed evidence and the manner in which it is to be presented;

ii. The estimated time needed for the presentation of the proposed evidence;

iii. How the personal interests of the participating victims would be affected by the presentation of the proposed evidence;

iv. The relevance of the proposed evidence to the charges;

v. How the presentation of the proposed evidence would assist in the Chamber's determination of the truth in this case;

vi. Whether a victim who is proposed as a witness has relinquished his or her anonymity;

vii. Whether and how the presentation of the proposed evidence would affect the rights of the accused and the fairness of the trial, especially if a victim wishes to testify without relinquishing his or her anonymity;

viii. Any disclosure issues that need to be resolved in connection with the presentation of the proposed evidence;

ix. Whether the Legal Representatives envisage applying for protective measures, such as redactions and/or in-court protective measures;

x. Whether the proposed evidence is to be presented through persons who have been authorised to participate as victims in the trial proceedings, and if so, the application numbers under which those persons are registered

c. If the Legal Representatives wish individual victims to present their views and concerns to the Chamber, by way of, for example, unsworn statements, the Legal Representatives' written applications are to explain:

i. The manner in which the victims' views and concerns are to be presented, e.g. in-person pursuant to rule 89 of the Rules or in writing;

ii. The estimated time needed for the victims to present their views and concerns;

iii. How the personal interests of the participating victims would be affected by the presentation of their views and concerns to the Chamber;

iv. Whether the victims wish their views and concerns to be presented publicly, or whether they need to be afforded in-court protective measures;

v. Whether the victims are persons authorised to participate in the trial, and if so, the application numbers under which those persons are registered;

[...]

f. To the extent that the Chamber permits the Legal Representatives to submit evidence, or authorises individual victims to present their views and concerns to the Chamber, this shall take place before the Defence begins its presentation of evidence, if any.

See No. ICC-01/05-01/08-1935, Trial Chamber III, 21 November 2011, paras. 1-3.

While it is important for the participation of victims in trial proceedings to be meaningful, such participation must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Among the accused's statutory rights is the right *"to be tried without undue delay,"* the importance of which is demonstrated by the fact that the Chamber has a statutory duty to ensure that the trial proceedings are *"expeditious."* To give effect to this duty, the Chamber must seek to prevent undue delays resulting from the presentation of cumulative evidence. It is against this standard of

judicial oversight that the Chamber conducts this preliminary assessment of the proposed presentation of evidence by the Legal Representatives.

[...]

The relevant Victims should be those who, in the Legal Representatives' view, are (i) best-placed to assist the Chamber in the determination of the truth in this case; (ii) able to present evidence and/or views and concerns that affect the personal interests of the greatest number of participating victims; (iii) best-placed to present testimony that will not be cumulative of that which has already been presented in this case; and (iv) willing for their identity to be disclosed to the parties in the event that they are permitted to testify and/or present their views and concerns.

After receiving the additional information and after hearing from the parties, the Chamber will make a final determination on which of the relevant Victims, if any, should be permitted to testify and/or present their views and concerns.

[...]

For each relevant Victim, the Legal Representatives shall provide a comprehensive written statement laying out the facts about which the victim proposes to testify and/or present his or her views and concerns. The statements shall be signed by the victim and shall be provided to the Chamber and the parties in one of the working languages of the Court.

[...]

In addition to the written statements described above, for each relevant Victim, the Legal Representatives shall explain (i) the estimated time needed for the presentation of the victim's testimony and/or views and concerns;

whether the victim is willing for his or her identity to be disclosed to the parties in the event that he or she is permitted to testify and/or present views and concerns; (iii) how the presentation of the victim's testimony and/or views and concerns would affect the overall interests of the participating victims in this case; (iv) the relevance of the victim's testimony to the charges; (v) how the victim's testimony would assist in the Chamber's determination of the truth in this case; and (vi) the reasons why the victim's testimony would not be cumulative of evidence that has been presented to date. These matters are to be addressed on a victim-by-victim basis.

[...]

In line with previous practice at this Court and for reasons of fairness, the Chamber will not permit victims to testify as witnesses or to present their views and concerns unless they relinquish their anonymity vis-à-vis

the parties. However, 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 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.

If the relevant Victims' written statements contain identifying information that should not be disclosed to the parties prior to the Chamber's ruling on the merits of their applications, the Legal Representatives are to file the victims' written statements on an ex parte basis, with proposed redactions to the identifying information. Subject to any changes ordered by the Chamber, the redacted versions will be notified to the parties.

Once the supplemented Applications and written statements have been filed and the Chamber has decided on any proposed redactions, the Chamber will instruct the Victims Participation and Reparations Section to provide the parties with unredacted or lesser redacted versions of the victims' application forms for the relevant Victims. In addition, the Chamber will provide the parties with the relevant portions of the ex parte annexes to the Chamber's victims' participation decisions in which the relevant victims were granted participating status in this case.

See No. ICC-01/05-01/08-2027, Trial Chamber III, 21 December 2011, paras. 9, 12-13, 15, 17, 19-21.

The Majority adopted a set of criteria, mainly established by Trial Chamber II in *The Prosecutor v. Katanga and Ngudjolo* case, in order to determine whether victims shall be authorised to present evidence. In particular, in its assessment of the applications, the Majority contemplated whether the presentation of evidence by a specific victim would *"make a genuine contribution to the ascertainment of the truth"* or *"bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges."*

I firmly disagree with the use of these criteria which are unduly and unfairly curtailing the victims' rights to present evidence. These criteria have no legal basis and cannot be deduced from the statutory framework pursuant to its literal, systematic or teleological interpretation. In my view, the adoption of these criteria by the Majority reflects a utilitarian approach to victims' rights rather than an attempt to ensure that the rights granted under the statutory provisions are exercised effectively and only within the limits specifically set out in these provisions.

It should be sufficient, in my view, to recall that the Appeals Chamber has detailed the requirements that are necessary in order to allow victims to present evidence, notably and most importantly for the purposes of my partly dissenting opinion: the demonstration of the personal interests that are affected by the specific proceedings; a determination of the appropriateness of the victims' specific participation; and the consistency with the rights of the accused and the requirements of a fair trial. However, the Majority's decision, in which the participatory rights of the victims are arbitrarily limited to two victims allowed to give testimony, is premised on the concept that the testimonies should be "useful" for the Chamber, make a "genuine contribution" and refer extensively to the need to avoid "undue" delays in the proceedings, which is not, in any of the findings of the Majority's decision, justified or based on factual elements. I would have assessed the victims' applications to present evidence in light of the Appeals Chamber requirements and after having determined whether the evidence intended to be presented is relevant and carrying probative value.

Furthermore, in my view, it would have been more appropriate, if not fairer, to analyse the impact of allowing victims to present evidence, in relation to the avoidance of *"undue delays,"* on the basis of what is stated in regulation 43 of the *Regulations of the Court:* the Presiding Judge, in consultation with the Chamber, is entitled to determine the mode and order of questioning witnesses, in order to avoid delays and ensure the effective use of time.

See No. ICC-01/05-01/08-2140, Partly Dissenting Opinion of Judge Sylvia Steiner, Trial Chamber III, 22 February 2012, paras. 13-17.

The Chamber deems it important to underscore the differences between the presentation by individual victims of evidence and the expression of their views and concerns in person. An instructive illustration to that effect was provided by Trial Chamber I in the following terms:

> [...] 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.

In line with these differences, the presentation by individual victims of evidence on the one hand and the expression of their views and concerns on the other is governed by different requirements, which are elaborated upon below. In particular, the threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, 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.

[...]

The imperative of expeditiousness requires the Chamber to determine which victims shall be authorised to present their views and concerns in person. In this context, the Chamber agrees with Trial Chamber I that this exercise requires "*fact-specific decisions* [...] *taking into account the circumstances of the trial as a whole.*" For that purpose and in the circumstances of the present case, the Chamber will consider whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of a larger number of victims. In particular, the assessment will take into account the nature of the harm suffered and the location of the events alleged by the victims who were proposed to express their views and concerns.

See No. ICC-01/05-01/08-2138, Trial Chamber III, 22 February 2012, paras. 19-22; and Oral Decision, No. ICC- 01/05-01/08-T-227-Red-ENG WT, Trial Chamber III, 25 June 2012, pp. 20-21.

Pursuant to article 68(3) of the Statute, victims enjoy an unequivocal statutory right to present their views and concerns whenever their personal interests are affected. Limitations to such an autonomous statutory right shall be interpreted in a strict manner and in compliance with the statutory framework. To that effect, article 68(3) of the Statute clearly determines the boundaries of the victims' right to present their views and concerns by stating that they are to be "*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.*" The *ultima ratio* of this provision is not to alter victims' right to present their views and concerns, which is unequivocal and autonomous, but rather to ensure that the modalities of their participation will not negatively impact the integrity of the criminal proceedings at hand, that the stages of the

proceedings in which the victims participate are appropriate, and the rights of the accused and a fair and impartial trial are not affected.

In my view, the Chamber has clearly and correctly recalled the strict limitations to the right of victims to present their views and concerns.

While I fully agree with the need to ensure the expeditiousness of the trial, in particular by limiting the number of victims authorised to present their views and concerns in person, I strongly disagree with the assessment *in fine* made by the Majority which, in my view, departs from the applicable law recalled in paragraph 21 of the Decision and reflects a utilitarian approach rather than a legal one.

In light of the circumstances of the case, I fail to understand how allowing 7 victims out of the 2287 already authorised to participate in the proceedings to express their views and concerns in person would affect the expeditiousness of the proceedings when authorising them to do so would only take approximately 80 hours (18 hearing days) at a time when 177 hearing days have already been dedicated to the prosecution's presentation of its evidence. It must be recalled that such length of time is just a very raw estimation given by Legal Representatives themselves.

To further illustrate my views, I finally refer to the precedents of the other Trial Chambers of this Court: Trial Chamber I authorised three victims to present evidence out of 129 participating victims, and Trial Chamber II had initially authorised four victims to present evidence out of 370 participating victims.

Therefore, the Majority, without any factual elements on which to base its assessment of the effect of the victims' participation on the expeditiousness of the trial, denied a number of victims their statutory rights to present their views and concerns which, depending on the modalities of participation that could be set by the Chamber at a later stage, could have been fully consistent with and not prejudicial to the rights of the accused.

See No. ICC-01/05-01/08-2140, Partly Dissenting Opinion of Judge Sylvia Steiner, Trial Chamber III, 22 February 2012, paras. 18-23.

[TRANSLATION] Pursuant to rule 141 of the *Rules of Procedure and Evidence*, the Chamber invites the parties to make closing arguments. It considers that Legal Representatives of victims shall also be granted this possibility. The Legal Representative of the former child soldiers will have a maximum of 40 minutes and the Legal Representatives of the main group of victims will then have 1 hour and 20 minutes maximum. The Chamber reserves its right to pose questions to the Legal Representatives of victims. In order to facilitate the good conduct of the hearings, the Chamber wishes

that the Legal Representatives of victims communicate the names of the persons of their teams who will take the floor during the closing statements, the main areas to be addressed and the estimated time for each intervention. As for the content of the closing statements, the Chamber instructs the parties and participants to develop in particular the issues of the case which, in light of the written submissions, appear to be the most litigated ones. In particular, the Prosecution and the Legal Representatives are requested to focus mainly on the issues addressed in the written conclusions of each defence team and which require an answer from their side. The Defence teams shall include all replies to said elements in response in their own oral submissions.

See No. ICC-01/04-01/07-3274, Trial Chamber II, 20 April 2012, paras. 4-12.

In the circumstances of the present case and pursuant to articles 64(2) and 68(3) of the Statute and Rule 89(1) of the Rules, the Majority of the Chamber, Judge Steiner dissenting, deems it appropriate to hear the views and concerns of victims a/0542/08, a/0394/08 and a/0511/08 by means of video-link technology. While the victims' views and concerns will be broadcast to the Chamber, the parties and the public via video-link, the Chamber recalls that in accordance with the 22 February 2012 Decision, the victims 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.

The respective Legal Representative will be responsible for guiding the victim through his or her presentation of views and concerns, but shall limit the intervention to questions that would facilitate this presentation. In this respect, and in accordance with the estimation of time provided at the status conference of 27 March 2012, the Legal Representatives shall further ensure that the presentation of views and concerns does not exceed one hearing day per victim. In addition, in accordance with its responsibilities under articles 64(2) and 68(3) of the Statute and rule 89(1) of the Rules, the Chamber may address the victims at any time it deems it appropriate.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, paras. 7-8.

The Chamber recalls that in accordance with its Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial ("Unified Protocol"), the Unified Protocol does not apply to victims appearing before the Court to present their views and concerns.

However, in conformity with the Victims and Witnesses Unit ("VWU")'s mandate, this specialised unit of the Registry shall be responsible for

arranging all logistics involved, including transportation for the victims to the location where the video-link technology will be installed, and for taking all necessary measures to ensure the victims' physical and psychological well-being. In addition, while the victims presenting views and concerns will not be subject to the formal familiarisation procedure applicable to witnesses, the VWU shall arrange for the victims to receive certain minimal guidance and explanation relating to the process of providing their views and concerns. The Legal Representatives, as deemed appropriate after consultation with the VWU, shall determine whether it is preferable to be present at either the location where the video-link will be broadcast from or in the courtroom in The Hague.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, paras. 9-11.

In accordance with the Chamber's previous finding that victims will not be permitted to present their views and concerns unless they relinquish their anonymity vis-à-vis the parties, and noting that the victims have consented to the disclosure of their identities to the parties, the present Decision now addresses the provision to the parties of the relevant information pertaining to the identities of victims a/0542/08, a/0394/08 and a/0511/08. In line with the procedure applied in the context of victims that had been authorised to give evidence, the Chamber needs to ensure that the parties are provided, for their information, with the relevant portions of the ex parte annexes to the Chamber's decisions on victims' applications, less redacted versions of the victims' application forms, and less redacted versions of the victims' written statements. When providing less redacted versions of the statements, the Legal Representatives shall ensure that any redactions to information pertaining to the victims' identities are lifted while any redactions to the identities of third parties and the victims' exact addresses should be maintained.

See No. ICC-01/05-01/08-2220, Trial Chamber III, 24 May 2012, par. 12.

In view of the specific circumstances of the present case, and in order to ensure that the participation by victims is meaningful, the Chamber is of the view that the Common Legal Representative may have access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he or she represents. It will be the responsibility of the filing party to indicate on the notification page whether the Common Legal Representative shall be notified.

In addition, given the security situation in Kenya, the Chamber considers it appropriate to restrict access to confidential documents to the Common

Legal Representative and to the OPCV when acting on the Common Legal Representative's behalf. Any requests for access for individual victims shall be specifically motivated and provide detailed information about 1) the necessity of sharing the information with a particular victim or group of victims, 2) the identity of the victim(s) who would have access to the confidential material, and 3) how the Common Legal Representative would guarantee that the information would not be circulated beyond the specifically authorised victim(s).

See No. ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, paras. 67-68. See also No. ICC-01/09-02/11- 498, Trial Chamber V, 3 October 2012, paras. 66-67.

When the Legal Representative wishes to examine a witness, he is directed, as general rule, to apply to the Chamber, by means of filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary.

The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application.

If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the Prosecution case.

See No. ICC-01/09-01/11-847-Corr, Trial Chamber V(a), 9 August 2013, paras. 19 and 21.

6. Modalities of participation during interlocutory appeals

The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

See No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, par. 26; See also No. ICC-01/04- 503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 39; and No. ICC-01/05-01/08-2098 OA10, Appeals Chamber, 1 February 2012, par. 10.

It is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Accordingly, in ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

See No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, 18 June 2008, paras. 60 and 62. See also No. ICC- 01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, par. 101; No. ICC-01/04-01/06-1452 OA12, Appeals Chamber, 6 August 2008, par. 12; No. ICC-01/04-01/06-1453 OA13, Appeals Chamber, 6 August 2008, par. 11; No. ICC-01/04-01/06-1335 OA9 OA10, Appeals Chamber, 16 May 2008, par. 50 and No. ICC-01/04-01/10-509 OA4, Appeals Chamber, 2 April 2012, par. 12.

In ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

In light of the similarities, the number and the complexities of the issues on appeal the Legal Representatives of the relevant victims are each directed to file a consolidated document pertaining to their views and concerns in respect of all three appeals.

See No. ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, paras. 101-102.

In the instant case, the application does not meet the first criterion for two reasons: (i) it does not make clear which victims are applying to participate in the appeal; and (ii) it does not indicate the decisions in which those victims were granted victim status. The Appeals Chamber has on previous occasions, underscored the importance of Legal Representatives specifying

the victims they represent in an appeal and referring to the decisions that granted the victims such status.

In the absence of the information referred to in the above paragraph, the Appeals Chamber is unable to determine which individuals are seeking participation in this appeal and whether they are victims in the case. As the criterion for determining victim participation is cumulative, the Appeals Chamber will not examine the remaining criteria. The Victims' Application is thus rejected.

See No. ICC-01/05-01/08-2098 OA10, Appeals Chamber, 1 February 2012, paras. 12-13.

According to the Appeals Chamber's jurispmdence 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. For the purpose of regulating and expediting the conduct of the proceedings arising from this appeal, the Appeals Chamber in these Directions determines that the victims who were represented by the OPCV in proceedings on the Jurisdictional Challenge before the Pre-Trial Chamber and made observations pursuant to article 19(3) of the Statute may also submit observations on the document in support of the appeal and the response thereto.

See No. ICC-02/11-01/11-236 OA2, Appeals Chamber, 31 August 2012, par. 3.

As to the manner of participation, the Appeals Chamber considers that the Victims in the present appeal will be limited to the written presentation of their views and concerns with respect to their personal interests relating to the issues raised in this appeal. The suspect and the Prosecutor will be permitted to reply to the Victims' views and concerns, in accordance with rule 91(2) of the *Rules of Procedure and Evidence.* In the view of the Appeals Chamber, this manner of participation does not cause prejudice to, nor is it inconsistent with, the rights of the accused and a fair and impartial trial. The fourth criterion for victim participation under article 68(3) of the Statute is therefore satisfied.

See No. ICC-02/11-01/11-491 OA4, Appeals Chamber, 27 August 2013, para. 14.

The Appeals Chamber finds that the present appeal is a stage of the proceedings in which the participation of the Victims is appropriate in light of the potential consequences of the appeal. As to the manner of participation, the Appeals Chamber decides that the Victims may participate in the present

appeal by making written submissions limited to their views and concerns with respect to their personal interests in the issues raised in this appeal. The Appeals Chamber considers that the participation of the Victims in the present appeal, in that manner, is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, the suspect and the Prosecutor will be permitted to respond to the Victims' views and concerns, in accordance with rule 91(2) of the *Rules of Procedure and Evidence.*

See No. ICC-02/11-01/11-492 OA5, Appeals Chamber, 29 August 2013, para. 11.

7. Modalities of participation at the appeal stage

Pursuant to rule 91(1) of the *Rules of Procedure and Evidence,* and having regard to rules 91(2), 92(5) and (6) of the *Rules of Procedure and Evidence,* the Appeals Chamber determines that the 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. The convicted person and the Prosecutor may each file a consolidated response to the victims' observations. Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the Legal Representatives of Victims V0I and V02.

See No. ICC-01/04-01/06-2951 A4 A5 A6, Appeals Chamber, 13 December 2012, par. 5

Pursuant to rule 91(1) of the *Rules of Procedure and Evidence,* and having regard to rules 91(2), 92(5) and (6) of the *Rules of Procedure and Evidence,* the Appeals Chamber determines that the victims may participate in the present appeals in the following manner: the legal representatives of victims may present the victims' views and concerns with respect to their personal interests in the issues on appeal by each filing observations on the document in support of the appeal and the response to the document in support of the appeal. The accused person and the Prosecutor may each file a consolidated response to the victims' observations. Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the legal representatives of victims.

See No. ICC-01/04-02/12-30 A, Appeals Chamber, 6 March 2013, para. 5.

The Appeals Chamber recalls that the Trial Chamber should have decided these applications, latest at the sentencing stage of the proceedings. The Appeals Chamber finds that these victims would have been subject to the Decision of 13 December 2012. Therefore, the Appeals Chamber also finds it appropriate to allow the 30 victims hereby authorised to participate in the proceedings the opportunity to file observations on the three documents in support of the appeals A 4 A 5 A 6. To this end, the Legal Representatives of Victims V01 and V02 are requested to contact the victims whom they represent and who are hereby authorised to participate in order to ascertain their views and concerns with respect to their personal interests in the issues on appeal in the present proceedings. Should the 30 victims express views and concerns that are different to those that have already been submitted in the consolidated observations of the 120 participating victims, the Legal Representatives of Victims V01 and V02 are requested to file a short submission presenting these views and concerns.

See No. ICC-01/04-01/06-3045-Red2 A 4 A 5 A 6, Appeals Chamber, 27 August 2013, para. 171. See also, No. ICC-01/04-01/06-3052-Red, Appeals Chamber, 3 October 2013, par. 10.

8. Specific issues related to the modalities of participation

8.1 Access to documents in general

Legal Representatives of victims participating in the proceedings shall not be given access to any non-public document contained in the record of the situation in the DRC.

See No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, p. 42. See also No. ICC- 01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, par. 6; and No. ICC-01/04-423- Corr, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 60.

If the Prosecution has no obligation to provide the Defense with full access to the Prosecution situation and case files, the Prosecution cannot be under any obligation to provide such access to those granted the procedural status of victim at the pre-trial stage of a case. In other words, the latter's access rights can by no means exceed those access rights granted by the Statute and the Rules to the Defense.

The right to have full access to the Prosecution's situation and case files cannot be part of the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 88-89.

If the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case were to include access, prior to the confirmation hearing, to the evidence proposed by the parties, such right could be satisfied by allowing victims to consult the record of the case kept by the Registry.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 118.

If victims were to be denied access to confidential filings, they would essentially be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.

See No. ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, par. 151.

Only the Legal Representatives of non-anonymous victims shall have the rights to access the confidential part of the record of the present case and to attend closed session hearings; and that therefore non-anonymous victims shall not have access to the confidential part of the case record nor shall they attend closed session hearings.

See No. ICC-01/04-01/07-537, Pre-Trial Chamber I (Single Judge), 30 May 2008, p. 12.

The Chamber is of the view that, in order to promote effective participation of vicitms in the trial, the legal representtaives must be able to consult all of the public and confidential decisions and docuemnts in the record of the case, wiht the exception of any docuemnt classified as ex parte.

See No. ICC-01/04-01/07-1788-tENG-,Trial Chamber II, 22 Janaury 2010, par. 121.

The Chamber is persuaded that in order to facilitate full participation by victims, it is in the interests of justice that those who have been granted leave to participate are afforded access to the confidential material in the case, relevant to their views and concerns. However, given the obligation of the Court to protect those affected by it activities, it is necessary that this opportunity is subject to the restriction that necessary protective measures or the security of individuals or organisations will not be adversely affected. Therefore, in order to guarantee the effective expression of the views and concerns of participating victims, they are, through their Legal

Representatives, to be notified in a timely manner of public and confidential filings whenever the Trial Chamber has resolved that their interests are engaged. In order to make this approach effective, the parties and participating victims are to inform the Chamber whenever confidential filings may engage the interests of particular participating victims. The Legal Representatives are not to communicate confidential information to their clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

See No. ICC-01/05-01/08-807-Corr,-Trial Chamber III, 30 June 2010, par. 47. See also No. ICC- 01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, par. 123.

Pursuant to rule 121(10) of the Rules, victims or their Legal Representatives may consult the record of all proceedings before the Pre-Trial Chamber, created and maintained by the Registry in accordance with the said provision. However, the same provision clarifies that such right is *"subject to any restrictions concerning confidentiality and the protection of national security information."*

The Single Judge thus considers that the Legal Representative of the victims authorised to participate pursuant to the present decision has the right, during the confirmation hearing and in the related proceedings, to have access to all public filings and public decisions contained in the record of the case. The right of access to the public record of the case extends to the public evidence filed by the Prosecutor and the Defence and contained in the record of the case, in the same format (i.e. unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which it has been made available to the party which has not proposed it. In relation to those decisions, filings or evidence that are classified as *"confidential,"* the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims' Legal Representative access thereto.

Finally, in light of the presence of the victims' Legal Representative in the courtroom, the Single Judge is of the view that she should also have access to the transcripts of:

(i) The public sessions of the confirmation of charges hearing;

(ii) The sessions of the confirmation of charges hearing held *in camera* or ex parte which the Legal Representative was authorised by the Chamber to attend;

(iii) The other public hearings and status conferences held in the present case; and

(iv) Any other *in camera* or ex parte hearings which the Legal Representative will attend pursuant to the Chamber's authorisation.

The Chamber reserves its right to decide on a case-by-case basis, on its own motion or upon receipt of a specific and motivated request, whether to grant the victims' Legal Representative access to the transcripts of non-public sessions of the confirmation of charges hearing or of non-public hearings and status conferences that the Legal Representative will not have been authorised to attend as well as to the transcripts of non-public hearings or status conferences held before the issuance of the present decision. Despite the absence of any such request at this moment of time, the Single Judge is of the view that, in order for the Legal Representative of victims to duly perform her duties as well as to meaningfully exercise her rights as established in the present decision, the victims' legal representative shall be granted *proprio motu* access to the redacted and unredacted versions of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings. The Registry is thus instructed accordingly.

According to rule 92(5) and (6) of the Rules, the victims' Legal Representative shall be notified by the Registrar of all decisions and filings filed during the proceedings in which they are admitted to participate. In light of this provision and mindful of the restriction to the access to confidential information as set forth in rule 121(10), the Single Judge holds that the Legal Representative of victims is entitled to be notified, on the same basis as the Prosecutor and the Defence, of:

(i) All requests, submissions, motions, responses and other documents within the meaning of regulation 22 of the *Regulations of the Court* which are filed as 'public' in the record of the case;

(ii) All the public decisions of the Chamber in the present proceedings; and

(iii) Of the confirmation of charges hearing and any postponement thereof, as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

The Chamber, however, considers that if a party or a participant in the present proceedings wishes to notify a document classified as *"confidential"* to the victims' Legal Representative, it may do so by including in the said document the name of the Legal Representative to be notified thereof. The

Registry shall then notify the Legal Representative accordingly. The Single Judge considers that, despite the classification as *"confidential"* of the annex attached to the present decision, the notification thereof to the common Legal Representative of victims is essential. The Registry is thus instructed to notify the said annex to the Legal Representative of victims.

See No. ICC-01/09-01/11-249, Pre-Trial Chamber II (Single Judge), 5 August 2011, paras. 90-97. See also No. ICC-01/09-02/11-267, Pre-Trial Chamber II (Single Judge), 26 August 2011, paras. 107-114.

The Single Judge is of the view that, in order for the Legal Representatives of victims to exercise the rights established in the present decision, they must be granted access the Document Containing the Charges which is currently classified as confidential.

See No. ICC-01/04-01/10-351, Pre-Trial Chamber I (Single Judge), 11 August 2011, par. 44.

NOTING the OPCV "Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court" *dated 18 August 2011, wherein the OPCV requests to be notified of:*

(i) Annexes B and C to the Defence Challenge, currently classified as confidential;

(ii) *Annexes 1 to 5 to the* "Prosecution Response to the 'Defence Request for Disclosure'" *currently classified as confidential and mentioned in the* "Prosecution's response to the Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290";

(iii) Any other relevant documents in relation to article 19 proceedings;

(iv) Unredacted version of the Document Containing the Charges; and

(v) Systematically, any document submitted by the parties, participants and/or the Democratic Republic of the Congo related to the Defence Challenge and which might be classified confidential.

NOTING articles 19(2), 19(3) of the *Rome Statute,* rules 58 and 59 of the *Rules of Procedure and Evidence;*

CONSIDERING that the participation of *"victims that have communicated with the Court"* in accordance with article 19(3) of the Statute is regulated by rule 59 of the Rules and strictly limited to the following (i) to be informed of the challenge (rule 59(1) of the Rules); (ii) to be provided, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the

Court has been challenged (rule 59(2) of the Rules); and (iii) to make representation in writing to the competent Chamber within such time limit as it considers appropriate (rule 59(3) of the Rules).

FOR THESE REASONS

GRANTS the OPCV Request in relation to the requested notification of annexes B and C to the Defence Challenge only;

REJECTS the OPCV Request in relation to all other requested notifications;

ORDERS the Registrar to notify the OPCV and the Legal Representatives of victims of annexes B and C to the Defence Challenge, currently classified as *"Confidential."*

See No. ICC-01/04-01/10-382, Pre-Trial Chamber I, 18 August 2011, pp. 4-5.

The common Legal Representative of victims grounds his Request on three main arguments. First, he seeks access to confidential material disclosed by the Prosecutor "on the basis that it has already been redacted in order to withhold the most sensitive material from the defendants." *Second, it is claimed that access to confidential material disclosed by the parties is necessary* "to ensure that victims' recognized interests are properly represented before the Chamber." *In this sense, it is the view of the Legal Representative that* "allowing *[...] [him]* to make an opening and closing statement, but depriving him of access to the material on which the confirmation hearing is based, would be tantamount to participation by the victims in form, but not substance." *Finally, it is contended that the disclosure of all confidential material to the victims' Legal Representative favours judicial economy. To the contrary* "requiring the parties to make submissions for and/or against disclosure based upon the importance of a document to victims' interests relative to any potential sensitivity of the material would be time-consuming and require individual determination."

At the outset, the Single Judge recalls the Decision on Victims' Participation, wherein the principle approach towards victims' procedural rights within the context of the confirmation of charges hearing and related proceedings has been established. First, the Single Judge held that a number of provisions of the applicable law *expressis verbis* confer upon victims certain rights that they could exercise *ex lege*, through their Legal Representative. Beside them, other rights may be granted to the victims, either *proprio motu* by the Chamber or *"upon specific and motivated request submitted by the Legal Representative,"* and provided that the personal interests of the victims are affected by the specific issue(s) under consideration.

With respect to the latter category, the Single Judge specified that determining whether or not it is appropriate to grant any specific rights to the victims is an exercise that cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request by the Legal Representative and *"in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,"* as stipulated by article 68(3) of the Statute. With specific regard to the rights of the victims to access decisions, filings and evidence that are classified as confidential, the Single Judge has held in the Decision on Victims' Participation that *"the Chamber retains the option to decide on a case-by-case basis, either proprio motu or upon receipt of a specific and motivated request"* whether to grant the victims' Legal Representative access to such material.

The Single Judge wishes to stress that, in the event of requests to access material withheld to the victims pursuant to rule 121(10) of the *Rules of Procedure and Evidence*, as in the present case, the approach established in the Decision on Victims' Participation is designed to avoid situations in which the victims' Legal Representative aims at collecting, indiscriminately, all material on which the parties intend to rely for the purposes of the confirmation of charges hearing, irrespective of its pertinence to any issue at stake and regardless of findings as to whether victims' interests are affected by that issue. The Single Judge shares the views expressed by the Defence, according to which the Request is essentially departing from the approach towards victims' rights under article 68(3) of the Statute as well as from the Decision on Victims' Participation. The Single Judge also agrees with the submission of the Prosecutor that *"access to confidential material should not be granted except on a case-by-case basis, and only when the victims can demonstrate that the material relates to issues specific to their interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information."*

In the view of the Single Judge, the Request runs contrary to the principle according to which any request pursuant to article 68(3) of the Statute shall demonstrate how the personal interests of victims are affected by the specific issue(s) at stake. Absent any specific issue identified by the victims' Legal Representative in the present circumstances and having failed to show any impact thereof on the victims' personal interests, the Single Judge considers that the Request remains in the abstract and must be rejected.

See No. ICC-01/09-02/11-326, Pre-Trial Chamber II (Single Judge), 14 September 2011, paras. 7-13.

In the Request, the victims' Legal Representative submits that the issue of "diligence and adequacy" *of the investigation carried out by the Prosecutor in the present case, as raised by the Defence teams of the Suspects, has* "a very direct bearing on the interests of the victims." *The common Legal Representative asserts that the personal interests of the victims* "would therefore clearly be directly affected if the crimes of which they were victims are not diligently and adequately investigated and prosecuted" *by the Prosecutor. It is contended that* "without access to the evidence that the Prosecutor has produced to date, the victims' representative is in no position at all to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate."

The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Statute, rule 121(3) and (10) of the *Rules of Procedure and Evidence.*

At the outset, the Single Judge wishes to make two clarifications. First, in the course of the confirmation of charges hearing, the victims effectively enjoyed—through their Legal Representative—the rights accorded to them, either *expressis verbis* in the Statute and the Rules or pursuant to an authorization by the Chamber. Second, the victims' Legal Representative was able to follow the presentation of the evidence, whether public or confidential, relied on by the Prosecutor and the Defence teams of the Suspects. It follows that the victims' Legal Representative is now potentially in a position to identify specific issues arising out of the confirmation of charges hearing which may affect the personal interests of the victims, so as to justify a request for access to material withheld from victims under rule 121(10) of the Rules. However, the Single Judge considers that providing the victims' Legal Representative with access to all confidential material disclosed by the Prosecutor, particularly in the absence of knowledge by the Legal Representative of the nature and content thereof, would still, 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 purposes of the confirmation of charges hearing, regardless of its pertinence to any issue at stake. Therefore, the Request is rejected. However, in order to identify material relevant to the issue(s) affecting the victims' interests as outlined in the Request, it is the view of the Single Judge that it might be useful for the victims' Legal Representative to have access to the list of evidence filed by the Prosecutor in accordance with rule 121(3) of the Rules and therefore the Single Judge requests the Prosecution to submit observations as to

whether he objects to grant the victims' Legal Representative access to said document.

See No. ICC-01/09-01/11-337, Pre-Trial Chamber II (Single Judge), 21 September 2011, paras. 7-11.

The Single Judge observes that in the present case it appears that an issue potentially affecting the victims' interests exists. Nevertheless, the Legal Representative of victims is prevented from identifying specific documents and material related to the issue at stake, since the list of evidence is confidential. If the list of evidence was always filed confidential, the victims' Legal Representative would never be in a position—using the Prosecutor's words—to *"demonstrate that the material relates to issues specific to their interests,"* even when the Legal Representative of victims has correctly identified an issue capable of affecting the victims' rights.

Thus, the Single Judge is of the view that, when an issue appears to affect the victims' rights, as asserted by the Legal Representative of victims, the list of evidence filed by the Prosecutor pursuant to rule 121(3) of the Rules would constitute a useful tool to select material of particular relevance for the issue under consideration. In conclusion, the Single Judge considers that the Request may be granted to the extent concerning access to the list of evidence of the Prosecution.

Finally, the Single Judge wishes to point out that this is without prejudice to the determination to be made by the Single Judge as to whether or not it would be appropriate to provide the Legal Representative of victims with access to any further documents she could identify upon analysis of the said list.

See No. ICC-01/09-01/11-340, Pre-Trial Chamber II (Single Judge), 23 September 2011, paras. 14-17.

The Single Judge recalls that if a party to or a participant in the present proceedings wishes to notify a document classified as confidential to the victims' Common Legal Representative, it may do so by including in the said document the name of the Common Legal Representative to be notified. The Registry shall notify the parties and the participants accordingly.

In relation to those filings that are marked confidential and are not notified to the victims' Common Legal Representative under the conditions set forth in the previous paragraph, the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant the Common Legal Representative of victims access thereto.

Finally, the Single Judge decides that, in order for the Common Legal Representative to discharge her duties, she shall be granted access to the redacted and unredacted copies of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 55-57. See also No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge), 13 February 2013, par. 15.

As for the request to access the list of evidence filed by the Defence pursuant to rule 121(6) of the Rules, the Single Judge underlines that, contrary to the arguments of the Defence, granting access to the Defence list of evidence does not amount to providing the Common Legal Representative with automatic access to all confidential material listed therein. Should the Common Legal Representative wish to access confidential documents in the Defence list of evidence, she will have to submit a specific and motivated request to this effect. By the same token, the Single Judge recalls that the Common Legal Representative needs the leave of the Chamber to make any oral submission during the confirmation of charges hearing, subject to the requirements of article 68(3) of the Statute. However, in light of the concerns expressed by the Defence with regard to the confidential information mentioned in the list of evidence, which are at the basis of the chosen level of classification, the Single Judge considers it is appropriate to allow the provision of the list with redaction, as proposed by both the Defence and the Common Legal Representative.

The Single Judge notes that a list of the public items contained in the Defence list of evidence has already been provided to the Common Legal Representative on 4 February 2013. However, the Single Judge considers that access to the list itself, even if in redacted form, may be of assistance to the Common Legal Representative in following the discussion on the evidence at the hearing, which may include confidential evidence. Therefore, the Single Judge considers it appropriate that the list of evidence filed by the Defence in the record of the case be communicated to the Common Legal Representative, containing such redactions to the titles of confidential items of evidence that are necessary to preserve the confidentiality of these documents.

See No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge), 13 February 2013, paras. 19 and 20.

As recently held by this Chamber in another case, "*in the absence of a proper reason justifying the* contrary, the OPCV should in principle be given access to the relevant material [concerning the admissibility challenge]."

See No. ICC-02/11-01/11-406, Pre-Trial Chamber I (Single Judge), 18 February 2013, para. 9.

With reference to its Victim Representation Decision, the Chamber hereby reminds the parties of their notification obligations pursuant to that decision. Where an ex parte filing is deemed necessary and in addition to providing the relevant justification in accordance with Regulation 23*bis* of the *Regulations of the Court*, the filing party is directed to file a redacted version concurrently. If the filing party is of the view that no confidential redacted version should be filed, it must make a specific submission to that effect to the Chamber. The parties are further reminded that the Legal Representative and OPCV are entitled to confidential documents that are relevant to the personal interests of victims. In such cases, it is the responsibility of the filing party to indicate on the notification page that the Legal Representative and OPCV are to be notified of the filing.

With respect to the request to be granted access to relevant evidence, the Chamber also reminds the parties of their obligation to provide the Legal Representative access in Ringtail to all items which are relevant to the personal interests of the victims. However, given the objections of the Defence to items which they labelled as confidential, the Chamber considers that if a party intends to use any of these items or tender one or more of them into evidence, the party concerned shall seek leave from the Chamber prior to notifying any of these items to the Legal Representative or OPCV.

The parties are primarily responsible for identifying when their filings are relevant to the victims' personal interests, and the Chamber expects the parties to notify all such filings to the Legal Representative and OPCV unless they can identify clear reasons not to do so. Accordingly, as a general rule, the Chamber considers it appropriate to grant the Legal Representative and OPCV access to filings when the parties do not object to this access being given. When objections are raised to notifying filings to the Legal Representative and OPCV, these objections will be assessed on a case by case basis.

See No. ICC-01/09-02/11-794, Trial Chamber V(b), 22 August 2013, paras. 11-13.

8.2. Access to observations under rule 89 of the Rules of Procedure and Evidence

When confidential information concerns all applicants, this information shall not be notified to persons who are not connected to all of the applicants. The

Single Judge further considers that the interest of the applicants in receiving the rule 89(1) observations should also be balanced with the further obligation of the Single Judge to ensure the expeditiousness and effectiveness of the proceedings. In particular, a system in which the Legal Representatives of the applicants receive redacted versions of the rule 89(1) observations which are specific to each applicant is not only impractical now, but will be extremely impractical as the number of applicants continues to increase.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 13 and 15.

The Single Judge considers that not notifying the rule 89(1) observations does not unduly prejudice the applicants since pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. At the same time, the Single Judge observes that the applicants are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications. While admitting that the absence of notification of rule 89(1) observations will prevent applicants from knowing the specific challenges made in the parties' observations, the Single Judge observes that the Chamber's decision on their applications will indicate any further information required or the reasons for which the applications were rejected. In such circumstances, notification of the Chamber's decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, paras. 16-17. See, for different reasoning and on the contrary, No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 36-39.

While recognising that it may be helpful to the applicants to know the types of challenges directed at the applications, the Single Judge considers that the helpfulness of this information must also be balanced with the obligation of the Single Judge to provide, where necessary, for the protection and privacy of the victims and witnesses pursuant to article 57(3)(c) of the Statute and with the general principle prescribed in rule 86 of the Rules that the Chamber in making any order shall take into account the needs of all victims and witnesses in accordance with article 68.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, par. 14.

With regard to the request to access the observations submitted by the parties pursuant to rule 89 of the Rules, the Single Judge points out that each of these observations consist of a main document, filed as *"public"* and containing the actual observations on the applications for victim participation

and a confidential annex setting out these observations in a differen
out, with a view to assisting the Single Judge in the assessment of
application for participation. The Single Judge therefore considers tha
confidential annexes referred to by the Common Legal Representative
tain information that is already reflected in the actual observations
by the parties, which are accessible to the Common Legal Representat

In light of the above, the Single Judge considers that the requested
uments are of no relevance to the Common Legal Representative fo
preparation of the confirmation of charges hearing. However, the S
Judge considers that the annexes to the Prosecutor's observations u
rule 89 of the Rules may be notified to the Common Legal Represent
since the Prosecutor does not object to that.

**See No. ICC-02/11-01/11-400, Pre-Trial Chamber I (Single Judge
February 2013, paras. 17 and 18.**

The OPCV filed the Request, requesting that the Defence
Observations be notified to it. In support of this request, the OPCV sub
that it participated throughout the sessions of the confirmation of cha
hearing and that the Chamber has stated on several occasions that the
written observations of the parties and participants should be limite
issues discussed at the hearing.

Upon review of the Defence Final Observations, and considering the
that the OPCV attended all sessions of the confirmation of charges hea
and is therefore privy to all discussions that have taken place at the hea
the Single Judge is of the view that the Request can be granted.

**See No. ICC-02/11-01/11-431, Pre-Trial Chamber I (Single Judge), 25
2013, paras. 2 and 5.**

8.3. Access to the index of the situation and case record

Rule 131(2) of the *Rules of Procedure and Evidence* provides particip
victims the right to consult the record of the proceedings, includin
index, subject to any restrictions concerning confidentiality and the
tection of national security information.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par

Regarding the access by Legal Representatives of victims to the filing
presumption will be the access to the public ones only. However, if confi
tial filings are of material relevance to the personal interests of particip
victims, their Legal Representatives might have access to them, so long
will not breach other protective measures that need to remain in place.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 106. See also Oral decision, Trial Chamber II, No. ICC-01/04-01/07-T-71-Red, 1 October 2009, pp. 4-6 and No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, 22 January 2010, paras. 118-125.

8.4. Access to documents in possession or control of the Prosecution

To give effect to article 68(3) of the *Rome Statute*, upon request by the Legal Representatives of the victims, the prosecution shall provide individual victims with any materials within the possession of the prosecution. The conditions set by the Chamber are as following: victims asking for such materials must have been granted the right to participate in the proceedings; the material requested shall be relevant to the personal interests of the victims; the Chamber shall have permitted that the material targeted be investigated during the proceedings; and the victims shall have identified with precision in writing the materials requested.

See No. ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, par. 111. See also No. ICC-01/04-01/06-1368, Trial Chamber I, 2 June 2008, paras. 27-35.

Relevant decisions regarding the modalities of victims' participation in the proceedings

Decision 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), No. ICC-01/04-101-tEN-Corr, 17 January 2006

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), No. ICC-01/04-01/06-462-tEN, 22 September 2006

Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (Pre-Trial Chamber I), No. ICC-01/04-01/06-601-tEN, 20 October 2006

Decision on the Schedule and Conduct of the Confirmation Hearing (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-678, 7 November 2006

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the *Regulations of the Court* and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-110, 3 December 2007

Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the *Regulations of the Court* and on the Disclosure of Exculpatory Materials by the Prosecutor (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-417, 7 December 2007

Decision on the Requests of the OPCV (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-418, 10 December 2007

Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-111-Corr, 14 December 2007

Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423, 24 December 2007

Decision on victim's participation (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008

Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the 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/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision on the role of the Office of Public Counsel for Victims and its request to access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

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), No. ICC-01/04-01/07-474, 13 May 2008

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008

Decision on the Legal Representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1368, 2 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence 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 Defence against Pre Trial Chamber I's Decision of 6 December 2007 (Appeals Chamber), No. ICC-02/05-138 OA OA2 OA3, 18 June 2008 and Partly dissenting opinion of Judge Sang-Hyun Song

Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-628, 23 June 2008

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007 (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008

Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1452 OA12, 6 August 2008

Decision on the participation of victims in the appeal (Appeals Chamber), No. ICC-01/04-01/06-1453 OA13, 6 August 2008

Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008

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), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008

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), No. ICC-02/05-177 OA OA2 OA3, 2 February 2009

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), No. ICC-01/04-01/06-2032 and its Annex No. ICC-01/04-01/06-2032-Anx, 9 July 2009

Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009

Decision on victims' modalities of participation at the Pre-Trial Stage of the Case (Pre-Trial Chamber I), No. ICC-02/05-02/09-136, 6 October 2009

Directions for the conduct of the proceedings and testimony in accordance with rule 140 (Trial Chamber II), No. ICC-01/04-01/07-1665, 20 November 2009

Decision on the Modalities of Victim Participation at Trial (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010

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), No. ICC-01/05-01/08-807-Corr, 12 July 2010

Instructions on the submissions of observations pursuant to article 19(3) of the *Rome Statute* and rule 59(3) of the *Rules of Procedure and Evidence* (Appeals Chamber), No.ICC-01/05-01/08-818-tENG OA3, 12 July 2010

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), No. ICC-01/04-01/07-2288 OA11, 16 July 2010

Decision on the request of the Legal Representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed (Pre-Trial Chamber I), No. ICC-01/04-582, 25 October 2010

Decision on Victims' Participation at the Hearing on the Confirmation of the Charges (Pre-Trial Chamber I), No.ICC-02/05-03/09-89, 29 October 2010

Decision authorising the appearence of Victims a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 acting on behalf of de a/0363/09 (Trial Chamber II), No.ICC-01/04-01/07-2517-tENG, 9 November 2010

Decision on the legal representation of victim applicants at trial (Trial Chamber III), No. ICC-01/05-01/08-1020, 19 November 2010

Decision on the arrangements for contact between represented victims and the parties (Trial Chamber II), No. ICC-01/04-01/07-2571-tENG, 23 November 2010

Order determining the mode and order of examination for the witnesses called by the Defence teams (regulation 43 and 54 of the Regulations of the Court) (Trial Chamber II), No. ICC-01/04-01/07-2275- tENG, 15 March 2011

Order on the timetable for closing submissions (Trial Chamber I) No. ICC-01/04-01/06-2722, 12 April 2011

Directions on the submission of observations pursuant to article 19(3) of the *Rome Statute* and rule 59(3) of the *Rules of Procedure and Evidence* (Appeals Chamber), No. ICC-01/09-01/11-123 OA, 13 June 2011

Directions on the submission of observations pursuant to article 19(3) of the *Rome Statute* and rule 59(3) of the *Rules of Procedure and Evidence* (Appeals Chamber), No. ICC-01/09-02/11-116 OA, 13 June 2011

Order on applications for victim participation (Appeals Chamber), No. ICC-01/05-01/08-1587 OA7, 5 July 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-01/11-249, 5 August 2011

Decision on 138 applications for victims' participation in the proceedings (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011

Decision on the Office of Public Counsel for Victims' "Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04-01/10-382, 18 August 2011

Decision on the "Request by the Victims' Representative for an authorization by the Chamber to make written submissions on specific issues of law and/or fact (Pre-Trial Chamber II), No. ICC-01/09-01/11-274, 19 August 2011

Decision on Victims' Participation at the Confirmation of the Charges Hearing and in the Related Proceedings (Pre-Trial Chamber II), No. ICC-01/09-02/11-267, 26 August 2011

Decision (i) ruling on Legal Representatives' application to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses (Trial Chamber III), No. ICC-01/05-01/08-1729, 9 September 2011

Decision on the Request for Access to Confidential Inter Partes Material (Pre-Trial Chamber II), No. ICC-01/09-02/11-326, 14 September 2011

Decision on the "Request by Victims' Representative for access to confidential materials" and Requesting Observations from the Prosecutor (Pre-Trial Chamber II), No. ICC-01/09-01/11-337, 21 September 2011

Decision on the "Renewed Request by the Victims' Representative for an authorization by the Chamber to make written submissions on specific

issues of law and/or fact (Pre-Trial Chamber II), No. ICC-01/09-01/11-338, 22 September 2011

Second Decision on the "Request by Victims' Representative for access to confidential materials" (Pre-Trial Chamber II), No. ICC-01/09-01/11-340, 23 September 2011

Decision on a judicial sie visit to the Democratic Republic of Congo (Trial Chamber II), No. ICC-01/04-01/07-3203-tENG, 18 November 2011

Order regarding applications by victims to present their views and concerns or to present evidence (Trial Chamber III), No. ICC-01/05-01/08-1935, 21 November 2011

Decision on a judicial sie visit to the Democratic Republic of Congo (Trial Chamber II), No. ICC-01/04-01/07-3213-tENG, 1 December 2011

Decision on the "Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims" (Pre-Trial Chamber II), No. ICC-01/09-01/11-371, 12 December 2011

Order on the arrangements for the submissions of the written and oral closing statements (regulation 54 of the *Regulations of the Court*)(Trial Chamber II), No.ICC-01/04-01/07-3218-tENG, 15 December 2011

Second order regarding the applications of the Legal Representatives of victims to present evidence and views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011

Decision on "Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012" (Appeals Chamber), No. ICC-01/05-01/08-2098 OA10, 1 February 2012

Décision relative à la nature du "Procès-verbal de l'opération de transport judiciaire en République démocratique du Congo" (Trial Chamber II), No. ICC-01/04-01/07-3240, 14 February 2012

Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2138, 22 February 2012

Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138 (Trial Chamber III), No. ICC-01/05-01/08-2140, 22 February 2012

Décision relative à la requête aux fins de prorogation du délai de dépôt des conclusions finales du représentant légal commun du groupe principal de victimes (Trial Chamber II), No. ICC-01/04-01/07-3256, 5 March 2012

Decision on the "Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)" (Appeals Chamber), No. ICC-01/04-01/10-509 OA4, 2 April 2012

Ordonnance relative aux modalités de présentation des conclusions orales (Trial Chamber II), No. ICC-01/04-01/07-3274, 20 April 2012

Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08 (Trial Chamber III), No. ICC-01/05-01/08-2220, 24 May 2012

Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings With confidential annex (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012

Oral Decision (Trial Chamber III), No. ICC-01/05-01/08-T-227-Red-ENG WT, 25 June 2012

Decision on the OPCV's "Request for leave to submit observations and Request to access the Expert Reports" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-211, 15 August 2012

Directions on the submissions of observations (Appeals Chamber), No. ICC-02/11-01/11-236 OA2, 31 August 2012

Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in the proceedings against him No. ICC-02/11-01/11-249 (Pre-Trial Chamber I, Single Judge), 20 September 2012

Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the *Regulations of the Court* (Trial Chamber III), No. ICC-01/05-01/08-2324, 21 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision on the participation of victims in the appeals against Trial Chamber's I conviction and sentencing decisions (Appeals Chamber), No. ICC-01/04-01/06-2951 A4 A5 A6, 13 December 2012

Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings (Pre-Trial Chamber I), No. ICC-02/11-01/11-384, 6 February 2013

Decision on the OPCV's "Requests to receive information and access document for the effective participation of victims at the confirmation of charges

hearing" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-400, 13 February 2013

Decision on the OPCV's "Request to access documents related to the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut' filed by the Defence on 15 February 2013" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-406, 18 February 2013

Decision on the participation of victims in the appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 de Statut" (Appeals Chamber), No. ICC-01/04-02/12-30 A, 6 March 2013

Decision on the OPCV's "Demande de notification au Représentant légal commun des observations déposées par la Défense sur les questions abordées lors de l'audience de confirmation des charges" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-431, 25 April 2013

Decision on a/2922/11's application to participate in the appeals proceedings (Appeals Chamber), No. ICC-01/04-01/06-3052-Red A4 A5 A6, 3 October 2013

Decision on the Conduct of Trial Proceedings (General Directions) (Trial Chamber V(A)), No. ICC-01/09-01/11-847-Corr, 9 August 2013

Decision on the Legal Representative's request for access to confidential filings (Trial Chamber V(B)), No. ICC-01/09-02/11-794, 22 August 2013

Decision on the application by victims for participation in the appeal (Appeals Chamber), No. ICC-02/11-01/11-491 OA4, 27 August 2013

Decision on the participation of victims in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Appeals Chamber), No. ICC-02/11-01/11-492 OA5, 29 August 2013

Decision on a/2922/11's application to participate in the appeals proceedings (Appeals Chamber), No. ICC-01/04-01/06-3052-Red A4 A5 A6, 3 October 2013

4. Role and mandate of the Office of Public Counsel for Victims

Regulations 80 and 81 of the *Regulations of the Court*
Regulations 114-117 of the *Regulations of the Registry*

1. Role of the Office in general

The mandate vested in the OPCV by the *Regulations of the Court* encompasses forms and methods of assistance to victims which fall short of legal representation and, therefore, it is appropriate for victims to benefit from any form of support and assistance which may be offered by the Office.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, par. 13.

For the purpose of the tasks entrusted to the OPCV in the Decision [of 1st February 2007] it appears indeed necessary for the OPCV to have access to the unredacted version of the Warrants [of arrest], in particular with a view to it being apprised of the specific scope and the factual features of the charges brought against the persons whose arrest is sought by the Court.

See No. ICC-02/04-01/05-152, Pre-Trial Chamber II (Single Judge), 7 February 2007, p. 3.

It is the task of the OPCV, as the Office entrusted with providing victims applying to participate with any support and assistance which may be appropriate at the stage of the proceedings which precede a determination on their status, to inform victims having communicated with the Court of their rights and prerogatives in relation to article 53 of the *Rome Statute*.

See No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, paras. 95, 101 and 103. See also No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 194 as well as the operative part of the decision.

Consistent with the object and purpose of the application process, the OPCV's role was limited to providing support and assistance in few instances in which the Registry automatically requests additional information for any incomplete applications.

See No. ICC-01/04-418, Pre-Trial Chamber I (Single Judge), 10 December 2007, par. 10. See also No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 34.

The relevant provisions of the *Rome Statute* framework envisage that the Office of Public Counsel for Victims may fulfil a wide variety of functions during the trial stage. Rule 90(1) of the Rules establishes the right for victims to choose a Legal Representative. The Chamber, under regulation 80 of the *Regulations of the Court*, has the power to appoint a Legal Representative, *inter alia*, from the Office, and regulation 81(4) requires the Office to provide support and assistance to victims and to their Legal Representatives by providing legal research and advice and appearing before the Chamber.

[...]

Decisions on the role of the Office of necessity will be case-specific: although the range of options is extensive, a bespoke role should be established in each case.

[...]

The Office is not of itself a party or a participant in a case. Therefore the opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by:

- the Chamber (this will usually relate to issues of general importance and applicability);
- a victim or his or her representative, who has asked for its support and assistance;
- the Office, if it is representing one or more victims; or the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability).

[...]

The Trial Chamber considers that the Office of Public Counsel for Victims in its capacity as Legal Representative of particular victim applicants should be granted the same access as that granted to any other Legal Representative of a victim applicant.

[...]

The right of the Office of Public Counsel for Victims to gain access to the index of the case record (and other documents that are not publicly available) depends on its role in the case. If the Office is representing individual victims who have been allowed to participate in the case, it will have the same rights as any other Legal Representative discharging that function for the particular victims concerned.

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 30-31, 35, 37 and 40.

Concerning more generally the procedure to be followed, the Chamber shall, in accordance with rule 58(3) of the Rules allow the Prosecutor and the suspects to submit written observations on the Application within a time period determined by the Chamber. In addition, the Chamber is of the view that the victims who have communicated with the Court namely, those who submitted applications to participate in the proceedings in the present case, shall be allowed, in accordance with article 19(3) of the Statute and rule 59(3) of the Rules, to submit written observations on the Application within a time period determined by the Chamber. In order to

ensure the proper and expeditious conduct of the article 19 proceedings and taking into consideration that no victim has been recognized yet in the present case, the Chamber is of the view that it is in the interest of justice to appoint the Office of Public Counsel for Victims (the "OPCV") to represent all those victims who have submitted applications to participate in the proceedings in the present case.

Although the Chamber has already stated in its *"First Decision on Victims' Participation in the Case"* that victims who have no legal representation shall be assisted by the OPCV for the purpose of participation in the proceedings, this does not deny the fact that the article 19 procedure is of a specific and limited nature and governed by *lex specialis* provisions, such as rule 59 of the Rules, which provides the Chamber with the discretion to organize the proceedings in a way that best guarantees its expeditiousness. Thus, it is the Chamber's view that for the purpose of the article 19 proceedings, the OPCV may still serve the common interest of victims who have communicated with the Court even if in the meantime they are represented by their Legal Representatives. The Victims Participation and Reparations Section is instructed to that effect to provide all victims applications related to this case to the OPCV and to provide it with any necessary assistance to contact the victim applicants expeditiously.

See No. ICC-01/09-01/11-31, Pre-Trial Chamber II, 4 April 2011, paras. 12 and 13. See also, No. ICC-01/09-02/11-40, Pre-Trial Chamber II, 4 April 2011, paras. 12 and 13.

The Chamber notes articles 3(1), (3) and 4(2) of the Rome Statute, *rule 100 of the* Rules of Procedure and Evidence *and regulations 80 and 81 of the* Regulations of the Court. *The Chamber further notes that although article 3(1) of the Statute states that the* "seat of the Court shall be established at The Hague in the Netherlands," *paragraph 3 of the same provision makes clear that the Court* "may sit elsewhere, whenever it considers it desirable, as provided in this Statute." *Moreover, according to rule 100(1) of the Rules, the Court* "may decide to sit in a State other than the host State, in a particular case, where [it] considers that it would be in the interests of justice."

In this regard, the Chamber underlines that it is in the process of assessing the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya. Accordingly, the Chamber deems it valuable, for a proper assessment of the interests of justice in the present case, to receive observations from the Prosecutor, the Defence and the victims who have applied for participation, on such possibility. Therefore, the Chamber decides to appoint the Office of Public

Council for Victims to submit observations on behalf of the victims who applied for participation.

See No. ICC-01/09-01/11-106, Pre-Trial Chamber II, 3 June 2011, paras. 4-6. See also, No. ICC-01/09-02/11-102, Pre-Trial Chamber II, 3 June 2011, paras. 4-6.

The Chamber decides that only for the purposes of their participation in the current article 19 proceedings, the OPCV shall represent unrepresented applicants and instructs the Victims Participation and Reparations Section to provide the OPCV with all the applications of unrepresented applicants and to provide it with any necessary assistance to contact applicants expeditiously.

See No. ICC-01/04-01/10-377, Pre-Trial Chamber I, 16 August 2011, p. 4.

As to the procedure to be adopted to hear the victims, the Chamber recalls that pursuant to regulation 81(4) (a) of the *Regulations of the Court*, the Legal Representatives may seek support and assistance from the Office of Public Counsel for Victims.

See No. ICC-01/05-01/08-2158, Trial Chamber III, 6 March 2012, par. 4.

Following the admissibility challenge filed by the Government of Libya, the Chamber has granted leave under rule 103 of the *Rules of Procedure and Evidence* to Lawyers for Justice in Libya and the Redress Trust for the purposes of submitting *amicus curiae* observations, among others, on the experiences of victims of crimes within the jurisdiction of the ICC in obtaining justice in Libya's domestic criminal jurisdictions and other fora, and the relationship between victims' rights and issues of admissibility under article 17 of the *Rome Statute*. This includes the capacity of the Libyan judiciary to afford justice to victims of serious international crimes, taking into account both tested capacity and plans for future prosecutions. The OPCV requested the Chamber to allow the Principal Counsel, should she deem it necessary for the protection of the interests of her clients, to submit observations on the *amicus curiae* observations to be filed by Lawyers for Justice in Libya and the Redress Trust. The Chamber notes rule 103 of the Rules, which gives it discretion to invite or grant leave for amicus curiae observations on any issue deemed appropriate. As concerns the involvement of parties, rule 103(2) of the Rules provides that the parties shall have the opportunity to respond to any *amicus curiae* observations. However, while this provision establishes the minimum rights that the Chamber must accord to the parties, it does not prevent as a matter of principle responses from other participants. Taking into account also the purpose of rule 103 of the Rules, the Chamber is of the view that it has the discretionary power

to invite or grant leave to participants in proceedings before it to submit responses to *amicus curiae* observations whenever appropriate in the particular circumstances. Having reviewed the OPCV's request, and considering the issues for which leave to submit *amicus curiae* observations has been granted to Lawyers for Justice in Libya and the Redress Trust, the Chamber is of the view that it is appropriate in the present circumstances to accord the OPCV the opportunity to submit a response to the *amicus curiae* observations. FOR THESE REASONS, the Chamber AUTHORISES the OPCV to file a response to the *amicus curiae* observations by Lawyers for Justice in Libya and the Redress Trust.

See No. ICC-01/11-01/11-168, Pre-Trial Chamber I, 5 June 2012, paras. 3-6.

The Appeals Chamber determines that, in the circumstances of the present case, the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a Legal Representative. However, the Appeals Chamber considers that the unidentified individuals who have not submitted applications but who may benefit from an award for collective reparations, pursuant to rules 97 and 98 of the Rules cannot have a right of appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist. Accordingly, to the extent that the OPCV has appealed the Impugned Decision on behalf of those unidentified individuals, the appeal must be rejected as inadmissible. 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.

See No. ICC-01/04-01/06-2953 AA2 A3 OA21, Appeals Chamber, 14 December 2012, par. 72.

In order to conduct the proceedings following the Admissibility Challenge efficiently and expeditiously, the Chamber considers it appropriate to appoint, under regulation 80 of the *Regulations of the Court*, the Principal Counsel from the OPCV to represent, in the proceedings following the Admissibility Challenge, the victims who have communicated with the Court in relation to the case. Accordingly, the Registrar is hereby instructed to provide the OPCV with information about victims who have communicated with the Court, as well as with any necessary assistance to contact them as soon as possible.

See. No. ICC-01/11-01/11-325, Pre-Trail Chamber I, 26 April 2013, para. 13.

The Single Judge recalls the model inaugurated in the case of the *Prosecutor v. Laurent Gbagbo*, whereby the OPCV's lead counsel was appointed as common legal representative of all admitted victims and was assisted by a team member based in the field, *"with wide knowledge of the*

context" and "to be paid by the Court's legal aid budget." Taking note of said experience, and should the involvement of the OPCV as common legal representative become an option, the Single Judge believes that in the current case such a person in the field could have the role of an *"assistant to counsel"* as provided for in regulation 81(3) of the *Regulations of the Court.* Thus, in order to ensure the expeditiousness of the proceedings, the Single Judge considers that the Registry should start as soon as possible to identify an appropriate "assistant to counsel" who meets the requirements set forth in regulation 124 of the *Regulations of the Registry* and should report to the Single Judge accordingly. Mindful of the fact that the assistant counsel would perform service to the OPCV, the latter should either be involved in the selection process or at least consulted on the person to be selected.

See No. ICC-01/04-02/06-67, Pre-Trial Chamber II (Single Judge), 28 May 2013, para. 47.

2. The provision of support and assistance to the victims applying to participate

The Office shall provide support and assistance to victims applying to participate in the situation in Uganda and in the case of *The Prosecutor v. Joseph Kony and al.* when necessary and appropriate at the stage of the proceedings which precedes a decision by the Chamber on their status.

See No. ICC-02/04-01/05-134, Pre-Trial Chamber II (Single Judge), 1 February 2007, par. 13, as well as the operative part of the decision. See also No. ICC-02/04-101, Pre-Trial Chamber II (Single Judge), 10 August 2007, par. 164 as well as the operative part of the decision and No. ICC-02/04-125 Pre-Trial Chamber II (Single Judge), 14 March 2008, par. 194 as well as the operative part of the decision.

3. The legal representation of victims applying to participate

The Chamber observes that of the persons applying at the investigative stage of the situation, a large number of those applicants may be without legal representation prior to a decision of the Chamber on whether to grant them victim status. Moreover, considering that under regulation 86(4) of the Regulations, the Registry will automatically request additional information for all incomplete Applications, the Chamber deems it appropriate

to appoint the OPCV to provide support and assistance to the unrepresented applicants. Thus pursuant to regulation 116 of the *Regulations of the Registry*, the Registry shall automatically transfer to the OPCV all information regarding unrepresented applicants simultaneously with the notification of the Applications to other participants.

The OPCV should therefore be available to provide support and assistance to applicants until such time as the procedural status of victim is granted to them and a Legal Representative is chosen by him or her or appointed by the Court.

[...]

The Chamber considers that the OPCV should be available to provide support and assistance to the applicants for whom powers of attorney have not been submitted, until such time as the proper documents are received by the VPRS or that applicants are granted victim status and a Legal Representative is chosen or appointed by the Court.

See No. ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, paras. 41, 43-44, 49-50 as well as the operative part of the decision. See also ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 34; No. ICC-01/04-395, Pre-Trial Chamber I (Single Judge), 17 September 2007, pp. 3-4; and No. ICC-01/05-01/08-699, Trial Chamber III, 22 February 2010, par. 23.

Since applications for participation are complete, there is no need for the OPCV to be appointed to assist any of the applicants in providing additional information in relation to their applications.

See No. ICC-01/04-01/07-182, Pre-Trial Chamber I (Single Judge), 7 February 2008, p. 2.

Although a literal reading of regulation 81(4) of the *Regulations of the Court* would suggest that it concerns only persons who have been granted victim status within the meaning of rule 85 of the Rules, three Chambers of the Court have thus far deemed it necessary to request the Registry to appoint the Office of Public Counsel for Victims as the Legal Representative of the victims, pending a decision of the Chamber on their victim status, or until a Legal Representative is appointed.

The Chamber also adopts this position, while stressing that the appointment of the Office of Public Counsel for Victims is in this instance provisional, and that it does not prejudge any subsequent granting of victim status by the Chamber.

See No. ICC-01/04-01/07-933-tENG, Trial Chamber II, 26 February 2009, paras. 44-45. See also No. ICC-01/04-374, Pre-Trial Chamber I, 17 August

2007, paras. 43-44; No. ICC-01/04-01/06-1308, Trial Chamber I, 6 May 2008, par. 18; No. ICC-01/05-01/08-103, Pre-Trial Chamber III, 12 September 2008, par. 10; No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, paras. 30-31 and 34; and No. ICC-01/05-01/08-651, Trial Chamber III, 9 December 2009 reclassified as public on 28 January 2010, paras. 9 and 18.

Where no Legal Representative has been appointed by a victim applicant, the Office of Public Counsel for Victims shall act as Legal Representative from the time the victim applicant submits his or her application for participation until a Legal Representative is chosen by the victim or is appointed by the Chamber. The VPRS shall transmit to the OPCV the applications for participation from unrepresented victim applicants so that the OPCV can exercise its role as Legal Representative, if necessary.

See No. ICC-01/09-01/11-17, Pre-Trial Chamber II (Single Judge), 30 March 2011, par. 23. See also No. ICC-01/09-02/11-23, Pre-Trial Chamber II (Single Judge), 30 March 2011, par. 23.

The Chamber further considers that the Registrar should appoint the Office of Public Counsel for Victims as the Legal Representative of applicants without legal representation, pending a decision of the Chamber on their application.

See No. ICC-02/05-03/09-231, Trial Chamber IV, 17 October 2011, par. 28.

The OPCV may fulfil a wide variety of functions during the trial, including the reparations phase. However, the role of the OPCV must be delineated by the Chamber in order to ensure the fair and expeditious conduct of proceedings.

During the trial the OPCV represented victims who had applied to participate in the proceedings, and on occasion it acted on their behalf until the Registrar arranged a Legal Representative. The Registry has informed the Chamber that of the 85 applications for reparations received thus far, 4 applicants are currently represented by the OPCV and 35 are unrepresented. As stated above, the Registry recommends that the OPCV is appointed as representative of these applicants and any additional applicants who apply.

The Registry also recommends that a Legal Representative is appointed to represent "the interests of other victims who have not submitted applications for reparation but, who, as noted, may still be considered by the Chamber within the scope of any reparations award." *The OPCV applies to introduce written submissions* "to represent the general interest of victims, on the issues related to reparations proceedings."

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. Consequently, victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their Legal Representatives.

The Chamber considers that the expertise of the OPCV will be useful, particularly in order to safeguard the rights of these potential beneficiaries of an award for collective reparations.

In all the circumstances, the OPCV may:

a. act as the Legal Representative 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.

Accordingly, the Chamber:

a. Instructs the Registry to appoint the OPCV as the Legal Representative for any unrepresented applicants and to provide the OPCV with the applications for reparations that have been received thus far, as well as any future applications from unrepresented victims; and

b. Instructs 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 Chamber on behalf of those victims who have not submitted applications but who may fall within the scope of an order for collective reparations.

See No. ICC-01/04-01/06-2858, Trial Chamber I, 5 April 2012, paras. 7-13.

4. The legal representation of victims allowed to participate in the proceedings

Counsel from the Office may be appointed, pending the appointment of a common Legal Representative, to exercise the rights of victims allowed to participate in the proceedings.

See No. ICC-02/04-105, Pre-Trial Chamber II, 28 August 2007 (Single Judge), p. 5. See also No. ICC-01/04-423-Corr, Pre-Trial Chamber I, 31 January 2008, in the operative part of the decision; No. ICC-02/04-01/05-267 and No. ICC-02/04-117, Pre-Trial Chamber II (Single Judge), 15 February 2008, pp. 4-6; and No. ICC-02/04-125, Pre-Trial Chamber II, 14 March 2008 (Single Judge), par. 194 as well as the operative part of the decision.

The Office of Public Counsel for Victims shall provide support and assistance to victims allowed to participate in the proceedings until such victims choose a Legal Representative or a Legal Representative is appointed by the Court.

See No. ICC-01/04-423-Corr-tENG, Pre-Trial Chamber I (Single Judge), 31 January 2008, p. 59.

In regards to an apparent conflict of interest of victims' legal counsel, the Pre-Trial Chamber directed the Registry to evaluate the existence and consequences of the apparent conflict of interest and pending the resolution of the issue the legal counsel was provisionally separated from his functions as Legal Representative of the victims and the victims were exceptionally and provisionally represented by the OPCV.

See No. ICC-01/04/01/07-660, Pre-Trial Chamber I, 3 July 2008, p. 9-10.

In case some of the victims participating in the present case object to being represented by the common Legal Representative appointed by the Registrar, or a conflict of interest is shown by the common Legal Representative, the Single Judge wishes to appoint the Office of Public Counsel for Victims (the "OPCV") as Legal Representative of those victims not represented by the common Legal Representative, if need be.

Concerning the role of OPCV, the Single Judge notes that this office is established for the main purpose of providing assistance and support to victims and their Legal Representatives in proceedings before this Court pursuant to regulation 81(4) of the *Regulations of the Court*, which includes (a) legal research and advice, and (b) appearing before a Chamber in respect of specific issues. In addition, counsel of this office may act as Legal Representative of victims pursuant to regulation 80(2) of the *Regulations of the Court*.

In the present case the OPCV has been appointed by the Chamber as Legal Representative for those victims *"where no Legal Representative has been appointed by the victims."* Thus, the Single Judge wishes to point out that the OPCV had been appointed by the Chamber only in case and for the time where victims could not organise their timely legal representation. The Single Judge finds it appropriate that at this stage of proceedings, where victims have been recognised to participate in the present case, be represented by a counsel from their country, unless those victims object to such legal representation.

In case all victims participating in the present case agree to be represented by one common Legal Representative from the CAR, the OPCV will fulfil its mandate as provided in regulation 81 of the *Regulations of the Court*. In case, one or more victims object to being represented by a counsel from

the CAR, the OPCV will continue to act as Legal Representative for those victims, in addition to its mandate pursuant to regulation 81 of the Regulations.

See No. ICC-01/05-01/08-322, Pre-Trial Chamber III (Single Judge), 16 December 2008, paras. 12-15.

The Single Judge is of the view that a Counsel from the OPCV should be appointed as the lead Counsel within the common legal representation team for the victims authorised to participate in the present case and that such Counsel should be assisted by a team member with wide knowledge of the context and based in Cote d'Ivoire to be paid by the Court's legal aid budget.

The Single Judge believes that this is the most appropriate and cost effective system at this stage as it would enable to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand. This system may be revisited at a later stage in light of the views expressed by the victims.

See No. ICC-02/11-01/11-138, Pre-Trial Chamber I (Single Judge), 4 June 2012, paras. 44-45.

In accordance with article 19(3) of the Statute and rule 59(3) of the Rules, the victims who have communicated with the Court in relation to the case—i.e. the victims admitted to participate in the proceedings related to the confirmation of charges hearing and those who submitted applications that have not yet been assessed by the Chamber—shall be allowed to submit written observations on the Challenge to jurisdiction within a time period determined by the Chamber. For the purposes of ensuring the proper and expeditious conduct of the article 19 proceedings and taking into account that the OPCV has already been appointed as the Common Legal Representative of victims admitted to participate in the present case, the Chamber is of the view that it is in the interest of justice to appoint the OPCV to also represent those victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber.

See No. ICC-02/11-01/11-153, Pre-Trial Chamber I (Single Judge), 15 June 2012, par. 7.

The procedure for victim participation will be based on common legal representation, which will include both an appointed common Legal Representative of victims ("Common Legal Representative") and the Office of Public Counsel for victims ("OPCV") acting on the Common Legal Representative's behalf. The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in day-to-day proceedings. To that end, the OPCV will be allowed to attend

hearings on behalf of the Common Legal Representative, during which it may be permitted to intervene and question witnesses. The OPCV shall also assist the Common Legal Representative in preparing relevant written submissions. The representation in the courtroom through the OPCV will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance. Involvement of the OPCV will also ensure that confidential information is handled safely and securely.

See No.ICC-01/09-01/11-460, Trial Chamber V, 3 October 2012, par. 41 and 43; see also No. ICC-01/09-02/11-498, Trial Chamber V, 3 October 2012, par. 40-42.

With respect to the assistance to be provided by the OPCV to the common Legal Representative, it is the Chamber's view that victims should benefit from the highest quality representation that is possible in the circumstances—both generally and in the courtroom. It is that consideration that primarily guides the Chamber's appointment of common Legal Representative for victims. It is neither the Chamber's desire nor intent to appoint such counsel and yet prevent him or her from representing victims in the manner warranted by their best interests, including making such appearances in the courtroom that are necessary in the circumstances. But the representation of the best interest of the victims will in many cases require that the common Legal Representative be in the field attending to the best interests of victims, while court proceedings are in progress. In such situations, it will be necessary for the common Legal Representative to be represented by members of the OPCV. The Chamber observes that the Registry appears to have interpreted the Decision to require the OPCV to provide staff fulfilling the qualifications of *"counsel"* within the meaning of regulation 67 of the Regulations. The Chamber notes that, according to the Decision, the OPCV *"will be acting on behalf of the Common Legal Representative when appearing before the Chamber."* Equally, the Chamber recalls that the Decision provides for the common Legal Representative to appear in person upon request and at critical junctures involving victims' interests. As such, the Chamber is of the view that although the representative or representatives of the OPCV acting on behalf of the common Legal Representative in Court should have significant relevant courtroom experience, the representative or representatives of the OPCV need not fulfil the requirements of "counsel" within the meaning of regulation 67 of the Regulations. Instead, at a minimum, they should fulfil the requirements for assistant counsel under regulation 68 of the Regulations and regulation 124 of the *Regulations of the Registry*. In such instances, the rule of 10-year post qualification standing prescribed in

regulation 67 should not operate to prevent any OPCV staff member from appearing on behalf of the common Legal Representative any more than the 10-yearrule stands in the way of any counsel appearing to represent the Prosecutor or the lead Defence Counsel in a case.

See No. ICC-01/09-02/11-537, Trial Chamber V, 20 November 2012, par. 7. See also No. ICC-01/09-01/11-479, Trial Chamber V, 23 November 2012, par. 8.

In the First Decision on Victims' Participation, the Single Judge held that:

A Counsel from the OPCV should be appointed as the lead Counsel within the common legal representation team for the victims authorised to participate in the present case and that such Counsel should be assisted by a team member with wide knowledge of the context and based in Côte d'Ivoire to be paid by the Court's legal aid budget.

At the time of the appointment of a Counsel from the OPCV as common legal representative of the victims admitted to participate, the Single Judge considered that this was "*the most appropriate and cost-effective system* [...] *to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand.*" The Single Judge also considered that such system could be revisited at a later stage in light of the views expressed by the victims.

The Single Judge notes that there are no indications that the current scheme of legal representation of victims in the case should be modified. Thus, taking into consideration the upcoming confirmation of charges hearing and with a view to ensuring uniformity and continuity in the legal representation of the victims admitted to participate in the present case, the Single Judge is of the view that the current system of common legal representation can be maintained. Therefore, all victims admitted to participate by the present decision shall be represented in the course of the confirmation of charges hearing and in the related proceedings by a Counsel from the OPCV.

See No. ICC-02/11-01/11-384, Pre-Trial Chamber I (Single Judge), 6 February 2013, paras. 44-46.

5. The appearance before a Chamber in respect of specific issues

The opportunity for the Office to appear before the Chamber in respect of specific issues can be initiated by:

— the Chamber (this will usually relate to issues of general importance and applicability);

— a victim or his or her representative, who has asked for its support and assistance;

— the Office, if it is representing one or more victims; or

— the Office, following an application to address the Chamber on specific issues, notwithstanding the fact that it has not been requested to do so by the representatives of victims or any individual victims (this will usually relate to issues of general importance and applicability).

See No. ICC-01/04-01/06-1211, Trial Chamber I, 6 March 2008, par. 35.

The OPCV had been requested to submit observations in accordance with regulation 81(4) (b) of the *Regulations of the Court*. Although the OPCV was not acting as a Legal Representative for any of these applicants, it had been asked to submit observations in order to provide support and assistance to them on the specific issue of whether they come within the category of indirect victims.

The Chamber notes that neither the Statute nor the Rules provide for the participation of the OPCV in the proceedings. This office was established by the *Regulations of the Court* with a mandate to provide support and assistance to the Legal Representatives and the victims after the adoption of the Statute and the Rules. In the judgment of the court, the circumstances of the creation of the OPCV should not have the consequence of diminishing the rights of the defence.

In the circumstances, the Chamber determines that whenever the OPCV is performing the functions of, or is acting akin to, a Legal Representative of a victim—not least to protect the accused—the *Rome Statute* framework shall be applied as if it is an *"ordinary"* Legal Representative. It follows that these observations, in the view of the Chamber, are to be treated as if they were made by a Legal Representative under rule 91(2) of the Rules.

See No. ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, paras. 37-39.

6. The participation in reparations proceedings

The Chamber therefore endorses the Registry's proposal that there should be a team of experts, rather than a sole expert. The team ought to include representatives from the DRC, international representatives and specialists in child and gender issues. The Chamber accepts the TFV's suggestion that there should be a preliminary consultative phase involving the victims and

the affected communities, to be carried out by the team of experts, with the support of the Registry, the OPCV and any local partners. This work must be undertaken with the cooperation and assistance of any relevant ICC officials.

[...]

The Chamber endorses the five-step implementation plan suggested by the TFV, which is to be executed in conjunction with the Registry, the OPCV and the experts. First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed). Although the Chamber referred in the article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval. The Chamber agrees that the assessment of harm is to be carried out by the TFV during a consultative phase in different localities. Moreover, the Chamber is satisfied that, in the circumstances of this case, the identification of the victims and beneficiaries (regulations 60 to 65 of the *Regulations of the TFV*) should be carried out by the TFV.

[...]

As noted above, the TFV proposes that a team of interdisciplinary experts assesses the harm suffered by the victims in different localities, with the support of the Registry, the OPCV and local partners. The TFV indicates that it has already used this approach in its projects under its assistance mandate.

[...]

There are very limited financial resources available in this case and it should be ensured that these are applied to the greatest extent possible to the benefit of the victims and any other beneficiaries. The Chamber considers that coordination and cooperation between the Registry, the OPCV and the TFV in establishing the reparations that are to be applied and implementing the plan are essential.

See No. ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 264, 281-283, 285 and 288.

Relevant decisions regarding the role of the Office of Public Counsel for Victims

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), No. ICC-02/04-01/05-134, 1 February 2007

Decision on "Request to access documents and material," and to hold a hearing in camera and ex parte (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-152, 7 February 2007

Decision on the OPCV's observations on victims' applications and on the Prosecution's objection thereto (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-243, 16 April 2007

Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007

Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007

Decision on legal representation of Victims a/0101/06 and a/0119/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-105, 28 August 2007

Order on the request by the OPCV for access to certain documents regarding applications a/0026/06, a/0145/06, a/0203/06 and a/0220/06 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-395, 17 September 2007

Order on the Office of Public Counsel for Victims' request filed on 21 November 2007 (Trial Chamber I), No. ICC-01/04-01/06-1046, 27 November 2007

Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the 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/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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), No. ICC-01/04-423-Corr-tENG, 31 January 2008

Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08 (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-182, 7 February 2008

Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06 (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-267 and No. ICC-02/04-117, 15 February 2008

Decision on the role of the Office of Public Counsel for Victims and its request for access to documents (Trial Chamber I), No. ICC-01/04-01/06-1211, 6 March 2008

Decision on victims' application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0101/06, 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), No. ICC-02/04-125, 14 March 2008

Decision on the OPCV's Requests for leave to file a response to the Defence's Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-132 and No.02/04-01/05-290, 4 April 2008

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008

Decision on the provisional separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 (Pre-Trial Chamber I), No. ICC-01/04-01/07-660, 3 July 2008

Decision on Victim Participation (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-103-tENG-Corr, 12 September 2008

Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-322, 16 December 2008

Decision on the treatment of applications for participation (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 26 February 2009

Redacted version of "Decision on ‹indirect victims'" (Trial Chamber I), No. ICC-01/04-01/06-1813, 8 April 2009

Decision on the Observations on legal representation of unrepresented applicants (Trial Chamber III), No. ICC-01/05-01/08-651, 9 December 2009 (reclassified as public on 28 January 2010)

Decision on common legal representation of victims for the purpose of trial (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010

Decision on common legal representation of victims for the purpose of trial (Trial Chamber), No. ICC-01/05-01/08-1020, 19 November 2010

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-01/11-17, 30 March 2011

First Decision on Victims' Participation in the Case (Pre-Trial Chamber II), No. ICC-01/09-02/11-23, 30 March 2011

Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the *Rome Statute* (Pre-Trial Chamber II), No. ICC-01/09-01/11-31, 4 April 2011

Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the *Rome Statute* (Pre-Trial Chamber II), No. ICC-01/09-02/11-40, 4 April 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-01/11-106, 3 June 2011

Decision requesting observations on the place of the proceedings for the purposes of the Confirmation of the Charges Hearing (Pre-Trial Chamber II), No. ICC-01/09-02/11-102, 3 June 2011

Decision requesting observations on the "Defence Challenge to the jurisdiction of the Court" (Pre-Trial Chamber I), No. ICC-01/04 -01/10-377, 16 August 2011

Decision on the Registry Report on six applications to participate in the proceedings (Trial Chamber IV), No. ICC-02/05-03/09-231, 17 October 2011

Order on the implementation of Decision on the supplemented applications by the Legal Representatives of victims to present evidence and the views and concerns of victims (Trial Chamber III), No. ICC-01/05-01/08-2158, 6 March 2012

Decision on the OPCV's request to participate in the reparations proceedings (Trial Chamber I), No. ICC-01/04-01/06-2858, 5 April 2012

Decision on the defence request for leave to appeal (Trial Chamber I), No. ICC-01/04-01/06-2874, 4 May 2012 (dated 3 May 2012)

Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012

Decision on the "Request related to the filing of observations by the *Amicus Curiae*" (Pre-Trial Chamber I), No. ICC-01/11-01/11-168, 5 June 2012

Decision on the conduct of the proceedings following the Defence challenge to the jurisdiction of the Court pursuant to article 19 of the *Rome Statute* (Pre-Trial Chamber I), No. ICC-02/11-01/11-153, 15 June 2012

Decision establishing the principles and procedures to be applied to reparations (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012

Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in the proceedings against him (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-249, 20 September 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012

Decision on victims' representation and participation (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012

Decision appointing a common Legal Representative of victims (Trial Chamber V), No. ICC-01/09-02/11-537, 21 November 2012

Decision appointing a common Legal Representative of victims (Trial Chamber V), No. ICC-01/09-01/11-479, 23 November 2012

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 the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012

Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings (Pre-Trial Chamber I), No. ICC-02/11-01/11-384, 6 February 2013

Order on the filing of submissions on new applications to participate as victims in the proceedings (Appeals Chamber), No. ICC-01/04-01/06-2978 A 4 A 5 A 6, 14 February 2013

Decision on the conduct of the proceedings following the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013

Decision Establishing Principles on the Victims' Application Process (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013

1. How to file a document in the proceedings before the Court?

All documents and material pertaining to the proceedings in a situation and/or case have to be filed through the Court Management Section (CMS) in order to be registered in the relevant situation and/or case record.

In accordance with regulation 24(1) of the *Regulations of the Registry*, "*documents* [and] *material* [...] *may be filed with the Registry by hand, by post or by electronic means.*" If filed electronically, documents and materials shall be sent to the following email address: judoc@icc-cpi.int.

The *Regulations of the Court* and the *Regulations of the Registry* provide for specificities regarding the format of the documents to be filed, their level of confidentiality, and time limits.

1. Format of documents filed with the Court

> **Regulation 36 of *the Regulations of the Court:***
> Format of documents and calculation of page limits
> "*4. All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words.*"

Participants in the proceedings shall use a specific template to file written submissions before the Court. Please refer to the Annex for the template and the explanations for its use.

2. Time limits for documents filed with the Court

> **Regulation 33 of *the Regulations of the Court*:**
> Calculation of time limits
> "*1. For the purposes of any proceedings before the Court, time shall be calculated as follows:*
>
> *(a) Days shall be understood as calendar days;*
>
> *(b) The day of notification of a document, decision or order shall not be counted as part of the time limit;*
>
> *(c) Where the day of notification is a Friday, or the day before an official holiday of the Court, the time limit shall not begin to run until the next working day of the Court;*

(d) Documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit.

2. Documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies.

3. Unless otherwise ordered by the Presidency or a Chamber, documents, decisions or orders received or filed after the filing time prescribed in sub-regulation 2 shall be notified on the next working day of the Court."

Regulation 34 of the *Regulations of the Court:*
Time limits for documents filed with the Court
"Unless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered:

(a) A Chamber may fix time limits for the submission of the initial document to be filed by a participant;

(b) A response referred to in regulation 24 shall be filed within 21 days of notification in accordance with regulation 31 of the document to which the participant is responding;

(c) Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response."

Regulation 35 of the *Regulations of the Court:*
Variation of time limits
"1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control."

Regulation 24 of the *Regulations of the Registry:*
Responses and replies
"3. The Presidency, a Chamber or a participant filing a document or material which requires urgent measures to be taken shall insert the word "URGENT" on the cover page in capital letters. Outside the filing hours described in regulation 33, sub-regulation 2, of the Regulations of the Court, the Presidency, a Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 44."

Examples:

- If a decision giving the right to respond within 3 days is issued on a Monday, the time limit begins to run on the Tuesday of the same week, for 3 days, and the response shall thus be filed at the latest on the Friday of the same week, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Friday (or on the day before an official holiday of the Court), the time limit will begin to run from the next working day of the Court, so on next Monday, for 3 days, and the response shall thus be filed at the latest on the next Thursday, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Tuesday, the time limit will begin to run on the Wednesday of the same week, for 3 days, and the response shall thus be filed at the latest on the next Monday, between 9am and 4pm The Hague time.
- If a decision giving the right to respond within 3 days is issued on a Wednesday, the time limit will begin to run on the Thursday of the same week, for 3 days, and the response shall thus be filed at the latest on the next Monday (the next working day), between 9am and 4pm The Hague time, since Saturdays and Sundays are considered as calendar days and as such shall be counted in the calculation.

The legal texts of the Court also refer to specific time limits as shown in the following tables:

TABLE 1 **General time limits**

Type of documents	**Time limits**	**Person(s) or organ(s) submitting the documents**	**Relevant Provision(s) of the *Regulations of the Court* or the *Rules of Procedure and Evidence***	**Specificities of the procedure**
Response	Within 21 days of notification	Prosecutor or defence Victims or their legal represent.	Regulation 24(1) & 34(b) Regulation 24(2) & 34(b)	• To any document filed by any participant in the case • When permitted to participate in the proceedings (article 68(3) & rule 89(1))
Reply	Within 10 days of notification	Participants	Regulation 24(4) & (5), & 34(c)	Only with the leave of the Chamber
Submissions	Within a time limit specified by the Chamber	Participants	Regulation 28	As a consequence of a Chamber's order
Representations	30 days following information given	Victims	Regulation 50(1)	Under art. 15(3) & rule 50(3) (Prosecutor's request for authorization of an investigation)
Evidence in proceedings before the court	Whenever possible Prior to the hearing	Not specified Participant	Regulation 26(4) E-court Protocol as adopted by the Chambers	• For evidence other than live testimony • In electronic form
Applications to extend or reduce any time limit	Before the lapse of the time limit After The lapse of a time limit	Participants	Regulation 35	• If good cause is shown For instance, if the document, decision or order is not received (Regulation 31(2)) • Only if demonstrated that the participant was unable for reasons outside his or her control to respect the deadline

TABLE II **Time limits related to appealsAn appeal shall of itself not have suspensive effect - except the ones against convictions, acquittals, sentences (see art. 81 (3)(a),(b) and (4))**

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the *Regulations of the Court* or the *Rules of Procedure and Evidence*	Specificities of the procedure
Appeals under rule 150	30 days from the date on which the party filing the appeal is notified of the relevant document	Not specified	Rule 150(1) Rule 150(2) Rule 152(1)	• Appeals under rule 150 are against convictions, acquittals, sentences and reparation orders • The Appeals Chamber may extend the time limit "for good cause," following an application to this effect • The Appellant can discontinue its appeal any time before judgment
Document in support of an appeal	Within 90 days of notification date	Not specified	Regulation 58(1)	
Response to the document In support of the appeal	Within 60 days of notification of the document in support of the appeal	Participant	Regulation 59(1)	
Reply to a response to the document in support of the appeal	Within such time as the Appeals Chamber may specify in its order	Appellant	Regulation 60(1)	Whenever the Appeals Chamber considers it necessary in the interests of justice

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the *Regulations of the Court* or the *Rules of Procedure and Evidence*	Specificities of the procedure
Appeals against other decisions, that do not require the leave of the court	Not later than 5 days from the "notification date" No later than 2 days from the "notification date"	The party filing the appeal The party filing the appeal	Rule 154(1) Rule 154(2)	• For appeals filed under article 81(3) (c) (ii) [detention maintained in case of an acquittal] or 82(1)(a)or(b) [decision/ jurisdiction, admissibility; granting, denying release of person investigated or prosecuted] • For appeals filed under article 82(1) (c) [PTC decision to act on its own initiative under art. 56(3)/unique investigative opportunity] • The Appellant can discontinue its appeal any time before judgment
Document in support of appeals under rule 154	Within 21 days of notification of the relevant decision	Appellant	Regulation 64(2)	
Response to a document in support of appeals under rule 154	Within 21 days of the notification date	Participant	Regulation 64(4)	

Type of documents	Time limits	Person(s) or organ(s) submitting the documents	Relevant Provision(s) of the *Regulations of the Court* or the *Rules of Procedure and Evidence*	Specificities of the procedure
Appeals against other decisions, that do require the leave of the court	Within 5 days of the notification date	"A party" State concerned or prosecutor	Rule 155(1)	• For appeals against decision under article 82(l)(d) [that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings • For appeals against decision under article 82(2) [PTC decision under art. 57(3)(d)] • The Appellant can discontinue its appeal any time before the judgment
Response to appeals under rule 155	Within 3 days of notification of the application	Participants	Regulation 65(3)	
Document in support of appeals under rule 155	Within 10 days of notification of the decision granting leave to appeal	Appellant	Regulation 65(4)	
Application for revision	NOT SPECIFIED	Accused	Regulation 66	

Type of documents	**Time limits**	**Person(s) or organ(s) submitting the documents**	**Relevant Provision(s) of the *Regulations of the Court* or the *Rules of Procedure and Evidence***	**Specificities of the procedure**
Response to the application for revision	Within 40 days of notification date	Participants & *any other person having a direct interest* in the revision proceedings	Regulation 66(2)	
Reply (to the response to the application for revision)	Within such time as specified in the Appeals Chamber's order	Appelant	Regulation 66(4)	May be ordered by the Appeals Chamber if the latter considers it necessary in the interests of justice

3. Level of confidentiality of documents filed with the Court

Pursuant to regulation 14 of the *Regulations of the Registry,* documents and material may be classified as public (available to the public and to all participants), confidential (not disclosed to the public, but available to all participants), under seal or ex parte (confidential and only available to a limited number of persons).

Regulation *23bis* of the *Regulations of the Court:*
Filing of documents marked ex parte, under seal or confidential

*"1. Any document filed by the Registrar or a participant and marked "*ex parte,*" "under seal" or "confidential," shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.*

2. *Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked "*ex parte,*" "under seal" or "confidential" shall be filed with the same classification. If there are additional reasons why a response, reply or any other document filed by the Registrar or a participant should be classified "*ex parte,*" "under seal," or "confidential," or reasons why the original document or other related documents should not be so classified, they shall be provided in the same document.*

3. *Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.*

4. *This regulation shall apply mutatis mutandis to proceedings before the Presidency."*

Regulation 24 of the *Regulations of the Registry:*
Responses and replies
"4. Where proceedings are held without notification of one or more of the participants, or where they do not have an opportunity to voice their arguments, documents, material and orders shall be filed ex parte. *The words* 'EX PARTE' *shall be inserted on the cover page in capital letters and the recipients other than the Chamber shall be specified after the phrase 'only available to'."*

Pursuant to regulation 23 *bis* of the *Regulations of the Court,* the legal and factual basis of the document filed shall be stated in the latter itself by the participant filing a document ex parte, under seal or confidential.

4. Page limits of documents filed with the Court

Regulation 37 of the *Regulations of the Court:*
Page limits for documents filed with the Registry
"1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances."

Regulation 38 of the *Regulations of the Court:*
Specific page limits
"1. Unless otherwise ordered by the Chamber, the page limit shall not exceed 100 pages for the following documents and responses thereto, if any:

[...]

(f) Representations under article 75.

> *2. Unless otherwise ordered by the Chamber, the page limit shall not exceed 50 pages for the following documents and responses thereto, if any:*
>
> *(a) Representations made by victims to the Pre-Trial Chamber under article 15, paragraph 3, and rule 50, sub-rule 3;*
>
> *[...]*
>
> *(e) A request by any participant to the Pre-Trial Chamber to take specific measures or to issue orders and warrants or to seek State cooperation;*
>
> *[...]."*

Documents filed shall usually not exceed 20 pages in accordance with regulation 37 of the *Regulations of the Court*. However, pursuant to regulation 38 of the *Regulations of the Court*, some submissions can exceed such page limit.

2. How to file an application for participation or for reparations in the proceedings before the Court?

1. Use of the standards forms created by the Court

Applications for participation and/or for reparations shall be submitted in writing to the Victims Participation and Reparations Section within the Registry. Pursuant to regulation 86 of the *Regulations of the Court*, a standard form has been developed to this effect and is available on the Website of the Court at the following addresses:

> Participation:
> http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm

2. Use of the Booklet accompanying the forms

In order to help victims and/or intermediaries and/or legal representatives, the Victims Participation and Reparations Section (VPRS) prepared a booklet explaining how to fill out the standard form. The booklet is available on the Website of the Court at the following address:

http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Booklet.

3. Appropriate moment to file the applications

Pursuant to regulation 86(3) of the *Regulations of the Court*, the application for participation should be filed *"before the start of the stage of the proceedings in which [victims] want to participate."*

4. Address where to send the applications

Once completed, the standards forms should be sent to:

Victims Participation and Reparations Section (VPRS)
P.O. Box 19519, 2500 CM The Hague
The Netherlands
Fax: + 31 (0)70 515 9100
Email: vprsapplications@icc-cpi.int

For further details on the completeness of the applications, please refer to Part II of this Manual.

3. How to ask for legal assistance paid by the Court?

Rule 90 of the *Rules of Procedure and Evidence:*
Legal representative of victims
"5. 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."

Regulation 113 of the *Regulations of the Registry:*
Legal assistance paid by the Court
"1. For the purpose of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant form(s).

2. In determining whether to grant such assistance, the Registrar shall take into account, inter alia, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono legal advice and assistance.

3. Regulations 130—139 shall apply mutatis mutandis."

1. Applications for legal assistance paid by the Court

Pursuant to rule 90(5) of the *Rules of Procedure and Evidence* and regulation 113(1) of the *Regulations of the Registry*, when victims have no financial means to pay a counsel they may apply for legal assistance to be paid for by the Court. A standard form is available upon request. Please note that the declaration of indigence attached to the form ought to be signed by the victim himself or herself and that the legal representative of the said victim cannot sign for his or her client.

A specific section within the Registry - the Counsel Support Section (CSS)—deals with any matters related to the legal assistance paid by the Court, as well as with matters dealing with administrative support to counsel.

By mail
css@icc-cpi.int

By postal mail
ICC - Counsel Support Section
P.O. Box 19 19519
2500 CM, The Hague
The Netherlands

By phone:
+31-(0)705158787

2. Criteria used for the evaluation of such applications

Pursuant to regulation 113(2) of the *Regulations of the Registry*, "[i]*n determining whether to grant such assistance, the Registrar shall take into account, inter alia, the factors mentioned in article 68, paragraph 1, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono legal advice and assistance.*"

Moreover, pursuant to regulation 84(1) of the *Regulations of the Court*, it is for the Registrar to determine whether or not a person applying for legal assistance has the means and whether or not full or partial payment should be made.

Details on the payment scheme can be found in the reports of the Committee of Budget and Finance to the Assembly of State Parties (See the Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004), ICC-ASP/6/INF.1, 31 May 2007).

4. How to constitute a team?

Proceedings before the Court require constant attention. It is therefore essential to constitute a team in order to be able to fully follow the entire proceedings before the Court and to react in a timely manner. In order to help the legal representatives to constitute their teams, the Registry has created and maintains, on the one hand, a list of assistants to Counsel and, on the other hand, a list of professional investigators. These lists are available upon request.

1. Lists of assistants and professional investigators

Assistants are persons who support counsel in the proceedings before the Court. They have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.

Professional investigators are persons with established competence in international or criminal law procedure and at least ten years of relevant experience in investigative work in criminal proceedings at the national or international level. Legal Representatives should consider to be assisted by professional investigators if investigative actions are needed for the representation of the

interests of their clients. Appeal to an investigator may be useful, for instance, during the reparations proceedings when victims will need to present evidence of the harm suffered in support of their claims to the relevant Chamber.

Regulation 127 of the *Regulations of the Registry:*
Appointment of assistants to counsel
"Persons who assist counsel in the presentation of the case before a Chamber shall be appointed by counsel and selected from the list maintained by the Registrar."

Regulation 139 of the *Regulations of the Registry:*
Selection of professional investigators
"1. Where legal assistance is paid by the Court and includes the fee of a professional investigator, counsel shall select the professional investigator from the list referred to in regulation 137.

2. A person not included in the list of investigators but who has relevant experience with regard to investigations in criminal proceedings, is fluent in at least one of the working languages of the Court and speaks at least one of the languages of the country in which the investigation is being conducted, exceptionally and after confirmation by the Registrar that the above criteria have been met, can be selected by counsel as a resource person in a given case. That resource person shall not be related to the person entitled to legal assistance, to the counsel or any person assisting him or her."

2. The issue of the language used in the proceedings

Considering that the proceedings before the Court are conducted in English and French, it is essential that legal representatives constitute teams including people speaking both working languages. Despite the fact that decisions and orders are translated into both languages, such translations are not available at the same time the original decision is issued. Moreover, filings of the participants to the proceedings are normally not translated.

Legal representatives should also consider to be assisted by an interpreter, if they do not speak the language of the victim(s) they represent.

3. Examples for the constitution of a team

The needs of the legal representatives with regard to their teams will necessarily vary according to the different stages of the proceedings and the modalities of participation granted by Chambers.

Different factors need to be taken into account:

- The fact that Legal Representatives are usually present in the courtroom during hearings, but they also need to be able to respond to any written submissions in the proceedings at the same time;
- The need for maintaining a constant contact with their clients - who are usually located outside The Netherlands and in remote areas of the country of their residence—in order to be able to collect their views and concerns and to keep them updated of the proceedings;
- The need to collect evidence for the purposes of the proceedings.
- During the reparations stage, the prerogatives of the legal representatives are much wider than during the pre-trial and the trial stages. The possibility for legal representatives to question witnesses, experts and the accused, to submit evidence as well as a list of witnesses and experts gives rise to additional needs with regard to the composition of their teams.

5. How the OPCV may provide support and assistance to legal representatives?

In order to be able to fulfil its mandate with regards to the provision of support and assistance to external legal representatives, the Office of Public Counsel for Victims (OPCV) has developed several tools with the aim of enhancing effectiveness and promptness of answers.

The Office has created a Library for the use of its staff and for the use of external legal representatives' teams. The sections of the library are divided per subject and include, *inter alia*, a section on gender issues, one on children issue, one on reparations issues, one on victims in general, and section per country where a situation or a case is ongoing, including national jurisprudence on crimes under the jurisdiction of the Court.

In order to assist external legal representatives in the proceedings before the Court, the Office has also drafted researches on several topics concerning victims' rights, as well as on the crimes under the jurisdiction of the Court. Special attention has been given to the analysis of the preparatory

works for the draft of the *Rome Statute*, the *Rules of Procedure and Evidence*, the *Regulations of the Court* and the *Regulations of the Registry*.

In order to answer to the needs of each external legal representatives' team, the modalities and extent of the support and assistance provided by the Office are agreed upon on a case-by-case basis.

The Office can be contacted at:

OPCV@icc-cpi.int

6. Some information on research methodology

1. ICC Legal Tools Project

Since 2002, work has steadily progressed at the ICC on a range of electronic legal services known as the Legal Tools Project. The Project provides a comprehensive collection of resources relevant to the theory and practice of international criminal law and brings modern technologies into the investigation, prosecution and defence of core international crimes.

The Legal Tools Project is composed of a wide range of electronic legal tools and services. The Project has developed the Legal Tools Database which contains repositories of key Court documents and collections of legal research resources in international criminal law. This Database is available through the ICC website.

The Project comprises:

1. The **Elements Digest**: This is a doctrinal commentary on each element of the crimes and legal requirements of the modes of liability in the *Rome Statute*. It describes all main sources of international criminal law and seeks to give users access to the text of relevant sources for a proper understanding of the substantive law of the *Rome Statute*. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).

2. The **Proceedings Commentary**: This is a detailed commentary on criminal procedural and evidentiary questions as contained in the *Rome Statute*, the *Rules of Procedure and Evidence*, and the *Regulations of the Court*. It provides an analysis of key legal issues that are relevant for proceedings before the ICC. This tool may be made publicly available in the future.

3. The **Means of Proof Digest**: This tool provides practical examples of the types or categories of evidence used in national and international criminal jurisdictions to satisfy the legal requirements of the crimes and modes of liability contained in the *Rome Statute*. It is a comprehensive document amounting to more than 6,000 A4 pages of text. The text in this tool does not necessarily represent the views of the ICC, any of its Organs or any participant in proceedings before the ICC. This tool is only available through the Case Matrix (see below).

4. The **Case Matrix**: a unique, law-driven case management application that provides an explanation of the elements of crimes and legal requirements of modes of liability for all crimes in the *Rome Statute*, serves as a user's guide to how one could prove international crimes and modes of liability, and provides a database service to organise and present the potential evidence in a case; the Case Matrix is only available to users who are working on core international crime cases, on the basis of an agreement with the ICC; and

5. The **Legal Tools Database**, available through the ICC website, containing more than 40,000 documents. It is the most comprehensive and complete database within the field of international criminal law. The tools in the Database are the following:

- **ICC Documents**: This is a repository of basic ICC documents (such as founding instruments) and case documents. It provides a one-stop location for finding materials used by the Court in its daily practice;
- **ICC "Preparatory Works,"** containing more than 16,000 documents related to the negotiation and drafting of the *Rome Statute*, the *Rules of Procedure and Evidence* and the Elements of Crimes, issued by States, Non-Governmental Organisations (NGOs), academic institutions, the United Nations and other international organisations between December 1989 and September 2002;
- **International Legal Instruments**: This tool provides the full text of key international treaties in four areas relevant to work on core international crimes: public international law, international human rights, international humanitarian law, and international criminal law;
- **International(ised) Criminal Jurisdictions**: This tool contains the basic legal texts and background information of the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, the East Timor Panels for Serious Crimes, the Iraqi High Tribunal, and the Extraordinary Chambers in the Courts of Cambodia;

- **International(ised) Criminal Judgments**: This tool contains the full text of indictments and judgments and other selected decisions issued by the International Military Tribunals of Nuremberg and Tokyo, the ICTY, the ICTR, UNMIK courts and tribunals, the Special Court for Sierra Leone, and the East Timor Panels for Serious Crimes. It also includes selected judgments of allied tribunals in trials for international crimes held immediately after World War II. Judgments of the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia will also be made available in the future;
- **National Jurisdictions**: This tool provides an overview of national legal systems. It contains information helpful for conducting comparative research on criminal law and procedure and on the legal status of core international crimes in the systems;
- **National Implementing Legislation**: This tool collects national legislation implementing the *Rome Statute*;
- **National Cases Involving Core International Crimes**: This tool compiles the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity and war crimes, both in civil and criminal matters;
- **Publicists**: This tool contains articles and opinions by prominent scholars on international criminal law. This tool will be made publicly available in the future;
- **Internet Legal Resources**: This tool provides a structured list of other Internet websites of relevance to research on international criminal law and related fields;
- **Human Rights Decisions**: This tool contains human rights decisions from United Nations and regional human rights mechanisms particularly relevant to criminal justice processes linked to core international crimes. This tool is under development and will only be made publicly available in the future;
- **Other International Legal Decisions**: This tool contains decisions by international courts that are not criminal jurisdictions on matters which may be relevant to criminal justice for core international crimes. This tool is under development and is only partially available to the public;
- **Legal Kit**: This is a mobile mini-library of international criminal law sources which fits on portable digital media and can be kept with the user at all times. This tool may be made publicly available in the future.

How are the Legal Tools being maintained?

The Legal Tools undergo continuous content and technical development in order to keep improving their quality, scope and relevance. Given the limited human resources available in the operational environment of a court such as the ICC, this development work has been outsourced without cost to the Court to institutions with expertise in this field. The ICC draws on the support of outside partners for the development and maintenance of the Legal Tools. With the assistance of these partners, who raise their own funds, the Court expects to stimulate further contributions and engage new partners to expand and improve the Legal Tools. Currently, the governments of Austria, Germany, Norway and Switzerland have contributed to the Legal Tools activities of the outsourcing partners. The Legal Tools Advisory Committee oversees that user needs within the different organs of the Court properly guide future development work. In addition, an external Legal Tools Expert Advisory Group comprising leading legal technology experts has been established to serve as a sounding board for the future development of the Legal Tools.
The Legal Tools are available at:
www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/

2. Databases on the Law of the International Criminal Court

2.1. Annotated Leading Cases

This database is published under the editorial supervision of Prof. André Klip (Maastricht University, the Netherlands) and Prof. Göran Sluiter (University of Amsterdam, the Netherlands). It provides the full text of the most important decisions of the ICC, ICTY, ICTR, and other international courts. It is very useful for counsel practising at the ICC and is available through the ICC Library. However, the database is offered with charge for private users. The web address is:

http://www.aantatedleadingcases.com/index.aspx

7. What are the specificities of the different sections of the Court dealing with victims?

Within the remit of the Registry, the Office is not the only section dealing with victims. The Victims Participation and Reparation Section and the Victims and Witnesses Unit are also in charge of specific aspects concerning victims.

The Victims Participation and Reparation Section (VPRS) is a section within the Registry dealing with victims' participation and reparations, with the responsibility for assisting victims and groups of victims to understand how victims can exercise their rights under the *Rome Statute* and for assisting them in obtaining legal assistance and representation, including, where appropriate, from the Office of Public Counsel for Victims. The VPRS can be seen as the first point of contact of victims with the Court, since the Section is in charge of assisting victims in filling in their application forms for participation and/or reparations, as well as of providing them with all information necessary to be able to exercise their rights under the *Rome Statute*.

The Victims and Witnesses Unit (VWU) assists victims and witnesses testifying and/or participating in the proceedings and limits possible adverse effects due to their status by providing protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony. The VWU also takes appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and other persons at risk, and advise the participants in the proceedings and other organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance, in accordance with article 68 of the *Rome Statute*.

8. Useful websites

I. International Courts

- International Court of Justice (www.icj-cij.org) [See also: World Court Digest provided by the Max Planck Institute for Comparative Public Law and International Law] www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm?100000000000.cfm
- Permanent Court of Arbitration (www.pca-cpa.org)
- European Court of Human Rights (www.echr.coe.int)
- African Commission on Human and Peoples' Rights (www.achpr.org) [An African Court on Human and Peoples' Rights has been established but it does not have any website yet]
- Inter-American Court of Human Rights (www.corteidh.or.cr/)
- There are many regional courts which jurisprudence may be relevant to counsel work on legal analysis and doctrine [Caribbean Court of Justice

(www.caribbeancourtofjustice.org/); Eastern Caribbean Supreme Court (www.eccourts.org/); etc.]

2. International Criminal Tribunals

- International Criminal Tribunal for the Former Yugoslavia (ICTY) (www.un.org/icty/)
- International Criminal Tribunal for Rwanda (ICTR) (www.unictr.org) (www.ictr.org)

3. Mixed Courts

- Special Court of Sierra Leone (SCSL) (www.sc-sl.org)
- East Timor - Dili District Courts on the Judicial System Monitoring Programme (www.jsmp.minihub.org/)
- Extraordinary Chambers in the Courts of Cambodia (EECC) (www.cambodia.gov.kh/krt/english/index.htm) [See also: United Nations Assistance to Khmer Rouge Trials (www.un.org/law/khmerrougetrials/); Khmer Rouge Trial Web Portal (www.krtrial.info/) (website in Cambodian)]
- Special Tribunal for Lebanon (STL) (www.stl-tsl.org)

4. Other Websites

- Iraqi Special Tribunal (www.iraqispecialtribunal.org)
- African International Courts and Tribunals (www.aict-ctia.org)
- Peace Palace Library (www.ppl.nl)
- Project on International Courts and Tribunals (www.pict-pcti.org)
- Harvard University (Law School), ILS Websites - Foreign & International Law Resources: An Annotated Guide to Websites Around the World (www.law.harvard.edu/library/services/research/guides/international/web_resources/index.php)
- Georgetown University, Law Library - Researching International & Foreign Law (www.ll.georgetown.edu/intl/guides/index.html)

Table of Authorities

⁂ ICC Rulings and Filings*

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* Please note that the citation styles used herein are not necessarily uniform; instead, they track how the issuing Chamber styled the ruling.,

International Statutes, Protocols, Covenants, Reports, Conventions, and Charters

Other Cases

ICC Legal Provisions

Rome Statute Articles

Rules

❋ Regulations of the Court

Index

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