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### Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court

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## RECONCILING THE CONFLICTING RIGHTS OF VICTIMS AND DEFENDANTS AT THE INTERNATIONAL CRIMINAL COURT

MUGAMBI JOUET\*

### I. INTRODUCTION

The Rome Statute of the International Criminal Court (ICC) entered into force on July 1, 2002, heralding a new era in international justice for the prosecution of genocide, war crimes, and crimes against humanity.<sup>1</sup> Whenever gross human rights violators are apprehended and tried at the ICC, their alleged victims literally may have their day in court. The ICC reached new grounds in international criminal law by providing victims with legal standing to be represented by counsel and formally participate throughout trial and other court proceedings. This article will explore whether victim participation will unduly conflict with defendants' rights and undermine the ICC's ability to justly adjudicate atrocity crimes.

The analysis of this article will revolve around three key premises. First, it is a fundamental principle of international law that every defendant, no matter how wicked or unpopular, has the right to an utterly just trial. The United Nations International Covenant on Civil and Political Rights (ICCPR) recognizes "the inherent dignity and . . . equal and inalienable rights of all members of the human family" and posits that all criminal defendants have the right to a "fair" and "impartial" trial where they are "presumed innocent until proven guilty."<sup>2</sup> The United Nations Universal Declaration of Human Rights (UDHR) espouses the same moral and legal principles.<sup>3</sup>

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1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter ICC Statute].

2. International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52-53, 54, U.N. GAOR, 21st Sess., 1496th plen. mtg., Annex, U.N. Doc. A/6316 (Dec. 16, 1966).

3. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 72, 73, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

Second, victims should participate in criminal proceedings in some capacity. Victims of crime—in particular victims of atrocities like genocide, crimes against humanity, and war crimes—have several important needs, including: 1) receiving financial compensation for their harms; 2) seeing that culprits get retribution so long as the punishment is reasonable; 3) having a forum to speak and be heard; and 4) obtaining closure and truth about the political affairs behind their harms. Participation in ICC proceedings could help satisfy these needs and alleviate the suffering of victims of atrocities in post-conflict societies seeking a peaceful transition towards democracy.

Third, during a criminal proceeding, defendants' due process rights must trump alleged victims' participatory rights. The rights of alleged victims (the accusers) and defendants (the accused) will sometimes conflict since they are inherently adverse parties. Unlike the longstanding right of defendants to a just trial with due process, the right of alleged victims to participate in proceedings is a new concept in international criminal law. Victims had no such rights in prior international criminal courts created by the global community, such as the International Criminal Tribunal for Rwanda (ICTR),<sup>4</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>5</sup> and the Special Court for Sierra Leone that was created by agreement between the United Nations and the Sierra Leone government.<sup>6</sup> Likewise, the ICCPR and UDHR do not grant victims this right. Defendants' rights must therefore trump alleged victims' rights. As will be shown, the ICC's Statute and Rules actually adopt this principle.<sup>7</sup> In light of these three premises, the challenge lies in reconciling the conflicting rights of defendants and victims by granting victims the most participation possible without violating defendants' rights.

The structure of this essay will proceed as follows. After briefly surveying the ICC's victim standing rule and its origins in continental European law, I outline the ICC Pre-Trial Chamber's first decisions on victim participation in *Prosecutor v. Thomas Lubanga Dyilo*,<sup>8</sup> which will be the first case tried by the Court. I subsequently posit that, due to deficiencies in the Court's Statute and Rules, there is a risk that victim participation could violate defendants' due process rights, such as by lowering the prosecution's burden of proof, shifting this burden to the defense, and undermining the presumption of innocence. I

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4. See Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

5. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 19, 2003).

6. See Statute of the Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2004).

7. See ICC Statute, *supra* note 1, at art. 68 § 3.

8. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 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* (Oct. 20, 2006).

then add that victim participation may also interfere with prosecutors' strategic decisions and judges' ability to manage proceedings effectively. I thereafter suggest that the rule be amended or interpreted narrowly so that victim participation does not conflict with defendants' rights. Given that the ICC has not yet completed any case, attention is paid to the experience of the ICTY to illustrate challenges that the ICC may encounter. Next, I examine three predictable counter-arguments to my proposed reforms to the victim standing rule—namely that 1) granting defendants “excessive” rights will unnecessarily frustrate efforts to convict persons who are obviously guilty; 2) the suggested problems with victim participation are unlikely to occur because it is unfathomable that any defendant at the ICC will be deprived of a fair trial; and 3) victims are entitled to full participation in ICC proceedings. Following rebuttal of these positions, this article concludes by arguing that the interests of victims are often better served by truth and reconciliation commissions than by criminal prosecutions, although prosecuting defendants remains necessary and must consequently be conducted according to international norms and standards on defendants' rights, which justifies considering the proposed approach to victim participation.

## II. ICC VICTIM STANDING RULE'S ROOTS IN EUROPEAN LAW

The ICC grants important rights to both defendants and victims. Its Statute and Rules provide numerous due process guarantees to ensure that every defendant has a fair trial devoid of unfair prejudice.<sup>9</sup> The rights afforded to the accused include public hearings conducted fairly and impartially, equal justice, prompt notification of all charges, discretion to choose one's counsel or have one appointed by the court if unable to pay, confidential communications with counsel, adequate time and facilities to prepare a defense, trial without undue delay, the right not to be compelled to testify without silence being considered as proof of guilt or innocence, the right to be free from coercion, the right to be free from inhuman or degrading treatment or punishment, and the right to be presumed innocent until the prosecution has proven guilt beyond reasonable doubt.<sup>10</sup> The rights of defendants at the ICC therefore generally conform with

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9. It is important to stress the difference between mere prejudice and unfair prejudice. All relevant incriminating evidence introduced against a defendant is necessarily prejudicial to his interests. That does not make this evidence unfair. Likewise, a prosecutor's prerogative to argue that a defendant is guilty is necessarily prejudicial to the defendant's interests, although there is nothing unfair about such arguments in and of themselves. Conversely, it is *unfairly* prejudicial to violate a defendant's right to a fair trial marked by due process of law.

10. *See, e.g.*, ICC Statute, *supra* note 1, at arts. 55, 66, 67; International Criminal Court, Regulations of the Court, May 26, 2004, U.N. Doc. ICC-BD/01-01-04, at 83-86 [hereinafter ICC Regulations].

international laws and standards on the administration of justice, as provided by the ICCPR, UDHR, and norms of practice.

Moreover, the ICC recognizes that victims have important rights and needs. The substance of crimes under the ICC Statute heeds the forms of victimization that have been prevalent in recent and ongoing conflicts. For instance, attention has been paid to the conscription of children as soldiers,<sup>11</sup> which is a particularly grave problem in Africa.<sup>12</sup> The Statute also “marks [an] advance in the gender sensitiveness of international law[, as] it includes a comprehensive definition of gender-based war crimes and crimes against humanity” that encompass rape and other sexual abuses.<sup>13</sup> Besides the substantive crimes that the Court seeks to punish and deter, a special support unit is responsible for obtaining legal advice for victims, notifying them of their rights, informing them of the Court’s decisions, ensuring their security, and providing them with medical and post-traumatic psychological assistance, including specialized services for victims of sexual violence.<sup>14</sup> Whenever the Prosecutor opens an investigation, purported victims “may make representations to the Pre-Trial Chamber” about crimes to be investigated.<sup>15</sup> Further, the Court is empowered to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>16</sup> The Court “may make an order directly against a convicted person specifying appropriate reparations” for victims and their families.<sup>17</sup> Alternatively, reparations can be paid through a special Trust Fund subsidized by ICC member states.<sup>18</sup>

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11. ICC Statute, *supra* note 1, at art. 8 § 2(b)(xxvi).

12. Amnesty International, Report: Human Rights Owes the Child ‘The Best it Has to Give,’ <http://www.amnestyusa.org/document.php?lang=e&id=B0275B42F3B4C25380256900006933EF> (last visited Sept. 2, 2007).

13. MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 112 (2006); ICC Statute, *supra* note 1, at arts. 7 § 1(g), 8 § 2(b)(xxii), 8 § 2(e)(vi).

14. Rules of Procedure and Evidence, Sept. 10, 2002, U.N. Doc. ICC-ASP/1/3, at 16-19, 86-91 [hereinafter ICC Rules]; ICC Regulations, *supra* note 10, at 79-82.

15. ICC Statute, *supra* note 1, at art. 15 § 3.

16. *Id.* at art. 75 § 1.

17. *Id.* at art. 75 § 2.

18. *Id.* at arts. 75, 79; *see also* ICC Rules, *supra* note 14, at 173-175; ICC Regulations, *supra* note 10, at 88, 117. During negotiations to establish the Rome Treaty, a significant number of delegations opposed a proposal that would have allowed the ICC to force a state to pay reparations to victims if the state bore some degree of responsibility for the crimes. Opposition to this proposal was partly rooted in the understanding that the ICC was intended to deal solely with individual criminal responsibility. Christopher Muttukumaru, *Reparations to Victims*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 262, 267-68 (Roy S. Lee ed., 1999).

Most importantly, the ICC Statute gives victims standing to participate in a trial and other court proceedings. The rule is codified in Article 68 § 3 of the Statute:

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.<sup>19</sup>

Article 68 § 3 was created after intense discussions between treaty negotiators, as countries essentially split into two camps respectively, representing civil and common law traditions.<sup>20</sup> Delegations from civil law countries were particularly supportive of victim standing,<sup>21</sup> which is commonplace in their legal systems, unlike in common law jurisdictions.<sup>22</sup> The French government and certain Non-Governmental Organizations (NGOs) were especially insistent about granting victims broad standing rights.<sup>23</sup> The ensuing compromise partly consisted of making victim participation discretionary, as partisans of incorporating the term “may” in the Statute’s language prevailed over those preferring “shall.”<sup>24</sup>

Article 68 § 3 consequently became the principal basis for the ICC’s victim standing rule, which draws its roots from continental European systems.<sup>25</sup> Even though continental systems are not uniform and vary according to whether they are civil Germanic (Austria, Germany, Turkey, etc.), Nordic (Denmark, Norway, Sweden, etc.), civil Romanic (France, Italy, Spain, etc.), or mixed (Greece),<sup>26</sup> they all give victims standing to participate in

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19. ICC Statute, *supra* note 1, at art. 68 § 3 (emphasis added); *see also* ICC Regulations, *supra* note 10, at 86-87.

20. WILLIAM BOURDON & EMMANUELLE DUVERGER, *LA COUR PENALE INTERNATIONALE: LE STATUT DE ROME (COMMENTARY ON THE ROME STATUTE)* 203 (Olivier Duhamel ed., 2000).

21. Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1399 (Antonio Cassese et al. eds., Oxford University Press 2002).

22. *See infra* Part II.A.

23. Jorda & Hemptinne, *supra* note 21, at 1400. Notably, in April 1999, the French government hosted an international seminar on victims’ rights in international criminal law. *Id.* at 1399, n.43 (citing C. Trean, *Organiser les Droits des Victimes Devant la Justice Internationale*, *LE MONDE*, Apr. 30, 1999). NGOs like Amnesty International and Human Rights Watch also advocated for victim participation. *See id.* at 1400, n.46.

24. BOURDON & DUVERGER, *supra* note 20, at 203.

25. *See* ICC Statute, *supra* note 1, at art. 68 § 3; Jorda & Hemptinne, *supra* note 21, at 1399.

26. MARION E. BRIENEN & ERNESTINE H. HOEGEN, *VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS* 49 (2000).

criminal proceedings under the concept of *partie civile*.<sup>27</sup> Conversely, victims have virtually no such standing in common law jurisdictions like England, Ireland, and the United States.<sup>28</sup> This article will therefore examine the different role victims play in these systems as a background consideration to its analysis of the ICC's victim standing rule.

A. *Continental European Systems*

Continental European systems use inquisitorial criminal procedures under which victims have standing to participate in court and certain judges have investigative responsibilities.<sup>29</sup> The primary systemic role for a crime victim is as a civil claimant, which enables the integration of his civil claim for compensation directly into criminal proceedings.<sup>30</sup> Insofar as a civil claimant's interventions are related to his claim for damages, he is generally permitted to participate in all court proceedings by arguing his views and concerns, questioning witnesses, appealing a defendant's acquittal insofar as it bars compensation, etc.<sup>31</sup> The procedure is advantageous for victims because if the prosecution is successful, the victims will not have to prove the defendant's liability for damages in a separate civil suit.<sup>32</sup> When a defendant is acquitted, jurisdictions vary on whether they allow victims to initiate a separate civil suit for compensation. For instance, French law forbids civil court judges from reaching decisions contrary to those of criminal court judges,<sup>33</sup> but Norwegian law permits liability in civil court even if a defendant was acquitted in criminal court.<sup>34</sup>

In misdemeanor cases and, to a lesser extent, in felony cases, continental systems generally allow victims to act as private prosecutors, which enables them to directly summon the accused to court and seek to prove his guilt without the involvement of government prosecutors.<sup>35</sup> Unlike a civil claimant's participation, a private prosecutor's participation is not restricted to the reach of his civil claim for compensation, thereby enabling the private prosecutor to expressly seek the defendant's conviction in addition to damages.<sup>36</sup> Nevertheless, government prosecutors can usually intervene and dismiss the case if they deem that prosecution is not justified.<sup>37</sup> Countries

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27. BOURDON & DUVERGER, *supra* note 20, at 203.

28. BRIENEN & HOEGEN, *supra* note 26, at 39.

29. *Id.* at 39.

30. *Id.* at 27.

31. *Id.*

32. *Id.*

33. *Id.* at 319.

34. BRIENEN & HOEGEN, *supra* note 26, at 736.

35. *Id.* at 28.

36. *Id.*

37. *Id.* at 28-29.

have instituted different checks on the private prosecutor procedure, such as France's provision that the private prosecutor must pay for court costs and the accused's legal fees if the accused is found not guilty.<sup>38</sup> Certain countries go even further, such as Spain, which allows felonies to be privately prosecuted by virtually any person, even if he is neither a victim nor a citizen, so long as the government has declined to prosecute the case.<sup>39</sup>

Accordingly, continental systems grant victims extensive rights to participate in court proceedings, thereby effectively limiting the government prosecutors' discretion to control criminal cases.<sup>40</sup> In fact, if a government prosecutor declines to investigate or prosecute a case, alleged victims typically have a formal right to appeal this decision to a higher public authority who may then order the prosecutor to proceed with the case.<sup>41</sup>

### B. Common Law Systems

Common law systems typically do not give victims standing to participate in criminal proceedings.<sup>42</sup> Their criminal justice procedures revolve around an adversarial system pitting the state against one or more defendants.<sup>43</sup> Victims are not formal parties to the process, and judges do not have investigative responsibilities.<sup>44</sup> If a prosecutor declines to investigate or prosecute a case, victims typically lack a formal procedural right to ask another official to review the decision.<sup>45</sup> Certainly, victims can use the political process to pressure a prosecutor to indict someone. Prosecutors who routinely fail to investigate or prosecute cases are unlikely to either be reelected or keep their appointed positions. Nevertheless, when prosecutors indict a defendant, victims have no right to participate in proceedings until the sentencing hearing, if the defendant is convicted.<sup>46</sup> Victims may nonetheless appear as witnesses if requested by the state or the defense. But the common law systems' reliance

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38. *Id.* at 322; *see generally* Valérie Devrieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES 218 (Mireille Delmas-Marty & J.R. Spencer eds., Cambridge University Press 2002).

39. BRIENEN & HOEGEN, *supra* note 26, at 28, 857-58.

40. *Id.* at 26.

41. *See id.* at 333-34 (discussing French system).

42. Observations on the American criminal justice system are based on the author's professional experience. Observations on European common law systems are based on BRIENEN & HOEGEN, *supra* note 26, and EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Marty & J.R. Spencer eds., Cambridge University Press 2002).

43. BRIENEN AND HOEGEN, *supra* note 26, at 245.

44. *Id.* at 244, 248.

45. *Id.* at 270, 490. In America, the principle of prosecutorial discretion means that the government essentially has unfettered discretion whether to prosecute cases. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (stressing that "prosecutorial discretion" is a "special province of the Executive").

46. BRIENEN & HOEGEN, *supra* note 26, at 39.



on plea bargaining results in trial avoidance, which means that authorities tend to dissociate themselves from victims when they have no need for them to serve as witnesses.<sup>47</sup> As part of the adversarial system, victims who are called to testify are subjected to cross-examination by the defense.<sup>48</sup> Conversely, the inquisitorial system used in continental jurisdictions does not necessarily authorize defendants to confront and cross-examine victims, which is perceived as harsh treatment.<sup>49</sup>

Nevertheless, it must be noted that criminal procedures vary across common law countries. For example, victims in America have fewer standing rights than in England. Neither the federal government nor any state in the American system permits private prosecutions. While private persons can seek punitive damages in civil court and recover substantial financial compensation, only public officials can prosecute cases. However, in England, any citizen is permitted to privately prosecute a case, even if he is not an alleged victim.<sup>50</sup> No special status is actually provided to victims. During a public prosecution, victims have no standing right to join the case, unlike in continental European systems.<sup>51</sup>

Common law systems have counter-balanced the victims' limited role in criminal court by defending their interests in other ways. England has the strongest state compensation scheme and victim support service of all Europe.<sup>52</sup> Unlike judges in most continental systems, English judges also have the authority to order defendants to pay compensation to the victims even if the victims have not formally requested damages.<sup>53</sup> Further, common law systems allow victims to assume a rather significant role at sentencing.<sup>54</sup> In recent years, legal reforms have allowed the use of "victim impact statements" explaining the harm that victims have suffered due to the defendants' actions and demanding punishment, financial damages, or other forms of compensation.<sup>55</sup>

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47. *Id.* at 247.

48. *Id.* at 39.

49. *Id.* at 39.

50. J.R. Spencer, *The English System, in EUROPEAN CRIMINAL PROCEDURES* 142, 152-53 (Mireielle Delmas-Marty & J.R. Spencer eds., Cambridge University Press 2002).

51. *Id.* at 156. It must also be noted that acting as a private prosecutor is a difficult endeavor in England, as indigent citizens or victims must find their own counsel, and the Director of Public Prosecutions can dismiss the case altogether at any time. BRIENEN & HOEGEN, *supra* note 26, at 259, 270. Ireland also grants victims a limited capacity to act as private prosecutors. *Id.* at 479-80.

52. BRIENEN & HOEGEN, *supra* note 26, at 285.

53. *Id.* at 244, 285.

54. *Id.* at 481.

55. *Id.* at 481, 267-68.

Aside from compensation through criminal proceedings, common law countries enable victims to seek compensation in civil courts as well. In America, for example, victims can prevail in civil court even if the defendant has been acquitted in criminal court, as civil liability requires a lower burden of proof than criminal guilt.

A thorough comparative analysis of criminal procedures in civil and common law systems is beyond the scope of this article. The foregoing commentary merely demonstrates that the ICC victim standing rule is rather similar to victim standing rules in continental European systems, somewhat analogous to the right to private prosecution in England and Ireland, and markedly different from American criminal procedures.

The ICTY's and ICTR's procedures are essentially patterned after the Anglo-American common law adversarial system,<sup>56</sup> as the victims' only role is to serve as witnesses called by the prosecution, defense, or the court. Those called to testify face possible contempt charges for failing to appear or to state the truth,<sup>57</sup> although one can certainly imagine why certain traumatized victims would prefer not to serve as witnesses, especially if they fear reprisals from the accused. In sum, while ICTY and ICTR proceedings have little use for non-testifying victims, those victims serving as witnesses have virtually no choice but to abide by the awesome power of the courts' authority.

Victim participation in judicial proceedings may be a progressive procedure because it recognizes that proceedings can benefit from the direct contribution of individuals who have first-hand knowledge of the commission of the charged crimes.<sup>58</sup> Permitting victim participation also suggests a pragmatic acknowledgment that victims and prosecutors do not necessarily have the same interests, as argued in Part V below. Victims can therefore serve as a check on prosecutorial discretion, which is often unbridled in common law countries. Besides, victim participation can contribute to putting a human face on proceedings,<sup>59</sup> especially if the latter are conducted in The Hague, a remote location from crime scenes often situated in war-torn developing countries. In addition, the ICC may be able to administer restorative justice by directly awarding reparations for victims,<sup>60</sup> which is

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56. Jorda & Hemptinne, *supra* note 21, at 1391.

57. *Id.* at 1390; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Feb. 11, 1994, U.N. Doc. IT/32/Rev. 39, at 77; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, June 29, 1995, U.N. Doc. ITR/3/Rev.1, at 77.

58. Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219, 221 (2006).

59. *Id.*

60. Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 17 (2005).

permitted at neither the ICTR nor the ICTY,<sup>61</sup> although reparations are increasingly required by international law.<sup>62</sup> Victim standing at the ICC might therefore be a sign of progress, although adequate procedures will be necessary to apply the rule without violating defendants' rights.

### III. THE ICC REACHES ITS FIRST DECISIONS ON VICTIM PARTICIPATION

In October 2005, the ICC issued its first arrest warrants, seeking the apprehension of five leaders of the Lord's Resistance Army, a Ugandan militia allegedly responsible for killing tens of thousands of victims, as well as other atrocities.<sup>63</sup> The five wanted men are accused of crimes against humanity and war crimes.<sup>64</sup> But the case has stalled partly because of an ongoing controversy over whether the Ugandan government should grant them amnesty in exchange for a peace deal, and whether Uganda even has the power to refuse to comply with an arrest warrant after referring the case to the ICC.<sup>65</sup> Meanwhile, another case will be the first to proceed to trial.<sup>66</sup> In March 2004, the Democratic Republic of the Congo (DRC) referred a situation to the ICC Prosecutor, which led to the opening of an investigation.<sup>67</sup> This eventually led to the arraignment of Thomas Lubanga Dyilo at the ICC on March 20, 2006.<sup>68</sup> Lubanga Dyilo, known as a Congolese warlord and militia leader, is accused of war crimes in enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities, in violation of Article 8 § 2 of the Rome Statute.<sup>69</sup> The allegations include kidnapping children as young as seven and turning them into soldiers, sex slaves, and servants in the conflict-

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61. *Id.* at 11-15.

62. Peter G. Fischer, Comment, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 197-201 (2003).

63. Emily Wax, *Net Tightens Around Northern Uganda's Brutal Rebel Militia: Lord's Resistance Army Unchecked for 20 Years*, WASH. POST, Oct. 8, 2005, at A12.

64. *Id.*; Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders, U.N. Doc. ICC-20051014-110 (Oct. 14, 2005), available at [http://www.icc-cpi.int/pressrelease\\_details&id=114&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html) (last visited April 11, 2007).

65. See generally *Will Kony Come Out of the Bush?*, THE ECONOMIST, Oct. 21, 2006, at 56, 57; *Heeding Truce, Rebel Leader From Uganda Waits in Sudan*, N.Y. TIMES, Sept. 18, 2006, at A18.

66. Marlise Simons, *Criminal Court Hears Its First Case; Congolese Warlord is Accused of Abuses*, INT'L HERALD TRIBUNE, March 21, 2006, at 3.

67. Jérôme de Hemptinne & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 J. INT'L CRIM. JUST. 342, 342 (2006).

68. Simons, *supra* note 66.

69. Press Release, International Criminal Court, Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo, U.N. Doc. ICC-OTP-20060302-126 (Mar. 17, 2006), available at [http://www.icc-cpi.int/pressrelease\\_details&id=133.html](http://www.icc-cpi.int/pressrelease_details&id=133.html) (last visited April 11, 2007).

prone Ituri region of the DRC.<sup>70</sup> The Pre-Trial Chamber ultimately confirmed the charges against Lubanga Dyilo and allowed the case to proceed to the Trial Chamber.<sup>71</sup>

Lubanga Dyilo challenged the ICC's jurisdiction to try him.<sup>72</sup> Several victims were empowered by the Chamber to submit their observations on this matter.<sup>73</sup> The victims argued that the ICC has jurisdiction and that Lubanga Dyilo's motion must be denied.<sup>74</sup> Victim participants likewise argued against Lubanga Dyilo's motion seeking provisional release from ICC detention.<sup>75</sup> Predictably, the Pre-Trial Chamber denied Lubanga Dyilo's jurisdictional challenge and release.<sup>76</sup> Even though these outcomes would probably still have been the same if victims had not presented their views, their participation as litigants on these important issues was nonetheless a clear victory for the victims' rights movement. Yet, the admission of victims into proceedings has proved to be a tortuous path marred by controversial due process issues.<sup>77</sup>

Thus far, the Court's decisions have been more or less amenable to victims' applications for participation. In May 2005, well before Lubanga Dyilo was charged with any crimes by the ICC, the Pre-Trial Chamber received applications to participate in proceedings from alleged "victims of the situation" in the DRC.<sup>78</sup> The Chamber subsequently appointed an attorney to represent their interests.<sup>79</sup> In a noteworthy decision issued on January 17, 2006, the Chamber broadly interpreted victims' participatory rights.<sup>80</sup> After considering the submissions of the parties and the ICC's Victims and Witnesses Unit, the Chamber granted to six alleged victims the right to

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70. *Id.*; Simons, *supra* note 66; Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Jan. 29, 2007) at 86-101, 125-153.

71. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Jan. 29, 2007).

72. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute (Oct. 3, 2006).

73. *Id.* at 4.

74. *Id.* at 4.

75. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-530, Observations of Victims a/0001/06, a/0002/06 and a/003/06 in Respect of the Application for Release Filed by the Defence (Oct. 9, 2006).

76. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute (Oct. 3, 2006) at 11.

77. Hemptinne & Rindi, *supra* note 67, at 347-48.

78. *Id.* at 343.

79. *Id.* at 343.

80. *Id.*; Situation in the Democratic Republic of Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006).

participate in court proceedings at a relatively early stage of the investigation of the DRC situation,<sup>81</sup> which preceded the issuance of an arrest warrant against Lubanga Dyilo on March 17, 2006.<sup>82</sup>

Since Article 68 § 3 contemplates victim participation “at stages of the proceedings determined to be appropriate by the Court,” the Chamber reasoned that the term “proceedings” encompasses the investigation phase.<sup>83</sup> It elaborated four requirements for determining whether alleged victims should be allowed to participate in investigation proceedings. Relying on Rule 85 (a), it concluded that applicants must: i) be natural persons; ii) have suffered harm; iii) allege crimes covered by the ICC’s jurisdiction; and iv) show a causal link between the alleged crimes and the harm.<sup>84</sup> The Chamber held that victims’ applications to partake in investigation proceedings would be granted when there are “grounds to believe” that these four requirements are satisfied.<sup>85</sup>

The Prosecutor strongly opposed the alleged victims’ applications, arguing that victim participation “in the investigation phase was not envisaged” by the Rome Statute, and that the purported victims’ influence “could jeopardize the objectivity and integrity” of the Prosecutor’s investigation.<sup>86</sup> The Chamber rejected these arguments and granted the six alleged victims’ applications to participate in judicial proceedings related to the investigation.<sup>87</sup> The Chamber also denied the Prosecutor’s request to file an interlocutory appeal of this decision.<sup>88</sup> Notably, it held that: i) the Prosecutor failed to adduce “concrete evidence” that victim participation in the investigation phase would impede the fairness of the proceedings;<sup>89</sup> ii) the Chamber’s decision merely created a “very limited” system of victim participation that essentially relies on a “case-by-case” evaluation;<sup>90</sup> and iii) “the Chamber will ensure the impartiality and integrity of the investigation at all stages of future proceedings.”<sup>91</sup> The Prosecutor then unavailingly sought extraordinary review from the Appeals

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81. Hemptinne & Rindi, *supra* note 67, at 343.

82. Press Release, International Criminal Court, Issuance of a Warrant of Arrest Against Thomas Lubanga Dyilo, *supra* note 69.

83. Situation in the Democratic Republic of Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006) at 8, 11.

84. Hemptinne & Rindi, *supra* note 67, at 345.

85. *Id.*

86. *Id.* at 343.

87. *Id.* at 343.

88. Situation in the Democratic Republic of Congo, ICC-01/04-135, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Mar. 31, 2006).

89. *Id.* at 15-16.

90. *Id.* at 16.

91. *Id.* at 16-17.

Chamber, which unanimously dismissed the appeal on procedural grounds since no interlocutory appeal was permitted by the Rome Statute under these circumstances,<sup>92</sup> thereby leaving the appeal's substance "non-justiciable" at this stage.<sup>93</sup>

In spite of the Pre-Trial Chamber's relatively broad interpretation of victims' participatory rights, it has not hesitated to limit victim involvement in other respects. First, the Chamber placed restrictions on the scope of participation of the aforementioned six alleged victims.<sup>94</sup> For example, the Chamber twice rejected victims' applications to participate in status conferences, thereby depriving them of equal participatory rights to the prosecution and defense.<sup>95</sup> Second, the Chamber clarified that admitting victims into investigation proceedings for a *situation* did not grant them a license to participate in a concrete *case* against any individual that may stem from the investigation of the situation.<sup>96</sup> Hence, the six victims of the Situation in the Democratic Republic of the Congo were constrained to reapply for participation in the case of Lubanga Dyilo after charges were entered against him.<sup>97</sup> The Chamber remarkably rejected their applications.<sup>98</sup> Three of the alleged victims did not demonstrate "any causal link between the harm they suffered and the crimes contained in the arrest warrant against Thomas Lubanga Dyilo."<sup>99</sup> The three other alleged victims did not provide sufficient evidence to give reasonable grounds to believe that their harm was directly linked to the crimes charged against Thomas Lubanga Dyilo or that they suffered harm by intervening to help direct victims or to prevent them from

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

93. *Id.* at 16.

94. See Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-335, *Décision Relative à la Demande de Participation des Victimes a/0001/06 à a/0003/06 à la conférence de mise en état du 24 août 2006* (Aug. 17, 2006); Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-380, *Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 5 September 2006* (Sept. 4, 2006).

95. See Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-335, *Décision Relative à la Demande de Participation des Victimes a/0001/06 à a/0003/06 à la conférence de mise en état du 24 août 2006* (Aug. 17, 2006); Prosecutor v. Lubanga Dyilo, *Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 5 September 2006* (Sept. 4, 2006).

96. Situation in the Democratic Republic of the Congo, ICC-01/04-101, *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6* (Jan. 17, 2006) at 17-18.

97. *Id.*

98. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-172, *Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo* (June 29, 2006).

99. *Id.* at 7.

becoming victims.<sup>100</sup> Both the prosecution and defense had argued that the alleged victims' applications should be denied.<sup>101</sup>

But this decision did not dissuade other potential victims from applying, as the Chamber subsequently invited the prosecution and defense to submit their observations on a whopping sixty-five new applications.<sup>102</sup> The Chamber eventually concluded that fifty-eight of these applicants would be barred from participating in the proceedings, mostly because they failed to substantiate a causal link between their alleged harm and the crimes charged against Lubanga Dyilo.<sup>103</sup>

Further, as noted above, the Chamber invited potential victims to submit their observations on Lubanga Dyilo's challenge to the ICC's jurisdiction to try him.<sup>104</sup> The Chamber then granted three victims' applications to participate in proceedings.<sup>105</sup> All three victims were parents acting in a representative capacity for their children, who allegedly endured harm and were killed as a result of their conscription into armed forces led by Lubanga Dyilo.<sup>106</sup> The parents also acted as victims on their own behalf because they allegedly suffered as a result of the killing and harm wrought on their children and other relatives.<sup>107</sup> The Prosecutor reasserted his prior position that victims' allegations should be denied when they did not directly relate to Lubanga Dyilo's case.<sup>108</sup> Nonetheless, he supported victims' applications insofar as they concerned crimes sufficiently linked to the charges in the case.<sup>109</sup>

The ICC's decisions thus far may be perceived as a victory for victims' rights. Yet, they concurrently raise problematic issues for defendants' due

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100. *Id.* at 7-8.

101. *Id.* at 3-4.

102. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-463, Decision Authorising the Filing of Observations on the Applications for Participation in the Proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 (Sept. 22, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-494, Decision Authorising the Filing of Observations on Applications for Participation in the Proceedings a/0072/06 to a/0080/06 and a/0105/06 (Sept. 29, 2006).

103. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-601, 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 (Oct. 20, 2006).

104. *Id.* at 4.

105. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (July 28, 2006).

106. *Id.* at 6.

107. *Id.* at 7-13.

108. *Id.* at 3.

109. *Id.* at 3-5.

process rights. The decision authorizing alleged victims to participate during the investigation phase might result in violations of defendants' rights by prejudicing the impartiality and independence of the Prosecutor. While any investigation must devote equal attention to incriminating and exonerating factors, alleged victims could unduly influence the Prosecutor to press unwarranted charges. The Prosecutor could also be pressured to disregard other factors that should be taken into account in deciding whether to press charges, such as the crimes' gravity, the burden on the Court's caseload, and whether prosecution will impede societal reconciliation.<sup>110</sup>

The most controversial due process issue thus far may have been the Chamber's decision to allow certain victims to participate in the proceedings in an anonymous capacity.<sup>111</sup> The Chamber faced a dilemma in deciding how to balance defendants' due process rights against the need to protect victims from intimidation, threat, or harm.<sup>112</sup> It tackled this problem by barring the defense from knowing the alleged victims' identities, as provided by Rule 87.<sup>113</sup> Consequently, any information that could lead to victims' identifications was expurgated from documents and victims' applications provided to the defense for Lubanga Dyilo.<sup>114</sup>

The defense vehemently protested that it must know who is bringing legal proceedings and seeking compensation against the accused<sup>115</sup> by raising several points: i) protective measures are extraordinary and were unjustified by Rule 87 under these circumstances; ii) the victims' applications amounted to improper anonymous accusations; iii) the redacted victim allegations that were

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110. Hemptinne & Rindi, *supra* note 67, at 347-48.

111. Witness anonymity has been another major issue. *See generally* Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-437, First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Sept. 15, 2006); Situation in the Democratic Republic of Congo, ICC-01/04-01/06-447, Decision on a General Framework Concerning Protective Measures for Prosecution and Defence Witnesses (Sept. 19, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-455, Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Sept. 20, 2006).

112. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-437, First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 (Sept. 15, 2006) at 8.

113. *Id.*

114. *See, e.g.*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-463, Decision Authorizing the Filing of Observations on the Applications for Participation in the Proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 (Sept. 22, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-494, Decision Authorizing the Filing of Observations on Applications for Participation in the Proceedings a/0072/06 to a/0080/06 and a/0105/06 (Sept. 29, 2006).

115. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 5-7.



provided to the defense were too vague, such as by omitting or expurgating the age of the children concerned at the time of the alleged incident, even though Lubanga Dyilo is charged with using children as soldiers;<sup>116</sup> iv) a complete defense cannot be organized without verifying a purported victim's identity, age, residence, and place of origin, as well as the location, place, and dates of the alleged crimes;<sup>117</sup> v) expurgated information may be exculpatory or otherwise useful to the defense,<sup>118</sup> such as by indicating the absence of a causal link to the charged crimes;<sup>119</sup> vii) the accused's right to be tried without undue delay is compromised by constraining the defense to spend much more time analyzing partially expurgated applications' contents;<sup>120</sup> viii) providing information about victims and their allegations to the prosecution but not the defense violates "the right to equality of arms and to a fair trial;" and ix) Rule 87 § 3 does not prevent a victim's identity from being revealed to the defense but only to the "public," "press," and "information agencies," as the rationale behind the rule is that security measures must always be subordinate to a defendant's rights.<sup>121</sup>

The Pre-Trial Chamber struck a middle ground in ruling on some of these issues when the defense filed a motion opposing victims' participation in the hearing addressing whether the charges against Lubanga Dyilo should be confirmed.<sup>122</sup> The Chamber found that the deterioration of the safety situation in certain areas of the DRC had diminished the effectiveness of security measures that could otherwise protect victims and witnesses living in these

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116. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Application for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo (July 28, 2006) at 5. For example, the Chamber's decision suggests that the defense was even deprived of the following redacted basic information: "Applicant a/0001/06 is a woman of Congolese nationality from the [redacted] ethnic group, who currently lives in [redacted] (DRC) and who is acting both on her own behalf and as the legal representative for her minor son [redacted], born in [redacted] in [redacted]." *Id.* at 7-8.

117. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 5-7.

118. *Id.* at 7.

119. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Application for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo (July 28, 2006) at 9.

120. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 10.

121. *Id.* at 8-9.

122. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-386, Defence Submissions regarding the Applications for Participation in the Proceedings of Applicants a/0004/06 to a/0052/06 (Sept. 4, 2006).

areas.<sup>123</sup> The Chamber therefore granted several victims' requests to remain anonymous in order to shield their identities from the defense during the confirmation hearing.<sup>124</sup> However, the Chamber also held that the privilege of anonymity comes with the cost of limiting the extent of victims' participation because "the fundamental principle prohibiting anonymous accusations would be violated [if victims] were permitted to add any point of fact or any evidence at all to the Prosecution's case file against Thomas Lubanga Dyilo in the notification of charges document and the list of evidence."<sup>125</sup> Accordingly, the Chamber held that victims would only receive notification of the public documents in the case's record and would only be permitted to attend hearings open to the public.<sup>126</sup> Further, the Chamber exercised its discretion to determine the extent of victim participation under Rule 97 (3) by allowing victims' representatives to make opening and closing statements but not question witnesses.<sup>127</sup> The Chamber noted that it might authorize victims to participate to a greater extent if they consented to the disclosure of their identities to the defense.<sup>128</sup> Thus, the Chamber rejected part of the defense's arguments against witness anonymity and expurgation, although it reminded the Prosecutor of his duty to disclose exculpatory or otherwise helpful evidence to the defense.<sup>129</sup>

The Chamber likewise denied the defense's claim that victim participation violates the presumption of innocence.<sup>130</sup> Notably, the defense had argued that allowing purported victims to participate in the confirmation hearing assessing the charges against Lubanga Dyilo would be premature since recognizing an applicant as a victim entails recognizing the defendant's guilt, thereby violating the presumption of innocence.<sup>131</sup> The defense added that, by creating a "grounds to believe" standard for recognizing someone as a purported victim, the Chamber's admission of victim applicants invited "an appearance of

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123. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-462, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing (Sept. 22, 2006) at 6.

124. *Id.*

125. *Id.* at 7.

126. *Id.* at 7-8.

127. *Id.* at 8.

128. *Id.* at 8.

129. *See, e.g.*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-517, Decision Concerning the Prosecution Proposed Summary Evidence (Oct. 4, 2006).

130. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 14.

131. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the Investigation in the Democratic Republic of the Congo (July 28, 2006) at 5.

prejudgment, if not actual prejudice.”<sup>132</sup> The Chamber found that this argument could not prevail “unless the procedural framework provided in the Statute and the Rules is considered an infringement *per se* of the presumption of innocence.”<sup>133</sup> But the Chamber concluded that victim participation posed no such problem.<sup>134</sup> The Pre-Trial Chamber twice denied defense motions for leave to appeal on this issue, holding that the defense did not demonstrate how an interlocutory appellate resolution was required to ensure the fairness and expeditiousness of the proceedings.<sup>135</sup>

In sum, the ICC’s first decisions on victim participation have raised concerns about defendants’ rights. Yet, this should not overshadow the fact that the Pre-Trial Chamber has taken commendable steps to protect defendants. It has encouraged the defense (and prosecution) to submit their observations or objections on victims’ applications for participation.<sup>136</sup> Further, it appointed an ad hoc counsel to represent the interests of any potential suspect during the investigation phase of the situation in the DRC.<sup>137</sup> It likewise appointed an ad hoc counsel to defend the rights of potential suspects during the investigation of the Darfur situation.<sup>138</sup> It also reprimanded the Prosecutor for improperly making *ex parte* filings aiming to prevent the defense not only from responding to the filings’ content but also from becoming aware of the filings’ actual existence.<sup>139</sup> In addition, it granted the defense’s motion to prevent the

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132. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-338, Decision on Defence Motion for Leave to Appeal (Aug. 18, 2006) at 4.

133. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-489, Decision on Second Defence Motion for Leave to Appeal (Sept. 28, 2006) at 10.

134. *Id.*

135. *Id.* at 15; Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-338, Decision on Defence Motion for Leave to Appeal (Aug. 18, 2006) at 10.

136. See Situation en République Démocratique du Congo, ICC-01/04-01/06-60, Décision Autorisant Procureur et la Défense à Déposer des Observations au Sujet du Statut de Victime des Demandeurs VPRS 1 à VPRS 6 dans le cadre de l’affaire le Procureur c. Thomas Lubanga Dyilo (Mar. 28, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-270, Decision Authorizing the Prosecutor and the Defence to File Observations on the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06 in the Case of the Prosecutor v. Thomas Lubanga Dyilo (Aug. 4, 2006).

137. Situation in the Democratic Republic of Congo, ICC-01/04-73, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (July 21, 2005) at 5.

138. Situation in Darfur, ICC-02/05-10, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence (July 24, 2006) at 6.

139. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-166, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal (June 23, 2006) at 21. The Chamber also rejected the Prosecutor’s proposal that the defense show good cause for revealing any expurgated material in the Prosecutor’s filings, as this would impermissibly shift the burden of proof to the defense. Rather, the Prosecutor must convince the Chamber of the need to expurgate any materials from the defense’s consideration in the first place. Situation in the Democratic Republic of Congo, ICC-01/04-01/06-355, Decision on the

Prosecutor from coaching, rehearsing, or otherwise preparing the testimony of its witnesses, which is generally considered unlawful and unethical in most countries, with the notable exception of the United States.<sup>140</sup> The Pre-Trial Chamber also granted the defense's request to have the prosecution disclose any criminal record of its witnesses as relevant to assessing the witnesses' credibility.<sup>141</sup>

Overall, the ICC has thus far taken measures that have been either favorable or unfavorable to victims and defendants' respective interests. Having reviewed the Court's first decisions on victim participation at the pre-trial stage, this article subsequently analyzes due process problems that might occur at the trial phase.

#### IV. ANALYZING POTENTIAL DUE PROCESS PROBLEMS WITH THE VICTIM STANDING RULE

Whereas the ICC's victim standing rule has evident roots in continental European law, it fails to specify whether victims will act as civil claimants or private prosecutors or as a combination of these roles. In fact, the Court's Statute and Rules are rather vague and ambiguous on the issue of victim participation, which could lead to differing interpretations of their language.

The means and substance of victim participation are often unspecified. Under the principle *expressio unius est exclusio alterius*, one may infer from omissions in the Statute and Rules that victims were deliberately precluded from employing certain means for asserting their claims. After all, the Statute and Rules do not formally empower victims with the right to participate in the Prosecutor's investigation, access evidence gathered by the parties, call witnesses to testify, or file an appeal.<sup>142</sup> Victim participation in pre-trial investigation proceedings may also have been intended to be restricted to representations in writing.<sup>143</sup> On the other hand, one may posit that these specific rights must logically be extrapolated from general statutory provisions because the Statute and Rules should be interpreted broadly in order to give victims concrete powers.<sup>144</sup> Indeed, without these rights, victims may lack the

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Prosecution Practice to Provide to the Defence Redacted Versions of Evidence and Materials without Authorization by the Chamber (Aug. 25, 2006) at 4.

140. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-679, Decision on the Practice of Witness Familiarisation and Witness Proofing (Nov. 8, 2006).

141. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-649, Decision on the Defence Request for an Order to Disclose Exculpatory Materials (Nov. 2, 2006) at 3-7.

142. Jorda & Hemptinne, *supra* note 21, at 1406, 1412-13.

143. Stahn et al., *supra* note 58, at 228. The Court Rules also state that victims are allowed "participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the [victims'] representative's intervention should be confined to written observations or submissions." ICC Rules, *supra* note 14, at 91 § 2.

144. NICOLÁS CABEZUDO RODRÍGUEZ, LA CORTE PENAL INTERNACIONAL 109 (2002).

ability to meaningfully participate. Their interventions could have little weight, credibility, and persuasiveness against those of the prosecution and defense.<sup>145</sup> Comparably, the Statute and Rules do not concretely specify whether victim participation should be permitted in proceedings during the investigation phase. The Prosecutor argued that participation in this phase should not be permitted because victims were not specifically granted this right under the Rome Statute, thereby effectively invoking the *expressio unius est exclusio alterius* paradigm.<sup>146</sup> The Pre-Trial Chamber disagreed and held that this right can be extrapolated from Article 68 § 1, which generally obliges the Court to “take appropriate measures to protect the safety, physical well-being, dignity and privacy of victims and witnesses.”<sup>147</sup> The Court’s judges and Prosecutor have therefore already strongly differed in their interpretation of the Statute and Rules.

Most importantly, the Statute and Rules do not concretely specify the purpose of victim participation. This article previously identified four different types of victim needs.<sup>148</sup> The drafters of the Statute and Rules may have intended for victim participation in judicial proceedings to help alleviate these needs, although the Statute and Rules themselves nowhere define either the needs of victims or the specific purpose of participation. Article 68 solely refers to the “personal interests” and the “views and concerns” of victims.<sup>149</sup> The Statute and Rules do not specify whether participation is restricted to the reach of victims’ claims for financial compensation as civil claimants or whether their role will be akin to that of private prosecutors who can expressly seek the defendant’s conviction in addition to damages. Without knowing *why* victims have standing, it becomes equally uncertain *what* victims will do in court and *when* they will do so. If victims are to act as civil claimants, their participation will be relatively narrow and consist only of introducing evidence, questioning witnesses, or making arguments related to reparations. Moreover, since reparations cannot be paid unless a defendant has been found guilty,<sup>150</sup> victim participation could technically be delayed until sentencing hearings at the end of trials. Conversely, if victims are to act as private prosecutors, they will assume broad participatory rights and have the same powers as ICC Prosecutors to seek conviction and retributive punishment for the accused. They could then enter proceedings from the outset. This seemed

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145. Jorda & Hemptinne, *supra* note 21, at 1412-13.

146. Situation in the Democratic Republic of Congo, ICC-01/04-84, Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp (Aug. 15, 2005) at 3.

147. Situation in the Democratic Republic of the Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006) at 12.

148. *See supra* Part I.

149. ICC Statute, *supra* note 1, at art. 68 § 3.

150. *Id.* at art. 75 § 2.

to be the Pre-Trial Chamber's interpretation when it allowed victim participation early in the investigation stage.<sup>151</sup>

Notwithstanding the Statute and Rules' vagueness, we can infer from Article 68's language that victims should have broad participatory rights. It is logical to assume that the "personal interests" and the "views and concerns" of victims will relate not only to their need for financial compensation but also to their need to see that culprits get reasonable retribution for their crimes. Victims may therefore act as private prosecutors and be allowed to argue a defendant's guilt in and of itself, especially since obtaining damages is contingent on a defendant being proved guilty. In addition to granting victims expansive powers to argue, broad participation would also be consistent with victims' need for a forum to speak and be heard, as the victims' lawyer could then generally attest to their suffering and the defendant's responsibility.<sup>152</sup> Broad participation would also help satisfy victims' need for closure and truth by exposing the state of affairs behind their victimization, an issue that will be addressed in the latter part of this article. This author's analysis of the victim standing rule will therefore be colored by these assumptions and inferences about why the rule exists, what actions it entails, and when victims will get involved.<sup>153</sup> Naturally, these assumptions would not be necessary if the victim standing rule was not so vague.

The only statutory provision impeding broad participation provides that victims have the right to appear "at stages of the proceedings" that are "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>154</sup> In other words, defendants' rights will trump victims' rights whenever they conflict, and victim participation must be deferred so long as it conflicts with defendants' rights. The main problem is that defendants' rights

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151. See Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (July 28, 2006).

152. Even though a lawyer could speak on their behalf, many victims may wish to testify personally. But the Statute and Rules do not specify whether victims have the right to appear as witnesses themselves on their own motion, even if they are not called to testify by the Court, prosecution, or defense. Besides, due process may require that victim litigants cannot serve as witnesses because this would pose a conflict of interest. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 22 (citing Jorda & Hemptinne, *supra* note 21, at 1409).

153. As in continental European systems, victims at the ICC can appeal a prosecutor's decision not to investigate or prosecute a case. ICC Rules, *supra* note 14, at 107. A pre-trial chamber can also review such decisions *sua sponte* and request victims' views on the matter. *Id.* at 93, 109.

154. ICC Statute, *supra* note 1, at art. 68 § 3.

almost inherently conflict with victims' rights due to the ICC's definition of *who* is a victim.

The Rules define victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."<sup>155</sup> It is fair to conclude that this definition encompasses victims' family members and close friends, who suffer indirect harm due to the commission of a crime against their loved ones, especially if those loved ones were killed. Serious injury or death to a provider can also affect the well-being of his dependents.<sup>156</sup>

When an alleged victim applies to participate in the proceedings, judges are responsible for determining whether he is really a victim.<sup>157</sup> The Court Rules merely state that a chamber "may reject the application if it considers that the person is not a victim."<sup>158</sup> Nowhere do the Court's Statute and Rules specify the standards for making this decision. The Statute and Rules do not define what types of facts indicate that someone is a victim, although these criteria can technically be determined by examining the statutory elements of a crime. While the prosecution or defense can move to support or reject a victim's application, judges apparently have ample discretion to decide the matter.<sup>159</sup> As noted above, in *Lubanga Dyilo*, the Pre-Trial Chamber exercised this discretion to elaborate four requirements for determining whether alleged victims should participate in investigation proceedings.<sup>160</sup>

Discretion will also be required to remedy the Statute and Rules' failure to state the level of proof required to make these findings. How much evidence is necessary to establish that a person is a victim? Is it the equivalent of evidence sufficient to support a finding (a significant level), a preponderance of the evidence (over 50% probability), clear and convincing evidence (circa 75%), or evidence beyond reasonable doubt (near absolute certainty)? The Statute and Rules do not answer these questions.

Certainly, Article 66 requires the prosecutor to prove the accused's guilt "beyond reasonable doubt."<sup>161</sup> This could be a befitting standard for proving that someone is a victim. Yet, because it is a high burden to make a determination beyond reasonable doubt, it is unlikely that such a determination could be made before the prosecution and defense have introduced all the

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155. ICC Rules, *supra* note 14, at 85(a). The Rules also recognize that "[v]ictims 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." *Id.* at 85(b)

156. Stahn et al., *supra* note 58, at 232.

157. ICC Rules, *supra* note 14, at 89(2).

158. *Id.*

159. *Id.*

160. See *supra* text accompanying notes 83-85; Hemptinne & Rindi, *supra* note 67, at 345.

161. ICC Statute, *supra* note 1, at art. 66 § 3.

evidence, made all their arguments, and rested their cases. Applying this high standard of proof would therefore defeat the purpose of the victim standing rule, which seeks to have victims participate in the guilt phase of a trial and perhaps even in pre-trial and investigation proceedings.<sup>162</sup> Judges will consequently require a lower level of proof to establish that someone is a victim. Predictably, in *Lubanga Dyilo*, the Pre-Trial Chamber set a relatively low standard in allowing victim participation in investigation proceedings when there are “grounds to believe” that the four aforementioned criteria are satisfied.<sup>163</sup>

However, allowing victim participation under such a low evidentiary threshold could lead to violations of defendants’ rights. By finding that certain individuals are victims, a judge effectively decides *two key elements* that the Prosecutor normally would have to prove beyond reasonable doubt: 1) a crime happened and 2) there are victims.<sup>164</sup> Indeed, the Statute and Rules do not specify the procedural and substantive implications of allowing alleged victims to enter the proceedings. One is thus left to conclude that by finding that applicants are victims of the alleged crime for which the defendant is prosecuted, judges also necessarily find that the alleged crime has occurred.

Judges will make these findings of fact on an incomplete evidentiary record because they will rule on the alleged victims’ applications before the prosecution and the defense have completed their cases.<sup>165</sup> This problem could be technically resolved by having judges wait to rule on the applications until both the prosecution and defense have rested. After all, alleged victims have the right to appear in court “at *stages* of the proceedings” that are “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>166</sup> But this would again reduce participation to post-trial sentencing hearings. Accordingly, the victim standing rule effectively entices judges to rule on applications well before both the prosecution and defense rest their cases, which may take months or even years.<sup>167</sup> The victim standing rule might therefore lead to due process violations by encouraging findings on key elements based on an incomplete evidentiary record and before the prosecution and defense have made closing arguments analyzing the evidence.

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162. Hemptinne & Rindi, *supra* note 67, at 343-44.

163. See *Situation in the Democratic Republic of Congo*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006); Hemptinne & Rindi, *supra* note 67, at 345.

164. The ICC does not address so-called “victim-less crimes” like drug-dealing, which is often described as a crime against society. For every ICC crime, there is necessarily a victim. So finding that someone is a victim entails concluding that a crime occurred.

165. ICC Rules, *supra* note 14, at 89.

166. ICC Statute, *supra* note 1, at art. 68 § 3 (emphasis added).

167. Jorda & Hemptinne, *supra* note 21, at 1412.



The victim standing rule might also violate other ICC provisions. Article 66 states that every defendant “shall be presumed innocent until proved guilty” and that “[t]he onus is on the Prosecutor to prove the guilt of the accused . . . beyond reasonable doubt.”<sup>168</sup> A high burden of proof therefore rests squarely with the prosecution. But by enticing judges to find before a trial’s end—or even its start, in *Lubanga Dyilo*—that there are victims and that, by extension, the prosecuted crime occurred, the victim standing rule makes the Prosecutor’s job easier. Indeed, the judge’s findings lower the Prosecutor’s burden of proof on the aforesaid two key elements, thereby allowing the Prosecutor to concentrate on his burden of proving whether the defendant is the actual culprit. Naturally, a judge’s grant of an alleged victim’s application is not the exact equivalent of a judge’s final verdict. Even after such a grant, the Prosecutor will continue introducing evidence of victimization and of the occurrence of a crime. Nevertheless, a granted application is the functional equivalent of a preliminary verdict. In *Lubanga Dyilo*, the defense had this in mind when it complained of “an appearance of prejudgment, if not actual prejudgment.”<sup>169</sup> At the very least, it relaxes the Prosecutor’s burden of proving that victims exist and that the prosecuted crime happened.

After the Court has approved an alleged victim’s application, a defendant is still free to challenge this approval by introducing additional evidence and presenting contrary arguments.<sup>170</sup> But this places the burden of proof on the defense to rebut the aforementioned two key elements, although Article 66 stresses that the entire burden of proof rests squarely with the prosecution.<sup>171</sup> Article 67 § 1(i) underlines that the prosecution’s burden of proof should never shift to the defense since every defendant has the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”<sup>172</sup> The presumption of innocence is therefore indirectly undermined by forcing a defendant to rebut elements of a crime before the Prosecutor has proved them. However, the presumption of innocence not only presumes that the defendant is not the culprit, it also presumes that elements of a crime are not established until they are actually proved beyond reasonable doubt.

Further, the victim standing rule unfairly prejudices the defense by significantly limiting the range of defense theories available to an accused person. First, the rule undermines the so-called “reasonable doubt defense,” where the defendant argues that the prosecution is simply unable to prove all the elements of the crime beyond reasonable doubt. Indeed, the rule entices

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168. ICC Statute, *supra* note 1, at art. 66.

169. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-338, Decision on Defence Motion for Leave to Appeal (Aug. 18, 2006) at 4.

170. ICC Statute, *supra* note 1, at art. 67.

171. *See id.* at art. 66 § 2.

172. *Id.* at art. 67 § 1(i).

judges to find that there are victims and that, by extension, the prosecuted crime occurred—all of this on less than proof beyond reasonable doubt.

Second, subsequent to the court's acceptance that victims exist, the rule makes it much harder for the defendant to adopt the standard defense theory that "no crime occurred at all." The rule effectively entices or relegates defendants into adopting the separate defense theory that "there was a crime, but I didn't do it." Arguing that no crime occurred at all is tantamount to arguing that the law was never broken. The accusation could be a lie, or it could be an innocent mistake, such as a misidentification. Comparably, the defendant can argue that his actions were not illegal under the circumstances, such as due to self-defense. Hence, "[n]o crime occurred at all" is a defense theory that can be construed in various ways by advancing justifications and excuses that are recognized as defenses under international law<sup>173</sup> and by the ICC.<sup>174</sup>

Admittedly, this theory is likely to appear completely far-fetched and unreasonable in the overwhelming majority of ICC cases because the Court only addresses offenses such as genocide, crimes against humanity, and war crimes.<sup>175</sup> The magnitude of such crimes frequently results in the accumulation of such damning evidence (mass graves, slews of video-recorded footage, hundreds of eyewitnesses, etc.) that it is often impossible to reasonably argue that no crime at all occurred.<sup>176</sup> Further, there is no question that the alleged conduct was illegal, as one cannot reasonably argue that committing massacres and other atrocities is permitted.

Consequently, one could argue that the victim standing rule is not problematic because the "[n]o crime occurred at all" defense is wholly inapplicable to the type of crimes tackled by the ICC. But this argument would go too far, as certain ICC crimes are amenable to a reasonable use of this defense theory. For example, consider the war crime of attacking civilians. Among other elements, guilt requires the prosecution to prove that the perpetrator directed an attack at a civilian population not taking part in

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173. Antonio Cassese, *Justifications and Excuses in International Criminal Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 951, 951-54 (Antonio Cassese et al. eds., Oxford University Press 2002).

174. The ICC recognizes several justifications and excuses, including mental disease, intoxication, self-defense, duress, mistake of fact, mistake of law, and superior orders. *Id.* at 954 (citing ICC Statute, *supra* note 1, at arts. 31-33). These are not absolute defenses that will necessarily always result in an acquittal and absolve all criminal responsibility.

175. ICC Statute, *supra* note 1, at art. 5.

176. I write "reasonably argue," as it is always possible to argue anything without being reasonable. To this day, there are unreasonable individuals denying that Nazi Germany committed genocide against the Jewish people during World War II despite massive evidence to the contrary.

hostilities.<sup>177</sup> A defendant may therefore contend that he is not guilty because he was acting in self-defense since the civilians were actually involved in the hostilities, such as by serving as rooftop snipers. Under such a theory, the civilians would not be victims. But the victim standing rule would permit the civilians to enter the proceedings, not even as *alleged* victims, but as *actual* victims pursuant to a finding made on less than proof beyond reasonable doubt.<sup>178</sup> The defendant would therefore be disadvantaged in trying to argue that no crime ever happened because he first would have the burden of rebutting the Court's conclusion that these particular civilians were victims.

The sniper example described an incident involving the defendant and the alleged victims, although no crime occurred because the alleged victims were not victims under the circumstances. But one can go further and conceive of other examples where no incident occurred at all and an accusation against the defendant is entirely false. One need only look at the intensity of the hatred in recent conflicts between, for instance, Serbs and Kosovars or Hutus and Tutsis to imagine that elements of these populations would be willing to make a false complaint in order to frame persons whom they view as brutal enemies. To state a few examples, war crimes like unlawful confinement,<sup>179</sup> taking hostages,<sup>180</sup> improperly using a truce flag,<sup>181</sup> or even running medical or scientific experiments<sup>182</sup> are amenable to false complaints by purported victims lying about what happened to them. "No crime occurred at all" would obviously be an appropriate defense in such situations.

Hence, the victim standing rule could violate the ICC's own guarantee to afford each defendant a fair trial insofar as it might: i) infringe on due process of law by enticing judges to make findings on key elements favorable to the prosecution's case based on insufficient evidence and arguments; ii) lower the prosecution's burden of proving each element of a crime beyond reasonable doubt; iii) shift the burden of proof to the defense by effectively relegating it to rebut elements before the prosecution has proved them beyond reasonable doubt; iv) undermine the presumption of innocence by forcing the defendant to disprove elements before the prosecution has proved them beyond reasonable doubt; and v) curtail the ability of an accused to defend himself by making reasonable use of the "reasonable doubt" and the "no crime occurred at all" defense theories.

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177. ICC Statute, *supra* note 1, at art. 8 § 2(b)(i).

178. For further discussion on alleged victims and the presumption of innocence, see John R. W. D. Jones, *Protection of Victims and Witnesses*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1355, 1357 (Antonio Cassese et al. eds., Oxford University Press 2002).

179. ICC Statute, *supra* note 1, at art. 8 § 2(a)(vii).

180. *Id.* at art. 8 § 2(a)(viii), (c)(iii).

181. *Id.* at art. 8 § 2(b)(vii).

182. *Id.* at art. 8 § 2(b)(x).

## V. PROSECUTORS AND JUDGES MAY OPPOSE VICTIM PARTICIPATION

In addition to defendants, prosecutors and judges at the ICC may be tepid about the prospect of victim participation. At the outset, it is important to dispel any notion that the Prosecutor is necessarily the ally of victim litigants. In both the DRC situation and the *Lubanga Dyilo* case, the Prosecutor has vehemently opposed victim participation on several occasions.<sup>183</sup> While the Prosecutor has supported certain victims' applications,<sup>184</sup> it is now clear that a peculiar de facto alliance between the prosecution and defense can materialize against victim litigants.

There are numerous reasons why a prosecutor may be lukewarm about sharing his duties with victims' attorneys. While this would be especially true of prosecutors from common law countries that do not permit victim standing, it may be true of all ICC prosecutors in general.<sup>185</sup> First, a prosecutor and a victims' counsel may not have the same theory of the case, which would lead them to make inconsistent arguments and undermine the prosecutor's ability to secure a conviction. Second, even if they have the same theory, they may disagree over the proper trial strategy, including the wisdom of introducing evidence of debatable probative value, the respective strengths and weaknesses of a particular line of witness questioning, whether it is necessary to call a potentially tricky witness altogether, etc. More specifically, consider the example of a defendant who chooses to testify and is subject to cross

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183. See Situation in the Democratic Republic of Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006); Situation in the Democratic Republic of Congo, ICC-01/04-135, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Mar. 31, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo (June 29, 2006) at 3-4; Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (July 28, 2006) at 3-5; see also Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-589, Formatted and Redacted Version of Prosecution's Observations on the Applications for Participation of Applicants a/0072/06 to a/0080/06 and a/0105/06 (Oct. 19, 2006) at 12.

184. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (July 28, 2006) at 3-5.

185. For additional arguments regarding the Prosecutor and victims' diverging interests, see Jorda & Hemptinne, *supra* note 21, at 1394-1397.

examination by the prosecutor and the victims' lawyer.<sup>186</sup> The most dramatic moment in a criminal trial often occurs when a prosecutor gets this unique opportunity to directly question the defendant. While witnesses can typically explain themselves in a re-direct examination by the opposing counsel, there is great value to the sound cross-examination of a defendant who makes a series of incriminating admissions pursuant to a prosecutor's leading questions. Since what the defendant says can sometimes literally make or break the prosecutor's case, the challenge of conducting a solid cross-examination is particularly high in this circumstance. Naturally, the pressure on the prosecutor will be vastly greater in an ICC case given the monumental stakes of a high-profile prosecution for genocide, crimes against humanity, or war crimes. Accordingly, one can easily imagine an ICC prosecutor sighing in relief upon concluding the successful cross-examination of a defendant, only to be disconcerted a few moments later by the fact that the victims' counsel may recklessly conduct another cross-examination that could allow the defendant to redeem himself. In sum, since prosecutors may feel concerned that victim participation will jeopardize their ability to convict defendants, it is conceivable that they will object to victims questioning witnesses, introducing evidence, or even participating in a trial altogether before sentencing.

The risk that victims and the prosecution will follow diverging strategies is accentuated by victims' apparent lack of a formal right to access evidence gathered by the prosecution and defense.<sup>187</sup> Victims may consequently lack the information necessary to fully understand the theories and strategies of the other parties.<sup>188</sup> Accordingly, even when victims are determined not to hamper the prosecution's strategy, they may inadvertently do so insofar as they will be constrained to operate under this procedural blindfold.<sup>189</sup> Moreover, this could unduly prolong proceedings since victims may ask witnesses for information that would otherwise be readily accessible from the prosecution's files.<sup>190</sup> Wild goose chases could occur if victims pursue lines of questioning that they

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186. We must generally note that cross-examinations are by nature delicate endeavors because a lawyer is trying to extract probative information from a witness who has been called by the adverse party, and is therefore frequently hostile to the cross-examiner. To many attorneys, the motto for cross-examination is to "get in and get out" and avoid a "fishing expedition." A good cross-examination is often relatively brief and highly focused, as the cross-examiner must keep control of the witness and delicately obtain the information from him without opening the door for the witness to explain away his statements. A sloppy cross-examination will be unfocused and allow the witness to justify himself or wander in his testimony by introducing new information that was not elicited on direct examination and that may prove harmful to the cross-examiner's case.

187. Jorda & Hemptinne, *supra* note 21, at 1412.

188. *Id.*

189. *Id.*

190. *Id.*

would know are futile if they had access to the prosecution's evidence. Of course, these problems may be the lesser of two evils, as forcing the prosecution to share all its evidence with victims may not be advisable, especially insofar as it concerns sensitive political or diplomatic questions. Regardless, even if the prosecution were to share access to its evidence with victims, voluntarily or by court order, fairness might require that it share this evidence with the defense as well.<sup>191</sup>

Judges may also have reservations about victim participation. Judges are responsible for ensuring that proceedings run smoothly and according to schedule.<sup>192</sup> Their responsibility is especially difficult in high-profile international prosecutions involving complex legal and factual issues, numerous witnesses, loads of evidence, and a palpable sense of emotion and tension due to the gravity of the accusations, high political stakes, and intense public scrutiny afforded by incessant media coverage. The introduction of victims as represented parties into ICC proceedings will further complicate these matters and render international criminal trials even harder to manage, especially if separate lawyers represent different groups of victims. Thus, judges may try to limit the extent of victim participation.

Victim participation could make ICC judges' jobs more difficult than those of judges at the ICTY and ICTR, where prosecutors are essentially solely responsible for representing and safeguarding victims' interests.<sup>193</sup> Conversely, ICC judges have a great responsibility to protect victim's interests since they must decide the extent of their participation.<sup>194</sup> Moreover, ICC judges are exclusively responsible for dealing with all technical matters relating to assessing victims' reparations.<sup>195</sup> Judge Claude Jorda, who formerly served as Presiding Judge on the ICC Pre-Trial Chamber, has underlined that, by granting judges what may prove to be an intractable duty due to the large scale of ICC crimes and ensuing reparation claims, the Statute's framers took the risk of "complicating the proceedings before the Court and of seriously compromising the[ir] expeditious conduct."<sup>196</sup> For

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191. The defense for Lubanga Dyilo has argued that providing information about victims and their allegations to the prosecution but not the defense violates "the right to equality of arms and to a fair trial." Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 6. While the Pre-Trial Chamber rejected this argument, it has emphasized that the prosecution must disclose exculpatory or favorable evidence to the defense. *See, e.g.*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-517, Decision Concerning the Prosecution Proposed Summary Evidence (Oct. 4, 2006).

192. *See* Jorda & Hemptinne, *supra* note 21, at 1413.

193. *Id.* at 1408.

194. *Id.*

195. *Id.* at 1407.

196. *Id.* at 1414-15; *see also* ICC Rules, *supra* note 14, at 97.

instance, in the first six months after *Lubanga Dyilo* began, the Pre-Trial Chamber has already had to examine dozens of victim applications.<sup>197</sup> This burden will probably grow exponentially as the ICC takes on more and more cases.

Notwithstanding possible opposition from Prosecutors and judges, Article 68 § 3 only restricts victim participation insofar as it is “prejudicial to or inconsistent with the rights of *the accused* and a fair and impartial trial.”<sup>198</sup> Nothing specifically provides for victim participation to be limited when it is inconsistent with the objectives or the strategy of a Prosecutor. Judges may therefore be unreceptive to the objections that prosecutors will have to victim participation. Similarly, judges will have little choice but to permit victim participation even when it hinders their ability to manage proceedings effectively.<sup>199</sup>

Despite the protections that Article 68 § 3 affords to the defense, the accused likely will have to bear the brunt of the troubles associated with victim participation. In addition to the aforementioned due process problems, victim participation will extend proceedings that are already extremely complicated and long, which could potentially violate the accused’s right under Article 67 § 1(c) to a fair trial devoid of undue delay.<sup>200</sup> The defense for *Lubanga Dyilo* has already been confronted with the need to respond to forty-three new requests for victim participation under a rather short deadline. The defense protested that it lacked the time and resources to examine and investigate victims’ applications given its workload in tackling a host of other matters pending trial, which purportedly violated Article 67 § 1(b)’s guarantee of adequate time and facilities for the preparation of the defense.<sup>201</sup> The Chamber took steps towards addressing these concerns by granting deadline extensions<sup>202</sup> and providing the defense with an additional legal assistant.<sup>203</sup>

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197. *See, e.g.*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-463, Decision Authorizing the Filing of Observations on the Applications for Participation in the Proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 (Sept. 22, 2006); Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-494, Decision Authorizing the Filing of Observations on Applications for Participation in the Proceedings a/0072/06 to a/0080/06 and a/0105/06 (Sept. 29, 2006).

198. ICC Statute, *supra* note 1, at art. 68 § 3 (emphasis added).

199. Jorda & Hemptinne, *supra* note 21, at 1411.

200. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 15-16; Stahn et al., *supra* note 58, at 223.

201. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-379, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06 (Sept. 4, 2006) at 15-16.

202. *See, e.g.*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-407, Decision on the Prosecution Deadline of 12 September 2006 and the Defence Deadline of 12 September 2006 (Sept. 7, 2006).

Slowing down cases and increasing resources for the Court, Prosecutor, and defense may be the only way of containing the increased workload associated with victim participation. Of course, slowing cases even further is unlikely to satisfy victim litigants, victims at large, and the general public, who all generally complain about the slow pace of cases at the ICTR and ICTY. But this may be a reasonable price to pay for victim participation. Most importantly, in light of the due process risks associated with participation, the victim standing rule may have to be amended or interpreted in a way that does not infringe on defendants' rights.

#### VI. SUGGESTED AMENDMENT OR INTERPRETATION OF THE VICTIM STANDING RULE

The ICC Statute and Rules may have internal contradictions between victims' and defendants' rights. The challenge lies in reconciling the conflicting rights of defendants and victims by granting victims the most participation possible without violating defendants' rights. There are two possible remedies to this problem: adequately interpreting the victim standing rule or amending it.

An adequate interpretation of the Statute and Rules could focus on Article 68 § 3, which effectively posits that defendants' rights trump victims' rights.<sup>204</sup> Victims do not have absolute participatory rights since they can only get involved in "stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>205</sup> Thus, the question is not whether victims should enter the proceedings. It is *when* they should do so.

The victim standing rule might not violate defendants' rights if the ICC declines alleged victims the right to enter the proceedings until *after* they have been proved to be actual victims beyond reasonable doubt. Bifurcating proceedings could be a step towards resolving this problem, as it would preclude judges from allowing victims to enter proceedings before the prosecution or a victim litigant has established beyond reasonable doubt that: i) a crime occurred; and ii) the alleged victims are the actual victims of this crime. After this first step, the case would then move on to address the second step of whether the defendant is the actual culprit, as well as any other elements.<sup>206</sup> Nevertheless, bifurcating trials might not work in practice. When the prosecution would move for a ruling on these two elements, the defense

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203. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-460, Decision on Defence Request pursuant to Regulation 83 (4) (Sept. 22, 2006) at 3.

204. ICC Statute, *supra* note 1, at art. 68 § 3.

205. *Id.*

206. Note that Judge Jorda of the ICC Pre-Trial Chamber has offered an alternative proposal for bifurcating proceedings. Jorda & Hemptinne, *supra* note 21, at 1414.



may object that the ruling must be delayed until the defense has rested its entire case and made its closing arguments. If a judge overruled the objection and found that the two elements had been met, this could compel the defense to rebut these elements and shift the burden of proof in violation of Article 67 § 1 (i). Notwithstanding these eventual complications, bifurcating proceedings has the potential to remedy or attenuate the aforesaid due process problems.

Support for bifurcating proceedings under this interpretation of the Statute lies in the fact that the ICC's Statute and Rules, contrary to what some commentators have argued,<sup>207</sup> do *not* provide for a utilitarian balancing test measuring the benefits of a victim's participation against its costs in unfairly prejudicing a defendant's trial. The Statute and Rules say nothing of balancing a victim's interests against a defendant's rights. Instead, Article 68 § 3 states that victims are *not* allowed to participate in legal proceedings if this would be "prejudicial to or inconsistent with the rights of the accused."<sup>208</sup> Conversely, a utilitarian balancing test would allow victims to participate when their interest in doing so is deemed to outweigh prejudice to defendants' rights. By implication, a balancing test would permit victim participation even if it violated defendants' rights because the emphasis would not be on the importance of the violation but on whether victims' interest in participating outweighed the violation. Yet, Article 68 § 3 emphasizes that victim participation is impermissible if it would violate defendants' rights, regardless of whether the violation would be relatively minor in comparison to victims' interests in participating.<sup>209</sup>

Certainly, Article 69 § 4 suggests a balancing test by emphasizing that the Court may consider "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial."<sup>210</sup> But this balancing test does not apply to victim participation issues since Article 69 (titled "Evidence") is supplanted by the more specific rule provided under Article 68 (titled "Protection of the victims and witnesses and their participation in the proceedings").<sup>211</sup> Thus, the applicable rule as provided by Article 68 is that victim participation is always impermissible if it would result in *any* unfair prejudice, even if the victims' interests might outweigh the unfair prejudice.

The ICC member states should consider amending the Statute to codify this interpretation. Nonetheless, limiting victim participation to the second phase of the bifurcated procedure may not be politically feasible because this could be seen as going too far in retracting victims' rights. But the member

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207. Mekjian & Varughese, *supra* note 60, at 29-34.

208. ICC Statute, *supra* note 1, at art. 68 § 3; *see also* ICC Rules, *supra* note 14, at 91 § 3.

209. *See* ICC Statute, *supra* note 1, at art. 68 § 3.

210. *Id.* at art. 69. This balancing test is akin to Federal Rule of Evidence 403 in American law. *See* FED. R. EVID. 403.

211. *See* ICC Statute, *supra* note 1, at arts. 68, 69.

states should still consider amending the Statute and Rules to ensure that defendants' rights are duly protected if victims are to participate throughout investigation, pre-trial, trial, and appellate proceedings. Adequate procedures for victim participation are required because the current standards are far too vague, which will give way to extensive judicial discretion. Of course, judicial discretion can certainly be very positive because legislators cannot foresee and codify all issues and situations. In fact, during Rome Statute negotiations, many delegations were preoccupied that victim participation might become unmanageable due to the large number of victims.<sup>212</sup> Instead of developing specific procedures on victim standing, the drafters therefore apparently proceeded to leave the modalities of victim participation to be resolved by judges' discretion.<sup>213</sup> Judges will consequently have the discretion to make many important decisions, and the extent of victim participation will presumably be resolved by the Court's jurisprudence as cases are litigated.

While judicial discretion may prove beneficial in allowing flexible decision-making, the Statute's drafters may have overlooked the risk that the victim standing rule could be construed in ways that are unfairly prejudicial to defendants' rights. Thus, an amendment may be necessary. An appropriate construction of the victim standing rule could be a provision in the vein of:

A judge *must* reject the application of an *alleged* victim if there is not a *reasonable basis* to conclude that this person *could* be *proved* to be an *actual* victim at trial. Allowing an alleged victim to participate in proceedings is not a recognition that the prosecuted crime occurred. The prosecutor or an alleged victim has the burden of proving that the prosecuted crime occurred beyond reasonable doubt. The prosecutor or an alleged victim has the burden of proving that the alleged victim is an actual victim beyond reasonable doubt. An alleged victim will be referred to as a *private accuser* in all court proceedings until proven to be an actual victim beyond reasonable doubt in a final judgment of conviction.<sup>214</sup>

This proposed rule would draw a strict distinction between an alleged victim and an actual victim and create a specific evidentiary standard of reasonableness as the degree of proof for allowing someone to be recognized as an alleged victim. Of course, reasonableness can be an imprecise evidentiary standard because judges may have different conceptions of what is reasonable. Yet, judges could not realistically make meaningful determinations under preponderance of the evidence, clear and convincing evidence, or beyond reasonable doubt standard until a trial had been concluded

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212. Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 1999).

213. *Id.*

214. Emphasis added for demonstrative purposes.

and all evidence and arguments are on the record. This could frustrate the rule's purpose by limiting victim participation until sentencing or reparation proceedings. Reasonableness could be a relatively low level of proof, although it is appropriate for a finding that someone is an *alleged* victim.<sup>215</sup> Findings made under a higher standard would risk lending credence to a pretense that the alleged victim is in reality an actual victim before there is proof beyond reasonable doubt at the end of a trial. This suggestion may comport with the Pre-Trial Chamber's decision in *Lubanga Dyilo*, where the Court set a relatively low burden of proof to authorize victim participation in investigation proceedings with "the grounds to believe" that someone is a victim.<sup>216</sup> But the Chamber did not define the victim litigants as alleged victims, which could lead to the aforesaid due process problems.<sup>217</sup>

Further, an alleged victim could be referred to as a "private accuser" in court. The adjective "private" would separate the person's status from the Prosecutor's public mandate as a civil servant commissioned by the ICC member states. The term "accuser" would reflect the notion that an alleged victim is essentially another accuser in addition to the ICC Prosecutor.<sup>218</sup> Additionally, the degree of proof to establish that a crime occurred and that someone is an actual victim would be evidence beyond reasonable doubt. The proposed rule would allow the burden of proof on these elements to be satisfied by either the Prosecutor or the private accusers.

While these reforms could technically prevent the burden of proof from shifting to the defense, they could also mend problems with the presumption of innocence. The Pre-Trial Chamber was correct in holding that victim participation cannot be an outright violation of the presumption of innocence because this would signify that the Statute and Rules' procedural framework is "an infringement per se" of the presumption.<sup>219</sup> However, even though victim

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215. Several statutory sections already employ a "reasonable basis" standard. See ICC Statute, *supra* note 1, at arts. 15, 18, 53.

216. See Hemptinne & Rindi, *supra* note 67, at 345.

217. See Situation in the Democratic Republic of Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006).

218. One can argue that there is no need for a private accuser, as the prosecution will necessarily try to prove that the alleged victim is a true victim. Even though the goals of prosecutors and private accusers will indeed often be identical, it will not always be the case. A prosecutor may believe that there are victims, although he may not believe that a particular person is a victim. As a private accuser, such a person could make his case independently of the prosecutor's wishes, pursuant to a judge finding that there is a reasonable basis for him to enter the proceedings. The private accuser could also act on his own behalf if he has a strategic disagreement with the prosecutor, or if the latter is more preoccupied with securing the defendant's conviction than with adducing evidence of reparations for victims.

219. Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-489, Decision on Second Defence Motion for Leave to Appeal (Sept. 28, 2006) at 10.

participation may not inherently violate the presumption of innocence, it could severely undermine it insofar as victim litigants are treated as actual victims but not as alleged victims.

Whereas this author's suggested reforms would redefine the status of victims as mere private accusers, they would expand the rights of victims in other respects. As previously noted, in continental Europe, the traditional role for victims in criminal proceedings is as civil claimants.<sup>220</sup> Participation is often restricted to establishing a claim for compensation due to financial or emotional harm, as the responsibility to prove criminal guilt lies with the public prosecutor.<sup>221</sup> However, since reparations are contingent on a defendant's conviction, the ICC should allow private accusers to argue the defendant's guilt in and of itself. If alleged victims are allowed to participate, they should also logically be allowed to try and prove the defendant's guilt. The victim's role would be analogous to that of a private prosecutor, who may operate alongside a public prosecutor at trial in many European countries.

The ICC could benefit from allowing victims to play such a role. European inquisitorial criminal justice systems have taken commendable steps to limit prosecutorial discretion.<sup>222</sup> Allowing alleged victims to prosecute cases may reflect a progressive notion that crime should no longer be perceived as a mere intrusion on public order, nor should the state be solely responsible for seeking redress.<sup>223</sup> Because crimes are hostile acts by individuals against each other, victims should also play an active role in obtaining justice.<sup>224</sup> However, the private prosecutor's role should be adapted to ICC proceedings. While many European countries allow alleged victims to privately prosecute defendants without the involvement of any public prosecutor (although the latter can intervene to dismiss the case), this procedure would not be suitable for the ICC, at least because it would presumably lead a host of alleged victims to bring private prosecutions. The ICC is a relatively small court with a limited number of judges, and it could not endure such a high caseload. So an alleged victim should only be allowed to privately prosecute an individual if the ICC Prosecutor is already handling the case.<sup>225</sup> In any case, granting victims such a right would not be a material difference from the status quo, which already tends to allow victims to

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220. BRIENEN & HOEGEN, *supra* note 26, at 27.

221. *Id.*

222. *Id.* at 15-16.

223. *Id.* at 30-31.

224. *Id.*

225. Even when the ICC prosecutor decides to bring the case, a risk would remain that an unmanageable number of alleged victims would try to enter the proceedings. The risk could be overcome by ensuring that one lawyer act on their behalf. Insofar as conflicts of interests would exist between the alleged victims, separate lawyers could possibly assume their representation.

participate in the proceedings.<sup>226</sup> This reform would just ensure that they have the right to make arguments or introduce evidence supporting the defendant's guilt.

Hence, there are laudable aspects to alleged victims playing an important role in proceedings but only so long as their participation does not undermine defendants' rights. By drawing the line between an alleged victim and an actual victim, the proposed reforms could technically allow alleged victims to participate without violating defendants' rights.

## VII. PREDICTABLE COUNTER-ARGUMENTS TO THE PROPOSED REFORMS

This author's arguments calling for reforms to the ICC Statute and Rules will likely face the three following predictable counterarguments. First, the proposed reforms will grant excessive rights to defendants and thereby create a nearly unattainable bar for convicting persons guilty of genocide, crimes against humanity, and war crimes. This position shall be referred to as the "excessive rights argument." Second, the call for reforms are much a-do about nothing because it is unreasonably far-fetched to posit that the ICC could deprive defendants of a fair trial marked by due process of law, as the ICC exemplifies rigorous international norms and standards on the administration of justice. This is the "much a-do about nothing argument." Third, the reforms are not called for because they will protect defendants at the expense of the victims' fundamental right to participate in the proceedings. This is the "victims' rights argument." These counterarguments are addressed in turn.

### A. *The Excessive Rights Argument*

The excessive rights argument would stress the following points: The proposed reforms are pointless because virtually all defendants are guilty anyway, even if they are not guilty of every technical count. The ICC already grants defendants adequate protections.<sup>227</sup> Giving defendants even stronger rights will create unnecessary hurdles in the work of the ICC Prosecutor and other law enforcement authorities who have worked conscientiously to arrest defendants and bring them to trial. If lofty philosophical principles or misplaced sympathy lead to excessive rights for defendants, the bar for conviction will be raised so high that numerous guilty persons will be acquitted. In the end, impunity will prevail, thereby defeating the ICC's purpose.

Before rebutting this argument, it is necessary to concede that there is truth to the contention that the handful of people who are charged with genocide, crimes against humanity, and war crimes are virtually always found guilty.

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226. ICC Statute, *supra* note 1, at art. 68.

227. *See id.* at arts. 66, 67.

This is evidenced by examining the differences between ordinary prosecutions for common crimes and high-profile international prosecutions for ICC-type crimes.

Ordinary criminal cases typically involve a limited number of perpetrators and victims and often only one defendant and one victim.<sup>228</sup> There is usually some doubt—perhaps reasonable doubt—about the perpetrators' identity. The criminal process therefore largely serves to determine who committed the crime. After a crime is reported, the police investigate the case and eventually arrest a suspect. If prosecutors decide to charge the suspect with a crime, he then becomes a defendant. He subsequently stands trial, during which the trier of fact (judge or jury) determines whether he is guilty as charged in light of the evidence. Accordingly, except in cases where the defendant is convicted pursuant to a plea-bargaining agreement, the criminal trial has an essential fact-finding purpose to determine whether the accused is actually guilty or innocent, and it is often uncertain whether the defendant will be convicted at all.

Conversely, high-profile international prosecutions dealing with genocide, crimes against humanity, and war crimes usually focus on wide scale atrocities that have been committed by numerous perpetrators against hundreds or thousands of victims. The identity of the average perpetrator is difficult to determine, as many random soldiers or civilians have partaken in gratuitous killings, punitive expeditions, mob actions, and other abuses. Yet, there is usually little doubt about the chief culprits' identities, as they are persons who ranked high in the chain of command and either directed or deliberately condoned atrocities. These are the persons who are likely to be targeted by prosecutors, who have insufficient time and resources to investigate and prosecute every crime, especially in light of the high number of overall perpetrators. Because prosecutors in high-profile international criminal cases usually only target a few political or military leaders who are "the worst of the worst," virtually everyone knows that the defendants are going to be found guilty. For instance, in light of the atrocities committed by the Serbian forces during the Wars of Yugoslav Succession, nobody can reasonably argue that then-president, Slobodan Milosevic, and his key commanders were completely innocent of war crimes.<sup>229</sup> Similarly, no reasonable person would argue that

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228. Even the extraordinary case of the serial killer is incomparable to international criminal trials involving hundreds or thousands of victims.

229. This article devotes much attention to the case of the late Slobodan Milosevic. It therefore focuses on the exception and not the norm, as he was only one man out of the 161 individuals indicted at the ICTY. Yet, his case merits close attention because of its important political ramifications, as shall later be demonstrated. Further, use of Milosevic's example must not obviate the reality that crimes were committed by all camps involved in the Wars of Yugoslav Succession. See United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key*

Saddam Hussein and his close aides were fully innocent of gross human rights violations during Hussein's tenure as President of Iraq from 1979 to 2003. There is virtually no doubt that the courts will find these types of defendants guilty. This is especially true in light of the damning evidence against them and the vast number of crimes committed, which allow prosecutors to selectively press charges for those crimes that are particularly likely to result in guilty verdicts. In the end, the courts may not find the defendants guilty on every charge, but the defendants will surely be found guilty of some egregious crimes, especially if the courts are free from corruption or undue influence.

Accordingly, one may argue that in high-profile international criminal cases, the purpose of the criminal process is not to conduct a fact-finding inquiry to *discover* the culprits' identities, as there is no question that the defendants are culpable. This argument should not be misconstrued as contending that the criminal process in high-profile international prosecutions is futile. The fact-finding inquiry remains important as a means of establishing legal proof of guilt, such as by demonstrating exactly *how* the defendant committed the crime or assisted others in its perpetration. It is necessary for international prosecutions to painstakingly follow all the steps of the criminal process. But that does not change the fact that we can correctly expect the overwhelming majority of the defendants to be found guilty.

This argument is supported by an examination of the outcomes of cases tried by the International Criminal Tribunal for the former Yugoslavia (ICTY). Established by the UN Security Council in 1993, the ICTY has tried persons accused of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law during the Wars of Yugoslav Succession.<sup>230</sup> As illustrated in Table 1, a total of 161 persons have been indicted at the ICTY.<sup>231</sup> Out of fifty-six cases completed through appeal so far, only five defendants have been acquitted on all counts.<sup>232</sup> Since three

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*Figures of ICTY Cases*, <http://www.un.org/icty/cases-e/factsheets/procfact-e.htm> (last visited Sept. 2, 2007).

230. United Nations, International Criminal Tribunal for the Former Yugoslavia, *General Information*, <http://www.un.org/icty/cases-e/factsheets/generalinfo-e.htm> (last visited April 13, 2007).

231. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229. Although ICTY prosecutors have only indicted 161 individuals among thousands involved in committing atrocities, some commentators have argued that far fewer persons should have been indicted. Some observers decried the low profile of many indictees and questioned the wisdom of spending millions of dollars to try prison guards at the world's most expensive criminal court. Ana Uzelac, *Hague Prosecutors Rest Their Case*, INSTITUTE FOR WAR AND PEACE REPORTING, Dec. 27, 2004, available at <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/1227rest.htm> (last visited April 13, 2007).

232. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229.

defendants were acquitted on appeal, this signifies that fifty-four out of fifty-six trials resulted in guilty verdicts.<sup>233</sup> Thus, the Trial Chamber has been overwhelmingly likely to find defendants guilty. Appellate review was also prone to deny significant relief to convicted defendants, as only three out of fifty-four trial convictions were vacated on appeal.<sup>234</sup> Of course, many cases are still at the pre-trial stage, and several trials have not yet been concluded. Additionally, there have been twenty-five withdrawn indictments.<sup>235</sup> Yet, precedents suggest very high odds that defendants tried at the ICTY will be convicted.<sup>236</sup>

On the other hand, any contention that the ICTY's high conviction rate demonstrates biases against defendants can be rebutted by the fact that defendants have been vested with significant due process rights.<sup>237</sup> The high conviction rate is not necessarily caused by any biases against defendants. Under Occam's Razor—"All other things being equal, the simplest explanation tends to be the best"—the reason why the conviction rate is so high may simply be that defendants are indeed virtually always guilty. As formerly argued, prosecutors in ICTY cases will focus their time and resources on targeting a relatively small number of perpetrators who bear the greatest criminal responsibility for the widespread abuses committed during the Wars of Yugoslav Succession. The principal reason why few defendants have been acquitted could be that prosecutors carefully investigated cases and declined to pursue suspects who would probably be found not guilty.

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233. *Id.*

234. *Id.*; see also Stephen Castle, *War Crimes Court Reverses Convictions of Bosnians*, THE INDEPENDENT, Oct. 24, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/2410.htm> (last visited April 13, 2007).

235. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229. Withdrawn indictments are analogous to acquittals insofar as the prosecutor withdrew the charges because he determined that the defendant was either innocent or there was insufficient proof of guilt. But if there was no basis for a conviction, the prosecutor should not have indicted the defendant. So a withdrawn indictment is still vastly distinguishable from an acquittal by the court pursuant to a contested trial.

236. This high conviction rate is not extraordinary. For instance, the odds that a defendant will be convicted at trial in the United States are quite high. See Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003, (U.S. Department of Justice 2003) at 2.

237. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 19, 2003) at art. 21.



TABLE 1: KEY FIGURES OF ICTY CASES<sup>238</sup>

ICTY Case Status	Cases
Acquitted at trial	2
Acquitted on appeal	3
Convicted	51
TOTAL CASES COMPLETED THROUGH APPEAL	56
TOTAL CONVICTED PENDING APPEAL	11
Withdrawn indictment before commencement of proceedings	20
Withdrawn indictment after commencement of proceedings	5
TOTAL WITHDRAWN INDICTMENTS	25
Defendant died before commencement of proceedings	7
Defendant died after commencement of proceedings	4
TOTAL DEAD DEFENDANTS	11 <sup>239</sup>
TOTAL DEFENDANTS TRANSFERRED TO NATIONAL COURTS	13
TOTAL DEFENDANTS AT LARGE	4
TOTAL DEFENDANTS IN PRE-TRIAL OR TRIAL PROCEEDINGS	41
TOTAL INDICTMENTS	161

Nevertheless, focusing on the overall conviction rate could obscure subtleties in conviction patterns, as certain defendants have been convicted on some counts but acquitted on others. For instance, Goran Jelusic was convicted of war crimes and crimes against humanity but acquitted of genocide, in spite of his role in the brutalization or murder of an estimated thousands of Bosnian Muslims and Croats at a concentration camp.<sup>240</sup>

Further, the high conviction rate does not reflect the fact that prosecutors have sometimes faced serious challenges to prove a defendant's guilt. For instance, many commentators believe that Milosevic would have been

238. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229.

239. In addition, Milan Babić and Miroslav Deronjić died while serving their sentences. *Id.*

240. Stacy Sullivan, *Milosevic and Genocide: Has the Prosecution Made the Case?*, FOREIGN POLICY IN FOCUS, Feb. 19, 2004, at 2, available at <http://www.irc-online.org/fpif/pdf/gac/0402milosevic.pdf> (last visited April 13, 2007).

acquitted of genocide if his trial had been completed<sup>241</sup> before his death.<sup>242</sup> After the prosecution rested its case in February 25, 2004, Carla Del Ponte, the head prosecutor, admitted that specific intent to commit genocide is hard to prove and stated: “I know that I don’t have the smoking gun in the count of genocide” against Milosevic.<sup>243</sup> Milosevic could still have been convicted of complicity to commit genocide, a lesser offense, as evidence suggested that he knew that genocide was underway and aided and abetted its commission.<sup>244</sup> Milosevic should also have been convicted of crimes against humanity and war crimes.<sup>245</sup> Nevertheless, an acquittal on genocide would have been all over the headlines.

Any shortcomings by prosecutors at the ICTY could be partly attributable to “good lawyering” for defendants, who are generally defended by elite lawyers. Even Milosevic, who had a law degree<sup>246</sup> and acted essentially as his own lawyer, managed to score points in his defense case.<sup>247</sup> He conducted the skillful cross-examination of key witnesses like Mahmut Bakalli, an Albanian politician, who unconvincingly contended that he was unaware of any arms trafficking in Kosovo.<sup>248</sup> Aside from his courtroom defense, an acquittal on genocide for Milosevic could have been the product of more sinister actions he may have undertaken before he was even indicted by the ICTY. As the Yugoslav head of state from 1989 to 2000, Milosevic conceivably could have ensured that any evidence documenting a genocide plan would be destroyed. Although this has not been proven, the possibility of such schemes to destroy evidence in the case of Milosevic and other defendants should permeate the analysis of the ICTY’s verdicts.

Accordingly, in high-profile cases like Milosevic’s, guilt is not easy to establish, especially if the prosecution must prove guilt by command responsibility, which generally requires documentary or testimonial evidence demonstrating the intent for subordinates to commit genocide and other atrocities. Naturally, one may argue that this does not change the gist of the excessive rights argument: the proposed reforms to the victim standing rule are

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241. *Id.*

242. Marlise Simons & Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES, Mar. 12, 2006, at 34.

243. Bruce Wallace, *Prosecution in Milosevic Trial Rests Case Early*, L.A. TIMES, Feb. 26, 2004, at A3.

244. Sullivan, *supra* note 240, at 4.

245. *Id.* at 1.

246. WARREN ZIMMERMAN, *ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS* 20 (2d ed. 1999).

247. See Jon Silverman, *Milosevic Shines as Lawyer*, B.B.C. NEWS, Feb. 19, 2002, available at <http://news.bbc.co.uk/1/hi/world/europe/1830203.stm> (last visited April 13, 2007).

248. *Id.*

pointless because virtually all defendants are guilty anyway, even if they are not guilty of every technical count.

The rationale behind the excessive rights argument is that victim participation is not outcome-changing because virtually all defendants would *still* be convicted of at least one count even if the victims did not participate.<sup>249</sup> But this rationale is flawed. Even at the ICTY, some defendants have been acquitted on all counts.<sup>250</sup> Since we cannot know in advance which defendants will be found innocent, we should not let unfair procedures infect *any* defendant's trial and therefore risk that he would be convicted and imprisoned on an improper basis. Utilitarian considerations should not offset the guarantee of individual rights that the ICC provides to every defendant. The Statute and Rules do not permit a utilitarian balancing test weighing a defendant and a victim's interests against each other. Article 68 § 3 bars *any* victim participation that is "prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial."<sup>251</sup> Even if many genuine victims would benefit from the victim standing rule, the ICC should not risk convicting an innocent person due to the unfair prejudice that the rule could create.

A utilitarian approach would likewise ignore the importance of every count in an indictment. Just because a defendant will surely be convicted of some counts does not mean that the ICC should disregard whether unfair prejudice will lead him to be improperly convicted of other counts for which he is innocent. The excessive rights argument reflects disregard for the rule of law since *all* counts matter, especially when someone is charged with extremely grave deeds like genocide, crimes against humanity, or war crimes. Even if a defendant will inevitably be incarcerated on one count, his conviction on an additional count will generally result in a harsher sentence, thereby violating the defendant's rights if conviction on the additional count was improper.<sup>252</sup>

Respecting the inalienable dignity of an individual entails being mindful of the truth of what he did and did not do. We should not jump to the conclusion that guilt for one crime means guilt for another, as legal rigor precludes such unsubstantiated assumptions. Even though Milosevic undeniably had a lot of blood on his hands, that does not mean he committed genocide, which is perhaps the most horrible crime known to mankind. Whereas some critics like human rights advocate Samantha Power have argued that Milosevic's likely acquittal for genocide would mean that the ICTY has created unattainable

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249. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229.

250. *Id.*

251. ICC Statute, *supra* note 1, at art. 68 § 3.

252. See ICC Statute, *supra* note 1, at art. 78 § 3. Unfair prejudice caused by victim participation may also lead the defendant to receive a harsher sentence on the one count on which he was surely going to be convicted.

standards for conviction,<sup>253</sup> this claim is contradicted by the overwhelming majority of guilty verdicts handed down by the Court.<sup>254</sup> All trials have an important fact-finding purpose, and guilt must be established under the applicable standard of proof if a court is to have legitimacy. But this can only happen if we preserve each defendant's due process safeguards, thereby justifying the proposed reforms to the ICC's victim standing rule.

In spite of all these considerations, the excessive rights argument may serve as the chief basis for opposition to amending the victim standing rule. The provisions enabled by the Rome Statute were the product of zealous negotiations and reluctant compromises conducted over years and years by the representatives of a host of countries separated by different cultures, histories, legal traditions, and geopolitical interests.<sup>255</sup> Reaching the necessary consensus to amend the Court's procedures could be at least as challenging. Thus, the member states may be tepid or hostile to proposals for amending the victim standing rule to provide greater rights to defendants, especially if they feel that the Statute and Rules already sufficiently protect defendants. Hence, the excessive rights argument may amount to a statement about the difficult political feasibility of amending the rule. Yet, even if the benefits of an amendment are unrealizable, an adequate interpretation of the rule would be equally beneficial.

#### B. *The Much A-Do About Nothing Argument*

The much a-do about nothing argument is as follows: It is utterly unlikely that defendants will face unfair prejudice while tried at the ICC, which comports with rigorous international norms and standards on the administration of justice. ICC judges are among the greatest jurists in the world, and they have the experience, knowledge, and professionalism to administer proceedings so as to avoid any unfair prejudice—no matter how unpopular the defendant or how heinous the charged offense may be.<sup>256</sup> The ICC is meant to be a model of justice for the world to follow and will therefore operate under tremendous scrutiny by political leaders, the media, and the general public. For all these reasons, it is unfathomable that any defendant at

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253. Sullivan, *supra* note 240, at 1.

254. United Nations, International Criminal Tribunal for the Former Yugoslavia, *Key Figures of ICTY Cases*, *supra* note 229.

255. Hans Corell, Legal Counsel of the United Nations, Address at Training Course on the Rome Statute of the International Criminal Court, *Evaluating the ICC Regime: The Likely Impact on States and International Law* 4-5 (Dec. 21, 2000), available at [http://untreaty.un.org/ola/media/info\\_from\\_lc/romestatute\\_dec00.pdf](http://untreaty.un.org/ola/media/info_from_lc/romestatute_dec00.pdf) (last visited April 15, 2007).

256. See International Criminal Court, The Judges—Biographical Notes, <http://www.icc-cpi.int/chambers/judges.html> (last visited April 15, 2007).

the ICC will be deprived of his right to a fair trial marked by due process of law.

This is a cogent argument insofar as it posits that the ICC will not deliberately or gratuitously violate defendants' rights. It is undeniable that the Court's Statute and Rules generally guarantee due process and fairness to all defendants, thereby comporting with international norms and standards for criminal trials. It is also true that ICC judges have the savvy to administer proceedings in a just manner. The ICC is indeed a model of justice for the world and is far removed from the unfairness of victor's justice. Nevertheless, there are significant flaws with the much a-do about nothing argument.

First, a court can violate a defendant's rights even if it sincerely desires to administer a fair trial. This is particularly likely to happen when the court must apply laws that are unfairly prejudicial to a defendant. Since judges will have little choice but to apply the victim standing rule, unfair prejudice might occur regardless of their intentions. Thus, even with all the goodwill in the world, the ICC could deprive defendants of their right to a fair trial marked by due process of law.

Second, it is not unfathomable that ICC judges could sometimes fail to be impartial in spite of the Court's mission and intense public scrutiny. Initially, it must be noted that bias against criminal defendants is commonplace. Of course, the general public often thinks that if someone has been arrested for murder, assault, or rape, he is probably not a "choir-boy." By the same token, the general public is inclined to think that if a defendant is one of the few persons facing a high-profile trial for genocide, crimes against humanity, war crimes, and other abuses involving hundreds or thousands of victims, he probably has blood on his hands. Of course, when it comes to the guilt or innocence of a defendant, there are significant differences between the views of the general public and the impartial, sophisticated positions judges are usually able to attain. Yet, judges are human beings too, and their decisions are sometimes affected by biases against defendants. Although quite imponderable, judicial bias may occur when judges have to deal with a defendant who appears utterly unsympathetic. Consider a defendant, who acts in an unruly manner in court, is being tried for extremely heinous crimes, and is perceived as guilty by the vast majority of top political leaders, the media, and the general public. Enter Slobodan Milosevic.

While on trial at the ICTY, Milosevic acted as a grand provocateur with his uncouth demeanor and his frequent questioning of the Court's power to try him. On his first appearance, Milosevic expressly refused to acknowledge the Court's authority and stated that "[his] trial's aim is to produce false justification for the war crimes of NATO committed in Yugoslavia."<sup>257</sup> He

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257. *Milosevic Hearing Transcript*, B.B.C. NEWS, July 3, 2001, available at <http://news.bbc.co.uk/2/hi/europe/1419971.stm> (last visited April 15, 2007).

also described his trial as “an evil and hostile action aimed at justifying the crimes committed against my country.”<sup>258</sup> For instance, he argued that the massacre of over 8,000 Muslim men and boys at Srebrenica in 1995 was a conspiracy conducted by French spies and the Bosnian Muslim government.<sup>259</sup> These allegations caused tremendous uproar, as the conventional idea among Westerners is that Serbs were responsible for the Wars of Yugoslav Succession due to nationalist politics meant to create a “Greater Serbia” under the pretense of self-defense.<sup>260</sup> For instance, Warren Zimmermann, the last American ambassador to Yugoslavia, has criticized Serbs for historically defining themselves as victims of both Western powers and their non-Serb neighbors.<sup>261</sup> Milosevic has indeed stated that his trial is “an attempt to turn the victim into the culprit.”<sup>262</sup> He and his supporters believe that the Serbs’ participation in the wars was mere self-defense against Slovenes, Croats, Muslim fundamentalists, and Kosovar terrorists who were all supported by NATO in their efforts to either oppress Serbs or unlawfully secede from a fraternal federal state of Yugoslavia.<sup>263</sup> At the ICTY, Milosevic argued that NATO “supported a totalitarian chauvinist elite, terrorists, Islamic fundamentalists, neo-Nazis whose objective was an ethnically pure state, that is to say a state without any Serbs.”<sup>264</sup> Milosevic’s contemptuous tirades questioning the Court’s legitimacy and denouncing an anti-Serb conspiracy contributed to several spats between Milosevic and Presiding Judge Richard May.<sup>265</sup>

Milosevic’s trial strategy was criticized for relying on obstructionist methods serving to unduly delay the conclusion of his trial.<sup>266</sup> Milosevic

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258. *Milosevic, Calling Himself Victim, Asks to Be Freed by Court*, ASSOCIATED PRESS, Jan. 30, 2002, available at <http://www.globalpolicy.org/intljustice/tribunals/2002/0131nyt.htm> (last visited April 15, 2007).

259. *Milosevic Says Srebrenica ‘Made Up,’* B.B.C. NEWS, Sept. 27, 2002, available at <http://news.bbc.co.uk/2/hi/europe/2284777.stm> (last visited April 15, 2007).

260. Toby Sterling, *After Delays, Milosevic Opens Defense: Former Yugoslav Leader Shifts Blame for Atrocities*, ASSOCIATED PRESS, Sept. 1, 2004, at A11, available at <http://www.genocidewatch.org/FrmYugoAfterDelaysMilosevicOpensDefense1sept2004.htm> (last visited April 15, 2007).

261. WARREN ZIMMERMAN, *ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA’S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY* 12-14 (1996).

262. *Milosevic, Calling Himself a Victim, Asks to Be Freed by Court*, *supra* note 258.

263. *Milosevic Launches Trial Defense*, B.B.C. NEWS, Aug. 31, 2004, available at <http://news.bbc.co.uk/1/hi/world/europe/3613020.stm> (last visited April 15, 2007).

264. *Id.*

265. Chris Morris, *Sparks Fly at Milosevic Grand Slam*, B.B.C. NEWS, Oct. 5, 2002, available at [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/2301993.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/2301993.stm) (last visited April 15, 2007); *Milosevic Hearing Transcript*, B.B.C. NEWS, *supra* note 263.

266. Marlise Simons, *U.N. Court Faces Fairness Issue at Milosevic Trial*, N.Y. TIMES, Nov. 4, 2005, at A10.

initially moved to call 1,631 witnesses, which was over five times more than the number called by the prosecution.<sup>267</sup> The witness list included former American President Bill Clinton and former British Prime Minister Tony Blair so Milosevic could question them about what he believed was a NATO conspiracy to break up Yugoslavia and harm Serbs.<sup>268</sup> After presenting his first 40 witnesses, Milosevic conceded to call “only” 199 more witnesses, which he described as “the absolute minimum.”<sup>269</sup> This defense strategy precluded him from keeping up with the trial schedule.<sup>270</sup> Even though Milosevic’s trial ended with his death, it began in February 2002 and was the longest international trial in history.<sup>271</sup> Delays were also caused by Milosevic’s poor health, as doctors concluded he needed extended rest periods. This was particularly problematic since Milosevic acted as his own lawyer.<sup>272</sup> His Serbian lawyers only assisted him outside the courtroom, and he obstinately refused to consort with two British lawyers appointed by the Court to defend him.<sup>273</sup>

Milosevic was therefore not in the Court’s good graces. Naturally, these tensions may not have led to judicial bias depriving Milosevic of his right to a fair trial. Even so, a basic point can be drawn from Milosevic’s case. Prosecutions for genocide, crimes against humanity, war crimes, and other gross atrocities involve intense emotions. Of course, emotions do not consist exclusively of outbursts such as Milosevic’s. Emotions can also be more subtly internalized in our psyche. In a criminal trial, emotions often translate into conscious or subconscious feelings of sympathy or antipathy towards a defendant or a victim. Of course, judges have the duty to detach themselves from emotions so that they can rationally decide issues without any bias or unfair prejudice. But it is unrealistic to expect that judges can always be totally impassive to emotion, especially in high-profile international prosecutions characterized by the unspeakable enormity of atrocities wrought on victims, extreme unpopularity of defendants, critical political stakes, and intense media coverage.

Numerous ICC cases will likely be characterized by the same factors that have made Milosevic’s trial so emotional. But ICC cases will also have to handle victim participation, whereas the ICTY does not give victims standing to participate throughout proceedings. Under these circumstances, it is

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267. *Milosevic Files Witness Wish List*, B.B.C. NEWS, Apr. 14, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3623985.stm> (last visited April 15, 2007).

268. *Id.*

269. Simons, *U.N. Court Faces Fairness Issue at Milosevic Trial*, *supra* note 266, at A10.

270. *Id.*

271. *Id.*

272. *Id.*

273. Marlise Simons, *Citing New Medical Report, Milosevic's Lawyers Urge Postponement in War Crimes Trial*, N.Y. TIMES, November 13, 2005, at 22.

difficult to imagine that victim involvement will not exacerbate the inherent emotional nature of the proceedings. Judge Claude Jorda, former ICTY Judge and President, as well as former Presiding Judge in the ICC's Pre-Trial Chamber, and Jérôme de Hemptinne, the ICTY's Legal Officer, have recognized the possibility that ICC judges may be biased against the accused if the judges read the preliminary statements of victims before trial.<sup>274</sup> The victims' presence, and possible emotional behavior, could lead judges to sympathize with them and antagonize defendants. Even if the victims themselves are not present in court, their lawyers will describe the harm they allegedly suffered due to the defendants' actions, which could lead judges to side with the victims, especially since judges could generally consider them to be true victims pursuant to granting their application to enter the proceedings—again before proof beyond reasonable doubt has established that a crime occurred and that they are actual victims. Unless the ICC adopts the panglossian notion that everything will always be for the best in its proceedings; it should consider that the risk of judicial bias, even by well-intentioned and eminently qualified judges, accentuates the need for an adequate procedure to reconcile the conflicting rights of victims and defendants.

### C. *The Victims' Rights Argument*

The victims' rights argument revolves around these points: By seeking to either undercut the victim standing rule or eliminate it altogether, the proposed reforms will improperly protect defendants at the expense of the victims. All victims must be allowed to vindicate their interests by fully participating throughout judicial proceedings. Whereas the ICC already grants adequate rights to defendants,<sup>275</sup> the proposed reforms evince greater concern for the well-being of criminals than for the victims' moral need for justice.

More specifically, Marion Brienen and Ernestine Hoegen, who are victims' rights advocates, contend that treating persons as alleged victims only adds insult to injury since it reflects a lack of respect for victims' suffering.<sup>276</sup> In discussing European criminal justice reform, they argue in favor of the presumption of truth of a person's claim that he is a victim.<sup>277</sup> They further posit that a presumption of truth for a victim does not compromise the defendant's presumption of innocence.<sup>278</sup>

At the outset, this author must emphasize that the reforms proposed in this article do not reflect a lack of preoccupation for victims' need for justice.

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274. Jorda & Hemptinne, *supra* note 21, at 1413.

275. *See* ICC Statute, *supra* note 1, at art. 67.

276. BRIENEN & HOEGEN, *supra* note 26, at 285.

277. *Id.* at 30.

278. *Id.* at 285-86.



Victims should unequivocally have the right to participate in reparation proceedings and in non-judicial forums. However, they should not participate in court proceedings as actual victims until it has, at least, been proven beyond reasonable doubt that a crime occurred and that they are victims. Requiring use of the denomination “alleged victim” or “private accuser” until proof has been made is not a sign of disrespect for the victims’ suffering. Legal terms must always take into account what has been established or not, which is a principle espoused by the ICC Statute and Rules in referring to defendants.<sup>279</sup>

Moreover, no legal system can fully recognize a presumption of truth for both an alleged victim and a defendant because the presumptions are irreconcilable. In most cases, the alleged victim will allege, “the defendant committed a crime against me,” and the defendant will contend, “the victim is not telling the truth.” The law cannot presume that such mutually-exclusive claims are both true. The presumption of innocence not only presumes that the defendant is not the culprit; it also presumes that elements of a crime are not proved until they are actually proved beyond reasonable doubt.<sup>280</sup> Again, two of these elements are that: 1) a crime occurred; and 2) there are victims.

Part of the problem behind Brienens and Hoegen’s argument is traceable in their writing, which reflects a profound trust in the investigative authorities’ ability to systematically charge the right persons with the right crimes. Their apparent conception that defendants are virtually always guilty precludes them from viewing a criminal trial as a truth-finding inquiry meant to uncover whether an accusation is truthful. Under such a conception, a trial is a mere formality, and it is proper to let purported victims have their day in court even if it is unfairly prejudicial to defendants. After all, if defendants are virtually always guilty, one can argue that the benefits of victim participation outweigh the costs of wrongfully convicting a small handful of innocents. But this reverts to the type of balancing test that is not permitted at the ICC. Article 68 § 3 stresses that victims do not have an absolute right to participate in proceedings and that their rights are trumped by defendants’ rights.<sup>281</sup>

Another problem with the victims’ rights argument is that it often reflects the false assumption that participation in criminal proceedings is essential to victims’ interests. In fact, criminal proceedings are not necessarily the best means of protecting victims’ interests when compared to truth and

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279. The Statute and Rules refer to a defendant as “the accused,” see, e.g., ICC Statute, *supra* note 1, at art. 67; instead of terms like “the culprit” or “the perpetrator,” which would indicate a presumption of guilt. In statutory sections relating to appeal or sentencing, the Statute and Rules also appropriately refer to a defendant as “the convicted person” or “the sentenced person.” See, e.g., *id.* at arts. 81, 106.

280. *Id.* at art. 66.

281. *Id.* at art. 68 § 3. Another evident limitation on victims’ rights is that they cannot question a defendant who declines to testify. *Id.* at art. 67 § 1 (g).

reconciliation commissions. Victims' interests generally consist of: 1) obtaining closure and truth about the political affairs behind their victimization; 2) having a forum to speak and be heard; 3) receiving financial compensation for their harm; and 4) seeing that culprits get retribution so long as the punishment is reasonable. Except for the last category, truth and reconciliation commissions may better serve victims than criminal proceedings.

A criminal trial is largely a determination of the truth based on the findings of investigative authorities and a defendant's counter-arguments. A healthy dose of cynicism regarding the capacity of trials to unearth the truth is nonetheless appropriate. After all, the verdict of a criminal case is more a measure of proof than of truth because an acquittal does not mean that a defendant is innocent. It just means that the prosecution was unable to prove guilt. Sometimes the truth will not come out because there is insufficient proof to convict a person who actually was guilty.<sup>282</sup> In light of the threat of imprisonment and a stiff fine, it is not surprising that most guilty defendants adamantly deny all accusations and use every legal tactic to avoid conviction. In addition to putting the accused on the defensive, the prospect of punishment can lead national governments to obstruct the prosecution's efforts to acquire evidence of abuses when a guilty verdict could pave the way for hefty state-paid financial damages. For this reason, ICTY prosecutors have alleged that Belgrade is doing everything it can to ensure that any evidence of genocidal intent is kept secret.<sup>283</sup>

The ICTY's verdicts have had important political repercussions, as they influenced conceptions of who was responsible for the Wars of Yugoslav

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282. The outcome of a case will be an even greater measure of proof than of truth if the defendant manages to shield relevant and reliable incriminating evidence from the eyes of the trier of fact pursuant to an exclusionary rule. The U.S. Supreme Court has held that suppressing evidence is the only means of deterring law enforcement authorities from violating defendants' rights while seeking to amass proof of guilt. *See generally* *Mapp v. Ohio*, 367 U.S. 643 (1961). While statistics suggest that only a small proportion of prosecutions are dropped due to suppression problems, the exclusionary rule is controversial partly because it obviates the truth-finding function of trials in favor of systemic deterrence of police overreaching. *See generally* JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 465-510 (2d ed. 2003). However, the ICC is unlikely to regularly confront these issues since it has narrower exclusionary procedures than American courts. For instance, the ICC does not require that police provide suspects with self-incrimination warnings before custodial interrogations ("You have the right to remain silent, etc."), although the failure to give such warnings often results in the suppression of an incriminating statement by a suspect under American law. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus, the ICC may have a greater truth-finding ability than American courts. Yet, the ICC's ability to uncover the truth may be hindered by another type of problem: the systematic destruction of evidence documenting conspiracies to commit genocide or other wide-scale atrocities.

283. Sullivan, *supra* note 240, at 3.

Succession and the ensuing atrocities, and whether responsible parties would be held accountable. Some commentators argued that an acquittal on the genocide charge for Milosevic would have had serious implications for future attempts to prosecute genocide and to deter its occurrence.<sup>284</sup> It would also have consternated victims and provided ammunition for those denying that genocide was committed.<sup>285</sup> On the other hand, Milosevic's conviction on the genocide charge would have entered history books as "proof" that his regime was criminal, which would have helped some victims turn the page and eased the resentment of those who considered themselves to be Milosevic's victims.

In order to estimate the dramatic impact that Milosevic's acquittal or conviction on the genocide charge would have had on politics in the Balkans if he had not died before the end of his trial,<sup>286</sup> it is useful to consider the reactions to the decision rendered by the International Court of Justice (ICJ) in a related case where Bosnia sued Serbia and Montenegro for genocide.<sup>287</sup> Whereas the ICJ is not a criminal court and therefore cannot judge and punish individuals, the ICJ is responsible for adjudicating disputes between states.<sup>288</sup> In that capacity, the ICJ was called upon to decide whether the government of Serbia and Montenegro was responsible for committing genocide against the people of the state of Bosnia.<sup>289</sup> This was the first time in history where a state sued another for genocide.<sup>290</sup> The ICJ held that Serbia was *not* directly responsible for the genocide of nearly 8,000 Bosnian Muslims in 1995, although it noted that Serbia "could and should" have prevented the killings as the Genocide Convention requires, since the genocide was committed by Bosnian Serb troops that had close links to the Serb government.<sup>291</sup> "A minority of four judges found Serbia guilty of complicity in the genocide."<sup>292</sup> The outcome significantly favored Serbia, which was absolved of having to pay substantial financial reparations that Bosnia had demanded.<sup>293</sup> Serbia will nonetheless endure the stigma of being, at least in some measure, associated with genocide.<sup>294</sup> Serbia had contended that it did not control events in Bosnia

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284. *Id.* at 1.

285. *Id.*

286. Simons & Smale, *supra* note 242.

287. Sullivan, *supra* note 240, at 3; Marlise Simons, *Court Still Weighing Genocide Case From Milosevic Era*, N.Y. TIMES, June 18, 2006, at A6.

288. See International Court of Justice, How the Court Works, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Aug. 27, 2007).

289. Marlise Simons, *Mixed Ruling on Genocide Still Puts Pressure on Serbia*, N.Y. TIMES, Mar. 6, 2007, at A10.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

and that a verdict for Bosnia would have further complicated reconciliation between the neighbors,<sup>295</sup> although there is no reason to believe that the ICJ's ruling in favor of Serbia will in any way facilitate reconciliation. Indeed, Bosnian Muslims angrily dismissed the ICJ's ruling as a disgrace,<sup>296</sup> as Bosnia had insisted that the ICJ's recognition of Serbia's responsibility for genocide was more important than reparations.<sup>297</sup>

For better or worse, the ICTY and ICJ's verdicts will likely influence politics for years to come in the historically unstable and war-prone Balkans. Notably, certain international law experts described the ICJ's decision as a tactful political compromise.<sup>298</sup> Bosnians will be especially resentful insofar as they believe that such a political compromise led the ICJ to rule in favor of Serbia in the genocide case.<sup>299</sup> In turn, the ICC's verdicts will also probably have a significant influence over political affairs in conflict-prone societies. Under these circumstances, the acquittal of guilty defendants due to their resistance or to state obstruction would obviously frustrate victims' attempts to expose the truth about their suffering and to have the culprits' officially recognized, which could also lead victims to accuse the ICC of making improper political compromises.

Victims may also become frustrated with the trial process. To many, justice delayed is justice denied, especially if the verdict is anything less than a finding of guilt on all counts. But proceedings in ICTR and ICTY cases have often dragged on for months or years.<sup>300</sup> Victim participation could easily make proceedings even longer at the ICC. Victim litigants or victims at large will be annoyed with the wait, especially since their need for closure might not be satisfied until cases' outcomes are finite through appeal. These problems will be compounded by the ICC's location in The Hague, which will inevitably appear remote to many victims in distant countries. The U.N. special tribunals for the former Yugoslavia and for Rwanda are based in The Hague and in Arusha, Tanzania, many miles away from the scene of the crimes they are

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295. Simons, *Court Still Weighing Genocide Case From Milosevic Era*, *supra* note 287.

296. Simons, *Mixed Ruling on Genocide Still Puts Pressure on Serbia*, *supra* note 289.

297. Simons, *Court Still Weighing Genocide Case From Milosevic Era*, *supra* note 287.

298. Simons, *Mixed Ruling on Genocide Still Puts Pressure on Serbia*, *supra* note 289. The ICJ largely based its ruling on documents that Serbia provided to the court only after Serbia had redacted substantial passages that may well have established its direct responsibility for genocide. But the court never pressed Serbia to provide the original documents, and rejected a Bosnian request for these documents. Marlise Simons, *Genocide Court Ruled For Serbia Without Seeing Full War Archive*, N.Y. TIMES, Apr. 9, 2007, at A1.

299. *Id.*

300. United Nations, International Criminal Tribunal for Rwanda, Status of Cases, <http://www.ictt.org> (last visited Sept. 13, 2007); United Nations, International Criminal Tribunal for the Former Yugoslavia, Indictments and Proceedings, <http://www.un.org/icty/cases-e/indictments-e.htm> (last visited Sept. 13, 2007).

judging.<sup>301</sup> “[B]ecause the sessions are often tedious and rarely broadcast back home, survivors, bystanders, and fellow perpetrators pay almost no attention. (Contrast this with the Israelis glued to their radios during the 1961 trial of Adolf Eichmann in Jerusalem.)”<sup>302</sup>

Criminal trials may consequently be unable to satisfy victims’ need for truth and justice. Nevertheless, criminal trials, with all their underlying due process guarantees, are the best means of finding the truth when the truth may result in the accused being imprisoned or otherwise punished. However, in cases where the international community is willing to sacrifice the possibility of punishing the accused in exchange for greater truth, the international community should consider foregoing criminal prosecutions in favor of investigation by truth and reconciliation commissions. While the latter are typically established by national governments, the United Nations has also played a role in sponsoring commissions, such as in El Salvador.<sup>303</sup> “[E]merging principles of international law have recognized a right of victims and their families to be apprised of the truth concerning human rights abuses and a corresponding duty upon States to investigate and disseminate the truth.”<sup>304</sup> This is particularly important to help provide closure to the victims of abuses and facilitate transition into a stable post-conflict democracy. For instance, a truth and reconciliation commission contributed to Chile’s transition from the Pinochet dictatorship into a rather stable and prosperous democracy.<sup>305</sup> In 1991, Chilean president Patricio Aylwin presented the commission’s report on national television, publicly apologized to the victims, and sent a copy of the report to each victimized family with a letter indicating on what page information on the victims could be found.<sup>306</sup>

Moreover, South Africa’s commission has unraveled much information by eliciting admissions from perpetrators who would have denied all accusations if they had faced the threat of criminal punishment. South Africa employed a novel approach by granting its commission the power to issue an amnesty for

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301. United Nations, International Criminal Tribunal for Rwanda: General Information, <http://69.94.11.53/ENGLISH/geninfo/index.htm> (last visited April 15, 2007); United Nations, Fact Sheet on ICTY Proceedings: General Information, <http://www.un.org/icty/cases-e/factsheets/generalinfo-e.htm> (last visited April 15, 2007).

302. Samantha Power, *How to Try Saddam Hussein: Unpunishable*, NEW REPUBLIC, December 29, 2003, available at [http://www.ksg.harvard.edu/news/opeds/2003/power\\_hussein\\_tnr\\_122903.htm](http://www.ksg.harvard.edu/news/opeds/2003/power_hussein_tnr_122903.htm) (last visited April 15, 2007).

303. See, e.g., Reed Brody, *The United Nations and Human Rights in El Salvador’s “Negotiated Revolution,”* 8 HARV. HUM. RTS. J. 153, 153-54 (1995).

304. Jason S. Abrams & Priscilla Hayner, *Documenting, Acknowledging and Publicizing the Truth*, in POST-CONFLICT JUSTICE 283, 283 (Cherif Bassiouni ed., 2002).

305. *Id.* at 290-91.

306. Malcolm Coad, *Chile Report Details 2,000 Deaths*, THE GUARDIAN, March 5, 1991.

individuals who acknowledged politically-motivated offenses. Over 7,500 perpetrators submitted applications for amnesty.<sup>307</sup> The admissions of numerous perpetrators led the commission to find other perpetrators, who in turn applied for amnesty in exchange for their own admissions.<sup>308</sup> In the end, the process enabled the commission to elicit “dramatic admissions about the apartheid regime’s abuses.”<sup>309</sup> The international community has lauded the commission’s approach, although some South Africans felt that it enabled abusers to have impunity. Insofar as the amnesty program was successful, it was only so because the South African government was able to use the threat of prosecution to encourage perpetrators to apply for amnesty and reveal their wrongdoing.<sup>310</sup>

Truth commissions can therefore effectively discover the truth about a pattern of gross human rights abuses. Of course, the complete truth will not always come out. Some offenders will be acquitted in criminal court, and others will never admit to wrongdoing even if they are not prosecuted. But there is a greater risk that the truth will not be uncovered when criminal prosecutions are chosen instead of truth and reconciliation commissions.<sup>311</sup> That is the price to pay if the international community seeks to punish someone.

In addition to better serving victims’ need for truth and closure, commissions will provide a greater opportunity for victims to speak and be heard than ICC proceedings. In a criminal trial, victims can only speak as witnesses, but judges will only allow a limited number of victims to testify about the harm the defendant caused them due to the requirement of a speedy trial and the prohibition on cumulative evidence. Testifying victims will additionally have to answer rather narrow questions related to specific legal issues, instead of being able to vent all their thoughts and emotions about their suffering. Conversely, commission hearings will allow numerous victims to

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307. Abrams & Hayner, *supra* note 311, at 304.

308. *Id.*

309. *Id.*

310. *Id.* The successes of the amnesty program have been mitigated by the South African government’s unwillingness to prosecute persons who failed to apply for amnesty or fully cooperate with the commission. Paul Van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE 745, 745 (Cherif Bassiouni ed., 2002).

311. It must nonetheless be underlined that the effectiveness of past truth commissions has sometimes been limited by their status as non-permanent bodies. They are difficult and time-consuming to assemble, and often do not have sufficient resources to investigate all abuses. Abrams & Hayner, *supra* note 304, at 286-88. Accordingly, it is worth exploring the idea of a permanent United Nations Truth and Reconciliation Commission with adequate staffing and resources to tackle the numerous conflicts persisting in the world. The commission could even work in unison with the ICC. If an accused person refused to comply with the commission’s requests for truth, he could then be prosecuted at the ICC.

appear and fully express their views, thereby serving as a superior forum than the ICC for this purpose.

Additionally, victims might be more likely to receive financial compensation at commissions than at the ICC. Punishment pursuant to a guilty verdict at the ICC will take the form of either an order of financial compensation to be paid by the defendant to the victim and/or imprisonment of the defendant for a term of years.<sup>312</sup> However, due to practical limitations, ordering defendants to pay financial compensation is unlikely to satisfy victims' needs. It has already been explained that the typical ICC case will involve a handful of high-profile defendants and hundreds or even thousands of victims of genocide, war crimes, or crimes against humanity. The sheer contrast between the small number of defendants and the high number of victims signifies that virtually no defendant will have the personal resources to pay meaningful compensation to victims, especially considering the monumental financial damages involved in ICC cases. While victims may be pleased to see defendants lose all their assets as a result of an order of compensation, victims will remain unsatisfied because they will not receive any large sum from defendants. This is partly why the ICC realistically allows damages to be paid through a special Trust Fund alimeted by the member states.<sup>313</sup> But the ICC will not allow financial compensation for offenses for which a defendant is acquitted.<sup>314</sup> Compensation for the victim is therefore contingent on the prosecution being able to prove beyond reasonable doubt that a particular defendant committed a crime. Whereas victims at the ICC probably will be compensated by the Trust Fund since it can be expected that defendants typically will not be able to pay full damages, victims might be more likely to receive these public funds from a U.N.-sponsored truth commission than from the ICC. Indeed, a commission can formally recognize someone as a victim pursuant to an investigation without having to first establish that a particular individual is guilty of a crime beyond reasonable doubt, which is a high burden of proof. A commission can even compensate a victim if authorities have nobody to prosecute because the perpetrator is unknown or at large.<sup>315</sup>

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312. ICC Statute, *supra* note 1, at art. 77. Note that financial compensation includes the "forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties." *Id.*

313. *Id.* at arts. 75, 79; *see also* ICC Rules, *supra* note 14, at 173-75; ICC Regulations, *supra* note 10, at 88, 117.

314. ICC Statute, *supra* note 1, at art. 75 (referring to reparations "against a convicted person").

315. Judge Jorda has supported the creation of an independent commission to ensure that victims actually receive compensation from the ICC Trust Fund when there is *prima facie* evidence of harm, including when the accused are not arrested or the convicted are insolvent. Jorda & Hemptinne, *supra* note 21, at 1415.

Hence, a commission might better satisfy victims' need for obtaining truth, being heard, and receiving financial compensation than the ICC might be able to. Advocates of victim participation in ICC proceedings may therefore have promised victims more than what the Court can actually deliver. An ICC prosecution may only provide greater satisfaction to victims insofar as they wish for perpetrators to receive retributive punishment by imprisonment. To many victims, this would understandably constitute a sufficient reason to prefer that a perpetrator be prosecuted despite the risk of acquittal, instead of him receiving amnesty pursuant to a truth and reconciliation process. After all, commissions "cannot directly punish perpetrators, beyond stigmatizing them or recommending non-criminal measures such as removal from positions in the government or armed forces. Such sanctions seem a paltry substitute for trial punishment where a person is personally responsible for atrocities of the highest magnitude."<sup>316</sup> The necessary compromise that commissions have made for finding the truth has often been to forego prosecution altogether.<sup>317</sup> But ICC-type crimes must ordinarily be prosecuted in order to avoid impunity for genocide, crimes against humanity, and war crimes. Whereas the deterrent value of international prosecutions is perhaps imponderable, at least some political and military leaders have realized that they may be brought to justice if they go too far. The last decade has marked a new era in international justice with the creation of the U.N. tribunals for Cambodia, Rwanda, Sierra Leone, and the former Yugoslavia, as well as the ICC. The time may be over when a brutal dictator like Mobutu Sese Seko could just move into a comfortable exile and never be brought to justice.<sup>318</sup>

Beside deterrence, one may feel that prosecuting mass abusers is a moral obligation because it would be insufferable not to exert retribution on individuals responsible for unspeakable atrocities. David Scheffer, who was Ambassador at Large for War Crimes under the Clinton administration from 1997 to 2001, has stated:

Accountability is society's collective judgment about how both to forgive and to punish, in this case for crimes that directly assault humankind as a whole and the very meaning of faith among the world's leading religions. For these crimes, the courtroom remains the great leveler, addressing both the perpetrators and the victims through the revelation of the truth and also through the knowledge that consequences flow from evil actions.<sup>319</sup>

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316. Abrams & Hayner, *supra* note 304, at 292.

317. *Id.* at 287.

318. Howard W. French, *Mobutu Sese Seko, Zairian Ruler, Is Dead in Exile in Morocco* at 66, N.Y. TIMES, Sept. 8, 1997, at A1.

319. David J. Scheffer, *The Tool Box, Past and Present, of Justice and Reconciliation for Atrocities*, 95 AM. J. INT'L L. 970, 977 (2001) (reviewing GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000)).



The necessity of pursuing accountability through criminal prosecutions at the ICC can still be reconciled with the establishment of truth commissions. A commission's purpose is far from synonymous with granting impunity to perpetrators, as even in South Africa, fewer than 10% of the over 7,500 persons who applied for amnesty actually received it.<sup>320</sup> By submitting its comprehensive investigative findings to executive officials, a commission may actually facilitate prosecution, as was the case in Argentina, Chile, South Africa, and Uganda.<sup>321</sup>

In sum, truth and reconciliation commissions can generally far better address victims' needs than the ICC. Further, by focusing narrowly on the importance of victims participating as litigants at the ICC, certain victim rights advocates may have neglected the need to advocate for the creation of truth and reconciliation commissions, and may have overlooked that the ICC and such commissions can coexist and significantly complement each other.

#### VIII. CONCLUSION

The ICC is a long overdue and much-needed international institution that will advance the interests of justice and human rights. Its victim standing rule could nonetheless violate defendants' rights because of procedural problems. The rule is largely based on European criminal procedures, which are vastly different from American criminal procedures. This article's arguments could therefore be misconstrued as evincing the conception that, by barring victim participation, American procedures better protect defendants' rights than European procedures. However, there is little doubt that criminal defendants fare much worse in America than in Europe.

America has by far the highest incarceration rate in the entire world, and a far greater proportion of Americans are incarcerated than Europeans.<sup>322</sup> Life sentences are constitutionally permissible for minor non-violent offenses.<sup>323</sup> Even teenagers commonly receive life sentences, a practice which is virtually nonexistent in any other country.<sup>324</sup> On December 1, 2005, the 1,000<sup>th</sup> person

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320. Van Zyl, *supra* note 310, at 753.

321. *Id.*; Abrams & Hayner, *supra* note 304, at 286-87.

322. *Prison and Beyond: A Stigma that Never Fades*, THE ECONOMIST, Aug. 8, 2002, available at [http://www.economist.com/world/na/displayStory.cfm?story\\_id=1270755](http://www.economist.com/world/na/displayStory.cfm?story_id=1270755) (last visited April 15, 2007).

323. In 1980, the Supreme Court held that Texas' three-strikes law was not cruel and unusual, thereby affirming the life sentence of a defendant who had been convicted of credit card fraud, forgery, and theft. *Rummel v. Estelle*, 445 U.S. 263 (1980). The Court revisited the issue in 2003 and upheld California's three strikes law. The defendant got a fifty-year sentence for shoplifting videotapes worth \$153.54 since he already had convictions for petty theft, burglary, and transportation of marijuana. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

324. An estimated 2,200 persons in America are serving life without parole for crimes committed before turning eighteen. More than 350 of them were fifteen or younger. The only

was executed in America since the Supreme Court reauthorized capital punishment in 1976,<sup>325</sup> although the death penalty has been abolished in law or in practice by more than half of all countries, in conformance with the growing international recognition of the death penalty as a human rights violation.<sup>326</sup> Further, indigent defendants in America are frequently appointed lawyers who have neither the personal motivation nor financial incentives to represent defendants zealously.<sup>327</sup> Systemic racial discrimination in sentencing has gone ignored by legislators and the Supreme Court.<sup>328</sup>

In sum, while America may be a model in other areas, its criminal justice practices are far from exemplary. Whereas this paper may reflect arguments, assumptions, and premises particular to American jurisprudence, it should not be construed as positing that American or common law procedures are necessarily superior to the European procedures that have served as a model for the ICC's victim standing rule. The purpose of this article is not to compare European and American domestic practices. Instead, it is to analyze the ICC victim standing rule, which will apply in the vastly different context of high-profile international prosecutions with critical political implications and a non-negligible emotional dimension. Under these circumstances, victim participation could prove unfairly prejudicial to defendants, especially considering the deficiencies of the Court's Statute and Rules when it comes to concretely defining the nature of victim standing. But yet again, European

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three other countries with juveniles serving life sentences are Israel, South Africa, and Tanzania—they respectively have seven, four, and one prisoner(s) serving such sentences. Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1; see also Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005), available at <http://hrw.org/reports/2005/us1005> (last visited April 15, 2007).

325. Brenda Goodman, *North Carolina Man is 1,000<sup>th</sup> Person Executed Since 1976*, N.Y. TIMES, Dec. 1, 2005, at A17.

326. See, e.g., Amnesty International, Abolitionist and Retentionist Countries, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited April 15, 2007).

327. Even in death penalty cases, the gravest of all cases,

[c]ourt-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense.

McFarland v. Scott, 512 U.S. 1256, 1258 (1994) (Blackmun, J., dissenting) (stressing that the death penalty "cannot be imposed fairly").

328. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that proof of systemic racial discrimination in the administration of the death penalty is irrelevant if the defendant cannot prove racial discrimination in his particular case, which is extremely hard to prove without considering systemic patterns).

countries seem to manage to conciliate the presumption of innocence of the accused and the presumption of truth of the victim.<sup>329</sup>

Moreover, the possibility of bias against defendants at the ICC must be compared to the alternative form of justice. Many suspects who are not tried by the ICC (or another international court) could face summary extrajudicial executions without standing trial. Others could face trials conducted by vindictive national courts offering far fewer due process guarantees and harsher punishments, including oftentimes the death penalty. For instance, the Iraqi Special Tribunal sentenced Saddam Hussein to death after a trial marred by due process deficiencies and political interferences, despite the reasonableness of the guilty verdict *per se*.<sup>330</sup> Conversely, the ICC provides significant due process guarantees to defendants and its harshest punishment is life imprisonment, which will presumably be reserved for the absolutely most outrageous crimes, such as genocide.<sup>331</sup> One may therefore posit that international justice is necessarily “pro-defendant” relative to such alternatives.<sup>332</sup>

In the end, time will tell whether victim participation at the ICC will conflict with the rights of the accused. The Court should nonetheless contemplate reconciling the conflicting rights of victims and defendants. In particular, it is worth considering a redefinition of victim litigants as “alleged victims” in order to avoid lowering the prosecution’s burden of proof and shifting this burden to the defense by compelling it to rebut elements that have not been established beyond reasonable doubt, thereby undermining the presumption of innocence. However, even if the victim standing rule is unchanged and applied in a way that is utterly favorable to alleged victims at the expense of every defendant’s rights to a fair trial marked by due process of law, it must not be forgotten that ICC prosecutions may in certain respects prove less satisfactory for victims than truth and reconciliation commissions.

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329. European civil law systems consider alleged victims as actual victims, even when they enter proceedings before the accused has been proven guilty. *See generally* BRIENEN & HOEGEN, *supra* note 26. Both civil and common law European systems afford the presumption of innocence to the accused. Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim*, in EUROPEAN CRIMINAL PROCEDURES 552-53 (Mireille Delmas-Marty and J. R. Spencer eds., Cambridge University Press 2002). This principle is also recognized by the draft European Constitution, which states: “Everyone who has been charged shall be presumed innocent until proved guilty according to law.” DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE art. II-48, July 18, 2003, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited April 15, 2007).

330. *See, e.g.*, Julia Preston, *Hussein Trial Was Flawed but Reasonably Fair, and Verdict was Justified*, *Legal Experts Say*, N.Y. TIMES, Nov. 6, 2006, at A10; Kirk Semple, *Iraqi Predicts the Hanging of Hussein by Year’s End*, N.Y. TIMES, Nov. 9, 2006, at A18.

331. ICC Statute, *supra* note 1, at art. 77 § 1 (b).

332. Professor Anthony D’Amato, Remarks at the Northwestern University School of Law, *The Dangers of Universal Jurisdiction: A Debate* (Mar. 27, 2006).

Victim participation in ICC proceedings will not be a panacea and should not discourage the establishment of truth and reconciliation commissions to address victims' needs and facilitate peaceful democratic transition in post-conflict societies.

