

# NEITHER VICTIMS NOR EXECUTIONERS: THE DILEMMA OF VICTIM PARTICIPATION AND THE DEFENDANT’S RIGHT TO A FAIR TRIAL AT THE INTERNATIONAL CRIMINAL COURT

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I.	INTRODUCTION.....	489
II.	THE ICC’S HYBRID LEGAL SYSTEM AND VICTIM PARTICIPATION.....	490
III.	THE IMPACT OF VICTIM PARTICIPATION UPON A DEFENDANT’S RIGHT TO A FAIR TRIAL .....	491
	A. <i>Erosion of the Presumption of Innocence</i> .....	492
	B. <i>Lack of Notice to Defendant of the Charges</i> .....	493
	C. <i>Delays in the Proceedings</i> .....	495
IV.	CONCLUSION .....	496

## I. INTRODUCTION

My talk today analyzes victims’ participation from the defendant’s perspective and its impact upon the right to a fair trial at the International Criminal Court (ICC).<sup>1</sup> In response to criticisms from civilians in the conflict zones and non-governmental organizations that the *ad hoc* international tribunals for Rwanda and the former Yugoslavia silenced the victims’ voices by excluding them from the trials and appeals, the ICC has elevated victims’ concerns and prioritized restorative justice.<sup>2</sup> Victim involvement at the guilt phase places too great a strain upon this fledgling institution and jeopardizes both the defendant’s right to a fair trial and the ICC’s legitimacy. The current jurisprudence of the court reflects the enhanced status of victims.<sup>3</sup> However, the decisions to date on victim participation and the parameters of that participation have gone far beyond

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1. Hereinafter ICC.

2. The Preamble to the Rome Statute states: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

3. A review of the court’s docket for any of the cases or investigations reveals that the majority of the submissions and rulings (pretrial, trial, and appeals) are victim-related.

what was envisioned by the drafters of the Statute.<sup>4</sup> It is my assertion that victim participation should be radically curtailed during the guilt phase to a very limited role similar to an *amicus curiae*. Victim participation could play an appropriate and constructive role during post-conviction reparations proceedings.<sup>5</sup>

There are three critical problems related to victim participation as it impacts the rights of the accused:

- a) The presumption of innocence is eroded;
- b) Defendant lacks proper notice of charges;
- c) The proceedings are delayed.

## II. THE ICC'S HYBRID LEGAL SYSTEM AND VICTIM PARTICIPATION

Victim participation in criminal proceedings is more familiar to countries that have inquisitorial legal traditions—where a civil complainant appears during the criminal proceedings to claim damages from the accused. This is not the case in common law countries. In common law systems, a victim may bring a case as plaintiff in a separate civil lawsuit filed by the victims against a perpetrator. The ICC, however, is a hybrid legal system that was established by a diplomatic conference of states' delegations and non governmental organizations (NGOs) which negotiated the substance of the statute.<sup>6</sup> The political compromises made by the

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4. This position was supported by Judge Philippe Kirsch of Canada. Judge Kirsch practiced in the hybrid jurisdiction of Quebec for much of his career. In his dissent from the court's decision permitting the leading of evidence by the victims, Judge Kirsch observed:

My reading of the various provisions of the Statute and the Rules referred to above leads me to the conclusion that it was not the intention of the drafters that victims should lead evidence on guilt or innocence. In addition, determining that it is the parties that lead evidence on guilt or innocence, and not the victims, is consistent with the overall desire to ensure that proceedings at the ICC are both fair and expeditious.

Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-OA90A10, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partially dissenting opinion of Judge Philippe Kirsch, ¶ 23 (July 23, 2008).

5. Judge Kirsch noted that the ICC's Rules of Procedure and Evidence gave the victims greater rights of participation in the post-conviction process. Rule 94(1)(g) "explicitly foresees the leading of evidence by Victims on reparations." *Id.* ¶ 22.

6. See generally OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (2d ed. 2008); THE ROME STATUTE FOR AN INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOs, DISCOURSE, AND AGENCY (2008).

governments involved at the time produced an institution which, in the end, does not completely resemble either legal tradition.

In domestic mixed or hybrid jurisdictions,<sup>7</sup> “both the civil law and the common law traditions make valuable contributions to mixed legal systems and mixed jurisdictions, provided that the two traditions are duly respected and kept in equilibrium, so that one does not overshadow and obliterate the other.”<sup>8</sup> This balance does not exist at the ICC. The ICC is more adversarial than inquisitorial in its structure. The ICC prosecutor presents his case to the court as an adversary; we do not have a recognizable civil law system at the ICC where an investigating magistrate collects and presents evidence in a more complete format in an attempt to find the truth. Instead, the parties litigate the inclusion and exclusion of evidence before the court. In addition, the prosecutor has the burden of proving the defendant guilty beyond a reasonable doubt. Overall, the ICC resembles a common law court with additional features from the civil law. John Jackson noted that the ICC’s hybrid system results in a “skewed procedure.”<sup>9</sup>

### III. THE IMPACT OF VICTIM PARTICIPATION UPON A DEFENDANT’S RIGHT TO A FAIR TRIAL

The fact that the ICC is of neither major legal tradition makes it *sui generis* as a criminal tribunal. The safeguards present in either civil or common law criminal courts evolved over many centuries. By picking and choosing from both systems, the creators of the ICC apparently did not take into account or made political compromises that mean the accused is not afforded the institutional protections he or she would receive in a national court of either of the major legal systems of the civil and common law. Three problems worth exploring here are:

- a) The presumption of innocence is eroded;
- b) A defendant lacks proper notice of charges against him or her;
- c) The proceedings are delayed from initial investigation of possible war crimes through the final presentation of evidence by the prosecutor at trial.

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7. E.g., Cyprus, Quebec, Israel, Louisiana, and South Africa.

8. William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 681 (2000).

9. John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy*, 7 J. INT’L CRIM. JUST. 17, 34 (2009).

*A. Erosion of the Presumption of Innocence*

In the *Thomas Lubanga Dyilo*<sup>10</sup> case from the Democratic Republic of the Congo, two victim participation decisions from 2008 highlight this point. The first pertains to possible pretrial release of the defendant while the second addresses the stay of proceedings due to the prosecutor withholding potentially exculpatory evidence from the defense. Regarding the release of the defendant, the dissenting opinion of Judge Georghios M. Pikiis of Cyprus is instructive as to the proper role of victims in the criminal process. He concluded that victims are not legitimate participants in proceedings relating to the course of the judicial process.<sup>11</sup> Judge Pikiis wrote:

The framework of the criminal trial is defined in the first place by the presumption of innocence. This presumption can be refuted within the context of a fair trial. In the outcome of a fair trial, or in the outcome of a case in which a fair trial cannot be held, victims have no interest distinct from the public interest that the law should take its course.<sup>12</sup>

By contrast, the victims' submissions regarding Mr. Lubanga's possible release contended that "the accused's Defence [counsel] . . . should also seek to gather its own exculpatory material to secure its client's release from detention . . . and effectively contribute to the establishment of the truth through a fair trial, to which it is also expected to contribute."<sup>13</sup> This position rejects the presumption of innocence; it is an attempt to shift the burden of proof away from the prosecutor. Also, the victims fail to explain what personal interest is affected by the court releasing the defendant.<sup>14</sup>

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10. Hereinafter *Lubanga*.

11. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-OA12, Decision on the Participation of Victims in the appeal, Dissenting Opinion of Judge Georghios M. Pikiis, ¶ 6 (Aug. 29, 2008).

12. *Id.*

13. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-OA13, Observations of the Legal Representative of Victim a/0105/06 Regarding the Release of Thomas Lubanga Dyilo, ¶ 16 (Aug. 12, 2008).

14. The Rome Statute permits victim participation only under the following circumstances:

Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rome Statute, *supra* note 2, art. 68(3).

The second example of the erosion of the presumption of innocence was highlighted by the victims' observations regarding the court-ordered stay of proceedings because the prosecutor refused to disclose exculpatory evidence to the defense.<sup>15</sup> The victims, through their legal representatives, used this opportunity to request access to the prosecutor's complete file.<sup>16</sup> Then they argued that the "Defence's right to obtain disclosure of any exculpatory evidence in the Prosecutor's possession is not an absolute right, and may conflict with other rights which must be protected, in particular, the rights of victims and witnesses as guaranteed by the Statute and other international human rights instruments."<sup>17</sup>

This argument supports a conviction over fairness of the legal proceedings. I argue if the case has stalled, then it must be abandoned. Initially the court came to this conclusion.<sup>18</sup> The judges held that society, not just the victims, are the beneficiary of the ICC's proceedings. However, the victims' representatives challenged the court's position in a way that disregarded the rule of law.<sup>19</sup> Ultimately, a fair trial ensures the court's legitimacy over accusations to the contrary.

#### *B. Lack of Notice to Defendant of the Charges*

Second, the lack of notice to the defendant prevents him from fairly and adequately responding to the charges. Twice in the *Lubanga* case the victims' lawyers succeeded in changing or adding charges against the

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15. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Victims' Observations on the Prosecutor's Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings (Aug. 12, 2008).

16. *Id.* ¶ 2.

17. *Id.* ¶ 3.

18. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (June 13, 2008).

19. The victims' lawyers do not have the same ethical duties as the defense and prosecution. During the *Lubanga* litigation, victims' representatives contended that trial chamber's position was too absolute:

The principle of fair trial does not exclude the possibility that protection of victims and witnesses may argue against the disclosure of some material, exculpatory though it may be, to the Defence, although the Prosecution must play the game by the rules, especially by endeavouring to avoid such a situation and by admitting the existence of the exculpatory information that it finds in documents it is not in a position to disclose.

Prosecutor v. Lubanga Dyilo, ICC - 01/04 - 01/06, Victims' Observations on the Prosecutor's Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings (Aug. 12, 2008), ¶16 (June 13, 2009).

accused. First, the prosecutor petitioned to reduce the charges in order to ease his burden of proof.<sup>20</sup> Victims' counsel intervened and opposed the motion; then, the victims' legal representatives successfully petitioned the court to change the characterization of the conflict from an internal to an international conflict even though the prosecutor did not allege it or perhaps did not believe he could prove it at trial.<sup>21</sup>

On a second occasion, victims requested that the ICC expand the charges against the defendant at the conclusion of the prosecutor's case. In June 2009, the victims' representatives asked the trial chamber to add charges.<sup>22</sup> When the trial commenced, Lubanga was charged with recruiting, enlisting, and conscripting child soldiers.<sup>23</sup> However, lawyers for the victims contended that expansion of the charges was needed because many trial witnesses testified to seeing or had personally experienced rape by commanders at the training camps of Mr. Lubanga's militia.<sup>24</sup> This request was not made by the prosecutor.

The majority of the trial chamber ruled on July 14, 2009 that it was permissible to add new charges based on trial testimony.<sup>25</sup> These charges now include allegations of sexual slavery and inhuman treatment.<sup>26</sup> However, Judge Adrian Fulford, the presiding judge, dissented.<sup>27</sup> In his opinion, the victims' representatives sought to add five new charges rather

20. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Public Document with *Ex Parte*, Confidential and Public Annexes Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3) (Aug. 28, 2006).

21. Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 809 (2008).

22. Rachel Irwin, *Lubanga Trial Transformed by Victims*, INST. FOR WAR & PEACE REP., Sept. 4, 2009, <http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/48120-lubanga-trial-transformed-by-victims.html> (last visited Mar. 8, 2010).

23. *Id.*

24. *Id.*

25. *Id.*

26. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, (July 14, 2009). Trial Chamber I comprised Judges Adrian Fulford, Presiding Judge (United Kingdom), Elizabeth Odio Benito (Costa Rica), and René Blattmann (Bolivia).

27. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," (July 17, 2009); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision issuing a corrigendum to the "Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' of 17 July 2009" (July 21, 2009).

than just request a modification.<sup>28</sup> Currently, a three-month suspension of the trial has been ordered pending the Appeal Chamber's ruling on the victims' request.<sup>29</sup>

According to Kevin Heller at Melbourne Law School, "The [Lubanga] trial has been undeniably altered by the influence of the victims."<sup>30</sup> Indeed, Heller found the addition of new charges at the request of the victims troubling because it would set a dangerous precedent. He asked:

When would a defendant ever be safe, if at any point during a trial . . . the chamber can just re-characterise the facts to add new charges? You can never be certain that your defence is adequate or adequately tailored to the charges, because you'll never know what the charges are.<sup>31</sup>

### C. Delays in the Proceedings

A criminal defendant has a right to trial without delay. In the *Lubanga* case, victim participation has occurred at all stages of proceedings—even in interlocutory appeals regarding his interim release. At the ICC, a victim may only express views and concerns "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>32</sup> As one commentator has observed, "[i]nterlocutory appeals have the potential to compromise both the rights of accused persons and judicial economy by unduly prolonging the proceedings."<sup>33</sup>

It is important to remember the prosecutor and defense team must respond to each victim application to the court. It is a time-consuming process that is inefficient. Delays arise because documents have to be translated and the court must rule on these applications and motions by victims; there is no limit to number of victims that may apply to participate. To date, the majority of the submissions to the ICC and court decisions have been related to victim participation, not the merits of the prosecutor's allegations against the accused.

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28. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (July 17, 2009).

29. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision adjourning the evidence in the case and consideration of Regulation 55 (Oct. 2, 2009).

30. Irwin, *supra* note 22.

31. *Id.*

32. Rome Statute, *supra* note 2, art. 68(3).

33. Jason Manning, *On Power, Participation and Authority: The International Criminal Court's Initial Appellate Jurisprudence*, 38 GEO. J. INT'L L. 803, 819 (2007) (citing WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE, § 27.2(b) (4th ed. 2004)).

## IV. CONCLUSION

Since the ICC is, by its design, a court of last resort, the same should be true for victim participation. Can local or regional courts address these victim-related matters and claims? Can a truth and reconciliation commission or other body be created for the country in question? Also, the ICC's mandate does not allow for court orders condemning states, only individuals can be punished. Peter Maguire, an expert on international justice was quoted in a 2008 *New York Times* article on victim participation in the Cambodian trial proceedings against the former Khmer Rouge leaders, "[h]ow do you measure closure, how do you measure truth, how do you measure reconciliation? These are not empirical categories."<sup>34</sup> Now, the Cambodia chamber is reconsidering the role of victims participating during trial; a restructuring proposal will be ready by January 2010 to address that court's concerns.<sup>35</sup>

Likewise, structural changes need to be made at the ICC. In the future, if subsequent trials take place at the ICC with reduced victim involvement, I predict a reversal of any conviction in *Lubanga* because the participation by the victims has misdirected the court's efforts to fairly and impartially try the defendant. At the least, I assert that Lubanga will receive a significantly reduced sentence on appeal.

For advocates of an international law regime, the ICC is the realization of a long-standing dream. We need to bring this aspiration to full legitimacy by treading cautiously in the area of victim participation.

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34. Seth Mydans, *In Khmer Rouge Trial, Victims Will Not Stand Idly By*, N.Y. TIMES, June 17, 2008, at A6.

35. Thierry Cruvellier, *Civil parties under attack at Khmer Rouge court*, INT'L JUST. TRIB., No. 89, Sept. 17, 2009, at 2.