

## MEMORANDUM

**TO:** Anne Heindel, DC-Cam Legal Advisor  
**FROM:** Charline Yim, Harvard Law School 2011, DC-Cam Legal Associate January 2011  
**DATE:** 1/18/11  
**RE:** Scope of Victim Participation before the ICC and the ECCC

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### INTRODUCTION

This Report provides an overview of the participation rights granted to victim “participants” before the International Criminal Court (“ICC”) and “Civil Parties” before the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). In particular, this Report focuses on the governing rules of each court and how these rules have been interpreted by the respective chambers in practice. Part I provides an overview of victim participation before the ICC. Part II details participation rights granted to Civil Parties before the ECCC. Part III concludes with a summary of specific points of comparison between the two courts and participation rights granted to victims in their respective proceedings. Recent rule changes at the ECCC and trends in the jurisprudence of both courts suggests that, contrary to what has commonly been assumed, victims’ participation rights at the ECCC are not clearly more robust than those at the ICC, and in practice there may be instances where victim participants before the ICC are granted greater substantive participation rights than ECCC Civil Parties.

### I. THE ICC

#### A. Victim Participation Before the ICC

The Rome Statute (“Statute”) of the ICC and the creation of the Court has been viewed “as an unprecedented ratification of victims’ rights.”<sup>1</sup> Under the Statute, individuals and organizations can apply to be victim “participants” in the Court’s proceedings. Victims are recognized in the Statute, the Rules of Procedure and Evidence (“Rules”),<sup>2</sup> and the Regulations of the Court (“Regulations”)<sup>3</sup> as key stakeholders in the international criminal justice process.<sup>4</sup> Consequently, as recognized by the Chamber, “the Statute and the Rules provide victims with a meaningful role in criminal proceedings,” and as such, the Court must interpret provisions to so that “[victims] can have a substantial impact on the proceedings.”<sup>5</sup>

### 1. *Structural Support*

The Statute and Rules of the ICC create and regulate structural mechanisms designated to support victim participation in proceedings before the Court, namely the Victims Witness Unit, the Office of the Public Counsel for Victims, and the Trust Fund. Article 43(6) establishes the Victims and Witness Unit within the Registry,<sup>6</sup> which is tasked with providing, in consultation with the Office of the Prosecutor, protective measures, security arrangements, counseling, and other forms of assistance, as appropriate, to victims and witnesses who appear before the Court.<sup>7</sup> Additionally, the Registrar’s direct responsibilities to the victims include assisting victims in

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<sup>1</sup> J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO J. INT’L L. 363, 369; Rome Statute of the International Criminal Court, opened for signature July 17, 1998, Art. 43(6), 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Statute].

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

<sup>3</sup> Regulations of the Court, *adopted* on 26 May 2004 by the Judges of the Court, as amended on 18 December 2007, ICC-BD/01-02-07 [hereinafter Regulations].

<sup>4</sup> Humanitarian Law Perspectives, Topic 1(b): International Criminal Court: *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, AUSTRALIAN RED CROSS, *citing* Elisabeth Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court, 90 INT’L REVIEW OF THE RED CROSS 409, 410.

<sup>5</sup> Prosecutor v. Bahar Idriss Abu Garda, Decision on victims’ modalities of participation at the Pre-Trial Stage of the Case, Case No. ICC-02/05-02/09 (Pre-Trial Chamber I, October 6, 2009) at ¶ 7. [hereinafter Garda Decision on victims’ modalities at the Pre-Trial Stage].

<sup>6</sup> Art. 43(6). The responsibilities of the Unit are detailed in Rules 16 through 19 of the Rules.

<sup>7</sup> Art. 43(6); Rule 17.

obtaining legal advice, organizing legal representation, and providing the legal representatives of the victims with adequate support and assistance throughout the proceedings.<sup>8</sup> Regulation 81 of establishes the Office of the Public Counsel for Victims.<sup>9</sup> The Office is also responsible for providing support and assistance to the victims' legal representatives as well as appearing before the Chambers in respect to specific issues "where appropriate."<sup>10</sup> Additionally, the Statute establishes a Trust Fund meant to provide financial reparations to victims of crimes within the jurisdiction of the Court as well as the families of such victims.<sup>11</sup>

## 2. Article 68(3)

Article 68 defines the key provisions for victim participation before the Court. As a guiding principle, Article 68(1) states, "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."<sup>12</sup>

Most significantly, Article 68(3) provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.<sup>13</sup>

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<sup>8</sup> Rule 16(1).

<sup>9</sup> Reg. 81.

<sup>10</sup> Reg. 81(4).

<sup>11</sup> Art. 79. *See also* Rule 98. Rules 87 and 88 permit the Chamber to grant "protective measures" for victims and witnesses, which could involve the implementation of special procedures including expunging the name of the victim, witness, or individual at risk from the public records, prohibitions from disclosing such information to third parties, alteration of voice and image during testimony recorded electronically or by other special means, use of a pseudonym, or conducting the proceedings "in camera." Rule 87. Rule 88 provides that by motion from a party, upon request of a witness or a victim, or by its own motion, the Chamber may order special measures meant to facilitate the testimony of a traumatized victim or witness, a child, an elderly person, or a victim of sexual violence, pursuant to Article 68(1) and (2). Rule 88.

<sup>12</sup> Rule 68(1).

<sup>13</sup> Rule 68(3).

While Article 68(3) is clear that once granted the right to participate, the scope of the procedural rights will be determined by the Chamber, the questions of what constitutes a “proceeding” and the appropriate manner of participation during such proceedings has led to significant amounts of controversy and litigation before the Court. Ultimately, Article 68(3) provides the Chamber with broad discretion in its determination of the modalities of victim participation.

Much has been written on when a victim is permitted to participate in a proceeding before the Court. The Trial Chamber has maintained that a victim can only participate actively in a trial “if their intervention would make a relevant contribution to the determination of the truth and does not prejudice the principles of the fairness and impartiality of the proceedings before the Court.”<sup>14</sup> While an assessment of the Court’s analysis on when an individual is given victim participant status is outside the limited scope of this Report, it is important to note that the current jurisprudence of the Appeals Chamber indicates that victim participants who have already had their participant applications granted must reapply at each individual stage of a proceeding, including an interlocutory appeal.<sup>15</sup> This is particularly significant because revoking the participant” status of victims at different stages of the proceedings has detrimental effects to the substantive rights of victims to meaningfully participate in the proceedings of the Court.

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<sup>14</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of Victim Participation at Trial, Case No. ICC-01/04-01/07 (Trial Chamber II, January 22, 2010) at ¶ 65 [hereinafter Katanga Decision on Modalities of Victim Participation at Trial].

<sup>15</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on victims’ participation, Case No. ICC-01/04-01/06 (Trial Chamber I, January 18, 2008) at ¶ 69 [hereinafter Lubanga Decision on victims’ participation]; Prosecutor v. Thomas Lubanga Dyilo, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation,” Case No. ICC-01/04-01/06 OA 9 and OA 10, at (Appeals Chamber, May 16, 2008) ¶ 12; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Participation of Victims in the Appeal against the “Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence,” Case No. ICC-01/05-01/08 OA 4 (Trial Chamber III, August 18, 2010) at ¶ 10; Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Second Application of Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” Case No. ICC-02/05-01/09 OA (Appeals Chamber, January 28, 2010) at ¶ 10.

### 3. Legal Representation

Rule 90 provides guidance regarding the selection or appointment of victims' legal representatives.<sup>16</sup> Once the Court has approved a victim's application, the legal representative of the victim is entitled to attend and participate in the proceedings in accordance with any conditions/limitations set by the Chamber.<sup>17</sup> The Chamber has the explicit power to limit the legal representative to written observations or submissions.<sup>18</sup>

While the victim is "free to choose a legal representative,"<sup>19</sup> the Chamber may, for the purpose of ensuring the effectiveness of the proceedings, "request" that victims or a group of victims choose a common legal representative.<sup>20</sup> If the victims are unable to choose a common legal representative within the time limit set by the Court, the Chamber can request the Registrar to choose the representative for the victims.<sup>21</sup> The Chamber may, after consultation with the Registrar, appoint a legal representative to the victims if "the interests of justice so require."<sup>22</sup> A victim or groups of victims who cannot pay for a common legal representative chosen by the Court can receive assistance from the Registry including financial assistance.<sup>23</sup> Victims can request the Chamber to review the Registrar's choice of common legal representative.<sup>24</sup>

The Chamber and Registry are required to take all reasonable steps necessary to ensure that the selection of the common representative is done in light of the distinct interests of the different victims and should avoid conflicts of interests.<sup>25</sup> Furthermore, when choosing a common legal representative, the Registrar is required to give consideration to the views of the

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<sup>16</sup> Rule 90.

<sup>17</sup> Rule 91(2).

<sup>18</sup> *Id.*

<sup>19</sup> Rule 90(1).

<sup>20</sup> Rule 90(2).

<sup>21</sup> Rule 90(3).

<sup>22</sup> Reg. 80(1).

<sup>23</sup> Rule 90(5).

<sup>24</sup> Reg. 79(3).

<sup>25</sup> Rule 90(4).

victims and respect local traditions.<sup>26</sup> In *Bemba*, the Chamber identified factors that should be taken into account when choosing a common legal representation, namely:

- a) the need to ensure that the participation of victims, through their legal representatives, is as meaningful as possible, as opposed to "purely symbolic";
- b) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity;
- c) the Chamber's obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>27</sup>

The Chamber in *Bemba* also highlighted “the need to respect local traditions” as set out under Regulation 79(2) of the Regulations,<sup>28</sup> and maintained that it was advisable that the common legal representative speak the victims’ language, share their culture, and “know their realities” to make such representation meaningful.<sup>29</sup> Furthermore, the Chamber endorsed the additional criteria that the representative has education and experience in representing a large number of victims and, if possible, familiarity with the *Bemba* case.<sup>30</sup>

The right of the victim to employ a legal representative of their choosing is particularly limited in the context of choosing a common legal representative among a group or where the victim has limited financial resources to pay the representative. In *Lubanga*, the Trial Chamber held that “the determination of when common legal representation is necessary in order to ensure the effectiveness of the proceedings is to be made by the Chamber,”<sup>31</sup> and a legal representative can be imposed rather than agreed upon. While the factors described above may be taken into

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<sup>26</sup> Reg. 79(2).

<sup>27</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Decision on common legal representation of victims for the purposes of trial, Case No. ICC-01/05-01/08 (Trial Chamber III, November 10, 2010) at ¶ 9. [hereinafter Bemba Decision on common legal representation].

<sup>28</sup> *Id.* at ¶ 11.

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

<sup>30</sup> *Id.* at ¶ 12.

<sup>31</sup> Lubanga Decision on victims’ participation, *supra* note 15, at ¶ 123. See also Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, Case No. ICC-01/05-01/08 (Trial Chamber III, June 30, 2010), at ¶ 27. [hereinafter Bemba Decision on 86 applications].

account and Regulation 79(2) obliges the consideration of the views of the victim when choosing a common legal representative, the Trial Chamber in *Bemba* maintained that consideration be given to the views of each victim only to the extent possible.<sup>32</sup> The freedom to choose one's own legal representative is subject to the authority of the Chamber to take all measures necessary if the interests of justice so require.<sup>33</sup> The Chamber interpreted Rule 90(5) to mean that when a victim cannot pay for the common legal representative, the legal representative will be chosen by the Court.<sup>34</sup> Where the Registry provides the financial means of paying the common legal representative, victims have a limited freedom to select their own legal representative.<sup>35</sup>

### **B. The Modalities of Victim Participation before the ICC**

As a result of the minimal guidance provided by the Statute, Rules, and Regulations, the Chambers has broad discretion when defining the rights of victims to participate in proceedings before the Court. Once an application for participation has been granted, the Chamber determines if participation in the manner requested is appropriate and consistent with the Statute, Rules, Regulations, and the circumstances of the case.<sup>36</sup> While victims are meant to exercise a meaningful role in the Court's proceedings,<sup>37</sup> the Court must maintain the balance between the rights of the victim, the rights of the Prosecutor, and the rights of the Accused. The Court has determined, "it [is] more the mode of participation that could be prejudicial than the actual participation as such."<sup>38</sup> Consequently, when defining the modalities of victim participation, "the

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<sup>32</sup> Bemba Decision on common legal representation, *supra* note 27, at ¶ 14.

<sup>33</sup> *Id.* at ¶ 15.

<sup>34</sup> *Id.* at ¶ 16.

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

<sup>36</sup> Lubanga Decision on victims' participation, *supra* note 15, at ¶ 104; Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 52.

<sup>37</sup> Garda Decision on victims' modalities at the Pre-Trial Stage, *supra* note 5, at ¶ 7.

<sup>38</sup> Humanitarian Law Perspectives, Topic 1(b): International Criminal Court: *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, AUSTRALIAN RED CROSS.

Chamber must strike a balance between the rights of the victims and the rights of the person charged by ensuring that such modalities are not prejudicial to the rights of the suspect and the requirements of a fair and impartial trial.”<sup>39</sup>

### *1. The Prosecutor’s Investigation*

Current jurisprudence suggests that victim participants cannot intervene during a prosecutor’s investigation because a prosecutor’s investigation is not a judicial “proceeding” - rather the victim may only present his or her views to the Chamber regarding the Prosecutor’s decision to investigate or prosecute. The Statute and Rules provide few indications regarding the extent to which a victim may participate during a prosecutor’s investigation. Article 19(3) states that victims may submit observations to the Court in proceedings with respect to jurisdiction or admissibility questions raised by the Prosecutor.<sup>40</sup> In regards to the decision by the Prosecutor to investigate or prosecute, Article 15(3) provides that victims may make representations to the Pre-Trial Chamber if the Prosecutor requests authorization for an investigation.<sup>41</sup> The Pre-Trial Chamber may request the Prosecutor to reconsider its decision,<sup>42</sup> or may, on its own initiative, review the decision of the Prosecutor not to proceed if the decision is based on evaluation of whether the prosecution is “in the interests of justice.”<sup>43</sup> The Court is required to notify victims of the Prosecutor’s decision not to initiate an investigation or prosecute pursuant to Rule 92(2),<sup>44</sup> and Rule 93 provides that the Chamber may seek the views of victims or their legal

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<sup>39</sup> Garda Decision on victims’ modalities at the Pre-Trial Stage, *supra* note 5, at ¶ 8.

<sup>40</sup> Art. 19(3).

<sup>41</sup> Art. 15(3). *See* Situation in the Republic of Kenya, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, Situation No. ICC-01/09 (Pre-Trial Chamber II, December 10, 2009) at ¶ 9.

<sup>42</sup> Art. 53(3)(a).

<sup>43</sup> Art. 53(3)(b). *See also* Arts. 53(1)(c) and 53(2)(c).

<sup>44</sup> Rule 92(2).

representatives during this review of the Prosecutor’s decision not to initiate an investigation or prosecute.<sup>45</sup>

The jurisprudence of the Court demonstrates early confusion as to whether or not the Prosecutor’s investigation can be considered a “proceeding” for the purposes of Article 68(3). In the *Situation in the Democratic Republic of Congo*, the Pre-Trial Chamber determined that the investigation stage of a situation is considered a “proceeding,”<sup>46</sup> and that victims can participate in the investigation stage to establish whether a particular situation will arise to formal charges before the court.<sup>47</sup> The Chamber determined that the victims could present their views and concerns as well as file documents pertaining to the current investigation into the DRC to the Chamber.<sup>48</sup> On December 19, 2008, the Appeals Chamber, overruling the decision of the Trial Chamber, determined that an investigation is not a “proceeding” for the purposes of Article 68(3).<sup>49</sup> The initial appraisal of a referral of a situation by a State Party and the authority to investigate is under the exclusive authority of the Prosecutor, and to allow victims the right to participate would contravene the Statute.<sup>50</sup> The Appeals Chamber found that Article 68(3) rights are confined only to proceedings before the Court, and the Pre-Trial Chamber wrongly extended

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<sup>45</sup> Similarly, Rule 93 also provides that the Chamber may seek the views of victims or their representatives on issues related to Rules 109, 125, 128, 136, 139, and 191.

<sup>46</sup> *Situation in the Democratic Republic of Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 5, and VPRS 6 (Pre-Trial Chamber I, January 17, 2006) at ¶ 38, 46, 54.

<sup>47</sup> *Id.* at ¶ 59-60.

<sup>48</sup> *Id.* at ¶ 71-72, 85. Furthermore, the Chamber distinguished between victims of “situations” and victims of “cases.” *Id.* at ¶ 65. The Chamber determined that *situations* “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” On the other hand, *cases* “entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.* Even if a participant is determined under Rule 85 to be a victim in a situation, the Rule 85 analysis would be undertaken again to determine whether the applicant was a “victim” of a case, should one arise. *Id.* at ¶ 66, 68.

<sup>49</sup> *Situation in the Democratic Republic of Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, Situation No. ICC-01/04 OA4 OA5 OA6 (Appeals Chamber, December 19, 2008) at ¶ 45.

<sup>50</sup> *Id.* at ¶ 51, 54.

these rights beyond its limits to include investigations.<sup>51</sup> The Chamber did state that victims are not precluded from participating in judicial proceedings, including proceedings affecting investigations if their personal interests are affected.<sup>52</sup> The position of the Appeals Chamber was confirmed in the *Situation in Darfur*.<sup>53</sup>

## 2. The Confirmation Hearing

Rule 92(3) provides that “in order to allow victims to apply for participation in the proceedings” the Court shall notify victims regarding its decision to hold a confirmation hearing.<sup>54</sup> The Single Judge in *Bemba* confirmed that a confirmation hearing amounts to a particular “[stage] of the proceedings” within the meaning of Article 68(3),<sup>55</sup> and victims may participate in the proceeding if they can demonstrate a personal interest and the exercise of participation is not prejudicial to or inconsistent with the rights of the Accused.<sup>56</sup> The Pre-Trial Chamber in *Garda* found that the personal interests of the victims are affected by the outcome of the pre-trial stage in so far as it is directed at confirming or declining to confirm charges.<sup>57</sup>

While victims are permitted to participate in confirmation hearing, the modalities of participation granted by the Chamber to particular victims depends on whether the victims are

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<sup>51</sup> *Id.* at ¶ 55-56

<sup>52</sup> *Id.* at ¶ 56.

<sup>53</sup> See *Situation in Darfur*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2008 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, Situation No. ICC-02/05 OA OA2 OA3 (Appeals Chamber) which directly cites the 19 December 2008 decision of the Appeals Chamber.

<sup>54</sup> Rule 92(3).

<sup>55</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Third Decision on the Question of Victims’ Participation Requesting Observations from the Parties, Case No. ICC-01/05-01/08 (Pre-Trial Chamber III, November 17, 2008) at ¶ 7.

<sup>56</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Fourth Decision on Victims’ Participation, Case No. ICC-01/05-01/08 (Pre-Trial Chamber III, December 12, 2008) at ¶ 95-96.

<sup>57</sup> *Garda* Decision on victims’ modalities at the Pre-Trial Stage, *supra* note 5, at ¶ 36. See also Prosecutor v. Bahar Idriss Abu Garda, Decision on the Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, Case No. ICC-02/05-02/09 (Pre-Trial Chamber I, March 19, 2010) at ¶ 3. Here the Pre-Trial Chamber determined that the victims could also participate in regards to Prosecutor’s Application for Leave to Appeal the “Decision on the Confirmation of Charges.” *Id.*

anonymous during the hearing or if the identities of the victims are known by the Accused. With the recent decision in *Garda*, the developing jurisprudence suggests that both anonymous and non-anonymous victims can, for example, make opening and closing statements, access public records, and attend public hearings.<sup>58</sup> Yet, in order to gain access to confidential hearings and records, both categories of victims must apply to the Chamber who will grant or deny the application on a case-by-case basis.<sup>59</sup> The central point of departure in the rights granted to the anonymous versus victims whose identities are known occurs in regards to the questioning of witness - anonymous victims will not be granted permission to question and examine witnesses during the confirmation hearing.<sup>60</sup>

In *Lubanga*, the Pre-Trial Chamber provided that the victims participants, all of whom where remaining anonymous, could have access to public documents, participates in public hearings, and make opening and closing statements.<sup>61</sup> The victims legal representatives could request to intervene during the public session of the confirmation hearing, and the Chamber would rule on those requests on a case-by-case basis.<sup>62</sup> In the Pre-Trial Chamber's decision, these anonymous victims were prohibited from submitting evidence or questioning witnesses,<sup>63</sup>

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<sup>58</sup> Prosecutor v. Thomas Lubanga Dyilo, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Case No. ICC-01/04-01/06 (Pre-Trial Chamber I, September 22, 2006) at p. 6 [hereinafter *Lubanga Decision on Arrangements for Participation of Victims*]; Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Case No. ICC-01/04-01/07 (Pre-Trial Chamber I, May 13, 2008) at ¶ 182 [hereinafter *Katanga Decision on Procedural Status of Victims at the Pre-Trial Stage*]; *Garda Decision on victims' modalities at the Pre-Trial Stage*, *supra* note 5, at ¶ 17.

<sup>59</sup> *Garda Decision on victim's modalities at the Pre-Trial Stage*, *supra* note 5, at ¶ 11-13, 15, 20.

<sup>60</sup> *Katanga Decision on Procedural Status of Victims at the Pre-Trial Stage*, *supra* note 58, at ¶ 182; *Lubanga Decision on Arrangements for Participation of Victims*, *supra* note 58, at p. 7; *Garda Decision on victim's modalities at the Pre-Trial Stage*, *supra* note 5, at ¶ 22.

<sup>61</sup> *Lubanga Decision on Arrangements for Participation of Victims*, *supra* note 58, at p. 6. The Chamber retained the authority to make an exception to this principle in the event of exceptional circumstances. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at p. 7.

although in practice, a legal representative was granted the right to pose one question to the sole witness called by the Prosecutor.<sup>64</sup>

On May 13, 2008, the Single Judge in the Pre-Trial Chamber in *Katanga*, citing the principle of prohibiting anonymous accusations, granted separate procedural rights to those victim participants whose identities were disclosed in contrast to those who requested anonymity.<sup>65</sup> Following the decision in *Lubanga*, anonymous victim participants would receive notifications regarding the public documents in the record, could attend public status conferences, make opening and closing statements at the confirmation hearing, and request the right to intervene during the hearing which the Chamber would rule upon on a case-by-case basis.<sup>66</sup> The Single Judge prohibited the anonymous victims from adding any point of fact or evidence or questioning witnesses.<sup>67</sup>

For those victim participants who would not be anonymous, the Single Judge granted the following additional procedural rights: access to all filings and decisions in the record of the case regardless of confidentiality, not including *ex parte* filings;<sup>68</sup> access to the transcripts of hearings in the case regardless of whether they were held in public or in closed session, not including those heard on an *ex parte* basis;<sup>69</sup> access to evidence proposed by the prosecution and defense;<sup>70</sup> access to non-public filings and decisions;<sup>71</sup> the right to make submissions on all issues related to admissibility and probative value of evidence during the confirmation hearing and to examine such evidence;<sup>72</sup> right to examine witnesses at the confirmation hearing;<sup>73</sup> the right to attend all

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<sup>64</sup> *Lubanga* Decision on victims' participation, *supra* note 15, at ¶ 12.

<sup>65</sup> *Katanga* Decision on Procedural Status of Victims at the Pre-Trial Stage, *supra* note 58, at ¶ 180.

<sup>66</sup> *Id.* at ¶ 182.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at ¶ 128-29.

<sup>69</sup> *Id.* at ¶ 130.

<sup>70</sup> *Id.* at ¶ 132.

<sup>71</sup> *Id.* at ¶ 133.

<sup>72</sup> *Id.* at ¶ 134.

public and closed session hearings leading to the confirmation hearing, not including those held on an ex parte basis;<sup>74</sup> the right to participate through oral motions, responses, and submissions in hearings unless excluded by the Statute and Rules;<sup>75</sup> the right to file written motions, responses, and replies where they have been permitted to participate in the proceedings;<sup>76</sup> and the right to make opening and closing statements at the confirmation hearing.<sup>77</sup> The Chamber reserved the right to limit these procedural rights listed at a later date, if necessary.<sup>78</sup>

On October 6, 2009, the Pre-Trial Chamber in *Garda* gave a slightly different interpretation of the rights provided to non-anonymous victim participants and explicitly differentiated between the procedural rights of victims whose identities were known and anonymous victims only in the instance of questioning witnesses. Chamber declared that it would permit the victims “the right to fully participate in the debate held at the confirmation hearing, bearing in mind its limited scope.”<sup>79</sup> For all victims, the Chamber determined the legal representatives could attend all public session leading to the confirmation hearing as well as the public sessions of the confirmation hearing.<sup>80</sup> In regard to confidential hearings and confidential documents, rather than grant non-anonymous victims the right to access such files and hearings and limit anonymous victims to the public record, the Chamber determined it would grant or deny access to both anonymous and non-anonymous victims on a case-by-case basis—thus leaving open the possibility that non-anonymous victims could be authorized after an application to attend ex parte or in camera hearings<sup>81</sup> or have access to confidential filings.<sup>82</sup> All legal

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<sup>73</sup> *Id.* at ¶ 137.

<sup>74</sup> *Id.* at ¶ 140.

<sup>75</sup> *Id.* at ¶ 141.

<sup>76</sup> *Id.* at ¶ 142. *See also* Reg. 24(2).

<sup>77</sup> Katanga Decision on Procedural Status of Victims at the Pre-Trial Stage, *supra* note 58, at ¶ 143.

<sup>78</sup> *Id.* at ¶ 147.

<sup>79</sup> Garda Decision on victim’s modalities at the Pre-Trial Stage, *supra* note 5, at ¶ 7.

<sup>80</sup> *Id.* at ¶ 17.

<sup>81</sup> *Id.* at ¶ 20.

representatives would be able to participate through oral motions, responses, and submissions,<sup>83</sup> make opening and closing statements at the confirmation hearing,<sup>84</sup> and could file written motions, responses, and replies subject to any limitations set by the Chamber and pursuant to Regulation 24.<sup>85</sup>

In regards to the questioning of witnesses, in light of the Prosecution's intention to call three witnesses during the confirmation hearing, the Pre-Trial Chamber held that where the identities of the victims are disclosed, the legal representatives who want to question witnesses called must make an application pursuant to Rule 91(3).<sup>86</sup> Victims who would remain anonymous through the pre-trial stage would, as held in *Lubanga* and *Katanga*, be prohibited from examining witnesses pursuant to the principle prohibiting anonymous accusations.<sup>87</sup>

### 3. *The Trial*

#### a. Hearing

If granted participant status, Rule 91(2) provides the legal representative of the victim with the right to attend and participate in hearings subject to the conditions and limits set by the Chamber on the form and manner of participation,<sup>88</sup> including the Chamber's explicit right to

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<sup>82</sup> *Id.* at ¶ 11-13, 15.

<sup>83</sup> *Id.* at ¶ 18.

<sup>84</sup> *Id.* at ¶ 19.

<sup>85</sup> *Id.* at ¶ 25.

<sup>86</sup> *Id.* at ¶ 23-24.

<sup>87</sup> *Id.* at ¶ 22. The Single Judge in *Bemba* specifically decided against granting differential treatment between victims whose identities were known to the Defense and those for whom anonymity had been granted, but generally granted both groups of victims the participation rights granted to anonymous victims in other cases. Fourth Decision on Victims' Participation, *supra* note 56, at ¶ 99. Thus, he granted all legal representatives the right to attend the public parts of the hearing on the confirmation charges—reserving the right to grant attendance rights for parts in camera or ex parte. *Id.* at ¶ 101. The legal representatives could also present an opening and closing statement during the confirmation hearing, were given access to public documents and evidence, and could make oral submissions and written submissions if deemed appropriate by the Chamber. *Id.* at ¶ 102-103, 106.

<sup>88</sup> Rule 91(2).

limit participation in a hearing to only written submissions.<sup>89</sup> The Trial Chamber has determined that the Chamber can grant the victim the right to participate in closed and *ex parte* hearings depending on the circumstances.<sup>90</sup>

b. Opening and Closing Statements

As provided in Rule 89(1) and granted by a number of decisions, victims may make an opening and closing statement if authorized by the Chamber, which has the right to regulate the circumstances for which such statements will be made.<sup>91</sup>

c. Access to the Case File

In preparation for the trial, the victim participants who have been granted the right to participate or their legal representatives shall have access to the record of the proceedings transmitted by the Pre-Trial Chamber subject to any limitations on confidentiality set by the Chamber.<sup>92</sup> The Trial Chamber in *Lubanga* found that the presumption is that legal representatives have access to public filings only, but allowed the possibility that victims could be given access to confidential filings upon an application, and consideration will be given to the application if the confidential filings are of material relevance to the personal interest of the victims.<sup>93</sup> For the purpose of promoting the effective participation of victims in the trial, the Trial Chamber has the discretion to consider such an application as long as it does not breach

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<sup>89</sup> Rule 91(2); Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶¶ 69-71.

<sup>90</sup> Lubanga Decision on victims' participation, *supra* note 15, at ¶ 113. *See also* Bemba Decision on 86 applications, *supra* note 31, at ¶ 27.

<sup>91</sup> Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 68; Prosecutor v. Thomas Lubanga Dyilo, Decision on the applications by victims to participate in the proceedings, ICC-01/04-01/06 (Trial Chamber I, December 15, 2008) at ¶ 135; Lubanga Decision on victims' participation, *supra* note 15, at ¶ 117; Bemba Decision on 86 applications, *supra* note 31, at ¶ 27.

<sup>92</sup> Rule 131(2); Lubanga Decision on victims' participation, *supra* note 15, at ¶ 105.

<sup>93</sup> Lubanga Decision on victims' participation, *supra* note 15, at ¶¶ 106, 121, 122.

protective measures.<sup>94</sup> The legal representatives' obligation of confidentiality requires that access to the evidence in the case cannot be extended to include their clients.<sup>95</sup>

The Trial Chambers has granted victims' representatives access to confidential materials in practice. The Trial Chamber in *Bemba* determined that in order to facilitate full participation by victims, those who have been granted the right to participate should have access to confidential material in the case, subject to restrictions as a result of protective measures and the security of individuals and organizations.<sup>96</sup> The Trial Chamber in *Katanga* also found that in order to promote effective participation, the legal representatives must be able to consult the confidential decisions and documents in the record, with the exception of documents classified as *ex parte*,<sup>97</sup> and again restricted this right to only the legal representatives and no their clients.<sup>98</sup>

#### d. Questioning Witnesses

Rule 91(3) clearly states that a legal representative may submit an application request to the Chamber to question a witness, including an expert or the Accused.<sup>99</sup> If the application is granted, the Chamber may limit the manner and order in which victims present the questions, and the Chamber may require that that a written submission of the questions to be asked be submitted with the application which will be communicated to the Prosecutor and, if appropriate, the Defense.<sup>100</sup> In making its decision, the Chamber "take[s] into account the stage of the proceedings, the rights of the accused, the interests of the witnesses, the need for a fair, impartial

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<sup>94</sup> *Id.* at ¶ 106, 121, 122.

<sup>95</sup> *Id.* at ¶ 123.

<sup>96</sup> Bemba Decision on 86 applications, *supra* note 31, at ¶ 47.

<sup>97</sup> Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 121.

<sup>98</sup> *Id.* at ¶ 123.

<sup>99</sup> Rule 91(3). *See also* Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 72-73.

<sup>100</sup> Rule 91(3)(a)

and expeditious trial and in order to give effect to article 68, paragraph 3.”<sup>101</sup> The Chamber can determine the order and manner of the questions and production of documents.<sup>102</sup> The Trial Chamber in *Lubanga* determined victims are not restricted to putting forward questions on reparation issues, but will be permitted to pose questions whenever their personal interests are engaged.<sup>103</sup>

e. Dual Victim/Witness Status

If permitted by the Chamber, victim participants can participate both as a “victim participant” and as a “witness” in the same case. The Trial Chamber in *Lubanga* found that the victims of crimes are often able to give direct evidence about the alleged offences, and, as a result, a general ban on victim participant participation as witnesses in the proceedings would be contrary to the aim and purpose of Article 68(3) and the Chamber's obligation to establish the truth.<sup>104</sup> When considering an application by a victim for dual status, the Trial Chamber will consider whether the victim’s participation as a witness might adversely affect the rights of the defence “at a particular stage.”<sup>105</sup>

The Trial Chamber in *Katanga* granted the Legal Representatives of the victims the right to call one or more victims to give to give evidence under oath under the conditions defined by the Trial Chamber.<sup>106</sup> In making its determination, the Trial Chamber noted the decision in *Lubanga*, and the Chamber ultimately authorized three of the victims participating to give

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<sup>101</sup> Rule 91(3)(b).

<sup>102</sup> *Id.*

<sup>103</sup> *Lubanga* Decision on victims’ participation, *supra* note 15, at ¶ 108.

<sup>104</sup> *Id.* at ¶ 133. *See also* Bemba Decision on 86 applications, *supra* note 31, at ¶ 52-54.

<sup>105</sup> *Lubanga* Decision on victims’ participation, *supra* note 15, at ¶ 134.

<sup>106</sup> *Katanga* Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 85-88. *See also* *Lubanga* Decision on victims’ participation, *supra* note 15, at ¶ 134.

evidence under oath.<sup>107</sup> There is nothing in the Statute or the Rules to prohibit this dual status, and nothing in the Rules prevents a victim from giving evidence on behalf of a party.<sup>108</sup> The Chamber found “it would be contrary to the Chamber’s obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims.”<sup>109</sup> If there are potential doubts regarding the reliability of the victim’s testimony, the Chamber may decide not to authorize the victim to testify.<sup>110</sup> Furthermore, the Chamber determined that any victim participants who wish to testify cannot remain anonymous to the Defense.<sup>111</sup>

The Appeals Chamber confirmed the Trial Chamber’s position in *Katanga* and found that the possibility for the victims to testify on matters including the role of the Accused in the crimes charged is not *per se* inconsistent with the rights of the Accused.<sup>112</sup> In order to allow such testimony, the Chamber must ensure on a case-by-case basis whether the testimony (i) affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of truth; and (iv) whether the testimony would be consistent with the rights of the accused, and in particular the right to have adequate time and facilities to prepare his defense and a fair and impartial trial.<sup>113</sup>

## f. Evidence

### i. *Generally*

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<sup>107</sup> *Katanga* Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 88.

<sup>108</sup> *Id.* at ¶ 110.

<sup>109</sup> *Id.* at ¶ 88.

<sup>110</sup> *Id.* at ¶ 91.

<sup>111</sup> *Id.* at ¶ 92-93.

<sup>112</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial,”* Case No. ICC-01/04-01/07 OA 11 (Appeals Chamber, July 16, 2010) at ¶ 114. [hereinafter *Katanga* Judgment on the Appeal Against Decision on Modalities].

<sup>113</sup> *Id.* at ¶ 114.

Perhaps the most controversial and contested form of victim participation has been the right to offer, examine, and challenge evidence. While neither the Statute nor the Rules explicitly grants victims the right to call their own witnesses or tender evidence generally, the Trial and Appeals Chambers have ruled that it is within their discretion to “request” evidence from victim participants pursuant to Article 69(3) which grants the Court the general right to request all evidence necessary for the determination of truth.<sup>114</sup> Reading Article 69(3) in light of the general victim participation provision in Article 68(3), the Chamber has found that once a victim is granted “participant” status and the Chamber determines that the victim has a personal interest in the relevant procedural activity or issue, the legal representative can offer, examine, and challenge evidence. This includes the presentation of documentary evidence, and Rule 68(3) permits the legal representatives to apply to the Chamber to propose the presentation of documentary evidence that would assist the Chamber in the determination of truth pursuant to Article 69(3).<sup>115</sup>

In *Lubanga*, the Trial Chamber was clear that the right to introduce evidence during trials is not limited to parties. Victims participating in proceedings may be permitted to tender and examine evidence if the Chamber believes that it will assist in the determination of the truth—in a sense thus “requesting” that piece of evidence.<sup>116</sup> The Appeals Chamber in *Katanga* confirmed that victims do not have a *right* to present evidence, but rather the Trial Chamber has the authority to request evidence from the legal representative if the requirements of Article 68(3) are satisfied and it has been established that the victim’s personal interests are affected.<sup>117</sup> The Appeals Chamber acknowledged that the determination of what constitutes evidence “necessary

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<sup>114</sup> Art. 69(3); *Lubanga* Decision on victims’ participation, *supra* note 15, at ¶ 108; *Katanga* Judgment on the Appeal Against Decision on Modalities, *supra* note 112, at ¶ 40.

<sup>115</sup> *Katanga* Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 98.

<sup>116</sup> *Lubanga* Decision on victims’ participation, *supra* note 15, at ¶ 108

<sup>117</sup> *Katanga* Judgment on the Appeal Against Decision on Modalities, *supra* note 112, at ¶ 40.

for the determination of the truth” will inevitably be decided by the Trial Chamber on a case-by-case basis.<sup>118</sup>

ii. *Exculpatory and Incriminating Evidence*

The jurisprudence of the Court demonstrates that legal representatives of victims can submit and examine exculpatory and incriminating evidence. On July 11, 2008, the Appeals Chamber in *Lubanga* confirmed the Trial Chamber’s finding that, pursuant to Article 69(3),<sup>119</sup> victims can offer evidence pertaining to the guilt or innocence of the Accused.<sup>120</sup> Submitting evidence is not the right of the legal representative, but rather the Chambers can consider the legal representative’s application in its determination of the admissibility of evidence in relation to Article 69(3).<sup>121</sup> Furthermore, in order for Article 68(3) to provide a meaningful opportunity for victims to participate in the trial proceedings, it must leave open the possibility for victims to move the Chamber to request the submission of evidence.<sup>122</sup> The Chamber concluded, “[i]f victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.”<sup>123</sup> Furthermore, nowhere in the Rules are the victims prohibited from examining evidence pertaining to the culpability of the Accused.<sup>124</sup>

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<sup>118</sup> *Id.* at ¶ 112.

<sup>119</sup> *Id.* at ¶ 95. Recall that Article 69(3) states that the Court has the authority to request all evidence necessary for the determination of the truth.

<sup>120</sup> Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10 (Appeals Chamber, July 11, 2008) at ¶ 94. [hereinafter *Lubanga Judgment on the Appeals on Decision on Victims’ Participation*].

<sup>121</sup> *Id.* at ¶ 101.

<sup>122</sup> *Id.* at ¶ 96-98.

<sup>123</sup> *Id.* at ¶ 98.

<sup>124</sup> *Id.* at ¶ 101.

On July 16, 2010, the Appeals Chamber in *Katanga* determined that the Trial Chamber did not err in deciding that victims can be requested by the Chamber to submit incriminating evidence, “even though such evidence will not have been disclosed to the accused prior to the commencement of the trial.”<sup>125</sup> The Appeals Chamber agreed that the Trial Chamber has the authority to order the production of exculpatory or mitigating evidence when it considers that evidence necessary for the determination of truth, including instances where such evidence is brought to the attention of the Trial Chamber through a victim participant.<sup>126</sup> While there is no *right* to present evidence on the guilt of the accused, the Trial Chamber has the authority to request submission of all evidence it considers necessary for the determination of the truth.<sup>127</sup>

### iii. *Disclosure of Evidence*

The Trial Chamber in *Katanga* maintained that because victims do not have a right and only a possibility, if granted by the Chamber, to present evidence, there can be no such obligation for the victim to disclose to the defense any incriminating or exculpatory evidence and no such obligation exists within the rules or the statute.<sup>128</sup> When victims apply to the Chamber to present evidence, it is up to the Chamber, if approving the application, to determine the modalities of disclosure of the evidence.<sup>129</sup> The Appeals Chamber confirmed this point, and maintained that the Trial Chamber did not err in finding that there is no justification to impose a

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<sup>125</sup> *Katanga* Judgment on the Appeal Against Decision on Modalities, *supra* note 112, at ¶ 37.

<sup>126</sup> *Id.* at ¶ 86.

<sup>127</sup> *Id.* at ¶ 111. The Trial Chamber in *Katanga* clarified that while the victims are authorized to present incriminating or exculpatory evidence, this does not mean that victims are entitled to conduct investigations to establish the guilt of the Accused which would be tantamount to giving them the role of an “assistant prosecutor.” *Katanga* Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 102. On the other hand, the legal representatives can conduct investigations to collect information “with a view to establishing the existence, nature and extent of the harm suffered by their clients.” *Id.* at ¶ 103.

<sup>128</sup> *Katanga* Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 105.

<sup>129</sup> *Id.* at ¶ 107.

general obligation on the victim to disclose incriminating or exculpatory evidence.<sup>130</sup> While there is no general obligation, the Appeals Chamber confirmed this finding means that there may be specific instances where the Trial Chamber requires the victim to disclose exculpatory evidence.<sup>131</sup>

#### iv. *Challenging the Admissibility and Relevancy of Evidence*

The Trial Chamber in *Lubanga* found that following an application by the legal representative, the legal representative may be permitted by the Court to challenge the admissibility or relevance of evidence.<sup>132</sup> The Appeals Chamber in *Lubanga* again recalled the authority of the Chambers under Article 69(3) which, read in light of Article 68(3), leaves open the possibility for victims to move the Chamber to request the submission of all evidence.<sup>133</sup> Nothing prevents the Trial Chamber from ruling on the admissibility or relevance of evidence after having received submissions from the victim participants.<sup>134</sup> The Trial Chamber in *Katanga* further considered the ability of the legal representative to challenge the admissibility and relevancy of evidence as a means for the victim to express his or her views and concerns regarding Article 68(3).<sup>135</sup>

#### v. *Calling Witnesses*

In *Lubanga*, the Trial Chamber determined that the victims participating in the proceedings could be permitted to call and question witnesses if in the view of the Chamber it

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<sup>130</sup> Katanga Judgment on the Appeal Against Decision on Modalities, *supra* note 112, at ¶ 71.

<sup>131</sup> *Id.* at ¶ 71.

<sup>132</sup> Lubanga Decision on victims' participation, *supra* note 15, at ¶ 109

<sup>133</sup> Katanga Judgment on the Appeal Against Decision on Modalities, *supra* note 112, at ¶ 96-98.

<sup>134</sup> *Id.* at ¶ 101.

<sup>135</sup> Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 104.

will assist it in the determination of the truth and if the victims’ personal interests were engaged by the evidence under consideration.<sup>136</sup> In *Katanga*, the Trial Chamber again determined that legal representatives could “draw the Chamber’s attention to witnesses who could provide it with relevant information about issues which affect the interests of the victims.”<sup>137</sup> The Chamber has the right to call further witnesses on its own motion including motions resulting from the suggestion of the victims’ legal representatives.<sup>138</sup> The Trial Chamber in this case limited the right of legal representatives to call witnesses to after the presentation of both parties’ cases because “only after such presentation will the Chamber be able to make a fully informed assessment of the interest and relevance of those witnesses.”<sup>139</sup> The Chamber found that only witnesses whose testimony can make a genuine contribution to the determination of the truth would be permitted, and the Chamber would ensure that the testimony does not conflict with the rights of the Accused to a fair and impartial trial.<sup>140</sup>

g. Right to Appeal

Article 81 specifically excludes victim participants from the right to appeal a decision of conviction, acquittal, or the sentence.<sup>141</sup> Article 82(4) does provide the legal representatives of the victim the right to appeal an order of reparations.<sup>142</sup> The right to participate in an interlocutory appeal is determined on a case-by-case basis by the Chamber and is discussed briefly *infra* Part I(A)(2).

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<sup>136</sup> Lubanga Decision on victims’ participation, *supra* note 15, at ¶ 108.

<sup>137</sup> Katanga Decision on Modalities of Victim Participation at Trial, *supra* note 14, at ¶ 94.

<sup>138</sup> *Id.* at ¶ 95.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at ¶ 96.

<sup>141</sup> Art. 81.

<sup>142</sup> Art. 82(4).

#### 4. *Reparations*

Article 75, “Reparations to Victims,” provides that the ICC has the authority to order individual reparations, including restitution, compensation and rehabilitation.<sup>143</sup> Rule 94 states the form and content of a victim’s request for reparations.<sup>144</sup> While the Court has the authority to determine the scope and extent of damage, loss, and injury,<sup>145</sup> the Court is required to take into account the representations of victims in the determination of an order of reparations.<sup>146</sup> During a hearing limited to the issue of reparations, the legal representative of the victim may question witnesses, including experts and the Accused with the Court’s permission.<sup>147</sup> Finally, Article 82 provides that a legal representative adversely affected by an order under Article 75 may appeal against the order for reparations.<sup>148</sup>

## II. THE ECCC

### A. Civil Parties Before the ECCC

The ECCC has been viewed as an advancement in the recognition of victim rights before international criminal law by allowing victims the right to participate as Civil Parties in its proceedings. The Internal Rules (“IRs”) of the ECCC, most recently revised on September 17, 2010 in Revision 6, provide the guiding principles of Civil Party participation in proceedings before the tribunal, and both reflect recognition of the important role the Civil Parties and victims as stakeholders maintain in the justice process.<sup>149</sup> Civil Parties have been recognized by

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<sup>143</sup> Art. 75(1).

<sup>144</sup> Rule 94. *See also* Reg. 88.

<sup>145</sup> Art. 75(1)

<sup>146</sup> Art. 75(3).

<sup>147</sup> Rule 91(4).

<sup>148</sup> Art. 82.

<sup>149</sup> Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 6) (17 September 2010). [hereinafter IRs].

the Chambers of the ECCC for their contribution to the tribunal’s fundamental goal of national reconciliation.<sup>150</sup>

### 1. *Structural Support*

IR 12, the “Organization of Victims Participation,” describes the requirement of the Administrative Office of the ECCC to establish the Victims Support Section and the Civil Party Lead Co-Lawyer’s Section. The Victims Support Section is required to (1) provide “general information” to victims and Civil Parties, (2) facilitate legal representation, (3) assist and support victims and Civil Parties in attending court proceedings, and (4) assist victims in lodging complaints and submitting Civil Party applications.<sup>151</sup> Where appropriate and in consultation with the Civil Party Lead Co-lawyers and the Public Affairs section, the Section is also required to undertake outreach activities related to victims and Civil Parties.<sup>152</sup> In cooperation with the Civil Party Lead Co-Lawyers, the Victims Support Section has the additional responsibility of liaising with government and NGOs to identify, design, and implement projects to satisfy reparations orders.<sup>153</sup> Civil Parties in the ECCC cannot receive monetary payments as reparations and, as such, there is currently no Trust Fund similar to that of the ICC for the Civil Parties of the ECCC.<sup>154</sup> The role of the Civil Party Lead Co-Lawyers are discussed *infra* Part II(A)(3).

### 2. *Internal Rule 23*

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<sup>150</sup> Decision on Civil Party Participation in Provisional Detention Appeals, No. 002/19-09-2007-ECCC/OCIJ (PTC01) (March 20, 2008) at ¶ 37. [hereinafter Decision on Civil Party Participation in Provisional Appeals]

<sup>151</sup> IR 12*bis*(1).

<sup>152</sup> IR 12*bis*(1)(h).

<sup>153</sup> IR 12*bis*(2).

<sup>154</sup> IR 23*quinqüies*(1).

IR 23 provides the central rights of victim participation as Civil Parties in the proceedings of the ECCC and addresses the general principles of victim participation, the application process to become a Civil Party, the representation of Civil Parties, Victims Associations, and Civil Party Claims. Successive amendments of the rule have increasingly restricted Civil Party participation in an effort to address perceived weaknesses in the system during the Court’s first case and the large number of Civil Parties who will be participating in upcoming Case 002.

Specifically, IR 23 states that the Civil Party participates in criminal proceedings “by supporting the prosecution” and seeking “collective and moral reparations.”<sup>155</sup> Pursuant to IR 23*bis*, only Civil Party applicants who are able to demonstrate physical, material, or psychological harm as a direct consequence of one of the crimes alleged against the Accused may be admitted as a Civil Party,<sup>156</sup> and the Co-Investigating Judges (“CIJs”) must determine that the facts alleged supporting the application are more likely than not to be true.<sup>157</sup>

Applications may be rejected at any time until the date of the Closing Order, and unless and until rejected, Civil Party applicants may exercise Civil Party rights.<sup>158</sup> The Pre-Trial Chamber has determined, “Unlike the ICC Statute, the Internal Rules provide that once admitted, a Civil Party may participate in all stages of the proceedings according to Internal Rule 23(4). There is no need to show any special interest in any stage of the proceeding.”<sup>159</sup>

### 3. *Legal Representation*

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<sup>155</sup> IR 23(1). *See also* IR 23*quinqies*.

<sup>156</sup> IR 23*bis*(1).

<sup>157</sup> *Id.*

<sup>158</sup> IR 23*bis*(2).

<sup>159</sup> Decision on Civil Party Participation in Provisional Appeals, *supra* note **Error! Bookmark not defined.**, at ¶ 49.

When the Civil Party is represented by a lawyer, the victim’s rights in the proceedings are exercised by his or her lawyer.<sup>160</sup> An individual Civil Party may be directed by the Chamber to join an existing civil party group and thus represented by a common lawyer.<sup>161</sup> Civil Parties may also form Civil Party groups on their own initiative.<sup>162</sup> The CIJ or the Chamber can organize such common representation, taking all reasonable steps to ensure that when selecting lawyers, the interests of the distinct parties are represented and conflicts of interest are avoided.<sup>163</sup> The Civil Parties may appeal the designation of their lawyer at any time.<sup>164</sup> Civil Parties who lack the necessary means to pay can seek assistance from the Office of Administration.<sup>165</sup> A group of victims can also organize as members of a Victims Association and are thus represented by the Association’s lawyers.<sup>166</sup>

IR 12*ter*, adopted with Revision 5 of the Internal Rules on February 9, 2010, describes the new role of the “Civil Party Lead Co-Lawyers,” who are tasked with representing the interests of the single, consolidated group of Civil Parties at the trial stage of the proceedings.<sup>167</sup> The Co-Lead Lawyers comprise a national and international lawyer selected and funded by the ECCC, and their role begins once the Trial Chamber is seized of a case.<sup>168</sup> Lead Co-Lawyers are required to seek the views of the separate Civil Party lawyers and “shall endeavor” to reach consensus among the Civil Party lawyers to coordinate representation of the Civil Parties at trial.<sup>169</sup> The core functions of the Lead Co-Lawyers are to protect the interest of the consolidated group of Civil Parties and to shoulder the “ultimate responsibility to the court for the overall

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<sup>160</sup> IR 23*ter*(2).

<sup>161</sup> IR 23*ter*(1).

<sup>162</sup> IR 23*ter*(3).

<sup>163</sup> IR 23*ter*(3)(c).

<sup>164</sup> IR 23*ter*(3)(d).

<sup>165</sup> IR 23*ter*(3)(e).

<sup>166</sup> IR 23*quarter*.

<sup>167</sup> IR 12*ter*; IR 23(3).

<sup>168</sup> IR 12*ter*(4).

<sup>169</sup> IR 12*ter*(3).

advocacy, strategy, and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond.”<sup>170</sup> The Lead Co-Lawyers are required to balance the rights of all parties, the need for an expeditious trial, and an obligation to promote justice and a fair and effective conduct of proceedings while at the same time ensuring the effective organization of Civil Party representation during the trial.<sup>171</sup> The Civil Party lawyers who provide direct legal representation to the victims must endeavor to support the Lead Co-Lawyers in their representation of the consolidated group,<sup>172</sup> but it is unclear to what extent the Lead Co-Lawyers must attend to the views of Civil Party Lawyers in undertaking their mandate.

With the most recent revision of the IRs on September 17, 2010 (Revision 6), it appears that after the issuing of a “Closing Order” of the CIJ ending the investigation phase, all Civil Parties are both required and entitled to representation by a lawyer. Rule 23*ter*(1) requires that after the issuing of the Closing Order, the Civil Party **must** be represented by a lawyer in order to participate in the proceedings.<sup>173</sup> In addition to this requirement, IR 22 provides that any person “entitled to” a lawyer under the IRs has the right to the assistance of a lawyer of their own choosing.<sup>174</sup> Indigent persons, including indigent civil parties, “entitled to” representation have the right to choose a Civil Party lawyer on the list provided by the Victims Support Section.<sup>175</sup> Explicit references to Civil Parties in IR 22 were added with the recent revision, and the rule, unlike its earlier versions, no longer specifically addresses only the rights of those “entitled to a

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<sup>170</sup> IR 12*ter*(5).

<sup>171</sup> IR 12*ter*(1), (2).

<sup>172</sup> IR 12*ter*(6).

<sup>173</sup> IR 23*ter*(1).

<sup>174</sup> IR 22(1).

<sup>175</sup> IR 22(1)(b).

defence lawyer.”<sup>176</sup> IR 23ter(1) states that where necessary, the civil party may be directed to join an existing civil party group and thus represented by a common lawyer.<sup>177</sup>

Consequently, while no IR explicitly states that a Civil Party is entitled to a lawyer, the recent revisions to the IRs suggest this entitlement as one possible interpretation. Prior to the Revision 5 and 6 of the rules, Civil Parties had the *right* to be represented by a lawyer, but there was no requirement to be represented by a lawyer after the issuing of the Closing Order and there were no provisions guaranteeing the right to counsel if so “entitled” by the IRs. While this would appear to be a potential advance in the legal representation rights of Civil Parties at trial, it remains unclear what Revision 6 of the IRs will mean in practice. Are Civil Parties guaranteed some form of representation as the revision implicitly suggests? Can this form of representation be satisfied by direct representation from the new Lead Co-Lawyers who are required to represent the interests of the consolidated group? Furthermore, the creation of the new Lead Co-Lawyers and the establishment of what appears to be a pyramid scheme for Civil Party representation before the ECCC raises immediate concerns regarding (1) whether Lead Co-Lawyers can meaningfully represent the distinct interests of separate civil parties before the tribunal, and (2) the diminishing impact any individual civil party or civil party group can play in the proceedings if their interests are represented by counsel tasked with representing the interests of the entire group.

## **B. The Procedural Rights of Civil Parties before the ECCC**

### *1. The Pre-Trial Investigation Phase*

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<sup>176</sup> Cf. IR 22(1)(b) of Rev. 6 to IR 22(1) of Rev. 5.

<sup>177</sup> IR 23ter(1).

After the Co-Prosecutors submit their Introductory Submission to the CIJ, the CIJ begin its investigation of the facts set out in the Introductory Submission or any subsequent Supplementary Submissions filed by the Co-Prosecutors.<sup>178</sup> IR 55(5) provides that during the investigation, the “[CIJs] may take any investigative action conducive to ascertaining the truth.”<sup>179</sup> The scope of the CIJ’s investigation is limited to the facts set out by the Co-Prosecutors in their Introductory Submission or subsequent Supplementary Submissions.<sup>180</sup> IR 55(3) provides that if any new facts come to the knowledge of the CIJ during their investigation, the CIJ “shall” inform the Co-Prosecutors, and the CIJ cannot investigate those facts unless the CIJ receives a Supplementary Submission from the Co-Prosecutors.<sup>181</sup> When an investigation is concluded by the CIJ, the CIJ will issue the Closing Order which either indicts a charged person and sends him/her to trial or dismisses the case (the “Dismissal Order”).<sup>182</sup>

The Pre-Trial Chamber has held that Civil Party participation during the Pre-Trial proceedings arises from two core rights, “the right to truth and the right to justice.”<sup>183</sup> During this stage, Civil Parties participate individually, while Civil Parties are consolidated into a group during the trial stage whose interests are represented by the Civil Party Lead Co-Lawyers.<sup>184</sup> Civil Parties do not have an automatic right to participate or intervene in an investigation of the CIJ. During the CIJ’s investigation, the Civil Party may *request* the CIJ to interview him/her, question witnesses, visit sites, order expertise, or collect other evidence on the Civil Parties

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<sup>178</sup> IR 55(2) and 55(3).

<sup>179</sup> IR 55(5).

<sup>180</sup> IR 55(2).

<sup>181</sup> IR 55(3).

<sup>182</sup> IR 67(1).

<sup>183</sup> Directions on Unrepresented Civil Parties’ Rights to Address the Pre-trial Chamber in Person, No. 002/19-09-2007-ECCC/OCIJ (PTC03) (August 29, 2009), at ¶ 8. [hereinafter Directions on Unrepresented Civil Parties’ Rights to Address the Pre-trial Chamber].

<sup>184</sup> IR 23(3).

behalf.<sup>185</sup> At any time during an investigation, a Civil Party may *request* the CIJ to make orders or undertake an investigation the party considers useful for the investigation.<sup>186</sup> This includes the right of the Civil Parties to request the CIJ to appoint additional experts to conduct new examinations or re-examine a matter already the subject of an expert report.<sup>187</sup> During an interview of a Charged Person by the CIJ, a Civil Party lawyer may only be present in the case of confrontation with the permission of the CIJ.<sup>188</sup>

IR 74(4) states that Civil Parties may appeal certain orders made by the CIJ during the investigation including the CIJ's refusal of a request to take a specific investigative action, the declaration of a Civil Party application inadmissible, and the refusal of requests for expert reports or further expert investigation allowed under the IRs.<sup>189</sup> Additionally, Civil Parties may participate in proceedings related to pre-trial appeals.<sup>190</sup> Civil Parties may only appeal a Dismissal Order where the Co-Prosecutors have appealed.<sup>191</sup>

On March 20, 2008, the Chamber determined that the IRs are clear when allowing Civil Parties certain active rights to participate in the investigative phase of a case.<sup>192</sup> More specifically, the Chamber maintained that IR 23(1)(a) provides Civil Parties the right to participate in all criminal proceedings including the proceedings related to the appeal of provision detention during the Pre-Trial phase.<sup>193</sup> If an appeal is made regarding provisional detention, the Civil Party has the right to participate because this is a "criminal proceeding" for

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<sup>185</sup> IR 59(5).

<sup>186</sup> IR 55(10).

<sup>187</sup> IR 31(10).

<sup>188</sup> IR 58(4) and 58(5). In order for a CIJ to interview a Civil Party who is represented by a lawyer for its investigation, the lawyer of the Civil Party must be present unless the Civil Party waives that right or the lawyer is validly summoned but fails to appear. IR 59(1) and 59(2).

<sup>189</sup> IR 74(4).

<sup>190</sup> *See, e.g.*, IR 77(3) which notes that the Pre-Trial Chamber may, "after considering the views of the *parties*," decide on the determination of an appeal or application. Furthermore, IR 77(4) describes the right of "lawyers for the *parties*" to consult the case file up to the date of the hearing.

<sup>191</sup> IR 74(4)(f).

<sup>192</sup> Decision on Civil Party Participation in Provisional Appeals, *supra* note **Error! Bookmark not defined.**, at ¶ 36.

<sup>193</sup> *Id* at ¶ 35-36.

the purposes of IR 23(1),<sup>194</sup> and the rights of the charged Person to a fair trial in this scenario are sufficiently guaranteed.<sup>195</sup>

Several decisions have dealt with the Civil Parties appeal of the CIJ's decisions to reject an investigation request. For instance, Civil Parties filed an appeal against the CIJ's decision to reject a request to re-interview certain witnesses in order to gather further evidence to support the inclusion of crimes in the Closing Order of the CIJ. The Pre-Trial Chamber maintained, "[T]he Appellant is required to show that the evidence of the witnesses, in its totality, does not provide enough information to satisfactorily substantiate the elements of [the crimes]."<sup>196</sup> The burden is upon the Appellant to show how the re-interview of the requested witness would assist in proving the elements of the crime so that it can be included in the Closing Order.<sup>197</sup>

Additionally, the Pre-Chamber confirmed, "[W]hile Civil Parties and Civil Party Applicants may request the CIJs to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation, the scope of the investigation is defined by the Introductory and Supplementary Submissions."<sup>198</sup> Although the CIJ is required to bring new facts to the attention of the Co-Prosecutors if a request is made to the CIJ concerning new facts, the CIJ may not investigate those facts unless the Co-Prosecutors submit a Supplementary Submission.<sup>199</sup> Thus Civil Parties can bring new facts to the attention of the CIJ or the Co-Prosecutors, but have no standing to request such investigative actions unless they are included by the Co-Prosecutor in a Supplementary Submission.<sup>200</sup> The Pre-Trial Chamber

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<sup>194</sup> *Id.* at ¶ 41

<sup>195</sup> *Id.* at ¶ 44

<sup>196</sup> Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, No. 002/1909-2007-ECCC-OCIJ (PTC52) (July 21, 2010) at ¶ 20. [hereinafter Decision on Appeal of Co-Lawyers for Civil Parties]

<sup>197</sup> *Id.* at ¶ 23.

<sup>198</sup> *Id.* at ¶ 11.

<sup>199</sup> *Id.* at ¶ 14.

<sup>200</sup> *Id.* at ¶ 15. This limitation would also apply if the Accused is bringing new facts to the attention of the CIJ.

concluded that the IRs do not allow give Civil Parties the authority to expand and an investigation, and such power is vested in the Co-Prosecutors alone.<sup>201</sup>

## 2. *The Trial*

### a. Hearing

As noted previous, at the trial stage, Civil Parties in the trial stage are consolidated into a single group whose interests are represented by the Lead Co-Lawyers.<sup>202</sup> What this means in terms of direct participation in the trial proceedings is unclear—are only the Lead Co-Lawyers able to participate in the proceedings or do the separate Civil Party lawyers have some procedural standing before the Trial Chamber? IR 23 provides that victims “may participate in criminal proceedings.”<sup>203</sup> IR 92 provides that “the parties” may, until the closing statements, make written submissions to the Chamber in accordance with the Practice Direction on Filing Documents.<sup>204</sup> The Practice Direction on Filing documents contains no restrictions preventing Civil Parties or Civil Party Lawyers from submitting documents, and the form for filing a written submission includes in the “Filed by” an option for “Civil Party.”<sup>205</sup> Yet, although the IRs do not contain any explicit restrictions on the right of a Civil Party lawyer to participate in a hearing, the new duties of the Lead Co-Lawyers as described in the IRs suggest that the rights of the Civil Party during the proceedings and during hearings may prove to be more limited.<sup>206</sup>

### b. Opening and Closing Statements

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<sup>201</sup> *Id.* at ¶ 16.

<sup>202</sup> IR 23(3).

<sup>203</sup> IR 23(1).

<sup>204</sup> IR 92.

<sup>205</sup> Practice Direction on Filing of Documents Before the ECCC Revision 5, ECCC/01/2007/Rev. 5, last amended 17 September 2010.

<sup>206</sup> IR 12*ter*.

There is no right for the Civil Party to make an opening statement. The Trial Chamber has held that neither IR 89*bis* (which grants explicit rights to the Co-Prosecutors to make a brief statement and for the Accused to respond), the IR generally, nor the Code of Criminal Procedure of Cambodia grant Civil Parties the right to make an opening statement.<sup>207</sup> Citing Rule 2 which grants the Chamber the authority to make a determination of questions not addressed in the IRs,<sup>208</sup> the Court maintained that Civil Parties do not have identical rights to the Defence or the Prosecution.<sup>209</sup> Rule 89*bis* specifically excludes reference to the Civil Parties and confers the right to make opening statements exclusively to the co-Prosecutors, the Accused, or his/her lawyers.<sup>210</sup> Civil Parties are limited in their role to supporting the Prosecution,<sup>211</sup> and the Civil Party has no autonomous role in this opening stage of the proceedings.<sup>212</sup>

On the other hand, the IRs provide that Civil Parties do have the right to make a closing statement. Pursuant to IR 94, the Civil Party Lead Co-Lawyers have the first opportunity to present closing statements at the conclusion of the trial,<sup>213</sup> and also have the opportunity to make rebuttal statements.<sup>214</sup> The Accused always has the right to make the final statement.<sup>215</sup>

c. Access to the Case File

The lawyers for all parties have the right to examine and obtain copies of the case file.<sup>216</sup> The Pre-Trial Chamber has determined that “only the lawyers may access the factual material in

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<sup>207</sup> Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, 001/18-07-2007-ECCC/TC (March 29, 2009), at ¶ 4.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at ¶ 5.

<sup>210</sup> *Id.* at ¶ 9.

<sup>211</sup> *Id.* at ¶ 5.

<sup>212</sup> *Id.* at ¶ 9.

<sup>213</sup> IR 94(1).

<sup>214</sup> IR 94(2).

<sup>215</sup> IR 94(3).

<sup>216</sup> IR 86.

the case file,” and appears to prohibit Civil Party lawyers from allowing their clients to access the case file.<sup>217</sup>

d. Questioning Witnesses

The Chamber determines the order in which it hears Civil Parties, witnesses, and experts,<sup>218</sup> and also determines the order in which the judges and parties have the right to ask questions.<sup>219</sup> All parties and their lawyers have the right to ask questions of these witnesses with the permission of the President.<sup>220</sup> All parties and their lawyers have the right to question the Accused, but, again, “all questions shall be asked with the permission of the President.”<sup>221</sup> Except for those questions asked by the Judges and lawyers, all other questions are asked through the President of the Chamber, and in the order determined by the President.<sup>222</sup>

e. Dual Victim/Witness Status

When a victim is joined as a Civil Party, the Civil Party can no longer be questioned as a simple witness in the same case and may only be interviewed under the same conditions as a Charged Person or Accused.<sup>223</sup> As is the case for all witnesses, parties must receive permission from the President of the Chamber to ask questions to Civil Parties.<sup>224</sup>

f. Evidence

i. *Generally and the Admission of Exculpatory or Incriminating Evidence.*

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<sup>217</sup> Directions on Unrepresented Civil Parties’ Rights to Address the Pre-trial Chamber, *supra* note 183, at ¶ 6.

<sup>218</sup> IR 91(1).

<sup>219</sup> IR 91*bis*.

<sup>220</sup> IR 91(2).

<sup>221</sup> IR 90.

<sup>222</sup> IR 90(2); IR 91(2).

<sup>223</sup> IR 23(4). The central significance of this point appears to be during the CIJ investigation phase. See IR 58; IR 59.

<sup>224</sup> IR 90; IR 91.

The “Rules of Evidence,” IR 87, states that unless otherwise provided in the IRs, all evidence is admissible.<sup>225</sup> The Chamber may reject evidence where it finds that the evidence is irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or intended to prolong the proceedings or is frivolous.<sup>226</sup> During the trial, the Chamber may summon nor hearing any persons or witness or admit any new evidence “it deems conducive to ascertaining the truth.”<sup>227</sup> Any party can make a request to submit evidence by reasoned submission and the Chamber can grant the request if the Chamber is satisfied that it was unavailable before the opening of trial.<sup>228</sup>

Despite these evidently broad procedural rights, the Chamber has significantly limited the rights of Civil Parties to submit evidence and question witnesses. The Trial Chamber on October 9, 2009 determined that the right of Civil Parties to participate in criminal proceedings is limited by the fact that Civil Parties are interested principally in the pursuit of reparations and, consequently, the elements of the crimes that form the basis of their civil claim.<sup>229</sup> The Trial Chamber consequently found that Civil Parties would be barred from making submissions relevant to sentencing<sup>230</sup> and would be barred from questioning witnesses regarding the character of the Accused.<sup>231</sup> While during the course of the proceedings, all testimony concerning the guilt, innocence, and sentencing of the Accused is considered in one hearing, the Trial Chamber clarified that the form of the proceedings should not be interpreted to suggest that Civil Parties

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<sup>225</sup> IR 87(1).

<sup>226</sup> IR 87(3).

<sup>227</sup> IR 87(4).

<sup>228</sup> *Id.*

<sup>229</sup> Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, No. 001/18-08-2007/ECCC/TC (October 9, 2009) at ¶ 33.

<sup>230</sup> *Id.* at ¶ 36.

<sup>231</sup> *Id.* at ¶ 44.

have an interest in the sentencing of the Accused.<sup>232</sup> Civil Parties are entitled to support the Prosecution in establishing the criminality of the actions of the Accused which creates the foundation for a claim for reparation.<sup>233</sup> The rules do “not confer a general right of equal participation with the Co-Prosecutors,”<sup>234</sup> and the Accused’s right to a fair trial includes the right to face only one prosecuting authority.<sup>235</sup> The Trial Chamber notes that the IRs contain no express rights or limitations on Civil Parties in relation to sentencing.<sup>236</sup> Yet, the right of the Civil Party to participate in the proceedings must accord with the principle that Civil Parties are interested primarily in reparations,<sup>237</sup> and Civil Parties are limited to facts or factors relevant to the determination of guilt or innocence.<sup>238</sup>

In his dissent, Trial Chamber Judge Lavergne determined that IR 23 allows victims to participate at all stages of the proceedings,<sup>239</sup> and unless the IR explicitly exclude Civil Parties from participating or places restrictions on their rights, it must be assumed that Civil Parties have the same rights and obligations as other parties.<sup>240</sup> Explicit restrictions, including the one in IR 89*bis* and IR 82(3) are included in the IR.<sup>241</sup> He further took issue with the inconsistency between this decision and practice during the hearings, and noted, “In practice, the Civil Parties have indeed, on numerous occasions, been allowed, up to now, to put questions on character both to the Accused and to witnesses and experts, be they direct witnesses to the events included in

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<sup>232</sup> *Id.* at ¶ 15-17, 36.

<sup>233</sup> *Id.* at ¶ 25, 33, 41.

<sup>234</sup> *Id.* at ¶ 25.

<sup>235</sup> *Id.* at ¶ 26.

<sup>236</sup> *Id.* at ¶ 33.

<sup>237</sup> *Id.* at ¶ 33.

<sup>238</sup> *Id.* at ¶ 34.

<sup>239</sup> Dissenting Opinions of Judge Lavergne, Judge of the Trial Chamber, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, No. 001/18-08-2007/ECCC/TC (October 9, 2009) at ¶ 12-13.

<sup>240</sup> *Id.* at ¶ 13.

<sup>241</sup> *Id.* at ¶ 14-15. IR 89*bis* states that only the Accused and the Co-Prosecutors may make opening statements. IR 82(3) states that a release request from the Accused will be decided on after hearing from the Co-Prosecutors, the Accused, and his/her lawyers.

the Indictment or witnesses who were expected to help put these events in their historical and personal context.”<sup>242</sup> On December 24, 2009, the Supreme Court Chamber rendered a decision on the appeal by the co-Civil Party Lawyers and held that these decisions can only be appealed at the same time as the judgment on the merits.<sup>243</sup>

ii. *Disclosure of Evidence*

The IRs do not contain any provisions requiring Civil Parties to disclose specific forms of evidence. The Chamber may order the parties prior to the Initial Hearing to file documents including a summary of facts on which each witness is expected to testify,<sup>244</sup> a list of exhibits the party intends to offer in the case with a brief description of the nature and contents,<sup>245</sup> an indication of legal issues they intend to raise at the initial hearing,<sup>246</sup> and a list of new documents they intend to put before the Chamber with a description of their nature and contents.<sup>247</sup>

iii. *Challenging the Admissibility and Relevancy of Evidence*

IR 80(4) states that the Chamber may require any objections to the admissibility of an exhibit or document identified by the parties in preparation for trial be made in writing within a prescribed time limit.<sup>248</sup>

iv. *Calling Witnesses*

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<sup>242</sup> *Id.* at ¶ 25.

<sup>243</sup> Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) Against the Trial Chamber’s Oral Decisions of 27 August 2009, No. 001/18-07-2007-ECCC/SC, (December 24, 2009) at ¶ 11-12.

<sup>244</sup> IR 80(3)(a)(i).

<sup>245</sup> IR 80(3)(b).

<sup>246</sup> IR 80(3)(c).

<sup>247</sup> IR 80(3)(d).

<sup>248</sup> IR 80(4).

Where the Accused or Civil Parties want to summon witnesses not on the list provided by the Co-Prosecutors in preparation for the trial, the Accused or Civil Party may request the Chamber to summon its own witnesses.<sup>249</sup> The Chamber can reject the request by any party to summon a witness if they consider that hearing the proposed witness or expert would not be conducive to the good administration of justice.<sup>250</sup> The Chamber may order parties to file documents providing a summary of the witness' testimony indicating the facts and points of the indictment the witness will address, the list of exhibits, legal issues, a list of new documents the parties intend to submit, and a list of uncontested facts.<sup>251</sup>

During the trial, if the Chamber consents, each party may request the Chamber to hear witnesses present in the courtroom who were previously approved to testify if the Chamber deems it conducive to ascertaining the truth.<sup>252</sup> The Chamber must also be satisfied that the requested testimony or evidence was not available before the opening of the trial.<sup>253</sup> Furthermore, all parties may request the Chamber to appoint additional experts to conduct new examinations or re-examine a matter already the subject of an expert report.<sup>254</sup> All decisions concerning the summoning of witnesses shall be open to appeal *only* at the same time as the Judgment of the Chamber on the merits.<sup>255</sup>

g. Right to Appeal

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<sup>249</sup> IR 80(2).

<sup>250</sup> IR 80*bis*(2).

<sup>251</sup> IR 80(3).

<sup>252</sup> IR 84(3).

<sup>253</sup> IR 87(4).

<sup>254</sup> IR 31(10).

<sup>255</sup> IR 84(4).

Pursuant to IR 100, the Trial Chamber provides a decision on Civil Party claims in the judgment on the merits.<sup>256</sup> The Chamber cannot hand down a judgment on a Civil Party action that is in contradiction with the judgment of the criminal action in the same case.<sup>257</sup> In regards to the Trial Chamber Judgment, a Civil Party may appeal the decision on reparations, but cannot appeal a sentence.<sup>258</sup> Where the Co-Prosecutors have appealed the verdict, the Civil Party can also appeal the verdict.<sup>259</sup> IR 106 provides that during an appeal, the Civil Parties must be represented by the Civil Party Lead Co-Lawyers.<sup>260</sup>

Only certain decisions of the Trial Chamber can be appealed immediately; other decisions may be appealed only at the same time as an appeal against the judgment on the merits.<sup>261</sup> Decisions subject to immediate appeal include decisions which have the effect of terminating the proceedings, regarding provisional detention, protective measures, and decisions on the interference with the administration of justice.<sup>262</sup> IR 104 does not specify which parties can initiate such appeals, though IR 105 describes the admissibility of an appeal under IR 104(4) from “a party,” suggesting that such appeals may be available to Civil Parties.<sup>263</sup> While IR 106 provides that during an appeal, the Civil Parties must be represented by the Civil Party Lead Co-Lawyers,<sup>264</sup> during the appeal, lawyers for the parties may examine the case file at any time before the hearing IR 108(6),<sup>265</sup> and “parties” can submit a request to the Chamber for additional evidence if it was (1) unavailable at trial and (2) could have been a decisive factor for reaching a

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<sup>256</sup> IR 100.

<sup>257</sup> IR 104.

<sup>258</sup> IR 105(1)(c). IR 105(1)(c) and (d) of Revision 4 of the IR provided that appeals are permitted for “(c) Victims, in respect of their rights under Rule 23(4); and (c) [*sic*] the Civil Parties in respect of their other civil interests, but only where the Co-Prosecutors have appealed.”

<sup>259</sup> IR 105(1)(c).

<sup>260</sup> IR 106(3).

<sup>261</sup> IR 104(4).

<sup>262</sup> IR 100.

<sup>263</sup> IR 105(2).

<sup>264</sup> IR 106(3).

<sup>265</sup> IR 108(6).

decision.<sup>266</sup> The right to examine the case file and to submit requests for additional evidence extends to Civil Parties, though it is unclear whether such rights are limited to exercise by the Lead Co-Lawyers or includes Civil Party lawyers.<sup>267</sup>

On appeal, the parties may not raise matters of fact or law during a hearing that were not previously set out in the submissions on appeal.<sup>268</sup> Civil Parties, specifically, are prohibited from introducing new claims that were not submitted to the Trial Chamber.<sup>269</sup> If the only appeal is filed by the Accused, the Chamber cannot increase any reparations in favor of the Civil Parties.<sup>270</sup>

### 3. *Reparations*

The Civil Party Lead Co-Lawyers file a single claim for collective and moral reparations.<sup>271</sup> IR 23*quinqüies* states that Civil Parties may only be granted collective and moral reparations and cannot take the form of monetary payments.<sup>272</sup> Thus, Civil Parties cannot receive individual compensation. The reparations must be requested in a single submission describing the award sought and the mode of implementation necessary.<sup>273</sup> The Chamber may order that the costs of the award be borne by the convicted person or order that a specific project sought by the Lead Co-Lawyers be implemented.<sup>274</sup>

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<sup>266</sup> IR 108(7).

<sup>267</sup> *Id.*

<sup>268</sup> IR 109(6).

<sup>269</sup> IR 110(5).

<sup>270</sup> IR 110(3).

<sup>271</sup> IR 23(3).

<sup>272</sup> IR 23*quinqüies*(1).

<sup>273</sup> IR 23*quinqüies*(2).

<sup>274</sup> IR 23*quinqüies*(3).

On August 4, 2010, the Pre-Trial Chamber held that Civil Parties do not have the right to initiate enforcement of reparations at the pre-trial stage of a criminal proceeding.<sup>275</sup> The Chamber held, “Internal Rule 23*quinqüies* specifies that reparations can only be awarded against a convicted person. As reparations can only be awarded against a convicted person, reparations cannot be *enforced* against an unindicted, untried and unconvicted person.”<sup>276</sup> The Pre-Trial Chamber maintained that right to the possibility of an award of reparations as provided for in the IRs is much more limited than the reparations scheme of the ICC - the ability of the Chamber in the ECCC to award reparations, being limited to collective and moral reparations, is narrower than the grant of authority to order reparations in Article 75 of the Rome Statute.<sup>277</sup> Consequently, “confiscation of unlawfully obtained assets, if any, is part of the sentence and is not linked to reparations or to the role of the Civil Parties.”<sup>278</sup>

### III. CONCLUSION

The establishing laws and governing rules of both the ICC and ECCC reflect recognition of the importance of victims as participants in criminal proceedings and as key stakeholders in the justice process. Consequently, both courts acknowledge that victims must be provided with a meaningful opportunity to participate in its criminal proceedings. The participation rights of should not be purely nominal, and the rights enshrined in the internal rules of both courts should be protected and facilitated while at the same time maintaining the principles of a fair and impartial trial. Once permitted to participate in the proceedings of the Chamber, the central

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<sup>275</sup> Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties’ Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, No. 002/19-09-2007-ECCC/OCIJ (PTC 57) (August 4, 2010) at ¶ 23.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at ¶ 25.

<sup>278</sup> *Id.* at ¶ 37.

distinction made between the victim participation rights granted by the two courts has rested superficially on the identification of victims before the ICC as “participants” versus the ECCC’s recognition of victims as “parties” to the proceedings. The general limitation for the exercise of victim participation rights before the ICC is the requirement that each procedural act must be authorized by the Chamber and is subject to the limitations and conditions imposed by the Chamber. Beyond this limitation, if the Chambers of the ICC so determines, the rights of victim participants before the ICC become strikingly similar to that of Civil Parties before the ECCC. Furthermore, the current trends of both the ICC and ECCC suggests that modalities of participation granted to victims before the ICC can, at times, even surpass the rights of Civil Parties before the ECCC. Several points of comparison are summarized below:

1. Both courts limit the ability of victims to choose their own legal representation. The latest revision of the ECCC IRs appears to suggest that Civil Parties are both required and entitled to a Civil Party lawyer during the trial. However, it is unclear if, once joined in the consolidated group under the Lead Co-Lawyers, there will be any attorney-client relationship between Civil Parties and the Lead Co-Lawyers or if instead the Lead-Co-Lawyers will function as general victims’ advocates. Moreover it is unclear what effect the new requirement will have on the ability of individual Civil Parties to meaningfully exercise substantive procedural rights before the Court.
2. Both courts provide victims limited opportunities to participate in the Investigation and Pre-Trial stages of the proceedings. While the victims before the ICC do not have the right to intervene during the Prosecutor’s investigation, victims have been granted the right to actively participate during the confirmation hearing (of which there is no similar proceeding in the ECCC) if permitted by the Chamber. While the ECCC grants Civil

Parties the right, during the investigation, to request the CIJ to undertake certain investigative action, such requests can be denied—particularly if the request is determined by the CIJ to exceed the scope of the Co-Prosecutor’s Introductory and Supplementary Submissions. A rejection of a request can be appealed by the Civil Party, and the Civil Party has the right to participate in proceedings related to the appeals of other parties in this investigatory phase.

3. During the Trial, the ICC allows victim participants to attend and exercise procedural rights in the specific proceedings for which their application was approved subject to conditions set by the Chamber regarding the form and manner of participation. Before the ECCC, Civil Parties are granted the general right to participate in all criminal proceedings, though the exercise of the right to participate has been limited by the Chamber in practice. Significantly, it remains to be seen to what extent recent revisions of the IRs vest the exercise of procedural rights only in Co-Lead Lawyers or if Civil Party lawyers retain the power to advance the interests of their clients at trial. Because the Co-Lead Lawyers have only an obligation to “seek the views” of and “endeavour to reach consensus” with Civil Party lawyers regarding overall advocacy, strategy, and in-court presentation, in practice the ability of individual Civil Parties to exercise their rights through their Civil Party lawyers may be substantially restricted.
4. The Chambers of the ICC has allowed victim participants the opportunity to make opening and closing statements. While Civil Parties in the ECCC have the right to make a closing statement, the Civil Parties do not have the right to make an opening statement, and appear to be specifically excluded from that opportunity.

5. Legal representatives of victims before the ICC have been granted access to both the public and confidential record. The lawyers of the Civil Parties in the ECCC have the right to access and obtain copies of the case file.
6. The ICC allows legal representatives of victims to submit applications to the Court to question witnesses including the Accused. While the ECCC provides that Civil Parties “shall” be able to ask questions, the permission of the President of the Chambers is required. Whether the “permission” requirement poses a substantive hurdle to the Civil Parties ability to exercise this right is unclear. Before the ICC, if the application of the legal representatives is granted, the Chamber may limit the manner and form of the questions posed by the legal representative. Similarly, the Chamber of the ECCC determines the order that it hears Civil Parties, witnesses, and experts, and also determines the order in which the judges and parties have the right to ask questions. Victim participants in the ICC, if permitted by the Chamber, can be both victim participants and witnesses in the same case. Civil Parties before the ECCC can no longer be questioned as a simple witness in the same case.
7. Victim participants in the ICC, if permitted by the Chamber, can be both victim participants and witnesses in the same case. Civil Parties before the ECCC can no longer be questioned as a simple witness in the same case.
8. The right of victims to offer, lead, and examine evidence has proven to be a controversial issue before both Courts. The Chambers of the ICC has determined that victim participants may submit and examine evidence (including exculpatory and incriminating evidence) as well as call witnesses if the Chamber determines that such actions are (1) necessary for the determination of the truth and (2) the issues addressed involve the

victims' personal interests. While the ECCC grants Civil Parties the explicit right to submit evidence, the ECCC has prohibited Civil Parties from submitting/examining evidence in relation to issues of sentencing and the character of the Accused, finding that the interest of Civil Parties is primarily the determination of reparations. The ICC has yet to address the issue explicitly, but appears to have left open the possibility that victim participants can lead, offer, and examine evidence regarding the sentencing and the character of the Accused. In the future, the ICC's determination of this issue will rest on a finding of whether the "personal interest" of the victim is engaged by issues related to the sentencing and character of the Accused, and whether the evidence proposed by the victim participant accords with the Court's general interest in the determination of truth.

9. Victims before both the ICC and the ECCC have the right to appeal an order of reparations. While victim participants before the ICC can only appeal the order for reparations, Civil Parties before the ECCC have the additional opportunity to appeal the verdict, but only when the Co-Prosecutor's have also appealed. In regards to actual order for reparations, the ECCC is more limited than the ICC. The ICC has the authority order individual reparations, but the ECCC has the power to grant only collective and moral reparations.

This Report has focused primarily on the internal rules of the ICC and ECCC in determining the procedural rights that victims have before the respective tribunals. While many of the decisions assessed have granted victims the right to *apply* to the Chamber to exercise certain procedural rights, more analysis is necessary to determine if and when these rights are permitted in practice during the actual proceedings. Furthermore, as both Courts continue to

develop its jurisprudence regarding the exercise of victim participation and introduce additional revisions to their internal provisions (particularly the IRs of the ECCC), careful monitoring of the progress of the Courts is required to ensure that victims have the power to exercise the meaningful participation rights that both courts purport to protect. Ultimately, it appears that the broad discretion provided to the Chambers of both the ICC and the ECCC may lead to a greater convergence in the procedural rights afforded to victim participants and Civil Parties, respectively. Contrary to what has commonly been noted when comparing the rights of victims before the two courts, if recent trends in the form of participation rights granted to victim participants and Civil Parties continue, it appears that there may be instances in the future where the rights exercised by victim participants before the ICC during certain proceedings surpass those exercised by Civil Parties before the ECCC.