

# **No Longer Just A Victim: The Impact Of Victim Participation On Trial Proceedings At The International Criminal Court**

## **Abstract**

The Rome Statute of the International Criminal Court adopted an innovative participatory role for victims hailed as a major step towards recognising the rights of victims in international criminal proceedings. However, it is unclear whether direct participation has resulted in a more productive role for victims. This article discusses the goals of trial, focusing on the victims' interests and the interests of the International Criminal Court; the statutory and jurisprudential rules pertaining to victims' participation at the Court; and the testimony of witnesses questioned by the victims' representatives in the *Lubanga* and *Katanga* trials. The article concludes that the victims' representatives in *Lubanga* and *Katanga* achieved some of the goals of trial but had a more limited impact on others. It also warns that the International Criminal Court needs to continue to protect the rights of the victims and ensure that it does not improperly limit their participation.

**Keywords:** victim participation, International Criminal Court, witness testimony

## 1 Introduction

Until the adoption of the Rome Statute of the International Criminal Court (“Rome Statute”) in 1998, the only role available to victims in international criminal proceedings was that of witness.<sup>1</sup> Described by numerous commentators as “one of the major innovations and achievements” of the Rome Statute, the ability of victims to actively participate in proceedings “exceeds what is allowed in most countries, even in civil law jurisdictions where victims can often initiate a criminal proceeding.”<sup>2</sup> Now that the Court has been in operation for more than thirteen years it is reasonable to ask the following questions: has the participatory role of the victims had any effect on the achievement of the court’s trial goals? If so, is that contribution greater than it would have been had the victims simply acted as witnesses?

Article 68 of the Rome Statute provides the victims with rights previously unknown in international criminal law. Article 68(3) allows for the “views and

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<sup>1</sup> Salvatore Zappalà, ‘The Rights of Victims vs. the Rights of the Accused’, 8 *Journal of International Criminal Justice* (2010) 137-164, 137.

<sup>2</sup> Lucia Catani, ‘Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case’, 10 *Journal of International Criminal Justice* (2012) 905-922, at 906; Jens David Ohlin, ‘Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law’, 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 77-120, 99; Sergey Vasiliev, ‘Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC’, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (Martinus Nijhoff Publishers, Leiden, 2009) p. 635; Emily Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope over Experience’, in Dominick McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court*, (Oxford, Hart Publishing, 2004) p. 315; Christine H. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’, 6(3) *Northwestern Journal of International Human Rights* (2008) 459-545, 459.

concerns” of the victims “to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”<sup>3</sup> Article 75 also grants victims the right to reparations in the form of restitution, compensation and rehabilitation in the event that the individual accused of injuring the victims is convicted.<sup>4</sup> The International Criminal Court’s Rules of Procedure and Evidence further expand the rights of the victims to include the right to representation, the right to directly participate in the proceedings and the right to question witnesses during trial.<sup>5</sup> Generally, victims have exercised these rights and played an active role in the court proceedings that have thus far been conducted at the Court.

The International Criminal Court’s position on the role of the victim in court proceedings represents a turning point in international law. This is evidenced by the fact that the foundational texts of the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia (“Extraordinary Chambers”) emulate the International Criminal Court by providing victims with many of the same rights. Victims in the Special Tribunal for Lebanon have the right to present their views and concerns and have them considered by the Tribunal.<sup>6</sup> The Special Tribunal’s Rules of Procedure and Evidence also provide victims with the right to counsel, the right to call witnesses and the right to introduce evidence.<sup>7</sup> At the Extraordinary Chambers in the Courts of Cambodia, victims are authorized to participate as civil parties in Rules 23 and 23*bis*.<sup>8</sup> That the Special Tribunal for

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<sup>3</sup> Article 68(3) of the International Criminal Court Statute.

<sup>4</sup> Article 75 of the International Criminal Court Statute.

<sup>5</sup> Rule 91 of the International Criminal Court Rules of Procedure and Evidence.

<sup>6</sup> Article 17 of the Special Tribunal for Lebanon Statute.

<sup>7</sup> Rules 86-87 of the Special Tribunal for Lebanon Rules of Procedure and Evidence.

<sup>8</sup> Rules 23 and 23*bis* of the Internal Rules, Extraordinary Chambers in the Courts of Cambodia.

Lebanon and the Extraordinary Chambers have followed the lead of the International Criminal Court and adopted a participatory role for victims demonstrates a clear trend in international criminal law.

The victim's right to participation at the International Criminal Court is not unfettered. A victim may only participate in trial when their personal interests are affected.<sup>9</sup> The Court also has the discretion to permit a victim to participate "when the court deems it appropriate."<sup>10</sup> The victim may express his or her views and concerns, but only to the extent that they are "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".<sup>11</sup> Finally, victims do not have complete access to the evidence and are limited to what extent that they may participate in the investigation process.<sup>12</sup> These restrictions leave the victim's exercise of his or her participatory right to the discretion of the court, contingent on how broadly or narrowly the court chooses to interpret what evidence affects a victim's personal rights.<sup>13</sup> Such limitations are not per se unreasonable, but they are also likely to diminish the relief felt by participating victims.<sup>14</sup> Dissatisfaction on the part of victim participants is often a result of the perception that the criminal justice system

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<sup>9</sup> Article 68(3) of the International Criminal Court Statute.

<sup>10</sup> Article 68(3) of the International Criminal Court Statute; William Schabas, *An Introduction to the International Criminal Court* (4<sup>th</sup> Edition, Cambridge, Cambridge University Press, 2011) p. 347.

<sup>11</sup> *Ibid.*

<sup>12</sup> Haslam, *supra* note 2, p. 323.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 324.

disproportionately focuses on the defendant and fails to adequately account for the needs of the victims.<sup>15</sup>

## **2 The Goals of Victim Participation and International Criminal Trials**

Victim participation can serve a number of purposes that do not relate to the conviction of the accused. Reasons advanced in support of victim participation include: determining the truth, individual and collective healing, morality, the reintegration of the criminal into the community and victim reparations.<sup>16</sup> Of these goals, the search for truth is the most prominent in the context of the trial. The other identified goals are typically satisfied through a comprehensive and robust truth-telling process. Therefore, the search for truth is an overarching goal that enables the other victim-oriented purposes for trial to be fulfilled. The importance of establishing the truth cannot be overstated. As the representative for the Office of Public Counsel for Victims stated during closing statements in the *Lubanga* trial, “the essential concern of the victims participating in this trial, over and beyond the conviction of the accused, is therefore to contribute to the establishment of the truth, seeking for the truth and establishing the truth.”<sup>17</sup>

In this context, it is necessary to distinguish the role of victim as witness from

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<sup>15</sup> Mina Rauschenbach and Damien Scalia, ‘Victims and International Criminal Justice: A Vexed Question?’, 90(870) *International Review of the Red Cross* (2008) 441-459, 447.

<sup>16</sup> Haslam, *supra* note 2, p. 325; *citing* Claude Jorda and Jerome de Hemptinne, ‘The Status and Role of the Victim’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford University Press, Oxford, 2002) pp. 1400-01.

<sup>17</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 25 August 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/06, p. 62, lines 2-5, <[www.icc-cpi.int/iccdocs/doc/doc1210316.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1210316.pdf)>, 22 February 2016.

the role of victim as participant. There is no question that the participation of victims as witnesses at trial often plays a significant part in the conviction of the accused. Victims are often in the best position to give the most persuasive evidence against the accused due to their close proximity to the alleged incidents that are the subject of the trial. However, victims acting only as witnesses primarily serve the interests of the Prosecution, and not themselves, and those interests do not necessarily coincide.<sup>18</sup> Conversely, victim participants are capable of presenting and examining evidence from their own unique perspective and for their own purposes, rather than being constrained by the goals the Prosecution hopes to achieve through trial.<sup>19</sup>

There are a variety of reasons to conduct an international criminal trial, some of which overlap with the reasons underlying victim participation. These goals can be divided into the judicial and the political. The judicial purposes of trial are to assess the evidence against the accused and to determine his or her guilt or innocence. The political goals include: the search for truth through the creation of an historical record, promoting the rule of law as a way of achieving long-term peace and stability and providing victims with a sense of closure.<sup>20</sup> These purposes exist on a spectrum. On one end is the purely legal trial, limited in scope to a determination of the guilt or innocence of the accused based on the evidence as assessed following the application

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<sup>18</sup> Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?', 7 *The International Journal of Transitional Justice* (2013) 518-535, 520.

<sup>19</sup> Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Judge', 44 *Case Western Reserve Journal of International Law* (2011) 475-496, 487.

<sup>20</sup> Jenia Iontcheva Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', 48 *Virginia Journal of International Law* (2007-08) 529-594, 533-34, 536.

of the accused's fair trial rights.<sup>21</sup> At the other end is a 'show trial' in which all those involved assume the guilt of the accused in advance of trial and which is held largely to silence the political opponents of the group conducting the trial.<sup>22</sup>

The International Criminal Court fall somewhere along this spectrum as the Court seeks to balance its judicial and political functions during trial. Determining the individual criminal liability of the defendant is clearly the Court's most important judicial function. The primary political goal of the Court is less well defined, although the Statute's emphasis on victims' rights suggests a predilection in favour of the interests of the victims, the most important of which is the search for truth.<sup>23</sup> The victims' interest in the truth was specifically recognised by Pre-Trial Chamber I, which also confirmed that proceedings at the International Criminal Court are capable of satisfying that interest.<sup>24</sup> This also fits with the Court's overall obligation "to establish the truth" as described by the *Lubanga* court.<sup>25</sup> That is not to say that the

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<sup>21</sup> Eric A. Posner, 'Political Trials in Domestic and International Law', 55 *Duke Law Journal* (2005-2006) 75-152, 82

<sup>22</sup> Turner, *supra* note 22, pp. 533-34; *see also* Kirsten Campbell, 'The Making of Global Legal Culture and International Criminal Law', 26 *Leiden Journal of International Law* (2013) 155-172, 164.

<sup>23</sup> M.M. de Guzman and W.A. Schabas, 'Initiation of Investigations and Selection of Cases', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds.), *International Criminal Procedure: Principles and Rules*, (Oxford University Press, Oxford, 2013) p. 163; Carsten Stahn, *The Law and Practice of the International Criminal Court*, (Oxford University Press, Oxford, 2015) p. 384.

<sup>24</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, 13 May 2008, International Criminal Court, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, paras. 31-36, <[www.icc-cpi.int/iccdocs/doc/doc486390.pdf](http://www.icc-cpi.int/iccdocs/doc/doc486390.pdf)>, 22 February 2016.

<sup>25</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 18 January 2008, International Criminal Court, Decision on Victims' Participation, ICC-01/04-01/06-1119, para. 133, <[www.icccpi.int/iccdocs/doc/doc409168](http://www.icccpi.int/iccdocs/doc/doc409168)>.

Court has developed an explicit policy in favor of satisfying the victims' interest in establishing the truth. The Court's main function is, and will likely remain, determining the guilt or innocence of the defendant. However, the practise of the Court indicates that the victims' interest in the truth can also play an important role in the trial process.

Determining the truth is clearly an important goal underlying both victim participation and international criminal trials. However, some commentators are concerned that the sort of truth produced by the legal process is necessarily incomplete.<sup>26</sup> Emily Haslam argues that truth in the context of trial is limited to the extent that some facts may be important to the victim but irrelevant to the charges against the defendant and other facts may be uncontested.<sup>27</sup> Little or no evidence will be introduced at trial relating to issues that fall into either category foreclosing the possibility that the truth can be established as it relates to those areas. Haslam also suggests that that the sorts of questions asked of witnesses prevent some facts from being included in the historical record.<sup>28</sup>

Similar concerns have also been expressed about the ability of a trial to develop an adequate historical record. Judges are not trained historians and their primary responsibility is to adjudicate the case at bar and not to establish historical truths.<sup>29</sup> Mirjan Damaška suggests that courts are constrained by the necessity that evidence

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PDF>, 28 June 2015.

<sup>26</sup> Haslam *supra* n. 2 at 328-29.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Leila Sadat Wexler, 'Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity', 20 *Law and Social Inquiry* (1995) 191-222, at 215.



introduced at trial must be relevant to the crimes charged.<sup>30</sup> The requirement that evidence be relevant can lead to the omission from the record of facts relating to the actions of individuals or organisations not on trial, or facts that are considered too remote in time to have a bearing on the proceedings.<sup>31</sup> This results in the historical record being viewed through the filter of legal rules and procedure rather than being evaluated on its merits.<sup>32</sup>

An additional barrier to developing an accurate historical record is the binary nature of the adversarial criminal trial as practised at the International Criminal Court.<sup>33</sup> This form of trial necessarily limits the consideration of the facts to the “clash of bias and counter-bias”, which is thought to inhibit the discovery of historical truth.<sup>34</sup> That is, the facts creating the historical record only represent two perspectives, the prosecution and the defence, and do not encompass the multiplicity of viewpoints normally preferred by historians.<sup>35</sup> Both the prosecution and the defence are interested in introducing evidence that is favourable to their own position, omitting seemingly neutral information that may not be relevant to the case at bar, but are significant to understanding the historical record as a whole.<sup>36</sup>

Direct victim participation is one way to alleviate (but not eliminate) these concerns.

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<sup>30</sup> Mirjan Damaška, ‘What is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008) 329-365, at 336.

<sup>31</sup> *Ibid.*

<sup>32</sup> Lawrence Douglas, *The Memory of Judgment* (London, Yale University Press, 2001) p. 75.

<sup>33</sup> Damaška, *supra* note 30, p. 337.

<sup>34</sup> *Ibid.*, citing Susan Haack, ‘Epistemology Legalized: Or, Truth, Justice, and the American Way’, 49 *American Journal of Jurisprudence* (2004) 43-62, at 49.

<sup>35</sup> Damaška, *supra* note 30, p. 337.

<sup>36</sup> *Ibid.*

Victim participation introduces a third perspective into the trial process allowing for a fuller understanding of the truth of the situation and the creation of a more accurate historical record. A participating victim can attempt to inquire into those areas that the other parties are disinclined to explore. The ability to launch such an inquiry is of course limited by the procedural restrictions discussed above; nonetheless, the right to participate provides victims with the opportunity to determine the truth to an extent previously unknown in international criminal law.

### **3 The Modality of Victim Participation at the International Criminal Court**

To understand the contribution victims have made to the trial process at the International Criminal Court, it is necessary to examine what distinct rights the victims have as participants. Although Article 68(c) confers upon the victims the right to have their views and concerns presented during proceedings, it is silent as to how that presentation should occur. Thus far, the manner in which victims are permitted to participate is determined on a case-by-case basis.

The Court first took up the task of delineating the proper participatory role of victims during trial prior to the commencement of the *Lubanga* trial. Although the modality of victim participation had been much debated during the negotiation of the Rome Statute, and had been addressed by the Pre-Trial Chambers, it had not yet been addressed in the trial context. Trial Chamber I recalled that victim participation is contingent upon whether the personal interests of the alleged victim are implicated.<sup>37</sup> The Trial Chamber indicated that an individual victim could only participate if the victim submitted a written applications specifying “why his or her interests are

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<sup>37</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 18 January 2008, International Criminal Court, Decision on Victims’ Participation, ICC-01/04-01/06-1119, para. 93, <[www.iccpi.int/iccdocs/doc/doc409168.PDF](http://www.iccpi.int/iccdocs/doc/doc409168.PDF)>, 28 June 2015 (“*Lubanga* Victim Participation Decision”).

affected by the evidence or issue then arising in the case” and delineating the nature and the extent of the proposed participation.<sup>38</sup> The Trial Chamber clarified that a general interest in the outcome of the case and/or the evidence being presented before the chamber would likely be insufficient to permit the victim to participate.<sup>39</sup>

The *Lubanga* Court also explicitly recognised the important role that victim participants can play in the ascertainment of the truth. The Trial Chamber held that pursuant to its Article 69(3) authority it could “request the submission of all evidence that it considers necessary for the determination of the truth” and that any participant, including the victims, could be a source of such evidence.<sup>40</sup> From that authority the Chamber extrapolated a right held by victim participants to “tender and examine evidence” if doing so will assist in determining the truth.<sup>41</sup> The Appeals Chamber upheld the decision on the grounds that victim participation would be ineffective if the victims were not able to present evidence relating to the accused’s guilt or innocence or to challenge the admissibility or relevance of the evidence.<sup>42</sup> However, the Appeals Chamber made it clear that the right would not be unfettered as victims wishing to introduce evidence are still required to meet the requirements of Article 68(3).<sup>43</sup>

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<sup>38</sup> *Ibid.*, para. 96.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, para. 108.

<sup>41</sup> *Ibid.*

<sup>42</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 11 July 2008, International Criminal Court, 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, paras. 97, 105, <[www.icc-cpi.int/iccdocs/doc/doc529076.PDF](http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF)>, 14 December 2015.

<sup>43</sup> *Ibid.*, paras. 99 and 101.

This decision was not free from controversy. Judge Kirsh, in his partial dissenting opinion to the Appeals Chamber's decision, argued against the introduction of evidence by victim participants, finding that the Statute and the Rules do not contain any disclosure obligation applicable to victims.<sup>44</sup> He further argued that the absence of such an obligation, which exists to ensure the fairness of proceedings, demonstrates that the drafters of the Statute and the Rules did not envisage the victim participants introducing evidence relevant to the guilt or innocence of the accused.<sup>45</sup> Judge Pikis also partially dissented from the Appeals Chamber's decision and asserted that the Statute limits participation in the proof or disproof of the charges to the parties, i.e. the prosecution and the accused, and does not permit victims to participate in that inquiry.<sup>46</sup> It has also been suggested that permitting victim participants to introduce evidence during trial exceeds the limits on participation contained in the Statute and the Rules of Evidence and fails to properly protect the rights of the accused, which the Statute places in a superior position to the participation rights of the victims.<sup>47</sup> While these arguments have some validity, they do not challenge the basic premise of the Trial Chamber's decision recognising both the paramount

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<sup>44</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 11 July 2008, International Criminal Court, Judgment on the Appeals of The Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partially Dissenting Opinion of Judge Kirsh, ICC-01/04-01/06, para. 16, <[www.icc-cpi.int/iccdocs/doc/doc534776.pdf](http://www.icc-cpi.int/iccdocs/doc/doc534776.pdf)>, 7 December 2015.

<sup>45</sup> *Ibid.*

<sup>46</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, No. 11 July 2008, International Criminal Court, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partially Dissenting Opinion of Judge Pikis, ICC-01/04-01/06, para. 6, <[www.icc-cpi.int/iccdocs/doc/doc529076.PDF](http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF)>, 14 December 2015.

<sup>47</sup> Chung, *supra* note 2, 459, 519.

importance of determining the truth and the important truth-telling role played by the victims as a participant in the trial. Rather, they only challenge the modality by which that purpose is achieved leaving the underlying basis for the decision undisturbed.

Each subsequent Trial Chamber ruling on the issue of victim participation has largely followed the lead of the *Lubanga* Appeals Chamber; but each has also applied the holding of the Appeals Chamber in a manner that the deciding Chamber considered more suitable for the case under consideration. The *Katanga and Ngudjolo* case provided the Court with its first opportunity after the *Lubanga* Appeals Chamber decision to consider the participation of victims during trial. Trial Chamber II took notice of the concerns expressed about the Appeals Chamber's decision and made clear that victims could participate only to the extent that their involvement would contribute to the determination of the truth, did not prejudice the rights of the accused, and did not slow down the trial process.<sup>48</sup> The victims were permitted to question witnesses, but had to submit an application to participate before each witness testified and the victims could be required to provide the parties with an advance draft of the written questions they wished to ask.<sup>49</sup> It is notable that the *Katanga and Ngudjolo* Court considered it appropriate to require the representatives of the victims to submit the questions they would like to pose in advance as exactly one year earlier, during the *Lubanga* case, Judge Fulford specifically rejected the notion that the victim participants be required to produce a list of questions in advance of examining a

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<sup>48</sup> *The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui*, 22 January 2010, International Criminal Court, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para. 65, <[www.icc-cpi.int/iccdocs/doc/doc831030.pdf](http://www.icc-cpi.int/iccdocs/doc/doc831030.pdf)>, 28 June 2015, (“*Katanga and Ngudjolo* Victim’s Participation Decision”).

<sup>49</sup> *Ibid.*, at para. 72.

witness as ‘unrealistic’ and ‘absurd.’<sup>50</sup>

Trial Chamber II asserted its right to dictate to the victims the order and manner in which their proposed questions were asked and retained the prerogative to itself to put those questions to the witnesses instead of allowing the victims’ legal representative to do so.<sup>51</sup> Questioning by the victims was limited to issues relating to the victims’ individual interests and concerns and could only be used to supplement or clarify the witness’ testimony.<sup>52</sup> The Trial Chamber also recognised the possibility that a victim might submit incriminating or exculpatory evidence, but reiterated that such a submission would be contingent on the outcome of a weighing of the victim’s interests, the rights of the accused and the requirements of a fair and impartial trial.<sup>53</sup>

In *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III set out ten issues that had to be addressed by a victim in his or her application to present evidence. Those issues ranged from the type of evidence to be introduced, the manner of introduction, the time needed to introduce it, the effect the evidence had on the personal interests of the victims, the relevance of the proposed evidence, how the evidence would assist the Chamber in determining the truth, whether a victim proposed as a witness had relinquished his or her anonymity, the effect the evidence would have on the fair trial rights of the accused, any disclosure issues that needed to be resolved, whether protective measures might be needed and whether the evidence

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<sup>50</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 22 January 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-177-RED-ENG, p. 21, lines 8-10. <[www.icc-cpi.int/iccdocs/doc/doc1301969.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1301969.pdf)>, 28 June 2015.

<sup>51</sup> See Katanga and Ngudjolo Victim’s Participation Decision, *supra* note 48, para. 73.

<sup>52</sup> *Ibid.*, paras. 74, 78.

<sup>53</sup> *Ibid.*, para. 83.

would be presented by an individual authorized to participate as a victim.<sup>54</sup> These requirements expanded the information identified by the *Lubanga* Trial Chamber as necessary information to be contained in an application to participate. The *Bemba* Trial Chamber also identified a mechanism whereby a victim participant could present his or her views and concerns, either orally or in writing, and which permitted the victim to present those views and concerns as unsworn.<sup>55</sup>

The Trial Chamber in the *Ruto* and *Sang* case set its own unique rules for the presentation of evidence by the victims. In *Ruto* and *Sang*, the Trial Chamber determined that the Office of Public Counsel for Victims, rather than the Common Legal Representative for the victims, would question witnesses on behalf of the victims, unless the Common Legal Representative was authorized to appear in person.<sup>56</sup> Questioning was limited to subjects that were relevant to the victims' interests, questions could not repeat those already asked by the party calling the witness, the form of the question could not be leading and no new allegations could be raised.<sup>57</sup> The Common Legal Representative could submit an application to present evidence that would be considered and determined on the basis of whether "the proposed evidence is relevant to the personal interests of victims, may contribute to the determination of the truth and whether it would be consistent with the rights of the

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<sup>54</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, 21 November 2011, International Criminal Court, Order regarding applications by victims to present their views and concerns or to present evidence, ICC-01/05-01/08-1935, para. 3(b), <[www.icccpi.int/iccdocs/doc/doc1274199.pdf](http://www.icccpi.int/iccdocs/doc/doc1274199.pdf)>, 28 June 2015.

<sup>55</sup> *Ibid.*, para. 3(c).

<sup>56</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 3 October 2012, International Criminal Court, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para. 75, <[www.icc-cpi.int/iccdocs/doc/doc1479374.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1479374.pdf)>, 28 June 2015.

<sup>57</sup> *Ibid.*, para. 75-76.

accused and a fair and impartial trial.”<sup>58</sup> Trial Chamber V imposed identical rules on victims wishing to present evidence in the *Kenyatta* and *Muthaura* case.<sup>59</sup>

Sitting in the *Ntaganda* case, Trial Chamber VI introduced a relatively restrictive victim participation regime. The Trial Chamber required victims wishing to question a particular witness to submit an application requesting permission to do so.<sup>60</sup> The application had to be submitted at least four days before the witness was expected to testify, it had to identify the specific topics about which the victim’s representative wished to inquire and the victims had to orally renew their request during court proceedings following the prosecution’s questioning of the witness.<sup>61</sup> The victims also had to indicate whether their counsel intended to question the witness about reparations and whether the victims intended to show the witness any documents or other materials during the questioning.<sup>62</sup> Finally, if the victims wished to present testimonial or written evidence independent of witnesses called by the prosecution or the defense, they were required to submit an application to that effect within two days of the prosecution concluding the presentation of its evidence.<sup>63</sup> Under these rules, the victims were allowed to question witnesses and introduce

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<sup>58</sup> *Ibid.*, para. 77.

<sup>59</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, 3 October 2012, International Criminal Court, Decision on Victims’ Representation and Participation, ICC-01/09-02/11-498, paras. 72-76, <[www.icc-cpi.int/iccdocs/doc/doc1479387.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1479387.pdf)>, 28 June 2015.

<sup>60</sup> *The Prosecutor v. Bosco Ntaganda*, 2 June 2015, International Criminal Court, Decision on the Conduct of Proceedings, ICC-01/04-02/06 411 619, para. 64, <[www.icccpi.int/iccdocs/doc/doc1986921.pdf](http://www.icccpi.int/iccdocs/doc/doc1986921.pdf)>, 22 February 2016.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, paras. 67-68.

<sup>63</sup> *Ibid.*, paras. 69-70.



evidence, but in a more circumscribed manner than that permitted by the procedure set out in the *Lubanga* case. In particular, the *Ntaganda* Trial Chamber imposed rather strict time limits on the victims in which to identify the nature and degree of their proposed participation.

Since the decision of the Appeals Chamber in the *Lubanga* case affirmed the rights of the victims to question witnesses during trial and introduce evidence relating to the guilt or innocence of the accused, the subsequent Trial Chamber decisions regarding victim participation have sought to respect that decision while simultaneously imposing restrictions on those same rights within the construct of the Appeals Chamber's decision. These subsequent rulings complied with the letter, but not the spirit of the Appeals Chamber's ruling. Further, each Trial Chamber introduced its own approach to victim participation preventing the development of a unified practice as to how victims participate in proceedings. Therefore, although the right of the victims to participate in the proceedings has been confirmed, the actual exercise of those rights has been circumscribed.

#### **4 The Impact of Evidence Introduced by the Victims on the Conviction of Thomas Lubanga**

Any valid evaluation of the impact victim participation has had during trials at the International Criminal Court must be limited to a consideration of those cases in which a guilty verdict has been rendered. One can only determine the effective role played by the victims in court proceedings by looking at the court's decisions and weighing the significance of victim participation on the court's final verdict. As the evidence introduced by the victims is generally inculpatory, a not guilty verdict, by its very nature, demonstrates that the victims' participation was not adequate to meet the judicial goals of trial. Therefore, consideration of this issue is confined to the *Lubanga* and *Katanga* decisions.

As in any criminal case, the burden of producing the evidence against the accused at the International Criminal Court is the responsibility of the Prosecution. However, the victims' right to participate in the trial grants them the ability to present additional evidence and legal arguments that can be considered by the Trial Chamber when reaching its verdict. If victim participation is to have any meaning, the victim must take advantage of this enhanced status and directly participate in presenting or eliciting evidence that leads to the conviction of the accused. Failure by the victim to present evidence drastically reduces the significance of the right to victim participation, as there is no change in how the trial is conducted.

In *Lubanga*, the Defendant, Thomas Lubanga, was convicted on 14 March 2012 of conscripting and enlisting children under the age of fifteen into the *Union de Patriotes Congolais* ("UPC") and the *Forces Patriotiques pour la libération du Congo* ("FPLC") and using those children to actively participate in hostilities pursuant to Article 8(2)(e)(vii) and Article 25(3)(a) of the Rome Statute.<sup>64</sup> There is no indication in the Trial Chamber's Decision, or the trial transcripts, that evidence introduced by victim participants in the *Lubanga* case had any bearing on the final verdict. This conclusion is borne out by an examination of the evidence relied on by the Trial Chamber when reaching its verdict. With regard to the finding that the accused engaged in conscription and enlistment of children under the age of fifteen and the use of those children as active participants in hostilities, the Trial Chamber specifically found that the testimony of numerous witnesses called by the Prosecution, in addition to physical evidence introduced by the Prosecution, established the

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<sup>64</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, International Criminal Court, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, para. 1358, <[www.icc-cpi.int/iccdocs/doc/doc1379838.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf)>, 28 June 2015 ("Lubanga Decision").

elements of the crime beyond reasonable doubt.<sup>65</sup>

A review of the Judgment and the transcripts of the proceedings demonstrates that all of the conclusive evidence relied on by the Chamber in reaching its verdict was introduced by the Prosecution and not the victims. The Trial Chamber specifically identified twelve witnesses in its decision who provided persuasive testimony relating to conscription and enlistment and the active use of child soldiers in hostilities.<sup>66</sup> The Prosecution called ten of those witnesses and the Defence called the other two. Of those twelve witnesses, the victim participants questioned only four. Of those four, only two, Witness P-0046 and Witness P-0055, were questioned by the victim participants about the recruitment of children under fifteen and the use of those children in active hostilities. The bulk of Witness P-0055's testimony in response to victim participant questioning related to the general structure and organization of the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo*, although Witness P-0055 did testify that children under the age of fifteen served as bodyguards in those organizations.<sup>67</sup> While that testimony was relevant to the charges, it had already been elicited during the Prosecution's questioning, and in much greater detail than that given in response to the victim participants' questions.<sup>68</sup>

Witness P-0046 was the only witness that the victim participants substantially

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<sup>65</sup> Lubanga Decision, *supra* note 64, paras. 911-914.

<sup>66</sup> *Ibid.*, para. 912.

<sup>67</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 20 May 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-177-RED-ENG, p. 32, lines 16-19, <[www.icc-cpi.int/iccdocs/doc/doc1301969.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1301969.pdf)>, 28 June 2015 ("Witness P-0055 Transcript").

<sup>68</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 20 May 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-176-RED-ENG, p. 45, lines 4-17; p. 46, lines 7-25; p. 47, lines 5-6, 25; p. 48, lines 1-7, <[www.icc-cpi.int/iccdocs/doc/doc1321320.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1321320.pdf)>, 29 June 2015.

questioned with regard to the recruitment of children under the age of fifteen and the use of those children in active hostilities. Pursuant to questioning by the representatives of the victims, Witness P-0046's testimony addressed several different areas including the conditions under which children were recruited by the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo*;<sup>69</sup> the living conditions experienced by children during training and active military deployment;<sup>70</sup> the murder of children and other threats made against children wishing to leave the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* following recruitment;<sup>71</sup> the condition of children and the attitude of families and the community after those children left military service;<sup>72</sup> that Witness P-0046 had personally informed Mr Lubanga that it was illegal to recruit child soldiers;<sup>73</sup> and the sexual violence experienced by some female child soldiers.<sup>74</sup>

In reaching its verdict, the Trial Chamber found that Witness P-0046 testified reliably about a number of subjects including: the age of children recruited into the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo*;<sup>75</sup> that children trained at the Rwampara Camp;<sup>76</sup> that children were

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<sup>69</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 9 July 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-207-RED2-ENG, p. 18, lines 1-24, <[www.icc-cpi.int/iccdocs/doc/doc1384503.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1384503.pdf)>, 29 June 2015 ("Witness P-0046 Transcript").

<sup>70</sup> *Ibid.*, p. 19, line 13 to p. 21, line 21; p. 25, lines 17 to p. 27, line 3.

<sup>71</sup> *Ibid.*, p. 21, line 22 to p. 23, line 17.

<sup>72</sup> *Ibid.*, p. 27, line 4 to p. 30, line 13.

<sup>73</sup> *Ibid.*, p. 24, line 20 to p. 25, line 16.

<sup>74</sup> *Ibid.*, p. 30, line 14 to p. 31, line 18; p. 35, line 17 to p. 39, line 19.

<sup>75</sup> See Lubanga Decision, *supra* note 64, paras. 650-655.

<sup>76</sup> *Ibid.*, paras. 790-800.

voluntarily or forcibly recruited into the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo*, and sent to serve at the headquarters of the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* in Bunia or training camps located Rwampara, Mandro and Mongbwalu;<sup>77</sup> that children were deployed as soldiers in Bunia, Tchoia, Kasenyi, Bogoro and elsewhere;<sup>78</sup> that children took part in fighting at Kobu, Songolo and Mongbwalu;<sup>79</sup> that the demobilisation orders issued pertaining to children were not properly implemented;<sup>80</sup> that Mr Lubanga was directly involved in recruiting soldiers generally, although the evidence did not support a finding that Mr Lubanga was directly involved in recruiting children as soldiers;<sup>81</sup> and that recruitment took place in the spring and summer of 2002.<sup>82</sup>

There is very little overlap between the evidence identified by the Trial Chamber as contributing to Mr Lubanga's conviction, and the testimony elicited by the victims' representatives during their examination of Witness P-0046. The questions posed by the victims' representatives largely focused on the general situation of the recruitment and deployment of child soldiers in the Ituri Province of the Democratic Republic of Congo and did not focus specifically on Mr Lubanga's involvement in those activities. In fact, the only time Mr Lubanga was mentioned in conjunction with a question posed by a legal representative of a victim was to indicate that Witness P-0046 personally told Mr Lubanga that it was illegal to recruit and use

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<sup>77</sup> *Ibid.*, para. 912.

<sup>78</sup> See Lubanga Decision, *supra* note 64, para. 915.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, para. 1327.

<sup>81</sup> *Ibid.*, para. 1234.

<sup>82</sup> *Ibid.*, para. 1078.

child soldiers in active hostilities.<sup>83</sup> Therefore, it can be concluded that Witness P-0046's answers to the questions of the legal representatives of the victims had little bearing on Mr Lubanga's conviction. As Witness P-0046 was the only witness questioned extensively by the victims about the recruitment and use of children in active hostilities it can also be concluded that the testimony produced pursuant to the questioning of the victim participants pertaining to the recruitment and use of child soldiers did not contribute to Mr Lubanga's conviction.

It also does not appear as if the testimony elicited by the victim participants contributed to Trial Chamber I's finding that Mr Lubanga was guilty pursuant to Article 25(3)(a). Under Article 25(3)(a), the Trial Chamber concluded that the evidence supported a finding that Mr Lubanga entered into an agreement and participated in a common plan to build an effective army to ensure military and political control over the Ituri province of the Democratic Republic of Congo.<sup>84</sup> The conscription and enlistment of children under the age of fifteen and the use of those children as participants in active hostilities was a consequence of this common plan.<sup>85</sup>

In reaching its conclusion with regard to Article 25(3)(a), the Trial Chamber considered the testimony of sixteen different witnesses and numerous items of physical evidence submitted by the Prosecution and the Defence. Only two witnesses gave testimony in response to questioning by the legal representatives of the victims that might have contributed to Mr Lubanga's conviction under Article 25(3)(a). Witness P-0041 testified generally about financial and material aid provided to the *Union de Patriotes Congolais* but did not mention how Mr Lubanga was involved, if

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<sup>83</sup> Witness P-0046 Transcript, *supra* note 69, p. 24, line 20 to p. 25, line 16.

<sup>84</sup> Lubanga Decision, *supra* note 64, para. 1136.

<sup>85</sup> *Ibid.*, para. 1136.

at all, in either area.<sup>86</sup> Witness P-0055 testified about the military structure of the *Union de Patriotes Congolais* generally, and in particular areas of Ituri, but failed to link Mr Lubanga to that structure.<sup>87</sup> While this testimony may have helped create a general understanding as to how the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* operated, it is very difficult to see how that testimony might have contributed to a finding that Mr Lubanga participated in the type of common plan for which he was convicted.

Based on the nature of the evidence, it is again reasonable to conclude that the testimony introduced through questioning by the victims' representatives did not contribute to Mr Lubanga's conviction. The testimony did, however, help to achieve some of the goals of victim participation and the non-judicial goals of the International Criminal Court. Specifically, the testimony represented the search for truth through the development of a historical record, and has hopefully brought a sense of healing and closure to the victims.

The historical record was augmented by the testimony of Witness P-0012, Witness P-0030, Witness P-0041, Witness P-0046, and Witness P-0055. The most significant of these contributions came from Witness P-0046 and her extensive testimony in response to the victims' questions regarding the general conditions that child soldiers in the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* were subjected to, instances of rape involving female child soldiers, the difficulties faced by former child soldiers when reintegrating themselves

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<sup>86</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 12 February 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-125-ENG, p. 73, lines 2 to 25 p. 74, lines 1-4, <[www.icc-cpi.int/iccdocs/doc/doc632753.pdf](http://www.icc-cpi.int/iccdocs/doc/doc632753.pdf)>, 30 June 2015 (“Witness P-0041 Transcript”).

<sup>87</sup> See Witness P-0055 Transcript, *supra* note 67, p. 23 lines 17 to p. 27, line 16, p. 28, line 18 to p. 42, line 10.

into their families and communities, and the use of murder and other threats to coerce children into continuing to serve as child soldiers.<sup>88</sup> The same is true of Witness P-0012 and Witness P-0030 and their statements about Eloy Mafuta Savo and his double role as political and military advisor to the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo*, as well as the assistance he provided in financing those organizations.<sup>89</sup> Without this testimony, Mr Savo's apparently important involvement in the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* may have gone undiscovered. Finally, the testimony of Witness P-0041 and Witness P-0055 also contributed to the development of the historical record as it helped to further delineate the structure of the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* and identify sources of financial and material aid.<sup>90</sup>

The testimony of these witnesses did not relate to any of the elements of the crimes for which Mr Lubanga was convicted. It does, however, serve an important truth-telling function and add to the historical record of regarding the use child soldiers in the Democratic Republic of Congo. Therefore, although the direct

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<sup>88</sup> See Witness P-0046 Transcript, *supra* note 69, p. 19, line 13 to p. 21, line 21; p. 25, lines 17 to p. 27, line 3; p. 21, line 22 to p. 23, line 17; p. 28, line 23 to p. 30, line 13; p. 30, line 14 to p. 31, line 18; p. 35, line 17 to p. 39, line 19.

<sup>89</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, 6 May 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-169-RED-ENG, p. 6, line 3 to p. 10, line 10; p. 13, line 9 to p. 17, line 12, <[www.icc-cpi.int/iccdocs/doc/doc1301780.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1301780.pdf)>, 2 July 2015; *The Prosecutor v. Thomas Lubanga Dyilo*, 18 February 2009, International Criminal Court, Trial Transcript, ICC-01/04-01/06-T-130-ENG, p. 90, line 19 to p. 92, line 9, <[www.icc-cpi.int/iccdocs/doc/doc970715.pdf](http://www.icc-cpi.int/iccdocs/doc/doc970715.pdf)>, 2 July 2015.

<sup>90</sup> See Witness P-0041 Transcript, *supra* note 86, p. 73, line 2 to p. 74, lines 4; See Witness P-0055 Transcript, *supra* note 67, p. 23, line 17 to p. 27, line 16; p. 28, line 18 to p. 42, line 10.



participation of the victims did not directly lead to Mr Lubanga's conviction, it did make an important contribution to the non-judicial goals international criminal trial process.

## **5 The Impact of Evidence Introduced by the Victims on the Conviction of Germain Katanga**

Victim participants played a much larger role in the conviction of Germain Katanga than they had in the *Lubanga* case. Germain Katanga was found guilty on 7 March 2014 of five different crimes including murder as both a war crime and a crime against humanity (Article 7(1)(a) and Article 8(2)(c)(1)), the war crimes of attacking a civilian population (Article 8(2)(e)(1)), pillaging (Article 8(2)(e)(v)) and the destruction of enemy property (Article 8(2)(e)(xii)).<sup>91</sup> Mr Katanga was convicted as an accessory to the commission of these crimes pursuant to Article 25(3)(d) due to his contribution to crimes committed by others. All of Mr Katanga's crimes were committed on or around 24 February 2003 in Bogoro in the Ituri province of the Democratic Republic of Congo.

In its decision, Trial Chamber II identified thirty-seven witnesses, including Mr Katanga and Mr Ngudjolo, who provided credible testimony about the five crimes Mr Katanga was convicted of, as well as his mode of liability. The representatives of the victims questioned at least twenty-seven of those thirty-seven witnesses during trial.<sup>92</sup> That constitutes 73 per cent of the witnesses that the court identified as having provided evidence leading to Mr Katanga's conviction, as opposed to only 38 per cent

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<sup>91</sup> *The Prosecutor v. Germain Katanga*, 7 March 2014, International Criminal Court, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, p. 658-59, <[www.icc-cpi.int/iccdocs/doc/doc1963464.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1963464.pdf)>, 6 July 2015, ("Katanga Judgment").

<sup>92</sup> Eight witnesses were not questioned and the trial transcripts of two of the identified witnesses are missing from the International Criminal Court website.

in the *Lubanga* case. Further, for the first time in the international context, two victims were examined about their experiences by their own legal representatives rather than by the prosecution. This shows significantly greater involvement by the victims' representatives in the *Katanga* case.

One reason for the victims' representatives' greater involvement during the *Katanga* trial is that different counsel represented two separate groups of victims. One group of lawyers represented the victims of the attack on Bogoro and another group acted on behalf of former child soldier victims. Because two distinct victims' groups were involved in the trial, each with different concerns, the lawyers representing each group were permitted to question the witnesses separately. Therefore, the witnesses were exposed to two sets of questions from two different lawyers resulting in more of the witnesses being questioned by the representatives of the victims.

The procedural obstacles implemented by the *Katanga and Ngudjolo* Trial Chamber in its 'Decision on the Modalities of Victim Participation' did not hinder victims' participation. In *Katanga*, the victim participants not only had to indicate that they wished to question a particular witness, but also had to submit in advance a list of the questions they intended to ask. In essence, the representatives of the victims were required to formulate their questions for each witness based on pre-trial statements and without the benefit of hearing the witness's testimony on direct examination and cross-examination. This procedure was further complicated by the fact that the victims' representatives were forbidden from questioning the witnesses about issues already raised by the prosecution, except to the extent that the victims' representatives sought clarification of that earlier testimony. These rules resulted in the victims' representatives working from pre-prepared lists of questions that had to be edited to account for questions already asked by the parties. Despite this difficult

task, the representatives of the victims still managed to adduce relevant evidence that helped contribute to Mr Katanga's conviction.

In *Katanga*, the testimony arising out of questioning by the victims' representatives was much more relevant to the elements of the crimes charged than in *Lubanga*. Of the twenty-seven witnesses questioned by the victims' representatives, fifteen of them recounted evidence directly relating to the murder of, and attacks on, civilians, the destruction of property and the pillaging of property. Witness D02-176 testified that civilians were attacked and killed during the assault on Bogoro and that people seeking refuge at the Bogoro Institute were killed inside the building.<sup>93</sup> Witness V-4, one of the victim participants who testified, described her experience inside the Bogoro Institute and her recollection of seeing civilians attacked with machetes as she fled from the Institute.<sup>94</sup> Witness P-249 and Witness P-317 both elaborated on testimony given during their direct examination that civilians had been murdered and injured during the attack.<sup>95</sup>

Multiple witnesses also testified about the extent of the destruction of property and the pillaging that took place. Both victim participants, Witness V-2 and Witness

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<sup>93</sup> *The Prosecutor v. Germain Katanga*, 9 May 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-256-Red-ENG, p. 35, line 4 to p. 45, line 15, <[www.icc-cpi.int/iccdocs/doc/doc1443416.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1443416.pdf)>, 8 July 2015.

<sup>94</sup> *The Prosecutor v. Germain Katanga*, 24 February 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-234-Red-ENG, p. 2, line 20 to p. 36, line 12, <[www.icc-cpi.int/iccdocs/doc/doc1044049.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1044049.pdf)>, 8 July 2015 ("Witness V-4 Transcript").

<sup>95</sup> *The Prosecutor v. Germain Katanga*, 5 May 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-136-Red-FRA, p. 68, line 23 to p. 73, line 19, <[www.icc-cpi.int/iccdocs/doc/doc878874.pdf](http://www.icc-cpi.int/iccdocs/doc/doc878874.pdf)>, 9 July 2015 ("Witness P-0249 Testimony"); *The Prosecutor v. Germain Katanga*, 7 December 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-229-Red-ENG, p. 25, line 12 to p. 39, line 21, <[www.icc-cpi.int/iccdocs/doc/doc1002095.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1002095.pdf)>, 8 July 2015.

V-4, testified that their houses were destroyed during the attack and that their livestock was stolen.<sup>96</sup> A third victim, Witness P-166, called to testify by the prosecution, testified in response to victim participant questions that his house was destroyed during the attack.<sup>97</sup> Witnesses P-12, P-28, P-249, P-268, P-323, D02-01, D02-129 all testified that houses in Bogoro were destroyed during the attack.<sup>98</sup> Additionally, the two victim participants that also testified both specifically named

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<sup>96</sup> *The Prosecutor v. Germain Katanga*, 21 February 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-231-Red-ENG, p. 16, line 1 to p. 59, line 20, <[www.icc-cpi.int/iccdocs/doc/doc1245216.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1245216.pdf)>, 9 July 2015; Witness V-4 Transcript, *supra* note 94, p. 2, line 20 to p. 36, line 12.

<sup>97</sup> *The Prosecutor v. Germain Katanga*, 1 December 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-226-Red-ENG, p. 52, line 15 to line 20, p. 55, line 15 to p. 70, line 7, <[www.icc-cpi.int/iccdocs/doc/doc1442440.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1442440.pdf)>, 16 July 2015.

<sup>98</sup> *The Prosecutor v. Germain Katanga*, 6 October 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-197-Red-ENG, pp. 36-66, <[www.icc-cpi.int/iccdocs/doc/doc958132.pdf](http://www.icc-cpi.int/iccdocs/doc/doc958132.pdf)>, 16 July 2015; *The Prosecutor v. Germain Katanga*, 17 November 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-218-Red-ENG, pp. 48-73, <[www.icc-cpi.int/iccdocs/doc/doc1002417.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1002417.pdf)>, 16 July 2015; *The Prosecutor v. Germain Katanga*, 25 February 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-108-Red-ENG, p. 23, line 18 to p. 28, line 2, p. 30, line 14 to p. 33, line 5, <[www.icc-cpi.int/iccdocs/doc/doc870483.pdf](http://www.icc-cpi.int/iccdocs/doc/doc870483.pdf)>, 17 July 2015; *Prosecutor v. Germain Katanga*, 3 March 2010, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-117-Red-FRA, p. 55, line 2 to 58, line 4, p. 58, line 16 to 62, line 4, <[www.icc-cpi.int/iccdocs/doc/doc869568.pdf](http://www.icc-cpi.int/iccdocs/doc/doc869568.pdf)>, 19 July 2015; *Prosecutor v. Germain Katanga*, 9 June 2011, International Criminal Court, Trial Transcript, p. 16, line 8 to p. 34, line 6, ICC-01/04-01/07-T-278-Red-ENG, <[www.icc-cpi.int/iccdocs/doc/doc1094857.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1094857.pdf)>, 17 July 2015; *Prosecutor v. Germain Katanga*, 31 May 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-272-Red-ENG, p. 25, line 13 to p. 38, line 8, <[www.icc-cpi.int/iccdocs/doc/doc1418502.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1418502.pdf)>, 17 July 2015; Witness P-0249 Testimony, *supra* note 95, p. 68, line 23 to p. 73, line 19.

Germain Katanga and Mathieu Ngudjolo as the individuals responsible for the attack on Bogoro.<sup>99</sup>

It is unlikely that the testimony elicited by the representatives of the victim participants, taken alone, would have been sufficient to convict Germain Katanga. However, the nature of the evidence elicited by the victims' legal representatives clearly contributed to the Trial Chamber's finding of guilt. Testimony responsive to questions posed by the legal representatives of the victims directly addressed important elements of the crimes for which Mr Katanga was convicted including evidence of murder, violent attacks on civilians, the destruction of houses in Bogoro and the pillaging of personal property. The evidence introduced by the victims was largely restricted to those areas and did not address Mr Katanga's participation in the common plan which led to the commission of the crimes charged. This can be explained by recalling that victim questioning is limited to those issues directly relating to the individual victims. The structure of Mr Katanga's political group had little bearing on victim related issues. Therefore, it is not surprising that the questioning by the victims' representatives did not address the modality of Mr Katanga's criminal responsibility.

Unlike in the *Lubanga* case, the testimony elicited in response to the questioning by the victims' legal representatives in the *Katanga* case achieved both the judicial and political goals of trial. In *Katanga*, the victim participants questioned more witnesses, asked more questions and extracted more substantive evidence. Two factors led to this result. First, Mr Katanga was accused of a greater variety of crimes

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<sup>99</sup> *The Prosecutor v. Germain Katanga*, 21 February 2011, International Criminal Court, Trial Transcript, ICC-01/04-01/07-T-231-Red-ENG, p. 57, lines 23-25, <[www.icccpi.int/iccdocs/doc/doc1245216.pdf](http://www.icccpi.int/iccdocs/doc/doc1245216.pdf)>, 16 July 2015; Witness V-4 Transcript, *supra* note 94, p. 26, lines 5-8.

than Mr Lubanga, allowing for inquiry into more factual areas. Second, as the second trial held at the International Criminal Court, the representatives of the victims in *Katanga* had observed the *Lubanga* case and could use it as a model of how (and how not) to effectively fulfil their role. This proved to be a great advantage as it allowed the victims' representatives to be more aggressive in their trial participation leading to greater advocacy on behalf of the victims and a greater influence on the proceedings as a whole.

## **6 Conclusion**

The evidence reviewed suggests that the participation by the victims in the *Lubanga* trial and the *Katanga* trial made a positive contribution to the work of the Court. The judicial and political purposes of international criminal trials were on display in both cases with the political purpose of establishing the truth being particularly prominent. Although the testimony responding to victim questioning in *Lubanga* did not lead to evidence that assisted in Mr Lubanga's conviction, it did contribute to the historical record in a number of factual areas. Issues of physical and sexual violence against child soldiers, the deleterious impact child conscription had on those involved and the structure of the *Union de Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* and their sources of support and assistance were all revealed during trial. Providing a forum for victims to explore these and other issues was important although much of this evidence did not relate to the crimes alleged against Mr Lubanga. The presentation of this evidence was particularly significant in light of the criticism directed against the Office of the Prosecutor for failing to bring charges related to physical and sexual violence against children forced to serve as soldiers, as it may have provided those affected individuals some sense of closure even if no one was convicted of those crimes.

In *Katanga*, the testimony given in response to questions posed by the victims' representatives helped to satisfy both the judicial and political goals of trial at the International Criminal Court in that it contributed to Mr Katanga's conviction and served the truth-telling function of the court. Hopefully, the victims' high level of engagement in the *Katanga* proceedings is indicative of a trend that as more trials take place at the International Criminal Court, the victims' representatives will become increasingly comfortable with a more active role in proceedings and lead to the victim making greater contributions to the goals of the Court. The more expansive involvement of the victims' representatives in the *Katanga* case, as demonstrated by the significantly larger number of witnesses questioned than in the *Lubanga* case, suggests that as additional trials are held, the more common significant victim participation will become.

It is essential that the individual Trial Chambers do not discourage victim participation by becoming overly restrictive in how they permit victims to participate. Unfortunately, the Trial Chambers appear to be following a trend of imposing increasingly greater restrictions on the modality of victim participation as evidenced by the progressively more restrictive victim participation regimes established by each successive Trial Chamber to rule on the issue. The growing confidence demonstrated by the victim participants in the *Katanga* case must not be undermined by overly obstructive procedural requirements. While it is well within the discretion of each Trial Chamber to determine how evidence is presented during trial, the judges would do well to heed the ruling of the Appeals Chamber in *Lubanga* and make sure that the restrictions that they impose on victim participation are not so onerous as to render that right ineffective.