

The Tension between the Presumption of Innocence and Victims' Participation Rights at the International Criminal Court

Abstract

This article explores where the participation rights of victims and the presumption of innocence come into conflict within the context of the International Criminal Court (ICC) and whether this causes either set of rights to be violated. First it discusses the development of the right to the presumption of innocence at the ICC and explains victims' participation rights. Next it outlines how conflict between these two rights should be resolved. The article then examines three areas in which there is tension between victims' participation and the presumption of innocence. These areas are: calling victims 'victims'; evidence submission; and participation by questioning witnesses. Finally, the article concludes that the rights of victims and the accused can come into conflict and that in order to ensure that the right to the presumption of innocence is protected, and to provide victims with a meaningful right to participation, victims' rights must be more clearly defined.

Keywords

international criminal law (ICL); International Criminal Court (ICC); victims, presumption of innocence; evidence; participation

1 Introduction

Since the development of the Universal Declaration of Human Rights human rights have generally expanded in scope and protections. This has occurred either through a greater definition of the human rights listed within the Declaration itself, or through the inclusion of groups that are generally absent from the Declaration – such as women, minorities, and victims. This expansion, however, has caused areas of tension where different rights overlap or conflict and where group rights might affect individual rights. Such is the case in international criminal law between the accused person’s due process rights and the rights afforded to victims to participate in criminal proceedings. Greater development of criminal due process rights through the case law of the regional human rights courts and the creation of international criminal courts and tribunals has strengthened and provided more protection for some rights that were included in the Universal Declaration, such as the presumption of innocence. Meanwhile, the International Criminal Court has revolutionized the way in which victims of alleged crimes can participate in the criminal process, allowing for victim recognition, participation and representation in the pre-trial and trial setting. The mutual development and expansion of the human rights of the accused and victims however, has caused areas in which these rights serve opposing purposes or conflict with each other. Because the rights of the accused and the rights of victims have different purposes, and because there is a lack of specificity on how victims’ rights are to be implemented, the rights of victims and the accused’s right to the presumption of innocence come into conflict at the International Criminal Court.

This article explores the tensions between the participation rights of victims and the accused person’s right to the presumption of innocence, and whether this

causes either set of rights to be violated. It builds on the scholarship surrounding this issue by using the current case law and limiting the victims' rights to participation and the rights of the accused to the presumption of innocence.¹ First the article will discuss the development of the right to the presumption of innocence at the International Criminal Court. The next section will explain victims' rights to participate at the Court. The third section will outline how conflict between these two sets of rights should be resolved; arguing that the Rome Statute mandates that the balance always be in favour of the accused. The article then examines three areas in which there is necessarily tension between victims' rights to participate and the accused's right to the presumption of innocence. These areas are: calling victims 'victims'; evidence submission; and participation by questioning witnesses. These areas highlight the conflict between the rights of victims and the accused and demonstrate how the conflicts have been resolved at the International Criminal Court. Finally, the article concludes the victims' participation rights and the accused's right to the presumption of innocence can come into conflict and when this happens the issue must be resolved in favour of the presumption of innocence. In order to ensure that the right to the presumption of innocence is protected, and to provide victims with a meaningful right to participation, it is important for victims' rights to be more clearly defined.

2 The Development of the Individual Right to the Presumption of Innocence at the International Criminal Court

¹ For works that this paper builds on, see Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness', 18 *Australian Int. Law Jour.* (2011) 105-126; Mugambi Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 26(2) *St Louis Uni. Public Law Rev.* (2007) 249-308; Salvatore Zappalà, 'The Rights of victims v. the Rights of the Accused', 8 *Jour. Int. Crim. Just.* (2010) 137-164, 137.

The presumption of innocence is an example of one human right that has become more defined in the time since the Universal Declaration of Human Rights was first introduced. Although it may be argued that the presumption of innocence falls under fairness or due process generally, it has developed into a specific and independent human right within criminal procedure.² While it has been considered a right for hundreds of years, what that right contains or how it should be enacted has historically been overlooked.³ The Universal Declaration of Human Rights, for example, specifically states that ‘[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.’⁴ Inclusion of the presumption of innocence within the Universal Declaration cements its place as an international human right, however there is no guidance as to how or when the presumption of innocence is meant to be used.

Even a look at the Universal Declaration’s *travaux préparatoires* does not provide illumination as to how the presumption of innocence was intended to be used in practice. The presumption of innocence was present in all drafts of the Universal Declaration of Human Rights.⁵ The inclusion of the presumption of innocence within

² See United Nations General Assembly, *Universal Declaration of Human Rights* (GA Res 217 A (III) UN Doc A/8810) Art. 11(1); Hock Lai Ho, ‘The Presumption of Innocence as a Human Right’, in Paul Roberts and Jill Hunter (eds.), *Criminal Evidence and Human Rights* (Hart, Oxford, 2012) pp. 259-282; Stefan Trechsel, ‘The Right to be Presumed Innocent’, in Stefan Trechsel and Sarah Summers (eds.), *Human Rights in Criminal Proceedings* (OUP, Oxford, 2006) pp 153-191; ICC Statute Art. 66.

³ The beginnings of the presumption of innocence are thought to come from Hammurabi’s Code. Yale Avalon Project (translators), *Hammurabi’s Code Hammurabi*, avalon.law.yale.edu/ancient/hamframe.asp, accessed 22 July 2019. See Code of Laws 1-3 for examples of crimes, required proofs, and of consequences for accuser if their accusations are not proved.

⁴ United Nations General Assembly, *Universal Declaration of Human Rights* (GA Res 217 A (III) UN Doc A/8810) Art. 11.

⁵ Commission on Human Rights, *Summary Record of the Fifty-Fourth Meeting* [of the Commission on Human Rights], held at Lake Success, New York, on Tuesday, 1 June 1948, at 2:30 p.m., (E/CN.4/SR.54) as reprinted in William A. Schabas (ed.), *The Universal Declaration of Human Rights*, vol. 2 (CUP, Cambridge, 2013) pp. 1700, 1707 As an example of how wide-spread the opinion was that the presumption of innocence be included, the Soviet Union, France, Belgium, China and Australia

the Universal Declaration of Human Rights shows that it was uncontroversial to consider this presumption a human right at the time of the drafting, although the lack of instruction and specificity as to how the presumption should be utilized may have resulted in the Declaration merely reserving a place for the presumption of innocence to be considered a human right rather than providing solid protection for the right itself.

The same lack of definition can be found in the international criminal courts and regional human rights courts that have been developed since the Universal Declaration of Human Rights. Without exception, they lack discussion during the development of their foundational documents and statutes as to what the presumption of innocence means and how it is meant to work. For example, the Rome Statute of the International Criminal Court provides ‘1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.’⁶ While this is certainly more specific than the Universal Declaration of Human Rights, as it starts to direct the onus of proof and the standard of proof, it still leaves significant questions as to the mechanics of how the presumption of innocence should be implemented in practice.

Fortunately, when the statutes and cases are read in conjunction with each other there is greater guidance about how the right should operate. As a result, the presumption of innocence has undergone far greater definition since 1948 within the spheres of international criminal law and regional human rights. What has been

firmly believed that the presumption of innocence had to be included in the Universal Declaration because the principle of innocent until proven guilty represented an important progression from the trials of the Middle Ages and that the Universal Declaration should specifically endorse a right rejected by Nazi Germany.

⁶ ICC Statute Art. 66.

developed is a right that is stronger, more meaningful, and is able to offer individuals who are charged with crimes greater protections.

Today the presumption of innocence consists of two aspects: the procedural and non-procedural. Both aspects provide protection within the general domain of criminal law and both aspects are operable once a person is ‘charged’ with a criminal offence.⁷ The procedural aspect is a mandatory rebuttable presumption of law, which acts as an instruction to the fact-finder as to how to decide the outcome in the case against the accused.⁸ This aspect requires sufficient proof in order for the fact-finder enter a conviction against the accused person. This means that a standard of proof is required, and that someone other than the accused must provide the proof of guilt.⁹ As a legal presumption, the presumption of innocence is mandatory because the fact-finder must find in the accused person’s favour unless the standard of proof is met.¹⁰ The presumption is rebuttable however, because if the party with the burden or onus of proof provides sufficient proof against the accused, that is, proof to the required

⁷ *Ibid.*; ICTR, *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-51, Pre-Trial Chamber I, Decisions on Defence request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011; United Nations General Assembly, *Universal Declaration of Human Rights* (GA Res 217 A (III) UN Doc A/8810) Art. 11; Raimo Lahti, ‘Article 11’, in Gudmundur Afredsson and Asbjøen Eide (eds.), *The Universal Declaration of Human Rights* (Martinus Nijhoff, Leiden, 1999) p. 241; David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Leiden, 2011) p. 20; Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting (2 June 1948)* (UN Doc. E/CN.4/SR.55) p. 13; W Schabas and Y McDermott, ‘Article 66: Presumption of Innocence’ in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, Hart, Nomos 2016) p. 1639, para. 11.

⁸ For information regarding the different types of presumptions see generally Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP, Oxford, 2010) pp. 232-239; P.J. Schwickard, *Presumption of Innocence* (Juta & Co, Cape Town, 1999) pp. 22-23.

⁹ ICC Statute Arts. 66, 67(1)(i); United Nations General Assembly, *Universal Declaration of Human Rights* (GA Res 217 A (III) UN Doc A/8810) Art. 11(1); Yvonne McDermott, *Fairness in International Criminal Trials* (OUP, Oxford, 2016) p. 44; John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence* (CUP, Cambridge, 2012) p. 201; Schabas and McDermott, *supra* note 7, p. 1640; ICC, *Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11, Trial Chamber V(A), Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer Motions’), 3 June 2014.

¹⁰ ICC Statute Art. 66.

standard, then the presumption is overturned and the fact-finder can enter a finding of guilt, or a conviction, against the accused.¹¹

The non-procedural aspect of the presumption of innocence is broader than the procedural aspect. This part of the presumption specifically protects individuals from being treated as if they are guilty without first being convicted of a crime.¹² This facet prevents pre-punishment and extra-judicial punishment as well as treatment that would imply that the person is guilty, such as dressing them in clothing reserved for convicted people or the unnecessary use of handcuffs.¹³ It also prevents public authorities and the media from making public statements that state or imply that a non-convicted person is guilty of a crime.¹⁴ By requiring a conviction before people may be treated as if they are guilty, this aspect makes criminal procedure and due process for criminal allegations a requirement.

¹¹ Ho, *supra* n 2; McDermott, *supra* note 9, p. 44; International Law Commission, *Yearbook of the International Law Commission 1993* (UN Doc No A/Cn.4/SER.A/1994/Add.1 (Part 2)) vol II, part 2, p. 119; ICTY, *Prosecutor v. Mucić, et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 600.

¹² Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984)' (UN Doc HRI/GEN/1/Rev.1), para. 7; European Commission, *Krause v. Switzerland*, No. 7986/77, 13 DR 73, 1979; Schabas and McDermott, *supra* note 7, pp. 1645-1646, para. 27.

¹³ Human Rights Committee, *General Comment 32: Right of Equality Before Courts and Tribunals and to Fair Trial*, (UN Doc No CCPR/C/GC/32 (2007)) para. 30; Human Rights Committee, *Karimov and Nursatov v. Tajikistan*, Comm. Nos. 1108/2002 and 1121/2002, 27 March 2007; Human Rights Committee, *Pinchuk v. Belarus*, Comm. No. 2165/2012, 24 October 2014; Human Rights Committee, *Grishkovtsov v. Belarus*, Comm. No. 2013/2010, 1 April 2015; Human Rights Committee, *Burdyko v. Belarus*, Comm. No. 2017/2010, 15 July 2015; Human Rights Committee, *Selyun v. Belarus*, Comm. No. 2298/2013, 6 November 2015; Human Rights Committee, *Kozulina v. Belarus*, Comm. No. 1773/2008, 21 October 2014.

¹⁴ Human Rights Committee, *General Comment 32: Right of Equality Before Courts and Tribunals and to Fair Trial*, (UN Doc No CCPR/C/GC/32 (2007)), para. 39; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP, Oxford, 2015) p. 298; ICC, *Situation in Kenya*, Case No. ICC-01/09, Pre-Trial Chamber II, Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)', 11 February 2011, para. 22; ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber I, Decision on the Press Interview with Ms Le Fraper du Hellen, 12 May 2010; ICC, *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-51, Pre-Trial Chamber I, Decisions on Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011; ICC, *Prosecutor v. Gaddafi*, Case No. ICC-01/11-01/11, Appeals Chamber, Decision on the Request for Disqualification of the Prosecutor.

Thus, the two aspects of the presumption of innocence work separately and together to provide protection to those who have been charged with a crime and to ensure that individuals are not treated as if they are guilty unless a conviction is secured against them. The non-procedural aspect makes criminal procedure, and specifically conviction, a requirement before an individual may be punished or otherwise treated as guilty of a crime. The procedural aspect ensures that convictions are not too easily achieved, thus reducing the possibility of people who have not committed a crime from being convicted. Together the two aspects prevent non-convicted individuals from being treated in the same manner as convicted people.¹⁵ The result of examining the statutes and case law of the international criminal courts and regional human rights courts since the Universal Declaration of Human Rights shows that there has been significant development in the right to the presumption of innocence, which has resulted in a meaningful and standalone right that provides protection to individuals subjected to criminal proceedings.

3 The Victims' Right to Participation in International Criminal Law

While individual human rights, such as the presumption of innocence, gained prominence, became strengthened and better defined, more discrete groups of people have also gained access to human rights. The International Criminal Court provides

¹⁵ Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984)' (UN Doc HRI/GEN/1/Rev.1), para. 7; European Commission, *Krause v. Switzerland*, No. 7986/77, 13 DR 73, 1979; Schabas and McDermott, *supra* note 7, pp. 1645-1646, para. 27; Thomas Weigend, 'There is Only One Presumption of Innocence', 42(3) *Netherlands Jour. Legal Philosophy* (2013) 193-204, p. 196; Andrew Ashworth, 'Four Threats to the Presumption of Innocence', 10(4) *Int. Jour. Evidence & Proof* (2006) 241-279, pp. 246-7; Paul Mahoney, 'Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.', 4(2) *Judicial Stud. Inst. Jour.* (2004) 107-129, p. 120; Rinat Kitai, 'Presuming Innocence', 55(2) *Oklahoma Law Rev.* (2002) 257-295, p. 287.

for cutting-edge victims' rights, which in turn has led to victims having an even more active role at the Extraordinary Chambers in the Court of Cambodia and the Special Tribunal for Lebanon.¹⁶ Within international criminal law victims have gained significant rights to participation, reparations, and representation during pre-trial and trial proceedings.¹⁷

The right to directly participate in the proceedings of the International Criminal Court goes beyond the typical role permitted to victims in domestic courts and at the post-Second World War and *ad hoc* Tribunals. Traditionally victims have only been allowed to participate in trial as witnesses.¹⁸ In that role, they did not have their interests taken into account, which could include: telling their version of events, gaining acknowledgement of their suffering, receiving reparations, or receiving a determination about the truth of the situation in which their victimisation occurred.¹⁹ Allowing victims participation rights, including early identification, helps rectify some of these issues, which are present at a more traditional trial.

The International Criminal Court allows victims to participate in the pre-trial, trial and reparations phases of proceedings before the Court.²⁰ Although the participation in reparations determinations is important, it is beyond the scope of this article as the rights to trial and pre-trial participation are different from the reparations rights. The right to seek reparations is closer to a traditional role that victims play in

¹⁶ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 7) as revised on 23 February 2011, Rule 12; Statute of the Special Tribunal for Lebanon Art. 17. For some discussion see McAsey, *supra* note 1.

¹⁷ See ICC Statute Art. 68(3); Morris A Anyah, 'Balancing rights of the accused with rights of victims before the International Criminal Court' in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, London, 2015) p. 79.

¹⁸ Anyah, *supra* note 17, p. 79; Zappalà, *supra* note 1, p. 137; Caleb H Wheeler, 'No Longer Just a Victim: The Impact of Victim Participation in Trial Proceedings at the International Criminal Court', 16 *Int. Crim. Law Rev.* (2016) 525-546, pp. 525-526.

¹⁹ Zappalà, *supra* note 1, p. 137; Wheeler, *supra* note 18, pp. 525-526.

²⁰ ICC Statute Art. 68(3).

court proceedings, and the presumption of innocence is no longer relevant, as reparations are not sought until the accused person has been convicted.²¹

With regard to participation rights, the identification of victims begins early in the proceedings, during the pre-trial phase. Rule 89 of the Rules of Procedure and Evidence allows for those who would like ‘to present their views and concerns’ to make an application to the relevant Chamber during the Pre-Trial process.²² Once a victim’s application is accepted by the Court, the particular Chamber then defines in what manner and to what extent they may participate.²³ The participation may include making opening and closing statements, questioning witnesses, and submitting written materials.²⁴ Therefore, due to a lack of *stare decisis*, the mode and extent to which victims can participate can vary from one case to the next. Because of the large number of victims that have thus far applied to participate, participation by victims is treated as a collective right during the pre-trial and trial phases of proceedings, with groups of victims sharing representation and making filings and assertions through their shared counsel.²⁵

Although victims may participate throughout the pre-trial and trial proceedings at the International Criminal Court, how that should happen in practice is not specified in the Court’s Statute or Rules of Procedure and Evidence. It is up to the individual Chambers presiding in each case to decide when and how victims will be able to participate in the proceedings, and what that participation might entail. As a result, the type and extent of participation permitted varies between cases, and the degree of meaningfulness of that participation does varies as well. While it is clear that victims

²¹ Zappalà, *supra* note 1, p. 154.

²² ICC RPE, Rule 89(1).

²³ ICC RPE, Rule 89(1).

²⁴ ICC RPE, Rule 89(1) (opening and closing statements); Rules 91(2) and 91(3)(a) (questioning witnesses and submitting written observations).

²⁵ ICC RPE, Rule 90.

have the right to participate, at times, that participation comes into conflict with the rights of the accused and the Court's other interests.

4 How Conflicts Between Victims' Rights to Participate and the Presumption of Innocence Should be Resolved

Allowing victims the right to participate in the criminal proceedings against an accused person causes tension between the victims' rights and the rights of the accused. While theoretically, victims should be interested in determining the truth, which may not be inconsistent with legal protection for the accused person, in practice victims' rights may infringe upon the rights of the accused. This is particularly a concern at the International Criminal Court where the specific way in which the implementation of the rights afforded to victims is determined on a case-by-case basis.²⁶ Thus, there may be either more or less tension between the presumption of innocence and victims' rights depending on the particular Chamber's ruling regarding victims' participation. While there is nothing prejudicial to the accused in allowing victims to participate in proceedings generally, the wide discretion that judges have in determining the extent of the victims' participation may cause tension and conflict between the rights or even violation of the presumption of innocence.²⁷

There is an important balance that must be struck between the victims' rights and the rights of the accused in order to help judges determine how victims may

²⁶ Zappalà, *supra* note 1; Wheeler, *supra* note 18, p. 531.

²⁷ Zappalà, *supra* note 1, p. 139.

participate in proceedings.²⁸ If the victims' right to participate is too weak, it will not be meaningful and will prevent victims from engaging in effective participation. If the victims' rights are too strong these rights could infringe on or violate the accused's rights. Because the purpose of criminal law is to determine whether the accused is guilty of a crime, the fundamental rights of the accused, including the presumption of innocence, must take precedence over victims' rights.²⁹ To do otherwise, would be to put other purposes above this general purpose of trial.

The presumption of innocence itself supports this balance. The relationship between the presumption of innocence and the burden of proof means that the accused person should only face those who have the burden of proving that they committed a crime. In international criminal law this burden is upon the Prosecutor.³⁰ Further, the standard of proof must be met only by the actor who has the burden.³¹ If victims were to introduce evidence that could support the burden and standard of proof, it would lower both the burden and standard of proof that the Prosecutor would need to reach in order to achieve a conviction. This is because two parties instead of one could provide the proof. If the burden were to be shifted to two separate groups, the prosecutor and the victims, without defining a structure supporting such a shift in the applicable criminal code or rules, it would necessarily undermine the presumption of innocence. The Rome Statute of the International Criminal Court prevents this kind of burden shifting by requiring the Prosecution to maintain the burden of proof and never allowing it to shift to other parties or participants.³²

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 140.

³⁰ Rome Statute Art 66(2).

³¹ *Ibid.*

³² ICC Statute Art. 66(2) see also ICC Statute Art. 67(1)(i); ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber II, Judgement and Sentence, 20 December 2012, para. 49; ICTR, *Kanyarukiga v. Prosecutor*, Case No. ICTR-02-78-A, Appeals Chamber, Judgement, 8 May 2012, para. 167; ICTR, *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Trial Chamber II,

The Rome Statute further mandates that any balancing of rights amongst the trial participants must be resolved in favour of the accused.³³ This is because the particular role that victims play at the International Criminal Court supports the idea that the accused's rights must take precedence over victims' rights. While during pre-trial and trial the Prosecution and Defence are parties to the International Criminal Court, the victims are 'participants'.³⁴ Being labelled a participant, as opposed to a party, necessarily places some limitations on the role that victims can play in the pre-trial or trial proceedings. Parties are entitled to submit evidence and make arguments. Victims however, as participants, can only submit their 'views and concerns... in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'³⁵ Victim participation is only permitted when the victims' personal interests are affected by the proceedings. Further, the Court determines when and how victim participation may take place in the particular case. Thus, the victims' right to participate is far more limited than rights of parties, and is subject to judicial discretion as to when and how this participation might be 'appropriate'. Additionally, by requiring victim participation not to prejudice or be inconsistent with the accused's rights, Article 68(3) instructs judges to resolve conflicts between victims' rights and the rights of the accused in the accused person's favour.

Because infringements should always be resolved in favour of protecting the presumption of innocence, the presumption of innocence necessarily cannot negatively affect victims' participation rights. It is not possible for victims to successfully raise the argument that the presumption of innocence is violating or improperly impacting their rights to participation; the tension between the

Judgement and Sentence, 6 December 2010; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP, Oxford, 2016) pp. 1009-1010.

³³ ICC Statute Art. 68(3).

³⁴ ICC RPE, Rule 89; Zappalà, *supra* note 1, p. 154.

³⁵ ICC Statute Art. 68(3); Zappalà, *supra* note 1, p. 142.

presumption of innocence and victims' rights is necessarily one sided. Further, examination of the purposes of the two sets of rights also demonstrates that resolving conflicts in favour of the presumption of innocence serves the purposes of the rights of the victims and the rights of the accused. One of the purposes of the presumption of innocence is to only convict people who are factually and legally guilty of the crimes alleged, while one of the purposes in allowing victim participation is to determine the truth about the situation under examination.³⁶ These purposes are not at odds. Although the presumption of innocence may prevent easy convictions, it does not prevent all convictions, and in fact should help ensure that convictions are only achieved when the accused person actually committed the alleged crime. Likewise, the presumption of innocence should encourage acquittals when the accused person either did not commit the crime, or in cases when it is unclear. Encouraging convictions and acquittals under these circumstances occurs when the justice system is functioning properly and helps determine the truth of what happened. Even in cases where an acquittal is based on evidence that is unclear the truth is served because it shows that the incident is complicated and that the criminal trial may not be the venue in which to determine the full truth of what happened. A fully functional and robust presumption of innocence always helps support the victims' pursuit of the truth, while the existence of victims' rights that are too strong may result in the conviction or acquittal of the wrong person. Therefore, the purpose of determining whether the accused is guilty and the purpose of determining the truth can coexist, however that does not mean that they are equally valued. The nature of the Court and the available

³⁶ The presumption of innocence's purpose is to help ensure that only legally and factually guilty people are convicted. See Weigend, *supra* note 15, p. 146; Schwikkard, *supra* note 8, pp. 14-15. On victims' rights purpose is to seek truth see: ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber, Trial Transcript, 25 August 2011, p. 62, lines 2-5; ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-474, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of victim at the Pre-Trial Stage of the Case, 13 May 2008, paras. 31-36; Wheeler, *supra* note 18, pp. 528-531.

outcomes at the end of trial necessitates that the purpose of determining the defendant's guilt always outweighs the truth-finding purpose.

This balancing in favour of the presumption of innocence should occur whenever there is tension or infringement between victims' rights to participate and the presumption of innocence. Despite this tool to resolve conflicts between these rights, tension still occurs. Further, because the Rome Statute allows for a great deal of flexibility in terms of what victims' rights could entail, there are several areas in which the balance may not be properly struck.

5 Specific Areas of Conflict Between the Presumption of Innocence and Victims' Participation Rights

Throughout the pre-trial and trial processes tension occurs between victims' rights to participate and the accused person's right to the presumption of innocence. Three areas of particular concern are discussed below: calling victims 'victims'; allowing victims to submit evidence; and allowing victims to ask questions of witnesses.

5.1 *Calling Victims 'Victims'*

One way the rights of victims and the rights of the accused can come into conflict is by labelling individuals as 'victims'.³⁷ This is a specific problem with regard to the presumption of innocence because this labelling can affect who needs to provide proof and to what standard that proof needs to be provided. The International Criminal Court does not separate the word victim from a requirement that a crime has

³⁷ Zappalà, *supra* note 1, pp. 146 – 7.

occurred. Rule 85(a) of the International Criminal Court Rules of Procedure and Evidence defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’. At first blush, by ‘requiring the commission of any crime’ within the definition of ‘victims’ it seems that there is already a conclusion made that a crime has been committed and that this is a conclusion that has been drawn by the Court. Were such a conclusion drawn, the presumption of innocence would be violated, as it both shifts the burden and lowers standard of proof required for conviction and may even involve some prejudgment. In fact, it mandates that a crime has occurred before proof of guilt is presented.

By not separating the word ‘victim’ from the idea that a crime has occurred, this description alone may imply that a crime has been committed creating a possible implication about the accused’s guilt.³⁸ However, the acknowledgment that a person have suffered some harm need not suggest that a crime has occurred. It is true that in everyday usage, the term ‘victim’ can refer people affected by an accident or a natural disaster, or some other event that is not necessarily criminal in nature. This can also be true in the context of armed conflict. Civilians who are harmed as a natural result of the conflict are still referred to as ‘victims’, even if in the absence of any allegations that a war crime occurred. However, when criminal activity is alleged and the word ‘victim’ is used, it is implied that the person labelled ‘victim’ has suffered as a result of events that amounted to a crime. For example, it is implied that a person who is called a victim of rape, did in fact suffer because they were raped. The linking of the term ‘victim’ with the criminal activity necessarily creates the idea that the criminal activity occurred. This in turn implies that since the criminal activity has occurred, it is only a question of who committed the crime. The result could be a

³⁸ *Ibid.*, p. 147; McAsey, *supra* note 1, pp. 118 – 119.

lowering of the standard of proof as the fact-finder would require less evidence that a crime occurred, than if this were a serious question. In the international context, this can be too much of a logical leap, as often people suffer greatly as a result of armed conflict, but the activity within the armed conflict is not necessarily criminal in nature. Thus, it is particularly important to separate the idea of victims from requiring a crime to have been committed in an international context, as individuals suffer serious harms from war or other deprivations that do not amount to crimes, and yet the suffering may be just as great, so as to trigger a humanitarian response.

It could be argued that attributing the cause of suffering for identified victims to a crime does not necessarily implicate the presumption of innocence. All the International Criminal Court's definition confirms is that a crime has been committed, but it is silent about who may have committed that crime. One reason the Rome Statute and Rules of Procedure and Evidence tie the status of victim to the commission of a crime is because the identification of victims comes after an individual is charged with at least one offence within the jurisdiction of the Court.³⁹ Specifying a crime before identifying victims helps focus the investigation and trial proceedings by limiting which people are victims relevant to the case at hand and which people are not. This however, is not how the Rules of Procedure and Evidence justify the use of the phrase 'commission of any crime' within the definition of victims which therefore leaves open the implication that a crime has been found to have been committed.

It could also be argued that requiring victims to be defined by an alleged crime that has occurred against them does not infringe on or violate the presumption of

³⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, para. 58.

innocence because during trial the Prosecutor must still prove that a specific crime was committed and that the accused person is responsible for that criminal act. To secure a conviction, ascribing responsibility to an individual requires more than merely proving that a crime was committed; the individual right to the presumption of innocence requires proof that the individual accused was the perpetrator of the crime.⁴⁰ However, the implication of the phrase ‘commission of any crime’ in Article 85(a) of the Rules of Procedure and Evidence is that the Court already believes that a crime of some type within the Court’s jurisdiction has been committed, which ultimately lowers the burden of proof that the Prosecutor must meet.

Having the idea of victimhood connected to a crime is also problematic for those who suffered harm if a case ends in anything other than conviction. If the suffering and acknowledgement of what happened to them is only recognized through the lens of a crime, then, if there is no crime proven, it could imply that their suffering did not happen, or at the very least that it is no longer recognized by the international community. In turn, this can have real, tangible consequences for those who have suffered, as it means that their ability to have their experiences heard may have been cut short, that they are not going to be entitled to reparations, and that the types of aid available to them may be less than if they were victims of a recognized international crime. Yet, these are people who have actually suffered harms and/or deprivation on a scale of such ‘gravity’ that the International Criminal Court exercised their jurisdiction. The situations that are brought before the Court are very serious and involve multiple victims who often have suffered very grave harms. Just because a crime was not committed, or at least was not proven, against a particular person, does not mean that the people who suffered within a particular situation suffered any less

⁴⁰ See ICC Statute Art. 66.

than if a conviction had been secured. Linking the idea of victimhood to a crime however, implies that their suffering is less worthy of acknowledgement in the event that the case does not result in a conviction.

The confusing manner in which the word ‘victim’ is used within the International Criminal Court is highlighted by the *Bemba* case. This case arose from the Situation in the Central African Republic that involved an armed conflict, which reached its peak in 2002 and 2003.⁴¹ The Situation gave rise to one main case before the International Criminal Court against Jean-Pierre Bemba Gombo.⁴² The case eventually had over 5,000 victims approved for participation.⁴³ On 21 March 2016 Mr Bemba was convicted of war crimes and crimes against humanity.⁴⁴ On 8 June 2018

⁴¹ International Criminal Court, *Central African Republic*, www.icc-cpi.int/car, accessed 30 September 2019.

⁴² ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-42, Pre-Trial Chamber III, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.

⁴³ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-103-tENG-Corr, Pre-Trial Chamber III, Decision on Victim Participation, Pre-Trial Chamber III, 12 September 2008; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-320, Pre-Trial Chamber III, Fourth Decision on Victims’ Participation, 12 December 2008; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-807-Corr, Pre-Trial Chamber III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1017, Trial Chamber III, Decision on 772 applications by victims to participate in the proceedings, 18 November 2010; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1091, Trial Chamber III, Decision on 653 applications by victims to participate in the proceedings, 23 December 2010; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1590-Corr, Trial Chamber III, Corrigendum to the Decision n 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims’ applications to the Registry, 21 July 2011; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1862, Trial Chamber III, Decision on 270 applications by victims to participate in the proceedings, 26 October 2011; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01-2011, Trial Chamber III, Decision on 418 applications by victims to participate in the proceedings, 15 December 2011; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2162, Trial Chamber III, Decision on 471 applications by victims to participate in the proceedings, 11 March 2012; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2219, Trial Chamber III, Decision on 1400 applications by victims to participate in the proceedings, 21 May 2012; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2247-Red, Trial Chamber III, Public Redacted version of ‘Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings’, 20 July 2012; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2401, Trial Chamber III, Decision on 799 applications by victims to participate in the proceedings, Trial Chamber III, 5 November 2012.

⁴⁴ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3343, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016.

the Appeals Chamber acquitted Mr Bemba of these same charges.⁴⁵ This case demonstrates the confusing nature of the use of the word ‘victim’ within the context of the International Criminal Court because first there were victims of the conflict which could be victims of crimes or just victims of the conflict in a general sense. Once the Court began to approve victims for participation these approved victims were necessarily determined to be victims of a crime within the Court’s jurisdiction. This was confirmed when Mr Bemba was convicted of war crimes and crimes against humanity and in fact the conviction communicates that not only are they victims of crime within the Court’s jurisdiction, they are specifically victims of crimes committed by Mr Bemba. However, once Mr Bemba was acquitted of those same charges the victims lost their victim status before the Court. This would seem to be a big blow for the previously approved victims. Where their victimhood had been recognised by the Court, that recognition is lost by the acquittal. The acquittal however, does not mean that they were not victims of the conflict, or of potential criminal activity committed during that conflict. It merely means that they legally are not victims of crimes committed by Mr Bemba.

Separating the definition of victim from the requirement that his or her victimhood resulted from harm suffered as a result of a crime would lessen the tension between victim participation and the presumption of innocence. Acknowledging that people have suffered from a particular set of events, but not attributing those events to criminal activity would allow victims to be acknowledged and identified without implying that a crime has been committed. It would therefore leave the question open as to whether a crime actually occurred, which would

⁴⁵ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, 8 June 2018.

ultimately be determined at trial. In the pre-trial and trial phases this change would also underscore that nothing has been proven to the required standard of proof and that the question of whether a crime occurred and who is responsible for that crime is still open in the minds of the fact-finder. Finally, it would acknowledge the harm suffered and recognize that people were harmed regardless of whether anyone is held criminally responsible for that suffering.

5.2 *Evidence Submission*

Tension also exists between the right to participation and the presumption of innocence with regard to evidence submission.⁴⁶ During certain trials, victim participants have been allowed to submit evidence to the Court. The Trial Chamber in *Lubanga* specifically allowed victims to present evidence if it would aid in the determination of the truth.⁴⁷ The Appeals Chamber supported this finding but noted that any evidence submitted by the victims would necessarily need to be in compliance with Article 68(3) of the Rome Statute.⁴⁸ Article 68(3) however, does not provide particular substantive limits as to what evidence victims might be able to submit. This article merely states that any participation should not infringe upon the rights of the accused. The ability of victims to submit evidence does not inherently come into tension with the presumption of innocence, particularly if it is in compliance with Article 68(3).

⁴⁶ For a discussion on evidence submission by victims and procedural fairness generally, see McAsey, *supra* note 1, pp. 114 – 116.

⁴⁷ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, para. 93; Wheeler, *supra* n 18, p. 532.

⁴⁸ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, 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, 11 July 2008, paras. 97, 105; Wheeler, *supra* note 18, p. 532.

Interestingly, however, the Appeals Chamber specifically found that this approach to evidence submission could include evidence that tends to prove the guilt or innocence of the accused.⁴⁹ This raises the issue of whether it is possible for victims to provide evidence that would not be ‘prejudicial to or inconsistent with’ the accused’s rights.⁵⁰ The Appeals Chamber explicitly allows the presentation of this sort of proof because evidence that does not go toward guilt or innocence ‘would most likely be considered inadmissible and irrelevant’ and that if the evidence were considered inadmissible, the victims’ ability to submit evidence would not be meaningful.⁵¹ Being able to submit evidence that is admissible is a valid concern on the victims’ part, however, allowing victims to submit evidence that tends to show the guilt of the accused violates the presumption of innocence by lowering the standard of proof, which must be met by the Prosecutor.

If both the Prosecutor and the victims are submitting evidence that tends to show the accused’s guilt then one of two things will occur. If the victims submit evidence that is the same as what the Prosecutor has submitted, the victims’ evidence would not substantively impact the standard of proof. The evidence they submitted however, would be redundant and a waste of the Court’s time. Such evidence is likely to be rejected by the Court both because it is redundant and because it would tend to negatively impact the accused’s right to a timely trial. If however, the victims submit additional evidence of guilt, that is evidence of guilt that is different from that submitted by the Prosecutor, the evidence would tend to lower the standard of proof that the Prosecutor is required to meet. This is because the additional evidence provided by the victims could close up any reasonable doubt that was left after the

⁴⁹ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, 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, 11 July 2008, para. 97.

⁵⁰ ICC Statute Art. 68(3).

⁵¹ *Ibid.*

Prosecutor provided their evidence. This is impermissible under the presumption of innocence at the International Criminal Court, which requires that the Prosecutor alone must meet the burden of proof.⁵² Regardless of what evidence the victims provide, the Prosecutor must meet the burden and standard of proof for guilt and this cannot shift to another party or participant.

Therefore, victims cannot be allowed to provide evidence of the accused's guilt. It will be either redundant or it will violate the presumption of innocence by lowering the standard of proof that the Prosecutor must meet. Neither option is permissible and the conflict presented by the victims' desire to present evidence that tends to show guilt and the accused's rights should be resolved in favour of the accused.

This leaves open the question of whether the victims could present evidence that tends to show the accused's innocence, which was also permitted by the Appeals Chamber in *Lubanga*.⁵³ Because of the victims' concern for determining the truth about the situation that is the subject of the trial, it is possible that they may possess evidence that tends to exculpate the accused. The only rule that limits where exculpatory evidence may come from is in the Rome Statute. Article 67(1)(a) prevents the accused from having to prove their own innocence by not allowing the burden of proof to shift to the accused. This does not prevent the accused from providing evidence that tends to prove their innocence but merely means that the accused does not need to do so. Further, Article 68(3) of the Rome Statute merely states that the participation of the victims must 'not be prejudicial or inconsistent with

⁵² ICC Statute Art. 66(2).

⁵³ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, 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, 11 July 2008, para. 97.

the rights of the accused and a fair and impartial trial.’⁵⁴ Evidence tending to show the accused’s innocence is not prejudicial to the accused and therefore its submission would comport with the Statute. Exculpatory evidence submitted by the victims would also not impact the fairness or impartiality because it would tend to support the victims’ search for the truth, rather than impermissibly influence the court. Thus, it seems that evidence tending to show the accused’s innocence can permissibly come from either party or the victim-participants.

The question of whether victims can introduce evidence during trial is a source of tension between victims’ participation rights and the accused’s right to the presumption of innocence. While the Appeals Chamber stated in *Lubanga* that victims can present evidence relating to the guilt or innocence of the accused, a closer analysis shows that doing so only creates more tension and a greater risk of violating the presumption of innocence. Victims should not be permitted to submit evidence that tends to prove the accused’s guilt, as that evidence will be either redundant or it will lower the standard of proof and violate the presumption of innocence. Victims however, should be permitted to submit evidence that tends to show the accused’s innocence because that type of evidence would be admissible and does not conflict with the accused’s right to the presumption of innocence.

5.3 *Participating by Questioning Witnesses*

Victims may, through their legal representatives, ask questions of witnesses and provide written and oral arguments during trial. Rule 91(3)(b) of the Rules of Procedure and Evidence allows victims to participate, through their legal representatives, by asking witnesses questions and by submitting written observations

⁵⁴ ICC Statute Art. 68(3).

or submissions. This ability to participate is limited in that the participation can only occur in areas particularly in the victims' interests, it must not infringe upon the rights of the accused and the particular Chamber can limit the participation on a case-by-case basis.⁵⁵ This is justified under the Rome Statute, which provides '[w]here 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'.⁵⁶ However, there is little guidance as to what the 'personal interests of the victims' are, and this issue has not been cleared up by the case law.⁵⁷ It seems that this phrase could allow for much wider participation under article 68(3) in the future. If victims participate because they are interested in the truth of what occurred, then almost everything that is covered in trial would be in their interests, as just trials attempt to have an outcome that is close to the truth, at least with regard to the accused's guilt or innocence. Were a Chamber to expand on the rights of victims to participate, such that they were treated more like a party than a participant, or if they could present evidence that tends to show the guilt or innocence of the accused, that may result in increasing the tension between the rights of the victims and the accused's right to the presumption of innocence. So far, however, the practice has not been in this direction.

Of course, the extent to which victims may participate by questioning witnesses depends on the particular Chamber that hears the case. In the *Katanga and Ngudjolo* case, Trial Chamber II allowed victims to question witnesses, however this

⁵⁵ ICC RPE, Rule 91(3)(b). For a discussion on the victims' questioning witnesses and procedural fairness generally see McAsey, *supra* note 1, pp. 116 – 117.

⁵⁶ ICC Statute Art. 68(3)

⁵⁷ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01-04/04-01/06, Trial Chamber I, Decision on Victims' Participation, 18 January 2008.

was not an unqualified right.⁵⁸ The victims' representatives were required to submit a request for each witness that they wished to question and that request had to explain why the question was relevant.⁵⁹ The Chamber explained that any question that the victims might ask would either clarify or supplement evidence that was already provided by one of the parties, and so the questions were required to be neutral in style.⁶⁰ Trial Chamber II stated that while victims' questions should be aimed at gaining the truth, the questions that victims ask could help the Chamber understand some of the issues of the case 'given their local knowledge and social and cultural background.'⁶¹ Other Chambers have taken similar decisions. The *Katanga and Ngudjolo* decision was modelled on, but is somewhat more restrictive than, the *Lubanga* Trial Chamber.⁶² In the *Ntaganda* case, Trial Chamber VI took a more restrictive view of the victims' ability to ask questions, requiring an application seeking permission to ask questions in advance of the witness' testimony, which had to be relatively specific about the topics that the representative wanted to ask about.⁶³ In general, it seems that the Court is willing to allow victims to ask questions of witnesses during trial, but are simultaneously also concerned with placing restrictions on such questioning so as not to infringe upon the rights of the accused or allow the victims to take up too much time.

It is possible for victims to ask witnesses questions without infringing upon the presumption of innocence. This is particularly true when, as Trial Chamber II suggested, the victims can provide context, cultural and local background information

⁵⁸ ICC, *The Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui*, Case No. ICC-01/04-01/07-1788-teng, Case No. ICC-01/04-01/07, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, para. 65.

⁵⁹ *Ibid.*, para. 77.

⁶⁰ *Ibid.*, para. 78.

⁶¹ *Ibid.*, para. 75.

⁶² See ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01-04/04-01/06, Trial Chamber I, Decision on victim' participation, 18 January 2008, para. 93; Wheeler, *supra* note 18, p. 532.

⁶³ ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 411 619, Trial Chamber VI, Decision on the Conduct of Proceedings, 2 June 2015, para. 64; Wheeler, *supra* note 18, p. 535.

through their questioning. This approach can help the Court and the parties better interpret the evidence before them and developing this kind of background information does not bear on the elements of the crimes or the guilt or innocence of the accused. In this way, the relatively restrictive approaches taken by the various Trial Chambers to victim participation has supported the victims' ability to participate in trial and the accused's right to the presumption of innocence.

There is a concern however, that allowing victims to question witnesses will allow the victims to act as another party or to act as a part of the prosecution. This would be possible if a Trial Chamber took an approach less restrictive than that taken by the *Katanga and Ngudjolo* Trial Chambers. For example, the *Lubanga* approach to allowing questioning was quite close to the rules they used in allowing victims to submit evidence. In such a situation, the same concerns regarding a lowered standard of proof would apply. In practice however, the victims have used this as an opportunity to seek the truth of what happened and not to act as a second prosecutor.

6 Conclusion

The expansion of human rights has included the enhanced definition of individual rights and the ability of new groups of people to access rights. This is seen at the International Criminal Court through the development of the presumption of innocence and the inclusion of victims' rights to participation. The presumption of innocence has become more specific so as to become a meaningful right that protects the accused person. While greater definition of the presumption of innocence has allowed the right to be made more meaningful, there are obvious challenges when this right is considered in combination with victims' rights to participation. While victims' rights are a newly included within international criminal law, they are a set of rights

that are clearly still developing, and require further definition to ensure that the right allows for a meaningful practical application. The parallel development of these rights has led to tension between the two sets of rights and how they are to co-exist within the same criminal justice system.

While the mere definition of the word ‘victim’ may infringe on the presumption of innocence as it suggests that a crime has already been proven, at least to some extent, before the court, these rights do not necessarily conflict with one another. It could be possible for victims to meaningfully participate and for the accused to benefit from a robust presumption of innocence. This is particularly true in consideration of the fact that the two groups, the accused and the victims, have different roles in the Court’s proceedings. As parties, the accused has far more rights that are better defined than the victims who are limited to the role of ‘participants.’ This helps lead to how conflicts between these rights should be resolved. When the right to the presumption of innocence comes into conflict with victims’ participation rights the judges must decide in favour of protecting the presumption of innocence.

The tension that exists between these rights stems from the fact that the Court can decide how the victims might participate in trial on a case-by-case basis with the only real limit being that the participation cannot prejudice the accused or infringe on their rights. Thus, each Chamber has a different set of rules, some of which are more or less restrictive than others. When the Court is too permissive of victim participation the participation can infringe on or violate the presumption of innocence because the victims could be filling some of the standard of proof. However, when the Court is too restrictive it can render the victims’ participation rights meaningless and ineffectual.

There is little in the International Criminal Court's practice to suggest that the rights of the victims to participate in proceedings is infringing upon the defendant's right to the presumption of innocence. This however, is largely down to the individual Chamber's decisions regarding victim participation. The Rome Statute allows for wider participation and a future Chamber could allow for greater victim participation that would be more likely to encroach on the presumption of innocence. In order to reduce the tension between the victims' participation rights and the presumption of innocence, the rules allowing for victim participation should be better defined bearing in mind the rights of the accused. This would have the dual benefit of protecting the presumption of innocence while ensuring that victims can have a meaningful right to participation. The rights of victims should be the same in all Chambers and the rules should be drafted with particular attention to what the purpose of the victim participation is and whether the participation is affecting the standard of proof or shifting the burden away from the Prosecutor. In this way, the rights of the accused and the victims can be given full effect leading to greater satisfaction amongst the parties and participants at the International Criminal Court. That would, in turn, improve the overall legitimacy of the court by contributing to a sense that justice is being done.